

James Gunvaldsen Klaassen, Ian Miron and  
Joshua Ginsberg  
Suite 520, 1801 Hollis Street  
Halifax, Nova Scotia, B3J 3N4  
Telephone: (902) 417-1700 x 642  
Fax: (902) 417-1701  
E-Mail: [jgunvaldsenklaassen@ecojustice.ca](mailto:jgunvaldsenklaassen@ecojustice.ca)

October 12, 2018

**By Email to:** [ceaa.nloffshorestudy-etudeextracotieretnl.acee@canada.ca](mailto:ceaa.nloffshorestudy-etudeextracotieretnl.acee@canada.ca)

Canadian Environmental Assessment Agency  
10 Barbers Hill, Suite 301  
St. John's NL A1C 6M1

Dear Sir or Madam:

**Re: Public Comments on Draft Agreement to Conduct a Regional Assessment of  
Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador  
Reference Number: 80156**

---

Ecojustice submits this letter in response to the invitation for comments regarding the Draft Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador (the "Draft Agreement"), as per the Public Notice issued by the Canadian Environmental Assessment Agency on September 13, 2018.

Our submissions are filed on behalf of the Sierra Club Canada Foundation, Council of Canadians and the Ecology Action Centre. These groups also support and agree with the submissions filed separately by East Coast Environmental Law and the Ecology Action Centre.

### **Participating Groups**

The **Sierra Club Canada Foundation** is a national grassroots environmental organization that empowers people to protect, restore and enjoy a healthy and safe planet. Nationally and with our Atlantic Chapter, we have been involved in issues related to ocean protection, endangered species, and the offshore oil and gas industry for almost two decades.

Founded in 1985, the **Council of Canadians** is Canada's leading social action organization, mobilizing a network of 60 chapters across the country. Through our campaigns we advocate for clean water, fair trade, green energy, public health care, and a vibrant democracy. We educate and empower people to hold our governments and corporations accountable and are part of a

global movement working for social and environmental justice that believes a better Canada and a fairer world are possible.

The **Ecology Action Centre** is Atlantic Canada’s oldest and largest environmental charity. We work locally, nationally and internationally towards conserving and protecting the marine ecosystem and maintaining sustainable fisheries and vibrant coastal communities. We represent the voices of over 6,000 members across Canada as we engage in public policy development.

### **Introduction: the Regional Assessment Process is not a mechanism for promoting or fast-tracking oil and gas development**

The Draft Agreement must be clear that the objective of this Regional Assessment process is to gather baseline data that can be used for conservation efforts, to conduct an informed and impartial assessment of environmental risks, and to inform activity-specific environmental assessments. A Regional Assessment is not a mechanism to facilitate offshore oil and gas development for industry, or to expedite approvals of exploration activities. The Draft Agreement as currently constituted attempts to set up an “industry friendly” process, and fails to require consideration of the pressing issue of whether any further development of offshore oil and gas can be justified due to the environmental risks to marine ecosystems and further contribution to climate change.<sup>1</sup>

The participating groups do not support further oil and gas exploration and development in the offshore, but if a Regional Assessment is to be conducted in relation to exploratory activities, it must be designed properly and conducted fairly and impartially, as set out in detail below.

### **The Study Area should be subdivided to ensure sufficiently detailed assessment**

As shown by the vast proposed Study Area on the map at Appendix D of the Draft Agreement, and by the scale of activity envisioned in recent announcements from the Government of Newfoundland and Labrador, this Regional Assessment will have very significant planning implications for an extremely large and variable section of the North Atlantic Ocean.

Given the magnitude of the area under consideration, and the great variety in water depth, temperature, climate, dynamics, habitats, species and terrain from one portion of the Study Area to another, and the extremely constrained time frame the Draft Agreement imposes to conduct an assessment of this scale, the Regional Assessment must necessarily be an extremely general overview. However, the considerations at paragraph 2.1 of Appendix A are location-specific and may vary significantly within the Study Area. If the Regional Assessment is to “be used to guide

---

<sup>1</sup> See for example IPCC Special Report: Global Warming of 1.5°C, Oct 8, 2018: <http://www.ipcc.ch/report/sr15/>

and inform future environmental assessment and regulatory decisions,”<sup>2</sup> the Study Area must be divided into multiple subareas, with detailed information provided for each. The Study should identify the characteristics of each subarea, such as those with real exploration potential, those with particular environmental sensitivities, including with respect to aquatic species and/or areas that are already protected (e.g. fishery closures to protect sensitive benthic organisms), and those that are not under any realistic consideration for exploration activities. If the characteristics of each subarea are properly identified, the factors at paragraph 2.1 of the Draft Agreement will have more meaningful application to potential physical activities and may inform conservation efforts such as future marine protected areas. By contrast, generalizations about the entire Study Area would be of limited planning use and likely counterproductive.

