

ecojustice

formerly Sierra Legal

Vancouver Head Office
214 - 131 Water Street
Vancouver, B.C. V6B 4M3

Phone: (604) 685-5618

Fax: (604) 685-7813

E-mail: info@ecojustice.ca

Date : August 19, 2009

2 Copies of this letter FAXed

Total number of pages being transmitted, including this page: 8

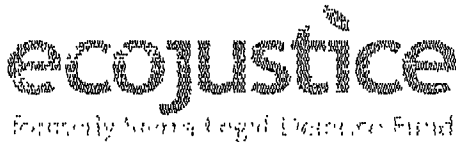
TO:	PHONE #	FAX #
Dr. Arden L. Bernert Jr., Director, National Science Foundation and Dr. Emilie Hooft, Dept. of Geological Sciences 1272 University of Oregon and Lawrence Rudolph, General Counsel, National Science Foundation and Dr. Douglas Toomey, Dept. of Geological Sciences 1272 University of Oregon and Dr. William Wilcock, Marine Sciences Building University of Washington	703-292-8000 703-292-8060 541-346-5576 206-543-5043	703-292-9232 541-346-4692 703-292-9041 541-346-4692 206-543-6073
cc: Lorne Lachance, Department of Justice and Charles Willms, Fasken Martineau Domoulin	(604) 666-6745 (604) 631-4789	(604) 775-7557 (604) 632-4789

FROM: Lara Tessaro

RE: Living Oceans Society et al v. Minister of Fisheries and Oceans et al. File No. T-1309-09

Please see attached correspondence.

NOTE: This facsimile transmission and the information contained herein are subject to solicitor/client privilege and confidentiality, intended only for the use of the intended recipient. If the reader of this message is not the person named above or if, upon commencing to review this facsimile transmission, you realize that the information contained herein was not intended for the person named above, please be advised that any dissemination, distribution or copying of this facsimile or the information contained herein is strictly prohibited. If you have received this transmission in error, please notify us immediately by telephone and return the original facsimile transmission, uncopied, to us at the above address by regular mail.



VANCOUVER OFFICE

131 Water Street, Suite 214. Phone (604) 685-5618
Vancouver BC V6B 4M3 Fax (604) 685-7813

info@ecojustice.ca
www.ecojustice.ca

August 19, 2009

By facsimile

Dr. Arden L. Bement Jr., Director
National Science Foundation
4201 Wilson Blvd.
Arlington, VA 22230, USA
Fax: 703-292-9232

Lawrence Rudolph, General Counsel
National Science Foundation
4201 Wilson Blvd.
Arlington, VA 22230, USA
Fax: 703-292-9041

Dr. Emilie Hooff
Dept. of Geological Sciences
1272 University of Oregon
Eugene, OR 97403-1272
Fax: 541-346-4692

Dr. Douglas Toomey
Dept. of Geological Sciences
1272 University of Oregon
Eugene, OR 97403-1272
Fax: 541-346-4692

Dr. William Wilcock
Room G, Marine Sciences Building
University of Washington
Seattle, WA 98185
Fax: 206-543-6073

Dear Sirs/Mesdames:

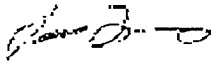
**Re: Living Oceans Society et al v. Minister of Foreign Affairs et al.
Federal Court of Canada File No. T-1309-09**

I am counsel for the Applicants in the above-referenced proceeding. As a courtesy, I have enclosed a copy of the Applicants' Notice of Motion, which seeks an injunction against Columbia University in the City of New York. A hearing has been scheduled for August 20, 2009, at 9:30 a.m. PDT in the Federal Court of Canada, 701 West Georgia Street, Vancouver, British Columbia. The hearing will be focused on jurisdictional issues of the Federal Court of Canada to issue the relief sought by the Applicants against Columbia University.

The Applicants are of the view that neither the National Science Foundation ("NSF"), nor any individual scientist meets the legal test requiring you to be specifically named in our lawsuit. With respect to the NSF, the Applicants are of the view that they are immune by virtue of the *State Immunity Act*, R.S.C., 1985, C.S-

18. Despite this, the respondent Columbia University has made submissions to the Court that the Applicants committed a legal error by failing to sue both the NSF and a number of individual scientists in the lawsuit. If you have questions, you may contact me at 514-318-8566.

