

**25 July 2019**

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To Whom it May Concern:

**Re: Joint Comments on the Process for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador**

This letter is a joint submission from the East Coast Environmental Law Association, the Sierra Club Canada Foundation, and the Ecology Action Centre. This letter follows a meeting in Halifax, NS at the Canadian Environmental Assessment Agency office on Tuesday 28 May 2019 (the “**Meeting**”), during which our organizations had the opportunity to learn more about the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East off Newfoundland and Labrador (the “**Regional Assessment**”) from the committee established to conduct the Regional Assessment (“**Committee**”). What follows is an expression of our concerns and expectations of the process as we move forward.

**1. What we heard: the background of the meeting**

During the meeting, we heard that this Regional Assessment process began approximately one and a half years ago as a concept. Its objective is more effective and efficient environmental assessments for offshore exploratory oil and gas activities. To achieve this, the Committee must “conduct a Regional Assessment of the effects of existing and anticipated exploratory drilling in the eastern Newfoundland and Labrador offshore”.<sup>1</sup>

In terms of process, we heard that the Committee’s work must be completed no later than the fall of 2019. This is in accordance with the Terms of Reference that guide the Regional Assessment and, specifically, the Committee’s work.<sup>2</sup> This deadline has been left undefined, and to that extent, the Committee has interpreted that it may complete its mandate as late as December

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<sup>1</sup> *Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador Between Her Majesty the Queen in Right of Canada as represented by the federal Minister of the Environment and the federal Minister of Natural Resources and Her Majesty the Queen in Right of Newfoundland and Labrador, as represented by the provincial Minister of Natural Resources and the provincial Minister for Intergovernmental and Indigenous Affairs, Government of Canada, online: <https://ceaa-acee.gc.ca/050/evaluations/document/127987?culture=en-CA> at s. 4.14 [“Terms of Reference” or “TOR”].*

<sup>2</sup> Terms of Reference at s. 5.7.

2019. We also heard that the Committee may go back to the Minister to request more time if it becomes apparent that the time provided is insufficient.

We heard that the Committee has set an aspirational goal to have the first round of engagement completed by the end of June, with the long-term aspirations of an information package by the early fall, followed by a second round of committee meetings and public review. More generally, the Committee expressed to us that there is a “sense of urgency” with regard to the completion of the Regional Assessment.

During the meeting, we heard that as part of its efforts, the Committee will be looking to develop a geographic information system (“GIS”) to collect information and data from a variety of sources, with the hope of creating an online database to store this information.<sup>3</sup> The Committee expressed to us that a large amount of information already exists in reports and other sources, which creates a “knowledge base”. The Committee hopes that it will be able to create an accessible and public database for this information that can be used for the purposes of the Regional Assessment and in the future for other assessments or areas. It was also relayed to us that the Regional Assessment would be an “evergreen” process, whereby newly available information would be continuously added to the GIS database.

Finally, it was confirmed at the meeting that the scope of the Regional Assessment is focused on offshore oil and gas exploratory drilling. We learned that seismic activity is not included within the scope of the Regional Assessment and that only short duration programs are being included. Moreover, we learned that the Committee has not yet discussed whether the Regional Assessment will include a review of impacts on climate change targets, or whether upstream and downstream emissions will be included.

## 2. The timeline of the Regional Assessment is too short

We would like to begin by reiterating our serious concern with the designated length of the Regional Assessment. It is our opinion that the Committee must be guided by an objective and rigorous fact-gathering process that values effective and comprehensive public consultation and engagement. In order to achieve effective and meaningful engagement and to gather all of the relevant and necessary information to allow for effective decision-making, it is our opinion that more time is needed to conduct this Regional Assessment given its parameters and its potential future applications.

As the Committee suggested in the meeting, there are a number of areas which the Committee has only begun to consider; for example, the Committee noted that gathering data has been slower than anticipated and that it had not begun reaching out to international bodies as it was “very early in the process”. In our respectful opinion, to not have engaged with the international community for a Regional Assessment with a study area that includes large areas beyond Canada’s jurisdiction, given timelines that are shorter than a year, is unworkable. This is not

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<sup>3</sup> See s. 2.4 of Appendix D of the TOR.

something to be addressed later, but something that ought to have been identified and addressed immediately, and which, by itself, warrants the Committee requesting additional time from the Minister.

All of our group members made submissions to the Agency on the draft Terms of Reference for the Regional Assessment in the fall of 2018. All of these submissions included recommendations that the Regional Assessment not be fast-tracked, but rather, be conducted in a timeframe that can adequately facilitate engagement, learning and good decision-making, taking into account all of the available information, and identifying and addressing the numerous gaps in available data. These concerns were not addressed and we have not been provided with an adequate explanation as to why a report is due by the fall of 2019. For the Committee to state that there is a “sense of urgency”, without providing clarity as to why, does nothing to provide us with confidence in this process.

