

2016



Hfx No. 453771

Supreme Court of Nova Scotia

Between:

THE BAY OF FUNDY INSHORE FISHERMAN'S ASSOCIATION

Applicant

and

NOVA SCOTIA MINISTER OF ENVIRONMENT, THE ATTORNEY GENERAL OF NOVA SCOTIA REPRESENTING HER MAJESTY IN RIGHT OF THE PROVINCE OF NOVA SCOTIA, FUNDY OCEAN RESEARCH CENTER FOR ENERGY LIMITED, and CAPE SHARP TIDAL VENTURE LTD.

Respondents

**Amended Notice of Application for Judicial Review in the Nature of Certiorari**

**To:** The Honourable Margaret Miller, Minister of Environment  
Nova Scotia Environment  
1903 Barrington Street  
Halifax, NS B3J 2P8

**And To:** Mr. Edward Gores, Q.C.  
Nova Scotia Department of Justice  
1690 Hollis Street, 8th Floor  
PO Box 7  
Halifax, NS B3J 3J9

**And To:** Cape Sharp Tidal Venture Ltd.  
c/o Mr. Harvey Morrison  
McInnes Cooper  
1300-1969 Upper Water Street  
Halifax, NS B3J 3R7

**And To:** Fundy Ocean Research Center for Energy Limited  
c/o Tony James Wright, Recognized Agent  
400 - 1533 Barrington Street  
Halifax, NS B3J 1Z4

## Request for judicial review

The applicant requests judicial review pursuant to Civil Procedure Rule 7 of a decision by a decision-making authority, the Nova Scotia Minister of Environment.

## Decision to be reviewed

The decision was made on June 20, 2016.

The authority under which the decision is made is under the *Environment Act*, SNS 1994-95, c 1.

Attached to this Notice is a copy of the decision.

## Grounds for review

The applicant seeks review on the following grounds:

1. The Minister of the Environment (the “Minister”) erred in law and acted unreasonably by authorizing Fundy Ocean Research Center for Energy (FORCE) to proceed with an Environmental Effects Monitoring Program (EEMP) project at Cape Sharp, Nova Scotia (the “Test Site”) to monitor interactions between tidal in-stream energy conversion (TISEC) devices and marine resources (the “Decision”), and contrary to the requirements of procedural fairness set out in the *Environmental Assessment Regulations*, N.S. Reg 26/95 made under Section 49 of the *Environment Act*, S.N.S. 1994-95, c. 1 (the “EA”). Specifically, the Minister erred by:
  - a. Failing to adequately consider, or consider at all, or be guided by, relevant evidence, including:
    - i. information provided by Fisheries and Oceans Canada (“DOF”) and others with respect to the adequacy of the proposed EEMP and the existence, or lack thereof, of a baseline study of the test site and there species therein;
    - ii. the presence of species and their habitats at or near the Test Site which have been designated a listed wildlife species pursuant to Schedule 1 of the *Species At Risk Act*, SC 2002, c 29, and the potential and known adverse effects of the proposed undertaking on such species and their habitats;
    - iii. the fact that no monitoring program has been proposed or required to take into account the cumulative effects at the Test Site (including near-field, mid-field and far-field) which will occur once one or more of the three remaining proponents install and/or activate the turbines at the Test Site;
    - iv. historical data available relating to the species located at or near the Test Site, including data available from local fishing associations including the Bay of Fundy Inshore Fishermens’ Association and individual fishermen such as weir fishermen;

- v. the potential and known adverse environmental effects of the proposed undertaking, including identifying any effects on species at risk, species of conservation concern and their habitats;
  - vi. information relating to the nature and sensitivity of the surrounding area of the test site;
  - vii. the adequacy of steps taken by the proponent to address environmental concerns expressed by the public and aboriginal people, including concerns expressed by the Applicants; and
  - viii. the environmental risks which arise as a consequence of the Test Site infrastructure, as presently prepared and operationally intended, being other than what was originally contemplated;
- b. Determining that there existed adequate information to make the Decision;
  - c. Failing to attribute appropriate weight to the importance of baseline information; and
  - d. Such other grounds as may appear.
2. The Minister erred in law and acted unreasonably by proceeding contrary to the requirements set out in the *EA* by:
- a. Failing to use the precautionary principle in her decision-making, contrary to the *EA*, s. 2(a)(ii);
  - b. Failing to maintain environmental protection as essential to the integrity of ecosystems, contrary to the *EA*, s.2(a);
  - c. Failure to provide a responsive, effective, fair, timely and efficient administrative and regulatory system, contrary to the *EA*, s. 2(i); and
  - d. Such other grounds as may appear.
3. The Minister further erred in law and acted unreasonably by:
- a. Issuing an authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species without consulting with the competent minister and without considering the impact on the species' critical habitat, contrary to s.77(1) of the *Species At Risk Act*, SC 2002, c 29; and
  - b. Such other grounds as may appear.

