www.ecojustice.ca
info@ecojustice.ca
1.800.926.7744

VANCOUVER
214 – 131 Water Street
Vancouver BC V6B 4M3
T 604.685.5618
F 604.685.7813

TORONTO
Centre for Green Cities
401 – 550 Bayview Avenue
Toronto, ON M4W 3X8
T 416.368.7533
F 416.363.2746

OTTAWA
University of Ottawa
LeBlanc Residence, 107
35 Copernicus Street
Ottawa, ON K1N 6N5
T 613.562.5800 x 3382
F 613.562.5184

CALGARY
900 – 1000 5th Avenue SW
Calgary, AB T2P 4V1
T 403.705.0202
F 403.264.8399

August 22, 2012

John McCauley
Director, Legislative and Regulatory Affairs
Canadian Environmental Assessment Agency
22nd Floor, Place Bell
160 Elgin Street
Ottawa, ON
K1A 0H3
RegulationsReglements2012@ceaa-acee.gc.ca

cc:
The Honourable John Duncan, Minister of Aboriginal Affairs and Northern Development
Mr. Gaétan Caron, Chair and CEO, National Energy Board of Canada
Mr. Max Ruelokke, Chair and CEO, Canada-Newfoundland and Labrador Offshore Petroleum Board
Mr. Keith Evans, Acting Chair, Canada-Nova Scotia Offshore Petroleum Board

Dear Mr. McCauley,

Re: Amendment proposal for the *Regulations Designating Physical Activities* and the *Prescribed Information Regulations* under the *Canadian Environmental Assessment Act, 2012*

We are writing to you on behalf of Ecojustice to express our concerns regarding the *Regulations Designating Physical Activities*[1] ("RDPA") and the *Prescribed Information Regulations*[2] as they currently exist under the *Canadian Environmental Assessment Act, 2012*[3] ("CEAA 2012"). Below we set out Ecojustice's general concerns with the RDPA and the *Prescribed Information Regulations*, as well as specific concerns with the non-application of the RDPA to offshore oil and gas exploration and licensing activities.

Ecojustice is Canada's largest public interest environmental law charity, with a mission to defend Canadians' right to a healthy environment. Our lawyers and scientists have been involved in litigation and law reform matters pertaining to

[1] *Regulations Designating Physical Activities*, SOR/2012-147.
[2] *Prescribed Information Regulations*, SOR/2012-148.
[3] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19.

CEAA for the past two decades, and bring considerable experience working with civil society and government in the implementation of this law.

For the reasons outlined below**, Ecojustice recommends that:**

1) CEAA 2012 be amended to require that all projects designated in the RDPA be subject to environmental assessment, regardless of the responsible authority;
2) the *Prescribed Information Regulations* be amended to require the following relevant information in project descriptions:
    a. description of changes that may be caused to non-aquatic species at risk listed under the federal *Species at Risk Act* ("SARA")
    b. description of the impact of the project on the critical habitat of species at risk listed under SARA (aquatic species and otherwise)
    c. description of the impact on navigable waters or any unique or special resources not already identified
    d. description of consultations undertaken with the Canadian public, provincial/territorial governments and foreign countries
    e. description of the project's purpose (without which it is extremely difficult to assess the need for the project)
    f. description of the projects' proximity to other projects
    g. description of the "components of the environment that are likely to be affected by the project and a summary of potential environmental effects"
    h. information related to the terrain, water bodies, air, and vegetation potentially affected by the project
    i. information related to the name, width and depth of any waterway affected by the project and a description of how the waterway is likely to be affected;
3) the *Prescribed Information Regulations* be amended to remove or extend the 10 day time period within which the CEA Agency must determine whether an environmental assessment is required; and
4) the RDPA be amended to include both offshore oil and gas exploration activities and the issuance of offshore oil and gas exploration licences.

A. Concerns with the *Regulations Designating Physical Activities*

Significantly fewer environmental assessments will be required under the RDPA than were required under the former CEAA and its associated regulation, the *Comprehensive Study List Regulations* ("CSLR").

While the activities that may be subject to an environmental assessment under CEAA 2012 (as listed in the RDPA) are substantially similar to those activities listed under the former CSLR (excluding golf and ski resort development projects in national parks for example), there is a very significant difference: while all of the activities listed in the CSLR were required to undergo an environmental assessment where a federal authority was involved, not all activities listed in the RDPA actually require an assessment. In fact, the vast majority of activities listed as part of a project under the RDPA (31 of 39) may not be subject to an environmental assessment. Almost all of the activities listed in the RDPA (paragraphs 1-31 out of 39 in the Schedule) are linked to the Canadian Environmental Assessment Agency (the "Agency"), which means that the only legal requirement is that those projects undergo a screening by the Agency to determine whether an actual environmental assessment may be required. The Agency has broad discretion to decide whether or not these designated projects will be subject to environmental assessment. This is marked departure from the framework in the former CEAA, where an environmental assessment was required for **all** of the projects listed in the CSLR, in addition to the broader host of projects to which the Act applied due to federal authority participation.

