

West Coast Environmental Law Association

Submission to the Standing Committee on Fisheries and Oceans Regarding [Bill C-55, An Act to amend the \*Oceans Act\* and the \*Canada Petroleum Resources Act\*](#)

November 15, 2017

“No areas [of the ocean] are unaffected by human influences”<sup>1</sup>

## I. INTRODUCTION

1. West Coast Environmental Law Association (“West Coast”) commends the federal government for introducing [Bill C-55, An Act to amend the \*Oceans Act\* and the \*Canada Petroleum Resources Act\*](#) and thanks the Committee for the opportunity to provide testimony regarding the Bill.
2. The oceans provide every second breath we take, and are essential to who we are as Canadians. Our history, culture, diet, transportation networks, recreational activities, and spiritual beliefs revolve around the ocean. Yet cod - the lifeblood of Newfoundland and Labrador - have still not recovered twenty-five years after commercial fishing was halted, wild salmon are in danger on both coasts, whales are dying in alarming numbers, and moratoria are in place for too many previously fished commercial species, such as abalone in British Columbia.
3. Marine protected areas (MPAs) are one solution, which this Bill recognizes. Once passed, Bill C-55 will fulfill the government’s commitment to “Establish MPAs Faster” by updating the *Oceans Act* “to facilitate the designation process for MPAs, without sacrificing science, or the public’s opportunity to provide input.”<sup>2</sup>
4. West Coast commends the federal government on three key amendments proposed in Bill C-55:
  - a. The proposed new process to designate Interim MPAs by Ministerial Order, which would protect MPAs far more quickly than the current process. Under this new process, the government will have five years to convert the Interim MPA into a permanent *Oceans Act* MPA through regulation.<sup>3</sup> New activities that may harm marine ecosystems in proposed Interim MPAs, such as fisheries, seismic testing, undersea mining and offshore oil and gas extraction, may be immediately restricted when the Ministerial Order is issued. Existing fisheries activities in these areas may also be restricted.

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<sup>1</sup> Benjamin S Halpern et al, “A Global Map of Human Impact on Marine Ecosystems” (2008) 319 *Science* 948.

<sup>2</sup> *Oceans Act*, RSC 1996, c 31; Government of Canada, “News Release: Government of Canada Celebrates Oceans Day and Announces Plan for Marine Conservation Targets”, (8 June 2016), online: <https://www.canada.ca/en/fisheries-oceans/news/2016/06/government-of-canada-celebrates-oceans-day-and-announces-plan-for-marine-conservation-targets.html>.

<sup>3</sup> Bill C-55, An Act to amend the *Oceans Act* and the *Canada Petroleum Resources Act*, 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, cl 5.

- b. Consequential amendments to the *Canada Petroleum Resources Act* that allow the Minister to prohibit new oil and gas activities in MPAs and to cancel existing oil and gas interests in MPAs.<sup>4</sup> We commend this approach and recommend similar amendments to the *Accord Acts*<sup>5</sup> to allow for a consistent legal regime on this issue across Canada.
  - c. The application of the precautionary principle will ensure that Canada errs on the side of protecting marine areas from harm in the face of scientific uncertainty.<sup>6</sup>
5. West Coast has testified to this Committee on previous occasions and released a number of publications regarding a more effective *Oceans Act*, including most recently:
- *Oceans20: Canada's Oceans Act Workshop Report* (October 2017);<sup>7</sup>
  - *An Ocean of Opportunity: Co-governance in Marine Protected Areas in Canada* (June 2017);<sup>8</sup>
  - *Linking Science and Law: Minimum Protection Standards for Canada's Marine Protected Areas* (May 2017);<sup>9</sup>
  - An article, currently undergoing peer review, arising from the *Linking Environmental Law and Science Symposium* at the Canadian Society of Ecology and Evolution conference (May 2017);
  - Submissions to the Standing Committee on Environment and Sustainable Development's study on Federal Protected Areas and Conservation Objectives, including a brief titled *Opportunities to Accelerate Creation of Marine and Coastal Protected Areas - Learning from Other Jurisdictions and Legal Innovations* (May 8, 2016);<sup>10</sup>
  - Submissions to this Committee as part of its *Oceans Act* MPA study (May 2, 2016).<sup>11</sup>

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<sup>4</sup> Bill C-55, *supra* note 3, cl 19, 20; *Canada Petroleum Resources Act*, RSC 1985, c 36 (2<sup>nd</sup> Supp) [CPRA].

<sup>5</sup> In Atlantic Canada, the federal and provincial governments jointly manage petroleum resources in the offshore areas adjacent to Newfoundland and Labrador and Nova Scotia. These areas are subject to separate agreements between Canada and each of those provinces, known together as the Offshore Accords, and legislated by mirror federal and provincial statutes, known collectively as the *Accord Acts*. *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28.

<sup>6</sup> Bill C-55, *supra* note 3, cl 5.

<sup>7</sup> West Coast Environmental Law, *Oceans20: Canada's Oceans Act Workshop Report* (October 2017), online: <https://www.wcel.org/publication/oceans20-canadas-oceans-act-workshop-report> [*Oceans20 Workshop Report*].

<sup>8</sup> West Coast Environmental Law, *An Ocean of Opportunity: Co-Governance in Marine Protected Areas in Canada* (June 2017), online: [https://www.wcel.org/sites/default/files/publications/2017-06-oceanofopportunity-cogovernance-brief-eng\\_0.pdf](https://www.wcel.org/sites/default/files/publications/2017-06-oceanofopportunity-cogovernance-brief-eng_0.pdf).

<sup>9</sup> West Coast Environmental Law, *Linking Science and Law: Minimum Protection Standards for Canada's Marine Protected Areas* (West Coast Environmental Law, 2017), online: [https://www.wcel.org/sites/default/files/publications/2017-05-mpaminimumprotectionstandards\\_brief\\_web.pdf](https://www.wcel.org/sites/default/files/publications/2017-05-mpaminimumprotectionstandards_brief_web.pdf).

<sup>10</sup> West Coast Environmental Law, *Opportunities to Accelerate Creation of Marine and Coastal Protected Areas: Learning from Other Jurisdictions and Legal Innovations* (8 May 2016), online: <https://www.wcel.org/sites/default/files/publications/WCEL%20Brief%20on%20MPAs%20to%20Standing%20Cttee%20May%209%202016.pdf>.

<sup>11</sup> Parliament, House of Commons, Standing Committee on Fisheries and Oceans, *Evidence*, 35<sup>th</sup> Parl, 1<sup>st</sup> Sess, No 058 (2 May 2017) at 0900 (Linda Nowlan).

