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Tulita District Land Corporation

FAX

To:	Mr. Gaetan Caron @ NEB	**From:**	Todd McCauley
Fax:	(403)292-5503	**Date:**	October 29, 2013
Phone:		**Pages:**	Cover + 8
Re:	Attached letter	**CC:**	Fort Norman Metis Land Corporation, Norman Wells Land Corporation, Tulita Land Corporation, Sahtu Secretariat Inc., Minister of the Legislative Assembly, Dave Ramsey

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

•Comments:

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October 29, 2013

Mr. Gaetan Caron
Chairman
National Energy Board
444 Seventh Avenue SW
Calgary, Alberta
T2P 0X8

VIA FAX: (403)292-5503

Dear Chairman Caron;

Re: Draft Financial Viability and Financial Responsibility Guidelines

The Tulita District Land Corporation (TDLC) wishes to express its very grave concerns with the National Energy Board's (NEB) proposed Financial Viability and Financial Responsibility Guidelines.

As both a private subsurface land owner and a potential economic beneficiary of petroleum exploration and development activity on Crown subsurface, TDLC is concerned that the NEB's "draft" Guidelines suffer from a number of defaults.

We encourage the NEB to review its planned approaches to ensuring financial responsibility on the part of developers, a goal we all support, but one that we do not believe is well served by the NEB's proposal.

Our concerns are as follows:

What exactly is the problem the NEB is seeking to address with the Guidelines?

Other than a vague reference to the effect that *"During the course of the Arctic Review, the NEB heard that clarity was sought on Financial Responsibility requirements for authorized activities in all regions covered by the Canada Oil and Gas Operations Act"*, the NEB provides no information on how it reached the conclusion that the draft Guidelines now out for review are the only way available to meet the call for clarity it heard.

The NEB has provided no detailed information as to the nature of the problem it is seeking to solve through these Guidelines.

- is there a long history of oil companies regulated by the NEB not meeting their financial obligations in the NWT?;
- have there been many instances where a company regulated by the NEB has not cleaned up after its project termination?;
- have there been many instances, one even, where a company regulated by the NEB has not responded appropriately to an oilspill caused during its NWT onshore operations?

In the absence of this information, and in the absence of any indication that the NEB looked at alternative approaches to ensuring financial responsibility, it becomes difficult to determine that the NEB even requires these new Guidelines.

The Impact of the Financial Viability Requirement

According to the Guidelines, in order to address the issue of financial viability, the Applicant must do two things. First, it "must provide the estimated cost of the applied-for activity, including all expenses to be incurred to ensure that the activity can be conducted in a safe and environmentally responsible manner". This is essentially the budget for the proposed exploration activity.

Then once these costs have been determined, the Applicant must demonstrate to the NEB that it can actually pay for this estimated cost over the life of the project.

The Guidelines require that this demonstration include "the submission of the Applicant's audited financial statements and the Applicant's most recent credit rating reports which need to be investment grade."

On the surface, the first of these requirements seem to be reasonable. Clearly, any company wishing to explore in the NWT should develop a budget for its proposed activities and equally obviously, such a budget should be as complete as possible. The submission of such a budget can provide comfort to both the regulator and the public that the applicant has indeed considered all the cost aspects of its exploration proposal.

It is the second requirement, the proof of financial viability, that is causing some concern among potential explorers in the North.

While major companies such as Esso and ConocoPhillips may have ready access to audited financial statements and have an investment grade credit rating, not all companies can meet these requirements.

Smaller, privately-owned, companies, for example, may not have audited financial statements or, if they do have them, may not wish to share them with the regulator, arguing that such information is, by definition, private.

Similarly, many smaller companies, a seismic company for example, may not have sufficient financial history or resources to have earned an "investment grade" credit rating.

The NEB Guidelines seems to make no provision for such companies to provide alternatives to prove its financial viability and the Board's insistence on this standard could well result in smaller companies, including Aboriginal-owned ones, being unable to operate in the north.

The draft Guidelines do say that "The Board may consider other evidence of Financial Viability, in addition to the above, that indicate sufficient financial strength and liquidity" but this statement is unclear as to whether it means other evidence in place of audited financial statements and an investment grade credit rating or other evidence as well as audited financial statements and an investment grade credit rating.

This is an issue that needs to be clarified by the Board.

Consistency of Approach to Proving Financial Viability

TDLC notes that while the east coast offshore boards, joint federal-provincial boards responsible for administering the *Canada Oil and Gas Operations Act* in that region, also require evidence of financial responsibility on the part of any applicant, the form of the evidence they require is much more flexible.

The "Guidelines Respecting Financial Responsibility Requirements for Work or Activity in the Newfoundland and Nova Scotia Offshore Areas" specifically provide that:

"the type of evidence which may be used by an operator for financial responsibility purposes is intended to be flexible and non-prescriptive. In general, the Board has no preference as to the type of evidence used, as long as the objectives and requirements are satisfied."

