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Ms Anne-Marie Erickson, Secretary of the Board
National Energy Board
444 Seventh Avenue SW
Calgary, Alberta T2P 0X8

July 15, 2010

File Number: OF-EP-Gen-EPGen-AODR 01

Re: Public Review of Arctic Offshore Drilling Requirements

Dear Ms. Erickson,

As a participant in the NEB's *Public Review of Arctic Safety and Environmental Offshore Drilling Requirements*¹ (the 'Review'), WWF would like to offer recommendations on the process and scope of that Review, organized according to the following themes:

1. Specific comments on the preliminary scoping document
2. Timing
3. Who will conduct the hearing
4. Location of the hearings
5. Intervenor funding

Summary of recommendations

1. **WWF recommends that authorization and compliance be included within the scope of review.**
2. **WWF recommends that an environmental assessment of the appropriateness of the area being considered for an exploration license be considered before awarding the license.**
3. **WWF recommends the review explicitly include the estimation of the costs and duration of spill clean up, restoration and compensation.**

¹ https://www.neb.gc.ca/l1-eng/livelink.exe/fetch/2000/90463/621169/621864/A1T2K1_-_Letter_and_Preliminary_Scope_-_Public_Review_Of_Arctic_Safety_And_Environmental_Offshore_Drilling_Requirements.pdf?nodeid=621930&vernum=0.

4. WWF recommends that the NEB review should not start until the public report of the U.S. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling is available.
5. WWF recommend that this review be undertaken jointly by the NEB, Indian and Northern Affairs Canada, Natural Resources Canada, and the Atlantic Offshore Petroleum boards.
6. WWF recommends that the review be held in such a manner to facilitate input from communities in the Western, Central, and Eastern Arctic, as well as southern locations appropriate for a national review.
7. WWF recommends that the NEB provide sufficient and timely funding for intervenors.

1. Specific comments on preliminary scope

In response to the NEB's request for comments on the preliminary scope of the Review provided by the NEB in its 10 June 2010 letter,² we agree the scope should include the 11 points in the NEB's preliminary scope, but recommend it also address the following matters.

First, given the early lessons from the Gulf appear to be highlighting problems in the regulatory process for first authorizing and then ensuring compliance during offshore drilling, we recommend that authorization and compliance be included within the scope of review.

In particular, we recommend the following be added to the scope:

Drilling Authorization Process

- Lessons learned from other jurisdictions on effective versus ineffective permitting processes, such as how to maintain appropriate distance between regulator and industry to ensure sufficiently independent review, as relevant to offshore drilling.
- Historical changes in the Canadian requirements for environmental assessment of Arctic offshore drilling, noting that there used to be a comprehensive study requirement under the *Canadian Environmental Assessment Act* (CEAA) and that this requirement was subsequently downgraded to a screening process under CEAA. This raises important questions of whether the existing environmental assessment regime is sufficient as applied to offshore drilling, and whether the NEB can, of its own motion, ensure a more

² https://www.neb.gc.ca/l1-eng/livelink.exe/fetch/2000/90463/621169/621864/A1T2K1_-_Letter_and_Preliminary_Scope_-_Public_Review_Of_Arctic_Safety_And_Environmental_Offshore_Drilling_Requirements.pdf?nodeid=621930&vernum=0&redirect=3.



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thorough review and/or whether the NEB should advise government to change the CEEA requirement to a more stringent review process.

- Effectiveness of current permitting and assessment processes for Arctic offshore drilling applications.
- Effectiveness of the current risk assessment process in the Arctic. There are objective grounds to require a full assessment of risk which is not currently required. This means not simply an assessment of the likelihood of an event and means to mitigate, but the creation of risk entailed in the decision to go ahead and the consequences of failure.

Operational Compliance and Inspection

- Lessons learned from other jurisdictions on effective versus ineffective compliance and inspection processes by regulators relevant to offshore drilling.
- Effectiveness of current compliance and inspection processes (including the necessary resources for regulators) for Arctic offshore drilling.

