FORM 301
Rule 301

Court File No. ______________

FEDERAL COURT

BETWEEN:

SIERRA CLUB CANADA FOUNDATION, WORLD WILDLIFE FUND CANADA and ECOLOGY ACTION CENTRE

Applicants

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and THE ATTORNEY GENERAL OF CANADA

Respondents

APPLICATION UNDER SECTION 18.1 OF THE
FEDERAL COURTS ACT, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Halifax, Nova Scotia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

May ____, 2020

Issued by: ________________

(Registry Officer)

Address of local office:

Halifax Local Office
Suite 1720 - 1801 Hollis Street, 17th Floor
Halifax, NS B3J 3N4

TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and the ATTORNEY GENERAL OF CANADA
Atlantic Regional Office
Department of Justice Canada
Suite 1400 – 5251 Duke St.
Halifax NS B3J 1P3

AND TO: The Regional Assessment Committee for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador
c/o the Impact Assessment Agency of Canada
10 Barters Hill, Suite 301
St. Johns, NL, A1C 6M1

APPLICATION

This is an application for judicial review in respect of the *Report of the Regional Assessment Committee for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador,* made available to the public and the applicants on March 4, 2020 (the "Report"). The Report was prepared by the Regional Assessment Committee (the "Committee"). The Report, and the regional assessment process leading to the Report, together constitute a reviewable decision or matter within the meaning of ss 18 and 18.1 of the *Federal Courts Act* and have an ongoing and prejudicial effect on the rights and legal obligations of the applicants, and on the public interest.

The applicants make application for:

(a) An order declaring that the Report is not a "regional assessment" within the meaning of the *Impact Assessment Act*, S.C. 2019, c. 28 (the *Act*), as it does not comply with s. 102(1), 92 and/or 93, and 96-103 inclusive, of the *Act* and the requirements of the "Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador" (the "Agreement");

(b) An order quashing the Report and sending it back to the Committee for a complete assessment that complies with the Agreement and the *Act*;

(c) An order prohibiting the Respondent Minister of Environment and Climate Change (the "Minister") from making a regulation pursuant to ss 112(1)(a.2), 112(2) and 112.1 of the *Act* (the "proposed regulation"), based upon the Report, which would exempt from assessment under the *Act* certain exploratory drilling activities in the study area in the Atlantic offshore east of Newfoundland and Labrador;

(d) By Notice of Motion to be filed herein, an interim order pursuant to s 18.2 of the *Federal Courts Act* prohibiting the Minister from making the proposed regulation based upon the Report until this Court issues its decision on the within judicial review application;

(e) In the alternative, if the proposed regulation has come into force before this application is adjudicated on its merits, an interim order staying the effect of the proposed regulation until this Court issues its decision on the within judicial review application;

(f) An order of costs in favour of the applicants throughout;

(g) In the alternative, in the event that this application is dismissed, an order that the applicants shall not be required to pay costs to the respondents, pursuant to Rule 400 of the *Federal Courts Rules*; and,

(h) Such further and other relief as may be requested and this Honourable Court may see fit to order.

The grounds for the application are:

The Parties

1. The applicant Sierra Club Canada Foundation ("SCCF") is an environmental non-governmental organization, a not for profit corporation and a registered charity. It is a national grassroots organization that empowers people to be leaders in protecting, restoring and enjoying healthy and safe ecosystems. The SCCF has been involved in issues related to ocean ecosystem protection, endangered species, and the offshore oil and gas industry for two decades. The SCCF is incorporated under the laws of Ontario, with a registered address at 231 -211 Bronson Avenue, Ottawa ON K1R 6H5.

2. The applicant World Wildlife Fund Canada ("WWF") is Canada's largest international conservation organization, with the active support of hundreds of thousands of Canadians. WWF's mandate is to reverse wildlife declines in Canada and globally and, among other things, to work toward preserving, enhancing and protecting healthy marine ecosystems and habitat off the Atlantic, Pacific and Northern coasts. The WWF advocates for marine protected areas which exclude oil and gas and other industrial activities, as a step in preserving sensitive ecosystems and achieving sustainable uses of our oceans. The WWF has offices in Halifax NS and St. John's NL, as well as other cities across Canada. It is a not-for-profit corporation registered under the *Canada Not-*

for-profit Corporations Act, S.C. 2009, c. 23, with a registered address at 410 Adelaide St. West, Suite 400, Toronto ON M5V 1S8.

