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Regulation for offshore drilling creates welcome efficiencies under the Impact Assessment Act

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On June 3, 2020, Canada's Minister of Environment and Climate Change (the Minister) issued the *Regulation Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)* (the Regulation) pursuant to the *Impact Assessment Act* [PDF] (the IAA). The Regulation exempts proposed exploratory drilling operations occurring offshore Newfoundland and Labrador from the requirement to undergo a project-specific federal impact assessment. The Regulation came into effect June 4, 2020.

This exemption is a welcome effort at creating a more efficient regulatory process, consistent with "smart regulation," the principle that the degree of regulatory oversight for any activity should reflect the level of environmental risk posed by that activity. Not only does the Regulation draw upon past studies to significantly reduce the regulatory burden on new drilling projects, it also provides a model for how regional assessments can be used to achieve efficiencies for other types of activities under the IAA. However, the Regulation is not a free pass, and proponents of new exploratory drilling projects are incented to ensure they satisfy all of the conditions under the Regulation, with particular attention to consultation with Indigenous Groups. Failure to meet such conditions will result in the proposal again requiring an impact assessment under the IAA, causing delays and heightened costs for that project.

Background on the Regulation

Under the IAA (the cornerstone legislation in Bill C-69 that was passed into law last year), federal impact assessments are required for "designated projects" set out in the *Physical Activities Regulation* [PDF], unless those activities are exempt under a regulation made by the Minister pursuant to paragraph 112(1)(a.1) of the IAA. Section 34 of the *Physical Activities Regulation* [PDF] incudes "the drilling, testing and abandonment, in an area set out in one or more exploration licences issued in accordance with the *Canada Petroleum Resources Act*, the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act* or the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, of offshore exploratory wells in the first drilling program, as defined in subsection 1(1) of the *Canada Oil and Gas Drilling and Production Regulations*, SOR/2009-315."

The Regulation is the first under paragraph 112(1)(a.1). It exempts the drilling, testing and abandonment of offshore exploratory wells governed by the Regulation from the need to complete a federal impact assessment pursuant to paragraph 112.1 of the IAA. The Regulation was issued following the publication of the Final Report of the Regional Assessment of Exploratory Drilling East of Newfoundland and Labrador (the Regional Assessment) by the governments of Canada and Newfoundland and Labrador on February 29, 2020. The Regional Assessment found that exploratory drilling activities offshore

Newfoundland and Labrador usually involve similar environmental conditions and hazards, and that recent impact assessments for such projects have largely imposed similar mitigation measures. The authors of the Regional Assessment therefore recommended that mitigation and follow-up measures required under recent environmental assessments conducted pursuant to the *Canadian Environmental Assessment Act, 2012* (the predecessor legislation to the IAA) be codified as regulatory requirements for exploratory wells offshore Newfoundland and Labrador, and that such wells be henceforth exempt from federal impact assessments under the IAA.

Regulation details

Schedule 2 of the Regulation contains several detailed requirements for all drilling programs within the scope of the Regulation that generally align with conditions imposed on recent projects approved under the *Canadian Environmental Assessment Act, 2012*. These conditions require the proponent to:

- **Information to be provided to Impact Assessment Agency of Canada** – Provide notice containing defined categories of information to the Agency at least 90 days prior to commencing the drilling program.
- **Internet publication** – Maintain an up-to-date website hosting a defined set of information and documents and notify a list of 41 prescribed Indigenous Groups in Atlantic Canada and Québec of the initial publication of these materials and of any subsequent updates to the documents on the website.
- **Plans and studies** – Develop a series of plans and studies in consultation with various stakeholders and regulators (including, for some plans and studies, all prescribed Indigenous Groups): a fisheries communications plan, a marine mammal and sea turtle monitoring plan, a spill response plan, a well and wellhead abandonment plan, a seabed investigation study, an ice-management plan, and a plan for the avoidance of collisions between drilling installations and vessels.
- **Follow-up programs** – Develop a follow-up monitoring program with respect to migratory birds and fish and fish habitat.
- **Measures reducing harm** – Adopt and implement prescribed measures to reduce harm to marine mammals, sea turtles and migratory birds.
- **Well control strategies and spill responses** – Adopt a series of prescribed well control strategies and measures designed to prevent accidents.
- **Compliance with guidelines** – Comply with a variety of guidelines, including the *Offshore Chemical Selection Guidelines for Drilling & Production Activities on Frontier Lands* [PDF], the *Offshore Waste Treatment Guidelines* [PDF], the *Offshore Physical Environmental Guidelines* [PDF], and the *Drilling and Production Guidelines* [PDF].
- **Compliance with other applicable laws** – Comply with the requirements under all other legislation and regulations that apply in the event of a spill, accident, or malfunction.

