



East Coast Environmental Law Association (2007)

**Submission on the Draft Report for the Newfoundland and
Labrador Offshore Regional Assessment of Exploratory Oil & Gas**

21 February 2020

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1. Overview

East Coast Environmental Law Association (2007) received funding from the Impact Assessment Agency of Canada (formerly the Canadian Environmental Impact Assessment Agency) to participate in the Newfoundland and Labrador Regional Assessment of Offshore Exploratory Oil and Gas (“Regional Assessment”). Using those funds, our organization has been engaged with the Regional Assessment Committee and collaborated with other participants of the process to provide feedback, commentary and information to the process; this has included providing commentary on the process to the Agency and Committee, writing letters to the Minister of Environment and Climate Change, participating in the Technical Advisory Group meetings, meeting with the Committee in St. John’s, Newfoundland, and Halifax, Nova Scotia, and participating in a review of the draft recommendations prior to the release of the full draft report.

What follows is our submission on the Draft Regional Assessment Report (“Draft Report”) and the accompanying Geographical Information System (“GIS”). We have framed our comments under two broad categories – the Regional Assessment process and the Draft Report – and provided suggestions or recommendations for areas of the Draft Report that require further thought or attention.

We begin with comments on the procedural aspects of the Regional Assessment process. This includes an overview of how the process has been received and offers insights into how the process should address some of the concerns that we have previously raised with the Committee and with the Minister. Our most pressing concerns with the Regional Assessment process are two-fold.

First, the Committee for the Regional Assessment was not provided with adequate capacity nor time by the Minister to complete this very important and substantial work. This created a process that felt rushed and, at times disorganized, and resulted in a draft report which does not meet all of the requirements which were clearly set out for the Committee in its Agreement and Terms of Reference. This includes conducting an actual assessment of the regional impacts of exploratory oil and gas and a cumulative effects assessment.

Second, the Regional Assessment process did not provide for meaningful public participation, nor for adequate participation of its core component participants – namely, the Technical Advisory Group. The Committee did invite various stakeholders to TAG meetings in September 2019. There were a total of eight meetings, with each day according with a different topic area, including climate change, biodiversity, and fisheries. However, the meetings were brief – approximately three hours in total – and were well attended; thus, there was not a great deal of time for participants to discuss issues. There were no follow-up meetings, although a literature review period was provided. Other participation in the process was rushed, with little time for preparation.

Following our comments on the procedural aspects of the Regional Assessment, we have provided comments on substantive content present or missing in the Draft Report, as well as some comments on the GIS – on both its uses and limitations.

As a non-profit organization that has a mandate to provide public legal education, and to advocate for fair and effective environmental laws and their implementation, we have focused our efforts in

this submission on the relationship between law, policy and the outcomes of the Regional Assessment. Specifically, we have sought to identify how the Regional Assessment as a process created under and authorized by law can be improved to satisfy various legal requirements, set out in legislation (CEAA 2012, IAA 2019). We have also endeavored to highlight instances where the Regional Assessment has not provided adequate assessment of important aspects that ought to have been considered and assessed.

While we have included more specific insight and recommendations throughout our submission, our overall assessment of the Regional Assessment and the associated Draft Report is as follows:

1. The Committee needs to request more time from the Minister to complete the Regional Assessment work as set out in its Terms of Reference and as required under the *Impact Assessment Act*. Although the current Draft Report is a valuable foundation of work, it is not an adequate foundation on which to create regulations exempting exploratory oil and gas projects from further project-specific impact assessments under the *Impact Assessment Act* or its associated regulations.
2. As an extension of the previous point, we recommend that the Committee conduct a full assessment of the regional impacts of exploratory oil and gas within the study area as is required by law, and specifically, by the Committee's Terms of Reference. If there are areas for which there is not enough information to make a reasonable assessment, the Committee should either request that information from relevant departments, or take a precautionary approach by recommending areas which ought to be exempted from oil and gas exploration, or which will require project-specific impact assessments in the future.
3. We maintain that a key requirement of any impact assessment is meaningful public participation. This requirement is about more than providing public comment periods. It requires listening and engaging and incorporating feedback when it is appropriate. It involves providing for more than one week to review and implement feedback from public comments between the end of the 30-day public comment period and the final submission of the report to the Minister.

2. The Regional Assessment Process

2.1 Objective of the Regional Assessment

The Committee has interpreted the objective of the Regional Assessment as being the facilitation of a more effective and efficient assessment processes for exploratory drilling projects within the defined offshore Study Area, while also ensuring the highest levels of environmental protection.¹

With respect, this is not the objective of the Regional Assessment; that language appears only in the preambular text of the *Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador* (“Agreement”) that set out the Regional Assessment, and does not feature in the Committee’s mandate.

The Agreement sets out the Committee’s mandate as follows (emphasis added):

4.14. The Committee will conduct a Regional Assessment of the effects of existing and anticipated exploratory drilling in the eastern Newfoundland and Labrador offshore, generally outlined in Appendices A and D.

The Agreement provides that, “Regional Assessment” means a Regional Study pursuant to the *Canadian Environmental Assessment Act* (2012) and is a study or assessment of the effects of existing or future physical activities carried out in a region.²

While we have provided further commentary below, we would highlight now that both a “study” and an “assessment” require careful consideration of the effects of activities under review.

2.2 Timelines and Deadlines

The Regional Assessment was originally to be completed by the “Fall of 2019” and was subsequently extended to the end of February 2020 (for the Final Report) and the end of May 2020 (for the completion of the GIS decision-support tool).³

Beginning with our initial introductory meeting with the Committee in May 2019, we have communicated our concern about the short and unworkable timeline and deadline. We sent correspondence to the Committee reiterating our concerns and asked the Committee to discuss options to extend the timeline with the Minister. The Committee continued to suggest that it was working diligently and would not release a report which it was not comfortable with. Early in its Draft Report, the Committee acknowledged that concerns were often raised that it had insufficient time, and that the Study Area was too large and complex.⁴

¹ Regional Assessment Draft Report, p. viii. [Draft Report]

² *Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador*, at p. 2.

³ Draft Report, p. viii.

⁴ *Ibid* p. viii.

The timeline for the Regional Assessment work that is set out in the Draft Report does not provide us with confidence that our concerns were meaningfully considered or addressed. As Table 2.1 highlights, we were really only engaged in substantive conversations with the Committee on the context of the Regional Assessment in September 2019.

Table 2.1 – Engagement with the Committee

Task	Period	Comments
Introductory Meeting	Late May 2019 (22, 28)	Provided with an initial proposal for the regional assessment; we were told that engagement opportunities with stakeholders would begin in the summer (June).
Meeting with Indigenous Groups	Early June 2019	N/A
TAG Meetings	Early September 2019 (9-17 th)	This was the first time we were provided any relevant materials related to the Committee’s work to that point; the materials provided in advance of meetings were minimal.
Meeting with Committee in St. Johns, NFLD	October 8 th 2019	We had an in-person meeting with members of the Committee to discuss our concerns with the process, as well as to discuss substantive aspects of the Regional Assessment.
Literature Review	October-November 2019	The content of circulated materials was outside the expertise of our organization.
Indigenous TAG meetings	September-Early November	N/A
Indigenous Workshop	November 13	N/A
Meetings re Draft Recommendations	Early December (5 th -6 th)	We were provided minimal preparation time and materials provided were without context.

Our concern with the limited time for the Committee to conduct its work remains and is exacerbated by the Draft Report.

2.3 Meaningful Participation

Another frequent concern, which we raised with the Committee was that the distribution of materials in advance of meetings needed to provide participants with adequate time to review and analyze those materials. This preparation time is important because materials often guided discussions in meetings. However, these concerns were ignored by the Committee, leading to inefficient meetings.

As an example, in December 2019, the Committee convened a number of meetings with stakeholders to discuss draft recommendations in advance of the release of the draft report. While these meetings were welcomed by the participants, and were certainly welcomed by our

organization, the draft recommendations were circulated the day before the meetings.⁵ Additionally, the time provided to participants following the meeting on December 6th, 2019 to discuss draft recommendation, to provide further feedback on the suggested draft recommendations did not lend itself to meaningful participation or engagement.

⁵ See also Draft Report, p. 21.

3. The Draft Regional Assessment Report

The Draft Report of the Regional Assessment was structured to facilitate the eventual review and consideration by the Minister to inform content of a regulation that would set out conditions to exempt future exploratory oil and gas projects in the Study Area.

While the Committee has identified and recommended some generic mitigation and follow-up measures to be implemented for all future exploratory oil and gas drilling projects, the lack of an assessment of potential regional adverse effects caused by these projects, as well as an inadequate cumulative effects assessment and a lack of proper application of the precautionary principle, prompts us to temper the use of this Regional Assessment Report, in its current state, for this purpose.

3.1 A Regional Assessment of the Adverse Effects of Exploratory Oil and Gas is Lacking

“Assigning risk was beyond the timing and resources of the Committee [...]”⁶

3.1.1 – Committee’s Access to Information

The Committee acknowledged that “assessing and evaluating risk was beyond the timing and resources available to the Committee but remains a fundamental requirement to guide future decision-making around sustainable use of offshore resources”.⁷

The Committee commented that “the science expertise of the federal government was not available or accessible to support the work of this Committee”.⁸ It further noted that it was originally envisioned that government experts would be directly involved in planning, data analysis and writing of various components of the Regional Assessment, which did not occur – with some exceptions.⁹ The Committee described this as an “untenable situation” which “seriously hampered” efforts, noting that for future Regional Assessments, that weaknesses needed to be addressed as a priority.¹⁰

With all due respect, the Committee was provided with all the tools necessary to obtain all relevant and necessary information that it required to conduct its work. It was a failure of the Committee and a flaw of the Regional Assessment to date that all relevant information the Committee required was not obtained.

First, the Agreement creates multiple options by which the Committee was enabled to obtain information necessary for its work. This included the Task Team and the Technical Advisory Group (“TAG”). It is a failure of the Committee that it did not assemble the TAG until September 2019, and a further failure that these TAG meetings were brief, did not provide participants with any substantive plan or materials to work with, and that no additional meetings occurred.

⁶ *Ibid.*, p. 107.

⁷ *Ibid.*, p. viii.

⁸ *Ibid.*, p. ix.

⁹ *Ibid.*, p. ix.

¹⁰ *Ibid.*, p. ix-x.