3. The applicant Ecology Action Centre ("EAC") is one of Atlantic Canada's oldest and largest environmental organizations, established in 1971. The EAC is a membership-based organization with over 5,000 members who directly support its work. The organization takes leadership on critical environmental issues from biodiversity protection to climate change to environmental justice. The EAC is an independent organization that strives to catalyze change through policy advocacy, community development and as a watch-dog for the environment. It takes a holistic approach to the environment and our economy to create a just and sustainable society. EAC works to protect marine ecosystems and support coastal communities and livelihoods. EAC is a strong proponent for marine protection and pollution reduction in the marine environment, advocating for marine protected areas and protecting biodiversity both in Canadian waters and on the high seas. The EAC is a registered non-profit society incorporated in Nova Scotia under the *Societies Act*, with a registered head office at 2705 Fern Lane, Halifax NS B3K 4L3.

4. The applicants were active participants in the regional assessment process leading to the Report and each made multiple individual submissions to the Committee, as well as joint submissions to the Committee and to the Minister. All were recipients of participant funding within the regional assessment process and within other environmental review processes regarding offshore oil and gas development. Each has a genuine interest in protecting the environment from the risks posed by exploratory drilling and has expressed significant concerns regarding the process followed by the Committee and the Committee's draft and final substantive findings and recommendations. Likewise, each has a genuine interest in ensuring that the *Act's* new regional assessment process is implemented and conducted robustly and thoroughly in a manner that upholds the precautionary principle.

5. The Minister is responsible for the administration of the *Act*, and for the Impact Assessment Agency of Canada. The Minister established the Committee and set its tasks

and terms of reference under s 73 and/or 74 of the *Canadian Environmental Assessment Act, 2012* (now repealed) and continued under the *Act* pursuant to ss 92, and/or 93, and 187.1 of the *Act*. The Committee must provide a report to the Minister pursuant to s 102(1) of the *Act.* Further, the Minister may make a regulation pursuant to s 112(1)(a.2) of the *Act,* provided it complies with the requirements of that section and the *Act.*

6. The Attorney General of Canada is responsible for the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada, pursuant to s 5(d) of the *Department of Justice Act* and s 18(1)(b) of the *Federal Courts Act*. Further or in the alternative, the Attorney General of Canada is named as Respondent pursuant to Rule 303(2) of the *Federal Courts Rules.*

Background

7. On April 15, 2019 the Minister announced the establishment of the Committee, at that time pursuant to the *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* which was then in force, and pursuant to the terms of the Agreement. The Committee was mandated to conduct a "regional study", within the meaning of *CEAA 2012*, also referred to in the Agreement as a "regional assessment". The Agreement provided that it would remain in force if *CEAA 2012* were repealed or replaced by the *Act*, which at the time had not yet been enacted. In August 2020 the provisions of *CEAA 2012* were repealed and the Agreement became subject to the *Act*. The Agreement established the Committee's mandate, terms of reference and the factors it was required to consider in conducting the assessment.

8. Regional assessments have a broad scope and impact. They are intended to encompass overarching issues common to a whole region, such as cumulative effects, that are difficult to address adequately in an assessment specific to a single project. Regional assessments are distinct from project-specific assessments. Unlike project-specific assessments, regional assessments can be used to inform baselines to determine the impact of discrete projects, provide standard mitigation measures for future projects and

provide guidance for land-use or marine-use planning and other initiatives that may be undertaken by various jurisdictions.

9. The Agreement defines a "regional assessment" as follows:

> **"Regional Assessment"** means a Regional Study pursuant to CEAA 2012 and is a study or assessment of the effects of existing or future physical activities carried out in a region.

10. It is unclear what provision of *CEAA 2012,* and the *Act* after it*,* enabled the Committee's work. Section 73 of *CEAA 2012* provided for assessment of regions entirely on federal lands, where section 74 dealt with regions composed in part of federal lands or entirely outside federal lands – the Agreement does not specify which provision it relied upon to enable the assessment and the Minister has made no order or statement to that effect. This ambiguity was not rectified when the regional assessment was continued under the *Act,* which makes the same distinction, in sections 92 and 93, between types of regional assessments.

11. Notwithstanding the ambiguity as to the precise statutory source of its authority, the Committee purported to conduct a regional assessment and provided the Report to the Minister under section 102(1) of the *Act* and under the Agreement.

12. In the Report, the Committee refers to its assessment as "evergreen" and says that it is meant to apply over a significant, but undefined, period of time.

