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October 31, 2013

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Submitted hardcopy and via email to finrespguidelines@neb-one.gc.ca

Attention: Marie-Anick Elie, Northern Co-ordinator

Re: Draft Financial Viability and Financial Responsibility Guidelines

Dear Ms. Elie;

Explor is a privately held Canadian corporation specialized in acquiring and owning high quality seismic data in challenging areas. Explor has been active in the Northwest Territories for decades and we have spent hundreds of millions of dollars in the region, with approximately 80% of our NWT project expenditures in the past decade going to aboriginal-owned businesses in the NWT.

As an experienced proponent of northern projects, Explor is very concerned with the Draft Financial Viability and Financial Responsibility Guidelines. These Draft Guidelines are deeply flawed and will cause great harm to northern businesses. In fact, we have already seen glimpses of the damage they will do as there premature implementation has caused Explor to re-direct $6.5 million of our planned 2013 NWT budget to projects outside the NEB's jurisdiction.

The Draft Guidelines create a barrier to business and opportunity that is unique in Canada and perhaps the world in order to attempt to address an imagined problem that does not exist.

Premature Implementation of the Draft Guidelines

On May 13, 2013, Explor received a document entitled "Draft Financial Viability and Financial Responsibility Guidelines" (hereinafter referred to as the "Draft Guidelines") via e-mail from the NEB. The opening paragraph states (among other things) that "The Board is seeking comments on the (Guidelines) from all interested persons until 31 October 2013."

It is somewhat disingenuous for the Board to claim that the Draft Guidelines are "draft" and open for review and comment, but then move forward with applying them prior to receiving feedback. The result of the NEB's decision to implement these Draft Guidelines prematurely was that the NEB harmed Explor's business and took opportunity away from our suppliers and contractors, thereby harming the economic opportunities available to people within the Northwest Territories generally and the Sahtu Settlement Area in particular.

While Explor appreciates the opportunity to comment on these Draft Guidelines, we are dismayed and frustrated that the NEB has prematurely begun to apply the Draft Guidelines in advance of receiving comments from affected parties.

The claim made by certain Board members and NEB staffers (including Chairman Gaetan Caron) to the media there has been no change is also untrue. We know change when we see it, and we know that the Draft Guidelines were applied prior to the end of the comment period. In fact, we were directly informed that this would be the case in a series of meetings and telephone conversations related to two separate GOA applications we had submitted for work we had originally planned for this past summer.

Through a series of information requests and discussions, the Board implemented the Guidelines when reviewing Explor's two most recent GOA applications before the deadline for comments, thereby holding up the applications and preventing the projects from moving forward, to the detriment of the northern economy. This is a new and unfortunate development that we have not experienced in dozens of previous applications to the NEB.

The Board's decision to implement these Draft Guidelines concurrently with the comment and review period placed Explor in the unenviable position of being the proverbial guinea pig to these new and very flawed Draft Guidelines. We were placed in the terrible position of being asked to comment on the Draft Guidelines while actively seeking two GOAs where they were being prematurely subjected to those same Draft Guidelines.

We note that in a letter to the Board dated October 29, 2013, the Tulita District Land Corporation has raised the issue of inadequate consultation on the Draft Guidelines on the part of the Board. Explor fully agrees with the position taken by the Tulita District Land Corporation on that issue. The Sahtu people have already lost business and suffered economic harm because of these Draft Guidelines, yet they haven't been properly consulted on them.

Guidelines: Background and Scope

Our overall perspective of the Draft Guidelines is that they are entirely unnecessary, they consist of a dramatic expansion to the NEB's power, they are an attempt to reinterpret old regulations in a way that results in regulatory overreach and will produce dire unintended consequences.

We note from the preamble to the Guidelines that the Guidelines flow from the Arctic Offshore Drilling Review and a request for clarity on Financial Responsibility requirements covered by COGOA. The Arctic Offshore Drilling Review was itself largely a Canadian byproduct of the Macondo blowout and spill in the Gulf of Mexico in the context of several large and expensive Exploration Licenses having been sold in the Canadian Beaufort and the potential for deep water drilling that would soon follow. This context is important, as the Guidelines seem to have been constructed largely with offshore drilling and the associated risk of blowouts and the resulting spills in mind.