Yours truly,



Lara Tessaro
Staff Lawyer

cc: Charles Willms, Fasken Martineau Dumoulin
Lorne Lachance, Justice Canada

Enclosure

000001A

Court File No. T-1309-09

FEDERAL COURT OF CANADA

BETWEEN:

LIVING OCEANS SOCIETY and CANADIAN PARKS AND WILDERNESS
COMMITTEE

APPLICANTS

AND:

MINISTER OF FOREIGN AFFAIRS,
MINISTER OF FISHERIES AND OCEANS and
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

RESPONDENTS

NOTICE OF MOTION

TAKE NOTICE THAT the Living Oceans Society and the Canadian Parks and
Wilderness Committee, will make a motion to the Court on Friday, the 14th day of
August, 2009 at 9:30 a.m. or as soon thereafter as the motion can be heard, at the Federal
Court of Canada, 90 Sparks Street, Ottawa, Ontario.

THE MOTION IS FOR the following Orders:

1. An interlocutory injunction enjoining Columbia University and its affiliated
institution the Lamont-Doherty Earth Observatory, as well as all persons having
notice of this order, from using the *R.V. Marcus G. Langseth* to conduct marine
seismic testing in Canadian waters of the Northeast Pacific Ocean, particularly in
and around the Endeavour Hydrothermal Vents Marine Protected Area.
2. An Order dispensing with the provision of any undertaking for damages by the
Applicants.
3. Costs of this motion.
4. Any such further Orders as this Honourable Court deems just.

000002 B

THE GROUNDS FOR THE MOTION ARE:

1. Lamont-Doherty Earth Observatory (L-DEO), a research institution that is part of Columbia University, plans to conduct a marine seismic survey in the Endeavour Hydrothermal Vents Marine Protected Area and surrounding Canadian waters. The Endeavour Hydrothermal Vents Marine Protected Area is located roughly 250 km. southwest of Vancouver Island in Canada's Exclusive Economic Zone.
2. The seismic testing is planned to be conducted by the *R.V. Marcus G. Langseth*, a seismic research vessel operated by L-DEO.
3. The location where the seismic testing is proposed to take place is known to be inhabited by various species of marine mammals, including species that are listed as *endangered* or *threatened* under the *Species at Risk Act, 2002, c.29 (SARA)*.
4. The seismic testing involves a towed array of 36 airguns firing at long intervals with a total volume of ~6600 in³ (180 – 190 db). The airgun array will result in significant underwater acoustic disturbance which is expected to result in behavioural disturbance, temporary or permanent hearing impairment, and physical or psychological effects on marine mammals and sea turtles.
5. L-DEO has sought an Incidental Harassment Authorization (IHA) from the U.S. National Marine Fisheries Service to authorize non-lethal take of marine mammals incidental to this seismic testing.
6. On August 10, 2009, the Applicants commenced an application for judicial review. That application seeks orders related to the anticipated decision of the Minister of Foreign Affairs to issue any a foreign vessel clearance for the *R.V. Marcus G. Langseth* to conduct seismic testing in the Endeavour Hydrothermal Vents Marine Protected Area, and the failure of the Minister of Fisheries and Oceans to legally authorize harassment and impacts on marine mammals. The seismic testing is alleged to cause disturbance and harassment of marine mammals contrary to the Endeavour Hydrothermal Vents Marine Protected Area

000003C

Regulations, S.O.R./2003-87; the Marine Mammal Regulations S.O.R./93-56; and the *SARA*.

Urgency

7. As of August 10, 2009, the Minister of Foreign Affairs has not issued a foreign vessel clearance.
8. The seismic testing is scheduled to commence on August 17, 2009, but the vessel may depart from port as early as August 14, 2009.
9. This application for an injunction is not premature and it is appropriate to hear it as early as possible, in light of the short period of time available before the scheduled commencement of seismic testing.
10. If the seismic testing occurs, the Applicants' judicial review application will be rendered moot. An interlocutory injunction is necessary to maintain the *status quo* until the application for judicial review is determined on its merits.

Serious Issue

11. The judicial review application raises a number of serious issues to be tried:
 - a. Whether the Minister of Foreign Affairs acts unlawfully and/or unreasonably in granting a foreign vessel clearance to enable proposed seismic testing that will harass marine mammals contrary to the Marine Mammal Regulations and the *SARA*, without any lawful authorization;
 - b. Whether the Minister of Foreign Affairs acts unlawfully and/or unreasonably in granting a foreign vessel clearance to enable seismic testing that will violate section 2 of the Endeavour Hydrothermal Vents Marine Protected Areas Regulation;
 - c. Whether seismic testing activities anticipated to harass endangered and threatened species can legally proceed in Canada without a permit under s.73(1) of the *SARA* or a similar authorization under another Act of Parliament;
 - d. Whether the Minister of Fisheries and Oceans has unlawfully failed to exercise his jurisdiction to consider and authorize the impacts of seismic

000004 D

testing on endangered and threatened species under s.73(1) of the *SARA*;
and

- e. Whether the seismic testing qualifies under s.73(3) of *SARA* for a permit authorizing impacts on endangered or threatened species.