Furthermore, while we cannot comment on the specifics of the Committee’s engagement with Indigenous Peoples of Canada, and especially with those in the province of Newfoundland and Labrador, we remind this Committee that part of its mandate is to facilitate meaningful engagement with Indigenous peoples. It is our belief that the timelines for completion of the Regional Assessment will not result in effective reconciliation or relationship building with Indigenous peoples.

### Recommendation

For all of the above reasons, we urge the Committee to return to the Minister and either request a pause to reconsider the Regional Assessment or request additional time to conduct the Regional Assessment. Anything else will be a failure of this Committee to meet its mandate to conduct a Regional Assessment that meets the rigour demanded by its Terms of Reference and a failure of the Minister to provide for the appropriate protections for our marine environment when making use of the Regional Assessment in the future.

### 3. The Regional Assessment must be conducted within the context of the Impact Assessment Act (Bill C-69)

During the meeting, we clearly communicated to the Committee that there are serious reservations regarding how the Regional Assessment might be used in the future. Specifically, Lisa Mitchell from the East Coast Environmental Law Association noted that the Regional Assessment must be viewed within the context of Bill C-69. It is our belief that considering the Bill received Royal Assent on June 21, 2019, this is all the more important now.

As you are aware, Bill C-69 repeals the *Canadian Environmental Assessment Act, 2012* (“CEAA”), and replaces it with the *Impact Assessment Act* (“IAA”). In May 2019, the Government of Canada released a document entitled “Discussion Paper on The Proposed Project List: A Proposed Impact Assessment System”. As the document suggests, the process under the IAA will be similar to the

current process under CEAA. Certain projects will require an environmental assessment if they are listed on the Project List:

*Any individual project that matches the description of a project type and meets or exceeds the established threshold set out in the Project List would be a designated project and would be subject to the Impact Assessment Act.<sup>4</sup>*

However, the Discussion Paper goes on to describe instances where an environmental assessment will not be required (emphasis added):

*Certain project types may also have conditions that would exclude certain projects from being a designated project. For example, an offshore exploratory well proposed in an area with a completed regional assessment that addresses relevant issues and mitigations would not be a designated project, and would not require a federal impact assessment. Such projects would not enter into the early planning phase.<sup>5</sup>*

And more specifically, the document later provides a list of projects that will become designated projects. This includes the following (emphasis added):

*Offshore exploratory wells in the first drilling program in an area set out in one or more exploration licences issued in accordance with the Canada–Newfoundland and Labrador Atlantic Accord Implementation Act, the Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act or the Canada Petroleum Resources Act, except when it is proposed in an area for which a regional assessment has been carried out and it is in conformity with the conditions for exemption approved by the Minister for that regional assessment.<sup>6</sup>*

Therefore, it has been made explicitly clear that regional assessments in general, and the present Regional Assessment in particular, will be used to remove offshore exploratory wells from the requirement to undergo any kind of project-based impact assessment.

This must be further contextualized by the preamble of the Terms of Reference (“TOR”). The Draft TOR, released in 2018, read as follows (emphasis added):

*WHEREAS the Government of Newfoundland and Labrador recently announced plans to encourage the drilling of up to 100 new exploratory wells by the year 2030;*

When the final TOR were released, the language around the number of offshore exploratory wells had been softened, but nonetheless, the objective remains implicit (emphasis added):

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<sup>4</sup> Government of Canada, “Discussion Paper on The Proposed Project List: A Proposed Impact Assessment System” May 2019 online: < <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/discussion-paper-proposed-project-list.html> > at p. 7.

<sup>5</sup> *Ibid*, at p. 7.

<sup>6</sup> *Ibid* at p. 11.

*WHEREAS the Government of Newfoundland and Labrador recently announced initiatives to encourage a significant level of increased exploratory activity in the Canada-Newfoundland and Labrador Offshore Area by the year 2030*;

These documents contextualize the current Regional Assessment. It would appear to us that the Regional Assessment is being used to facilitate an expedited approval process for offshore oil and gas projects already anticipated to be developed. We believe that this could undermine the legitimacy of this Regional Assessment.

#### Recommendation

We therefore recommend that the Committee consider the potential implications of the passage of Bill C-69 and subsequent regulations as a part of the Regional Assessment.