Furthermore, while TAG participants were provided with an opportunity to conduct a literature review, the timing of that review was not conducive to effective information gathering and analysis, because it occurred at such a late stage of the process.

Second, the Agreement is explicit that the Committee has the powers provided for in section 45 of the *Canadian Environmental Assessment Act* (2012) to compel the production of records necessary for its work. Specifically, the Committee had all of the powers of a review panel, under that Act, to compel witnesses to provide information necessary to conduct its work, including through oral and written testimony. These powers are also provided to the Committee under the *Impact Assessment Act*.¹¹ As far as the Draft Report makes evident, it does not appear that the Committee attempted to use the full range of its legitimate authority to conduct its work.

Third, the Committee was required to provide regular reports to the Minister and had the option of requesting clarification or modification of its Terms of Reference. If the Committee was of the opinion that it was not receiving information necessary to conduct its work, it should have requested the Minister to facilitate the release of this information, or in the alternative, requested additional time or a narrowing of its mandate. As participants of the Regional Assessment process, we were not provided with any indication that the Committee sought modification of its TOR.

Recommendation #1: *The Committee must request more time from the Minister to continue the Regional Assessment, and then use the applicable authority vested in it to obtain all relevant and necessary information.*

3.1.2 – Identified Adverse Effects from Exploratory Oil and Gas Drilling Activities

The Committee identifies a number of potentially adverse impacts resulting from exploratory oil and gas activities, but does not provide an evaluation of the impact, on a regional level, of these potential impacts. While some of these impacts are discussed in more specific detail below, we have highlighted some of the key potential impacts here:

Presence and Operation of Drill Rigs: The Committee notes that a number of impacts from drill rigs can occur, including disturbance of the benthic area and various forms of emissions (ballast water, grey water, sewage, wastewater, deck drainage and air emissions), and states that these can be managed in accordance with applicable regulations and guidelines, and offers no further analysis or assessment of potential risks. The Committee also notes that marine biota may also be attracted to drilling rigs, increasing the potential for interactions and adverse effects like contamination or collisions. The Committee notes that the “short-term nature” of drill rigs reduces effects.¹² Finally, the Committee also noted potential impacts from underwater noise.¹³

Marine Discharges: The Committee concluded that the primary disturbances with drilling itself is related to discharges (of drilling fluids), which it described as “essentially non-toxic”.¹⁴ To put it another way, then, the Committee has identified that discharges are toxic.

¹¹ See ss. 101 and 53 of the *Impact Assessment Act*, SC 2019 c. 28 s. 1.

¹² Draft Report, p. 101.

¹³ *Ibid*, p. 101.

¹⁴ *Ibid*, p. 102.

The Committee notes that the use of drilling fluids and other chemicals are required to be selected and used in accordance with applicable regulatory requirements.¹⁵

The marine disposal and deposition of drill cuttings (and any residual fluids) may cause a degree of accumulation on the seabed, but drill cuttings modelling carried out for previous and on-going EAs typically shows that the formed cuttings pile will be limited in size and distribution, with limited areas in which the cuttings pile thicknesses exceed the established thresholds for creation of anoxic areas and smothering of benthic species (Modules 2 and 7). Any cuttings accumulations on the seabed are also eventually recolonized following the completion of the well.¹⁶

Recommendation #2: *The Committee should conduct an assessment of whether there exploratory oil and gas drilling activity causes potential adverse effects to the marine environment, including a decision on whether these potential adverse effects can be fully prevented or reasonably mitigated by current applicable regulatory requirements.*

3.1.3 – Reliance on Project Environmental Assessments

The Committee relies on previous and on-going environmental assessments (“EAs”) of exploratory oil and gas drilling projects in the Study Area to identify the primary issues and effects of those projects.¹⁷ The Committee notes that (emphasis added):

For the most part, these EAs and the resulting EA decisions have concluded that the potential effects of offshore exploration drilling in the Study Area are relatively well understood and entail relatively minor, localized and temporary disturbances at any one location and time. They have also indicated that, with the implementation of typical and industry standard mitigation (see Section 4.5), are unlikely to result in significant adverse effects on any aspect of the environment.¹⁸

The Committee also relies on the conclusions of “previous EAs” to come to conclusions about potential future effects of exploratory oil and gas drilling (emphasis added):

Previous EAs have generally concluded, however, that the overall and defining features and characteristics of any special areas that overlap with or occur in the vicinity of a proposed drilling project will not be materially and adversely affected by such activities, as these activities are characterized by small footprints and are temporary in nature. In addition, the implementation of mitigation measures is intended to avoid or reduce any disturbances and resulting effects to overlapping or adjacent special areas.¹⁹

[...]

¹⁵ *Ibid*, p. 102.

¹⁶ *Ibid*, p. 102-03.

¹⁷ *Ibid*, p. 101.

¹⁸ *Ibid*, p. 101.

¹⁹ *Ibid*, p. 104.

Recent EAs have concluded that given the nature, location and duration of exploratory drilling activities in the Study Area, they are unlikely to have adverse effects on people and communities, including Indigenous groups. As most such activities take place in the offshore marine environment, often several hundred kilometers from land, and because their associated emissions are expected to be quite localized and short-term in nature, the assumptions are that these effects are unlikely to extend to or affect the health, well-being or other socioeconomic conditions of Indigenous peoples. Indigenous peoples are not known to undertake any traditional activities within the Study Area.²⁰

[...]

Recent EAs have generally concluded, however, that the localized nature and short-term duration of exploration drilling activities, and the implementation of standard mitigation measures, will avoid or reduce the occurrence and magnitude of any such effects.²¹

[...]

Recent EAs for offshore exploratory drilling have included estimates of the air emissions that may be associated with the proposed project in question (Module 2). These have generally found that such activities will produce a localized, transient effect on air quality, and due to the distance from shore, effects on onshore areas and receptors are unlikely. In addition, since predicted greenhouse gas (GHG) emissions from an individual project are low and insignificant in comparison to GHG targets, individual drilling programs have virtually no effect on current estimates of future global climate change (Section 7.2).²²

[...]

As noted in Section 4.2 above, recent project-specific EAs for offshore exploratory drilling programs in the Study Area (and their resulting EA decisions) have concluded that their potential effects are relatively well understood, and that these entail relatively minor, localized and temporary disturbances at any one location and time. They have also concluded that, with the implementation of the various mitigation measures summarized above in Section 4.5, these activities are unlikely to result in significant adverse effects on any aspect of the environment.²³

[...]

The Committee has taken the approach of considering, and then building upon as required, the findings of these previous project-specific EAs, and have used these as the initial basis and ‘frame of reference’ for the Regional Assessment. This report therefore does not repeat

²⁰ *Ibid*, p. 104.

²¹ *Ibid*, p. 105.

²² *Ibid*, p. 105.

²³ *Ibid*, p. 112.

or seek to redo the detailed project-specific effects assessments carried out to date, the key findings of which are summarized in Section 4.2 above.²⁴

The Committee's lack of objective review, analysis and assessment of the risks of future exploratory oil and gas drilling is a failure of the Committee to adhere to its mandate and its legal obligations to conduct itself impartially and objectively. Reliance on the finding of project-level EAs that have been conducted by industry, and which thus are not impartially created using verified and independent scientific research, amount to the Committee fettering its discretion. This is inappropriate and unreasonable.

Despite the Committee's indication that the Regional Assessment will build upon the findings of project specific EAs where required, there is no further discussion or evaluation that goes beyond those findings, and in fact, the Committee repeatedly refers back to these findings that effects are "short-term", "localized" and unlikely to result in significant adverse effects.

Finally, it is not clear which project-specific EAs were used, but presumptively, it was EAs completed through the Canada-Newfoundland and Labrador Offshore Petroleum Board ("CNLOPB") process. We note that the information and findings of the CNLOPB cannot be used to supplant the process under either CEAA 2012 or IAA.

Recommendation #3: *The Committee must complete its own assessment, regional in scope, of the potential of exploratory oil and gas drilling projects to produce adverse effects on the environment, without relying on project-specific EAs conducted by the CNLOPB.*

3.1.4 – Assessment of Environmental Components

The Draft Report provides an overview of the biophysical environment, providing findings and conclusions such as:

- "Many benthic invertebrate species are relatively immobile and are thus relatively sensitive to disturbance [with] characteristics that make recovery from disturbance relatively slow" [p. 40]
- Deep sea coral and sponges "are particularly sensitive to the effects of offshore exploratory drilling and other anthropogenic stressors" [p. 40]
- "Within the Study Area, a number of particularly important areas for corals and sponges have been identified through various scientific processes. Fisheries and Oceans Canada (DFO), for example, has identified various Significant Benthic Areas (SiBAs), which are regional habitats for which sponges, large and small gorgonian corals and/or sea pens are defining features [p. 44]
- "There have also been a number of Vulnerable Marine Ecosystems (VMEs) identified and delineated within the Study Area by the international community (including contributions from DFO). VMEs

²⁴ *Ibid*, p. 112.

The Committee noted that there are a number of protected species (under the *Species at Risk Act*, *NFLD Endangered Species Act*), including critical habitat of the spotted and northern wolfish.²⁵ The Committee also notes that many other species that occur within the area are considered to be at risk or otherwise of special conservation concern, and that there are no formally designated critical habitat for any of the species in or near the Study Area.²⁶

Despite the Committee's various observations about possible adverse impacts from exploratory oil and gas drilling projects, there is no assessment of the impacts on the regional scale.

3.2 Climate Change

The Committee calculated the annual GHG emissions of the projected 100 new exploratory wells to contribute 0.07 – 0.1% and 0.09 – 0.12% of the federal 2020 and 2030 GHG targets, respectfully.²⁷ The Committee noted that exploratory drilling is meant to facilitate the discovery and production of oil and gas, but cited its mandate to examine only exploratory drilling as the reason to leave the total GHG emissions and associated climate change considerations to “more appropriate venues”.²⁸

With respect, for the Committee to cite its mandate and the scope of the Regional Assessment (exploratory oil and gas) as an excuse not to calculate the full impacts of exploratory oil and gas on climate change goals and commitments – despite referring to benefits of potential development of the oil and gas sector, including full production facilities (for example, the economic benefits found at page 5 of the Draft Report) is hypocritical and suggests that the Committee has spent a great deal of time thinking about benefits outside of its “narrow” scope, but has not evaluated the potential risks. This is not a reasonable application of the requirements for the Committee to evaluate Canada's climate change commitments.