Irreparable Harm

12. The seismic testing will cause irreparable harm to the marine environment and irreparable harm to the Applicants' interests in marine conservation.
13. Harassment and disturbance of marine mammals, including species-at-risk, and disturbance of marine organisms and habitat in a marine protected area, is irreparable harm not compensable by monetary damages.
14. Harassment and disturbance of marine mammals is not merely speculative. The L-DEO has applied for authorization from United States authorities to harass marine mammals.

Balance of Convenience

15. The balance of convenience favours maintaining the *status quo* by restraining the proposed seismic testing until the merits of the Applicants' judicial review application can be determined.
16. The Applicants have a strong case that any harassment of marine mammals and disturbance of their habitat may not occur in Canada without legal authorization.
17. L-DEO will not be materially prejudiced by the granting of an interlocutory injunction.
18. L-DEO will not suffer any monetary damages or financial losses if the proposed seismic testing is temporarily restrained.
19. The proposed seismic testing is not for the purpose of financial gain or profit. Its purpose is to collect data on the sub-seafloor structure of volcanic and hydrothermal features that form as a result of movements of the Earth's plates.

000005 E

20. If the Applicants' judicial review application is dismissed, the L-DEO can conduct seismic testing and collect data in Canadian waters at a future date. A temporary injunction will not remove L-DEO's ability to do seismic research in Canada at a future date, nor will it threaten the availability or quality of data.
21. There is no urgency to the conduct of this marine research. This seismic testing proposal was originally proposed for 2008, and postponed to 2009.
22. The public interest favours postponing marine seismic research so as to ensure protection of endangered and threatened whales.
23. While the L-DEO is the operator of the vessel, it is not paying for the use of the vessel or funding the costs of the seismic research. The *R.V. Marcus G. Langseth* is provided to the L-DEO by the U.S. National Science Foundation (NSF), the owner of the vessel. The seismic research is also funded by grants from the NSF.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied on:

1. The Affidavit of Anna Johnston affirmed August 10, 2009; and
2. Such further and other material as counsel may advise and this Honourable Court may permit.

Date: August 10, 2009


per: Lara Tessaro

Solicitor for the Applicants Living Oceans Society
and Canadian Parks and Wilderness Committee

214-131 Water Street
Vancouver BC V5B 4M3
Tel: (604) 685-5618 ext 245
Fax: (604) 685-7813



VANCOUVER OFFICE

131 Water Street, Suite 214, Phone (604) 685-5618
Vancouver BC V6B 4M3 Fax (604) 685-7813info@ecojustice.ca
www.ecojustice.ca

August 19, 2009

*By facsimile*Dr. Arden L. Bement Jr., Director
National Science Foundation
4201 Wilson Blvd.
Arlington, VA 22230, USA
Fax: 703-292-9232Lawrence Rudolph, General Counsel
National Science Foundation
4201 Wilson Blvd.
Arlington, VA 22230, USA
Fax: 703-292-9041Dr. Emilie Hooft
Dept. of Geological Sciences
1272 University of Oregon
Eugene, OR 97403-1272
Fax: 541-346-4692Dr. Douglas Toomey
Dept. of Geological Sciences
1272 University of Oregon
Eugene, OR 97403-1272
Fax: 541-346-4692Dr. William Wilcock
Room G, Marine Sciences Building
University of Washington
Seattle, WA 98185
Fax: 206-543-6073

Dear Sirs/Mesdames:

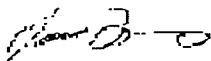
**Re: Living Oceans Society et al v. Minister of Foreign Affairs et al.
Federal Court of Canada File No. T-1309-09**

I am counsel for the Applicants in the above-referenced proceeding. As a courtesy, I have enclosed a copy of the Applicants' Notice of Motion, which seeks an injunction against Columbia University in the City of New York. A hearing has been scheduled for August 20, 2009, at 9:30 a.m. PDT in the Federal Court of Canada, 701 West Georgia Street, Vancouver, British Columbia. The hearing will be focused on jurisdictional issues of the Federal Court of Canada to issue the relief sought by the Applicants against Columbia University.

The Applicants are of the view that neither the National Science Foundation ("NSF"), nor any individual scientist meets the legal test requiring you to be specifically named in our lawsuit. With respect to the NSF, the Applicants are of the view that they are immune by virtue of the *State Immunity Act*, R.S.C., 1985, C.S-

18. Despite this, the respondent Columbia University has made submissions to the Court that the Applicants committed a legal error by failing to sue both the NSF and a number of individual scientists in the lawsuit. If you have questions, you may contact me at 514-318-8566.

