

Court File No.:

FEDERAL COURT

BETWEEN:

SKEENAWILD CONSERVATION TRUST

Applicant

and

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA,
MINISTER OF ENVIRONMENT AND CLIMATE CHANGE,
CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, and
PACIFIC NORTHWEST LNG LIMITED PARTNERSHIP

Respondents

APPLICATION UNDER SECTIONS 18 & 18.1 OF THE *FEDERAL COURTS ACT*,
R.S.C. 1985, c. F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

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

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

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

Date:

Issued by:

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local office:

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PACIFIC NORTHWEST LNG LIMITED PARTNERSHIP
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APPLICATION

This is an application for judicial review in respect of:

1. The environmental assessment report (the “Report”) of the Canadian Environmental Assessment Agency (the “Agency”) dated September 27, 2016 in relation to the Pacific NorthWest LNG Project (the “Project”);
2. The decision of the Minister of Environment and Climate Change (the “Minister”) dated September 27, 2016 under section 52 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (“*CEAA, 2012*”) and published in a decision statement pursuant to section 54 of the *CEAA, 2012*, in which the Minister determined that the Project is likely to cause significant adverse environmental effects, and referred to the Governor in Council the matter of whether those significant adverse environmental effects were justified in the circumstances (the “Minister’s decision”); and,
3. Order in Council P.C. 2016-0838 dated September 27, 2016 issued by the Governor in Council in which the Governor in Council determined that the significant adverse environmental effects associated with the Project are justified in the circumstances pursuant to subsection 52(4) of the *CEAA, 2012* (the “GiC Order”).

The applicant makes application for:

1. An order or orders:
 - a. quashing or setting aside the Report, in whole or in part;
 - b. declaring that the Report fails to comply with the *CEAA, 2012* and is therefore invalid or unlawful in whole or in part;
 - c. remitting the Report back to the Agency for further consideration with such directions that the Court considers appropriate to ensure compliance with the requirements of the *CEAA 2012*;

- d. directing the Agency to reconsider its assessment of, and recommendation concerning, the significance of the adverse environmental effects of the Project on marine fish and fish habitat;
 - e. directing the Agency to assess and report on the significance of the adverse environmental effects resulting from greenhouse gas emissions associated with the Project in a manner that is legally adequate to allow the Governor in Council to determine whether such effects would be justified in the circumstances;
 - f. directing the Agency to assess and report on the cumulative environmental effects resulting from greenhouse gas emissions associated with the Project in a manner that is legally adequate to allow the Governor in Council to determine whether such effects would be justified in the circumstances;
 - g. directing the Agency to assess and report on alternative means for carrying out Project in relation to managing greenhouse gas emissions in a manner that is legally adequate to allow the Governor in Council to determine whether the significant adverse environmental effects associated with greenhouse gases would be justified in the circumstances;
 - h. declaring that, until the Agency has rendered a report that complies with the requirements of the *CEAA, 2012*, the Minister and Governor in Council cannot discharge their duties as decision makers under the *CEAA, 2012*;
 - i. quashing or setting aside the Minister's decision; and,
 - j. quashing or setting aside the GiC Order;
2. In the event that this application is dismissed, an order that the applicant shall not be required to pay costs to the respondents, pursuant to Rule 400 of the *Federal Courts Rules*;
 3. An order granting the applicant its costs; and,

4. Such further and other relief as this Honourable Court may deem just.

The grounds for the application are:

A. The Parties

1. Pacific NorthWest LNG Limited Partnership (the “Proponent”) is the proponent of the Project.
2. The Canadian Environmental Assessment Agency is the responsible authority to conduct an environmental assessment of the Project and to provide the Minister with an environmental assessment report pursuant to the *CEAA, 2012*.
3. The Minister is responsible under the *CEAA, 2012* to determine whether the Project is likely to cause significant adverse environmental effects and, if so, refer the matter of whether those effects would be justified under the circumstances to the Governor in Council.
4. The Governor in Council is responsible under the *CEAA, 2012*, if a referral has been made by the Minister, to determine whether significant adverse environmental effects that are likely to occur would be justified in the circumstances.
5. SkeenaWild Conservation Trust (“SkeenaWild”) is a charitable purpose trust whose goal is to make the Skeena River watershed and nearby coastal communities a global model of sustainability. It has both direct interest and public interest in the Project and the decisions under review because a significant portion of its work involves the protection and conservation of salmon and salmon habitats within the Skeena River watershed.