6. This brief expands on the key points from these publications and submissions, and particularly from our submissions to this Committee on May 2, 2016.<sup>12</sup> In the interest of providing a submission that will best assist the Committee in its review of Bill C-55, we focus this brief on the following issues:
  - a. Part II summarizes the strong public support for the Bill;
  - b. Part III outlines our main recommendation on establishing minimum protection standards through a series of proposed amendments which
    - i. Prohibit oil and gas and mineral activities, harmful commercial fishing practices, wind farms and tidal power development within MPAs,
    - ii. Require that at least 75% of every MPA be closed to all extractive activities, including recreational and commercial fishing,
    - iii. Enshrine the maintenance of ecological integrity as the top priority in the designation and management of MPAs under the *Oceans Act*, and
    - iv. Incorporate the use of the globally-accepted International Union for the Conservation of Nature (IUCN) standards for protected areas;
  - c. Part IV outlines proposed amendments to enhance public accountability for the designation and management of MPAs by amending the public reporting requirements in the *Act*;
  - d. Part V contains proposed amendments to give effect to the government's commitment to reconciliation with Indigenous peoples and the commitment in the mandate letter to improve co-management of Canada's oceans.

## II. STRONG PUBLIC SUPPORT FOR BILL C-55

7. The public strongly supports "more, better, faster" marine protection in Canada.<sup>13</sup> Polling released by WWF-Canada last fall shows that 98 per cent of Canadians support designating parts of Canada's waters as MPAs, 80 per cent rejected oil and gas exploration in MPAs, and 63 per cent favoured limits on commercial fishing within MPAs.<sup>14</sup>
8. Participants at cross-country workshops held twenty years ago, when the *Oceans Act* was developed, urged the government to focus on ocean ecosystem health, and supported greater involvement of

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<sup>12</sup> *Ibid.* In our testimony to this Committee on May 2, 2017, we made three recommendations on how to incorporate these standards for more certainty for ocean users:

First, set general prohibitions against damaging activities instead of negotiating on a case-by-case basis each time. Second, require assignment of an IUCN category to each MPA, as the IUCN guidance documents suggest...Third, you could recommend that ecological integrity be the primary goal for the marine protected areas, as it is for land protected areas such as under the Canada National Parks Act.

<sup>13</sup> Bettina Saier, "More, better, faster: three words that will help Canada reach its ocean protection goals" (18 December 2015) *WWF-Canada Blog*, online: <http://blog.wwf.ca/blog/2015/12/18/more-better-faster-three-words-that-will-help-canada-reach-it-ocean-protection-goals/>.

<sup>14</sup> WWF-Canada, "Support near unanimous for marine protection, new survey finds" (25 October 2016), online: <http://www.wwf.ca/?22721/Support-near-unanimous-for-marine-protection-new-survey-finds>.

Indigenous peoples and communities in marine management.<sup>15</sup>

9. The public outcry in relation to the proposal to allow oil and gas in a large part of the proposed Laurentian Channel *Oceans Act* MPA shows the depth of public concern for healthy oceans. Fisheries and Oceans Canada received over 70,000 comments from the public on this issue, opposing the proposal.

### III. MPAS NEED MINIMUM PROTECTION STANDARDS TO BE EFFECTIVE

10. In our view, the most concerning aspect of Bill C-55 is the lack of minimum protection standards for MPAs. Before outlining proposed amendments to enshrine these standards, this brief provides scientific evidence on the need for the standards, outlines the current inconsistent legal regime regarding permissible activities in MPAs, and summarizes the government's commitment to these standards.
11. Expert participants at the Oceans20 workshop in Ottawa, June 2017, recommended that the government "define minimum standards for protection and explicitly require that MPAs set objectives for maintaining ecological integrity and ecosystem function," as a matter of top priority.<sup>16</sup>
12. Globally, oceans are in trouble. All marine ecosystems are increasingly threatened by biodiversity loss caused by human activities, including fishing, aquaculture, mining, pollution, and offshore development.<sup>17</sup>
13. Human activities that harm marine areas and marine life are numerous and have been detailed in our briefs and by many of the witnesses that this Committee has heard.
14. The IUCN, the world's largest conservation organization, of which Canada is a state member, recommends that:

[A]s with terrestrial sites, *some activities should always be strictly prohibited* throughout the marine and coastal protected areas network, for example, damaging coral; taking or harming, rare, threatened or endangered marine species; large-scale extractive activities like mining and industrial fisheries; and the dumping of ship waste, bilge water or toxic substances.<sup>18</sup>
15. In 2016, the IUCN called on governments to prohibit environmentally damaging industrial activities and infrastructure development in all protected areas.<sup>19</sup>

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<sup>15</sup> See Leslie Beckmann & Nigel Bankes, "Bill C-98 and the Oceans Act: a retrospective" (2017), online [https://www.wcel.org/sites/default/files/publications/1\\_oceansact\\_20yearson\\_final.pdf](https://www.wcel.org/sites/default/files/publications/1_oceansact_20yearson_final.pdf), a background paper we commissioned on the development of the *Oceans Act*, which details the extensive public engagement held prior to the introduction of the Act.

<sup>16</sup> *Oceans20 Workshop Report*, *supra* note 7 at 38.

<sup>17</sup> Boris Worm et al, "Impacts of Biodiversity Loss on Ocean Ecosystem Services" (2006) 314 *Science* 787. Douglas J McCauley et al, "Marine defaunation: animal loss in the global ocean" (2015) 347 *Science* 1255641; Benjamin S Halpern et al, "Evaluating and Ranking the Vulnerability of Global Marine Ecosystems to Anthropogenic Threats. *Conservation Biology*" (2007) 21 *Conservation Biology* 1301.

<sup>18</sup> Barbara J Lausche & Françoise Burhenne-Guilmin, "Guidelines for protected areas legislation No. 81," (Gland: IUCN, 2011) at para 218 [emphasis added].

<sup>19</sup> IUCN, *Protected areas and other areas important for biodiversity in relation to environmentally damaging industrial activities and infrastructure development* (Gland: IUCN, 2016).

## Current Inconsistent Legal Regime in Canada for *Oceans Act* MPAs

16. Canada's legal regime for marine protection lacks consistent standards of protection from harmful human activities.<sup>20</sup>
17. There is no outright prohibition on extractive activities in MPAs in the text of the *Oceans Act*. Instead, each *Oceans Act* MPA is governed by a separate regulation, which all follow the same structure. Every regulation prohibits all activities that disturb, damage, destroy or remove any living marine organism or part of its habitat. The general prohibition is followed by a list of activities that are allowed despite the prohibition. These activities, or exceptions to the prohibition, vary from MPA to MPA.
18. This structure fails to impose a baseline of minimum protection for all *Oceans Act* MPAs. It is also ambiguous, inconsistent and creates uncertainty, increasing the time and effort required every time a new MPA is designated.
19. As a result, the majority of Canada's MPAs designated under the *Oceans Act* allow extractive activities within their boundaries. For example: Tarium Nirjutait MPA (Northwest Territories) and the proposed Laurentian Channel MPA (Newfoundland and Labrador) both expressly allow oil and gas exploitation within certain zones; bottom trawling is permitted in the Basin Head (Prince Edward Island), Gilbert Bay (Labrador) and Tarium Nirjutait MPAs; and trap fishing is permitted within Sgaan Kinghlas- Bowie Seamount MPA (British Columbia). See Appendix 2 for a summary of activities allowed in *Oceans Act* MPAs.