Projects with cumulative values of many billions of dollars have been completed without these Draft Guidelines without the issues they are purported to address arising. In fact, when asked, Chairman Gaeton Caron stated that to his knowledge no proponent had ever failed to take on the financial responsibility for any spill within the NEB's jurisdiction. This means that there is simply no need for these Draft Guidelines.

Further, to take Draft Guidelines created with Arctic Offshore Drilling and apply them to projects that are not in the Arctic, not Offshore and not Drilling is even more problematic. Draft Guidelines derived from an Arctic Offshore Drilling Review have limited utility or applicability for sub-Arctic Onshore Seismic operations.

Guidelines Stated Purpose #1: Financial Viability

The first stated Purpose of the Guidelines is to "explain the information an applicant seeking an authorization under section 5(1)(b) of COGOA (Applicant) should provide to the NEB to demonstrate Financial Viability with respect to the applied-for activity…".

Financial Viability is then defined in the Guidelines as "the extent to which an Applicant is financially capable of conducting the applied-for activity safely and in an environmentally responsible manner. The Applicant must provide an estimate of the costs of doing so, and demonstrate its ability to pay for these costs"

COGOA does not mention the question of Financial Viability. This is a new concept that appears for the first time in the Guidelines and has no basis in the Act or Regulations.

The NEB does not have the ability to introduce new regulations, especially those that would extend its authority and power into new areas.

The Governor in Council cannot introduce new regulations without due process and in fact has not introduced new regulations with respect to Financial Viability under COGOA.

Introduction of the concept of Financial Viability in the Guidelines vastly extends the NEB's jurisdiction and powers in a way not permitted by law.

Introducing the concept of Financial Viability as defined in the Guidelines causes the unnecessary and unwarranted intrusion of the NEB into private corporate affairs.

For example, in a paragraph entitled "To Demonstrate Coverage for Financial Viability" the board calls for:

- Audited financial statements.
- Most recent credit rating reports which need to be investment grade (B-rating) or above. The Guidelines go on to define this as BBB- or higher from Standard & Poor's, BBB Low or higher from DBRS, Baa3 or higher from Moody's, BBB- or higher from Fitch, etc.

As a privately held Canadian corporation, Explor has neither audited financial statements nor an investment grade credit rating from an internationally recognized credit rating agency, nor should we. Obtaining them serves no business need for Explor and would be a costly and time-consuming undertaking.

Perhaps the NEB intends to hire a team of investment and credit analysts to scrutinize proponents' financials and challenge their cash flow forecasts and business plans, assess and forecast market conditions and commodity pricing and then require proponents to make certain adjustments in order to satisfy the Board. But even if the NEB adds this intrusive regulatory scrutiny, the notion that the NEB would be able to identify and separate successful businesses from imminent collapses is doubtful, to say the least.

Requiring investment grade credit ratings from a proponent to any NEB activity is basically a bullying tactic that heavily in favour of giant corporations and offers no improvement of certainty of financial responsibility. Giant investment grade corporations fail too. Both Lehman Brothers and AIG had AAA or AA credit ratings in the moments prior to their respective collapses. Enron had audited financial statements that would likely have met with NEB approval prior to their collapse and the indictment of their executive team for fraud. Note also that the audit firms themselves were implicated in the Enron case. These companies would therefore have received approval according to these draft Guidelines prior to their bankruptcies, but they weren't financially viable and clearly wouldn't have been able to pay their bills.

