

January 6, 2014

Céline Sirois
National Energy Board
444 Seventh Avenue SW
finerespguidelines@neb-one.gc.ca

RE: National Energy Board Draft Financial Viability and Financial Responsibility Guidelines

Dear Ms. Sirois,

The Pembina Institute supports the National Energy Board's efforts to establish Financial Viability and Financial Responsibility Guidelines for applicants seeking authorizations under the *Canada Oil and Gas Operations Act* (COGOA). We are pleased to provide thirteen specific recommendations below that are meant to further strengthen the Draft Guidelines.

To date, both onshore and offshore oil and gas extraction activities in the Northwest Territories (NWT) have been limited, so there is limited evidence to prove that existing National Energy Board (NEB) procedures to ensure financial viability and responsibility are either adequate or inadequate. However, extraction operations in the southwestern NWT and near Norman Wells are entering remediation phases of their projects, and already there are significant questions about who will take full responsibility for clean-up and whether adequate funds are available. With a shale oil exploration boom emerging in the Central Mackenzie Valley and a proposal for deep offshore drilling already submitted, these guidelines are urgently needed. Both of these types of operations are untested in a northern context and involve considerable risks over the short-term and long-term.

As of 2010, the estimated *public* liability for northern contaminated sites was \$1.5 billion.¹ While the financial burden is felt by taxpayers across Canada, the communities nearest the contaminated sites suffer incalculable losses in terms of both the current resources they depend on and the damaged legacy they pass to their children and grandchildren. Giant Mine alone is estimated to cost over a billion taxpayer dollars to address. Those costs will not even be sufficient to clean up the site—perched on the outskirts of Yellowknife, N'dilo and Detah—since there is currently no viable technological solution to remove or treat the arsenic trioxide. This example highlights the need for a strong polluter-pay approach and a robust regulatory regime ensuring

¹ INAC Northern Contaminated Sites Program, *2005-2010 Progress Report* (Indian and Northern Affairs Canada, 2010), 6. http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/textetext/nth_ct_ncsp_csrep0510_1318949021276_eng.pdf

every operator's financial viability and responsibility. These objectives must not be sacrificed in the name of short-term jobs and economic gain. Direct federal and territorial government revenues from Giant Mine amounted to \$94 million (1948-1999), which is less than 9.4% of the taxpayer dollars required to clean up and care for the now-abandoned site.²

Oil and gas development comes with substantial risks of environmental harm. Despite the widespread use of environmental management systems and prevention procedures by oil and gas industry operators, accidents and violations continue to happen on a regular basis. In some cases, regulators have not been able to keep up in terms of holding operators accountable.

According to a 2013 report by Global Forest Watch, *Environmental Incidents in Northeastern Alberta's Bitumen Sands Region, 1996-2012*.³

- At least 9,262 environmental incidents were documented in the oil sands region of northeastern Alberta between 1996 and mid-2012, including at least 4,063 alleged contraventions (or perceived violations of legislation).
- According to the Alberta Energy Regulator pipeline releases database, there were 1,179 pipeline releases in the study region over the same period.
- The environmental enforcement rate is only 0.9 % of the alleged contravention rate.
- It is impossible to know the full extent of the environmental damage from these incidents, or the associated liabilities, because in many cases the volume, duration, and chemical composition of the releases to air, and spills, leaks, and discharges to land or water have been recorded as unspecified or unknown.