## Government Commitment to Minimum Standards for MPAs

20. Marine protection was a central concern at the time the *Oceans Act* was passed in 1996.
21. The Honourable Brian Tobin, then Minister of Fisheries and Oceans, spoke of the need for MPAs before the House of Commons when he introduced the *Act*.<sup>21</sup> He advocated to this Committee's predecessor for the importance of "err[ing] on the side of conservation," which he called "a prerequisite if we are to keep our commitment to a holistic and collaborative approach to the management of this vast and diverse coastal resource base."<sup>22</sup>
22. In the Pacific region, as far back as 2000, government agencies agreed on the need for minimum protection standards, particularly ocean dumping, dredging, and exploration and development of non-renewable resources.<sup>23</sup>
23. Minimum protection standards received recent support from the House of Commons Standing Committee on Environment and Sustainable Development's report on federal protected areas, which

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<sup>20</sup> Canada Parks and Wilderness Society, *Dare to be Deep – Are Canada's Marine Protected Areas really 'protected'? Annual report on Canada's progress in protecting our ocean* (Ottawa, 2015).

<sup>21</sup> *House of Commons Debates*, No 231 (26 September 1995) at 14864 (Hon Brian Tobin): "If we want to take the precautionary approach in fisheries management...we give ourselves a measure of insurance by setting aside certain zones." [Emphasis added].

<sup>22</sup> Parliament, House of Commons, Standing Committee on Fisheries and Oceans, *Evidence*, 35<sup>th</sup> Parl, 1<sup>st</sup> sess, No 53 (9 November 1995) at 1540 (Hon. Brian Tobin).

<sup>23</sup> Glen S Jamieson & Joanne Lessard, "Marine Protected Areas and Fishery Closures in British Columbia" (2000) 131 *Can Spec Publ Fish Aquat Sci* at 30.

unanimously recommended that the government “confirm minimum conservation standards of protection for each category of federal protected area to meet accepted international standards.”<sup>24</sup>

24. Further, Minister LeBlanc announced at the “Our Ocean” Conference in Malta, October 2017, that Canada will establish a national advisory panel to provide advice on minimum standards within future MPAs in Canada’s waters. This is a welcome announcement. However, as laws such as the *Oceans Act* come up only rarely for amendment, the federal government should seize the opportunity to amend Bill C-55 now to incorporate minimum standards.
25. Minister LeBlanc said in the House of Commons that the federal government intends to establish “a floor of basic protections” to apply to all MPAs.<sup>25</sup> We commend this statement, and recommend that the government honour this commitment by enshrining minimum protection standards in the *Oceans Act*.
26. A number of legislative options exist to achieve these standards. The legal situation with respect to prohibiting oil and gas is particularly complex given moratoria on these activities in different areas of Canada and joint management regimes in Atlantic Canada, and we have included additional detail about this situation in Appendix 3.

### Recommended Amendment: Outright Prohibition on Harmful Activities

27. An outright prohibition on harmful activities such as oil, gas and mineral exploration and development, other forms of energy development such as wind farms and tidal power projects, open net-pen aquaculture and bottom trawling, would afford the strongest protection to *Oceans Act* MPAs.
28. Such a prohibition on oil and gas and mineral development exists in section 13 of the *National Marine Conservation Areas Act*, which reads:

No persons shall explore for or exploit hydrocarbons, minerals, aggregates or any other inorganic matter within a marine conservation area.<sup>26</sup>
29. Prohibiting bottom trawling would safeguard *Oceans Act* MPAs from industrial fishing activities. This type of ban is found in MPAs internationally, including MPAs in Scotland, Australia, and New Zealand.<sup>27</sup> Similarly, prohibiting open net-pen aquaculture would protect *Oceans Act* MPAs from the damage and destruction caused by disease, parasite transfer, and other risks associated with fish farms.

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<sup>24</sup> Parliament, House of Commons, Standing Committee on Environment and Sustainable Development, *Taking Action Today: Establishing Protected Areas for Canada’s Future*, 42nd Parl, 1st Sess, No 5 (24 March 2017) (Chair: Deborah Schulte), Recommendation 26 [ENVI Committee Report].

<sup>25</sup> *House of Commons Debates*, No 207 (27 September 2017) at 13653 (Hon Dominic LeBlanc).

<sup>26</sup> *National Marine Conservation Areas Act*, SC 2002, c 18, s 13.

<sup>27</sup> *The South Arran Marine Conservation Order 2015*, Scot SI 2015/ 437; *The Inner Dowsing, Race Bank and North Ridge European Marine Site (Specified Areas) Bottom Towed Fishing Gear Byelaw* (UK) 2013, s 2; *South-East Commonwealth Marine Reserves Network Management Plan 2013–23* (Cth), s 5.5.4; Government of New Zealand, “Type 2 Marine Protected Areas,” online: <http://www.doc.govt.nz/nature/habitats/marine/type-2-marine-protected-areas/>.

30. Amending the Bill would offer uniform protection to *Oceans Act* MPAs, remove the ambiguity of the implicit prohibitions in the current legal regime, and ensure lasting protection that could not be altered without legislative amendments in Parliament.

**Recommended Amendment:**

The Act is amended by adding the following after section 35:

**S. 35.1 Prohibitions**

No persons shall explore for or exploit hydrocarbons, wind or tidal power, minerals, aggregates or any other inorganic matter, conduct marine finfish aquaculture, or use bottom trawl fishing gear within a marine protected area.

**Recommended Amendment: Requirement for No-Take Areas**

31. The first of the five key conditions for successful conservation outcomes in MPAs, as identified by an influential and widely-cited scientific study, is that they be “no-take” or closed to all extractive activity, including commercial and recreational fishing.<sup>28</sup> Scientific literature emphasizes that “no-take” areas are most successful at protecting marine life and helping populations recover from high extractive pressures within protected areas.
32. Currently the *Oceans Act* contains no requirement for any zone or portion of any MPA to be “no-take.” In addition to the prohibition above, we recommend an amendment that requires that a minimum of 75 per cent of the area within every MPA designated under the *Oceans Act* be prescribed as a “no-take” zone; i.e. closed to all commercial and recreational fishing and harvesting activities.

**Recommended Amendment:**

The Act is amended by adding the following after section 35.1:

**S. 35.2 Prohibition on Extractive Activities in at least 75 per cent of Area**

- (1) Each marine protected area must prohibit all extractive and commercial activities, including commercial and recreational fisheries in at least 75 per cent of the area to fully protect the special features or sensitive elements of the marine ecosystems.
- (2) Nothing in this provision limits the constitutionally-protected rights of Indigenous peoples.