#### 4. The Regional Assessment must consider cumulative effects

During the meeting, we heard that the Regional Assessment will address cumulative effects and that further discussion on the matter would be required. Additionally, the issue of the climate change crisis was identified as a critically important issue that must be addressed, especially given the need to focus on cumulative effects. We heard that the Committee is still considering how it will address climate change.

We reiterate our call for the Committee to identify the cumulative effects of all past, present and future activities within the Regional Assessment area. This includes upstream and downstream impacts on Canada's climate commitments. This is especially important in light of the recent announcement that the province of Newfoundland and Labrador is seeking to increase offshore oil production with the drilling of at least 100 exploratory wells by 2030. We believe that this goal is counter to the clear global energy shift that is imperative to reach the latest Intergovernmental Panel on Climate Change recommendation of 45% reduction of carbon emissions from 2010 levels by 2030 in order to prevent greater than 1.5 degrees of global warming.

Our concern stems from the clear direction that the TOR mandates for the Committee: to assess exploratory oil and gas activities singularly, without regard to a broader, regional scope including other activities even closely related.<sup>7</sup> For example, the Committee made it clear to us that most seismic activity will not be included in the Regional Assessment. Seismic activity often, if not always, precedes exploratory drilling projects and could impact endangered species like whales, commercial fish stocks, and other marine industries like fishing and tourism. As such, this Regional Assessment does not accord with either the principle or spirit of a regional assessment and creates uncertainty about the true purpose and legitimacy of the Regional Assessment.

We implore the Committee to review "Building Common Ground: A New Vision for Impact Assessment in Canada", which is the final report of the Expert Panel for the Review of

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<sup>7</sup> For example, see section 2.3 of the TOR.

Environmental Assessment Processes that was completed in 2017. The Expert Panel conducted a review of federal environmental assessment processes on behalf of the Minister of Environment and Climate Change and its report included recommendations to the Minister. The Expert Panel included regional assessments within the scope of its review and recommended that a regional assessment establish thresholds and objectives to be used in project assessments and federal decisions.<sup>8</sup>

The Expert Panel report clarified that regional impact assessment is used to assess baseline conditions and cumulative impacts of all projects and activities within a defined region.<sup>9</sup> These conclusions came about as a result of reviewing regional assessments that had occurred under previous federal environmental assessment regimes, as well as by other jurisdictions, and from engagement with communities and groups. In its specific recommendations on regional assessments, the Expert Panel noted that one of the key objectives of a regional assessment is “to gather information about and improve management of cumulative impacts affecting the sustainability of matters of federal interest”.<sup>10</sup>

The Expert Panel, in its report, noted that a regional assessment can streamline, inform and improve project assessments by reducing the burdens and costs of individual project assessments to having to create a cumulative effects framework, since that work could be done by the regional assessment.<sup>11</sup> Further, the Panel noted that its proposed model for regional assessment would seek baseline information on all federal interests.<sup>12</sup>

Based on our understanding of the purpose of a regional assessment, including the Expert Panel Report, we submit that a regional assessment is intended to assess all activities in a study region to identify gaps in information and knowledge and to identify cumulative impacts from all those activities. A regional assessment should provide the factual foundation to enable more informed project-level assessments, including that project’s ability to contribute to sustainability within the context of the entire region.<sup>13</sup>

The question that begs to be answered is, why is there such a particular focus on oil and gas activities when other activities like fishing, shipping and scientific research, among others also occur in the area? How can the cumulative impacts of all these activities be better understood and mitigated if the scope of the current Regional Assessment is so narrow? Our answer: cumulative effects cannot be understood by a regional assessment focused so narrowly on oil and gas exploration.

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<sup>8</sup> See Expert Panel, “Building Common Ground: A New Vision for Impact Assessment in Canada – The Final Report of the Expert Panel for the Review of Environmental Assessment Processes” (2017) at the Executive Summary, p. 7.

<sup>9</sup> *Ibid*, p. 76.

<sup>10</sup> *Ibid*, p. 77.

<sup>11</sup> *Ibid*, p. 77.

<sup>12</sup> *Ibid*, p. 77.