B. Concerns with the *Prescribed Information Regulations*

Information that is relevant and necessary in order to undertake an adequate screening is not included in the *Prescribed Information Regulations*.

The *Prescribed Information Regulations* set out information to be included in a project description for designated projects subject to a screening. The requirements in the *Prescribed Information Regulations* are similar to those found in the *Establishing Timelines for Comprehensive Studies Regulations* under the former CEAA. However, there are some significant and important

differences between the two. In particular, under the *Prescribed Information Regulations* there is no longer a requirement to:

- describe changes that may be caused to non-aquatic species at risk under the federal *Species at Risk Act*.
- consider the impact of the project on the critical habitat of species at risk (even for aquatic species).
- describe impact on navigable waters or any unique or special resources not already identified.
- describe consultations undertaken with the Canadian public and foreign countries.
- describe the project's purpose, rendering it extremely difficult to assess the need for the project.
- include a description of the projects' proximity to other projects.
- describe the "components of the environment that are likely to be affected by the project and a summary of potential environmental effects".
- describe information relating to the terrain, water bodies, air, and vegetation.
- describe the name, width and depth of any waterway affected by the project and a description of how the waterway is likely to be affected.

In general, it is unclear why the information listed above is no longer required to be included in the project descriptions. Such information is clearly relevant to the determination of whether an environmental assessment is required and should be included in the project descriptions for screenings. In fact, such information is arguably necessary in order to ensure that an adequate screening is undertaken. For example, impacts on non-aquatic species at risk should be considered, as should the effects on components of the environment, including terrain, water, air and vegetation. Such information is important because it would give federal authorities a more accurate picture of the environment that may be impacted by the project. The failure to require a description of the projects proximity to other projects is also problematic because such information helps assess the true impacts of a project, including its cumulative effects.

Another problem with the ***Prescribed Information Regulations*** is that the Agency has a mere 10 days to make determination as to whether an environmental assessment is required based on the information provided by the project's proponent. This is an insufficient amount of time in which to assess the information provided and make an accurate determination as to whether an environmental assessment is required.

C. Specific Concerns regarding Offshore Oil and Gas Exploration and Licensing Activities

Historically, offshore oil and gas exploration activities have been subjected to environmental assessment. In the *Canadian Environmental Assessment Act, 1992*, such exploration activities, including both exploratory drilling and seismic surveying, were subject to a screening-level environmental assessment.[4] In addition, offshore exploratory drilling activities were included in the *Comprehensive Study List Regulations* until 2005, when they were controversially removed from the comprehensive study list.

Currently, the RDPA do not apply to either offshore oil and gas exploration activities, including drilling and seismic surveys, or to the issuance of offshore oil and gas exploration licenses. Rather, only offshore oil or gas production activity is subject to environmental assessment under CEAA 2012. Sections 10 and 11 of the Schedule to the RDPA designate offshore oil and gas production activities overseen by the Canadian Environmental Assessment Agency ("CEA Agency"), while sections 35 and 36 of the Schedule to the RDPA designate offshore oil and gas production activities overseen by the National Energy Board ("NEB").

While section 14(2) of CEAA 2012 allows the Minister to require an environmental assessment for a proposed activity not listed in the RDPA (if the activity may cause adverse environmental effects or if public concerns related to the effects may warrant the designation), this is far too discretionary an approach as applied to "high-risk, low-probability" development activities in Canada's offshore. The absence of objective criteria guiding the Minister's exercise of this discretionary power will necessarily lead to a lack of

[4] *Inclusion List Regulations*, SOR/94-637, Sch. ss. 18, 19.1.

transparency and openness, and will most certainly compromise the offshore industry's "social license to operate" in years to come.

Federal environmental assessment of proposed offshore oil and gas development, from the issuance of exploratory licenses to the undertaking of exploratory activities (including drilling and seismic surveys), is critical and must not be subject to Ministerial discretion for the following reasons:

1) High Risk of Blowout

In its 2011 report *Becoming Arctic-Ready*, the Pew Environment Group noted that "[d]rilling the first exploration well is the most dangerous step of the entire hydrocarbon development process because more well blowouts occur at this stage than at any other."[5] The 2010 Deepwater Horizon disaster ("Macondo") was caused by the blowout of an exploratory well.