In order to engage in such a review of the existing authorization and compliance regimes across Canada, WWF recommends that an independent evaluation of this regime be commissioned by the NEB and the Atlantic offshore petroleum boards. The Review could then proceed on the basis of this evaluation.

Second, we recommend that an environmental assessment of the appropriateness of the area being considered for an exploration license be considered before awarding the license. We are concerned that the current series of processes that offshore oil companies must follow prior to engaging in Arctic offshore drilling is fundamentally flawed. We understand that industry first obtains exploration licenses from government under the *Canadian Petroleum Resources Act* (CPRA), which includes significant commitments during the bidding process, but does not include any legal requirements for environmental assessment of the appropriateness of eventual oil and gas development in the area being opened by the license. Rather, only later does the NEB conduct an environment assessment of drilling impacts when operators apply for a drilling authorization under the *Canadian Oil and Gas Operations Act* (COGOA). In our opinion this environmental assessment process occurs too late, given that it only happens after industry has already made significant financial commitments during the earlier bidding process, and after potentially significant expenditures by industry, such as in seismic testing. These previous commitments and expenditures may lead to expectations and pressures that drilling be allowed when resources are found, and undermines confidence that a truly careful review of the appropriateness of drilling will be undertaken at a later stage. Any review of the risks of Arctic offshore drilling would be incomplete without consideration of the hierarchy of environmental precautions.

We recognize the issuance of licenses under the CPRA is not within the NEB's formal jurisdiction. However, the NEB does have an important role to advise government, and appropriate sequencing is a key such issue that the NEB could provide advice on.

We therefore recommend the scope of review also include:

Timing for Considering the Appropriateness of Drilling

- What regulatory system would be effective and provide confidence in the assessment and management of offshore drilling in the Arctic?
- Is the regulatory system in Canada undermining the effectiveness of environmental assessments and creating risks that other regulatory systems do not?
- What is an appropriate regulatory standard for operating in the Arctic and how can Canada's regulatory framework be improved by lessons learned from other countries (eg. Norway, Greenland/Denmark, U.S.)
- How would the Canadian system have to be modified?

Third, while item 8 in the NEB's preliminary scope includes financing spill clean-up, restoration and compensation, we recommend the review explicitly include the estimation of such costs and the duration of them:

- Estimates of spill clean-up, restoration and compensation costs, and the duration of such costs.

2. Timing of the Review Process

We recommend that the NEB review should not start until the public report of the U.S. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling is available. Although there may be no drilling applications anticipated for Arctic waters in the near future, there are nevertheless a number of reasons that necessitate an expedited Review process. These include the possibility of drilling applications off the East coast of Canada, and the likelihood of exploration licenses or seismic authorizations being granted off the Arctic coast in the coming months, both of which would lead to expenditure of funds and industry expectations that if suitable resources are found there will be the possibility of proceeding to exploration drilling and eventual development.

However, WWF also notes that the NEB Review would be well-advised to incorporate the findings of the U.S. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling as its proceedings unfold. On May 21, 2010, U.S. President Barack Obama ordered the establishment of this Commission to investigate the causes of the ongoing Gulf disaster, to develop options to prevent

future spills from offshore drilling and to mitigate their impacts, and to publically report its findings within six months following its first meeting.³ The Commission terminates 60 days after its report, suggesting further results or discussions may occur for approximately two months after its report is delivered. President Obama announced members of the Commission on June 14, 2010,⁴ but we are not aware of the Commission having met yet. It will therefore presumably be at least six months, possibly eight, and (if things are delayed) possibly more, until the Commission's work is complete. Meanwhile, activities continue in the Gulf, including the drilling of two relief wells. The success (or otherwise) of these ongoing activities will no doubt become clearer in coming months.

Given the Commission's work in the U.S. and the ongoing activities in the Gulf to bring the blowout under control, it is questionable whether the NEB's Review should start before at least the Commission's report is made public. Indeed, the Commission's report will likely be a key document in the NEB review and will give access to expertise that may not be available to the Canadian process; therefore it will take some time for parties to study the Commission's report, determine the relevance and further care required in the more demanding northern waters, and to then formulate submissions.