### **Order proposed**

The applicant requests an order setting aside and/or quashing the decision of the Minister of Environment dated June 20, 2016, an remitting the decision to the Minister of Environment for reconsideration, and costs to the Applicant.

## You may participate

You may participate in the judicial review if you file a notice of participation no more than ten days after the day a copy of this notice for judicial review is delivered to you. Filing the notice entitles you to notice of further steps in the judicial review.

## Record to be produced

The applicant anticipates that the record may include:

- Correspondence between government departments and/or the project's proponents and/or interested parties specific to the EEMP and to any permits, licenses, leases and authorizations sought thereto. The interested parties may include, but are not limited to, the Department of Fisheries and Oceans, Environment and Climate Change Canada (formerly Environment Canada), Transport Canada, the Canadian Environmental Assessment Agency, the Nova Scotia Departments of Environment, Energy, Communities Culture and Heritage, Municipal Affairs, Natural Resources and Fisheries and Aquaculture, FORCE, the Environmental Monitoring Advisory Committee (EMAC) specific to the project, Nova Scotia Power and OpenHydro;
- The executed document titled "Fundy Tidal Energy Demonstration Facility Federal-Provincial Environmental Assessment Agreement," dated June 10, 2009;
- All proposals submitted by FORCE for a change, whether by expansion or modification, to the project since the initial project approval by Nova Scotia Environment dated September 15, 2009 and signed by then Minister Sterling Belliveau;
- All permits, licenses, leases and authorizations approved by the Department of Environment for the project under any Act and its Regulations, including but not limited to the *Environment Act* and its Regulations;
- All permits, licenses, leases and authorizations approved by any and all governmental departments (including both provincial and federal departments) for the project under any applicable legislation;
- The complete Environmental Effects Monitoring Program (EEMP) report for which a summary was written and entitled: "Cape Sharp Tidal Environmental Effects Monitoring Program (EEMP) Summary";
- All environmental assessments and EEMP Reports;
- Documents prepared by the Department of Environment or received by the Department of Environment in response to, or in relation to, the following documents:
  - "Environmental Effects Monitoring Programs," by FORCE, dated March 2016;
  - "EMAC Recommendations Regarding the FORCE Environmental Effects Monitoring Program (EEMP) for 2016 and Beyond," by EMAC, dated March 11, 2016, including the 2014/2015 external third-party consultant's review cited on page 2; and Tc
  - "Review of the Environmental Effects Monitoring Program for the Fundy Tidal Energy Project," a Science Response Process conducted by Fisheries and Oceans Canada, dated April 22, 2016;

- “Review of the Environmental Effects Monitoring Program for the Fundy Tidal Energy Project,” a Science Response Process conducted by Fisheries and Oceans Canada, dated April 22, 2016;
- Letter from DFO dated June 14, 2016, subject: “Proposed Environmental Effects Monitoring Program 2016-2020 Fundy Ocean Research Centre for Energy (FORCE) and Cape Sharp Tidal Venture (CSTV) to Steve Sanford of the Environmental Assessment Branch of the Nova Scotia Department of Environment;
- Decision of the Minister of the Environment dated June 20, 2016, subject: “Environmental Effects Monitoring Programs Fundy Ocean Research Centre for Energy (FORCE)”;
- The applicant intends to file a report from an individual who the applicant expects to qualify as an expert witness in the area of marine biology and biostatistics;
- The applicant intends to file an affidavit from a member of the applicant setting out the facts to be relied on in making the determinations of the issues; and
- Potentially two additional affidavits, which will be determined upon a review of the record.

Prior to initiating this application, the applicant sought information that it anticipates will form part of the record as outlined above by making applications to various provincial departments under the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 and to a number of federal departments under the *Access to Information Act*, R.S., 1985, c. A-1. The majority of these requests remain outstanding. The applicant is therefore unable to enumerate each component of the record with certainty. The applicant predicts that it will be able to provide its affidavits by September 15, 2016.

The applicant anticipates that the respondent may want to provide one or more responding affidavits, which will form part of the record in addition to the foregoing documents, in addition to any other materials which may be required.

#### **Notice to decision-making authority**

The respondent Minister of Environment is required by Civil Procedure Rule 7 (Judicial Review and Appeal) to file one of the following no more than five days after the day the decision-making authority is notified of this proceeding by delivery of a copy of this notice for judicial review;

- a complete copy of this record, with copies of separate documents separated by numbered or lettered tabs;
- a statement indicating that the decision-making authority has made arrangements with the applicant to produce of the record, providing details of those arrangements, and estimating when the return will be ready;
- an undertaking that the decision-making authority will appear on the motion for directions and will seek directions concerning the record;

- a summary of reasons given orally without a record and your certificate the summary is accurate, if you gave reasons orally and not on record.