13. The Report also serves an immediate purpose. Pursuant to s 112(2) of the *Act,* the Minister must consider a regional assessment before determining whether to make a regulation under s 112(1)(a.2) exempting certain oil and gas exploratory drilling projects in the offshore of Newfoundland and Labrador from the requirement to conduct an impact assessment of **any** of those projects.

14. At present, since the proposed regulation has not yet been made, exploratory oil and gas drilling projects must undergo project-specific impact assessments under the *Act.*

The Report should be quashed as it does not constitute a Regional Assessment within the meaning of the *Impact Assessment Act*:

15. The Committee delivered its Report to the Minister on February 29, 2020. The Report was made public and came to the attention of the applicants on March 4, 2020.

16. In its assessment and the Report, the Committee failed to fulfill its mandate under the Agreement and the *Act* to conduct an assessment of the impacts of exploratory drilling on the environment in the offshore study area. The Committee expressly refused to consider issues that were part of its mandate and of concern to the applicants and to the public interest.

17. The Committee was required, by the Agreement, to consider the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by offshore exploratory drilling. In particular, the Committee, *inter alia*:

    (i) was required by s 6(1)(m) of the *Act* and paragraph 1(a) of Appendix A of the Agreement, and expressly failed, to assess cumulative effects of exploratory drilling in combination with other physical activities, including other oil and gas-related activities, that are in progress or will be carried out, in the area encompassed by the regional assessment; and,

    (ii) was required by paragraph 1(a) of the Agreement, and expressly refused or failed, to assess the effects of exploratory drilling, including malfunctions and accidents and the risks and effects of oil spills and blowouts in the area encompassed by the regional assessment; and

    (iii) was required by paragraph 1(a) of the Agreement, and failed, to assess the results of any interactions between the above effects.

18. The Committee was further required, under paragraph 1 of Appendix A of the Agreement, and failed, to assess the extent to which offshore exploratory drilling contributes to sustainability and the extent to which the effects of offshore exploration

drilling hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

19. In addition, the Committee ignored or refused to consider scientific reports, opinions and other information presented to the Committee, including information presented by the applicants, contrary to s 97(2) of the *Act* and s 18.1(4) of the *Federal Courts Act*. The Committee was made aware of important and relevant scientific studies that had been, or were in the process of being, conducted in relation to subject matters under the Committee's mandate but the Committee did not consider, seek out or make inquiries in relation to such studies.

20. In particular, and without limitation, the Committee failed to consider scientific reports regarding the problems, and contribution to cumulative effects and climate change, respecting methane leakage connected to oil and gas drilling, and failed to consider recommending any areas within the study area for exclusion from exploratory drilling, even though significant and relevant scientific evidence was presented to and/or was available to the Committee in relation to the need for, and means to identify, such exclusion zones. Many other relevant scientific reports were submitted to the Committee, but the Committee failed to consider them and take them into account in reaching its conclusions.

21. The Committee further identified "data gaps" in the information available to it and stated that it did not receive "full cooperation" from federal subject matter experts, even suggesting that "government experts" should have written the Report, or parts of the Report, for the Committee despite the Committee's clear mandate and responsibility. However, the Report provides no information as to the Committee's efforts, if any, to seek out the information needed to fill those data gaps, and the Committee refused to exercise its jurisdiction under s 53 and 101 of the *Act* to compel production of such information so that it could be considered and form part of the Committee's assessment.

22. The Committee ignored or refused to consider relevant policy directives, particularly with respect to the assessment of cumulative effects, which would have assisted it in fulfilling

its mandate. In fact, the Committee's determinations were contrary to the relevant policy directives.

23. The Committee purported to justify its failure to fulfil its mandate to assess risk and cumulative effects by unlawfully proposing that these assessments be carried out by others within vague and unidentified "qualitative and quantitative risk assessments in the future", and/or to an unspecified assessment within the "land tenure process" of the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB).

24. By deferring the required assessments to other processes and not conducting them as required, the Committee failed to conduct a "regional assessment" in accordance with the *Act* and the *Agreement,* and acted contrary to law.

25. The Committee's findings and recommendations are further unlawful and invalid as they fail to consider or are inconsistent with the precautionary principle as set out in the *Act,* including but not limited to ss 6(1)(d) and 6(1)(l).