It should also be noted that prior to cancelling the SSRW hearing,⁵ the NEB asked parties for their views on whether that hearing should be postponed to allow for answers to the Gulf incident to become available.⁶ As submitted by the Government of Northwest Territories, for example, "the process established by hearing MH-1-2010 should be adjourned generally until the results of the investigations into the Deepwater Horizon incident are available and can be fully considered by the parties during the course of the Board's process."⁷ Such comments seem equally applicable to the current review.

³ *Executive Order – National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling*, The White House – Office of the Press Secretary, May 22, 2010, <http://www.whitehouse.gov/the-press-office/executive-order-national-commission-bp-deepwater-horizon-oil-spill-and-offshore-dri>.

⁴ *President Obama Announces Members of the BP Deepwater Horizon Oil Spill and Offshore Drilling Commission*, The White House – Office of the Press Secretary, June 14, 2010, <http://www.whitehouse.gov/the-press-office/president-obama-announces-members-bp-deepwater-horizon-oil-spill-and-offshore-drill>.

⁵ The NEB cancelled MH-1-2010 on 11 May 2010, see [https://www.neb-one.gc.ca/ll-eng/Livelihood.exe/fetch/2000/90463/589151/594086/594087/617143/A1S8C1-Letter to all Participants regarding National Energy Board Policy for Same Season Relief Well Capability.pdf?nodeid=617257&vernum=0](https://www.neb-one.gc.ca/ll-eng/Livelihood.exe/fetch/2000/90463/589151/594086/594087/617143/A1S8C1-Letter%20to%20all%20Participants%20regarding%20National%20Energy%20Board%20Policy%20for%20Same%20Season%20Relief%20Well%20Capability.pdf?nodeid=617257&vernum=0).

⁶ [https://www.neb-one.gc.ca/ll-eng/Livelihood.exe/fetch/2000/90463/589151/594086/594087/614231/A-07-Letter to All Parties regarding Same Season Relief Well Capacity Hearing Order MH-1-2010-A1S6U2.pdf?nodeid=614232&vernum=0](https://www.neb-one.gc.ca/ll-eng/Livelihood.exe/fetch/2000/90463/589151/594086/594087/614231/A-07-Letter%20to%20All%20Parties%20regarding%20Same%20Season%20Relief%20Well%20Capacity%20Hearing%20Order%20MH-1-2010-A1S6U2.pdf?nodeid=614232&vernum=0).

⁷ [https://www.neb-one.gc.ca/ll-eng/Livelihood.exe/fetch/2000/90463/589151/594086/594088/602381/614546/C-10-3-GNWT Submission 3 May 2010 - A1S7G5 .pdf?nodeid=614625&vernum=0](https://www.neb-one.gc.ca/ll-eng/Livelihood.exe/fetch/2000/90463/589151/594086/594088/602381/614546/C-10-3-GNWT%20Submission%203%20May%202010-A1S7G5.pdf?nodeid=614625&vernum=0).

While the NEB process should be informed by the U.S. Commission, it is important that the conclusions from the Commission are considered at a broad level, without focusing too heavily on conclusions specific to the Gulf incident. The focus of the NEB should be on prospects for oil spill recovery and the management of risk under the very different conditions and remoteness of Canada's offshore environment, especially in the Arctic. This will entail consideration of the Canadian Arctic regulatory regime and how it would have to be modified to manage risk appropriately.

3. Who will conduct the hearing?

We recommend that this review be undertaken jointly by the NEB, Indian and Northern Affairs Canada, Natural Resources Canada, and the two Atlantic Offshore Petroleum boards. Given the national scope of offshore drilling, the contractual commitments made at the leasing stage (where exploration licenses are awarded), as well as the ecological risks associated with offshore drilling, and given that this Review will inform numerous individual applications in the future, WWF-Canada believes any review conducted by the NEB alone will be deficient. A broader regulatory perspective is needed to effectively address the geographic dimension and to ensure that the review process and recommendations are applied to the leasing, exploration and development stages.