If you fail in this regard, a judge may order costs against you including a requirement that you indemnify each other party for any expenses caused by your failure, such as expenses caused by an adjournment if that is the result.

### **Stay of proceedings or other interim remedy**

At the hearing of the motion for directions on August ~~26~~25, 2016, the applicant will seek directions from the Court regarding any motion for a stay of the enforcement of the decision under judicial review which might be brought

### **Filing and delivering documents**

Any documents you file with the court must be filed at the office of the Prothonotary, 1815 Upper Water Street, Halifax, Nova Scotia, B3J 1S7 (telephone #424-6900).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

### **Contact information**

The applicant designates the following address:

David G. Coles, Q.C.  
**BOYNECLARKE LLP**  
Barristers and Solicitors  
99 Wyse Road, Suite 600  
Dartmouth, Nova Scotia B3A 4S5

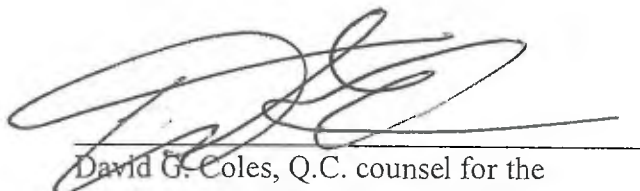
Documents delivered to this address are considered received by the applicant on delivery. Further contact information is available from the prothonotary.

### **Motion for date and directions**

At **11:00 a.m., on August 25, 2016**, the Applicant will appear before a judge in Chambers at The Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia, B3J 1S7 to make a motion for an order giving directions for the judicial review including a date and time for the hearing of it, including a date and time for the hearing of any motion that might be made for a stay of the enforcement of the decision under judicial review. The judge may make an order or provide directions in your absence if you or your counsel fail to attend, and the court may determine the judicial review without further notice to you.

Signature

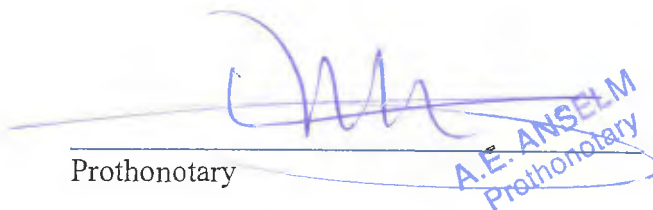
Signed July 25 2016



David G. Coles, Q.C. counsel for the  
Applicant, The Bay of Fundy Inshore  
Fisherman's Association

**Prothonotary's Certificate**

I certify that this **amended** notice for judicial review was filed with the court on July 25,  
2016.



A.E. ANSELM  
Prothonotary

June 20, 2016

Melissa Oldreive  
Director of Operations  
Fundy Ocean Research Center for Energy (FORCE)  
Halifax, Nova Scotia

Dear Ms. Oldreive:

**Subject: Environmental Effects Monitoring Programs  
Fundy Ocean Research Center for Energy (FORCE)**

The review of the Environmental Effects Monitoring Programs (EEMP) has been completed.

Following a review of the information provided by Fundy Ocean Research Center for Energy (FORCE), Cape Sharp Tidal Venture (CSTV) and through consultation with Fisheries and Oceans Canada (DFO), Nova Scotia Environment (NSE) is satisfied that an adaptive management approach to environmental effects monitoring will address outstanding knowledge gaps and improve our understanding of interactions between tidal in-stream energy conversion (TISEC) devices and marine resources.

In addition to the mitigation measures proposed for both near-field and mid-field monitoring programs, the review of the EEMP identified several areas that requires further attention. The following programs must be developed in consultation with and to the satisfaction of NSE and DFO and implemented following deployment of the CSTV TISEC device(s):

- The deployment of the CPODs needs to be expanded to account for the considerable inter-annual variation in the summer distribution of porpoises in this part of their range as detailed in the Update COSEWIC Status Report on the Harbour Porpoise 2006. It has been noted that some portions of the population may over-winter in the Bay of Fundy. Based on this information, the monitoring program should also be amended to reflect winter sampling periods;
- The use of the Marine Animal Response Society (MARS) reports to identify any potential marine animal interaction has limited use as it relies on the general public to report any dead or injured marine animals. A more robust dead or injured marine mammal monitoring plan must be developed and implemented as part of this EEMP. This plan must be developed in consultation with and to the satisfaction of NSE and DFO; and
- FORCE must provide additional details surrounding contingency planning for environmental effects monitoring in the event of equipment failure, data deficiency and/or loss of data.



