



13 June 2024

Senator Paul Massicotte
Chair, Senate Standing Committee on Energy, the Environment and Natural Resources
Via email: paul.massicotte@sen.parl.gc.ca

Re : Bill C-49 requires amendment to protect critical fishing grounds on Georges Bank

Dear Senator Massicotte,

Please accept this letter regarding Bill C-49, which updates the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* ("Accord Act") to include offshore renewable energy.

The Fisheries Council of Canada (FCC) is the national voice for Canada's commercial fisheries since 1915. Council members include small, medium and larger-sized companies along with Indigenous enterprises that harvest and process fish and seafood from Canada's three oceans. As the leading sector of the blue economy, the Canadian seafood industry employs close to 72,000 Canadians, mainly in coastal and rural communities, and generates \$9 billion in annual GDP.

Our concern is that Bill C-49 inadvertently lifts spatial protections for Georges Bank and Sable Island by empowering the Canada-Nova Scotia Offshore Petroleum Board to issue licences for these areas and, potentially, allows for certain types of development on Sable Island without a licence.

If the Senate approves the Bill as written, it will therefore represent some of the most profound legislative changes in the marine environment by opening Georges Bank and Sable Island for development. In short, Bill C-49 does not update sections 140.1 or 141 which establish the statutory protections for Georges Bank and Sable Island in relation to petroleum-related activities and other protections (such as Sable Island's status under the National Parks Act) are unsuitable because the Accord Act is paramount over other legislation. More details are provided below.

The role of the Senate is to provide 'sober second thought' and also to provide a regional perspective on legislation passed by the House of Commons.¹ On both accounts, we submit that it is squarely within your fundamental constitutional role to rectify these errors, or, if the government does feel that Georges Bank and Sable Island should be developed, to have them explain why this is the case.

.../2

¹ Reference Re Senate Reform at para 15.



Georges Bank – Background

Georges Bank is one of the most important fishing grounds in the world and continues to backstop the economy in South West Nova Scotia.² More recently, a coalition of First Nations acquired significant commercial interests for the bank, including some of the most valuable fishing licences issued for this area. The Bank is of particular importance because of its oceanographic and biological features. As noted in 2021 review of the Georges Bank moratorium, the high productivity of the Bank is due in part the unique circulation of water on the bank, which is in turn is related to tides, currents, winds and upwelling of waters.³ The result is persistently high and advantageously distributed phytoplankton along with fish larvae.⁴

The USA and Canada first granted petroleum exploration permits on Georges Bank in the 1960s. A moratorium was placed on further exploration, however, until the USA and Canada resolved a boundary dispute over jurisdiction for the Bank. After the World Court divided the Bank between Canadian and American jurisdiction, the federal government moved to establish a joint regulator in 1988 with the Province of Nova Scotia for offshore energy development through the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*.⁵

After considering the issue, Parliament and the provincial Legislature decided not to allow the regulator to issue licences for petroleum development on Georges Bank because of the risk presented to the key oceanographic and biological characteristics of the Bank. Instead, Parliament placed a 12-year moratorium on energy development on the bank which read:

141(1) No person shall, on or before January 1, 2000, in that portion of the offshore area described in Schedule IV, explore or drill for or produce, conserve or process petroleum or transport petroleum produced in that portion of the offshore area.

Section 141 was limited to petroleum at that time because the regulator did not have authority for any other types of development.

The Accord Act also allowed for an extension of the moratorium, which the Georges Bank Review Panel Report recommended in June 1999.⁶ The federal and provincial governments extended the moratorium to 2012, after which no further extensions were permitted as the legislation was drafted. The moratorium was extended by policy for several years, but in 2015 the federal and provincial governments introduced new amending legislation that would permanently enshrine the moratorium:

.../3

² Science and Socio-economic review of the Georges Bank Prohibition Area, 2010-2021 at 36.

³ *Ibid* at page 5.

⁴ *Ibid*.

⁵ Georges Bank Review Panel Report, June 1999 at 5.

