NWT OFFICE OF THE REGULATOR OF OIL AND GAS OPERATIONS

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GNWT – Department of Industry, Tourism and Investment
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MAY 03 2018

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Dear Dr. ~~McE~~achern:

OROGO Response to Engagement Paper on Updates to the NWT's Petroleum Legislation

Thank you for the opportunity to respond to the Government of the Northwest Territories' proposed updates to the *Petroleum Resources Act* (PRA) and the *Oil and Gas Operations Act* (OGOA), as contained in the March 2018 Engagement Paper issued by the Department of Industry, Tourism and Investment (ITI).

The Office of the Regulator of Oil and Gas Operations (OROGO) supports the Regulator appointed under OGOA in delivering on its mandate to protect human health and safety, protect the environment and ensure the conservation of the petroleum resource. As such, OROGO is the primary administrator of OGOA. OROGO also administers the sections of the PRA addressing Significant Discovery and Commercial Discovery Declarations.

On April 11, 2018, OROGO was pleased to participate in a consultation session on the Engagement Paper with other NWT resource regulators. At that consultation session, OROGO committed to submitting written feedback on the proposals in the Engagement Paper. OROGO also indicated its intention to make its written feedback available for public review on its website at www.orogo.gov.nt.ca.

OROGO's response to the Engagement Paper incorporates comments on the proposed options for legislative changes contained in the March 2018 Engagement Paper issued by ITI and clarifications or corrections to errors in interpretation of the existing legislation and its administration contained in the Engagement Paper.

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BUREAU DE L'ORGANISME DE RÉGLEMENTATION DES OPÉRATIONS PÉTROLIÈRES ET GAZIÈRES DES TN-O

OROGO would be happy to meet with ITI staff to discuss the comments contained in this submission and to engage in more detailed dialogue on proposed draft language for inclusion in the revised acts. Please contact Pauline de Jong, Senior Advisor, Legislation and Policy, at 867-979-9097 extension 78003 or by email at Pauline_Dejong@gov.nt.ca to set up a meeting.

Sincerely,

James Fulford
Executive Director

OROGO'S RESPONSE TO THE MARCH 2018 ENGAGEMENT PAPER

OROGO's comments on the proposed changes to the *Petroleum Resources Act* (PRA) and the *Oil and Gas Operations Act* (OGOA) are captured below, in the order in which they are discussed in the Engagement Paper, along with corrections or clarifications to errors in interpretation of the existing legislation or its administration contained in the Engagement Paper. The relevant page numbers from the Engagement Paper are included for ease of reference.

Petroleum Legislation in the NWT (page 7)

OROGO notes that the GNWT Regulator is not the only regulator active in the Northwest Territories (NWT) under the GNWT's legislation.

The GNWT Regulator and OROGO have regulatory authority in the NWT, excluding the Inuvialuit Settlement Region (ISR) and federal areas, under GNWT legislation (the PRA and OGOA).

The National Energy Board (NEB) has regulatory authority in the ISR. Outside of federal areas in the ISR, the NEB is administering the GNWT's legislation in that region.

The NEB also continues to regulate in federal areas (in the ISR and in the rest of the NWT), as well as in the offshore, under the Government of Canada's legislation.

Oil and Gas Operations Act (page 8)

OROGO notes that the Regulator's role, as outlined in section 2 of OGOA is to ensure human health and safety, the protection of the environment and the conservation (i.e. not wastage) of the resource. The Regulator does not have a mandate to promote economic development or development of petroleum resources.

Section 17 of OGOA addresses Benefits Plan Approval. This section specifies that the Regulator's role is to ensure that an approved Benefits Plan (or waiver from the requirement for a Benefits Plan) is in place before issuing an authorization. However, the authority to approve a Benefits Plan or issue a waiver, and therefore the role of ensuring "resident benefits from exploration and production activities", rests with the Minister of ITI and not with the Regulator.

Significant Discovery Declarations (pages 10 and 11)

OROGO notes that, under the PRA, a Significant Discovery is defined as a discovery that "*suggests* the existence of an accumulation of hydrocarbons that *has potential* for sustained production" (emphasis added). The PRA does not define "sustained production".

