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To Whom it May Concern:

Re: Comments on the Draft Agreement for a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador

The East Coast Environmental Law Association, established in 2007 as a non-profit organization, responds to community inquiries, carries out legal and policy research and presents educational resources and opportunities to increase public awareness of environmental laws in Atlantic Canada. Our objective is to build capacity in the public and among legal practitioners so that we can work together to ensure that environmental laws are effectively used and strengthened. East Coast Environmental Law regularly engages with marine environmental law issues throughout the Atlantic region.

East Coast Environmental Law submits this letter in response to the Canadian Environmental Assessment Agency's ("CEAA" or "the Agency") invitation issued on September 13, 2018 for public comments on the Draft Agreement between the federal Minister of the Environment and the federal Minister of Natural Resources, and the province of Newfoundland and Labrador with respect to conducting a Regional Assessment of offshore oil and gas exploratory drilling off the eastern coast of Newfoundland and Labrador.

In addition to this submission, we have read and agree with the submissions made by Ecojustice and the Ecology Action Centre.

Context

As an organization that supports the public interest we are concerned with the intent and timing of this process. As stated in the Preamble of the Draft Agreement the provincial government of Newfoundland and Labrador seeks to increase offshore oil production with the drilling of at least 100 exploratory wells by 2030, and this process aims to improve the efficiency of the environmental assessment. This goal is

counter to the clear global energy shift that is imperative to reach the latest Intergovernmental Panel on Climate Change recommendation of 45% reduction of carbon emissions from 2010 levels by 2030 in order to prevent greater than 1.5 degrees of global warming .

In addition, it is our opinion that given the introduction of Bill C-69, currently in the Senate, this process should be set aside until the Bill is passed and the regulatory framework that will govern impact assessment in Canada into the future is in place.

Comments on Engagement

The Draft Agreement envisions the Regional Committee conducting engagement that includes consultation on information along with public and Indigenous engagement sessions. The phrase ‘public and Indigenous engagement’ is used no less than five times in the Draft Agreement. The ‘engagement’ requirements for Indigenous Peoples and members of the public are virtually the same. The Regional Committee is required to engage with both (s 4.17) and to conduct engagement sessions with both (4.18, 4.19). The engagement must happen throughout the Regional Assessment and must include consultation on the draft Report (App A).

Public Engagement

The Draft Agreement provides that at a minimum public participation will include “open houses” in Newfoundland and Labrador and a public comment period on the draft Report. While open houses are a welcome information sharing component of the public input phase, it has been our experience that the most successful and democratic regulatory processes are those where the public has been provided with **adequate information** to understand the process and **appropriate time** to review that information and provide meaningful feedback. Fulsome consultation with the public will help ensure that the process is robust, that different perspectives and voices are considered and respected, and that the final product is useful. Although public engagement is expressed throughout the Draft Agreement as a component of the Regional Assessment, the Agreement should include clarity that the engagement will include clear opportunities for members of the public to present to the Regional Committee in a manner that is accessible and with adequate time to prepare. Further the Agreement should define ‘engagement’ as a process of listening and interacting with the goal of mutual sharing and learning, thereby improving the process and the result.

Indigenous Engagement

We trust that you will receive comments from members of Indigenous communities on this Draft Agreement to better define and enhance the approach to engagement with Indigenous Peoples. At this stage there is virtually no difference between how the Draft Agreement envisions engagement with the public and engagement with Indigenous Peoples.

At the very least, the Agreement should clarify that the Regional Committee be required to fully and meaningfully consult with Indigenous Peoples. Consultation with Indigenous Peoples is legally required by section 35 of the *Constitution Act, 1982*, and Canadian courts have repeatedly made it clear that this constitutional responsibility will not be satisfied unless that consultation is made in good faith and with genuine intent. Although Appendix C of the Draft Agreement identifies the impact of exploratory drilling may have on Indigenous groups and the rights of Indigenous Peoples as factors that must be considered

in the Regional Assessment, it does not draw any distinction between Indigenous engagement and public engagement.

The obligation to consult Indigenous Peoples should be expressly and clearly set out in the Agreement to ensure that all legal obligations are met. Further the Government of Canada has committed to implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). To that end, a commitment of meaningful engagement with Indigenous Peoples which aims to secure their free, prior and informed consent should be clearly articulated in the Agreement.

Roles and Influence

The Draft Agreement envisions three groups of individuals engaged in the development and implementation of the Regional Assessment: The Regional Committee, the Task Team and the Technical Advisory Group. The appointment of these individuals to the various roles envisioned in the Agreement is a critical part of ensuring a fair, transparent and independent assessment process. As it stands there is no clear criteria, other than ‘knowledge and experience relevant to the Regional Assessment’ and no transparent, public process in place for the appointment of any of these individuals.