**Recommended Amendment: Maintenance of ecological integrity as the top priority for MPAs and Interim MPAs**

33. MPAs are often described as national parks in the ocean. But while the first priority for park management under the *Canada National Parks Act* is “the maintenance or restoration of ecological integrity,” the *Oceans Act* contains no similar requirement for managing MPAs.<sup>29</sup>

<sup>28</sup> Graham J Edgar et al, “Global conservation outcomes depend on marine protected areas with five key features” (2014) 506 *Nature* 216.

<sup>29</sup> *Canada National Parks Act*, SC 2000, c 32, s 8(2): “Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.”

34. The Standing Committee on Environment and Sustainable Development considered this topic in its recent federal protected areas study and recommended that the Government of Canada amend and strengthen the *National Marine Conservation Areas Act* and the *Oceans Act* in order to “[e]nshrine the restoration and maintenance of ecological integrity as the overriding priority for Canada’s marine conservation areas in parallel with the *Canada National Parks Act*.”<sup>30</sup>

#### Recommended Amendment

The Act is amended by adding the following after section 35.1:

##### **S. 35.3 Maintenance of Ecological Integrity**

(1) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Governor in Council and the Minister when exercising their powers or performing their duties and functions under subsection 35(3) or 35.1(2).

(2) For the purposes of subsection (1), ecological integrity means, with respect to an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada, that the structure, composition and function of the ecosystem are unimpaired by stresses from human activity; natural ecological processes are intact and self-sustaining, the ecosystem evolves naturally and its capacity for self-renewal is maintained; and the ecosystem’s biodiversity is ensured.

#### Recommended Amendment: Assigning IUCN Protected Area Categories to MPAs

35. As the Committee has heard, the IUCN’s classification system for protected areas is widely used across the globe to guide MPA legislation, as are its *Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas* and *Guide to Protected Areas Legislation*.<sup>31</sup>
36. Defining the IUCN categories and requiring each MPA to be associated with an IUCN category would provide valuable guidance to those responsible for MPA management, set recommended restrictions on activities within each MPA according to its category, encourage greater consistency between MPAs, and help with international reporting obligations.
37. Canadian law should make it mandatory to state the purposes for which an MPA is declared and to assign an IUCN category to each MPA. An example of this approach is found in Australian law.<sup>32</sup>

<sup>30</sup> ENVI Committee Report, *supra* note 24, Recommendation 30.

<sup>31</sup> Jon Day et al, *Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas* (Gland, Switzerland: IUCN, 2012); Lausche, *supra* note 18. IUCN categories range from Category 1a - “Strict nature reserve” areas, which are afforded the greatest protection, to Category VI – “Protected Area with sustainable use of natural resources.” Leading laws like Australia’s *Environment Protection and Biodiversity Conservation Act 1999* (Cth) classify MPAs in Categories I-IV.

<sup>32</sup> *Environment Protection and Biodiversity Conservation Act*, *supra* note 31, s 346(1)(e):

346. (1) The Proclamation declaring an area to be a Commonwealth reserve must: [...]

(e) assign the reserve to a category (an *IUCN category*) prescribed in regulations made for the purposes of this subsection. [Emphasis in original].

### Recommended Amendment

The Act is amended by adding the following after section 35.1:

#### **S.35.4 Assigning IUCN Protected Area Categories to marine protected areas**

Designation of a marine protected area must assign a name to the marine protected area, state the purposes for which the marine protected area is designated, state the depth of any seabed that is under any sea included in the marine protected area and assign the marine protected area an IUCN category prescribed in regulations made for the purposes of this subsection.

## IV. ENHANCING ACCOUNTABILITY THROUGH PUBLIC REPORTING REQUIREMENTS

38. Incorporating annual public reviews of the status of MPAs into the *Oceans Act* would increase oversight and accountability of the management of MPAs.
39. New Zealand proposes an intriguing “generational review” for MPAs “to recognize the Maori view that decisions made by contemporary generations should not tie the hands of future generations.”<sup>33</sup>
40. The UK *Coastal and Marine Access Act* requires publication of a detailed report containing specific information on “indicators” of conservation status and management effectiveness for their MPAs, which are known as “Marine Conservation Zones” (MCZs). These reports include such information as the number of MCZs which the authority has designated during the relevant period; and the extent to which, in the opinion of the authority, the conservation objectives stated for each MCZ which it has designated have been achieved; as well as any further steps which, in the opinion of the authority, are required to be taken in relation to any MCZ in order to achieve the conservation objectives stated for it.<sup>34</sup>
41. In contrast, the *Oceans Act* currently requires a one-time review pursuant to s. 52, which this Committee completed in 2001.<sup>35</sup>

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<sup>33</sup> NZ Ministry of the Environment, *A New Marine Protected Areas Act: Consultation Document* (Wellington: Ministry for the Environment, 2016) at 28.

<sup>34</sup> *Marine and Coastal Access Act, 2009* (UK), 2009, c 23, s 124(2).

<sup>35</sup> Currently, section 52 of the *Oceans Act*, *supra* note 2, reads as follows:

52 (1) The administration of this Act shall, within three years after the coming into force of this section, be reviewed by the Standing Committee on Fisheries and Oceans.

(2) The Committee shall undertake a comprehensive review of the provisions and operation of this Act, including the consequences of its implementation, and shall, within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes to this Act or its administration that the Committee would recommend.

This review was completed in 2001: Parliament, House of Commons, Standing Committee on Fisheries and Oceans, *Report on the Oceans Act*, 37th Parl, 1st Sess (October 2001) (Chair: Wayne Easter).

42. We recommend that Fisheries and Oceans Canada conduct an annual review of MPAs, similar to the annual review now required for the *Fisheries Act*, which incorporates features from the *UK Marine and Coastal Act*.<sup>36</sup>

#### Recommended Amendment

Section 52 of the *Oceans Act*, is repealed and replaced with the following:

##### S. 52 Annual Report to Parliament

(1) The Minister shall, as soon as feasible after the end of each fiscal year, prepare and cause to be laid before each House of Parliament a report on the administration and enforcement of the provisions of this Act for that year.

(2) The annual report shall include

- (a) Marine protected areas designated during the relevant reporting period;
- (b) The extent to which, in the opinion of the Minister, the conservation objectives stated for each marine protected area for which it has designated have been achieved;
- (c) Any further steps which, in the opinion of the Minister, are required to be taken in relation to any MPA in order to achieve the conservation objectives stated for it.

## V. INDIGENOUS LAW, CO-GOVERNANCE, AND INDIGENOUS ENFORCEMENT

43. The current Government of Canada has committed to “a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.”<sup>37</sup> In particular, Minister LeBlanc’s mandate directs him to “work with the provinces, territories, Indigenous Peoples, and other stakeholders to better co-manage our three oceans.”<sup>38</sup>
44. A stronger *Oceans Act* can be a vehicle for reconciliation through express provisions that recognize the inherent rights of Indigenous peoples.
45. We commend the government on its Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples, and its recognition of the inherent jurisdiction and legal orders of Indigenous nations.<sup>39</sup> In broad terms, these Principles guide an on-going review of Canadian laws and policies designed “to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal

<sup>36</sup> *Fisheries Act*, RSC 1985, c F-14, s 42.1. This provision reads:

42.1 (1) The Minister shall, as soon as feasible after the end of each fiscal year, prepare and cause to be laid before each house of Parliament a report on the administration and enforcement of the provisions of this Act relating to fisheries protection and pollution prevention for that year.