According to figures from an NEB data-set obtained under access-to-information by CBC News, the rate of safety-related pipeline incidents has doubled between 2000 and 2011, rising from one to two for every 1,000 kilometres of federally-regulated pipeline (resulting in 142 safety-related incidents in 2011)⁴. From 2007 to 2011, the NEB itself reported an increase in the number and the severity of incidents being reported by NEB-regulated companies.⁵ There is no publicly-accessible information on the follow-up actions taken for each of those incidents (including whether the spills were fully cleaned

² S. Morgan et al, *Responsible Extraction* (Pembina Institute, August 2013), 18. <http://www.pembina.org/pub/2491>

³ Global Forest Watch, "New Study Demonstrates Alberta Failing to Enforce Environmental Legislation" (press release, July 23, 2013). http://www.globalforestwatch.ca/pubs/2013Releases/03PollutionIncidents/Envir_Incidents_press_release.pdf

⁴ Amber Hildebrandt, "Pipeline safety incident rate doubled in past decade," *CBC News*, October 28, 2013. <http://www.cbc.ca/news/pipeline-safety-incident-rate-doubled-in-past-decade-1.2251771>

⁵ National Energy Board, "Incident Reduction Project." <http://www.neb-one.gc.ca/clf-nsi/rsftyndthnvmnt/sfty/ncdntrdctn/ncdntrdctn-eng.html>

up and whether liabilities remain). The NEB data-set obtained by the CBC contains many blanks, and in many cases the amount of product spilled is marked as 'unknown'.⁶

The problem of financial responsibility extends beyond accidents to the liabilities being created on an ongoing basis through the licensed activities themselves. Pembina's 2010 report, *Toxic Liability: How Albertans Could End Up Paying for Oil Sands Mine Reclamation*, shows that many liabilities are not considered in Alberta's reclamation security policies, such as initial land disturbance, post-reclamation maintenance, groundwater disruption and contamination, and plant-site contamination. Pembina conservatively estimates that the cost of reclaiming disturbed land in the oil sands will be \$10 billion to \$15 billion (\$220,000 to \$320,000 per hectare); whereas, total oil sands security in the Environmental Protection Security Fund was only \$820 million in 2009 for 68,574 hectares of disturbed land (\$12,000 per hectare).⁷

In Alberta, as of June 2009, there were 61,945 inactive wells that had not yet been abandoned or reclaimed.⁸ Another 45,248 wells had been abandoned but not yet certified.⁹ The gap between the number of wells drilled and the number of wells abandoned and reclaimed in Alberta continues to grow, increasing the liabilities that will potentially become public responsibilities.¹⁰

The above examples show the necessity for a robust and transparent regulatory framework which ensures liabilities are addressed by the operators who cause the damage, not by the public.

Pembina has prepared the thirteen recommendations below with the intention of strengthening five aspects of the draft NEB *Guidelines*:

1. Polluter-pays principle should be explicit and absolute.
2. Reclamation costs should be explicitly included as part of Financial Viability.
3. Increased public transparency is key.
4. "Worst case scenario" costs should be clarified.
5. The role of the NEB in taking over spill response should be clarified.

⁶ Amber Hildebrandt and Michael Pereira, "Pipeline project: From grainy documents to interactive map," *CBC News*, October 28, 2013. <http://www.cbc.ca/news/pipeline-project-from-grainy-documents-to-interactive-map-1.2251803>

⁷ Nathan Lemphers, Simon Dyer and Jennifer Grant, *Toxic Liability: How Albertans Could End Up Paying for Oil Sands Mine Reclamation* (Pembina Institute, September 2010), 7. <http://www.pembina.org/pub/2075>

⁸ Barry Robinson, *Well Abandonment and Reclamation in Alberta: the Failure of the Licensee Liability Rating Program* (Paper prepared for the Well & Pipeline Abandonment, Suspension and Reclamation Conference, Canadian Institute, February 9-10, 2010), 4. <http://www.ecojustice.ca/publications/reports/well-abandonment-and-reclamation-in-alberta>

⁹ *Ibid*, 5.

¹⁰ *Ibid*, 9.

1. Polluter-Pays Principle

While the Draft Guidelines imply that they are intended to ensure operators pay for any pollution they cause, it would be clearer if this principle was laid out explicitly at the beginning of the document.

Recommendation #1: The purposive section of the Guidelines should state explicitly that the implementation of the polluter-pays principle is a primary objective of the liability regime.