Given that one of the express purposes of CEAA 2012 is to apply the precautionary principle to protect the environment and human health, it is nonsensical for environmental assessment, if it occurs at all, to be applied after the most dangerous activities relating to the development of offshore oil and gas resources have already been undertaken. In a post-Macondo era, the evaluation of high-risk, low-probability accident potential is a critical function of environmental assessment.

The risks of a blowout and other well-control incidents that may impact large marine and coastline areas must be assessed at the earliest stages, including those related to rights issuance and exploration activities.

2) Alternatives to RDPA Designation Cannot Replace CEAA 2012 Environmental Assessment

In the Arctic, and in relation to both licensing and exploration activities, existing tools and processes such as the Environmental Studies Research Fund ("ESRF"), the Petroleum and Environmental Management Tool ("PEMT"), and the Beaufort Regional Environmental Assessment ("BREA") cannot replace

[5] Porta, L. and Bankes, N. 2011. Becoming Arctic-Ready: Policy Recommendations for Reforming Canada's Approach to Licensing and Regulating Offshore Oil and Gas in the Arctic, page 1.

project- and license-specific federal environmental assessments. The same can be said for the ongoing Strategic Environmental Assessments ("SEAs") occurring in the Gulf of St. Lawrence.

Each of these tools and processes may play a valuable role in informing the scope of project- and license-specific environmental assessments, but none assesses the specific environmental effects related to a particular exploration activity or a broader commitment to conduct exploration activities, pursuant to the acceptance of a bid for exploratory rights and the issuance of a license. For example, Aboriginal Affairs and Northern Development Canada ("AANDC") acknowledges that the BREA is intended to "inform…project-specific environmental assessments."[6] Given the localized nature of important environmental areas such as polynyas and migratory routes in the Arctic, and fisheries in the Gulf of St. Lawrence, regional-level assessments are an inadequate replacement for project-specific environmental assessments.

Although alternative mechanisms may give rise to some form of environmental analysis that partially informs decision-making, they lack the transparency and openness afforded by a CEAA 2012 environmental assessment.

3) Inconsistent Offshore EA Requirements as between NEB, Canada-Newfoundland and Labrador Offshore Petroleum Board and Canada-Nova Scotia Offshore Petroleum Board

Federal environmental assessment in the offshore is complicated by the different regulatory bodies involved in various aspects of decision-making. The regulatory framework differs between the Arctic offshore and the Atlantic offshore. In the Arctic, exploration licenses (rights) are issued by AANDC. Exploration and production activities in the Arctic are regulated by the NEB. In the Atlantic and Gulf of St. Lawrence offshore, exploration licenses are granted either by the NEB, the Canada-Newfoundland and Labrador Offshore Petroleum Board ("CNLOPB") or the Canada-Nova Scotia Offshore Petroleum Board ("CNSOPB"). Exploration and production activities in the Atlantic region may be regulated by either the NEB or the CNLOPB/CNSOPB. Where the CNLOPB

[6] Aboriginal Affairs and Northern Development Canada. Beaufort Regional Environmental Assessment. http://www.aadnc-aandc.gc.ca/eng/1310583424493.

or CNSOPB regulates oil and gas activities, the CEA Agency is the responsible authority under CEAA 2012.

The differences in regulatory oversight are important because under CEAA 2012, designated projects linked to the CEA Agency are only required to undergo a screening environmental assessment at the discretion of the CEA Agency.[7] By contrast, designated projects linked to the NEB must undergo an environmental assessment and there is no discretionary scope to decline the conduct of a federal environmental assessment. This inconsistency is inappropriate and ought to be rectified: Atlantic offshore oil and gas exploration activities falling under the purview of the CNLOPB or the CNSOPB may not be subject to federal environmental assessment, even if offshore oil and gas exploration activities are added to the RDPA (if the CEA Agency decides not to perform an environmental assessment pursuant to a screening). As the NEB would be the responsible authority for offshore exploration activities in the Arctic, this concern would not apply given the absence of any screening process, and environmental assessment for such projects would be mandatory if added to the RDPA.

In response to this concern, we reiterate the above recommendation that all projects listed in the RDPA be required to undergo environmental assessment.

4) *Issuance of Offshore Oil and Gas Exploration Licenses Requires a CEAA 2012 Environmental Assessment*

Unlike exploration activities such as drilling or seismic surveying, and in contrast with the approaches taken in the United States, Norway, and Greenland (Denmark)[8], the issuance of exploratory licenses by AANDC has not traditionally been subject to environmental assessment in Canada. This is, and has always been highly problematic.