(2) The annual report shall include a statistical summary of convictions under section 40 for that year.

<sup>37</sup> Government of Canada, “Ministerial Mandate Letter from Prime Minister to the Minister of Fisheries and Oceans,” (15 November 2015), online: <http://pm.gc.ca/eng/minister-fisheries-oceans-and-canadian-coast-guard-mandate-letter>.

<sup>38</sup> *Ibid.*

<sup>39</sup> Department of Justice, “Principles respecting the Government of Canada’s relationship with Indigenous peoples,” online: <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>. The Principles state that “recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.”

and treaty rights; adhering to international human rights standards including the United Nations *Declaration on the Rights of Indigenous People*, and supporting the implementation of the Truth and Reconciliation Commission's Calls to Action."<sup>40</sup>

46. Consistent with these commitments, we recommend the following amendments to the *Oceans Act*, recognizing that the specifics of the legislative language should be developed in collaboration with Indigenous peoples.

#### *Indigenous Protected and Conserved Areas (IPCAs)*

47. The Standing Committee on Environment and Sustainable Development recommended the Government "work with Indigenous peoples to designate and manage Indigenous protected areas within their traditional territories, and incorporate these areas into Canada's inventory of protected areas by amending applicable legislation."<sup>41</sup>
48. The *Final Report on the Shared Arctic Leadership Model* by the Prime Minister's Special Representative, Mary Simon, recommended that Canada take a lead role by designing a new legislative provision for the IPA designation.<sup>42</sup>
49. Finally, the Indigenous Circle of Experts (ICE) Committee has been tasked with exploring the concept of IPCAs as part of the Pathway to Target 1 process.

#### *Strengthen ocean co-management*

50. The *Oceans Act* can provide for true joint management of Indigenous marine territories on a nation-to-nation basis where desired by Indigenous peoples.
51. The Standing Committee on Environment and Sustainable Development recommends that the Government "implement and respect co-management arrangements with Indigenous partners for federal protected areas in Indigenous traditional territories."<sup>43</sup>
52. At present, the *Oceans Act* provides wide latitude for the Minister to enter into agreements with multiple governments and groups to achieve the purposes of the *Oceans Act* but does not direct him or her to proactively pursue the development of co-governance bodies, or provide a regulatory framework for that to occur.
53. Strengthening co-management provisions will ensure that Indigenous nations along all three coasts have the opportunity to make decisions that will impact their marine territories.

#### *Recognize the authority of Indigenous Guardians in marine protection and management.*

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<sup>40</sup> Government of Canada, "Prime Minister Announces Working Group of Ministers to Review Laws and Policies Related to Indigenous Peoples", (22 February 2017), online: <https://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>.

<sup>41</sup> ENVI Committee Report, *supra* note 24.

<sup>42</sup> Indigenous Affairs and Northern Development, *A New Shared Arctic Leadership Model* by Mary Simon, (Ottawa, March 2017), online: <https://www.aadnc-aandc.gc.ca/eng/1492708558500/1492709024236>.

<sup>43</sup> ENVI Committee Report, *supra* note 24.

54. Indigenous Guardians have been stewarding their marine territories for thousands of years. At present, the *Oceans Act* does not recognize the legal authority of Guardians to enforce Canadian and Indigenous laws within MPAs.

#### **Recommended Amendments:**

##### **Principle of Reconciliation**

The Preamble is amended by adding:

WHEREAS Parliament wishes to affirm the recognition of Indigenous rights and strengthen Indigenous involvement in marine protection.<sup>44</sup>

##### **Inherent Indigenous Jurisdiction**

After the existing non-derogation clause in section 2.1 of the *Oceans Act*, add:

**2.2** Nothing in this Act abrogates or derogates from pre-existing jurisdiction of Indigenous peoples over Indigenous marine territories, which is hereby recognized and affirmed.

##### **Indigenous Protected and Conserved Areas**

We recommend the *Oceans Act* be amended to explicitly recognize Indigenous Protected and Conserved Areas, according to the recommendations of the groups referred to in paragraphs 47, 48 and 49.

##### **Co-Governance with First Nations**

We recommend the *Oceans Act* be amended to provide more legal direction and requirements related to oceans co-governance. Co-governance bodies should be collaboratively developed between the Crown and Indigenous nations consistent with their own legal traditions.

##### **Authority of Indigenous Guardians**

We recommend adding a section 39.1 to the *Oceans Act* to specify that Guardians may be designated as enforcement officers for the purposes of the *Oceans Act* and regulations.

## **VI. CONCLUSION**

55. West Coast thanks the Committee for the opportunity to present our views. We look forward to seeing a stronger *Oceans Act* passed into law.

#### **Submitted by:**

##### **West Coast Environmental Law**

Linda Nowlan, *Staff Counsel*

Stephanie Hewson, *Staff Counsel*

Georgia Lloyd-Smith, *Staff Counsel*

Maryann Watson, *Staff Scientist*

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<sup>44</sup> NZ Ministry of the Environment, *A New Marine Protected Areas Act: Consultation Document* (Wellington: Ministry for the Environment, 2016) at 26. An ‘important purpose’ of the proposed new New Zealand Marine Protected Areas Act is to ‘recognise the Treaty of Waitangi appropriately and strengthen iwi/Maori involvement in marine protection processes.’

## VII. APPENDIX I: SUMMARY OF PROPOSED AMENDMENTS

Issue	Recommended Amendments
<p><b>Minimum Protection Standards</b></p>	<p>The Act is amended by adding the following after section 35:</p> <p><b>S. 35.1 Prohibitions</b></p> <p>No persons shall explore for or exploit hydrocarbons, wind or tidal power, minerals, aggregates or any other inorganic matter, conduct marine finfish aquaculture, or use bottom trawl fishing gear within a marine protected area.</p> <p>The Act is amended by adding the following after section 35.1:</p> <p><b>S. 35.2 Prohibition on Extractive Activities in at Least 75% of Area</b></p> <p>Each marine protected area must prohibit all extractive and commercial activities in at least 75% of the area to fully protect the special features or sensitive elements of the marine ecosystems.</p> <p>The Act is amended by adding the following after section 35.1:</p> <p><b>S. 35.3 Maintenance of Ecological Integrity</b></p> <p>(1) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Governor in Council and the Minister when exercising their powers or performing their duties and functions under subsection 35(3) or 35.1(2).</p> <p>(2) For the purposes of subsection (1), ecological integrity means, with respect to an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada, that the structure, composition and function of the ecosystem are unimpaired by stresses from human activity; natural ecological processes are intact and self-sustaining, the ecosystem evolves naturally and its capacity for self-renewal is maintained; and the ecosystem’s biodiversity is ensured.</p> <p>The Act is amended by adding the following after section 35.1:</p> <p><b>S.35.4 Assigning IUCN Protected Area Categories to MPAs</b></p> <p>Designation of a MPA must assign a name to the MPA, state the purposes for which the MPA is designated, state the depth of any seabed that is under any sea included in the MPA and assign the MPA an IUCN category prescribed in regulations made for the purposes of this subsection.</p>