Furthermore, the requirement for investment grade credit ratings has some positively absurd consequences. An interesting outcome of this overreach is that according to some credit ratings agencies the Republics of Indonesia or Portugal (among many other sovereign nations) would be precluded from proposing to do any work under COGOA regardless of the size of their project. Indonesian government-employed geologists hoping to obtain NEB permission to spend a few thousand dollars on a geological field trip to see outcrops of the Canol Shale would be out of luck in spite of their country's GDP exceeding $850 billion and government revenues of over $130 billion per annum. Fortunately Ireland, Spain and India squeak by, at least for now.

Just as an apparently healthy balance sheet or an investment grade credit rating are no guarantee of viability, apparently small private corporations may have large financial backing from private shareholders or may secure large investments and assemble valuable business partnerships driven by opportunities they create despite having balance sheets and income statements that appear meager. Small corporations such as Explor have created huge opportunities for Canadians. The NEB's use of these Draft Guidelines to bully and push small corporations out of business is simply wrong and unfair.

Is it the NEB's intention to systematically destroy opportunities for small and medium enterprises to propose activities regulated under COGOA? Is it the intention of the NEB to remove any potential for locally owned aboriginal businesses to propose activities under COGOA? Is it the intention of the NEB to limit northern activity to giant corporations who have credit ratings that are superior to those of many sovereign nations?

These Draft Guidelines will create those outcomes, destroying many business opportunities for aboriginal and northern Canadians in the process. Having finally secured ownership of the sub-surface in their traditional lands, aboriginal land corporations will now find that they are unable to overcome the new obstacles placed in their path by these Guidelines should the opt to independently explore and drill for oil and gas on their own lands.

Simply put, assessing corporations' Financial Viability falls outside the jurisdiction of the NEB.

For those who do assess Financial Viability (markets, banks, investors and other lenders and creditors), past performance is the most reliable indicator of future behaviour.

Explor has a decades-long history of operating safely and responsibly in the north. We have operated in the north continuously since 1994, and in that time we have spent well over $150 million on projects across the NWT. Over 80% of these expenditures went to aboriginal businesses. In several instances we have provided capital for aboriginal businesses to start-up or expand. We have always paid our bills. We have repeatedly proven ourselves to be capable and competent and responsible over a period measured in decades. That should be enough. I

can also say that Explor doesn't run a deficit. That is something that the Government of Canada cannot say. Yet despite that past performance, Explor would not be able to meet the Financial Viability requirements of the Draft Guidelines.

Guidelines Stated Purpose #2: Financial Responsibility

The second stated purpose of the Guidelines to clarify requirements pursuant to subsection 27(1) of COGOA. Section 27 reads as follows:

> *Financial responsibility*
> *27. (1) An applicant for an authorization under paragraph 5(1)(b) in respect of any work or activity in any area in which this Act applies shall provide proof of financial responsibility in the form of a letter of credit, a guarantee or indemnity bond or in any other form satisfactory to the National Energy Board, in an amount satisfactory to the Board.*
>
> *Continuing obligation*
> *(1.1) The holder of an authorization under paragraph 5(1)(b) shall ensure that the proof of financial responsibility remains in force for the duration of the work or activity in respect of which the authorization is issued.*
>
> *Payment of claims*
> *(2) The National Energy Board may require that moneys in an amount not exceeding the amount prescribed for any case or class of cases, or determined by the Board in the absence of regulations, be paid out of the funds available under the letter of credit, guarantee or indemnity bond or other form of financial responsibility provided under subsection (1), in respect of any claim for which proceedings may be instituted under section 26, whether or not those proceedings have been instituted.*
>
> *Manner of payment*
> *(3) Where payment is required under subsection (2), it shall be made in such manner, subject to such conditions and procedures and to or for the benefit of such persons or classes of persons as may be prescribed for any case or class of cases, or as may be required by the National Energy Board in the absence of regulations.*
>
> *Deduction*
> *(4) Where a claim is sued for under section 26, there shall be deducted from any award made pursuant to the action on that claim any amount received by the claimant under this section in respect of the loss, damage, costs or expenses claimed.*

Again, context is important. These paragraphs lie under the "Spills and Debris" section of the regulations. Subsections 27(2), 27(3) (albeit by extension) and 27(4) all specifically refer back to Section 26 which in turn discusses liability for produced oil and gas discharge, emission or escape as well as spills.