6. SkeenaWild has been an active participant in the Agency's environmental assessment of this Project since the beginning. Its involvement includes, but is not limited to:
 - a. making submissions that the Agency is required to conduct an environmental assessment of this Project;
 - b. commenting on the draft environmental impact statement ("EIS") guidelines;
 - c. commenting on the Proponent's EIS;
 - d. commenting on the Proponent's responses to the Agency's information requests, including on the issue of computer modelling and baseline data relating to the Project's potential impact on marine fish and fish habitat;
 - e. making submissions on the Project's environmental effects from GHG emissions; and,
 - f. providing a detailed submission and expert opinion (over 1000 pages including appendices) on the Agency's draft environmental assessment report during the Agency's public comment period.

B. The Project

7. The Project consists of a natural gas liquefaction facility and export terminal on Lelu Island at the mouth of the Skeena River, approximately 15 km southwest of the Prince Rupert, BC. The purpose of the Project is to convert processed natural gas reserves into liquefied natural gas ("LNG") for export to the Pacific Rim markets in Asia. The power to convert natural gas into LNG, through a refrigeration process, would be generated onsite by burning natural gas. The estimated post-construction lifespan of the Project is over 30 years.
8. Agnew Bank and Flora Bank, off the coast of Lelu Island, are important fish habitats for salmon. Hundreds of millions of juvenile salmon travel down the

Skeena River and find food and shelter in eelgrass habitat found in these areas. They reside here while they undergo the smoltification process that enables them to transition from living in a freshwater environment into a marine environment. These salmon support commercial, recreational, and Aboriginal fisheries in the Skeena River watershed, which Fisheries and Oceans Canada describes as one of the largest and most diverse wild salmon watersheds in the world.

9. According to the Proponent, the Project will adversely affect approximately 100,000 m² of marine fish habitat, of which over 17,000 m² would be permanently destroyed. According to the Agency, based on information supplied by the Proponent, the amount of fish habitat permanently destroyed could be almost 35,000 m².
10. To mitigate the significant adverse environmental effects associated with the permanent destruction of marine fish habitat, the Proponent plans to apply for habitat offsets from Fisheries and Oceans Canada to offset any “serious harm to fish” as required by the *Fisheries Act*, R.S.C. 1985, c. F-14. If granted, the Proponent would use these offsets to attempt to create new eelgrass habitat and other forms of fish habitat in various potential offsetting locations.
11. The Agency explicitly recognized that there is uncertainty as to the effectiveness of these proposed mitigation measures. One of the sources for this uncertainty is that the Proponent intends to refine its calculations of permanent destruction of fish habitat and its habitat offsetting plan based on a final engineering design, which will occur once the *CEAA, 2012* assessment is completed.
12. If built, the Project will be one of Canada’s largest single point source emitters of greenhouse gas (“GHG”). Its annual direct GHG emissions will be approximately 4.3 million tonnes of CO₂ equivalents (“MtCO_{2e}”), and its annual upstream GHG emissions will be between 8.8 – 9.3 MtCO_{2e}.

13. The Report concluded that the annual emissions of the Project would be high in magnitude, continuous, irreversible and global “due to the cumulative nature of greenhouse gas emissions”.

C. Background

14. On February 19, 2013, the Proponent filed a Project Description with the Agency.
15. On April 5, 2013, the Agency determined that the Project required an environmental assessment under the *CEAA, 2012*. As a result, on April 8, 2013, the Agency commenced an environmental assessment of the Project under *CEAA, 2012*.

1) *The Environmental Assessment*

16. On February 28, 2014, the Proponent filed its EIS with the Agency.
17. On October 6, 2014, the Proponent filed a Project Design Update with the Agency, in which the Proponent proposed changes to the Project in order to reduce potential adverse environmental impacts from the Project. On December 12, 2014, the Proponent filed various addenda to the EIS as a result of those proposed design changes.
18. On February 10, 2016, the Agency published a draft environmental assessment report and invited public comments on the draft report for a period of 30 days.
19. On March 11, 2016, SkeenaWild submitted its comments to the Agency on the draft report. In its submission, SkeenaWild commented on the Project’s potential impacts on fish and fish habitat, and on the Project’s GHG emissions. Appended to the submission was an expert report by Matt Horne containing his analysis of the Agency’s conclusions in the draft report pertaining to the Project’s GHG emissions and his expert opinions on the Project’s GHG emissions within provincial, national, and global climate policy contexts.