Monitoring results collected as part of this EEMP will provide a limited understanding of the potential environmental effects and interactions between marine resources and TISEC devices. In consideration of an adaptive management approach to environmental effects monitoring, the EEMP will be expanded to address information gaps pertaining to environmental effects associated with the deployment of the CSTV TISEC device(s) and reduce uncertainty that may limit regulatory decisions respecting future TISEC deployments.

Unless otherwise approved, a revised EEMP must be submitted to NSE on or before January 1, 2017 and be developed in consideration of the following:

Lobsters:

- Additional non trap studies to detect changes in lobster movement patterns should be added to determine any changes in lobster movement around the turbine or cables.

Fish:

- The development of further studies intended to inform effects monitoring on fish populations should be undertaken in consultation with DFO such as an enhanced fish tagging study, to enable year round fish monitoring for species/populations found in the Minas Passage;
- The Minas Passage is a migratory path for numerous species and important overwintering habitat for species such as Striped Bass. The down-looking hydro acoustic monitoring program should be expanded both in scope and equipment beyond the proposed 6 days per year in order to be representative of actual usage of the site by marine fish species. Alternative programs should be explored and implemented where practical and in consultation with DFO. The use of an array of bottom mounted echo-sounders would provide more robust data and would not be subject to the environmental limitations that inhibit vessel based surveys such as visibility, seasonal constraints, weather and tides;
- A framework for interpreting the results of the monitoring programs that incorporates life history and dynamics of fish populations as well as their distribution, behaviour and survival through the turbines should be added to the EEMP. This will allow for the impacts on population status and fisheries to be incorporated into the encounter model that is proposed to be developed as part of this EEMP;
- Further evaluation of the potential use of intertidal weirs to gather additional seasonal baseline information on fish assemblages and habitat use in the vicinity of the Project should be undertaken; and
- The positioning of the Gemini Sea-Tec Sonar Device on the CSTV turbine will only provide interaction information from one side of one of the turbines (facing ebb flow) and has limited ability to be serviced in the event of failure or malfunction. Additional devices should be added to the program and deployed independently of the device to allow for accessibility. These devices should also be positioned to view any potential interaction from both sides of the turbines (e.g., side looking) and be applied to both proposed turbines. In the absence of this approach, alternative active fish monitoring methods should be developed for use in the program and submitted to DFO and NSE for review.

Marine Mammals:

- Additional data collection should be carried out to evaluate marine mammal use in the area throughout the year;
- Multi-year repetition of sampling periods should be undertaken to provide a more robust basis for inter-annual comparisons that will inform the determination of effects from baseline conditions;
- If CSTV's turbine installation occurs outside of periods of peak Harbour Porpoise presence, consider using recorded clicks to test the detection range of hydrophones pre and post installation;
- Data interpretation from hydrophones should be conducted by a qualified acoustics analyst;
- Hydrophones used to detect marine mammals should be capable of detecting lower frequencies typical of baleen whales; and
- Any necropsies should be performed by a certified veterinarian with specialized skills in this area.

General Comments:

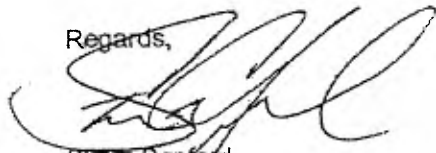
- As information is received during this EEMP, additional measures may be required to improve environmental effects monitoring;
- Elements of the EEMP may only be discontinued following consultation with NSE and DFO and obtaining written approval from NSE;
- Unless otherwise approved, reporting of monitoring results must be provided on a quarterly basis (seasonal) with a full summary provided in an annual report to be submitted on or before January 1;
- A detailed data management plan and process for sharing data must be provided to NSE and DFO; and
- At the request of NSE and/or DFO, raw data and/or other information from the monitoring programs must be submitted to provide an independent analysis or review of the effectiveness of the monitoring programs.

Within one (1) month following deployment of the CSTV TISEC device(s), FORCE must provide a status report to NSE and DFO detailing the operational status of all monitoring devices.

FORCE must seek written approval from NSE prior to the deployment of any other demonstration scale TISEC devices. If deployment of any other demonstration scale TISEC devices are planned for the period covered by this EEMP, a separate near-field EEMP will be required and FORCE may also be required to revise the mid-field EEMP. The implementation of a far-field EEMP must be considered for additional TISEC deployments.

If you have any questions or wish to discuss this in greater detail, please do not hesitate to contact me at 902-424-7630 or by email at [steve.sanford@novascotia.ca](mailto:steve.sanford@novascotia.ca).

Regards,



Steve Sanford  
Environmental Assessment Branch  
Nova Scotia Environment