The Guidelines then go completely off track by stating that Financial Responsibility is "the extent to which an Applicant is financially capable of implementing its worst case scenario spill contingency plan." The Act and Regulations themselves say no such thing. Several problems are evident with this illogical way of thinking.

The Draft Guidelines do not take into account the likelihood of any worst-case scenario actually occurring. No matter how infinitesimally small the likelihood of occurrence is, proponents are going to have to prove they can pay for those outcomes.

The detrimental effect this will have on business is obvious. If people or businesses were required to imagine the worst thing that could happen and then pre-pay for that event, nobody would do anything. People having to prepay for the worst case scenario that could unfold as they travelled to work would never leave their house. Staying in their house would be just as problematic if they were required to prepay for the worst case scenario that could befall them in the house.

Worst-case scenarios exist in the imagination. My 10 year old son has a very vivid imagination – so much so that I'm not sure all the money in the world could pay for the potential outcomes he conjures up. Butterflies will be posting giant bonds before they flap their wings.

On the other hand, a proponent with a very poor imagination might not be able to foresee the same terrible outcomes, so financial responsibility burdens would be lower.

The Draft Guidelines therefore propose to impose a burden of financial responsibility that rewards Applicants with poor imaginations and punishes those who envision a wider range of potential outcomes. This sets up a problematic dynamic wherein proponents will be incentivized to minimize the potential for disaster lest they be required to post an outlandish bond. It would be far better for the NEB to incentivize the envisioning of worst case scenarios and place the emphasis on preventing them, not paying for them.

We have seen via the premature application of the Draft Guidelines to our two applications that the outcome of this exercise was for the Board to demand that Explor supply the NEB with an irrevocable letter of credit that the Board could use for any reason at any time, essentially requiring us to pre-pay for an imagined worst case scenario.

Requiring proponents to prepay for an imagined worst case scenario regardless of how unlikely it might be (via an irrevocable letter of credit in the case of the Board's requests pertaining to our applications this past summer) also creates numerous strange outcomes, a few of which are listed below:

- Proponents' have to pre-pay for imagined scenarios to the NEB
- If an incident occurred, the proponent would not want the NEB to access the letter of credit, so they would have to pay for the costs directly, effectively doubling the cost of the incident to the proponent.
- Proponents already have bonds in place with other regulators for the same sorts of events, so this is another redundancy – effectively resulting in a tripling or quadrupling of costs.
- In the event that a proponent defaulted on their financial obligations, the NEB would find itself in the position of running an operation – something it has no experience or expertise in doing.
- The NEB would have to identify suitable contractors and suppliers. Would they have to sign benefits agreements with local aboriginal corporations? Would the NEB be permitted to take over our emergency response without its own Land Use Permit and Water Licenses? What procurement process would be followed?
- The NEB will find itself in the business of adjudicating claims made by different parties, unnecessarily inserting itself in the middle of business transactions.

According to footnote 2 to the Financial Responsibility concept definition on the first page (the Guidelines' pages are not numbered), the spill contingency plans to which the Guidelines refer are expected to be based on the filing requirements for offshore drilling. It does not make much sense to require an onshore seismic operation to file an offshore drilling spill contingency plan, let alone provide proof of financial responsibility for an imagined resulting worst case offshore drilling spill scenario.

The paragraph at the bottom of the second page of the Guidelines states:

> *"Prior to receiving an authorization for any oil or gas activity onshore of offshore, an Applicant must demonstrate to the Board that it is capable of acting in a financially responsible manner for the life of the proposed operations. The Board has full discretion over the proof of the Financial Responsibility that Applicant must put in place. There is no upper limit on the amount of Financial Responsibility which the Board may require."*

Again we see mission creep in this paragraph. The regulations do not require that the Applicant demonstrate that it is capable of acting in a "financially responsible manner for the life of the proposed operations." This is a carte blanche statement that would seem to give the NEB the power to assess whether proponents are acting in a financially responsible manner, whatever that might mean to the Board.