2) The Report

20. On September 27, 2016, the Agency published the final Report. The Agency reached the following conclusions in the Report:
 - a. the Project is likely to cause significant adverse environmental effects on harbour porpoise and as a result of greenhouse gas emissions, taking into account the implementation of the recommended mitigation measures.
 - b. the Project is also likely to result in significant adverse cumulative environmental effects on harbour porpoise; and
 - c. with respect to all other valued components, including marine fish and fish habitat, the Project is not likely to cause any significant adverse environmental effects taking into account the implementation of the mitigation measures.
21. In relation to marine fish and fish habitat, the Agency concluded that the Project will permanently destroy fish habitat, including fish habitat that the Proponent is specifically prohibited from destroying under s. 35 of *Fisheries Act* without an authorization from Fisheries and Oceans Canada.
22. According to the Report, the Agency was satisfied that the harm to and destruction of eelgrass habitat caused by the Project can be “adequately managed” by Fisheries and Oceans Canada through the development and implementation of a habitat offsetting plan.
23. The Agency relied on this potential habitat offsetting plan as a key mitigation measure under the *CEAA, 2012*. It concluded that this plan and other mitigation measures to be undertaken during project construction will reduce the otherwise significant adverse environmental effects of the Project on marine fish and fish habitat below the significance threshold.
24. The Agency expressly acknowledged that there is uncertainty as to the effectiveness of the proposed offsetting plan. Despite this, the Agency made no attempt to assess the technical feasibility of the offsetting plan. Nor, in relation

to the anticipated adverse environmental effects of the Project on marine fish and fish habitat, did the Agency consider or apply the precautionary principle.

25. In relation to GHG emissions, the Agency focused exclusively on the annual direct and upstream emissions of the Project. It concluded that the annual environmental effects of both the direct and upstream Project-related GHG emissions are significant. Key components of this significance determination were the magnitude, irreversibility and the globally cumulative nature of the adverse environmental effects resulting from the Project's GHG emissions.
26. Despite explicitly recognizing that the environmental effects resulting from the GHG emissions of the Project are significant due, in large measure, to their cumulative and irreversible nature, the Agency did not conduct a cumulative effects assessment of the Project's GHG emissions, nor did it assess or report on the cumulative contribution of the Project to global GHG stock over the life of the Project. Nor, in relation to the anticipated adverse environmental effects resulting from the Project's GHG emissions, did it consider or apply the precautionary principle.
27. The Agency gathered information on the technical and economic feasibility of alternative means for carrying out the Project in relation to reducing direct GHG emissions, including using grid electricity. It found that using grid electricity would be technically feasible, but failed to make a recommendation as to whether this alternative means of powering the Project would be economically feasible.

3) *Decisions by the Minister and the Governor in Council*

28. On September 27, 2016, the Minister issued a decision statement under section 54 of the *CEAA, 2012*. In the decision statement, the Minister indicated that she had determined under subsection 52(1) of the *CEAA, 2012*, after considering the Report and the implementation of mitigation measures that she considered appropriate, that the Project is likely to cause significant adverse environmental effects. Therefore, in accordance with subsection 52(2) of the

CEAA, 2012, she referred to the Governor in Council the matter of whether those significant adverse environmental effects were justified in the circumstances.

29. On September 27, 2016, the Governor in Council issued the GiC Order, in which the Governor in Council determined under subsection 52(4) of the *CEAA, 2012* that the significant adverse environmental effects associated with the Project are justified in the circumstances.

D. Legal Errors

30. In conducting an environmental assessment under the *CEAA, 2012* the Agency has three overarching duties:
 - a. An information-gathering duty: to ensure that all information required for an assessment is obtained and made available;
 - b. A consideration duty: to conduct an environmental assessment of the Project which includes, *inter alia*, an assessment of all related operations and undertakings, and considerations of cumulative environmental effects and their significance, and mitigation measures; and,
 - c. A reporting duty: to prepare a report which includes the rationale, conclusions, and recommendations of the Agency.
31. In discharging these duties, the role of the Agency under the *CEAA, 2012* is two-fold. One is to assist with the determination of whether the Project is likely to cause significant adverse environmental effects. The other is to provide a legally adequate basis for federal decision-makers to decide whether to exercise their discretion to make a decision that allows the project to proceed, taking account of the full range of environmental, social and economic factors.
32. The *CEAA, 2012* thus establishes a clear division of roles between the responsible authority (in this case, the Agency) and the ultimate decision-makers (the Minister and the Governor in Council) that ensures the assessment process is both evidence-based and democratically accountable. Under this arrangement, to ensure that decisions made by the Minister and Governor in

Council have a proper evidentiary basis, the Agency is required to complete a report that provides these decision-makers with a robust understanding of project-related environmental effects.