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This is a significantly lower threshold than that mentioned in the Engagement Paper: "enough petroleum for "sustained production" – meaning continued production over many years."

Significant Discovery Licence (page 11)

As noted above, a Significant Discovery does not require a company to prove "that there is a significant amount of petroleum resources in a part of its interest". It is only required to prove that it has made a "significant discovery" as defined in the PRA.

Authority to Issue Guidelines and Interpretation Notes (page 15)

OROGO agrees with the proposal to broaden the Regulator's authority to issue Guidelines and Interpretation Notes to include the application and administration of any section of OGOA or any regulations made under OGOA over which the Regulator has authority.

The proposed amendment would assist OROGO in its efforts to promote transparency and openness of the regulatory system and enhance certainty and predictability in regulatory decisions. OROGO also agrees with ITI's assessment that this amendment could also assist in better communicating regulatory expectations to operators and other stakeholders. It is important to note that all uses of this expanded authority would remain subject to supervision by the courts.

Clarification of Responsible Minister (page 16)

OROGO can see no need to clarify which "Minister" is responsible for duties and functions assigned under the PRA and OGOA.

OROGO is aware that the GNWT's legislative drafting practice is to rely on the general definition of "Minister" already set out the *Interpretation Act*. The *Interpretation Act* applies to all other acts of the legislature, including the PRA and OGOA, unless an act includes an exception. This existing practice results in a designation of Minister that is legally sound and leaves no ambiguity as to the identity of the responsible Minister.

ITI has referred to the definition in the *Northwest Territories Lands Act* (NWTLA) as a rationale for including a definition of "Minister" in OGOA and the PRA. OROGO is aware that a definition was included in the NWTLA as a special exception. In that case, it was known that one Minister would need to be assigned responsibility for the Act and a different Minister would be assigned responsibility for one or more of the regulations.

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Indeed, this is the case: the Minister of Lands is assigned responsibility for the Act and the Minister of ITI is assigned responsibility for several of the regulations (*Mining Regulations*, *Oil and Gas Land Regulations*) under the NWTLA.

No such need for an exception exists with the PRA, OGOA, or any of the regulations as OROGO understands it is intended that a single Minister is expected to remain responsible for the full suite of legislation.

Delegation Authority of the Minister (page 17)

OROGO has no comments.

Delegation Authority of the Regulator (page 18)

OROGO agrees with the proposal to authorize the Regulator to delegate more of its powers under OGOA.

The recommendation to broaden the Regulator's ability to delegate its authorities under OGOA would increase flexibility and responsiveness in the regulatory regime. Of particular importance in relation to compliance is the ability to delegate the power to make orders and issue prohibitions under section 20 of OGOA. OROGO notes that ITI proposes the ability to delegate powers "including but not limited to" the powers listed in the Engagement Paper. It is not yet clear to OROGO what further powers ITI is considering might be delegable.

OROGO has the following comments on the list of powers included at page 19 of the Engagement Paper:

> First, several sections of OGOA are listed for potential delegation and references are made to delegation to a "panel of experts". OROGO interprets this to be an example and suggests that a requirement to delegate to experts not be made a feature of the wording of section 8 of OGOA. Section 8 currently permits delegation to "any person". That person is free to engage expert advice as required. Including a requirement for delegation to a "panel of experts" would reduce the flexibility of the delegation provision and introduce an element of subjectivity into each delegation.
>
> Second, it is proposed that the power to delegate powers related to the determination of "straddling resources" under section 87 be subject to delegation. An example states that OROGO could be given greater authority to determine the existence of straddling resources. OROGO observes that straddling resources, by definition, straddle the onshore and offshore boundary.

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Accordingly, they are not within the jurisdiction of the GNWT Regulator at this time.

Finally, OROGO notes that section 64 of OGOA relates primarily to the proof of financial responsibility required of operators before an authorization for work can be issued and not to "authorizations for work", as referenced on page18 of the Engagement Paper.