Why is the situation so different in the NWT and why is the NEB, long a champion of non-prescriptive regulation, being in this instance so "prescriptive" in its demands?

Worst Case Scenario Development

In order to address the issue of financial responsibility, the Applicant must provide two separate submissions to the NEB.

First, it "will provide the Board with its estimate of the costs of implementing its Spill Contingency Plan for its worst case scenario" and second it "must demonstrate its ability to pay the full cost of addressing a worst case scenario".

There are a number of issues to be considered here.

(1) It is unclear where the requirement for an estimate of a company's "worst case scenario" comes from. Such a requirement is not specifically mentioned in the *Canada Oil and Gas Operations Act* and appears to be a unilateral transference by the NEB of a requirement found under the Inuvialuit Final Agreement covering exploration activity in the Inuvialuit Settlement Region (ISR) to the entire NWT.

It should also be noted that while the east coast offshore is also covered by the *Canada Oil and Gas Operations Act* (administered by joint Canada-provincial boards), there is no provision for a project proponent to provide a worst case scenario submission in that offshore region.

Would the NEB please explain its requirement for a "worst case scenario" costing for NWT onshore activities?

(2) The Guidelines set out the broad cost categories to be used in estimating a company's worst case scenario.

The total estimated cost must include the cost of (a) containing the incident; (b) cleaning up the environment; and (c) compensating affected third parties.

Items (a) and (b) are relatively straight-forward and will be based primarily on expert analysis but item (c) may prove to be a most troubling, contentious and difficult number to calculate.

This is because in order to properly estimate item (c), the project proponent must "engage potentially affected third parties when deriving estimates for compensation" and will therefore, in the process of doing so, need to outline the full extent of its worst case scenario with those potentially affected third parties.

Unfortunately, the NEB does not provide any guidance on how this engagement of "potentially affected third parties" is to be conducted.

Under the terms of the Inuvialuit Final Agreement, it is the responsibility of the Environmental Impact Review Board "on the basis of the evidence and information before it", that is, following a public hearing, to recommend to the regulator "an estimate of the potential liability of the developer, determined on a worst case scenario....."

The process of a public hearing allows for the developer to provide its cost estimates of a worst case scenario and for those estimates to be tested in front of the Review Board by all affected parties including the developer, government agencies, NGOs, municipal governments and individual citizens.

While there will clearly be differences of opinion among the many interveners about the cost estimate and its elements, the public process does provide for a forum to deal with these differences and the final recommendation by the Review Board may be considered as generally accepted by all parties.

The consultation exercise proposed by the NEB in the draft Guidelines is not likely to provide a similar "meeting of the minds" on the nature and extent of the applicant's worst case scenario.

Instead, the open-ended, multi-party, individual meetings proposed by the Board are more likely to result in a greater degree of uncertainty among those consulted and thereby give rise to less, not more, comfort with the company's proposed development.

As noted by Cass Sunstein, American legal scholar and the former Administrator of the White House Office of Information and Regulatory Affairs in the Obama Administration,:

"If the government discusses a worst case scenario in public, people might well fixate on it, even if it is most unlikely to come to fruition. If people fixate on a bad outcome, they might have serious qualms about a proposed course of action, even if it promises huge benefits and even if the small risk really should be ignored."[1]

Sunstein's claim is based in part on a decision of the U.S. Supreme Court from 1989[2], in which the Court reviewed, among other issues, the requirement for a "worst case scenario" in development applications. The Court noted the following:

"As CEQ [Council for Environmental Quality] explained: "Many respondents to the Council's Advance Notice of Proposed Rule-making pointed to the limitless nature of the inquiry established by this requirement; that is, one can always conjure up a worse `worst case' by adding an additional variable to a hypothetical scenario. Experts in the field of risk analysis and perception stated that the `worst case analysis' lacks defensible rationale or procedures, and that the current regulatory language stands `without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty. It is, therefore, not surprising that no one knows how to do a worst case analysis . . .', Slovic, P., February 1, 1985, Response to ANPRM.

"Moreover, in the institutional context of litigation over EIS(s) the `worst case' rule has proved counterproductive, because it has led to agencies being required to devote substantial time and resources to preparation of analyses which are not considered useful to decision-makers and divert the EIS process from its intended purpose." 50 Fed. Reg. 32236 (1985)."

The author quoted by the CEQ above, Paul Slovic, has written widely on the issue of risk perception and public involvement.

Slovic noted that the public's estimate of an activity's riskiness was to a very large degree determined by the qualities that they believed that activity to possess. If the qualities were considered to be generally negative, the public perception of risk rose. If the qualities were viewed in a more favourable light, the risk was believed to be less.

