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**SUBMISSION OF NATURE CANADA TO THE IMPACT ASSESSMENT  
AGENCY OF CANADA**

**Ministerial Regulatory Proposal to Designate Offshore Exploratory  
Drilling East of Newfoundland and Labrador for Exclusion under the  
*Impact Assessment Act***

**Introduction**

This submission sets out Nature Canada's concerns and recommendations with respect to the *Discussion Paper on a Ministerial Regulatory Proposal to Designate Offshore Exploratory Drilling East of Newfoundland and Labrador for Exclusion under the Impact Assessment Act* released by the Impact Assessment Agency of Canada on March 4, 2020 ("Discussion Paper"). The Minister of Environment and Climate Change Canada has proposed a regulation to designate exploratory oil and gas drilling projects within the Regional Assessment Study Area ("Study Area") for exclusion from impact assessment under the IAA.

The proposed Ministerial regulation follows the completion of the *Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador* ("Regional Assessment"). The Regional Assessment Committee submitted its final report to the Minister on February 29, 2020.

The proposed Ministerial regulation would exclude from project impact assessment Newfoundland and Labrador offshore drilling activities otherwise designated on the Project List. The Project List is a regulation under the *Impact Assessment Act* that designates certain major physical activities (e.g., construction of an oil pipeline, expansion of a coal mine) to be subject to impact assessment under that federal law. The proposed Ministerial regulation would eliminate the requirement for an impact assessment, replace it with a 90-day notification process, and require projects to meet prescribed conditions for environmental protection and wildlife conservation.

Nature Canada's has four main concerns with the proposed regulation, which are detailed below:

1. The Regional Assessment is so deeply flawed that it should not be relied upon to guide the proposed Ministerial regulation excluding offshore exploratory drilling projects from project impact assessment;
2. The Discussion Paper is an inadequate foundation for public consultation on the proposed Ministerial regulation;
3. Offshore exploration in ecologically important areas established by law or recognized by Canada or internationally should be subject to project impact assessment and not exempted from such assessment as proposed by the Discussion Paper; and
4. Annex 1 should include additional conditions to ensure compliance with the *Species at Risk Act*; Annex 1 conditions relating to the *Migratory Birds Convention Act* require refinement.

### **The Regional Assessment is deeply flawed and should not be relied upon to guide the proposed Ministerial regulation**

In April 2019, Canada and Newfoundland and Labrador signed an agreement under the *Canadian Environmental Assessment Act 2012* to conduct a regional assessment of exploratory oil and gas drilling projects in a Study Area covering 735,000 sq.km. of offshore Newfoundland and Labrador—an area considerably larger than the province of Alberta. A Regional Assessment Committee (“Committee”) was appointed with review panel powers and mandated to conduct a regional assessment of the effects of existing and anticipated exploratory drilling. The Committee submitted its final report on February 29, 2020, admitting in the covering letter that: “the abbreviated time given to the Committee to fulfil its task . . . limited the Committee’s ability in preparing the Report but also reduced public confidence in the Committee’s work and the opportunities for others to contribute.”

The short time frame meant that no public hearings were held, and public participation was limited. Other failings are just as serious. The Regional Assessment includes no assessment of the risks (e.g., worst case scenarios) posed by exploratory drilling at far greater depths in North Atlantic waters than earlier wells drilled in the Newfoundland and Labrador offshore. Risks to worker safety and nature—undisputed given the tragedies of the Ocean Ranger in 1982 and Deepwater Horizon in 2010—are not examined.

The Regional Assessment refers to an improved risk assessment process for spills that should be conducted in the future. Given the scope of planned activities and the Inability to respond to a spill In the North Atlantic, Nature Canada takes the view that this risk assessment should be conducted immediately, and certainly prior to finalization of the proposed Ministerial regulation and prior to approval of any further exploration drilling.

Cumulative impacts of the numerous exploratory drilling projects in the region are also not assessed. Assessment of cumulative impacts must consider impacts of the 77 exploration

projects subject to the proposed Ministerial regulation in combination with those of the 144 exploration projects that have already been approved. The Regional Assessment hardly began this assessment of cumulative effects—a critical aspect of any regional assessment. Impacts of seismic blasting and chronic noise on whales are among the issues not addressed adequately in the Regional Assessment.

Climate change issues are narrowly scoped in the Regional Assessment. No assessment of methane emissions was performed making use of recent science, so their contribution to overall GHG emissions is unknown. The Regional Assessment does not refer to the federal regulations on methane emissions. Similarly, the draft Strategic Assessment of Climate Change prepared by Environment and Climate Change Canada was also not discussed. Finally, the Regional Assessment ignores the reality that exploratory drilling often leads to production drilling with much greater GHG emissions.

