

From: [Dean Kennedy](#)
To: [finrespguidelines](#)
Subject: Draft Financial Viability and Financial Responsibility Guidelines - Operator GX Technology Canada Ltd. comments
Date: November 03, 2013 6:51:26 PM
Attachments: [drftfnncvlblyrspnsbltygdln-eng_TRACK.docx](#)

TO: Katie Johnson

Katie, I was traveling late last week and had email problems with our Houston server.

Please find attached operator GX Technology Canada Ltd. comments on the Draft Financial Viability and Financial Responsibility Guidelines.

1. The “unfettered funds” concept set forth on page 7, which gives the Board/NEB unfettered, free, and immediate access to GXT funds under an “unconditional and irrevocable” letter of credit is of concern to GXT, especially since there is apparently no liability standard or any other final determination of responsibility/liability attached to it as a condition precedent to accessing the funds. The attached has a couple of minor revisions that may remedy the issue.
2. The references to Section 7 in the final two pages of the guidelines should be referenced to Section 6.

Please find guidelines attached with track changes turned on.

Thanks,

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Draft Financial Viability and Financial Responsibility Guidelines

The National Energy Board (Board or NEB) published the Arctic Offshore Drilling Review (Arctic Review) report in December 2011 after meeting with and engaging northerners, environmental groups, industry and other stakeholders. 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* (COGOA).¹ The Board is seeking comments on the Draft Financial Viability and Financial Responsibility Guidelines (Guidelines) from all interested persons until 31 October 2013.

1. Purpose of the Guidelines:

The Guidelines will explain the information that 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 as well as how it will meet the Financial Responsibility requirements pursuant to subsection 27(1) of COGOA. These concepts are described as follows:

- **Financial Viability:** 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; and
- **Financial Responsibility:** the extent to which an Applicant is financially capable of implementing its worst case scenario spill contingency plan.² For the purposes of these Guidelines, the worst case scenario is a severe event with extreme and significant effects and consequences, as further discussed in Section 3. The Applicant must provide an estimate of all costs associated with control of the incident, clean-up of the environment and compensation to affected parties, and demonstrate its ability to pay for these costs.

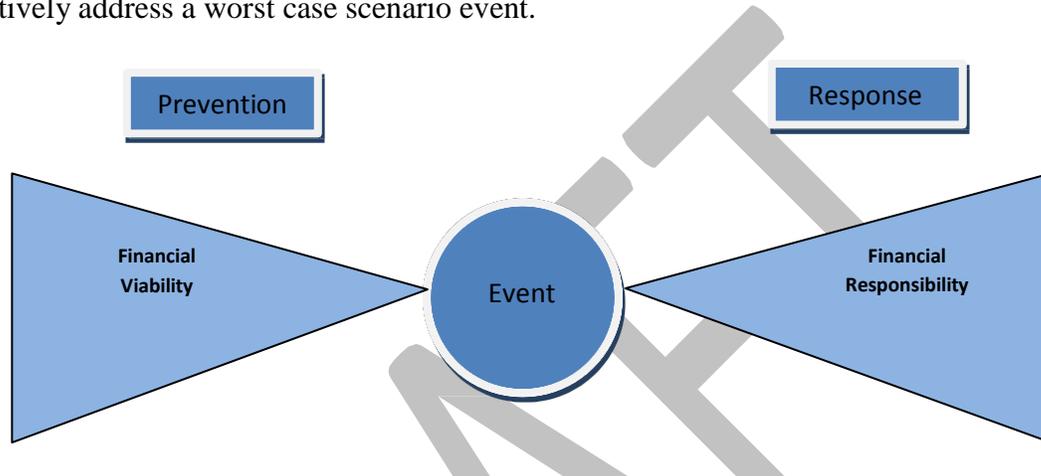
Background

The NEB's approach to determining Financial Viability and Financial Responsibility may be summarized using the diagram below. The left-hand side of the diagram addresses the actions that an Applicant undertakes to reduce the likelihood and consequence of an event occurring, which includes implementing an effective management system, and the safety, environmental

¹ *Canada Oil and Gas Operations Act* R.S.C., 1985, c.O-7. Comments in these Guidelines regarding relevant legislative references are interpretive and are not intended to replace or provide a complete interpretation of each provision, but to provide guidance in the context of Financial Viability and Financial Responsibility requirements.