Slovic concluded that among other elements, the level of familiarity with an action affects the perception of risk; that public understanding of the technology associated with the activity affects the risk perception; and that the level of trust in the institutions involved is yet another influencer.[3]

[1] Worst-case scenarios/ Cass R. Sunstein, p 2
[2] Roberton v. Methow Valley Citizens' Council, 490 U.S. 332, (1989)
[3] Risk, by Dan Gardner, 2008, p.76-77

Given the current public debate about the use of fracking, the inflammatory stories in the popular press, the lack of informed local knowledge concerning the technology involved and the untested capacity of the regulatory authorities to manage this new exploration technique, how comfortable are people likely to feel with the proposed development and, as a result, how likely are they to focus almost exclusively on the impacts of a worst case scenario, no matter how unlikely that scenario is?

The issue here, then, is to ensure that any analysis of a development activity concern itself with what are reasonably foreseeable outcomes of that activity, not to open the floodgates to a series of wildly speculative "what-ifs".

Would the NEB please explain how it intends to ensure that the "consultation" on a possible worst case scenario can be so organized as to provide for meaningful local involvement while also ensuring a realistic, scientifically-based, scenario emerges at the end of the process?

(3) How Many Worst Case Scenarios?

The draft Guidelines require a project applicant to submit "an estimate for the total cost of implementing its Spill Contingency Plan for its worst case scenario" but it appears from a review of the correspondence between the NEB and current project proponents in the Central Mackenzie Valley that one scenario is not enough and, further, that the scenarios to be considered are not solely the creature of the proponent.

The correspondence between the Board and companies seeking to adhere to the Board's draft Guidelines (in advance of their being finalized, it should be noted) shows that NEB staff have been questioning the companies' submissions and have been suggesting alternate worst case scenarios for the company to review and cost.

Given that the Guidelines are clearly marked "Draft", is it appropriate for the NEB staff to be using them in their review of drilling applications? And, further, is it appropriate for NEB staff to be generating alternative scenarios for the company to consider?

(4) The Response of the NEB to a Worst Case Scenario

Given that the NEB plans to require all applicants to provide a worst case scenario for their projects and given that the NEB retains the authority to take over the management and control of an incident in the event an operator is unable or unwilling to do so, how does the NEB plan to demonstrate its ability to handle a worst case scenario?

The Issue of Consultation on the Guidelines

The NEB is currently seeking comments on its draft Guidelines "from all interested persons" until October 31st.

DLC has been given access to letters from the NEB staff to companies seeking to operate in the Central Mackenzie Valley (Characterized as "Information Requests") that reference a number of elements of the draft Guidelines and it appears that the Board staff are acting as if the Guidelines are in fact now Board policy.

This clearly raises the question of the adequacy of Board consultation in regard to the draft Guidelines.

If we use the definition of "consultation" contained in the Sahtu Dene and Metis Comprehensive Land Claim, it appears the NEB's consultation is far from satisfactory. That definition reads:

"consultation" means

(a) the provision, to the party to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;

(b) the provision of a reasonable period of time in which the party to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the party obliged to consult; and

(c) full and fair consideration by the party obliged to consult of any views presented;

One can argue that the NEB has failed in each of (a) and (c).

As noted above, it has failed in meeting the requirement of (a) in that it has not in our view provided "sufficient form and detail" about its draft Guidelines as it has not provided any information on the rationale for the Guidelines nor any indication of alternative approaches it may have reviewed and discarded.

More egregiously, it appears that the National Energy Board's consultation also clearly fails under item (c) of the SDMLCA.

Given that NEB staff are now requiring companies seeking authorizations to respond to the draft Guidelines, well in advance of the October 31st date specified by the NEB for comments to be submitted, and given that TDLC is now submitting its comments, it becomes difficult to argue that the NEB has provided *full and fair consideration by the party obliged to consult of any views presented.*

Could the NEB please explain why its staff members are referencing the requirements outlined in the "draft" Guidelines in their review of authorizations' requests well in advance of the closing date for comments from interested parties?

Concluding Comments

In conclusion, the Tulita District Land Corporation is supportive of ensuring that all petroleum exploration activities in the Sahtu Region are conducted in a safe and environmentally-protective manner, and is equally supportive that all operators be capable, both operationally and financially, of operating in our Region.

But we believe the "draft" Guidelines provided by the National Energy Board are not the tool by which these goals can most effectively be reached.

Tulita District Land Corporation therefore strongly urges the Board to remove the current Guidelines from use and, through a more meaningful, and Constitutionally-consistent process, engage with us and others to develop a response more appropriate to our Region in particular and the Northwest Territories in general.

Yours very truly,

Louise Reindeer

for: Todd McCauley
President

CC: President, Tulita Land Corporation
President, Fort Norman Metis Corporation
Presdient, Norman Wells Land Corporation
Chairperson, Sahtu Secretariat Inc.
Minister of Legislative Assembly of the NWT, Dave Ramsey