Draft Regulation 46

On 46 TER, effective protection requires effective monitoring of effects.

This incorrectly provides for the contractor to undertake the monitoring. It should be the ISA.

The ISA has to have the capacity to independently and effectively monitor all activities in the Area and make that information publicly available. Relying on the contractor to monitor themselves is akin to allowing the fox to monitor the chicken pen.

This has already been an issue in regard to activities of contractors under the exploration regulations, whether in terms of a lack of sufficient monitoring programs for the testing of mining equipment, the ability of the ISA to independently verify the accuracy of the annual reports from the contractors, or the Council to exercise proper oversight over the contractors when infractions by the contractors occur. This body should not and cannot allow industry to monitor itself and meet the obligations under the Convention. This is already a problem and needs to be remedied rather than perpetuated through the exploitation regulations. **That the ISA cannot or will not monitor the effects illustrates why deep sea mining should not go ahead.**

The requirement in para 1 that “It shall keep under surveillance the effects of the mining operation to determine whether it is likely to have harmful effects on the marine environment” with respect misses the point: it should be monitored to determine whether it does, or may, have harmful effects: not just ‘likely”, and secondly all effects, not just what are judged to be harmful, need to be monitored.

In paragraph 3, annual reports are grossly inadequate: reporting should be real time.

For transparency, the reports should be communicated to Council and made public. Currently they are only to be sent to the Secretariat and the LTC.

Draft Regulation 47 (Environmental Impact Statement)

We reaffirm our intervention yesterday that separating EIA and EIS is artificial and confusing, and that these provisions should incorporate and reflect provisions being negotiated by BBNJ.

This regulation should require comments to be taken into account, not simply “Identify comments received through public consultation on the environmental impact assessment and how they have been addressed”.

The regulation should also include provisions for full public participation, including access to information and participation in the EIA and EIS process, including ongoing processes. We were told, for example, by NORI and The Metals Company in the last webinar that consultation was at an end, after having delivered hundreds of new pages just a few days before the webinar. This is unacceptable.
This regulation should require comments to be taken into account, not simply “Identify comments received through public consultation on the environmental impact assessment and how they have been addressed”. This means actually assessing the comments, taking them into account including making necessary changes in the EIS and reporting how they were addressed, on an iterative basis. It also means giving stakeholders sufficient time.

We support the inclusion of traditional knowledge, but also of free and prior informed consent, a key requirement including under the United Nations Declaration on the Rights of Indigenous Peoples, as well as the Convention on Biological Diversity and the International Labour Organization Convention 169.

Draft Regulation 47 does not include alternative options including the no-action alternative, which would mean no mining.

**Draft Regulation 48 (Environmental Management and Monitoring Plan)**

On effects vs impacts: we believe that ‘effects’ is a broader term, better catches other effects such as of climate change and ocean acidification, and is also consistent with usage in UNCLOS, including in article 145 and its use of harmful effects.

Secondly, the environmental management and monitoring plan (EMMP) should be drawn up by the ISA as regulator, not by the applicant/contractor.

Finally, we want to note that adaptive management has no role where, as here, it is not consistent with the precautionary principle.

The New Zealand Supreme Court in *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Ltd* at [129] has said the following matters must be satisfied for an adaptive management approach to sufficiently diminish the risk and the uncertainty:

(a) good baseline monitoring about the receiving environment;
(b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;
(c) thresholds are set to trigger remedial action before the effects become overly damaging; and
(d) effects that might arise can be remedied before they become irreversible.

They said, and I quote, “The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.”

In the DSM context, we know that a sufficient baseline is not available, effective monitoring is not possible, effects will be overly damaging and cannot be remedied. For these reasons we believe that it is clear that adaptive management has no role in the regulations.

**48 bis Test mining**

Any test mining would have to be short in duration to minimise effects, to scale and the ISA must fully analyze impacts including ongoing impacts over sufficient time frame - say a decade or two, if
not more, to determine whether and under what circumstances if at all mining could be permitted on a commercial scale.

Outstanding issues are firstly monitoring, (which is not addressed here) including ongoing monitoring.

Secondly, if an EIA carried out for test mining indicates any harm to biodiversity or ecosystem function would occur, then it must not be allowed.

And thirdly, full public participation is also essential.

**Draft Regulation 49**

While we appreciate that it is intended to broaden obligations, while the draft it reflects articles 192 it does not include the crucial obligation to ensure effective protection for the marine environment from harmful effects which may arise from such activities. We appreciate that this general obligation is included in draft regulation 44, but that is a general obligation whereas regulation 49 is specific with respect to pollution, and we must not lose the obligation and central aim being to ensure effective protection for the marine environment. We also think it should refer to article 194(5) being measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. Also worth adding is the article 194(2) obligation to ensure that activities are so conducted as not to cause damage by pollution to other States and their environment.

Moveover the draft would need to reflect the Article 145 obligations with respect to interference with respect to ecological balance of the marine environment, and the need for protection from harmful effects.

To the list of marine litter and underwater noise, we would add sediment plumes, toxic waste and light pollution, as well as taking into account cumulative impacts as Costa Rica suggested.

**Draft Regulation 50**

This paragraph is missing, and needs an overriding obligation, such as that no marine discharge shall cause significant adverse effects on the marine environment.

The deletion of “serious” before “harm” is appropriate. However, this one change underlines the necessity to ensure there are no significant adverse impacts, including preventing biodiversity loss.

Secondly, the provision that “if such harm [being harm to the Marine Environment] has occurred, to monitor and mitigate its impacts should require the activity to stop, not just to monitor and mitigate the impacts.

**Draft Regulation 51**

We have three brief comments.
Firstly, the reports should be made public, such as placed on the authority’s website.

Secondly, monitoring should be in real time. Reporting should be at the very least monthly, rather than annual.

Thirdly, monitoring and reporting should include cumulative impacts.

We also support Costa Rica and DOSI in their observations including about baseline data.

**Draft regulation 52 (paragraph 1)**

The performance assessments should be carried out by an independent third party, or the ISA, not by the contractor. Allowing contractors to review themselves amounts to industry self-regulation and is not acceptable.

Nor is simply having the ISA review the performance assessments enough. The “independent competent person” referred to in paragraphs 5 and 6 should be used in paragraph 1. Although perhaps it should be assumed that any person appointed by the Authority would be competent. They certainly should be independent.

**Draft regulation 52 (paragraphs 4, 6, 8)**

4. Currently the only requirement is that the report is to be made public. It should also be open to public comment.

6. There are no criteria for determining whether a report is “Unsatisfactory”. If by unsatisfactory means the contents of the report, there should be provision for the activity to cease. We don’t understand why two successive unsatisfactory reports can be submitted before this applies.

8. The steps that can be taken in para 8 should be able to be taken in response to any shortcoming, not just a breach of the EMMP or inadequacy of the plan itself. Paragraph b should include other steps including requiring the contractor to take certain steps. The compliance notice should be in addition to, not an alternative to, other steps.