Oil and Gas Committee (page 20)

OROGO takes no position on the proposal to eliminate the Oil and Gas Committee and reassign the committee's roles to the Regulator.

However, OROGO notes that unless further changes are made to the legislation, not all roles of the Oil and Gas Committee are amenable to assignment to the Regulator. In particular, OROGO notes that section 21 of OGOA makes all of the Regulator's powers under section 19 (hearings and determinations) and section 20 (orders and prohibitions) "subject to a decision or order of the Committee". As a result, the Committee performs an appeal function for certain decisions of the Regulator. In the case of section 21, it should be noted that the courts would continue to supervise the exercise of all powers by the Regulator or his delegates through the mechanism of judicial review

Should a decision be made to reassign certain of the Committee's powers to the Regulator, ITI may wish to consider (1) providing the Regulator with any ancillary powers of the Committee for that purpose and (2) considering whether the power should be delegable by the Regulator. OROGO affirms the Regulator's ability to carry out other roles of the Committee, such as hearing and determining applications for pooling orders and unitization orders.

Proof of Financial Responsibility (page 21)

OROGO agrees with the need for a legislative amendment that would clarify that "proof of financial responsibility" can be held for the full life cycle of an activity through to successful conclusion and not simply for the duration of an Operations Authorization.

Section 64 of OGOA currently requires an "applicant for an authorization" to provide proof of financial responsibility and a "holder of an authorization" to "ensure the proof of financial responsibility remains in force for the duration of the work or activity" for which the authorization was issued.

OROGO notes that the background discussion on this topic in the Engagement Paper appears to confuse the concepts of liability (being financially responsible for an action), and "proof of financial responsibility", a matter addressed in OGOA.

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A company that drilled a well, or the successor of that company, is always financially responsible, or liable, for a well. The "proof of financial responsibility" required under OGOA is a form of security ("a letter of credit, guarantee or indemnity bond or in any other form satisfactory to the Regulator" (OGOA s.64(1)), to be used by the Regulator to respond to requests for compensation for damages *without having to prove the fault* of the company (in other words, in the case of an accident). The limit for a company's liability "without proof of fault or negligence" (OGOA s.63(1)(a)) is set in the *Oil and Gas Spills and Debris Liability Regulations*.

If an incident is determined to be the company's fault, there is no legislated limit on its financial liability for rectifying the situation and compensating those affected.

The proposal to specify in section 64 of OGOA that proof of financial responsibility is a continuing obligation for all wells, regardless of whether or not an authorization is still held under subsection 10(1)(b) of OGOA, would address OROGO's concern that the current legislation has led to suspended wells on the landscape that are not subject to a current authorization and for which, therefore, the Regulator does not hold proof of financial responsibility.

Another approach to consider is adding a definition of "work or activity" to OGOA that would clearly encompass the full lifecycle of that oil and gas activity (for example, in the case of wells, from drilling to successful abandonment) and therefore require that an authorization be in place for that entire period.

OROGO does not agree that adding another term, "well owner", to OGOA would assist in clarifying a continued obligation to provide proof of financial responsibility, beyond what is proposed above. The ongoing liability of companies with respect to abandoned wells that subsequently develop leaks is addressed in the *Oil and Gas Drilling and Production Regulations*.

Updating the "Pool" Definition to Reflect Modern Technology (page 22)

OROGO notes that the definition of "pool" in OGOA is a technical definition that does not address the area of land held by a company, but instead relates to the characteristics of the geological feature question. It is therefore inaccurate to indicate that the current definition could result in companies being provided "larger tracts of land than the *definition intends*" (emphasis added).

Consequently, OROGO does not agree that splitting the definition of "pool" in OGOA into one for conventional reservoirs and one for unconventional reservoirs would achieve ITI's objective. Indeed, doing so may be contrary to the GNWT's obligations in the Devolution Agreement.