The Draft Guidelines are currently unclear as to whether, in a worst-case scenario that costs more than \$1 billion, an operator must cover the full costs of addressing such a scenario, or merely pay up to the maximum absolute liability limit.

Recommendation #2: There should be no limit on absolute liability; an operator should have to pay for the full cost of addressing a worst-case scenario.

2. Reclamation as part of Financial Viability

The Draft Guidelines do not provide any details as to what costs should be included within a Financial Viability estimate, beyond stating it is “the cost of completing the applied-for activity in a safe and environmentally responsible manner”. This could be interpreted as simply the budget for carrying out the operation, rather than the total cost of remediation, reclamation and post-reclamation maintenance.

Recommendation #3: The Guidelines should specify that the Financial Viability cost estimate must include the cost of remediation (including any groundwater disruption and contamination and plant-site contamination), full reclamation, and post-reclamation maintenance.

3. Transparency

The “just trust us” approach to regulation and financial assurance is simply not acceptable to the public. Data on financial viability and financial responsibility cost estimates must be accessible to the public; the methods for calculating these estimates must be transparent; and records that monitor financial viability and responsibility throughout the life of the project should be made public.

As outlined in Pembina’s *Toxic Liability* report, the reclamation security system in Alberta is significantly flawed and leaves Albertans open to large financial liabilities:

- Alberta Environment is supposed to ensure reclamation security estimates are accurate, but information about how estimates are calculated is not publicly available.

- Companies are reluctant to provide public information on estimated or actual reclamation costs.
- Alberta Environment has no formal policy to use accounting safeguards to verify the data submitted by oil sands mines.¹¹

The NEB can learn from the gaps in Alberta's system and put in place a system of financial responsibility that the public can have confidence in.

Recommendation #4: The criteria for determining the worst-case scenario should be transparent, and accessible to the public.

Recommendation #5: Financial responsibility cost estimates should be verified by an independent third-party and be made public.

Recommendation #6: The NEB should maintain records monitoring financial viability and responsibility throughout the life of the project, and these should be made public.

Some comments on these Draft Guidelines have stated that worst-case scenario cost estimates must be kept confidential in order to maintain public confidence in the oil and gas industry.¹² We disagree that potentially affected communities feel confident when the full range of risks are not disclosed. The public is aware that there continue to be a significant number of environmental incidents in oil and gas extraction as well as increasing pipeline incidents, as outlined above. Affected members of the public want proof that systems are in place to ensure operators take responsibility for those incidents as well as overall toxic liabilities.

4. Clarification of “Worst Case Scenario” Costs

Reasonable concerns have been expressed by many parties on how “worst case scenarios” are to be defined, and who is to define them.

First of all, the NEB implies in the Draft Guidelines that all “worst case scenarios” are to be related to spills (the release of hazardous substances or discharges of oil). Clarification of this point may help to alleviate concerns that the process of defining a worst-case scenario will be so broad as to include unlikely disastrous events of all kinds.

Neither concerned citizens nor the proponent should have primary control over the definition of a worst-case scenario. As the regulatory authority, the NEB should establish a standardized and publicly transparent procedure, which includes third-party verification of financial estimates.

¹¹ *Toxic Liability*, 7.

¹² See Canadian Association of Petroleum Producers (CAPP) letter to the National Energy Board, October 31, 2013, 4; and David Ramsay, Minister of Industry, Tourism and Investment - Government of the Northwest Territories, letter to the National Energy Board, October 24, 2013, 2.

Recommendation #7: The Guidelines should specify a defined set of criteria that the proponent would be required to submit to the NEB (eg. anticipated flow rate, pipe diameter, length of potential loss of well control, baseline ecological characteristics, etc) in order for the NEB to define several key spill/contamination pathways.

Recommendation #8: The NEB should define several standard categories of spill/contamination pathways that are to be considered, and the extent to which they could occur concurrently (in which case operators should have to cover the costs of the combined incidents). Examples of spill/contamination pathways include: spill during transportation of fracking chemicals to site, well blowout, and leaky casing/cementing causing contaminated fluids or gas to migrate into groundwater.