Adverse impacts (e.g., lighting, flaring, oil spills) of offshore oil and gas exploratory drilling operations on seabirds and shorebirds are known to be of concern yet the Regional Assessment does not mention *The State of Canada's Birds 2019*, the most recent comprehensive study of the conservation status of Canada's migratory birds. The study was prepared by the North American Bird Conservation Initiative (NABCI), a coalition of governments (e.g., Canada, Newfoundland and Labrador) and not-for-profit groups (e.g., Nature Canada, Birds Canada). The study reports that "95% of Canadian seabirds are in crisis worldwide" and that "55 of the 58 seabird species that use Canadian waters are of conservation concern". Shorebirds "are losing ground" and "have declined by 40%" according to the study.

By way of contrast, the Regional Assessment asserts that: "In general, the populations of most marine-associated bird species occurring off Eastern Newfoundland are considered stable overall ... although the Leach's Storm-petrel, for example, has seen considerable decline in recent years (Wilhelm et al 2015) as have some other species." How is it possible that the Regional Assessment could fail to mention, let alone discuss, *The State of Canada's Birds 2019* report?

Direct mortality of seabirds and shorebirds due to oiling from spills from offshore oil platforms and ships is another concern not adequately addressed in the Regional Assessment. Examples include the 2018 spill of 250,000 litres of oil from the SeaRose platform located 300 kilometres off the coast of St. John's and the 2005 ship-based spill of bilge that killed 1200 seabirds, mainly eider ducks off the Avalon Peninsula.

The Regional Assessment is misleading in downplaying the serious conservation concerns with seabird and shorebird species highlighted in *The State of Canada's Birds 2019*. These important conservation concerns beg the question that should have been addressed in the Regional Assessment: what are the likely cumulative effects of offshore oil and gas exploration and production activities on seabird and shorebird populations combined with other existing and future threats? The Regional Assessment does not address this question, providing no serious analysis of cumulative effects on these migratory birds (or any other valued ecosystem component).

The above are a subset of the many examples of the hastiness and incompleteness of the Regional Assessment. In Nature Canada's view, this it is not a regional assessment worthy of the name. This is particularly concerning since it is the first such assessment under the *Impact Assessment Act*, setting a low standard for future regional assessments.

A weak report is unacceptable in and of itself. Also worrisome is that the Regional Assessment effectively excludes the numerous planned offshore exploratory drilling projects from more careful and site-specific project assessment and creates barriers to legal protection of ecologically important areas from the effects of future oil and gas activity in a Study Area larger than Alberta.

The Minister of Environment and Climate Change is empowered to set conditions in the proposed Ministerial regulation based on the results of the Regional Assessment. The issue is how such a regulation can effectively set conditions to mitigate the risks of deep-water exploratory drilling, address cumulative effects, and deal with climate change and migratory bird issues when the Regional Assessment either does not deal with them, or deals with them inadequately.

### **The Discussion Paper is inadequate as the sole foundation for public consultation on proposed Ministerial regulation**

Nature Canada's view is that Discussion Paper provides an inadequate foundation for public consultation on the proposed Ministerial regulation and presents a flawed process for developing the regulation.

The Discussion Paper is the sole document upon which public comment on the proposed Ministerial regulation is to be elicited. Unfortunately, the Discussion Paper and annexes are incomplete; they include no draft regulation comparable to a draft regulation published in *Canada Gazette Part 1*.

Annex 1 to the Discussion Paper includes 55 proposed conditions to be included in the Ministerial regulation that "are based on conditions that have been included in past project-specific impact assessments." The conditions relate to engagement with Indigenous communities, public information-sharing, follow-up programs, reporting, requirements to follow specific industry guidelines, development of monitoring programs, and mitigation measures. This means Annex 1 does not represent an integrated and comprehensive set of conditions that the public expects to see in a draft federal regulation.

First, critically important conditions are missing. There are no conditions for further assessment of climate change impacts or cumulative effects and no reference to the draft Strategic Assessment on Climate Change. There are no conditions that incorporate the precautionary principle, as mandated by the Terms of Reference. There are no recommendations setting out requirements for gathering and analyzing further information in relation to ecologically important areas designated by Canada or internationally assuming that exploration is to be permitted in such areas.

The poor drafting of the conditions that are in Annex 1 also makes it difficult to comment on their appropriateness. In a subsequent section, Nature Canada comments on a few specific drafting problems, including the inadequacy of qualifying phrases relating to migratory bird conservation measures in section 24.

In our view, Annex 1 presents an unacceptably low standard in its drafting, even assuming that the policy content in the Discussion Paper for the proposed Ministerial regulation is adequate, which it is not.