The Regional Committee

The Draft Agreement when interpreted in accordance with CEAA 2012 makes it clear that the Regional Committee is akin to a Review Panel tasked with assessing the information they receive and providing recommendations to Ministers.

The Draft Agreement offers no clarification on the criteria to determine the knowledge, skill or experience required of Committee members other than to state that members have “knowledge or experience relevant to the Regional Assessment”(s 3.3). The decision to appoint the five Committee members is at the discretion of the Minister of Environment, with input from other Ministers but no requirement to consider the public interest or ensure that the Committee is unbiased and independent.

The Agreement should more clearly define criteria for the membership of the Regional Committee. As part of this criteria, it is essential that the Committee be able to complete its work in a manner that is independent, free from any conflict of interest and transparent. The six member C-NLOPB, like the C-NSOPB, draw their experiences from industry and for the most part the petroleum industry. The Regional Committee cannot reflect a similar industry bias.

The Task Team

The Task Team as constituted in the Draft Agreement is made up of technical staff from federal and provincial departments and agencies, including the C-NLOPB. The Task Team has the responsibility of gathering all of the relevant information and designing the Regional Assessment process including setting the objectives, work plan, process steps, knowledge and information requirements, resource needs and the measures for public and Indigenous engagement, consistent with the Factors to be considered in the Regional Assessment, outlined in Appendix C.

As with the Regional Committee, there are no criteria provided to ensure that members of the Task Team have the knowledge, skills and experience required to ensure that a fair and effective Regional Assessment process is developed and there is no clear opportunity for input from the general public or

Indigenous Peoples on the skills, knowledge or experience that the team members should bring to the Task Team. The sheer volume of responsibility given to the Task Team puts those individuals in an important position of influence. The Agreement should more clearly define criteria for the members of the Task Team, information on Task Team members should be available to the public and an opportunity to formally raise a concern regarding membership should be available to any member of the public.

The Technical Advisory Group

Included in the mandate of the Task Team is the appointment of a Technical Advisory Group. Members of this group can come from within or outside of government. The appointment process and rationale for appointments to the Technical Advisory Group should be open and transparent. Like the Regional Committee the membership of this Group must reflect the breadth of considerations necessary to ensure a balanced, fair and effective process. Undoubtedly the Technical Advisory Group will include experts in oil and gas exploration and development, however, it must also include those who can contribute community and traditional knowledge, experts in marine science, climate science, and the social sciences. The Technical Advisory Group provides direct advice to the Regional Committee and to that end has a key role in influencing the assessment process.

Access to Information and Transparency

The Draft Agreement requires that the public have access to information during and after the process, to be provided on the Agency's website. In section 5.1, the Draft Agreement provides that the Agency will enable this "convenient access" to information via a public registry. In order to ensure a fully transparent process, the Agreement should make clear that the access will be both timely and free.

Furthermore, the Draft Agreement currently states that the public registry will include information, including submissions, comments and reports that the Committee has received by the public and Indigenous Peoples. To ensure the integrity of the process, the Agreement should clarify that all information received by the Regional Committee will be included in the public registry.

Participant Funding

The Draft Agreement envisions engagement with the public and Indigenous Peoples but does not include any means of funding for participants in the process. Participant funding is a crucial component of a fair and effective consultation process. There is a clear bias against those who wish to participate but do not have the financial means to do so if participant funding is not in place prior to public engagement. The Agreement should include a statement that participant funding will be made available.

Time Frame

The Draft Agreement does not clearly set out how the Regional Assessment will ultimately be used in future environmental assessment (impact assessments) for exploratory drilling in the region. However, the Draft Agreement does mention that the committee may identify any "standard conditions" (see Appendix A – section 2.3) that could inform and guide future environmental assessments. We would submit that any process that claims to make a process more efficient is essentially streamlining the environmental assessment process, thereby taking away the opportunity for a full and robust engagement with the public and consultation with Indigenous Peoples in the future. It therefore

becomes imperative that the Regional Assessment process is not fast-tracked, but rather is conducted within a time-frame that will facilitate engagement, learning and good decision-making. Submission of a Report by the Fall of 2019 is not a reasonable time-frame. The Agreement should allow the Regional Committee a minimum of 18 months to submit their Report. The timeline should not begin until the Regional Committee members have been appointed and the appointments have been made public.

Closing Comments

Thank you for the opportunity to provide input into the Draft Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador. We would appreciate being informed when the next version of the Agreement is prepared.

Sincerely,

<Original signed by>

Lisa Mitchell, Executive Director & Senior Lawyer
East Coast Environmental Law Association