The primary regulators for enforcing the above requirements are the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Department of Fisheries and Oceans Canada, although the Impact Assessment Agency (the Agency) is responsible for determining compliance for the purposes of the Regulation.

Further, Schedule 2 prescribes the requirements for proponent "consultation" with stakeholders and Indigenous Groups. Whenever "consultation" is required by the Regulation, the proponent must

- provide information on the matters to be consulted on to each party "in a period of time that allows the party being consulted to prepare their views and information"
- consider all views and information provided by each group
- inform each group in a timely manner how their views and information have been considered

For Indigenous Groups, the proponent must also pre-consult on the manner in which the above consultations will be undertaken.

Implications for proponents

Directionally, the Regulation should be viewed as a positive step for companies interested in developing projects offshore Newfoundland and Labrador, and for resource development across Canada more generally. The Regulation's reliance on past studies to streamline the regulatory process for new projects will significantly reduce regulatory red tape. It will also allow the Agency to focus its resources on projects with less well-understood environmental effects or those more likely to result in significant environmental and socio-economic impacts. This is a good example of government tailoring the level of regulatory oversight for an activity to reflect the level of environmental risk posed by that activity. We encourage the federal government to identify similar opportunities elsewhere in Canada.

However, proponents of exploratory drilling programs offshore Newfoundland and Labrador will need to manage certain new risks moving forward. For example:

- While many of the requirements in Schedule 2 are clear and prescriptive, others may be open to multiple interpretations or findings of non-compliance by the Agency.
- The expansive consultation requirement creates the risk that an Indigenous Group or the Agency will claim consultation is inadequate, with the result that the Regulation exemption does not apply.
- The Regulation does not address what happens if a proponent complies with the Regulation but subsequently fails to comply with one of the Regulation's conditions once drilling has been initiated.

Proponents will need to carefully approach and manage each of these issues to ensure they can fully benefit from the exemption in the Regulation.

Legal challenge to the Regulation

Prior to the Regulation coming into effect, the Sierra Club Canada Foundation, World Wildlife Fund and Ecology Action Centre (the Applicants) brought an application for judicial review in Federal Court in respect of the Regional Assessment (Federal Court File T-541-20). They sought an order quashing the Regional Assessment and prohibiting the Minister from making the Regulation.

The Applicants challenge the Regional Assessment on the grounds that the committee responsible for its drafting failed to satisfy its mandate under the IAA. The Applicants assert that the Regional Assessment is unreasonable and procedurally flawed and therefore does

not satisfy the definition of a "regional assessment" under the IAA. In the absence of a proper "regional assessment," the Applicants argue that the Minister lacked the legal authority to make the Regulation pursuant to section 112(2) of the IAA. Among other relief, the Applicants seek to have the Regional Assessment quashed. They also brought an urgent motion to enjoin the Minister from making the Regulation.

On June 3, Justice Roussel issued her reasons on the application for an interim injunction and the Crown's motion to strike in *Sierra Club Canada Foundation et al v Minister of Climate Change Canada et al*, 2020 FC 663. She dismissed the injunction motion, finding that the Applicants failed to demonstrate that allowing the Minister to make the Regulation would cause irreparable harm. The Federal Court also dismissed the Crown's motion to strike the judicial review, rejecting the Crown's argument that the Regional Assessment was not subject to review. As such, Federal Court held that the matter will proceed to judicial review in the ordinary course.

We will continue to monitor the progress of this litigation as the outcome will impact offshore development, and the potential for smart regulation throughout Canada.