Recommendation #4: *The Committee should provide an overview, using modelling, of the full implications of emissions resulting from the development of exploratory oil and gas projects into full, oil-producing projects on Canada's climate obligations, particularly in light of Indigenous Knowledge (and the Two-Eyed Seeing method) that sees climate as an essential part of cumulative effects assessment.*

Additionally, Environment and Climate Change Canada is currently undertaking a Strategic Impact Assessment of Climate Change (“SACC”), which will set out how GHG emissions for projects should be determined, and whether upstream components should be included in those calculations. The SACC will set out the climate test to be used in impact assessments under the *Impacts Assessment Act*.

Recommendation #5: *The Committee should review the current Draft Report of the SACC and make a determination about its applicability to the Regional Assessment.*

²⁵ *Ibid*, p. 53.

²⁶ *Ibid*, p. 61.

²⁷ *Ibid*, p. xi.

²⁸ *Ibid*, p. xi.

3.3 Environmental Obligations

The Committee summarizes the potential implications of exploratory drilling and associated activities within the Study Area in Table 7.1. This includes a brief overview of potentially applicable domestic legislation and international conventions and sets out the implications of exploratory oil and gas projects for meeting Canada's obligations under those instruments. Notably, exploratory oil and gas does nothing to improve Canada's environmental obligations.

There is also no doubt that a large oil spill, such as from a blowout, could hinder Canada's ability to meet its obligations under the UN Convention on Biological Diversity.²⁹

Despite the Committee's finding that an oil spill from exploratory oil and gas could potentially hinder Canada's ability to meet its obligations under the UN Convention on Biological Diversity ("CBD"), the Committee concludes that implication of these projects are "neutral". We do not find the evaluation system used by the Committee to be effective at indicating potential serious implications for Canada's legal obligations with respect to protecting the environment. Furthermore, the Committee is lacking an actual assessment of these potential implications.

Furthermore, we cannot agree with the Committee's conclusion that, under the *United Nations Convention on the Law of the Sea* ("UNCLOS"), the effects of exploratory oil and gas drilling will be neutral.³⁰ The Committee notes that Canada has no obligations specific to exploratory drilling and provides no further analysis. We have identified several ways that offshore exploratory oil and gas drilling projects pose potential challenges for Canada's various obligations as set out under UNCLOS:

1. Canada currently has no jurisdiction beyond the 200 nautical mile limit of its Exclusive Economic Zone ("EEZ") and a large portion of the Study Area is situated beyond the EEZ. This necessarily implicates potential conflicts under UNCLOS with respect to Canada's jurisdiction for conducting a regional assessment without input from other UNCLOS signatories (which is the majority of global countries).
2. There are potential impacts between offshore platforms on which exploration drilling occurs (even temporarily) and marine navigation, including both domestic and international vessels.
3. Canada has rights *and obligations* with respect to protection of the marine environment under UNCLOS as a signatory coastal state.

An important principle of ocean governance and law, which has existed since at least the 17th century is the Freedom of the Seas doctrine. This doctrine conceptualizes the ocean as being the common heritage of humankind, with limited national rights or jurisdiction over the oceans, other than a fairly small marine area off each state's coast.³¹ The ocean was historically viewed as being free to use and belonging to no one. While this doctrine has guided the development of laws for ocean governance generally, advances in technology and impacts from fishing and shipping have

²⁹ *Ibid*, p. xi.

³⁰ *Ibid*, p. 174.

³¹ See: United Nations, "Oceans and the Law of the Sea" online <<https://www.un.org/en/sections/issues-depth/oceans-and-law-sea/>>

created a need for global cooperation and engagement in the marine space.³² The necessities and realities of global shipping has encouraged greater uniformity in all aspects of the legal framework governing ships and international trade. This includes uniformity in approaches to environmental protection and maritime safety.

Within the EEZ, Canada has sovereign rights over living and non-living natural resources, as well as the right and duty to protect and preserve the marine environment. However, these rights and duties must be exercised with “due regard” to the rights of other states, particularly foreign vessels’ rights to freedom of navigation within the EEZ.³³ Canada has a duty to protect the marine environment, as set out in articles 192 and 193 of UNCLOS. Additionally, under Article 194 of UNCLOS, Canada must take all measures necessary to prevent marine environmental pollution, including measures “necessary to protect and preserve rare or fragile ecosystems” and the habitat of depleted, threatened or endangered marine life.

Recommendation #6: *The Committee must further evaluate Canada’s duties and obligations under UNCLOS with respect to allowing for continued freedom of navigation and innocent passage inside of the 200NM EEZ and its territorial sea.*

Recommendation #7: *The Committee must consider Canada’s duties and obligations under UNCLOS with respect to environmental protection and consider its obligations to protect and preserve rare or fragile ecosystems. This must include a re-evaluation of the adverse impacts of exploratory oil and gas projects within its cumulative effects assessment (see more below).*

3.4 Contribution to Sustainability

In the Committee’s review of sustainability, the Committee focuses on four key aspects as set out in the *Interim Guidance: Considering the Extent to which a Project Contributes to Sustainability* and the *Interim Framework: Implementation of the Sustainability Guidance*.³⁴ These four factors are as follows:

- Interconnectedness
- Wellbeing of present and future generations
- Maximizing benefits and minimizing adverse effects
- Application of the Precautionary Principle and consideration of uncertainty

In its discussion of sustainability, the Committee relies heavily on a 2018 study on the value of the Newfoundland and Labrador offshore oil and gas industry by Jupia Consultants, a study that was commissioned by the Newfoundland and Labrador Oil and Gas Association (“NOIA”), which represents the interests of the oil and gas sector.³⁵

The Committee dedicates the majority of its discussion to the potential positive contributions of the oil and gas sector to the economy, but dedicates only a single sentence to potential negatives:

³² *Ibid.*

³³ United Nations Convention on the Law of the Sea, at article 56(1)(a), (b)(iii), 56(2).

³⁴ Draft Report, p. 163.

³⁵ *Ibid.*, p. 165.

“Despite the many positive socioeconomic contributions of this sector as described above, there have also been concerns raised at times about the potential negative implications of increased affluence and other social outcomes for individuals, families and communities and their overall well-being”.³⁶

It is a failure of the Committee that it does not discuss and evaluate any of the potential impacts to other important economic drivers in the region, such as the adverse impacts to fishing that it noted elsewhere in its Draft Report; for example, the loss of fishing areas, contamination of fisheries species or habitat and species on which they rely, safety risks, or the potential to impact the market perceptions of the health of fish in the fishing industry.

*The various regulatory requirements that pertain to spill prevention are also intended to help avoid or reduce any such effects resulting from a large spill event, although it is clear that such an incident could have serious implications for the nature, intensity, distribution or value of recreational or commercial activities in the affected area.*³⁷

Recommendation #8: *The Committee must conduct a full review and assessment of the potential negative socioeconomic impacts caused by exploratory oil and gas drilling projects.*

The Committee’s so-called cumulative effects assessment is also highly problematic because of perceived biases. After touting the many economic benefits of the oil and gas industry generally, which covers several decades, the Committee narrows its analysis of the possible social health and wellbeing analysis only to offshore exploratory drilling, without discussing the broader issues and adverse effects of large scale projects, which it clearly identifies as presenting risks to this criteria:

*In terms of social health and well-being, the nature, location and duration of offshore exploratory drilling activities typically means that these do not result in many of the socio-cultural issues that may be linked to larger-scale development projects.*³⁸

Recommendation #9: *The Committee must be consistent in its approach to assessment the contribution to sustainability of exploratory oil and gas by capturing both the positive and negative effects of these projects at a comparable level or scope.*

The Committee has also noted that it is of the view that a “measure of precaution is required” to guide the planning, regulatory review and implementation of exploratory oil and gas drilling in the Study Area.³⁹ The Committee highlights the precautionary principle as it is set out in the 1992 Rio Declaration on Environment and Development and points to its “analysis” of the effects and identification of mitigation and follow-up requirements in the Regional Assessment as being based on a precautionary approach.

The Committee’s review of mitigation and follow-up programs does not meet the threshold of the precautionary principle. Even as set out in the Rio Declaration (for more analysis on this, see

³⁶ *Ibid*, p. 165.

³⁷ *Ibid*, p. 166.

³⁸ *Ibid*, p. 167.

³⁹ *Ibid*, p. 168-169.

Appendix A), the precautionary principle is focused on “prevention” prior to damage, not mitigation and follow-up after damage has occurred. The Committee is wrong to state that the precautionary principle “requires that certain mitigations [...] be applied to all future wells in the Study Area”.⁴⁰ Under the precautionary principle, where there is a threat of adverse effects, action must be taken to prevent those threats – not to address them after they have happened. The precautionary principle also requires a proportional response, so that where threats of adverse effects are more serious (for example, in vulnerable or sensitive “special areas”), the response must be greater.

Recommendation #10: *The Committee should assess the opportunities and challenges (or limitations) of preventing adverse effects from exploratory oil and gas, going beyond merely mitigation and follow-up programs.*

The Committee further notes that:

Where there is uncertainty or other concerns around the nature and magnitude of potential effects, the Committee has also made recommendations on how these should be addressed for future projects, often taking a precautionary approach where the type and level of risk involved warrants this.⁴¹

This is an incorrect application of the precautionary principle; in a regional assessment of the regional effects of exploratory oil and gas, the precautionary principle must be applied to *all* aspects of that assessment.

The Committee also incorrectly refers to “associated risk of irreversible harm” in its discussion of the precautionary principle; however, the threshold for invoking action under the principle is only a threat of adverse effects.⁴² Irreversible harm is not a qualification under the precautionary principle.

In its conclusions on sustainability, the Committee notes that “it is beyond its scope and mandate to make determinations about the overall sustainability of the oil and gas industry as a whole”.⁴³ This follows a conclusion by the Committee that “Exploratory drilling is an important and required aspect of the oil and gas industry” and noting that the underlying objective of exploratory drilling is the discovery and production of oil.⁴⁴

Recommendation #11: *The Committee should include an assessment of the sustainability of the entire oil and gas industry within the study area, as an analysis of “all other relevant factors” that are within the scope of its mandate and Terms of Reference.*

⁴⁰ *Ibid*, p. 169.

⁴¹ *Ibid*, p. 169.

⁴² *Ibid*, p. 169.