Issue	Recommended Amendments
Accountability	<p>Section 52 of the Act, Review, is repealed and replaced with the following:</p> <p><b>S. 52 Annual Report to Parliament</b></p> <p>(1) The Minister shall, as soon as feasible after the end of each fiscal year, prepare and cause to be laid before each House of Parliament a report on the administration and enforcement of the provisions of this Act for that year.</p> <p>(2) The annual report shall include</p> <ul style="list-style-type: none"> <li>(a) Marine protected areas designated during the relevant reporting period;</li> <li>(b) The extent to which, in the opinion of the Minister the conservation objectives stated for each marine protected area which it has designated have been achieved;</li> <li>(c) Any further steps which, in the opinion of the Minister, are required to be taken in relation to any MPA in order to achieve the conservation objectives stated for it.</li> </ul>
Indigenous Co-Governance	<p><b>Principle of Reconciliation</b> The Preamble is amended by adding:</p> <p>WHEREAS Parliament wishes to affirm the recognition of Indigenous rights and strengthen Indigenous involvement in marine protection.</p> <p><b>Inherent Indigenous Jurisdiction</b></p> <p>After the existing non-derogation clause in section 2.1 of the <i>Oceans Act</i>, add:</p> <p><b>2.2</b> Nothing in this Act abrogates or derogates from pre-existing jurisdiction of Indigenous peoples over Indigenous marine territories, which is hereby recognized and affirmed.</p> <p><b>Indigenous Protected and Conserved Areas</b></p> <p>We recommend the Act be amended to explicitly recognize Indigenous Protected and Conserved Areas, according to the recommendations of the groups referred to in paragraphs 47, 48 and 49.</p> <p><b>Co-Governance with First Nations</b></p> <p>We recommend the Act be amended to provide more legal direction and requirements related to oceans co-governance. Co-governance bodies should be collaboratively developed between the Crown and Indigenous nations consistent with their own legal traditions.</p> <p><b>Authority of Indigenous Guardians</b></p> <p>We recommend adding a section 39.1 to the <i>Oceans Act</i> to specify that Guardians may be designated as enforcement officers for the purposes of the <i>Oceans Act</i> and regulations.</p>

## VIII. APPENDIX 2: OCEANS ACT MPA REGULATIONS AND PERMITTED ACTIVITIES

Marine Protected Area	Commercial & Recreational Fishing	Finfish Aquaculture <sup>45</sup>	Seabed mining	Oil & Gas Activities
[Region - Province/Territory]				
Anguniaqvia niqiqyuam [Arctic - NWT]	Fishing is permitted in accordance with the Inuvialuit Final Agreement. No commercial fishing currently takes place within the MPA. Commercial fishing in the area has been closed since 1986 due to a population decline of Arctic char, and is unlikely to develop in the near future due to the importance of the subsistence fishery to the community. Sport fishing is permitted in accordance with subsection 27(1) of the <i>Northwest Territories Fishery Regulations</i> .	Finfish aquaculture would be prohibited where commercial fishing is prohibited.	Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of five metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.	The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. The seabed and subsoil are protected to a depth of five metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.
Basin Head [Atlantic - PEI]	Commercial and recreational fishing permitted in zones 2 or 3.	Finfish aquaculture could be permitted where commercial fishing is permitted.	Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of two metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.	The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. The seabed and subsoil are protected to a depth of two metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.

<sup>45</sup> The definition of “commercial fishing” under the *Fisheries Act* includes commercial finfish aquaculture.

<p>Eastport [Atlantic - NL]</p>	<p>Commercial and recreational fishing prohibited within the MPAs.</p>	<p>Finfish aquaculture would be prohibited where commercial fishing is prohibited.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of two metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.</p>	<p>The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. The seabed and subsoil are protected to a depth of two metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.</p>
<p>Endeavour Hydrothermal Vents [Pacific - BC]</p>	<p>Commercial fishing is permitted. Currently all commercial fishing in the area is pelagic, and assumed to not impact the vents.</p>	<p>Though limited due to MPA location, finfish aquaculture could be permitted where commercial fishing is permitted.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any part of the seabed, including a venting structure, or any part of the subsoil, or any living marine organism or any part of its habitat are prohibited. Regulations do not define a seabed depth included within the MPA.</p>	<p>Regulations implicitly prohibit oil and gas production, however the lack of express prohibition leads to ambiguity and the potential for exploitation in the future.</p>
<p>Gilbert Bay [Atlantic - NL]</p>	<p>Commercial fishing permitted in Zones 2 or 3 for any species other than Atlantic cod. Permitted recreational fishing activities: Zone 1: fishing for Arctic char, salmon or trout. Zone 2: fishing for any species other than Atlantic cod. Zone 3: Fishing for any species.</p>	<p>Finfish aquaculture could be permitted where commercial fishing is permitted.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of two metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.</p>	<p>The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. The seabed and subsoil are protected to a depth of two metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.</p>

<p>Gully [Atlantic - NS]</p>	<p>No commercial fishing of any type is permitted in Zone 1 of the MPA. Commercial hook-and-line fishing for halibut, tuna, shark and swordfish allowed in Zones 2 and 3. Other fishing activities may be exempted from the general prohibitions in Zones 2 and 3 provided they meet certain conditions.</p>	<p>Though limited due to MPA location, finfish aquaculture could be permitted where commercial fishing is permitted.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat, including the subsoil to a depth of fifteen metres of the seabed are prohibited. Seabed and subsoil below waters to a depth of fifteen metres are included within the MPA.</p>	<p>The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. DFO's 2008 Management Plan for the Gully MPA states that oil and gas exploration may be possible, as long as it does not disturb, damage, destroy or remove marine animals or their habitat. The seabed and subsoil are protected to a depth of twenty metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.</p>
<p>Hecate Strait and Queen Charlotte Sound Glass Sponge Reefs [Pacific - BC]</p>	<p>The Core Protection Zones (CPZ) are closed to all commercial and recreational fishing. MPA Regulations permit commercial fishing in Adaptive Management Zones (AMZ) that are not likely to result in the damage, destruction or removal of any part of the glass sponge reefs. Commercial fishing in a vertical AMZ by means of midwater trawl, midwater hook and line, troll, seine or gillnet permitted provided the gear does not enter a CPZ. The vertical AMZ and horizontal AMZ are currently closed to all commercial bottom contact fishing activities for prawn, shrimp, crab, and groundfish (including halibut), as well as for midwater trawl for hake, through fisheries closures under the Fisheries Act. Recreational fishing is permitted within a vertical AMZ, provided the fishing is carried out by means of midwater hook and line and the gear does not enter a CPZ.</p>	<p>Though limited due to MPA location, finfish aquaculture could be permitted where commercial fishing is permitted.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of twenty metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.</p>	<p>The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. The seabed and subsoil are protected to a depth of twenty metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.</p>

