



BACKGROUND

Financial Responsibility and Liability

Introduction:

Companies drilling in the Canadian Arctic are liable for the loss or damage that they cause in accordance with the general laws of Canada. The *Canada Oil and Gas Operations Act* (COGOA) does not limit that liability but rather imposes additional absolute liability. Under that absolute liability provision, companies drilling in the Arctic are liable, regardless of negligence or fault, for loss or damage up to certain financial limits prescribed in the *Oil and Gas Spill and Debris Liability Regulations*.¹

Operator Proof of Financial Responsibility:

Section 27(1) of COGOA requires that, prior to receiving any authorization to drill offshore in the Arctic; the applicant must provide proof of financial responsibility in an amount satisfactory to the National Energy Board (Board). A company authorized under section 5(1)(b) of COGOA to drill offshore in the Arctic is defined as the operator.

Proof of financial responsibility must remain in force for the duration of the work or activity covered by the authorization. The Board may suspend or revoke the authorization if the operator fails to maintain the proof of financial responsibility. In addition, failure on the part of the operator to ensure that proof of financial responsibility remains in force for the duration of the work constitutes an offence under section 60 of COGOA.

The Board has full discretion over the forms and amounts of the financial responsibility that the operator must put in place. There is no upper limit on the amount of financial responsibility which the Board may require.

COGOA does not specify or describe what the Board must consider in establishing the financial responsibility requirements. The Board sets the requirements on a case-by-case basis and looks at relevant matters in setting the amount of financial responsibility. These could include estimates of the financial resources necessary to pay for losses or damages that could result from a spill, the actions necessary to prevent further spills, the actions necessary to clean up a spill, or the actions necessary to remove or recover debris.

Proof of financial responsibility might include letters of credit, bonds, insurance, guarantees and audited financial statements.

¹ For offshore drilling in the Arctic, the limit of absolute liability is \$40 million less any similar liability imposed by the *Arctic Waters Pollution Prevention Act*.

Duty to Report and Respond to Spills:

Under section 25 of COGOA, all those carrying out any work related to the exploration, development or production of oil and gas are required to report a spill to the Chief Conservation Officer (CCO) of the Board. This applies even if the spill is not from their operations. They must also take reasonable efforts to prevent any further spills and repair or remedy any condition resulting from the spill and reduce or mitigate any danger or potential danger to life, health, property or the environment. Failure to report the spill or take necessary action to contain and prevent the spill would constitute an offence under section 60 of COGOA.

A spill is captured in the definition of “incident” in the *Canada Oil and Gas Drilling and Production Regulations* (D&P Regulations). Under section 75 of these regulations, operators are required to report all incidents to the Board, investigate each incident, identify the root cause and causal factors and take corrective actions. For all incidents that cause the loss of containment of any fluid from a well or causes significant pollution, the operator is required to provide a copy of the investigation report to the Board.

Control of Spill Response and Clean-up:

Where the CCO determines that immediate action is necessary to address a spill that the operator is not reasonably handling, the CCO can authorize and direct others to take over the management and control of the spill response (sections 25(4) and 25(5)). The federal government can pay for this work but the operator remains responsible for its cost (section 25(7)).

Financial Liability:

Under COGOA, an operator is liable for actual loss or damage² resulting from spills or debris as follows:

- (a) liability is absolute up to the limits prescribed in the *Oil and Gas Spills and Debris Liability Regulations* regardless of proof of fault or negligent pursuant to sections 26(1)(a) and 26(2)(a); and
- (b) there is no upper limit of liability for loss or damage with proof of fault or negligence pursuant to sections 26(1)(b) and 26(2)(b). If there are several parties who could be at fault, liability is joint and several based on the degree to which each party is at fault.

Options to Recover Damage and Losses:

The financial liability provisions established under COGOA provide two routes for those seeking to recover compensation for damage and loss:

- (a) the Board is empowered by section 27(2) in respect of any claim which may be instituted under section 26 (see Financial Liability) to determine and require that

² Actual loss or damage includes loss of income, future income, and with respect to aboriginal peoples of Canada, loss of hunting, fishing and gathering opportunities (COGOA section 24(3)).

claims be paid from security held pursuant to section 27(1) (see Operator Proof of Financial Responsibility). This provides the Board the authority to directly pay out claims without waiting for a court to determine fault or negligence. Prior to paying out any claims, consideration would be given to whether any additional claims are likely to be submitted, the total of amount of any outstanding claims and whether the total amount claimed exceeds the specified limit of absolute liability.

- (b) any claim that may be made under section 26, including any claim that has been submitted to the Board³, may be sued for and recovered in a court of competent jurisdiction in Canada under section 26(3). There is no limit as to how much may be awarded by the court where fault or negligence has been established.

Offences and Punishment:

Every person or company who contravenes COGOA, the regulations or requirements of an authorization is guilty of an offence and could be subject to fines of up to \$1 million and imprisonment of up to five years pursuant to section 60. When an offence is committed on more than one day, it is deemed to be a separate offence for each day it is committed.

³ Awards by the court would consider any previous payment on the claim made by the Board if applicable, thereby preventing double recovery.