26. Further, or in the alternative, the Committee acted unfairly and unreasonably, in breach of the Agreement and the provisions of the *Act* which require meaningful public participation, by conducting a procedurally unfair process. In particular, and without limitation, the Committee:

    (a) conducted the process over an insufficiently short timeframe and in a manner that did not provide for a fulsome, thorough, thoughtful and informed assessment, and failed to seek appropriate extensions of time from the Minister to complete the assessment;

    (b) placed undue focus and high expenditure of resources on design and development of the Geographic Information System in a manner that exceeded the requirements of the Agreement, thereby further severely limiting the Committee's resources and time and making the Committee unable to consider information and fulfill the tasks which the Committee was required to complete;

(c) provided materials to the applicants on short notice and which did not allow sufficient time for the applicants and other participants to understand them and formulate comments on them;

(d) failed to consider the comments, submissions, scientific reports and information presented to the Committee by the applicants and by other participants in the regional assessment process and in coming to its conclusions in the Report;

(e) failed to post to the Impact Assessment Registry all submissions, comments and information provided to the Committee, or considered by the Committee, from the applicants, the public, other participants including oil and gas industry interests and the C-NLOPB, in accordance with the Agreement and the *Act*;

(f) failed to cite in its Report and make available on the Impact Assessment Registry all sources of information relied on by the Committee, or made available to the Committee, by or from proponents, federal authorities, industry representatives, subject-matter experts, the C-NLOPB, and/or other entities and individuals, other than Indigenous groups, in conducting the regional assessment process and in preparing the Report; and

(g) failed to give notice of, and/or make public, any amendments to the Agreement, and requests for same regarding the Committee's mandate and deadlines.

27. Despite the foregoing, the Committee purported to conclude that the effects of offshore oil and gas exploratory drilling are well understood, entail minor, localized and temporary disturbances, and are unlikely to be significant with the implementation of standard mitigation measures.

28. The Committee's findings, made without assessment, are the product of an unreasonable chain of reasoning and are untenable on the basis of the record before the Committee. The Committee therefore reached an unreasonable conclusion, contrary to ss 18.1(4)(a) and (d) of the *Federal Courts Act*.

The Court should prohibit the Minister from using the Committee's unreasonable Report to make the proposed regulation

29. By Notice dated March 4, 2020 the Minister announced that he is proposing, based on the Committee's Report, to make a regulation under paragraph 112(1)(a.2) of the *Act* (the "proposed regulation") to exclude exploratory drilling projects occurring in the study area from all assessment requirements under the Act. Although based on a flawed report, the proposed regulation would allow the many exploratory drilling projects pending or contemplated in the region to proceed without any evaluation of the environmental harms that they will cause.

30. It is beyond the Minister's jurisdiction and contrary to law to consider the flawed and incomplete Report in order to promulgate a regulation under section 112(2) of the *Act.* Since the Committee's Report cannot qualify as a "regional assessment", the Minister is unable to lawfully fulfil the statutory condition precedent of considering such an assessment prior to making a regulation exempting offshore exploratory drilling from the *Act*'s assessment requirements.

31. An order of prohibition is warranted and necessary in this matter because, despite taking only four days (including weekend days) to review the Report, the Minister has already signaled that he will be making the proposed regulation based on the Committee's Report. In a discussion paper respecting the proposed regulation, the Minister repeats and adopts the Committee's unreasonable and unsupported conclusions. The Minister's actions are contrary to his obligation under s 6(3) of the *Act* to exercise his powers in a manner that adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy.

32. Should the Minister make the proposed regulation despite this application and accompanying motion for an interim order of prohibition, the applicants will bring a further application seeking to challenge the regulation itself, once made, on the ground, *inter alia*, that the Minister did not review or consider a "regional assessment" within the meaning of the *Act*, did not satisfy the condition precedent for making of the proposed regulation and did not act in accordance with the precautionary principle and the *Act*.

This application and accompanying motion are exceptional and urgent

33. In recognition of this Court's directive and order, most recently updated on April 29, 2020, this application and accompanying motion are filed on an urgent and exceptional basis. The Minister will imminently be making a regulation based on the non-compliant Report, which will result in irreparable harm to the applicants' interests and the public interest.

34. Notice of the Minister's intention was issued almost immediately after the Committee delivered its Report to the Minister. In the Notice, the Minister solicited public comments on the regulatory proposal, and included all of the Committee's recommended provisions, but the full text of the proposed regulation was not provided. The Minister further advised that this would be the only opportunity to provide comments prior to the coming into force of the Ministerial regulation. The making of the proposed regulation is therefore imminent and will be made without further notice.