<p>Musquash Estuary [Atlantic - NB]</p>	<p>Commercial fishing for elvers or eels by hand-deployed fyke net or dipnet permitted in Zone 1. Fishing for lobster by individual traps and for herring by weir, beach seine, bar seine or drag seine permitted in Zone 2A, 2B or 3. Fishing for scallops permitted in Zone 3. Manually fishing for clams permitted in all zones. Recreational fishing is permitted for scallops or clams manually, and recreational fishing for any other species by means of angling or dip net.</p> <p>Manual recreational or commercial harvesting of dulse permitted in Zone 2A, 2B or 3.</p>	<p>Permitted commercial fishing activities are specified in regulations, it is unlikely that finfish aquaculture activities would be permitted.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of two metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.</p>	<p>The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. The seabed and subsoil are protected to a depth of two metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.</p>
<p>Sgaan Kinghlas/Bowie Seamount [Pacific - BC]</p>	<p>Regulations permit all commercial fishing that is carried out in accordance with the Fisheries Act and its regulations. Currently, sablefish trap fishery is the only commercial fishery permitted, and only occurs within Zone 2. A small amount of recreational fishing by tourists who visit the area may also take place.</p>	<p>Though limited due to MPA location, finfish aquaculture could be permitted where commercial fishing is permitted.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any part of the seabed, or any living marine organism or any part of its habitat are prohibited. Regulations do not define a seabed depth included within the MPA.</p>	<p>Regulations implicitly prohibit oil and gas production, however the lack of express prohibition leads to ambiguity and the potential for exploitation in the future.</p>

<p>St. Ann's Bank [Atlantic - NS]</p>	<p>Zone 2, commercial or recreational fishing by means of a pot, trap, rod and reel, harpoon, bottom longline, handline, gillnet or by diving. Zones 3 and 4, commercial or recreational fishing by means of a pot, trap, rod and reel, harpoon, bottom longline or handline. Fishing for seals and any related activities authorized under the Marine Mammal Regulations is permitted. Recreational fishing by any of the permitted gear types is allowed.</p>	<p>Permitted commercial fishing activities are specified in regulations, it is unlikely that finfish aquaculture activities would be permitted.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of five metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.</p>	<p>The lack of outright prohibition leaves open the possibility of oil and gas exploitation in MPAs. The seabed and subsoil are protected to a depth of five metres. This limitation could conceivably allow directional drilling into the seabed of the MPA.</p>
<p>Tarium Niryutait [Arctic - NWT]</p>	<p>Fishing permitted in accordance with the Inuvialuit Final Agreement and the Fisheries Act. Recreational fishing permitted.</p>	<p>Finfish aquaculture could be permitted where commercial fishing is permitted. The definition of "commercial fishing" under the Fisheries Act includes commercial finfish aquaculture.</p>	<p>Activities which are likely to disturb, damage, destroy or remove any living marine organism or any part of its habitat are prohibited. Seabed and subsoil below waters to a depth of five metres are included within the MPA. No regulations pertain directly to the destruction, damage or removal of the seabed within the MPA.</p>	<p>Seismic exploration activities, exploratory drilling, oil and gas production, and construction, maintenance and decommissioning of oil and gas pipelines are permitted.</p>

DFO. 2017. Marine Protected Areas (MPAs) and their Regulations. Accessed at <http://www.dfo-mpo.gc.ca/oceans/mpa-zpm/index-eng.html>

## IX. APPENDIX 3: OIL AND GAS ACTIVITIES

### Inconsistent Legal Regime for Oil and Gas Activities in MPAs across Canada

1. The federal government regulates oil and gas activities in the offshore area through the *Canada Petroleum Resources Act (CPR)*, the *Canada Oil and Gas Operations Act (COGOA)*.<sup>46</sup> In the offshore area adjacent to Nova Scotia and Newfoundland and Labrador, the federal and provincial governments jointly manage petroleum resources through the agreements referred to as the Offshore Accords, which are legislated by federal and provincial *Accord Acts*.<sup>47</sup>
2. There is currently a federal moratorium on offshore drilling in the Arctic and federal and provincial moratoria on offshore oil in BC.<sup>48</sup> There are at least two moratoria on oil and gas development within the Nova Scotia *Accord* area: a moratorium in the Gully MPA, which the Canada-Nova Scotia Offshore Petroleum Board has maintained since 1998; and a jointly declared federal-provincial moratorium in George Banks, which is not an MPA but is a valuable marine ecosystem and a productive fishing ground.<sup>49</sup>
3. These moratoria show that the federal government has already restricted offshore oil and gas activity in discrete, particularly sensitive areas, and that this type of restriction is possible within the *Accord* areas. However, moratoria do not provide strong legal protection as they are temporary and easily overturned. The Arctic moratorium was “declared” by an announcement from the Prime Minister’s Office, rather than by order, regulation or statute, and is reviewable every five years. Similarly, the Georges Bank moratorium currently expires in 2022, and the BC moratorium and Gully moratorium could be revoked at any time.
4. Moreover, moratoria do not address existing licences in the protected area. This creates uncertainty for licence holders about their oil and gas interests, and for the public about environmental protection in the long term.

### Current Status of Oil and Gas Activities within *Oceans Act* MPAs

5. There is no universal protection from oil and gas exploitation in *Oceans Act* MPAs. Seismic testing, exploratory drilling, oil and gas production, and pipelines are all allowed activities within the Tarniutit MPA (Northwest Territories) and in the proposed Laurentian Channel MPA (Newfoundland and Labrador).
6. Although none of the nine remaining *Oceans Act* MPAs contain exceptions for oil and gas activities, these activities are not expressly prohibited. This is ambiguous and leaves open the possibility of exploitation in the future. For example, Fisheries and Oceans Canada’s 2008 Management Plan for the

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<sup>46</sup> CPR, *supra* note 4; Canada Oil and Gas Operations Act, RSC 1985, c O-7, [COGOA].

<sup>47</sup> Accord Acts, *supra* note 5.

<sup>48</sup> Government of Canada, “United States-Canada Joint Arctic Leaders’ Statement,” (20 December 2016), online: <http://pm.gc.ca/eng/news/2016/12/20/united-states-canada-joint-arctic-leaders-statement>.

<sup>49</sup> Georges Bank Protection Act, SC 2015, c 39; Jean Laroche, “Georges Bank Moratorium extended by Nova Scotia government” *CBC News* (25 November 2015), online: <http://www.cbc.ca/news/canada/nova-scotia/georges-bank-moratorium-extended-1.3338283>.