⁴³ *Ibid*, p. 170.

⁴⁴ *Ibid*, p. 170.

3.5 The Precautionary Principle

The Committee stated that one area that challenged it was determining if there are identifiable geographic areas within the Study Area that deserve outright protection from future oil and gas exploratory drilling, or which required additional or enhanced mitigative measures. The Committee identified a number of “special areas”, none of which currently require enhanced protective measures.⁴⁵ The Committee noted that it had not been provided with any scientific basis on which to define specific locations, time or other situations where additional or enhanced mitigation or follow-up requirements should be applied.⁴⁶ The Committee did not recommend any portions of the Study Area to be excluded from exploratory drilling activities.

The basis for the Committee’s conclusion that there is no need to require additional mitigation protections for certain areas within the study area is counter to the application of the precautionary principle.

The Committee has at times referred to mitigation measures and monitoring as key aspects of the precautionary approach. In terms of monitoring and follow-up, the Committee has identified that requirements for monitoring are outlined in the *Offshore Waste Treatment Guidelines* and the *Environmental Protection Plan Guidelines*, which are administered by the C-NLOPB.⁴⁷

The Committee made a recommendation on the need for accelerated scientific review and analysis of certain “special areas” in the Study Area, as follows:

For each of the various types of identified special areas found within the Study Area (Marine Refuges, Fisheries Closure Areas, Ecologically and Biologically Significant Areas (EBSAs), Sensitive Benthic Areas (SiBAs), Vulnerable Marine Ecosystems (VMEs), it is recommended that the relevant authorities accelerate scientific review and analysis of these areas to determine if their various components and characteristics warrant additional protection, mitigation or follow-up measures for any future exploratory activity that may take place within them.⁴⁸

This approach is not an appropriate application of the precautionary principle (refer to Appendix A for more specific analysis). Where there is a possibility of adverse effects, scientific uncertainty should not be used as an excuse to prevent precautionary action. It seems obvious that these areas are a) especially significant and sensitive and b) have been identified as needing additional protection.

Although the lengthy temporal scope of these operations and associated exclusions creates the potential for interactions with commercial fishers and other ocean uses, some of these projects have been operating since the 1990s and are thus an established and known part of the seascape offshore Newfoundland and Labrador.⁴⁹

⁴⁵ *Ibid*, ix.

⁴⁶ *Ibid*, ix.

⁴⁷ *Ibid*, p. 111.

⁴⁸ *Ibid*, p. 116.

⁴⁹ *Ibid*, p. 127.

Recommendation #12: *In accordance with the Precautionary Principle as set out in the Impact Assessment Act, the Committee must re-evaluate its position on exclusion zones by undertaking an assessment of the special and protected areas within the Study Area to determine whether the associated potential adverse impacts of offshore oil and gas exploration drilling warrant exclusion for these activities.*

3.6 Cumulative Effects

The Committee underscores that many factors make assessment and evaluation of cumulative effects of multiple activities challenging because of uncertainty stemming from incomplete information and knowledge around a number of key areas, including⁵⁰:

- Nature, intensity, distribution and timing of future projects and activities
- Locations, abundance and movement of marine species and human activity
- Condition or health of species
- Occurrence and persistence of effects in marine ecosystems
- Ecosystem response to multiple and accumulating stresses

The Committee suggests that a planning modelling approach, rather than a predictive modelling approach, is more useful to avoid or minimize potential adverse effects.⁵¹ The Committee focused its attention on the Canada-Newfoundland and Labrador Offshore Petroleum Board's land tenure process as the optimal point in the planning process to consider spatial and temporal distribution and intensity of future activity, and to seek to address that by using the GIS decision support tool.⁵² A major problem with this approach is that the land tenure system is not an appropriate way to identify activities beyond oil and gas, which must be included in a cumulative effects assessment.

Recommendation #13: *The Committee must take a precautionary approach to conducting cumulative effects assessment by taking preventative action in the face of scientific uncertainty.*

Recommendation #14: *The Committee include climate change in its cumulative effects assessment.*

3.7 Oil Spills and Special Areas

In particular, the Committee has highlighted the fact that oil spills are of particular concern and would potentially cause long-lasting or irreversible adverse effects on the environment, and especially to sensitive or vulnerable marine areas:

Although available statistics and required spill prevention measures suggest that a blowout event is an extremely unlikely occurrence, this issue is amongst the most important and commonly raised concern heard by the Committee.⁵³

⁵⁰ *Ibid*, p. 132-133.

⁵¹ *Ibid*, p. x.

⁵² *Ibid* p. x.

⁵³ *Ibid*, p. 169.

The Committee notes the concerns that were frequently raised with respect to possible catastrophic release of hydrocarbons from offshore oil and gas activity (aka, oil spills) and the “certain damage to the ecosystem that would follow”.⁵⁴ The Committee also notes that there is “no doubt this is always a possible risk” and that “the fact that such spill prevention and response measures in Newfoundland and Labrador’s offshore environment are likely to be less than totally effective means a much harder look at risks to marine resources in the vicinity of offshore exploratory wells needs to become a priority. Thus, the Committee has called for improved science-policy linkages and the conduct of both qualitative and quantitative risk assessments in the future. Only then will we truly understand what critical environmental components are at risk”.⁵⁵

Recommendation #14: *The Committee should conduct its own qualitative and quantitative risk assessment of oil spills caused by exploratory oil and gas drilling, rather than calling for these risk assessments to be conducted in the future; otherwise, the Committee should recommend that no exploratory oil and gas projects be exempted from future impact assessment by regulation.*

The Committee has indicated in the Draft Report that no federal or provincial government department or agency has established or proposed areas or times within the Study Area that should be excluded from future exploratory drilling, nor that any such authority has provided any basis to define such exclusion areas.⁵⁶ The Committee noted that “other interests” suggested establishing exclusion zones, but did not provide supporting scientific basis for their identification.⁵⁷ It noted further that (emphasis added):

*respective regulatory authorities did not support these suggestions at this time (although a recommendation around additional analysis for future exploratory drilling activities in the Northeast Newfoundland Slope Marine Refuge is provided below).*⁵⁸

With respect, “other interests”, aka, stakeholders and participants, are not responsible for providing scientific information to support the establishment of exclusion zones in the Study Area; however, notwithstanding this misplaced and misguided presumption, participants, including our organization, have repeatedly indicated that a variety of “special” or protected areas exist within the Study Area. There is quite clearly a scientific basis for special and protected areas to exclude or limit other activities, for example fisheries, and that fact should be enough to warrant further investigation, examination, analysis and assessment by the Committee. Therefore, we cannot agree with the Committee’s statement.

Recommendation #15: *The Committee should retract its statement that there is no scientific evidence on which to base possible exclusion zones within the Study Area.*

Additionally, we are seriously concerned with the Committee’s deference to “respective regulatory authorities”, and what appears to be an abdication of the Committee’s responsibility to conduct its own assessment and come to its own conclusion on the matter.

⁵⁴ Draft Report, p x.

⁵⁵ *Ibid*, p. x-xi.

⁵⁶ *Ibid*, p. 114-115.

⁵⁷ *Ibid*, p. 115.

⁵⁸ *Ibid*, p. 115.

Although there are no prohibitions or other restrictions on offshore oil and gas exploratory drilling within each of the types of special areas currently found within the Study Area, they do represent areas that have been highlighted through applicable scientific processes as containing important environmental features and characteristics. Of particular interest in this Regional Assessment is therefore the potential for future drilling activities to adversely affect the important and defining ecological features, processes and integrity of any marine or coastal locations that are designated as special areas, including their associated human use and value.⁵⁹

The Committee notes that potential oil spills are a concern, “particularly the possibility for large amounts of discharged oil to extend to and reach special areas, and in doing so, to have adverse effects on their various defining ecological and socio-cultural features”.⁶⁰ This contradicts the Committee’s conclusion that there is no science that indicates that no special areas should be excluded from exploratory oil and gas operations. If the Committee is concerned by the potential adverse effects of an oil spill reaching a special area, what about oil spills and other exploratory drilling impacts, that occur *within* a special area?

Furthermore, the Committee notes that, although previous EAs for proposed drilling programs within the Study Area have found that spilled oil will most likely travel eastwards, given project and site-specific inputs, modeling can be quite variable. This is because the behavior of spilled oil is dependent on a number of properties and circumstances like the depth, total volume and rate of release, physical, chemical and biological environmental condition, and meteorological and oceanographic conditions at the well site and surrounding environment.⁶¹ The Committee further notes that the response level and methods necessary by oil spill response programs vary depending on a number of factors.⁶²

Recommendation #16: *The Committee should recommend that all exploratory oil and gas projects in the future continue to require individual and specific oil-spill modeling, and to show that if an oil spill occurs, that no adverse effects will result.*

We recognize that the Committee has recommended that operators demonstrate that any risks to intended biodiversity or conservation outcomes in a currently defined Marine Refuge (DFO) or a Northwest Atlantic Fisheries Organization (NAFO) Fisheries Closure Area will be avoided or mitigated.⁶³

Recommendation #17: *All future exploratory oil and gas drilling proposed in any marine area within the Study Area should not be exempted from the federal impact assessment process, and those areas must include all present and future areas in the Study Area that are protected by legislation, not just “currently defined” Marine Refuges and Fisheries Closure Areas. For example, protected areas would include Oceans Act Marine Protected Areas.*

⁵⁹ *Ibid*, p. 67.

⁶⁰ *Ibid*, p. 106.

⁶¹ *Ibid*, p. 106.

⁶² *Ibid*, p. 106-107.

⁶³ *Ibid*, p. 115.

3.8 Gender Analysis

While the Committee’s discussion of the intersection of sex and gender with other identity factors is, respectfully, lacking in scope or depth, we agree with the Committee’s recommendation that Diversity Plans specific to exploratory drilling programs should be required by the C-NLOPB for any future exploratory oil and gas projects.⁶⁴

3.9 Other Findings

We have provided further commentary on some of the specific recommendations that the Committee has set out in section 8 of its Draft Report, with respect to procedural requirements in the creation of a regulation stemming from the Regional Assessment.

Notwithstanding the concern that our organization has with respect to this incomplete Regional Assessment (Draft Report) being used to facilitate the creation of regulations to exempt exploratory oil and gas drilling projects in the Study Area, it is our opinion that the procedural recommendations for further public engagement and facilitation are necessary, and that they set out the minimum requirements for meaningful public participation under the IAA. We agree with the Committee, and its recommendations, that the IAAC consult with Indigenous and stakeholder groups and the public in the development of Ministerial Regulation(s) that may result from this Regional Assessment.