In fact, the regulations require "proof of financial responsibility in the form of a letter of credit, a guarantee or indemnity bond *or in any other form satisfactory* to the National Energy Board, in an amount satisfactory to the Board" specifically related to discharge emission or escape of produced oil and gas or other spills, and that "the holder of an authorization under paragraph 5(1)(b) shall ensure that the proof of financial responsibility remains in force for the duration of the work or activity in respect of which the authorization is issued." Properly and reasonably administered, the Regulations actually make sense. The Draft Guidelines do not.

The paragraph also incorrectly states that "there is no upper limit on the amount of Financial Responsibility which the Board may require." Actually, there is. The Board cannot arbitrarily require proof of financial responsibility that goes beyond the Act and Regulations or is not reasonable given the operations in question. The power of the NEB is not limitless. Canada is a democracy, after all. It just seems as though the NEB is trying to extend its authority and grab additional powers via the Guidelines. This is especially strange given that most of the NEB's onshore functions will soon be devolved to the Government of the NWT.

Devolution

In addition to all of the flaws with the Draft Guidelines, Explor believes that it is inappropriate for the NEB to be implementing new requirements for onshore exploration activities in the NWT just prior to the devolution of NEB's authority to the Government of the Northwest Territories (GNWT).

In discussions with the GNWT since the Draft Guidelines were prematurely implemented for Explor's operations, it is clear that the GNWT was not aware of the issues surrounding the Draft Guidelines. Just as the aboriginal people of the Sahtu were not properly consulted, neither was the GNWT.

Conclusions

By no means are the concerns listed herein exhaustive. There are many more flaws that exist within the Draft Guidelines including onerous and unprecedented insurance provisions, the lack of consideration given to proponents' existing insurance coverage and strange and problematic new worst-case consultation requirements to name a few. Many more concerns and questions will certainly be raised and identified by others commenting.

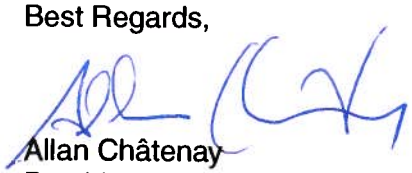
However, it is our hope that by taking the primary concerns and comments contained herein into consideration, the NEB simply returns to rational behaviour, eliminates the Draft Guidelines entirely and returns to direct use of the existing Act and Regulations as they were intended.

In the unfortunate event that the NEB persists with the Draft Guidelines, Explor recommends that all premature application of the Draft Guidelines cease immediately and that they be entirely re-written with a full and genuine consultation process with meaningful and representative participation from all stakeholders and rights holders in advance of implementation. All mention of Financial Viability and any related or consequential requirements should be dropped from the Draft Guidelines. The requirements for worst-case scenario pre-payments are absurd and should be entirely deleted from the Draft Guidelines. There should be clear differences between the expectations of onshore and offshore operations and between drilling operations and seismic and other non-drilling exploration activities. Finally, given that we are just a few months from devolution of onshore exploration to the GNWT, the Draft Guidelines should be limited in scope to those areas over which the NEB will retain authority following devolution.

In creating these unnecessary and flawed Draft Guidelines, the NEB has succeeded in simultaneously bullying and stomping on small corporations and aboriginal people, usurping the authority of the GNWT who will soon take over management of natural resources in the NWT in favour of extending the NEB's powers while chasing away large independent explorers and multinational firms who can easily redirect capital investments elsewhere. All of this stands in stark contrast to the stated desire of the Government of Canada to build a positive future for Northern Canada.

I know that our concerns are shared by many other people in industry, many of our friends in the north, and many people working within both the GNWT and Federal Government. We are all counting on the NEB to take immediate action and change course before it destroys more opportunity and potential for the people of the north.

Best Regards,



Allan Châtenay
President
Explor

cc: CAPP
CAGC
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TDLC
et. al.