The Draft Agreement should also require that the Committee: 1) ensure that oil and gas exploration is excluded from existing or planned marine protected areas (including fishery closures, Areas of Interest and Other Effective Area-Based Conservation Measures); and 2) identify areas of particular sensitivity that require designation as protected areas and in which no drilling will be permitted, even if no protection is currently in place or under consideration.

### **The Committee must have more time to conduct the Regional Assessment**

This review cannot be done hastily. It must be conducted fairly and the study must be fulsome and comprehensive. We do not believe that these goals can be achieved within the one year timeline proposed – i.e. final report presented to the Ministers by Fall 2019.<sup>3</sup> That is particularly so given the size and variability of the Study Area.<sup>4</sup> We propose that the process be conducted such that the Ministers receive the final report by Spring 2021 (an approximately 30-month timeframe).

As an example, the Strategic Environmental Assessment of the Baffin Bay offshore began in March 2017, and is now projected for completion in May 2019. Most SEAs, even though they are on a smaller scale than this proposed Regional Assessment, take more than a year to complete.

One year is not enough time to review the huge amounts of information that must necessarily be identified and generated by the Task Team, the Technical Advisory Group and the Committee. It will not be sufficient to conduct necessary Indigenous consultations. It will not provide stakeholders, including environmental groups and the general public, with adequate time to review, assess and test the information tendered in the process.

The Draft Agreement does not establish any timeframes for consulting with Indigenous groups and “others that have knowledge relevant to the Regional Assessment or whose interests and

---

<sup>2</sup> Notice – [Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador – posted on September 13, 2018, Canadian Environmental Assessment Agency.](#)

<sup>3</sup> Draft Agreement, para. 5.7.

<sup>4</sup> As stated above, the proposed Study Area varies greatly in water depth, temperature, climate, dynamics, habitats, species and terrain from one portion of the Study Area to another and the Committee will need a lengthy period to examine all the information pertaining to this region.

uses may be affected by exploratory drilling.”<sup>5</sup> Likewise, the Draft Agreement fails to establish timeframes for public participation in the Regional Assessment or for public comment periods.<sup>6</sup> Since, as discussed below, the Draft Agreement raises the possibility that the Regional Assessment will affect future environmental assessments and regulatory decision-making, it is critical that Indigenous groups and the public are given sufficient time to review the information presented, to present further information, and to contribute meaningfully to the assessment.

### **The Committee must meaningfully consult, not merely “engage” with, Indigenous peoples**

The Draft Agreement currently states that the Committee must “engage” with Indigenous groups. However, the Draft Agreement must specify that the Committee is required to meaningfully consult with Indigenous peoples. The Committee cannot take shortcuts in conducting Indigenous consultation. Such consultation is legally required by section 35 of the *Constitution Act*, and it cannot be reduced to mere “engagement.”

Canada is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples, which requires that (Article 19): “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”.

All of the provisions in the Draft Agreement that refer to Indigenous “engagement” must be replaced by requirements that the Committee consult with Indigenous peoples. As well, the Draft Agreement must state clearly how the Committee’s findings will be used going forward, and must provide for an appropriate process to determine how those uses will impact on Indigenous rights.

### **The Draft Agreement must establish the framework for a fair Regional Assessment process**

The Draft Agreement also provides little information as to the process that will be followed, or how Indigenous groups, environmental groups, stakeholders and the public will receive information submitted by others and tender their own. In particular, there is no mention of the role that the oil and gas industry and proponents of exploratory drilling will play in this process, and what obligations they will have to disclose information to the public.

We expect that oil and gas industry and proponents will participate in this process to share, in good faith, information relevant to potential future drilling in the area. Therefore, we expect that all information shared by the industry in this process will be made available to all participants and the general public. The Draft Agreement should specify expressly that information provided

---

<sup>5</sup> Draft Agreement, para. 4.17.

<sup>6</sup> Draft Agreement, para. 4.18.

by the industry in this process will be public and, for clarity, that the privilege created by section 119(2) of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* does not apply to any documents submitted in the course of this assessment, even though the CNLOPB will participate in the assessment. Likewise, the Agreement should state explicitly that section 45(4) of *CEAA 2012* (and subsequently section 53(4) of Bill C-69, when it comes into force) will not apply to any information supplied by industry in this assessment. This will set clear expectations from the outset of the process and will conform to section 98 of Bill C-69, under which this assessment is anticipated to continue. That section requires that all information used by the Committee when it conducts this assessment be available to the public. The Committee should make it clear from the outset that no information supplied by industry will be treated as privileged.