Recommendation #18: *The Committee’s recommendation with respect to consultation around future regulations resulting from this Regional Assessment Report should extend to the Minister and any federal departments that are involved in its potential creation.*⁶⁵

We agree that any such regulation must include a process for a proponent seeking an exemption to provide public notice and a description of its proposed project, that the proponent undertake engagement with Indigenous and stakeholder groups, that submissions made by the proponent be made available for public review, and that the outcome of any determination be made publicly available.⁶⁶ We highlight the requirements under the *Impact Assessment Act* for participation to be “meaningful” and note that the recommendations may not be enough to satisfy this requirement.

The Committee also recommends that proposed drilling programs that are exempted from federal impact assessment should be grandfathered.⁶⁷ We do not agree. The Committee has already recommended that the Regional Assessment be an ongoing, ever-green process and that, as new information and science becomes available, it be incorporated into the Regional Assessment. Grandfathering impact assessment exemptions for any project would not be in accordance with the Committee’s vision of an ever-green Regional Assessment.

Recommendation #19: *No exemptions from federal impact assessments created in the future as a result of this Regional Assessment should ever be “grandfathered”.*

⁶⁴ *Ibid*, p. 179.

⁶⁵ See Draft Report, at p. 183.

⁶⁶ See Draft Report, a p. 184.

⁶⁷ *Ibid*, p. 184.

4. The Geographic Information System

The Committee spent time and capacity during the Regional Assessment to develop a Geographic Information System (“GIS”) as a “decision-support tool”. The GIS is meant to be used to compile information to be made publicly available through an interactive system. The GIS is meant to be an “evergreen” product that must be regularly updated as new information and knowledge becomes available.⁶⁸

The Committee’s draft report is supplemented by a series of technical documents and mapping that provide additional information and analysis in support of the Regional Assessment and its findings; this content is located in the GIS, taking the form of a series of “modules”.⁶⁹ For instance, the GIS is stated as being a “key element” of the section devoted to summary descriptions of the existing physical, biological and socioeconomic settings of the Study Area.⁷⁰

The Committee commented that in the early stages of the RA process, it decided that a GI component would be an optimal tool to compile, organize and allow for the effective and efficient presentation of geospatial information and knowledge. The Committee views the development and maintenance of the GIS system as “integral to the successful implementation of the regulation that it understands will be derived from the Regional Assessment Report”.⁷¹

As an initial point, we have noted that associated technical supporting documents (module) and the GIS decision-support tool were not released for public review at the same time as the Draft Report. Upon the release of the Draft Report, the GIS was not available to be viewed by the public; the GIS was opened for public access on 03 February 2020. The Draft Report frequently refers the reader to the GIS and its modules for further information, mapping and references.⁷²

On a practical and technical level, there were significant problems associated with the use of the GIS system, including:

- **Loading** – It was difficult to initially load the GIS in a web browser (Safari) using the current version of MacOS. Following that, there were significant delays loading maps and subsequent figures that overlay onto maps. Overlaying multiple boundaries or map information (for example, physical and biological environment and special areas) caused the cursor to endlessly display a loading icon and prevented further use of other features – preventing, for example, minimizing of other windows to allow for viewing of the map and stopped text from being reloaded. To fix this issue, the website needed to be reloaded.
- **Text** – At times, some text and tables embedded within text did not fully display in the associated windows, and required the user to move bars to change the display to allow for reading the text. This in turn prevented the display of a sizeable portion of the mapping.
- **Scrolling** – Once the associated windows (the columns) were moved (adjusted), scrolling did not work, and text needed to be manually scrolled using the side scrolls.

⁶⁸ *Ibid*, p. xiii.

⁶⁹ *Ibid*, 12.

⁷⁰ *Ibid*, 12.

⁷¹ *Ibid*, p. viii.

⁷² See for example Draft Report, p. 37-38.

- **Hyperlinks** – The website links to further information were not hyperlinked, which made accessing further resources more difficult.

Our conclusion in terms of the GIS, in its current state, is that it does not provide any clarity to the Regional Assessment Draft Report or its (lack) of assessment; rather, it creates a further technical and practical roadblock to easy accessibility.

The Committee also recommends the creation of an Oversight Committee to ensure new information is identified and examined on an annual basis to determine its applicability to offshore exploratory drilling.⁷³ The Oversight Committee is recommended to have representation from Indigenous groups, environmental groups, fishing and oil and gas industries and others. The Committee also recommends that the Impact Assessment Agency of Canada (“IAAC”) lead the establishment of the Oversight Committee.

Under the current Impact Assessment framework, proponents of exploratory oil and gas drilling projects must undergo an impact assessment, by which they provide and produce the necessary information to inform an assessment. Therefore, while there are concerns about the integrity of the provided information, they are responsible and bear the associated costs of producing information if they wish to receive potential approval of their projects. The recommendation suggested by the Committee would transfer this burden onto government and shift the financial burdens of producing scientific information onto government. There seems to be no benefit to the environment, including all of its socio-economic and biological components, by what the Committee is recommending.

The Committee has recommended that the Regional Assessment (including the GIS) be reviewed annually and updated as required, including identifying and incorporating new or updated information.⁷⁴ The Committee suggests that this will help to facilitate an “adaptive management approach” for future exploratory drilling projects.⁷⁵ However, the Committee does not identify:

- Who will be responsible to review and update the Regional Assessment?
- Who will be responsible to identify and incorporate new information?
- Where will information be housed?
- How information will be reviewed?
- How will confidential information be used?
- How will new information be incorporated into regulations?

Recommendation #20: *The Committee should clarify, and detail, who is responsible for reviewing and updating the Regional Assessment, who is responsible for identifying new information, how the information will be peer-reviewed, how confidential information will be used, and how new information produced for the Regional Assessment will be incorporated into the proposed regulations.*

⁷³ *Ibid*, p. 117.

⁷⁴ *Ibid*, 89.

⁷⁵ *Ibid*, p. 89.

5. Conclusion & Summary of Recommendations

It is our conclusion that the Committee requires additional time and capacity to conduct, in full, the Regional Assessment of exploratory oil and gas projects in the Study Area. Many of our recommendations are calls for additional work to be completed, because in its current state, the Draft Report does not fulfil the requirements under the Agreement, nor did the process to date meet the criteria of meaningful public participation.

5.1 Overview of Recommendations

Assessment of Adverse Effects

Recommendation #1: *The Committee must request more time from the Minister to continue the Regional Assessment, and then use the applicable authority vested in it to obtain all relevant and necessary information.*

Recommendation #2: *The Committee should conduct an assessment of whether there exploratory oil and gas drilling activity causes potential adverse effects to the marine environment, including a decision on whether these potential adverse effects can be fully prevented or reasonably mitigated by current applicable regulatory requirements.*

Recommendation #3: *The Committee must complete its own assessment, regional in scope, of the potential of exploratory oil and gas drilling projects to produce adverse effects on the environment, without relying on project-specific EAs conducted by the CNLOPB.*

Climate Change

Recommendation #4: *The Committee should provide an overview, using modelling, of the full implications of emissions resulting from the development of exploratory oil and gas projects into full, oil-producing projects on Canada's climate obligations, particularly in light of Indigenous Knowledge (and the Two-Eyed Seeing method) that sees climate as an essential part of cumulative effects assessment.*

Recommendation #5: *The Committee should review the current Draft Report of the SACC and make a determination about its applicability to the Regional Assessment.*

Canada's Environmental Obligations

Recommendation #6: *The Committee must further evaluate Canada's duties and obligations under UNCLOS with respect to allowing for continued freedom of navigation and innocent passage inside of the 200NM EEZ and its territorial sea.*

Recommendation #7: *The Committee must consider Canada's duties and obligations under UNCLOS with respect to environmental protection and consider its obligations to protect and preserve rare or fragile ecosystems. This must include a re-evaluation of the adverse impacts of exploratory oil and gas projects within its cumulative effects assessment (see more below).*

Contribution to Sustainability

Recommendation #8: *The Committee must conduct a full review and assessment of the potential negative socioeconomic impacts caused by exploratory oil and gas drilling projects.*

Recommendation #9: *The Committee must be consistent in its approach to assessment the contribution to sustainability of exploratory oil and gas by capturing both the positive and negative effects of these projects at a comparable level or scope.*

Recommendation #10: *The Committee should assess the opportunities and challenges (or limitations) of preventing adverse effects from exploratory oil and gas, going beyond merely mitigation and follow-up programs.*

Recommendation #11: *The Committee should include an assessment of the sustainability of the entire oil and gas industry within the study area, as an analysis of “all other relevant factors” that are within the scope of its mandate and Terms of Reference.*

The Precautionary Principle

Recommendation #12: *In accordance with the Precautionary Principle as set out in the Impact Assessment Act, the Committee must re-evaluate its position on exclusion zones by undertaking an assessment of the special and protected areas within the Study Area to determine whether the associated potential adverse impacts of offshore oil and gas exploration drilling warrant exclusion for these activities.*

Cumulative Effects

Recommendation #13: *The Committee must take a precautionary approach to conducting cumulative effects assessment by taking preventative action in the face of scientific uncertainty.*

Recommendation #14: *The Committee should include climate change in its cumulative effects assessment.*

Oil Spills and Special Areas

Recommendation #14: *The Committee should conduct its own qualitative and quantitative risk assessment of oil spills caused by exploratory oil and gas drilling, rather than calling for these risk assessments to be conducted in the future; otherwise, the Committee should recommend that no exploratory oil and gas projects be exempted from future impact assessment by regulation.*

Recommendation #15: *The Committee should retract its statement that there is no scientific evidence on which to base possible exclusion zones within the Study Area.*

Recommendation #16: *The Committee should recommend that all exploratory oil and gas projects in the future continue to require individual and specific oil-spill modeling, and to show that if an oil spill occurs, that no adverse effects will result.*

Recommendation #17: All future exploratory oil and gas drilling proposed in any marine area within the Study Area should not be exempted from the federal impact assessment process, and those areas must include all present and future areas in the Study Area that are protected by legislation, not just “currently defined” Marine Refuges and Fisheries Closure Areas. For example, protected areas would include Oceans Act Marine Protected Areas.