² The spill contingency plan for all authorized activities proposed under COGOA is expected to be based on the information provided in the [NEB - Filing Requirements for Offshore Drilling](#).

protection, contingency, emergency response plans etc. that support the activity. The Applicant must demonstrate that it has sufficient funds available to pay for the activity to be completed safely pursuant to all regulatory requirements and any commitments and conditions that may accompany its application. The right-hand side addresses the actions an Applicant would take in response to an event occurring, such as stopping the flow of hydrocarbons, implementation of the spill contingency plan, containment of the hydrocarbons, clean-up, and compensation associated with the event. The Applicant is expected to demonstrate that sufficient funds are available to cover both sides of the diagram. This means that the Applicant will demonstrate that it has the financial resources to execute the activity safely and that it has the resources to quickly and effectively address a worst case scenario event.



Companies undertaking oil and gas exploration and production activities as well as other authorized activities in areas covered by COGOA are liable for the loss or damage that they may cause as a result of a spill and debris in accordance with the general laws of Canada. COGOA and the Inuvialuit Final Agreement in the Inuvialuit Settlement Region,³ hold the company that has been granted an authorization pursuant to subsection 5(1)(b) of COGOA (Operator), accountable as they impose absolute liability on the Operator. When absolute liability is imposed, an Operator cannot avoid liability on the basis that there was no fault or negligence. In the case of COGOA, this absolute liability is limited to the prescribed amounts found in the *Oil and Gas Spills and Debris Liability Regulations*⁴ or the *Arctic Waters Pollution Prevention Regulations*⁵ for the Canadian Arctic offshore.⁶

Prior to receiving an authorization for any oil or gas activity onshore or 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 the Applicant must put in place. There is no upper limit on the amount of Financial Responsibility which the Board may require.

³ Section 13 of the Inuvialuit Final Agreement also has requirements related Financial Responsibility applicable to the Inuvialuit Settlement Region.

⁴ *Oil and Gas Spills and Debris Liability Regulations* SOR/87-331

⁵ *Arctic Waters Pollution Prevention Act* R.S.C., 1985, c.A-12

⁶ Pursuant to paragraphs 26(1)(a) and 26(2)(a) of COGOA.

Subsection 27(1.1) of COGOA requires the holder of an authorization under paragraph 5(1)(b) to ensure that the proof of financial responsibility remains in force for the duration of the work or activity. If there is a draw down on a portion of the funds provided to the Board as proof of Financial Responsibility, the Board could require an Operator to replenish those funds. The Board may suspend or revoke the authorization if the Operator fails to maintain proof of Financial Responsibility.

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 liability provisions established under COGOA describe two possibilities for those seeking to recover compensation for damage and loss from an Operator following an incident. First, the Board can hold a security from the Operator and may require that claims be paid from this security. Prior to paying out claims, consideration would be given to whether any additional claims are likely to be submitted, the total amount of any outstanding claims and whether the total amount claimed exceeds the specified limit of absolute liability. The Board can directly pay out claims without waiting for a court to determine fault or negligence. Second, any claim that may be made under section 26, including any claim that has been submitted to the Board, may be sued for and recovered in a court of competent jurisdiction in Canada under subsection 26(3). There is no limit to liability where fault or negligence is established.

The NEB's Chief Conservation Officer can authorize any person to take control of the management of the emergency response if the Operator is not responding adequately to a spill. 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.

2. Timelines for Submitting Financial Viability and Financial Responsibility Information

The Applicant will file its Financial Viability and Financial Responsibility information at the same time as it files its application for an authorization. The Applicant is encouraged to contact the NEB to request a pre-application meeting to discuss the process requirements for filing the Financial Viability and Financial Responsibility information prior to filing an authorization application.

As part of its authorization application, the Applicant will provide two separate cost estimates: (1) an estimate for the cost of completing the applied-for activity in a safe and environmentally responsible manner; and (2) an estimate for the total cost of implementing its Spill Contingency Plan for its worst case scenario. In addition, the Applicant will provide both an explanation as to how these estimated costs were developed and will be covered as well as supporting documentation demonstrating the Applicant's ability to pay these costs.

As a minimum, an Applicant is expected to file an application for an onshore activity with the Board no less than two months, and an application for an offshore activity no less than 6 months, prior to the time a decision is requested from the Board. In the case of complex applications,

additional time may be required. Drafts of any financial instruments to be provided such as a letter of credit are required prior to the filing of the final instruments. Final instruments may be filed with the Board after the Board's assessment of the authorization, but before it is issued.

3. Required Cost Information

In order to determine the level of Financial Viability and Financial Responsibility that is required, the Board needs certain cost information to address both the prevention of an incident (Financial Viability) and the response to an incident, if it were to occur (Financial Responsibility). The cost estimate information required includes:

A. To address Financial Viability:

The Applicant will 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. In particular, the Applicant is expected to identify the cost of all activities included in its operations, including the effective implementation of its management system.