⁶ Senate Debates, 41-1, vol 148, no 138 (February 14, 2013) at 1449 (Sen. Michael Macdonald).



Jointly issued notice — prohibition

141(1) The Federal Minister and the Provincial Minister may jointly issue a written notice prohibiting, for a period beginning on the day specified in the notice and ending on December 31, 2022, the exploration and drilling for and the production, conservation and processing of petroleum in that portion of the offshore area described in Schedule IV, and the transportation of petroleum produced in that portion of the offshore area.

The moratorium was recently extended under the Accord Act to 2032.⁷ However, Bill C-49 does not update the moratorium to include offshore renewable energy and therefore extends the powers of the regulator to allow that type of development on the Bank. As will be discussed further, this is concerning given that the high productivity on Georges Bank is directly related to its oceanographic features, which will necessarily be affected by renewable energy development as it draws energy from the wind, impacts currents and upwelling of water, and creates new and different habitats.

Sable Island National Park Reserve

Sable Island is a unique ecosystem home to a wide variety of plant species and one of the few wild, unmanaged horse herds in the world.⁸ Because of its unique attributes, the island became a focal point for conservation in the 1960s when it was proposed to remove the wild horse population. This conservation focus culminated in the creation of the Sable Island National Park Reserve in 2013, initiated by the Senate, through the Expansion and Conservation of Canada's National Parks Act. Importantly, this Bill not only established the Sable Island National Park Reserve through the *Canada National Parks Act*, but also protected it under the Accord Act. This is because of section 4 of the Accord Act states that it is paramount over any other federal legislation, meaning that unless specifically prohibited, the regulator could issue permits for developing Sable Island despite its designation as a national park reserve.

This special protection for Sable Island is found in sections 140.1 and 142.1 of the current iteration of the Accord Act, which reads, in part:

Prohibition — Sable Island National Park Reserve of Canada

140.1 No person shall carry on any work or activity related to the drilling for petroleum, including exploratory drilling for petroleum, in Sable Island National Park Reserve of Canada or within one nautical mile seaward of its low-water mark.

.../4

⁷ Joint Notice Extending the Prohibition Period for Certain Activities on Georges Bank: SOR/2022-82

⁸ See, for example, Parks Canada, *Sable Island National Park Reserve of Canada Management Plan* (2019) at 2.0: <https://parks.canada.ca/pn-np/ns/sable/info/plan/gestion-management-2019>.



Similar to Georges Bank, Bill C-49 fails to update any provisions protecting Sable Island in the Accord Act. The result is that Bill C-49 in its current iteration effectively greenlights renewable energy development on and around the island.

This problem is illustrated by the definition of “offshore area” in the Accord Act, which is likewise not being amended in Bill C-49 and therefore continues to say that the offshore area means “the lands and submarine areas within the limits described in Schedule 1” [emphasis added].

There is no definition for submerged land licence in Bill C-49, but the Bill is nonetheless clear that the regulator may issue a licence for any portion of the offshore area and that a licence confers the right to carry on an offshore renewable energy project in the licenced area of the offshore area (which, to reiterate, could include Sable Island).⁹

What is more, if amendments to Bill C-49 are not made, subsection 91(4) of the new Accord Act appears to allow for research or assessment of renewable resources on Sable Island itself without an approval or licence from the Regulator. Given the paramountcy of the Accord Act, the status of Sable Island as a national park reserve would not be sufficient to prevent this, nor, in some circumstances would the *Impact Assessment Act*.

It is no answer to say that cabinet might eventually make a regulation prohibiting development in the Sable Park National Park Reserve under section 56.1. While such an argument would fly in the face of the precautionary principle, it would more importantly not cover the 1 nautical mile buffer zone because that buffer zone is not actually part of the National Park Reserve. This is emphasized by the preamble to the Act establishing the National Park Reserve, which states:

Whereas the Governments of Canada and Nova Scotia have agreed that Parliament will enact legislation amending the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act to prohibit drilling for petroleum in Sable Island National Park Reserve of Canada, **or within one nautical mile seaward of Sable Island’s low-water mark**, and to limit the range of surface access rights in respect of petroleum work or activity in Sable Island National Park Reserve of Canada;¹⁰

This is no small oversight. One parliamentarian remarked at the committee hearing establishing the Sable Island National Park Reserve that the 1 nautical mile buffer zone equated to 200 square kilometres of protection in the marine environment. It is also notable that a regulation under section 56.1 requires the consent of the provincial minister responsible. While we assume that both the federal and provincial minister should support the ongoing protection of Sable Island, the point remains that this Senate can fix this immediately, conclusively and directly.