Recommendation #9: The NEB, rather than the proponent, should be in charge of public consultation about the worst-case scenario. The NEB should also clarify the objectives of public consultation in this context. The *nature* of the several spill/contamination pathways should be defined ahead of time by the NEB. The NEB should then either hold a public hearing or cooperate with local regulators in seeking public input regarding the *consequences* of each event on the environment and on local communities. For example, local community members and/or environmental experts could indicate which locations or aspects of the environment could be most vulnerable to a spill (either for ecological or socio-cultural reasons), their expectations for appropriate standards of clean-up, and what kinds of damage would require compensation.

Recommendation #10: The NEB should be in charge of defining the worst-case scenario(s) and making the Financial Responsibility cost estimate, based on the information provided by the proponent and the public. A third party should be contracted to verify the Financial Responsibility cost estimate (as well as the Financial Viability estimate).

Recommendation #11: In the case of transportation of fracking chemicals to site, the chemicals remain under the care and ownership of the contracted transporter until they are delivered/ off loaded at their final destination. The NEB should obtain proof of Financial Responsibility ahead of time from either the contracted transporter or the proponent, or a combination of both.

With regard to the calculation of compensation costs to local communities, there is a danger that an unstructured “consultation” process led by the proponent will not be a useful exercise. The proponent has a vested interest in downplaying the worst case scenario to avoid alarming the public and local communities, while local communities have an obvious interest in demanding as much potential compensation as possible.

Without set terms for the negotiation, the parties are unlikely to come to a reasonable estimation of expected compensation.

While the NEB specifies in the Draft Guidelines that proponents must consider the extent to which local aboriginal peoples depend on “hunting, fishing, traditional lifestyle and livelihood” and their loss of “actual and future income derived from hunting, fishing, gathering”, in practice this will often be impossible to accurately calculate. Many Aboriginal communities do not keep detailed figures about their levels of harvesting and reliance on traditional livelihoods so any figures would be anecdotal. In any case, many community members prefer to keep these details private for a variety of reasons. Another consideration listed in the Guidelines is “value of the land to the cultural aspects of the northern people and communities”. It would be very difficult and likely inappropriate to try to put a monetary value on the cultural value people ascribe to the land.

Recommendation #12: Pending consultation on this issue with Aboriginal groups, it may be more appropriate to set a standard amount of compensation to be issued for any neighbouring First Nation communit(ies), scaled according to the extent, severity, and duration of the environmental damage and its location in relation to the community’s traditional territory. This would be over and above any direct damage to the property or livelihood of individual community members. These standard amounts of compensation should be set based on informed consultation between the NEB and Aboriginal governments, with invited input from Aboriginal community members, industry, and other knowledgeable experts.

5. NEB Role in Spill Response

The Draft Guidelines should provide more detail as to what constitutes inadequately responding to a spill, and what would trigger the NEB to take over spill response. According to the Draft Guidelines: “In the event of an incident, the Board expects an Operator to clean up the spill and debris, as well as pay out all claims as appropriate. The Board could take over spill response and pay out claims if the Operator does not appropriately address an incident...The NEB has trained emergency management specialists with the expertise to evaluate a company’s emergency response activities and, if required, take over management of the spill response.”¹³

Recommendation #13: The Guidelines should specify exactly what would trigger the NEB to take over spill response and clean-up, to ensure that the response would still be timely enough to implement any necessary emergency measures.

¹³ National Energy Board, *Draft Financial Viability and Financial Responsibility Guidelines*, page 3 under #1.

Thank you for this opportunity to comment on the NEB's Draft Guidelines. Please feel free to contact me at (867) 873-4309 for clarification or further discussion of the recommendations outlined above.

Sincerely,



Shauna Morgan
Northern Program Lead
Pembina Institute