B. To address Financial Responsibility:

The Applicant will provide the Board with its estimate of the costs of implementing its Spill Contingency Plan for its worst case scenario. The application must include a description of this scenario, the consultation process undertaken to determine it and the justification for the choice of scenario.

The estimated cost associated with implementing its Spill Contingency Plan for its worst case scenario should include the cost of:

- a) Containing the incident
- b) Cleaning up the environment
- c) Compensating affected third parties

a) Cost of Containing the Incident

Containing the incident refers to stopping any flow of hydrocarbons into the environment, as well as containing any spill and debris. The Applicant should submit information detailing the costs associated with containing the incident identified in the worst case scenario for which an authorization is being sought. The list of factors below is meant to be a starting point for relevant considerations, and would be customized for the nature, magnitude, and scale of the proposed project. It is intended to be illustrative and not exhaustive. The Applicant should consider all factors that have a bearing on the worst case scenario costs, including:

- The type, scale, timing, and location of the proposed activity;
- Stopping the flow of hydrocarbons;

- Key response strategies and methods for spill and debris containment, monitoring, tracking recovery, and clean-up on surface water, the subsurface, shoreline, ice, and ice-infested waters, as applicable;
- Rate of release, volume and properties of the product that could be released in the event of a worst-case scenario;
- Required support systems, including vessels and ice breakers;
- All factors that can cause harm to the proposed activities, and how such risk factors would be managed; and
- Environment, logistic, and geographic factors that affect stopping, containing and cleaning up the released product.

b) Cost of Cleaning-Up the Environment

The Applicant should provide the Board with an estimated cost for environmental clean-up under the worst case scenario as well as a rationale for how those costs were derived. The Applicant should consider all factors that have a bearing on the costs of cleaning up the environment. The list of factors below is meant to be a starting point for relevant considerations and should be customized for the nature, magnitude, and scale of the proposed project and is intended to be illustrative and not exhaustive.

- Spilt fluid characteristics (physical and chemical properties such as flow rates, volume, oil properties such as American Petroleum Institute (API) grade, viscosity, hydrocarbons constituent components, and wax content);
- Physical environment of the event (e.g., onshore or offshore, water depth, surface or sub-surface spill and debris, presence and make-up of ice, currents, waves, time of year, air temperature, and darkness);
- Effectiveness and efficacy of the proposed spill countermeasures in the operations time period (and possibly beyond the season as spill and debris clean-up may continue after the end of an effective operating period);
- Net Environmental Benefits Analysis outcome for considered spill countermeasures;
- Availability of suitable infrastructure, skilled and capable personnel, and adequate and appropriate equipment;
- Spill monitoring and spill track projector models for effective deployment of spill countermeasures; and

- Information on ecological, cultural, traditional use, commercial, and other significant sites.

c) Cost of Compensation

The Applicant will provide the Board with its estimated cost for compensating affected third parties in the case of its worst case scenario as well as a rationale for how those costs were derived. The estimated costs should take into consideration all factors which contribute to the cost of compensating third parties from an incident. The Board expects the Applicant to engage potentially affected third parties when deriving estimates for compensation, which may involve the consideration of traditional knowledge. The list of factors below is meant to be a starting point for relevant considerations and should be customized for the nature, magnitude, and scale of the proposed project. This list is intended to be illustrative and not exhaustive.

- Proximity of the authorized activities to communities;
- Cost to replace community's water and food sources/intakes;
- Extent of aboriginal people's dependence on hunting, fishing, traditional lifestyle and livelihood;
- Loss of aboriginal people's actual and future income generated from hunting, fishing, gathering;
- Value of the land to the cultural aspects of the northern people and communities; and
- Obligations and responsibilities under land claim settlement agreements.

4. Material Change to the Information Provided

The Operator is expected to file an update when there is a material change to the demonstration of Financial Viability or Financial Responsibility, such as a change to the estimated cost of the applied-for activity, the assessment of risk, the Spill Contingency Plan, or the estimated costs of a worst case scenario. If a material change is made to any of these factors, the Operator must notify the Board in writing immediately upon the change occurring.

5. Affirmation of Worst Case Scenario Cost Estimates

The Accountable Officer of the Applicant must sign off on the worst case scenario cost estimates and verify the accuracy of the information filed with the Board in accordance with these Guidelines. The Accountable Officer will be the person responsible for financial and human

resources as well as technical and operational activities within the Applicant's corporation and in most cases, this will be the Chief Executive Officer. The Operator should notify the Board if the Accountable Officer within a corporation has changed.

