



Our Rights. Our Future.

July 11<sup>th</sup>, 2018

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**Re: Framework Regulations Revised Policy Intent for the Frontier and Offshore Regulatory Renewal Initiative (FORRI)**

This is a response to the public comment period for the Frontier and Offshore Regulatory Review (FORRI) process and proposed changes to regulatory framework governing oil and gas activities in Canada's frontier and offshore oil and gas areas. Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO) did not provide comment in phase 1 or 2, partly because we did not have the capacity or specific capacity funding to do so. KMKNO has participated in the May 28<sup>th</sup>, 2018 webinar outlining the proposed regulatory changes.

The Mi'kmaq Nation in Nova Scotia has a general interest in all lands and resources in Nova Scotia as the Mi'kmaq Nation has never surrendered, ceded, or sold the Aboriginal title to any of its lands in Nova Scotia. The Mi'kmaq have a title claim to all of Nova Scotia and as co-owners of the land and its resources it is expected that any potential impacts to rights and title shall be addressed. This includes all offshore lands and resources. The treaties signed with the Mi'kmaq were built on friendship and sharing of the natural resources.

KMKNO is concerned there are several short-comings in the FORRI process including Mi'kmaq Engagement, Protection of Indigenous and Treaty Rights, Performance Based Standards, Contingency Planning, and Access to Information. Each of these are discussed below:

Mi'kmaq Engagement:

- KMKNO recognizes that Consultation under *Terms of Reference for Mi'kmaq-Nova Scotia-Canada Consultation Process (TOR)* is scheduled to occur in spring of 2018, however, during the first three phases of the FORRI policy development process much of the policy intent has already been developed and there has been no capacity funding offered to Indigenous peoples to help guide the development. This capacity funding is especially important for regulations that deal with technical standards for frontier and offshore oil and gas operations. Without

expertise in these types of oil and gas operations, it is difficult to determine if the proposed regulations go far enough in ensuring that all exploration and production facilities will be adequately regulated. KMKNO recommends FORRI provide funding to permit KMKNO to review and comment on the proposed regulations.

#### Protection of Indigenous and Treaty Rights:

- In its current form, the policy intent has no reference to minimizing potential impact on Indigenous and treaty rights. KMKNO expects that offshore drilling applications will trigger Consultation through the Terms of Reference for Mi'kmaq- Nova Scotia- Canada Consultation Process (TOR); however, the regulations would be strengthened by including language around the requirement to protect Indigenous and Treaty Rights. For instance, one section where Mi'kmaq concerns could be emphasized is within section 3.5 that requires operators "set out the procedures, practices, resources, and monitoring necessary to manage hazards to and protect the environment from the proposed, work or activity". KMKNO sees this as an ideal place to direct oil and gas operators to engage with Indigenous people. Indigenous communities have a deep knowledge of the environment in which they reside and are well placed to suggest mitigation or other measures to prevent environmental risks. KMKNO is concerned that instead of ensuring full and effective Indigenous participation in the environmental planning process of projects, the draft policy intentions simply speak of "measures for communicating the hazards and risk mitigation measure with all directly affected individuals". KMKNO recommends the policy insist that as part of preparing the environmental plan, the applicant must engage with the affected Indigenous community at the earliest opportunity and must involve that community in collecting information to identify environmental hazards.
- Further to environmental planning, section 3.5 j. states that "[for onshore COGOA regs only] a description of the procedure to be followed when an archaeological site or a burial ground is discovered during an operation". Both offshore and onshore oil and gas development have the potential to impact archeological and cultural sites of significance.

#### Performance Based Standards:

- FORRI is proposing to use performance-based standards to regulate frontier and offshore oil and gas operations. For instance, the draft policy document states that "all subsea production systems are designed, built, installed, commissioned, tested, operated, inspected, monitored and maintained to reduce risks to safety and to the environment to as low as reasonably practicable (ALARP) under all foreseeable environmental and operating conditions, for all modes of operation". KMKNO recognizes that performance-based standards are appropriate in some contexts and these can capitalize on industry expertise and innovation; however, performance-based standards can also empower operators to determine the technologies and measures to meet safety standards. KMKNO therefore recommends that FORRI more clearly explain why ALARP is the best regulatory approach for high risk projects such as frontier and offshore drilling in Canada. KMKNO also recommends that FORRI further clarify how the regulatory agencies (CNSOPB in Nova Scotia) have the capacity, knowledge and authority to ensure operators use technology and measures that will reduce risk as low as reasonably practicable. For instance, how will regulatory agencies decide on the level of risk associated with projects? This risk assessment is crucial because if proponents are able to downplay project risk – the threshold cost for "reasonable" risk mitigation will also be downplayed.

- KMKNO also questions whether there has there been enough debate or research on the comparison between ALARP, other performance-based standards, and prescriptive measures. For instance, one alternative performance-based standard is “Best available and safest technologies” (BAST). Using BAST can help ensure operators are using the best available technologies. Furthermore, FORRI might include prescriptive minimum standards alongside the ALARP or BAST regulations. Whatever the case, KMKNO recommends FORRI engage further about ALARP compared with other regulatory strategies.

Contingency Planning:

- In section 3.6 the draft policy document states that “the contingency plans shall set out procedures, including emergency response procedures” and requires “coordination and liaison measures with relevant municipal, provincial, territorial or federal emergency response organizations, and notification to any other work or activity in area that may be impacted by the incident”. KMKNO recommends that Indigenous emergency response organizations be included in this section. In some of the onshore remote areas at or close to where oil and gas activities are occurring, the only people in a position to help will be the nearest Indigenous community. Not all communities will have an “organized” emergency response team but local Indigenous communities may be the first line of hope for injured workers.

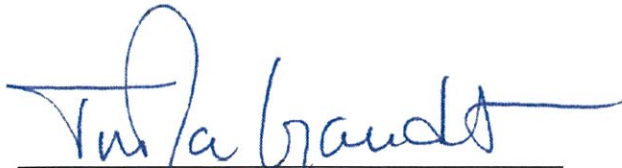
Access to information:

- Section 2.1.j. focuses on safety management and requires “that all documented policies and procedures are made accessible to those that require access”. KMKNO sees safety measures as extremely important especially with high risk projects such as frontier and offshore drilling because the lives of workers and the safety of our environment are at stake. KMKNO recommends public access to the safety measures that are in effect. If an accident does occur, it will be important to understand what standard the operation was supposed to be following. Furthermore sections 14.25 to 14.27 deal with the retention of data from any geoscience, geotechnical or environmental programme in Canada and state that such data may not be disposed of without the authority of the Chief Conservation Officer of Canada. KMKNO recommends there be a central registry listing where such information is retained in Canada.

It is expected that FORRI will consult with the Mi’kmaq of Nova Scotia under the *Terms of Reference for Mi’kmaq-Nova Scotia-Canada Consultation Process (TOR)* in the next phase of FORRI’s process.

We look forward to Consultation on this matter.

Yours in Recognition of Mi’kmaq Rights and Title,



Twila Gaudet, BA, LL.B.  
Director of Consultation

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**Kwilmu'kw Maw-klusuaqn Negotiation Office  
"Mi'kmaq Rights Initiative"**

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