Other Findings

Recommendation #18: The Committee’s recommendation with respect to consultation around future regulations resulting from this Regional Assessment Report should extend to the Minister and any federal departments that are involved in its potential creation.⁷⁶

Recommendation #19: No exemptions from federal impact assessments created in the future as a result of this Regional Assessment should ever be “grandfathered”.

Recommendation #20: The Committee should clarify, and detail, who is responsible for reviewing and updating the Regional Assessment, who is responsible for identifying new information, how the information will be peer-reviewed, how confidential information will be used, and how new information produced for the Regional Assessment will be incorporated into the proposed regulations.

⁷⁶ See Draft Report, at p. 183.

Appendix A – The Precautionary Principle

The Precautionary Principle in Law and its place in the Regional Assessment

Submission to the Newfoundland and Labrador Offshore Regional Assessment Committee

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1. Precautionary Principle: An Overview

1.1 What is the precautionary principle?

The precautionary principle is a **guiding principle** in decision-making processes and is used in Canada and internationally, including in impact assessments. It is widely considered to be a custom of international law.⁷⁷ While it has been cast in many different forms and there are many different definitions, fundamentally the precautionary principle requires **precautionary action** where the impacts of planning activities are unknown.

The precautionary principle is based in practical decision-making that takes a precautionary approach to conducting activities or making decisions in the face of scientific uncertainty. It is a guiding principle that is located within the broader context of sustainable development by looking towards the future and planning for sustainable use of resources and the protection of the environment.

As a legal principle, one of the primary original sources of the principle is the United Nations Conference on Environment and Development, also known as the Rio Conference or Earth Summit, held in Rio de Janeiro in 1992. The conference resulted in the *Rio Declaration on the Environment and Development* that included a proclamation (emphasis added):

*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*⁷⁸

1.2 How does the precautionary principle work?

The precautionary principle is often used to guide decision-making for development of new resources and prioritizes environmental conservation. It is meant to guide decision-making processes by requiring **action** in instances where there is a **threat of damage** to the environment or human health and an accompanying **lack of scientific certainty** about those possible threats.

A decision-making process using the precautionary principle involves an assessment of the risk of an activity in anticipation of damage to the environment. Where there is uncertainty about the risk of an activity, action proportionate to the severity of the threat must be taken. This usually involves taking measures to prevent or reduce the impacts of that activity on the health of the environment.

The precautionary principle is sometimes categorized as being “strong” or “weak”. The strong version of the precautionary principle requires that regulation should be presumptively applied where there is a serious threat to human health or the environment, even where there is scientific

⁷⁷ Tavis Potts, “The Management of Living Marine Resources in the Polar Regions” in Natalia Loukacheva, Ed, *Polar Law Textbook* (Copenhagen: Nordic Council of Ministers, 2010) at 73, 75.

⁷⁸ *Rio Declaration on the Environment and Development*, United Nations Conference on Environment and Development (Rio de Janeiro, 1992), Principle 15.

uncertainty about the nature or extent of those threats. It also places an **evidentiary burden on the proponent** of an activity to shift that presumption.⁷⁹ The weak version of the precautionary principle does not shift this burden. The provision for precaution in the Rio Declaration is an example of a “weak” version.⁸⁰ While both the weaker and stronger versions of the precautionary principle emphasize anticipation of harm and preventive measures, stronger versions generally require action, while the weaker versions only suggest or permit for it.⁸¹

One of the criticisms of the precautionary principle is that it provides no guidance on how it works or is meant to be implemented within specific decision-making processes.⁸² More specifically, the precautionary principle is not explicit on the degree of threat that triggers the principle or shifts the evidentiary burden onto the proponent, nor clear about what measures that must be taken or how much information is required.⁸³

While the degree of evidence required to trigger the action in the face of a threat is not always clear, it usually requires at least a threshold amount of evidence of a threat to the environment in order to be triggered, thus ensuring that precautionary measures are not based on purely hypothetical considerations or mere superstition that is not scientifically verified.⁸⁴ Action required under the principle depends on the nature of the risk (severity of the harm) and the strength of the evidence of the risk itself. Some applications of the principle have prohibited, rather than restricted, activities that pose a threat to the environment.⁸⁵

Additionally, the precautionary principle cannot be understood in isolation from other important legal principles that guide and aid in decision-making. The precautionary principle is often used conjunctively with an **ecosystem approach** to environmental decision-making. This approach calls for integrated management and conservation of all of the resources in a geographical area, as opposed to a sectoral approach focused on specific issues or activities.⁸⁶ One of the key components of the ecosystem approach is broad participation in decision-making.⁸⁷

The ecosystem approach recognizes that multiple simultaneous factors influence living resources.⁸⁸ An ecosystem approach has been used to develop fisheries and other resources. Fundamentally, the ecosystem approach is about sustainable resource allocation and finding a regional balance between resource-use and management and protection of the environment.⁸⁹

⁷⁹ Sachs, . 1288.

⁸⁰ Sachs, 1292.

⁸¹ Sachs, p 1295; see also: Kenisha Garnett and David Parsons, “Multi-Case Review of the Application of the Precautionary Principle in European Union Law and Case Law” *Risk Analysis*, vol 37 No. 3 (2017).

⁸² Sachs, 1289.

⁸³ Sachs, p 1296.

⁸⁴ Garnett, p. 505.

⁸⁵ Garnett, p. 509-510.

⁸⁶ Steven Murawski, “Ten Myths Concerning Ecosystem Approaches to Marine Resource Management” (2007) 31:6 *Marine Policy* 681 at 682.

⁸⁷ *Ibid*, 681.

⁸⁸ Adam Soliman, “Fisheries Governance and How It Fits Within the Broader Arctic Governance”, 37 *Seattle U L Review* 1209 at 1213.

⁸⁹ Serge M Garcia & Keven L. Cochrane, “Ecosystem Approach to Fisheries: A Review of Implementation Guidelines”, 62:3 *J Marine Science* 311 at 312.

There are other components of the precautionary principle that might also be considered. For example, the United Nations Food and Agricultural Organization (“FAO”) has argued that taking a precautionary approach involves foresight and requires action in the face of incomplete scientific knowledge about undeveloped fisheries.⁹⁰ The FAO introduced guidelines to manage new fisheries in the Central Arctic Ocean using a precautionary approach, which includes

- consideration of future generations;
- identifying undesirable outcomes;
- conducting scientific review;
- prioritizing conservation where impacts are scientifically unknown; and
- placing the burden of proof on proponents to show that their activities are not harmful.⁹¹

1.3 Is there a difference between the precautionary principle and the precautionary approach?

A distinction can, and often is, made between the precautionary principle and a precautionary approach. The difference between these two concepts is nuanced, but essentially the precautionary principle is a principle of law, while the precautionary approach is a method of realizing the goals of the principle.

⁹⁰ FAO, “Precautionary approach to capture fisheries and species introductions. Elaborated by the Technical Consultation on the Precautionary Approach to Capture Fisheries (Including Species Introductions)”, FAO Technical Guidelines for Responsible Fisheries, No. 2 (Rome: FAO, 1996), at article 6 [Precautionary Approach].

⁹¹ *Ibid*, article 6(a-h).

2. The Precautionary Principle and Canadian Law

2.1 How is the precautionary principle used in Canadian laws?

The precautionary principle has been developed and used in many Canadian statutes and regulations (together, “legislation”), many of which have adopted and adapted the definition set out in the *Bergen Ministerial Declaration on Sustainable Development* (emphasis added):

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.⁹²

The Ministerial declaration resulted from the Bergen Conference on Sustainable Development, which was attended by the Environment Ministers of 34 countries and one of a series of meetings held in advance of the Rio Conference.⁹³

In Canadian legislation, the precautionary principle is generally offered as a guiding principle in a decision-making framework and used to assist in the interpretation of other legal requirements, rights or duties, or to provide guidance on how to conduct procedures provided for by the law.

Most often, the precautionary principle deals with lack of information, usually scientific information, about the threat posed by an activity that must undergo government decision-making processes before being approved. While there is often a general objective to use a precautionary approach in many environmental and environmental assessment laws throughout Canada, it is common for the application of the precautionary principle to remain largely discretionary with respect to individual processes.

For more information on the specific language used to a) describe the substance of the precautionary principle and b) set out the legal requirements around it, consult **Appendix B**, which is a table of select laws in Canada that incorporate or require the use of the precautionary principle.

2.2 How have Canadian courts treated the precautionary principle?

The precautionary principle has been adopted and applied at all court levels in Canada. The Supreme Court of Canada (“SCC”) adopted the precautionary principle as a **legal principle** and has applied it as an **element of statutory interpretation**.

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town) (2001) SCC 40

In *Spraytech*, the SCC was asked to review the legitimacy of the town of Hudson adopting by-laws restricting the use of pesticides in certain areas and limiting their use to enumerated activities.

⁹² *Bergen Ministerial Declaration on Sustainable Development* (1990) at para 7.

⁹³ See: <https://unfccc.int/resource/ccsites/senegal/fact/fs220.htm>

The court, in considering the issues, included a discussion of whether the by-laws adhered to the precautionary principle as set out in international law.

The SCC referenced the definition of the principle found in the *Bergen Ministerial Declaration on Sustainable Development* (above). The court noted that Canada had advocated for inclusion of the precautionary principle during the meetings and highlighted that it had been codified in multiple pieces of Canadian legislation.⁹⁴ The Court also commented that the precautionary principle has been included in virtually every treaty and policy document related to the protection and preservation of the environment and noted that there was sufficient state practice to argue that the principle was a principle of customary international law.⁹⁵

In *Spraytech*, the SCC concluded that “in the context of the precautionary principle’s tenets, the Town’s concerns about pesticides fit well under their rubric of preventive action” (emphasis added).⁹⁶

Castonguay Blasting Ltd v Ontario (Environment) (2013) SCC 52

In *Castonguay*, the SCC was asked to determine whether a company had violated Ontario’s *Environmental Protection Act* (“EPA”) by failing to report an incident that saw rock debris being thrown into the air during blasting. Part of the issue before the court was interpreting provisions of the EPA, in light of its purpose (to protect and conserve the environment).