6. Demonstration of Financial Viability and Financial Responsibility

As part of its application, an Applicant must demonstrate Financial Viability with respect to the applied-for activity and how it will meet the Financial Responsibility requirements to address a worst case scenario.

To Demonstrate Coverage for Financial Viability: Demonstration of an Applicant's ability to pay for the costs of safely conducting the applied-for activity can be achieved by explaining how the costs for the activity will be paid for over the life of the activity. This explanation is expected to be supported by the submission of the Applicant's audited financial statements, and the Applicant's most recent credit rating reports which need to be investment grade (B-rating⁷) or above. The audited financial statements and credit rating reports of an Applicant's parent corporation will not be considered sufficient. The Board may consider other evidence of Financial Viability, in addition to the above, that indicate sufficient financial strength and liquidity.

To Demonstrate Coverage for Financial Responsibility: An Applicant must demonstrate its ability to pay the full cost of addressing a worst case scenario.

The Board will require unfettered access to a portion of the funds provided as proof of Financial Responsibility in the form of an irrevocable letter of credit. The Board requires the amount of the unfettered portion to be equal to or greater than the estimated cost of stopping and containing an incident. This does not mean that the Board is obligated to use these funds exclusively for the costs associated with stopping and containing the event, rather the Board may choose to use the funds for any costs associated with the incident, including compensation to affected persons.

- i) **Unfettered funds:** A financial security with unfettered access ensures that the Board will have immediate access to funds, if necessary, to address costs resulting from an incident where the Operator is found or deemed to be responsible / liable but does not pay for these costs itself. Unfettered funds will likely be in the form of an irrevocable letter of credit from a Canadian chartered bank, with a Calgary office, indicating the beneficiary as "Her Majesty The Queen in Right of Canada as represented by the National Energy Board". The letter of credit must be effective for at least the duration of the authorized activity as well as any additional period as directed by the Board. The letter of credit can be drawn upon on demand by the Board if an incident were to occur for which the Operator is found or deemed to be responsible / liable by the NEB or other applicable government authority. Any letter of credit provided must be unconditional and irrevocable, and solely dedicated to providing funds to remedy damages and losses from an incident.

⁷ This rating includes "BBB-" or higher from Standard & Poor's; "BBB low" or higher from DBRS; "Baa3" or higher from Moody's; "BBB-" or higher from Fitch; and/or the equivalent from another internationally recognized credit rating agency.

In addition to the unfettered funds, the Board requires the Applicant to carry insurance coverage.

ii) **Insurance:** The Board requires the Operator to hold, at a minimum, spill and pollution insurance. The Applicant must provide a Certificate of Insurance which contains, at a minimum, the information set out in the form found at Appendix I as well as provide a letter to the Board signed by the Applicant's Accountable Officer indicating:

- the name of the insurance carrier
- the amount of the coverage;
- the estimated time required before payout occurs;
- that the Applicant has sufficient funds to pay the deductible amount,
- the length of time for which the insurance coverage has been put in place;
- that the Board will be notified at least 60 days in advance if insurance will be cancelled or changed;
- the listing of all exclusions; and
- that the insurance provider has a credit rating of investment grade (B-rating⁸) or above
- that each policy names the Board as an insured party

If an Applicant is covered by more than one insurance policy, then in addition to the above requirements, a review of all the combined insurance policies must be provided by an independent third party. The independent third party must provide verification which contains, at a minimum, the information set out in the form found at Appendix II.

If an Applicant proposes to self-insure instead of using third party insurance, the Accountable Officer is required to confirm that sufficient funds are and will be available to address the costs of a worst case scenario.

If the costs of the worst case scenario are not fully covered through the unfettered funds and insurance, the Operator must provide the remainder of the costs.

iii) **Other financial instruments:** The remainder of the estimated worst case scenario costs that are not covered by the irrevocable letter of credit or insurance may be addressed through one or more of the following:

- **Additional third-party insurance:** beyond the insurance requirement set out in Section 67(ii), may be provided. The Applicant will provide the Board the specific information outlined in section 67(ii).
- **Audited financial statements:** that demonstrate the Applicant has sufficient financial strength with adequate cash and/or easily accessible capital to cover

⁸ This rating includes "BBB-" or higher from Standard & Poor's; "BBB low" or higher from DBRS; "Baa3" or higher from Moody's; "BBB-" or higher from Fitch; and/or the equivalent from another internationally recognized credit rating agency.

the costs of a worst case scenario. The audited financial statements of the Applicant's parent corporation will not be considered acceptable (unless the parent corporation has signed a parental guarantee).