Therefore, we urge that this review be undertaken jointly by the NEB, Indian and Northern Affairs Canada, Natural Resources Canada and the two Atlantic Offshore Boards for which it has federal responsibility: the Canada-Newfoundland Offshore Petroleum Board, and the Canada-Nova Scotia Offshore Petroleum Board. This will ensure the development of a harmonized series of regulations, guidelines and standards across Canada, from coast to coast to coast. As such, we further recommend that a multi-member panel be struck, that such a panel be chaired by the Chairperson of the NEB, with representation from the offshore petroleum boards and federal departments. We also recommend that the Nunavut Impact Review Board and the Inuvialuit Joint Secretariat be formally included in this review process.

The issue of who should conduct the hearing is also influenced by who is able and prepared to review the appropriate and relevant regulations. For example, the *Canadian Petroleum Resources Act* (CPRA) is clearly a part of the relevant regulatory framework, and if the NEB is not able or prepared to review the CPRA process and potentially make recommendations for a process better designed to manage risk, then departments that are more capable to do so should be included in conducting the hearing.

4. Location of hearings

The Arctic is not only a home to northern peoples, but is also a national treasure of importance to all Canadians. **We request that the review be held in such a manner as to facilitate input from**

communities in the Western, Central and Eastern Arctic. Furthermore, southern locations appropriate to a national review (Halifax, St John's, Edmonton, and Ottawa) should also be included to facilitate a broad range of effective voices from across the country.

5. Intervenor Funding

We recommend that participant funding be made available to ensure there is a broad range of effective voices at the Review. The Review is likely to be highly technical, requiring participants to engage experts to present evidence and to examine the evidence of other participants. Non-industry participants do not have such experts in-house, and would need to hire and contract them. Without such non-industry experts, evidence will be primarily supplied by industry, that evidence will not be tested by independent experts, alternative expert viewpoints and arguments will not come forward, and the quality of, and public confidence in, the NEB's Review will suffer.

We submit that the NEB has a mandate to provide participant funding for the Review, based on the following points:

- In its 1996 report,⁸ the NEB found that it could implement an intervenor funding program if it so chose. "There are...powers conferring the authority to make subordinate legislation which can be used by the Board or by government to initiate an intervenor funding program at the NEB."⁹ Furthermore, after reviewing case law applicable at the time, the NEB found "that there would be no impediment presented by case law to the creation of an intervenor funding program for proceedings before the NEB."¹⁰
- A proposed amendment to the *National Energy Board Act* contained in the current budget bill, C-9, would formally recognize the right of the NEB to institute a participant funding program.¹¹ While Bill C-9 has yet to receive Royal Assent, we believe that this proposed amendment is, at the very least, an indication that Parliament would not oppose such a program, if not endorse it outright.

⁸ NEB, "Intervenor Funding Options" (1996) at https://www.neb-one.gc.ca/ll-eng/Livelihood.exe/fetch/2000/90463/90470/Intervenor_Funding_Options.pdf?nodeid=90488&vernum=0.

⁹ *Ibid.* at 8.

¹⁰ *Ibid.* at vii.

¹¹ See <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4402776&Language=e&Mode=1>.



The need for funding is a time-sensitive issue, reinforcing our comments above on the overall timing of the review process. The absence of clarity on the question of funding may already place non-industry participants at a significant disadvantage with respect to contracting expertise, particularly if the timing of the review did not make allowances. WWF and other non-industry participants would need time, after clarity on the issue of funding, to contract work and have that work completed before the proceeding.

It is clear that a process will need to be established for parties to request participant funding, and to justify their eligibility and need. WWF hereby requests such funding, but we leave our detailed request until the NEB has set up such a process.

As a final note, if WWF's recommendation for the Review to be undertaken jointly by the NEB, the Canada-Newfoundland Offshore Petroleum Board, and the Canada-Nova Scotia Offshore Petroleum Board is accepted, we may wish to comment further on the scope of issues to be addressed, in keeping with the expanded mandate of the review.

We thank you for your attention to these matters, and look forward to participating in the Review.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arlin Hackman', written in a cursive style.

Arlin Hackman
VP & Chief Conservation Officer
WWF-Canada