Gully MPA (Nova Scotia) states that oil and gas exploration may be possible within the least-protected zone of the MPA, as long as the effects are within the natural variation of the ecosystem.<sup>50</sup> Similarly, the New Brunswick government has reserved its “right to all coal, minerals, oils and natural gas, bituminous shale and mines” in the Musquash Estuary MPA.<sup>51</sup> This points to the ambiguity and inconsistency resulting from the current legal regime, and raises concerns for the long-term protection of *Oceans Act* MPAs.

7. Further, some MPAs are vulnerable to directional drilling. The seabed of the Eastport MPA (Newfoundland) and Basin Head (Prince Edward Island) are protected only to a depth of 2m; the seabeds of Anguniaqvia niqiqyuam MPA (Northwest Territories) and St. Anns Bank MPA (Nova Scotia) are protected to a depth of 5m; and the seabed in the Hecate Strait MPA (British Columbia) is protected to a depth of 20m.<sup>52</sup> These limitations could conceivably allow oil and gas extraction from the seabed of these MPAs.

## Recommended Amendments: Prohibiting Oil and Gas Activities within MPAs

8. Several legal options could help achieve a consistent level of protection from oil and gas development in *Oceans Act* MPAs.

### 1. Outright prohibition in the *Oceans Act* on oil and gas in *Oceans Act* MPAs

9. We support an outright prohibition on oil and gas activities within *Oceans Act* MPAs, as outlined in paragraph 30 of this brief.

10. Special considerations arise in the areas governed by the *Accord Acts*, which have a “trumping” provision that reads:

In case of any inconsistency or conflict between

(a) this Act or any regulations made thereunder, and

(b) any other Act of Parliament that applies to the offshore area or any regulations made under that Act, except the Labrador Inuit Land Claims Agreement Act,

this Act and the regulations made thereunder take precedence.<sup>53</sup>

11. In order to apply to the Accord areas, a prohibition on oil and gas activities in the *Oceans Act* would require a trumping clause indicating that the *Oceans Act* takes precedence in case of inconsistency or conflict with other Acts.

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<sup>50</sup> Fisheries and Oceans Canada, *The Gully Marine Protected Area Management Plan*, (Dartmouth: Oceans and Habitat Branch, 2008) at 36. The Management Plan states:

The Regulations do not remove existing sub-surface rights to petroleum within the MPA boundary...nor do they explicitly prohibit oil and gas activities or prevent the issuance of future petroleum rights. Under the Regulations, proponents may apply to the Minister of Fisheries and Oceans Canada for approval to conduct activities within the MPA and the Minister may approve activities within Zone 3 of the MPA if effects are within the natural variability of the ecosystem and if the activities will not result in damage or disturbance to Zones 1 and 2. However, the CNOSPB Gully Policy has prohibited exploration within the MPA since 1998.

<sup>51</sup> Fisheries and Oceans Canada, *Musquash Estuary: A Management Plan for the Marine Protected Area and Administered Intertidal Area* (Dartmouth: Oceans, Habitat and Species at Risk Branch, 2008) at 6.

<sup>52</sup> SOR/2005-294, s. 1(1); SOR/2005-293, s. 1(1); SOR/2016-280, s. 2(3); SOR/2017-106, s 2(2); SOR/2017-15 ss 3(2), 4(2), 5(2).

<sup>53</sup> *NL Accord*, *supra* note 5 s 4; *Nova Scotia Accord*, *supra* note 5, s 4.

## 2. Redefining the application of select oil and gas legislation - *CPRA*, *COGOA* and the *Accord Acts* - to exclude MPAs

12. In the alternative, if an outright prohibition of oil and gas activities is not preferred, we propose withdrawing the areas designated as *Oceans Act* MPAs from the application of Canada's four oil and gas Acts.
13. Currently, the *CPRA* and the *COGOA* define their area of application as follows:

This Act applies in respect of the exploration and drilling for and the production, conservation, processing and transportation of oil and gas in

[...]

(d) that part — of the internal waters of Canada or the territorial sea of Canada — that is not situated

  - (i) in a province other than the Northwest Territories, or
  - (ii) in that part of the onshore that is not under the administration of a federal minister, and

(e) the continental shelf of Canada and the waters superjacent to the seabed of that continental shelf [...]<sup>54</sup>
14. The simplest option to protect *Oceans Act* MPAs would be to exclude “marine protected areas designated under subsection 35(3) or 35.1(2) of the *Oceans Act*” from the definition of “frontier lands” in the *CPRA* and from the area delineated under the “Application” provision of *COGOA*.<sup>55</sup>
15. Similarly, the definition of “offshore area” could be amended in the *Accord Acts*, or prescribed by regulation, to exclude *Oceans Act* MPAs.<sup>56</sup> This may require negotiating with the Newfoundland and Labrador and Nova Scotia governments, as the *Accord Acts* require that amendments to the Acts or their regulations have the consent of both levels of government.
16. These results could also be achieved through regulation, by withdrawing *Oceans Act* MPAs generally, or withdrawing *Oceans Act* MPAs individually as the federal government designates each area. There is precedent in Canada for withdrawing lands in this manner.<sup>57</sup>

### Consequential amendments to the *Accord Acts* to Mirror the Proposed Amendments to the *Canada Petroleum Resources Act*

17. Bill C-55 proposes consequential amendments to the *CPRA* that would allow the Governor in Council to issue an order prohibiting oil and gas activities within *Oceans Act* MPAs.<sup>58</sup> The amendments would also

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<sup>54</sup> *COGOA*, *supra* note 46, s 3.

<sup>55</sup> *CPRA*, *supra* note 4, ss 2, 5; *COGOA*, *supra* note 46, s 3.

<sup>56</sup> *Nova Scotia Accord*, s. 8(1), Sched 1; *NL Accord*, ss 2, 8(1).

<sup>57</sup> Land has been withdrawn from application of *COGOA* and of the Territorial Lands Act, RSC 1985, c T-7. See e.g. *Polar Bear Pass Withdrawal Order*, SOR/84-409; *Withdrawal from Disposal of Certain Tracts of Territorial Lands in the Northwest Territories (Nahanni National Park Reserve of Canada) Order*, SI/2008-101; *Withdrawal from Disposal of Certain Tracts of Territorial Lands in the Northwest Territories (Saoyú-Æehdacho (Grizzly Bear Mountain and Scented Grass Hills) National Historic Site) Order*, SI/2009-94.

<sup>58</sup> Bill C-55, *supra* note 3, s 19.

allow the Minister of Natural Resources to cancel interests within the frontier lands.<sup>59</sup> These amendments are essential to ensuring that *Oceans Act* MPAs are free of licenses and leases for oil and gas activities.

18. Thus, Bill C-55 should include similar amendments to allow for the rescinding of interests under *COGOA*, which regulates seismic testing, and the *Accord Acts*, in order to ensure that *Oceans Act* MPAs are uniformly free of oil and gas interests.

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<sup>59</sup> Bill C-55, *supra* note 3, s 20.