This Regional Assessment is unique: while industry is not required to participate or provide information, the assessment explicitly aims to benefit industry by encouraging development and streamlining the project-specific environmental assessment process. While this framing is inappropriate, as discussed above, it is only fair that industry be required to put its best foot forward in this process. Information provided by industry about, for instance, measures it can take to mitigate potential environmental effects must be made public so that all participants can fully scrutinize and test this information. Disclosure to all participants must occur within a reasonable time, such that it can be reviewed and assessed once it becomes available.

We note that the Committee may create an exception to a general disclosure requirement for traditional knowledge provided by Indigenous peoples. This exception to the above general rule requiring disclosure of all information is supported by Bill C-69, which creates a presumption of confidentiality in such traditional knowledge supplied within a regional assessment.<sup>7</sup> Such an exemption is further justified, as Indigenous peoples do not benefit from the streamlining of project-specific EA processes in the same direct manner as industry.

While the Draft Agreement does not clearly establish the procedure the Committee will follow in conducting this review, the participating groups submit that the public must be engaged in developing such a process. At a minimum, that process should permit oral testimony, with the ability to test information, evidence and opinions by way of cross-examination and/or other forms of questioning, and by presenting rebuttal evidence. Written summations should also be permitted once the evidence portion closes.

Public sessions should also be held in a number of locations in Newfoundland and Labrador to allow the public to fully access this process.

### **Existing information is too limited to provide a basis for an informed assessment**

It is not clear from the Draft Agreement how much of the Regional Assessment will be conducted on the basis of “existing information” and whether and how new studies and information will be provided to the Committee within the process. The Regional Assessment

---

<sup>7</sup> Bill C-69, s 119.

encompasses many diverse areas outside Canada's Exclusive Economic Zone which have not been studied in depth, including the Sackville Spur and the South East Grand Banks. The Committee must be empowered to seek out, commission and receive new information, including existing studies pending publication, and future studies, to eliminate the current information gaps regarding the Study Area.<sup>8</sup>

### **Constitution of the Committee and Technical Advisory Group**

The Committee and the Technical Advisory Group (TAG) must not be dominated by industry or by those who are interested in promotion of exploratory drilling. Rather, the Committee and TAG members must be independent from industry, government and the C-NLOPB and capable of rendering a decision contrary to those interests. Members should include Indigenous representation, as well as academics or independent scientists with marine expertise. Science advisors to the Committee and the TAG should be selected on the basis of merit and must be prepared to give independent science advice.

### **How will the results of the Regional Assessment be used?**

The Draft Agreement does not state how the findings which result from this proposed process will be used. It says only that the final report itself will describe "how the results of the Regional Assessment could be used to guide and inform future environmental assessment and regulatory decisions related to proposed offshore exploration and drilling in the region."<sup>9</sup> The participating groups therefore seek assurances that the results of this Regional Assessment will not be used to replace Environmental Assessments, which must be conducted specifically in relation to particular sites. The Draft Agreement should clarify the difference between this Regional Assessment, which will provide information about the Study Area, and class assessments, which give blanket approval to an activity on certain conditions. Although the Committee is asked to identify "any standard conditions that may be appropriate,"<sup>10</sup> the Draft Agreement should be clear that those conditions are not intended to replace individual assessments of exploratory drilling and seismic exploration.

### **Climate Change Assessment Required**

Among the stated goals of the Government of Newfoundland and Labrador are: (1) to have over 100 new exploration wells drilled and (2) to increase production in the offshore in order to have multiple basins producing over 650,000 barrels of oil equivalent per day from new and existing

---

<sup>8</sup> Paragraphs 4.5 and 4.6 should be amended to clarify and reflect the requirement that new studies and information shall be ordered by the Committee where uncertainties or gaps appear in existing sources, as identified by the Technical Advisory Group pursuant to paragraph 3.3 of Appendix A.

<sup>9</sup> Draft Agreement, para. 4.19 and Appendix A, para. 1.2.

<sup>10</sup> Draft Agreement, para 2.3.



projects.<sup>11</sup> Goals (1) and (2) are clearly indivisible, as there would be no purpose in drilling exploration wells if those wells were not intended to lead to oil or gas production. Yet only the first goal, regarding 100 new exploration wells, is mentioned in the Draft Agreement.<sup>12</sup> The intended significant increase in production resulting from the exploration activity is an inextricable result of the exploratory activity but is not discussed in the Draft Agreement or the Appended Terms of Reference or Factors to be considered. Nor is the intended increase to be discussed in the context of existing production.