This is particularly troubling given that the proposed Ministerial regulation will not be published in *Canada Gazette Part 1*. Hence, the public will have no opportunity to review a draft regulation that has been scrutinized through the federal regulation-development system.

A further issue is that the proposed Ministerial regulation would be published solely on the Agency website, and not in *Canada Gazette Part 2*. A great value of *Canada Gazette 2* is that it is a convenient, comprehensive and well-known source for federal regulations that is accessible to lawyers and non-specialists alike. Publishing the proposed Ministerial regulation on the Agency website alone could result in reduced public access. Nature Canada notes that these websites are subject to constant change in format and content. A major purge of historically important environmental assessment documents from the Agency website some years ago greatly damaged the ability of civil society organizations and the public to participate in current impact assessments.

Nature Canada is also concerned that the public will have no opportunity to comment on the Regulatory Impact Analysis Statement (RIAS) before it is finalized. RIAs are typically published in *Canada Gazette Part 1*, and the public thus has an opportunity to comment on draft RIAs as well as draft regulations.

The challenges posed by the COVID19 pandemic with respect to advancing public participation represents an additional reason for providing for a consultation period to review a complete draft regulation with RIAs.

### **Offshore exploration in ecologically important areas should be subject to project assessment to guide plans for protection of marine biodiversity**

The proposed Ministerial regulation would apply to the entire Regional Assessment Study Area, an area larger than Alberta. Exploratory drilling thus would be permitted anywhere within the Study Area subject to the regulation but with no project-specific impact assessment.

The Study Area presently does not contain within its boundaries areas with legal protection against oil and gas development such as Marine Protected Areas (*Oceans Act*), National Marine Conservation Areas and National Marine Conservation Area Reserves (*Canada National Marine Conservation Areas Act*) or Marine National Wildlife Areas (*Canada Wildlife Act*). Given that oil and gas development is problematic to the ecological health of these areas, the proposed Ministerial regulation should state that it does not apply to any protected areas that may be

established under these laws in future. This is particularly important given the urgent need to widen protection of marine biodiversity and Canada's stated commitment to expand protection to 25 % of its ocean waters by 2025.

This massive ocean area is a prime candidate for expansion of protected areas. The Regional Assessment notes that the Study Area contains areas designated as ecologically important by the federal government or internationally, including protected areas counting towards Canada's Aichi Target 1 goals, but that are not protected by law. These include: Ecologically and Biologically Significant Areas (EBSAs), Marine Refuge Areas, Vulnerable Marine Ecosystems (VMEs), Significant Biological Areas (SiBAs) and Bottom Fishing Closure Areas.

Crucially, offshore exploration in these designated ecologically important areas would not be subject to project impact assessment under the proposed Ministerial regulation. Section 10 of Annex 2 of the proposed regulation would only require the proponent "to outline how it intends to address any effects of these activities on the various environmental characteristics and sensitivities with the special areas . . ." which special areas include: "an other effective areas-based conservation measure [OECMs] in the marine environment (e.g., marine refuge), aggregations of habitat forming corals or sponges or a Northwest Atlantic Fisheries Organization Fisheries Closure Area."

Neither Annex 2 nor the Discussion Paper provide detail on what additional information proponents may be required to include. Further, neither document explains why the information requirements on proponents apply to Marine Refuge Areas and Fisheries Closures but not to EBSAs, VMEs or SiBAs.

The Regional Assessment states that the Committee had no scientific information on which it could recommend possible areas to be excluded from exploratory oil and gas drilling. This is demonstrably false. First, the onus should be on governments and proponents to provide evidence that oil and gas drilling will not harm ecosystems; this is the very purpose of an impact assessment and the very basis for application of the precautionary principle. Second, the Committee itself determined that special areas within the Study Area may be particularly vulnerable. Third, submissions from participants in the regional assessment process provided evidence that exploratory oil and gas drilling should not be authorized in these special areas.

Nature Canada takes the view that offshore exploration in these ecologically important areas should not be excluded from project assessment under the IAA, especially where the Government of Canada is claiming these areas as OECMs for the purpose of meeting its target of protecting 10 per cent of Canada's oceans by 2020 pursuant to its Aichi targets under the Convention for Biological Diversity. Excluding the vast Study Area from project assessment without caveats also limits the scope for the government to expand legally protected areas without having to financially compensate oil and gas companies. Following promulgation of the Ministerial regulation, Proponents would no doubt claim entitlement to conduct exploration activities and demand financial compensation based on that entitlement if legally protected areas are proposed.