- **Letter of credit:** an irrevocable letter of credit may be provided in addition to the one which comprises the unfettered portion of the Financial Responsibility as set out in section 67(i). The letter of credit must be from a Canadian chartered bank, with a Calgary office, and indicate the beneficiary as "Her Majesty The Queen in Right of Canada as represented by the National Energy Board." The letter of credit must be effective for the duration of the authorized activity as well as any additional period as directed by the Board.
- **Parental or third party guarantee:** The corporate affiliate or parent company can provide the Board with a letter indicating that in the event of an incident, the Board would be the recipient of sufficient funds from the corporate affiliate or parent company to cover the costs of the worst case scenario. This letter must be accompanied by audited financial statements and the most recent credit rating reports from the parent company or corporate affiliate.
- **Industry group fund:** The Applicant may provide evidence of participation in an industry group fund that may be used to cover the cost of a worst case scenario.
- Any other arrangement acceptable to the Board

The Board does not consider surety bonds an acceptable form for demonstrating Financial Responsibility.

Appendix I – CERTIFICATE OF INSURANCE FORM

For the Insurer

We, the undersigned (Insurer) OR (Insurance Broker or Agent), hereby certify and agree:

- (1) that policy number _____ effective from and expiring on _____ has been issued to _____ (hereinafter referred to as the ‘Insured’) whose address is at _____.
- (2) that subject to the policy terms and conditions, this policy provides for
 - Control of Spill insurance up to a limit of Cdn \$ _____ Per Incident
 - Seepage and Pollution (*Spill and Debris*), Clean-up and Contamination Insurance (including coverage for remediation and compensation) up to a limit of Cdn\$ _____ Per Incident
 - Control of the Spill plus Spill and Debris, Clean-up and Contamination Insurance (including coverage for pollution remediation and compensation) with a combined single limit of Cdn\$ _____ Per Incident [100%] OR [for Insured’s interest]
 - Deductible: Per Incident Cdn\$ _____ [100%]
- (3) that the coverage afforded by the said policy will not be cancelled until notice in writing has been given to the Insured and including the Board; furthermore, that such cancellation shall not become effective until after the expiration of 60 days from the date the notice is received by the Insured;
- (4) [that we have one or more of the following credit or financial strength ratings] OR [that the insurers underwriting the policy above each have one or more of the following credit or financial strength ratings]
 - “BBB-” or higher from Standard & Poor’s; “BBB low” or higher from DBRS; “Baa3” or higher from Moody’s; “BBB-” or higher from Fitch; and/or the equivalent from another internationally recognized credit rating agency.
 - If we cease or any such insurer ceases to satisfy such requirement, then we shall as soon as practicable notify the Insured and the NEB in writing of the same.

Signed for and on behalf of the Insurer

Appendix II – CERTIFICATE OF VERIFICATION FORM

For the Third Party

We, the undersigned Third Party, hereby certify that we have reviewed:

- (1) policy number(s) _____ effective from and expiring on _____ as issued to _____ (hereinafter referred to as the 'Insured') whose address is at _____.
- (2) the policies provide for
 - Control of Spill insurance up to a limit of Cdn \$ _____ Per Incident
 - Seepage and Pollution (Spill and Debris), Clean-up and Contamination Insurance (including coverage for remediation and compensation) up to a limit of Cdn\$ _____ Per Incident
 - Control of the Spill plus Spill and Debris, Clean-up and Contamination Insurance (including coverage for pollution remediation and compensation) with a combined single limit of Cdn\$ _____ Per Incident [100%] OR [for Insured's interest]
 - Deductible: Per Incident Cdn\$ _____ [100%]
- (3) The policies indicate that the coverage afforded by the said policies will not be cancelled until notice in writing has been given to the Insured and including the Board; furthermore, that such cancellation shall not become effective until after the expiration of 60 days from the date the notice is received by the Insured;
- (4) [that the each policy provider has one or more of the following credit or financial strength ratings] OR [that each providers' underwriter has one or more of the following credit or financial strength ratings]
 - "BBB-" or higher from Standard & Poor's; "BBB low" or higher from DBRS; "Baa3" or higher from Moody's; "BBB-" or higher from Fitch; and/or the equivalent from another internationally recognized credit rating agency.

Signed for and on behalf of the Third Party

Draft Financial Viability and Financial Responsibility Guidelines