<sup>13</sup> For example, see Meinhard Doelle, “Regional & Strategic Assessments in the Proposed Federal Impact Assessment Act (IAA)” (Feb 25, 2018) Blog Post online: <<https://blogs.dal.ca/melaw/2018/02/25/regional-strategic-assessments-in-the-proposed-canadian-impact-assessment-act-ciaa/>>

## Recommendation

We recommend that the Committee take a broad mandate and responsibility under its TOR to “conduct a regional assessment of the effects of the existing and anticipated exploratory drilling in the eastern Newfoundland and Labrador offshore”.<sup>14</sup> Furthermore, the Factors to be considered in the Regional Assessment, which are set out in Appendix A of the Committee’s TOR, include consideration of (emphasis added):

*A. the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by offshore exploratory drilling, including*

*i. the effects of malfunctions or accidents that may occur in connection with exploratory drilling,*

*ii. any cumulative effects that are likely to result from offshore exploratory drilling in combination with other physical activities that have been or will be carried out, and*

*iii. the result of any interaction between those effects;*<sup>15</sup>

The Committee’s mandate does not preclude an appropriate review of the cumulative effects of those existing and anticipated exploratory drilling activities within a broader regional context that includes all other activities in the study region. The Committee must also consider any other matter relevant to the Regional Assessment. We believe that includes the broader environmental and socio-economic impacts beyond exploratory oil and gas activities.<sup>16</sup>

However, if the Committee is still not confident it has the authority to conduct a more extensive regional assessment as we believe is required, the Committee is further enabled to seek an amendment to its Terms of Reference of the Factors to be considered in the Regional Assessment by sending a letter, signed by the Committee’s co-chairpersons to the Minister of Environment and Climate Change.<sup>17</sup>

## 5. Proprietary and transparency issues need to be addressed for a digital GIS-based system

During the meeting, we heard for the first time that part of the Committee’s work will entail putting together a Geographic Information System (“GIS”) platform. This will involve creating a digitalized spatial data system that will be linked to textual information to promote efficiency and

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<sup>14</sup> TOR at s. 4.14.

<sup>15</sup> See TOR, Appendix A, at s. 1(A).

<sup>16</sup> See TOR, Appendix A, at s. 1(Q).

<sup>17</sup> See TOR, at s. 4.24.

reduce regulatory fatigue. We reiterate our concern about the possible challenges with using such a system.

We question whether it is an appropriate use of the Committee's time, resources and expertise to be the primary body facilitating the creation of a GIS system. While a GIS system may enable the Committee to bring together information and data it accumulates during the Regional Assessment, this is a technical endeavor that ought to be undertaken by a group whose expertise lies in that area. It should not be a primary focus of the Committee.

Quality of the information and data is also an issue for us. There are currently large gaps in the available data and there is currently no credible process to fill those gaps. Much of the available data is also not currently independently peer-reviewed. Furthermore, during the meeting the Committee asked participants to provide examples of data protocols. This reflects a certain lack of protocols already in place for the collection and use of information and data, which could place further strain on the Regional Assessment's scope and short timeline.

It remains unclear to us how proprietary information and work will be used and placed into the GIS. If the information on the system is meant to inform decision-making, how will public engagement be facilitated if some information remains confidential or private? How will decisions made using that data and information that is not public be scrutinized and reviewed to enable and facilitate government accountability? Whose job will it be to maintain and administer the system and ensure its upkeep? These are questions that must be considered.

### Recommendation

Notwithstanding our objection, we recommend that clear criteria be created that set out the use of this GIS system for both this Regional Assessment and for future impact assessments. It is important that the information and data that is put into the system be used to identify natural and anthropogenic changes in the marine environment. An effective categorization baseline is as important as the assessment of the information in the system. Furthermore, gaps in the available data must be clearly identified and a process to address them must be created.

### 6. The Committee must engage with the international community

During the meeting with the Committee, concerns were expressed regarding the potential size of the area to be captured by the Regional Assessment, with some also highlighting that the area includes parts of the ocean beyond Canada's Exclusive Economic Zone (beyond 200NM) and extended shelf jurisdiction. When asked whether there is a process in place to engage with the appropriate international agencies on this issue, the Committee was unable to provide an answer as to what that engagement may look like.

It is clear to us that Canada has no lawful jurisdiction beyond its Exclusive Economic Zone ("EEZ"). Additionally, we would also like to highlight that a new and potentially legally binding draft instrument on the conservation and sustainable use of marine life in areas beyond national

jurisdiction is being finalized by the Intergovernmental Conference under the United Nations Law of the Sea Convention. The biodiversity beyond national jurisdiction agreement will create new international high seas rights and obligations for states engaging in environmental impact assessments and creating marine protected areas.<sup>18</sup>

### Recommendation

We therefore recommend that the Committee take immediate action to engage with international governance bodies and stakeholders like the United Nations, the International Maritime Organization, and the International Seabed Authority. Regional Fisheries Management Organizations (including the North Atlantic Fisheries Organization) will also likely be impacted and need to be consulted.

### 7. The Regional Assessment requires more rigorous record-keeping

On 24 June 2019, our groups received an email from the Committee with the draft notes of the Meeting. This document is a four-page summary of the key points of discussion. The email requests input from the groups on the notes before a finalized version is produced. The deadline for review and comments on the draft meeting notes was 02 July 2019.