## **Annex 1 conditions relating to the *Species at Risk Act* and *Migratory Birds Convention Act***

Nature Canada notes the section 23 requirement that “[t]he Proponent shall be in compliance, where applicable, with the *Migratory Birds Convention Act*, the *Migratory Birds Regulations* and with the *Species at Risk Act*.

*Species at Risk Act* - Annex 1 does not include conditions governing measures to be taken by Proponents to protect species under the *Species at Risk Act*. For example, Annex 1 does not require the Proponent to take note of, or take action with respect to, any recovery strategies or action plans that may be in place under the *Species at Risk Act* with respect to threatened or endangered migratory bird, marine mammal, fish or other species. Nature Canada maintains that conditions setting out Proponent responsibilities with respect to species at risk should be included before the proposed Ministerial regulation is finalized.

Nature Canada supports the conditions of approval for offshore exploration set out in section 24 of the proposed Annex 1, which describe obligations that proponents must meet with respect to conservation of migratory birds under the *Migratory Birds Convention Act*. However, Nature Canada has the following comments on these sections.

*Seabird Observer vs. Trained Observer* - Subsection 23.(m) of Annex 1 requires proponents to “have a dedicated Seabird Observer monitor and document bird behaviour around the flare” among other duties, when flaring occurs. Subsection 25.(a) requires a “trained observer” to “monitor daily for the presence of marine birds”. The duties of the Seabird Observer and the trained observer appear to overlap, such that the same person(s) would perform both sets of duties. Nature Canada recommends that the text of the regulation be revised to clarify that this is the case, perhaps by amalgamating the responsibilities under a single job title.

*Potpourri of Qualifying Phrases* – Sections 23 and 24 are rife with unnecessary or apparently arbitrary phrases qualifying the obligations of proponents with respect to migratory bird conservation mitigation measures. Some of these qualifying phrases include the following: “where applicable” s. 23; “where acceptable to the Board” s. 24.(a); “and as necessary for the safety of the operation” s.24.(b); “as early as practicable” s.24.(c); “while meeting operational health and safety requirements” s. 24.(f); “unless there is an emergency situation” s.24.(g); “as required under the Canadian Civil Aviation Regulations or if not feasible for safety reasons” s.24.(h); “to the extent possible without compromising safety” s. 24.(i); “to the extent feasible” s.24.(l); and “as applicable” s.24.(m).

Nature Canada’s view is that these qualifying phrases should be deleted because they provide proponents with conveniently broad justifications for failing to meet prescribed standards. Instead, Nature Canada proposes including a clause that states that the conditions do not apply during emergencies or when they would prejudice health and safety during exploration activities.

## Recommendations

Nature Canada's recommendations with respect to the *Discussion Paper on a Ministerial Regulatory Proposal to Designate Offshore Exploratory Drilling East of Newfoundland and Labrador for Exclusion under the Impact Assessment Act* are as follows:

### **1. Carry out additional work on the Regional Assessment before finalizing the regulation**

*Recommendation 1: The proposed Ministerial regulation should not be finalized until the deficiencies in the Regional Assessment, such as those relating to cumulative effects, greenhouse gas emissions, and protected areas are addressed.*

### **2. The regulatory process for the Ministerial regulation should be broadly similar to that for gazetted regulations**

*Recommendation 2: The equivalent to a regulatory impact assessment statement should be prepared and released for comment prior to finalization of the proposed Ministerial regulation. Further, the proposed final text of the proposed Ministerial regulation should be published on the Impact Assessment Agency of Canada website in a manner similar to publication in the Canada Gazette Part 1, with a time period of 60 days set aside for public comment prior to promulgation of the regulation.*

### **3. Offshore exploration in ecologically important areas established by law or recognized by Canada or internationally should be subject to project impact assessment**

*Recommendation 3: The proposed Ministerial regulation should include a provision declaring that the regulation does not apply to (future) Marine Protected Areas (Oceans Act), National Marine Conservation Areas and National Marine Conservation Area Reserves (Canada National Marine Conservation Areas Act) Marine National Wildlife Areas (Canada Wildlife Act), nor to internationally or federally designated ecologically important areas such as Ecologically and Biologically Significant Areas, Marine Refuge Areas, Vulnerable Marine Ecosystems, Significant Biological Areas, and Bottom Fishing Closure Areas.*

### **4. Annex 1 conditions relating to the Species at Risk Act and Migratory Birds Convention Act require further consideration and (re)drafting**

*Recommendation 4: Annex 1 should include further conditions setting out the duties of Proponents to protect species at risk to ensure compliance under the Species at Risk Act.*

*Recommendation 5: Annex 1 conditions relating to migratory bird conservation are important but require clarification and revision in order to meet the requirements of the Migratory Birds Convention Act.*



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