To accurately account for the climate impacts of Newfoundland and Labrador's intended production increase, the assessment should consider all intended and hoped-for results from the exploratory activity. Appendix C, Factors 1(g) and 1(h) should be expanded to expressly require the Committee to consider how the impacts caused by the exploration, extraction, production, processing and end uses of the oil and gas hinder the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change. A full climate change assessment should be conducted in relation to the cumulative effect of emissions from all of these activities. In addition, the list of factors should include a requirement to consider impacts on Canada's marine protection obligations under the *Convention on Biological Diversity* and commitments to protect at-risk species under the *Species at Risk Act* and other relevant legislation.

### **The Committee must consider renewable energy alternatives to exploratory drilling**

The draft terms of reference require consideration of alternative *means of carrying out* offshore exploratory drilling, but not consideration of alternatives to offshore exploratory drilling itself. That oversight is inconsistent with best practices in environmental assessment, and fails to take full advantage of the opportunity regional assessments provide. The main benefit of regional and strategic assessments is their ability to “address big issues and opportunities, broad alternatives and cumulative effects that cannot be covered as effectively and efficiently at the project level, and to use the strategic level findings as authoritative guidance for project planning and assessment.”<sup>13</sup> The Regional Assessment should consider the extent to which exploratory drilling may be displaced by other activities and uses of the offshore area that might better promote sustainability and Canada's obligations in respect of climate change. The high-level information can guide future assessments in determining whether the proposed drilling is, in all the circumstances, in the public interest.

Renewable energy projects are of particular relevance as potential alternatives to exploratory drilling. Indeed, when part 5 of the proposed new *Canadian Energy Regulator Act* comes into force, the Canadian Energy Regulator Commission will have authority to approve offshore

---

<sup>11</sup> Press Release – NL Government – 19 February 2018 - [Provincial Government Releases Advance 2030 – A Plan for Growth in the Newfoundland and Labrador Oil and Gas Industry](#)

<sup>12</sup> See sixth recital, page 2.

<sup>13</sup> Gibson et al, Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment, attached (2015) 29 J Envtl L & Prac 251 at 259. As one example, the Baffin Bay Strategic Environmental Assessment requires consideration of alternatives to development options.

renewable energy projects. Therefore, in keeping with Canada's commitments to reduce greenhouse gas emissions, and in order to consider alternatives to oil and gas development in this region, the Committee must be clearly tasked with assessing offshore renewable energy development as an alternative scenario in this regional assessment.

## **Participant Funding**

Both the *Canadian Environmental Assessment Act, 2012* (under which this assessment will begin) and the proposed *Impact Assessment Act* (under which, if enacted, this assessment will continue) require that the public have a meaningful opportunity to participate in this assessment.<sup>14</sup> Providing appropriate funding to participants is critical to ensuring that the public has a meaningful opportunity to participate in this assessment. While *CEAA 2012* does not explicitly require that participant funding be provided for regional studies, Bill C-69 will require that such funding be made available.<sup>15</sup>

Although the Draft Agreement mentions public comments, it is silent on the issue of participant funding, including how recipients will be determined and how much funding will be allocated to each recipient. The Draft Agreement must specify that adequate participant funding will be made available and must establish an appropriate application process for such funding.

Industry stands to benefit considerably from this assessment. Therefore, we trust that participant funding costs will be recovered from industry currently holding oil and gas interests in the area. This will ensure that Canadian taxpayers do not inappropriately subsidize industry.

The amount of available funding must be sufficient to ensure robust participation from interested parties, so that the process is not dominated by participants with the largest pocket-books (i.e. industry). The funding program should level the playing field so that all stakeholders with important perspectives have the resources to present their case and test the quality of evidence before the Committee.

---

<sup>14</sup> CEAA 2012, s 4(a); C-69, s 99

<sup>15</sup> C-69, s 75(1)(c)



## Conclusion

We thank the Canadian Environmental Assessment Agency for the opportunity to provide comments on the Draft Agreement. We ask that, if revisions are proposed to the Draft Agreement as a result of our comments, or the comments of other concerned parties, that a draft be provided for further review and public comment prior to finalizing its terms.

Sincerely,

<Original signed by>

<Original signed by>

<Original signed by>

---

James Gunvaldsen Klaassen  
Barrister & Solicitor

---

Joshua Ginsberg  
Barrister & Solicitor

---

Ian Miron  
Barrister & Solicitor

c.

### **Ecology Action Centre**

Jordy Thomson, Marine Science and Conservation Coordinator  
Email:<Contact information removed>

### **Council of Canadians**

Angela Giles, Atlantic Regional Organizer  
Email:<Contact information removed>

### **Sierra Club Canada Foundation**

Gretchen Fitzgerald, National Program Director  
Email: <Contact information removed>