First, we would like to register our disappointment with the record-keeping process. During the Meeting, we quickly realized that the primary person taking notes of the Meeting was not physically present, but rather, was taking notes over the phone. This was raised as an issue in terms of the note-taker capturing the full extent of the conversation as well as being able to hear the entire conversation. This concern was exacerbated when it was made clear that participants on the phone were not able to clearly hear participants in the meeting venue, due in part to the technology being used. The solution was that participants were encouraged to speak loudly and as closely to the microphone as possible. Given the large size of the group, this was difficult. In our opinion, this was not conducive to effective and reliable record keeping.

Furthermore, production of a four-page summary of key discussion points is not adequate. Participants addressed specific and important concerns that were either not captured by the summary notes (for example, the discussion around Bill C-69), or were captured inaccurately or incompletely (for example, the full extent of the reaction to creation of a GIS system).

We would also like to highlight the amount of time it took to provide the meeting notes: 19 working days or 27 regular days. That is basically an entire month. This is further evidence that the suggested timeline for completion of the Regional Assessment is too short. Furthermore,

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<sup>18</sup> See: Intergovernmental Conference of the United Nations Law of the Sea Convention, “Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction” (25 June 2019) online: <[https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft\\_text\\_a.conf\\_.232.2019.6\\_advanced\\_unedited\\_version\\_corr.pdf](https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_text_a.conf_.232.2019.6_advanced_unedited_version_corr.pdf)>

providing participants only 8 days to then comment on the draft summary of the notes is not reasonable.

Second, we are concerned about the transparency of the process. We have outstanding questions about the possibility of meetings being held outside of the formally structured Committee or TAG meetings. During the Meeting the Committee informed us that the Regional Assessment process has been going on for at least one and a half years. The issue this raises is whether there are “side-meetings” being conducted by the Committee or Canadian Environmental Assessment Agency, regarding the Committee’s work on the Regional Assessment, of which there is no record. For example, there is no record of ICI or AMEC contracts. The same holds true for the contract with Stantec for their GIS expertise. Was a public procurement process undertaken for the search of such consultants?

### Recommendation

We recommend that a fully written process for record-keeping be implemented and shared with all participants. The Regional Assessment engagement process requires fulsome and detailed note-taking, timely sharing of any notes taken with the public, and must allow all participants adequate time to provide commentary. Furthermore, notes taken in subsequent meetings must be taken by someone physically present to avoid issues around difficulty hearing participants or issues around technology. Going forward, all calls and meetings must be recorded. This will create a full record and allow comments to be transcribed verbatim to ensure that all concerns are properly addressed. Notes and recordings for all meetings that the Committee undertakes in fulfilment of its mandate must be made publicly available.

### 8. An independent expert must co-chair the Regional Assessment

The Canada-Newfoundland and Labrador Offshore Petroleum Board has a dual mandate to facilitate the exploration for and development of petroleum resources, and to regulate the oil and gas industry that undertakes that exploration and development. The Regional Assessment process is being co-chaired by a member of the C-NLOPB. This dual mandate is of concern when it comes to impartially evaluating risks to ocean life, climate, and other industries.

### Recommendation

The CNLOPB can play an expert advisory role, but an independent expert should be nominated to co-chair this assessment.

### 9. Conclusion: The Regional Assessment is NOT adequately rigorous

The mandate of the Committee, as set out in the Terms of Reference states (emphasis added):

*1.1 The Committee will conduct a regional assessment of offshore oil and gas exploratory drilling east of Newfoundland and Labrador in an area generally*

*outlined in Appendix B. On completion of the Regional Assessment, the Committee will provide the Ministers with a Report which includes the Committee's advice on how to best use the results in a systematic way to aid decision-making based on geographically-referenced knowledge and clear criteria. As such it will meet or exceed the rigour and performance of the current environmental Assessment and regulatory review process used for the approval of exploratory drilling*

Something that was made very clear at the Meeting, and by the Committee's TOR, is that the Regional Assessment is meant to create a process that provides for more efficient and effective environmental assessments of offshore exploratory oil and gas activities.

As we highlighted, we are gravely concerned that the Regional Assessment will replace future project-based environmental assessments for exploratory activities in the study area. That means that this Regional Assessment may be the ONLY opportunity for public engagement and consultation on these projects. Notwithstanding the inappropriateness of displacing individual project environmental assessments with a hastily conducted regional assessment, we do not believe that the Committee has the time or capacity to effectively facilitate a process of public engagement that meets or exceeds the rigour of the current environmental assessment and regulatory review processes.

Sincerely,

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F O U N D A T I O N

