

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, **red font**, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Section 2**Matters relating to production****Regulation 25****Documents to be submitted prior to production**

1. At least 12 months prior to the proposed commencement of Commercial Production ~~[in a Mining Area]~~ [Sustained Large-scale Recovery Operations], the Contractor shall provide to the Secretary-General a Feasibility Study prepared in accordance with ~~[Annex X]~~ and Good Industry Practice, and the applicable Standard, taking into ~~[consideration]~~ [account the applicable] Guidelines [as well as the results of the Test [Pilot] Mining study pursuant to Regulation [48 ~~ter~~ bis], paragraph 2 or 3, as applicable, and in accordance with Annex [IV ter]. ~~and the Secretary-General shall submit this matter to the Commission.~~

1.bis. The Contractor shall conduct consultation on the Feasibility Study with all States and Stakeholders in accordance with Regulation 93 bis.

1.ter. Provided the procedure under Regulation 93 bis has been completed, ~~if~~ the Commission shall review the Feasibility Study and determine whether ~~considers that~~ any Material Change needs to be made to the Plan of Work, [and it should promptly inform the Contractor, which ~~the Contractor~~ shall prepare and submit to the Commission ~~[through the Secretary-General]~~ a revised Plan of Work ~~accordingly~~.

2. Regulation 57 shall apply to a revised Plan of Work submitted by the Contractor under paragraph 1.

3. The Contractor ~~may~~ [shall] not commence Commercial Production in any part of the Area covered by the Plan of Work until either:

(a) The Commission has determined that no Material Change to the Plan of Work needs to be made [pursuant to paragraph 1 ter] ~~[in accordance with Regulation 57 (2) [and this has been approved by the Council]]~~; or

(b) In the event that a Material Change is made, the Council has given its approval to the revised Plan of Work pursuant to paragraph ~~25~~ above [Regulation 57]; and the [Authority has confirmed lodgement of] an Environmental Performance Guarantee in accordance with Regulation 26.

Comments

- Some delegations and observers have enquired whether it would be helpful to have a discussion on the policy intent of a feasibility study and the inclusion of an Annex or Standard indicating the required content of a feasibility study. This discussion is still outstanding. The outcome of such discussions might have an impact on the wording of draft regulation 25.
- It has been suggested to distinguish between Test Mining and Pilot Mining, and proposals to that effect have been inserted in draft regulation 48 ter Alt. It has been inserted in brackets in para 1 to align herewith.
- During the first part of the twenty-ninth session, most delegations supported the alternative version of paragraph 2, and it has thus been replaced. For the time being, the original paragraph 2 has been placed in the revised suspense document. The same is the case for paragraphs 3-5, which also was suggested deleted.

We agree with comments made by Council members in the 29th session that the Council needs to conceptually reconsider this regulation. Once the Council settles a **clear policy** intention behind DR25, it can be drafted. As it is, we do not find DR25 clear in policy intent, or effective in practice.

We are unclear what the content of this Feasibility Study would be. The defined term does not assist. The proposal for an Annex is a good one, and we would like to see this drafted to aid discussions. Though we **question that a separate study is needed at all**. Is this stage not in fact a review and revision of the Mining Plan, considering new information collected since Contract grant, with the purpose to agree whether or not the Contractor commences Commercial Production? We would prefer this approach. DR57 would apply, which triggers appropriate consultation and decision-making processes, so (1 bis) and (1 ter) could be removed. Indeed, the whole of DR25 could be replaced with:

1. *A Contractor must obtain the agreement of the Council before commencing Commercial Production.*
2. *At least 12 months prior to a proposed date of commencement of Commercial Production, the Contractor shall notify the Secretary-General of its intention to commence Commercial Production on that date.*
3. *The notification from the Contractor under paragraph (1) shall, taking into account any new information obtained since the Contract award, include either:*
 - a. *a confirmation that no amendment to the Plan of Work is required, or*
 - b. *a Plan of Work revised in accordance with regulation 57.*
4. *The Secretary-General shall promptly forward the notification to the Commission and the Council. The Commission shall conduct a consultation with Stakeholders and shall prepare a report and recommendation to the Council on whether to agree to the proposed date of commencement of Commercial Production, in accordance with the applicable Standards and taking into account Guidelines.*
5. *The Council shall decide, giving reasons, whether to agree to the proposed date of Commercial Production. Where the decision is not to agree to commencement of Commercial Production, the Council shall indicate any actions it requires from the Contractor to progress towards a new date of commencement of Commercial Production. The Contractor shall comply with the decision of the Council.*

If the requirement for a new study is retained, we would find a **name change** preferable, as a ‘Feasibility Study’ is a well-established component of mining projects, with a meaning and role unlike what is envisaged for DR25. (In terrestrial mining, a Feasibility Study is an objective study carried out by qualified experts, used by the mining operator or proponent at an early stage in the project to raise capital, before building infrastructure for mining etc. It is not a regulatory tool). ‘Validation study’ may be a more accurate reflection of this study, if we understand correctly that its purpose is to check that the information submitted at Contract application and incorporated in the Plan of Work remains valid at the point of Commercial Production (or needs to be updated).

The **reference in paragraph (1) to Test Mining** is confusing. If Test Mining has been conducted prior to the application for the Exploitation Contract, then this is not new information, and the results have already been taken into account in the ISA’s decision-making. We think paragraph (1) should more clearly refer to new studies and information that has been collected by the Contractor since the Exploitation Contract was awarded.

In relation to **paragraphs (1 bis) and (1 ter)** we again highlight a fundamental error throughout the regulations that misplaces the responsibility to conduct **consultation in relation to an ISA decision** upon the Contractor rather than the ISA. Our proposed wording above remedies this error.

Paragraph (3) lacks clarity that this is (a) a decision, (b) by the Council, and (c) about whether Commercial Production can commence. This is not, as (3) currently suggests, a decision point about whether there is a material change to the Plan of Work. Commencement of Commercial Production is a separate issue. What if a material change is approved on an unrelated part of the Plan of Work? Paragraph (3) appears to green-light Commercial Production on that basis, which is nonsensical. Again, we see a need for significant re-drafting. We consider that our proposed text above would remedy the current defects.