.../5

⁹ See clause 147 of Bill C-49, as it amends subsection 91(1) and section 92 of the Accord Act.

¹⁰ *Expansion and Conservation of Canada’s National Parks Act*, SC 2013, c 28.



Senate must apply the precautionary principle to Bill C-49

At second reading, the Minister expressed that the purpose of Bill C-49 is, in part, to “modernize parts of the land tenure process for existing offshore activities” and to “modernize the accord acts so that the boards can take on the important responsibility of regulating Nova Scotia's and Newfoundland and Labrador's offshore renewable energy projects”.¹¹ Nowhere in the debates or supporting materials does the government outline a deliberate plan to open Georges Bank and Sable Island for renewable energy development. Yet, the result of Bill C-49 is to enable the regulator to do so and thereby gives it much different powers for renewables as it does for petroleum. We feel that this is a clear oversight that needs to be remedied by the Senate. We are happy to provide specific amendments that can help guide the drafting process.

Alternatively, if the government is deliberately looking to open Georges Bank and Sable Island for development, we're left searching for a reason why. There have been volumes of studies justifying the unique statutory protections for Georges Bank and Sable Island,¹² but we are not aware of any studies being completed or commissioned specifically focusing on why it is justifiable to overturn the status quo and enable the regulator to develop these areas. If so the federal government feels it is worthwhile lifting the prohibitions without having learned something new, it would essentially flip the precautionary principle on its head, which states:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.¹³

Applying the current state of knowledge, it becomes clear that the statutory protections in place under the Accord Act need to be updated for Georges Bank and Sable Island. This is because renewable energy development could impact them just as seriously as petroleum development. Wind turbines will, by nature, impact the existing physical oceanography which drives the unique biological characteristics of the Bank. What's more, wind turbines will also change the benthic environment by creating artificial reefs, which in turn will impact existing benthic species. Sable Island's terrestrial ecosystem would also be impacted by development, indeed, potentially without any authorizations or impact assessment. This would include the sensitive physical characteristics of the island as well as impacts on migratory birds and wild horses.

.../6

¹¹ House of Commons Debates, 44-1, vol 151, no 220 (September 19, 2023) at 1039 (Hon Jonathan Wilkinson at second reading at 1039, second reading)

¹² See, for example, Consideration of the Potential Impacts on the Marine Environment Associated with Offshore Petroleum Exploration and Development Activities < <https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/343863.pdf>>.

¹³ 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para 31.



While these are just some concerns, it is important to reiterate that when it comes to development under the precautionary principle, the onus is not on justifying the status quo but rather on why the status quo should change. We remain convinced that this is an error in drafting, but if the government does intend on changing the status quo it is worth repeating that it is for the government to justify the change to the status quo, which is not at all evident for Georges Bank or Sable Island. We therefore urge you to fulfil your constitutional role of 'sober second thought' and regional representation and ensure that Bill C-49 properly updates the unique protections for Georges Bank and Sable Island.

Best regards,

Paul Lansbergen
President

c.c.: Members of Senate Standing Committee on Energy, the Environment and Natural Resources
Raymond St. Martin, Clerk, Senate Standing Committee on Energy, the Environment and Natural Resources
Members of the Senate Standing Committee on Fisheries and Oceans
Hon. Jonathan Wilkinson, Minister of Natural Resources
Hon. Diane Lebouthillier, Minister of Fisheries, Oceans and the Canadian Coast Guard
Ian McIsaac, President, Seafood Producers Association of Nova Scotia