The SCC expanded on the definition and meaning of the precautionary principle, discussing that “this emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation” (emphasis added).⁹⁷

The court also provided guidance on the level of scientific uncertainty and evidence required to trigger action under the precautionary principle. In commenting on the EPA provision requiring persons to notify the provincial Department of Environment where substances had been released into the environment, it noted that the provision gave effect to concerns underlying the principle by ensuring that the Minister was notified and had the ability to respond to discharges “without waiting for proof that the natural environment has, in fact, been impaired”.⁹⁸

Morton v. Canada (Minister of Fisheries and Oceans) (2015) FC 575

In *Morton*, the Federal Court was asked to review the approval of licences for an aquaculture operation to transfer smolts from fish farms. The fish smolts carried a disease, which the appellant claimed could lead to infections in wild species. The Minister contended that the licence conditions were reasonable and reflected a precautionary approach. The court used the opportunity to revisit the legal context and meaning of the precautionary principle. The court’s review of the scientific certainty necessary for the precautionary principle is instructive.

⁹⁴ 114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town) (2001) SCC 40 at para 31.

⁹⁵ *Ibid*, para 32.

⁹⁶ *Ibid*.

⁹⁷ *Castonguay Blasting Ltd v Ontario (Environment) (2013) SCC 52* at para 20.

⁹⁸ *Castonguay*, at para 20.

The Federal Court made the observation that the SCC’s discussion of the precautionary principle as an emerging principle of international law in its *Castonguay* decision informed the scope and application of the legislative provision in question in that decision.⁹⁹ The court commented that:

[T]he precautionary principal recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the public policy realm to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law.¹⁰⁰

In *Morton*, the court noted that the evidence before it demonstrated that there was a body of credible scientific study, conducted by respected scientists in different countries, establishing a causal relationship between PRV (a disease agent) and HSMI (the disease). The court discussed the level of science necessary and its connection to precautionary action (emphasis added):

[A]lthough there is a healthy debate between respected scientists on the issue, the evidence suggests that the disease (PRV) may be harmful to the protection and conservation of fish, and there a “lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”.¹⁰¹

The Federal Court concluded that based on the evidence, the Minister was “not [...] erring on the side of caution”.¹⁰²

The Federal Court also took the opportunity in its decision to comment on the validity of licence conditions created under the statutory scheme (the *Fisheries Act*) with respect to their interpretation in light of the precautionary principle. The court found that a consequence of interpreting regulations made under the *Fisheries Act* to reflect the precautionary principle meant that licence conditions must also reflect the precautionary principle.¹⁰³

2.3 How has the precautionary principle been used by courts in reviewing environmental assessments?

Under the *Canadian Environmental Assessment Act* (2012), now replaced by the *Impact Assessment Act*, decision-makers were required to apply the precautionary principle. Canadian courts have reviewed decisions made by relevant decision-makers to determine whether the precautionary principle was adequately applied within environmental assessment processes.¹⁰⁴

⁹⁹ *Morton*, at para 42.

¹⁰⁰ *Morton* at para 43.

¹⁰¹ *Morton* at para 45.

¹⁰² *Morton* at para 46.

¹⁰³ *Morton* at para 98.

¹⁰⁴ *Canadian Environmental Assessment Act* (2012) at s. 4(2).

In practice, courts will give deference to decision-makers in their application of the precautionary principle, but they continue to ensure that the precautionary principle was adhered to. This will include reviewing mitigative steps taken and reasons for decisions.

Pembina Institute for Appropriate Development v. Canada (Attorney General) (2008) FC 302

In *Pembina*, the Federal Court reviewed a report produced by a Joint Review Panel for an environmental assessment for a proposed oil-sands mine. The court was asked to review whether the Panel had erred by failing to consider factors as required under the *Canadian Environmental Assessment Act* (1992) by relying on mitigation measures that were not technically and economically feasible. In its decision, the court took the opportunity to review the requirement under CEEA 1992 to apply the precautionary principle.

The Federal Court referred to the earlier decision in *Canada Parks* and opined that adaptive management “permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exist”.¹⁰⁵ This commentary is important because it highlights that adaptive management as a measure under the precautionary principle requires that sufficient information must already exist.

The court commented that within the scope of the duties incumbent upon a panel, it must use two guiding tenets: the precautionary principle and adaptive management.¹⁰⁶ The court highlighted that environmental assessment is about management of future risk and there is a duty (on the panel in that case) to gather information to fulfil this obligation.¹⁰⁷

The court analyzed the environmental assessment with respect to greenhouse gas (“GHG”) emissions from the proposed project. The proponent had included annual GHG emissions as well as the intensity of those emissions per barrel. The court concluded that the panel was required to explain in a general way why the potential environmental effects, with or without mitigation measures, would be insignificant.¹⁰⁸ The Court’s remedy was to make the Panel provide its justification on why the proposed targets would have a mitigable effect on greenhouse gas emissions from the project “to a level of insignificance.”¹⁰⁹

¹⁰⁵ *Pembina*, at para 32.

¹⁰⁶ *Pembina*, at para 33.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, at para 73.

¹⁰⁹ *Ibid.*, at para 81

3. The Precautionary Principle in Other Jurisdictions

3.1 How has the precautionary principle been assessed in other jurisdictions?

The precautionary principle is used in many international conventions. It is included in the *Convention on Biological Diversity* 1992 (“*CBD*”) to which Canada is a party. Principle 15 of the *CBD* holds that States should apply the precautionary principle to their capabilities. It was later elaborated in 1995 that “the work [of the Secretariat on marine and coastal biological diversity] should not be impeded by the lack of full scientific information and will incorporate explicitly the precautionary approach in addressing conservation and sustainable use issues.”

The precautionary principle has also been discussed and analyzed by other courts. Specifically, several decisions coming out of Australia have reviewed the framework for implementing the precautionary principle in more detail than Canadian courts. They have been provided here because they provide further commentary and help set out a possible and workable framework to using the precautionary principle in the Regional Assessment.

Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133

This is a judgement from the Land and Environment Court of New South Wales. Before the court was an appeal by a telephone company of a decision by the Shire Council to deny a development application allowing the company to erect a cellphone tower. The court heard submissions that argued for the precautionary principle to be applied in the case. The court took the opportunity to explore in more detail how to apply the precautionary principle.

The court identified two conditions precedent or thresholds to triggering the application of the precautionary principle: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. The court noted that these conditions are cumulative. Once the principle is triggered, it must be applied proportionately.¹¹⁰

i) Threats of serious or irreversible damage.

The court discussed that the serious or irreversible damage required for the precautionary principle to be triggered must not already have occurred, only that there be a threat. The threat, however, must attain the level of being “serious” or “irreversible”.¹¹¹ The court noted that threats include direct and indirect, secondary and long-term threats, and incremental or cumulative impacts of multiple or repeated actions or decisions.¹¹² Where threats may interact or be interrelated, the court suggests that they should not be addressed in isolation.¹¹³

The court also provided guidance for assessing the seriousness or irreversibility of environmental damages, listing factors that include:

¹¹⁰ *Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133* at para 128.

¹¹¹ *Ibid* at para 129.

¹¹² *Ibid* at para 130.

¹¹³ *Ibid* at para 130.

- Spatial scale of threat (regional, local, national, international)
- Magnitude of impacts
- Perceived value of threatened environment
- Temporal scale of possible impacts (timing and longevity)
- Complexity and connectivity
- Manageability of impacts
- Level of public concern
- Reversibility of impacts¹¹⁴

The assessment will be “enhanced” by seeking and taking into account the views of relevant stakeholders and rightsholders.¹¹⁵ The court noted, with respect to rightsholders, that this was important because “different judgments, values and cultural perceptions of risk, threat and required action play a role in the assessment process”.¹¹⁶

The court also noted that there must be scientifically reasonable scenarios or models of possible harm.¹¹⁷ The court noted that the existence of a threat does not involve any evaluation of the scientific uncertainty of the threat in the first stage of assessment.

ii) Scientific uncertainty

The court further found that assessing the degree of uncertainty might include consideration of factors like the sufficiency of evidence that there might be serious or irreversible environmental harm caused by the development and the potential to reduce uncertainty, with respect to what is possible in principle, economically and within a reasonable time frame.¹¹⁸

The court identified a key issue as being how much scientific uncertainty must exist for the precautionary principle to be triggered. The court noted that the threshold is less than full scientific uncertainty.¹¹⁹ The court also referenced a threshold test of “reasonable scientific plausibility”, which is concerned with instances where a threat of risk of environmental damage is considered scientifically likely, as follows:

de Sadeleer posits a threshold test of “reasonable scientific plausibility,” or where a threat or risk of environmental damage is considered scientifically likely. de Sadeleer explains his test of reasonable scientific plausibility as follows:

“That condition would be fulfilled when empirical scientific data (as opposed to simple hypothesis, speculation, or intuition) make it reasonable to envisage a scenario, even if it does not enjoy unanimous scientific support.

¹¹⁴ *Ibid* at para 131.

¹¹⁵ *Ibid* at para 132.

¹¹⁶ *Ibid* at para 132.

¹¹⁷ *Ibid* at para 133.

¹¹⁸ *Ibid* at para 141.

¹¹⁹ *Ibid* at para 145.

When is there ‘reasonable scientific plausibility’? When risk begins to represent a minimum degree of certainty, supported by repeated experience. But a purely theoretical risk may also satisfy this condition, as soon as it becomes scientifically credible: that is, it arises from a hypothesis formulated with methodological rigour and wins the support of part of the scientific community, albeit a minority.

The principle may consequently apply to all post-industrial risks for which a cause-and-effect relationship is not clearly established but where there is a ‘reasonable scientific plausibility’ that this relationship exists. This would be particularly appropriate for delayed pollution, which does not become apparent for some time and for which full scientific proof is difficult to assemble”: N de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules, Oxford University Press, 2005 at p. 160.¹²⁰

The court commented that where the first two thresholds of the precautionary principle are met, the evidentiary burden shifts onto the proponent to prove that the threat does not exist or is negligible.¹²¹ The rationale for the shift of the burden onto the proponent is to act preventatively before scientific certainty is achieved.¹²² If the proponent fails to discharge this burden, it means that in the final decision-making process, the decision-maker must assume that there will be serious or irreversible environmental damage when making a decision.¹²³

iii) Precautionary measures

The court also looked at the type and level of precautionary measures that are necessary or appropriate, concluding that these depend on the degree of **seriousness** and **irreversibility** of the threat, and the degree of uncertainty. The more significant and uncertain the threat, the greater the degree of precaution that is required.¹²⁴ Thus, measures that are adopted should be proportionate to the potential threats.¹²⁵

The court in *Telstra* analyzed how a cost-benefit analysis might be used and suggested that traditional cost-benefit analysis does not fit into complex decision-making because of difficulties with incorporating environmental factors. The court suggested the use of a multi-criteria analysis, with integration of monetary and non-monetary decision criteria that reflect three dimensions: ecological, economic and social. Criteria within each dimension can be set to allow decision-makers to weigh the importance of each element¹²⁶

Finally, the court noted that the precautionary measures undertaken must be viewed in light of other principles of ecologically sustainable development:

¹²⁰ *Ibid* at para 148.