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The proposal to amend the definition of "pool" in OGOA would not address the concerns identified in the Engagement Paper with respect to limiting the size of petroleum lands for which companies are able to obtain Significant Discovery Licences, as the requirements for the declaration of a Significant Discovery are contained in the PRA, not in OGOA. The definition of pool in OGOA is used for purposes primarily related to conservation of the oil and gas resource.

One of those purposes is as part of the definition of "straddling resources" in OGOA and in the *Agreement for Coordination and Cooperation in the Management and Administration of Petroleum Resources in the Inuvialuit Settlement Region*, which accompanied Devolution. As part of Devolution, the GNWT agreed to pass legislation that included a reciprocal approach to oil and gas resources that straddle the Beaufort Sea coastline. Section 3.7(h) of the Devolution Agreement obligated the GNWT to pass legislation to provide for the unitization of straddling resources in the manner set out in the above-mentioned agreement and 3.7(i) further provides that the consent of the Government of Canada is required for any amendment that would affect that unitization. ITI may wish to consider whether a change to the definition of "pool" without the consent of the Government of Canada would be contrary to these obligations, which apply for an "initial period" of 20 years beginning on April 1, 2014.

Finally, the term "pool" is a generally understood technical term that is used throughout the petroleum industry, in Canada and worldwide. Having an "NWT" definition that differs from the common use of the word throughout the industry could lead to significant confusion. For reference, the Schlumberger Oilfield Glossary defines "pool" simply as "a subsurface oil accumulation".

Confidentiality in the PRA and OGOA (page 24)

OROGO agrees with the need for changes to modernize the confidentiality provision in the PRA and OGOA. However, OROGO wishes to emphasize that the confidentiality provisions in the PRA do not negatively affect OROGO's regulatory oversight. OROGO and its inspection team have access to all information required to effectively monitor company activities. The issue is that this information may not always be available to people other than OROGO, which may raise public accountability and other issues. While these issues are also important, it should be noted that the Regulator, the Chief Conservation Officer and the Chief Safety Officer may demand additional information from an operator at any time in order to fulfill their responsibilities. The statement that "excessive secrecy can ... prevent oversight bodies from effectively monitoring company activities" is overly broad and may raise unfounded public concern about the regulatory system.

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OROGO wholeheartedly supports efforts to modernize the confidentiality provisions in the PRA and OGOA to bring them in line with other jurisdictions across Canada and meet the expectations of Northerners for a transparent and open regulatory process. The GNWT's efforts in this direction would benefit from a thorough review of the confidentiality provisions in the *Yukon Oil and Gas Act* (YOGA) (section 103), the *Oil and Gas Drilling and Production Regulations* established under the YOGA (section 176) and the provisions on public hearings and confidentiality in the recently amended *Canada Oil and Gas Operations Act* (sections 5.331 through 5.351). The effort should be broadly-based and include consideration of provisions expressly contemplating public hearings, instead of being narrowly focused on disclosure under section 91 of the PRA.

However, in OROGO's view the proposal to delete subsection 91(11) of the PRA, which gives the provisions of the PRA precedence over the provisions of the *Access to Information and Protection of Privacy Act* (ATIPPA) should there be a conflict or inconsistency between the two pieces of legislation, may not support increased transparency and disclosure. The ATIPPA provisions for the release of business-related information are not tailored for regulatory purposes and are potentially more restrictive than those of the PRA, as they may allow for the company to unilaterally veto any release of information. Therefore, allowing ATIPPA to have precedence over the PRA could easily result in less information disclosure, not more. Instead, OROGO suggests that consideration be given to maintaining a separate, purpose-specific scheme for the treatment of information under the two acts that provides for an appropriate level of openness and transparency.

With respect to the proposal to require companies to publicly disclose an annual benefits plan implementation summary under OGOA, under the current regime OROGO does not have access to the contents of a company's benefits plan, as these are submitted to and approved by the Minister of ITI under the PRA, through the Petroleum Resources Division, and are considered confidential documents. As a result, the proposed public disclosure requirement may be better housed in the PRA. Alternatively, benefits plans could be made public, at which point the responsibility for ensuring disclosure of the annual summary could rest with either OROGO or the Petroleum Resources Division.