Fundamentally, offshore licensing decisions are marine planning decisions, sanctioning a developmental path dependency (toward offshore drilling) that is

[7] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 10.
[8] Porta, L. and Bankes, N. 2011. Becoming Arctic-Ready: Policy Recommendations for Reforming Canada's Approach to Licensing and Regulating Offshore Oil and Gas in the Arctic, page 5.

mirrored by license holders' commitments to invest hundreds of millions of dollars in exploratory activities. Given the risks associated with exploration activities, Ecojustice submits that exclusive exploratory rights must only be granted pursuant to a robust environmental assessment process and a comprehensive marine spatial planning exercise in a given region. Ecojustice recommends that the issuance of offshore oil and gas exploration licenses be added to the RDPA as a designated activity.

A pre-licensing environmental assessment under CEAA 2012 would provide crucial and consultation-driven information as to the suitability of a region for offshore oil and gas development before proponents invest significant amounts of time and resources into a project. Such environmental assessments under CEAA 2012 could pave the way for future project-specific assessments, allowing those future assessments to proceed more efficiently and with less public opposition.

Thus, mandatory pre-licensing environmental assessments, particularly if these were integrated within broader marine spatial planning processes, would provide significant long-term value.

In the alternative, Ecojustice submits that a condition precedent to any future licensing decisions across Canada be the completion of integrated marine spatial planning exercises in geographically defined areas.

5) Appropriate Use of Strategic Environmental Assessments

Strategic or regional environmental assessments should not replace activity- (project-) or license-specific environmental assessments, but they could be a useful tool at a pre-exploration stage for identifying whether an area is suitable for exploration, and would also be valuable in informing project-specific assessments. SEAs are also useful tools for assessing cumulative effects and alternatives to proposed projects, and can provide opportunities for consultation. SEAs provide the government with the necessary information to make informed policy decisions that pertain to the development of an entire region. It is unfortunate that CEAA 2012 did not more clearly integrate the use of SEAs as part of the legislative reforms.

Although the CNLOPB and the CNSOPB do occasionally conduct SEAs, these assessments are discretionary policy decisions, are not mandated by statute, and are not typically undertaken prior to the issuance of exploration licenses. In the Arctic, AANDC does not conduct systemic SEAs prior to opening up regions to potential offshore oil and gas development.[9] In addition, as the Pew Environment Group's report notes:

> Where [AANDC] has engaged in the Beaufort on regional planning to identify regulatory and information gaps, these efforts have not fulfilled the evaluation and integration components the Arctic Council described as key functions of a strategic environmental assessment. Nor have they in all cases preceded new leasing.[10]

The report further notes that:

> The failure to systematically analyze and evaluate environmental consequences at [the call for nominations] stage cannot be remedied by additional data gathering in later stages.[11]

While the *Canada Petroleum Resources Act*[12] ("CPRA") does provide some potential mechanisms for environmental protection during the licensing process[13], the use of these mechanisms lies entirely within the discretion of either Cabinet (Governor in Council) or the Minister of AANDC. As there are no guidelines for exercising these discretionary powers, such mechanisms present the same problems described above: lack of transparency, openness, and public engagement, all of which ultimately lead to a reduction or loss of the offshore industry's social license to operate.

The failure of AANDC to conduct SEAs in the Arctic also limits meaningful consultation with the Inuit at the call for nominations stage.[14] The same can be said of the CNLOPB and the CNSOPB in Canada's Atlantic and Gulf of St.

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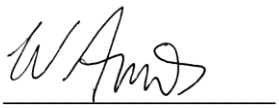
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.
[12] *Canada Petroleum Resources Act*, R.S.C. 1985, c. 36 (2nd Supp.), s. 13.
[13] See, for example, sections 10, 12(1)(b) and 14(3)(c) of the *Canada Petroleum Resources Act*.
[14] Porta, L. and Bankes, N. 2011. Becoming Arctic-Ready: Policy Recommendations for Reforming Canada's Approach to Licensing and Regulating Offshore Oil and Gas in the Arctic, page 5.

Lawrence regions, notably as regards Mi'kmaq First Nations.[15] By requiring a CEAA 2012 environmental assessment process in both the Arctic and Atlantic/Gulf of St. Lawrence offshore regions at the offshore licensing stage, the government will provide a necessary forum in which meaningful consultations with Inuit, First Nations and other stakeholders can occur.

On behalf of Ecojustice, we would like to thank you for considering our concerns. Please contact us if you have any questions regarding our concerns or any other matter.

Sincerely,



Will Amos
Director
Ecojustice Environmental Law Clinic
at the University of Ottawa

Melissa Gorrie
Staff Lawyer
Ecojustice

[15] Clancy, P. Offshore Politics and the Aboriginal Challenge. In *Offshore Petroleum Politics: Regulation and Risk in the Scotian Basin*; UBC Press: Vancouver, 2011, 321-352.