¹²¹ *Ibid* at para 150.

¹²² *Ibid* at para 151.

¹²³ *Ibid* at para 154.

¹²⁴ *Ibid* at para 161.

¹²⁵ *Ibid*, at para 167.

¹²⁶ *Ibid*, at para 175-76.

This means that the precautionary measures that should be selected must not only be appropriate having regard to the precautionary principle itself, but also in the context of the other principles of ecologically sustainable development including inter-generational and intra-generational equity and the conservation of biological diversity and ecological integrity”.

The court noted that in some circumstances these other principles may strengthen the case for precautionary action [para 182].¹²⁷

*Environment East Gippsland Inc v VicForests [2010] VSC 335 (11 August 2010)*¹²⁸

In *Vic Forests*, the plaintiffs were seeking to stop logging of an old growth forest, claiming the proposed project would breach conditions for permits to timber harvest. The plaintiffs contended that the project proponent was obligated to proceed in accordance with the precautionary principle with respect to habitat preservation for endangered species. The Supreme Court of Victoria accepted the analysis of the precautionary principle in the *Telstra* decision and referred to the factors it set out regarding both threats of serious and irreversible environmental damage. The court reiterated that a threat must have scientific basis.¹²⁹

The court made a number of determinations and conclusions, including:

- The degree of precaution that is appropriate depends on the combined effect of the seriousness of the threat and the degree of scientific uncertainty;¹³⁰
- The precautionary principle is not directed to avoidance of all risks;¹³¹
- The margin of error for a particular proposal might be controlled by an adaptive management approach;¹³²
- Action under the precautionary principle requires a proportional response;¹³³
- A reasonable balance must be struck between cost burden and benefit derived;¹³⁴ and
- A precautionary approach will also require consideration in the context of other principles of environmentally sustainable development.¹³⁵

The court then provided an analytical framework for determining the appropriate response under the precautionary approach:¹³⁶

- a) Is there a real threat of serious or irreversible damage to the environment?
- b) Is it attended by a lack of full scientific certainty?

¹²⁷ *Ibid*, at para 182. Source link: <https://jade.io/article/185471>

¹²⁸ https://www.informea.org/sites/default/files/court-decisions/Environment%20East%20Gippsland%20Inc%20v%20VicForests_AUSTLII.pdf

¹²⁹ *Vic Forests* at para 192.

¹³⁰ *Ibid* at para 204.

¹³¹ *Ibid* at para 203.

¹³² *Ibid* at para 205.

¹³³ *Ibid* at para 207.

¹³⁴ *Ibid*, at para 208

¹³⁵ *Ibid*, at para 211.

¹³⁶ *Ibid*, at para 212.

- c) Is yes to both, has the proponent demonstrated the threat is negligible?
- d) Is the threat able to be addressed by adaptive management?
- e) Is the measure alleged to be required proportionate to the threat in issue?

4. Using the Precautionary Principle in Environmental Assessments

4.1 Has the precautionary principle ever been analyzed during an environmental assessment of offshore oil and gas relevant to the regional assessment?

In 1999, a joint federal-provincial panel conducted an assessment of environmental and socio-economic impacts of petroleum exploration and drilling on Georges Bank offshore of Nova Scotia. The primary issue before the panel was whether to extend the legislated moratorium on hydrocarbon exploration in the study area. In its report, the panel noted that many participants in the process had highlighted the need to use the precautionary principle. The panel concluded specifically that “the available information on the impacts of seismic surveys is generally sparse; there is some credible evidence that fish catchability can be affected. Caution is called for”.¹³⁷ Amongst the Panel’s other conclusions to this effect were the following:

- Conservation and protection of habitat and biological diversity, productivity and resources should be the highest priority (in line with the precautionary principle prioritizing conservation);
- It would be more difficult to initiate new conservation approaches that involve zoning of activities if petroleum activities were allowed;
- Cumulative effects of exploration including field development and production could have significant impacts on the biota and fisheries in the area; and
- If commercial quantities of oil and gas were discovered, it would be inappropriate to permit the associated risk from development and production that inevitably follows.¹³⁸

In its conclusion with respect to decision-making, the Panel concluded that “in considering risks to Georges Bank, the unacceptability of potential harm is the most important factor”.¹³⁹ The panel recommended that action be taken to have the moratorium on petroleum activities on Georges Bank remain in place.¹⁴⁰

¹³⁷ Georges Bank Review Panel Report (1999: Natural Resources Canada) at p. 57.

¹³⁸ Georges Bank Review Panel Report, see: p. 57-58.

¹³⁹ *Ibid.*, p. 58.

¹⁴⁰ *Ibid.*, p. 59.

5. The Precautionary Principle and The Regional Assessment

5.1 The precautionary principle can contribute to better cumulative impacts assessment in the Regional Assessment

As highlighted earlier, the precautionary principle cannot be understood in isolation from other legal principles that guide and aid in decision-making. Often, courts have looked to apply the principle within a broader framework that is reliant on an **ecosystem approach**. This requires integrated management and conservation of all resources in a geographical area, rather than focusing on specific issues or activities.

The precautionary principle is fundamentally about looking to the future, to predict possible outcomes before they occur, and anticipating and preventing possible damage to the environment or human health. This is similar to cumulative effects assessment, which also considers future effects.

Cumulative environmental effects assessment recognizes that the impacts of activities or actions can accumulate in the environment, both spatially and temporally. It therefore seeks to assess the totality of impacts in a region of all the past, present and future activities to determine how those impacts will manifest.

Four provinces—British Columbia, Yukon, Alberta, and Quebec— include cumulative effects among the factors to be considered in their environmental assessments.¹⁴¹ Outside of Canada, the United States and the European Union require cumulative effects to be considered in environmental assessments.

While cumulative effects were not included specifically under the “regional studies” section of the *Canadian Environmental Assessment Act, 2012* (CEAA), they were included among the factors to be considered in environmental assessments under section 19(1)(a).¹⁴² Additionally, section 22 of the new *Impact Assessment Act* also includes cumulative effects in its factors to consider.

Cumulative effects are not explicitly defined or scoped in any provincial or federal legislation. However, Canadian courts have interpreted that “cumulative effects” in the context of environmental assessments generally means that a) likely cumulative effects must be considered, b) that all relevant matters outside of the scope and jurisdiction of the project must be considered, and c) the responsible authority has a duty to seek out all relevant information needed to carry out the assessment.

There are a number of challenges when attempting to effectively assess cumulative impacts in a project-specific environmental assessment. This includes uncertainty and limited access to important information or data, a lack of coordination in decision-making processes, and dispersed

¹⁴¹ *Environmental Assessment Act*, SBC 2002, c 43, s 11(2)(b); *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7, ss 42(1)(d), 48(3)(b), 58(2)(a), 108(3)(b) & 112(1)(a); *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 49(d); *Environment Quality Act*, CQLR c Q-2, s 95.10.

¹⁴² *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 4(1)(i) & 19(1)(a).

responsibilities. At the project level, cumulative effects assessment is about identifying the contribution of an individual project to cumulative effects.

A regional assessment is a more appropriate means of assessing cumulative effects because the regional scope of the assessment includes different activities that produce impacts on the interconnected ocean environment.

5.2 The precautionary principle should be used as an overarching principle to guide the Committee's recommendations

The first step in using the precautionary principle in the regional assessment is recognizing its value as a guiding principle to the entirety of the assessment. It may be thought of as a pillar or foundation on which the assessment and its work is built. This means that all aspects of the project must adhere to the principle by taking a precautionary approach that asks three questions:

1. Is there a threat of damage to the environment or to human health from exploratory oil and gas activities within the regional assessment study area?

As noted in *Telstra* threats to the environment will include cumulative effects of multiple activities, recommending that where threats interact or are interrelated, that they should not be addressed in isolation. The factors set out by the court in that decision include many of the same factors that are particularly relevant to cumulative effects assessment:

- Spatial scale of threat (regional):
- Magnitude of impacts:
- Perceived value of the threatened environment:
- Temporal scale of possible impacts (timing and longevity):
- Complexity and connectivity:
- Manageability of Impacts:
- Level of Public Concern and Reversibility.

2. Is there a lack of scientific certainty about the possible threats from exploratory oil and gas activities?

The threat from exploratory oil and gas is supported by some evidence, presented to the committee, supported by science. A number of Regional Assessment participants have highlights, and the committee has affirmed, a number of gaps of scientific information or data available for much of the study area, including the various impacts from oil and gas activities on marine mammals, fish, and benthic habitats.

Applying a “reasonable scientific plausibility” test to determine scientific uncertainty around the regional impacts of offshore exploratory oil and gas activities requires answering the question: is there some support in the science community that suggests that exploratory oil and gas activities contribute to a cause-and-effect relationship between effects and damage?

Using a strong precautionary approach would then shift the evidentiary burden onto the proponents, collectively, to prove that there is not a threat, or that it may be mitigated through other measures.

3. What is the appropriate action required as a result of threats to the environment and in the face of such scientific uncertainty?

Action taken under the precautionary principle must be proportionate to the severity of a threat. Within the regional context of the Study Area, the degree of threat is more evident in certain areas, both those which are already protected, vulnerable or sensitive marine areas, and those areas that are vulnerable because of serious gaps in scientific information and data. Areas in which cumulative effects are more likely, such as those areas where more activities overlap, including shipping, fishing and exploratory oil and gas drilling, are also are a higher risk.

The appropriate action to be taken is one that prevents adverse effects on marine areas by providing protection through the law, and by setting standards that are supported by western science and Indigenous Knowledge prior to approval of exploratory oil and gas projects.

One concrete action, which many participants have called for, is the creation of exclusion zones for areas that already receive protections, or for areas that will receive additional protection in the future.