Environmental Studies Management Board Composition (page 27)

OROGO has no comments.

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Environmental Studies Research Fund (page 28)

OROGO takes no position on the proposal to require the publication of information on the Environmental Studies Research Fund.

OROGO notes that for each year since Devolution, it has voluntarily filed an annual report on its activities with the NWT Legislative Assembly. To promote accountability, and to be consistent with legislative requirements in other jurisdictions, ITI may wish to consider making an annual report from each of the Regulators a legislated requirement. In this regard, OROGO notes that the National Energy Board is currently required to submit an annual report to the Minister of Natural Resources for tabling with the Parliament of Canada under section 131 of the *National Energy Board Act*.

Exploration Licence Transparency (page 30)

OROGO has no role in the issuance of exploration licences and takes no position on the proposals for greater transparency in the issuance of Exploration Licences.

OROGO notes that the *Oil and Gas Drilling and Production Regulations* require operators conducting exploratory drilling to submit a comprehensive suite of reports and other information (including physical samples) to the Regulator as a condition of their Well Approval. Similarly, the *Oil and Gas Geophysical Operations Regulations* require comprehensive reporting for exploratory seismic operations. These reports are confidential under section 91(8) for periods of two years (information directly resulting from the drilling of a well) or five years (geophysical work), after which they are made publicly available through OROGO's Information Office. The statement that "there are also no requirements to disclose ... the results of geological tests to the government" is misleading, as this information is indeed submitted to a public body and, eventually, made publicly available in order to "build the territory's geological information base". This is the express purpose of OROGO's Information Office.

Given the role of OROGO's Information Office described above, the proposal to amend the PRA to require seismic and drilling results to be provided to the GNWT is redundant, unless the intention is that they should be provided to both OROGO and the Petroleum Resources Division at the same time.

The Engagement Paper goes on to state that the results would "become GNWT property when the exploration licence expires". OROGO suggests that the GNWT should carefully consider the application of intellectual property and copyright laws, as well as recent case law, with respect to this proposal.

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Modernizing Publication of Regulations and Notices (page 32)

OROGO takes no position on the proposal, but observes that the Department of Justice already maintains an up-to-date, authoritative and publicly accessible registry of all petroleum-related acts and regulations at https://www.justice.gov.nt.ca/en/legislation/.

One proposed amendment calls for section 53 to be amended "to specify a period of consultation and review of regulations by the Regulator". While OROGO agrees that consulting with both the Regulators active in the NWT is an important part of any proposals to change OGOA, it notes that imposing a timeframe on this consultation could reduce flexibility and raise new questions about legislative consultation generally. For example, are other stakeholders limited by a legislated timeframe? Does this consultation occur sequentially or concurrently with other consultation?

Finally, OROGO notes that, contrary to the assertions in the discussion paper, section 53 of OGOA does not state that "the oil and gas regulator must publish regulations in the Gazette". This would be inappropriate, as the Regulator is not authorized to make regulations under the Act. Regulations are made by the Commissioner in Executive Council (OGOA s.52(1)), and section 53 imposes obligations on the Minister responsible for the Act and not the Regulator.

Production Licence Transparency (page 33)

OROGO has no role in the issuance of Production Licences and takes no position on the proposals for greater transparency in the issuance of Production Licences.

Significant Discovery Declarations and Licences (page 35)

The Engagement Paper proposes a number of options for addressing concerns with Significant Discovery Declarations (SDDs) and Significant Discovery Licences (SDLs). OROGO's comments on each option are captured below. OROGO does not have a preference for any particular option.

Status Quo

OROGO has no comments.

Limiting the size of Exploration Licences

OROGO notes that the existence of a Significant Discovery and the area over which it extends (Significant Discovery Area or SDA) is a technical determination based on the "lands in respect of which there are reasonable grounds to believe that the significant discovery may extend" (PRA s.27(1)).