33. Upon receipt of this report, pursuant to s. 52(1) of the *CEAA, 2012*, the Minister is under a legal duty to determine whether the Project is likely to cause significant adverse environmental effects after taking into account the implementation of any mitigation measures that the Minister considers appropriate.
34. If the Minister determines that mitigation measures cannot bring the Project's adverse environmental effects that are likely to occur below the significance threshold, then the Governor in Council is under a legal duty, pursuant to s. 52(4) of the *CEAA, 2012*, to determine whether the significant adverse environmental effects that are likely to occur are nevertheless justified in the circumstances.
35. The term "mitigation measure" is defined under the *CEAA, 2012* as "measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means".
36. The Agency is under a legal duty pursuant to paragraph 19(1)(d) of the *CEAA, 2012* to assess "mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project".
37. The Agency is under a legal duty pursuant to paragraph 19(1)(a) of the *CEAA, 2012* to assess "cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out".
38. The Agency is under a legal duty pursuant to paragraph 19(1)(g) of the *CEAA, 2012* to assess "alternative means of carrying out the designated project that are

technically and economically feasible and the environmental effects of any such alternative means”.

39. Furthermore, the Agency is under a legal duty to carry out its statutory functions under the *CEAA, 2012* in accordance with the Act’s purposes under section 4, including a requirement that it applies the precautionary principle.
40. The Agency failed in its legal duty to provide the Minister with a legally valid report contrary to the provisions of the *CEAA, 2012*, including by:
 - a. unreasonably and unlawfully failing to discharge its information gathering duty under the *CEAA, 2012*;
 - b. unreasonably and unlawfully failing to apply the precautionary principle in carrying out its statutory functions under the *CEAA, 2012*;
 - c. unreasonably and unlawfully abdicating its duty to assess whether the Project is likely to cause significant adverse environmental effects on marine fish and fish habitats by unreasonably and unlawfully relying on advice from Fisheries and Ocean Canada with respect to the potential of the Project to cause “serious harm to fish” under the *Fisheries Act*;
 - d. unreasonably and unlawfully conflating its duty to assess the Project’s likelihood to cause “significant adverse environmental effects” under the *CEAA, 2012* with an assessment of the Project’s potential to cause “serious harm to fish” under the *Fisheries Act*;
 - e. unreasonably and unlawfully interpreting and applying the statutory term “mitigation measures” under the *CEAA, 2012* by relying on “habitat offset measures” in relation to its conclusion that the Project is unlikely to cause significant adverse environmental effects on marine fish and fish habitat;
 - f. unreasonably and unlawfully failing to assess the technical and economic feasibility of habitat offsets as a “mitigation measure” in relation to marine fish and fish habitat;

- g. unreasonably and unlawfully reaching a conclusion, namely that the Project is not likely to cause significant adverse environmental effects on marine fish and fish habitats, that is not supported by the evidentiary record;
 - h. unreasonably and unlawfully failing to conduct a cumulative effects assessment of the environmental effects of the Project's GHG emissions;
 - i. unreasonably and unlawfully failing to conduct a legally valid assessment of alternative means of carrying out the Project in relation to the environmental effects it will cause resulting from its GHG emissions;
 - j. unreasonably and unlawfully failing to provide the Minister with a report that would provide her with a legally valid evidentiary basis to carry out her duties as a decision-maker under the *CEAA, 2012*; and,
 - k. unreasonably and unlawfully failing to complete an assessment of the significance of GHG emissions that could serve as a legally valid evidentiary basis for the Governor in Council to decide whether such effects were "justified in the circumstances" under the *CEAA, 2012*.
41. As a result of the foregoing errors, the Report is legally invalid and cannot therefore provide a lawful basis for the subsequent Minister's decision or the GiC Order.

E. General Grounds

42. The applicant relies on the following statutory provisions:
- a. The *CEAA, 2012* generally;
 - b. *Fisheries Act*, ss. 2 & 35;
 - c. *Federal Courts Act*, ss. 18 & 18.1; and,
 - d. *Federal Courts Rules* generally.
43. Such further grounds as counsel may identify and this Honourable Court may consider.

This application will be supported by the following material:

1. The Report;
2. The Record before the Agency as requested under Rule 317;
3. The Record before the Minister as requested under Rule 317;
4. The Record before the Governor in Council as requested under Rule 317;
5. An affidavit of Greg Knox, executive director of SkeenaWild; and,
6. Such further materials as counsel may identify and this Honourable Court may allow.

Rule 317 Request:

The applicant requests the Canadian Environmental Assessment Agency to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Agency to the applicant and to the Registry:

1. The record of all materials placed before and considered by the Agency in preparing the Report.

The applicant requests the Minister of Environment and Climate Change to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Minister to the applicant and to the Registry:

1. The record of all materials placed before and considered by the Minister in making the Minister's decision.

The applicant requests the Governor in Council to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Governor in Council to the applicant and to the Registry:

1. The record of all materials placed before and considered by the Governor in Council in making the GiC Order, including the record of all materials placed before and considered by the Governor in Council in making its determination under section 52(4) of the *CEAA, 2012* in relation to the Project.

October 27, 2016

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