35. As it is a Ministerial regulation, the proposed regulation is not subject to the *Statutory Instruments Act* and the Minister has chosen to withhold advance publication of the regulation's text. The public will not have advance notice of the precise wording of the regulation, nor a chance to comment on same, contrary to the requirement for meaningful public participation pursuant to s 6(1)(h) of the *Act*.

36. The applicants requested the Minister grant a further extension of time for the comment period, while restrictions are in place related to the COVID-19 pandemic. However, the Minister did not respond to the applicants' request, and the April 30, 2020 deadline has now passed.

37. If the accompanying motion for interim relief is not heard until after the Court resumes normal operations, the Minister will purport to make the proposed regulation and deny the applicants the opportunity to seek interim relief.

38. If the proposed regulation is made, there will be an immediate and irreversible impact. The approximately five projects currently awaiting or undergoing impact assessment would be able to proceed without being environmentally assessed under the *Act*, even though at least some are proposing to drill for oil in sensitive areas and marine refuges.

39. Likewise, any future exploratory drilling project in the study area will not be required to undergo environmental review. As the regional assessment was fundamentally flawed and unreasonable, these projects and those that will follow will be permitted to avoid any significant environmental review and scrutiny, and will never undergo an adequate assessment at either the project-specific level or at the regional assessment level.

Costs

40. The applicants are public interest litigants and have been advocating for the public's interest in environmental health and protection, and for urgent and responsible action to address the climate crisis. All applicants have raised issues of public importance, both within the regional assessment process and by bringing this application for judicial review. This application is the first time the new *Act* has been subject to judicial scrutiny, and presents the first opportunity this Court has had to determine the requirements of the *Act* and more particularly, the requirements and legal significance of a Regional Assessment. An order pursuant to Rule 400 that no costs be awarded against the applicants is just and appropriate in the circumstances, in the event this Honourable Court sees fit to dismiss this application.

This application will be supported by the following material:

1. Affidavit of Gretchen Fitzgerald;
2. Affidavit of Sigrid Kuehnemund;
3. Affidavit of Jordy Thomson; and
4. The Report of the Regional Assessment Committee for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador, made available to the public and the applicants on March 4, 2020;
5. Materials from the certified tribunal record produced under Rules 317-318 of the *Federal Courts Rules*; and
6. Other affidavits and evidence that the applicants may seek leave to file and this Court may see fit to consider.

Rule 317 Request

The applicants request the Impact Assessment Agency of Canada and the Regional Assessment Committee for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Agency and Committee to the applicants and to the Registry, other than those that are already posted on the Impact Assessment Agency of Canada on-line registry for the within regional assessment including, but not limited to:

1. All material and reports, including scientific reports and articles, comments, proposed conditions and communications submitted to the Committee or provided to the Committee by government, industry, the C-NLOPB and by any other participant, stakeholder or subject matter expert in the regional assessment;

2. Without limiting the generality of the foregoing, all materials provided to the Committee and/or considered by the Committee in respect of:

   (a) areas within in the study area in respect of which it was proposed that oil and gas exploratory drilling would not be permitted in such locations and/or the justification offered for such an exclusion and/or the methodology and supporting evidence by which such areas could be identified;

   (b) cumulative effects associated with oil and gas exploration, including but not limited to cumulative effects on climate change in relation to emissions from any or all sources that are or may be associated with the study area, and such effects from methane leakage associated with oil and gas facilities, and the ability of Canada to meet its climate targets;

   (c) oil spills and other accidents and unplanned events in the offshore area, including investigative reports, whether designated as confidential or otherwise;

3. All summaries, briefing notes or other material provided to the Committee between the close of the comment period for the draft assessment report on and the submission of the final Report to the Minister on February 29, 2020;

4. All amendments, if any, to the Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador, all requests for direction and extensions of time, and all directions and communications between, from or to the Committee and/or the Minister and/or the Minister's representatives regarding the Committee's findings, and/or the process and timelines to be followed by the Committee in conducting the Regional Assessment; and

5. Such further and other material as may be requested.

Date: May 11, 2020

James Gunvaldsen Klaassen and Joshua Ginsberg

James Gunvaldsen Klaassen and
Joshua Ginsberg
Counsel for the applicants Sierra Club Canada Foundation, World Wildlife Fund Canada and Ecology Action Centre

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