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Limiting the size of an Exploration Licence (EL) would limit the size of the SDL issued to the EL holder should an SDD occur within that particular EL. However, it would not limit the areal extent of the SDA. Therefore, the SDD could still extend onto neighbouring ELs, resulting in SDL applications for those areas. The SDD could also still extend onto neighbouring petroleum lands not subject to an existing interest.

Issuing drilling orders

OROGO observes that this is an existing tool that has not been employed since Devolution. In his 2016 review of the equivalent provisions in the *Canadian Petroleum Resources Act*, from which the PRA was mirrored in 2014, Minister's Special Representative Rowland Harrison Q.C. investigated the purpose of the drilling order. He found that explanatory notes from the time of the tabling of the Act in Parliament described the drilling order as the "*quid pro quo* for the fact that a significant discovery licence grants open-ended tenure." OROGO agrees that setting out a policy basis for the exercise of this power would help to provide clarity and set clear expectations for SDL holders. It seems that the SDL and the potential for the Minister to issue a drilling order were originally contemplated as two sides of the same coin.

Limiting the size of significant discovery areas

OROGO does not agree that this is a workable option without further fundamental changes to the regime in the PRA, including to the applicable definitions. "Significant discovery" and "significant discovery area" are defined terms under the PRA. The current definitions and the underlying concepts that inform them are not consistent with the proposal to limit the size of an SDA to an area equal to or less than the size of the existing interest on which the SDD is located. The current definitions are also based entirely on a technical, evidence-based determination, which would be difficult to reconcile with an artificially imposed boundary.

If the option to limit the size of SDAs is pursued, OROGO would recommend addressing this in the definition of an SDD and/or SDA, rather than in section 27(3) of the PRA, as proposed.

Limiting the term of SDLs

In OROGO's view, enabling the Minister to limit the term of SDLs is the simplest and most viable of the options presented in the Engagement Paper for addressing the GNWT's concerns with the size and impact of SDLs.

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However, OROGO notes that the current division of responsibilities between the Minister (for SDLs) and the Regulator (for SDDs) is such that the Minister is not able to amend the term of an SDD, as this is a technical decision which can only be amended by the Regulator based on new technical data obtained through further drilling.

It is unclear whether the proposed approach is in error (stating "significant discovery" as opposed to "significant discovery licence") or whether the intention is to amend the legislation to give the Minister the power to revoke an SDD. If the latter, OROGO notes that it may not be appropriate to mix the roles of the Minister and the Regulator on a technical decision of this nature.

Implementing renewal requirements for SDLs

This option could be pursued in tandem with the option to limit the terms of SDLs. However, it is unclear how requiring an SDL holder to take part in drilling or seismic testing on their interest would differ significantly from the current provisions allowing for a Ministerial drilling order under section 33 of the PRA, beyond including seismic testing.

Limiting exploration rights for SDL holders

OROGO agrees that limiting the exploration rights issued under an Exploration Licence to a certain formation could potentially "leave less land tied up without work being done and leave it available to contribute to the NWT". However, the success of this proposal might depend on whether there are multiple known geological formations of interest to industry in a given area. OROGO also observes that this would not limit the areal extent of an SDL unless it is employed along with another option identified above and might, instead, result in multiple "layers" of large areal extent, each applying to a different geological formation.

Eliminating SDDs and SDLs from the PRA

OROGO has no comments.

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In closing on this subject, OROGO notes several statements requiring clarification or correction in the background provided on SDDs and SDLs:

- A Significant Discovery does not require a company to prove it has made "a discovery of enough petroleum in its interest to justify sustained production". "Significant Discovery" is defined in the PRA and only requires evidence showing "potential for sustained production".

- Section 27(7) of the PRA states that the Regulator "may delegate" any of its powers in relation to the determination of a Significant Discovery to any person. In the past, the Regulator has delegated a decision to a panel of decision-makers with specific expertise in petroleum technical matters. However, the Regulator is not required to delegate these powers and can perform them with technical advice from experts.

- The term of an SDL is not "limited ... by way of a "drilling order"". An SDL remains in effect for as long as the underlying SDD is in force (PRA s. 32(3)).