Yours truly,



Lara Tessaro
Staff Lawyer

cc: Charles Willms, Fasken Martineau Dumoulin
Lorne Lachance, Justice Canada

Enclosure

000001A

Court File No. T-1309-09

FEDERAL COURT OF CANADA

BETWEEN:

LIVING OCEANS SOCIETY and CANADIAN PARKS AND WILDERNESS
COMMITTEE

APPLICANTS

AND:

MINISTER OF FOREIGN AFFAIRS,
MINISTER OF FISHERIES AND OCEANS and
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

RESPONDENTS

NOTICE OF MOTION

TAKE NOTICE THAT the Living Oceans Society and the Canadian Parks and
Wilderness Committee, will make a motion to the Court on Friday, the 14th day of
August, 2009 at 9:30 a.m. or as soon thereafter as the motion can be heard, at the Federal
Court of Canada, 90 Sparks Street, Ottawa, Ontario.

THE MOTION IS FOR the following Orders:

1. An interlocutory injunction enjoining Columbia University and its affiliated
institution the Lamont-Doherty Earth Observatory, as well as all persons having
notice of this order, from using the *R.V. Marcus G. Langseth* to conduct marine
seismic testing in Canadian waters of the Northeast Pacific Ocean, particularly in
and around the Endeavour Hydrothermal Vents Marine Protected Area.
2. An Order dispensing with the provision of any undertaking for damages by the
Applicants.
3. Costs of this motion.
4. Any such further Orders as this Honourable Court deems just.

000002 B

THE GROUNDS FOR THE MOTION ARE:

1. Lamont-Doherty Earth Observatory (L-DEO), a research institution that is part of Columbia University, plans to conduct a marine seismic survey in the Endeavour Hydrothermal Vents Marine Protected Area and surrounding Canadian waters. The Endeavour Hydrothermal Vents Marine Protected Area is located roughly 250 km. southwest of Vancouver Island in Canada's Exclusive Economic Zone.
2. The seismic testing is planned to be conducted by the *R.V. Marcus G. Langseth*, a seismic research vessel operated by L-DEO.
3. The location where the seismic testing is proposed to take place is known to be inhabited by various species of marine mammals, including species that are listed as *endangered or threatened* under the *Species at Risk Act, 2002, c.29 (SARA)*.
4. The seismic testing involves a towed array of 36 airguns firing at long intervals with a total volume of ~6600 in³ (180 – 190 db). The airgun array will result in significant underwater acoustic disturbance which is expected to result in behavioural disturbance, temporary or permanent hearing impairment, and physical or psychological effects on marine mammals and sea turtles.
5. L-DEO has sought an Incidental Harassment Authorization (IHA) from the U.S. National Marine Fisheries Service to authorize non-lethal take of marine mammals incidental to this seismic testing.
6. On August 10, 2009, the Applicants commenced an application for judicial review. That application seeks orders related to the anticipated decision of the Minister of Foreign Affairs to issue any a foreign vessel clearance for the *R.V. Marcus G. Langseth* to conduct seismic testing in the Endeavour Hydrothermal Vents Marine Protected Area, and the failure of the Minister of Fisheries and Oceans to legally authorize harassment and impacts on marine mammals. The seismic testing is alleged to cause disturbance and harassment of marine mammals contrary to the Endeavour Hydrothermal Vents Marine Protected Area

000003C

Regulations, S.O.R./2003-87; the Marine Mammal Regulations S.O.R./93-56; and the *SARA*.

Urgency

7. As of August 10, 2009, the Minister of Foreign Affairs has not issued a foreign vessel clearance.
8. The seismic testing is scheduled to commence on August 17, 2009, but the vessel may depart from port as early as August 14, 2009.
9. This application for an injunction is not premature and it is appropriate to hear it as early as possible, in light of the short period of time available before the scheduled commencement of seismic testing.
10. If the seismic testing occurs, the Applicants' judicial review application will be rendered moot. An interlocutory injunction is necessary to maintain the *status quo* until the application for judicial review is determined on its merits.

Serious Issue

11. The judicial review application raises a number of serious issues to be tried:
 - a. Whether the Minister of Foreign Affairs acts unlawfully and/or unreasonably in granting a foreign vessel clearance to enable proposed seismic testing that will harass marine mammals contrary to the Marine Mammal Regulations and the *SARA*, without any lawful authorization;
 - b. Whether the Minister of Foreign Affairs acts unlawfully and/or unreasonably in granting a foreign vessel clearance to enable seismic testing that will violate section 2 of the Endeavour Hydrothermal Vents Marine Protected Areas Regulation;
 - c. Whether seismic testing activities anticipated to harass endangered and threatened species can legally proceed in Canada without a permit under s.73(1) of the *SARA* or a similar authorization under another Act of Parliament;
 - d. Whether the Minister of Fisheries and Oceans has unlawfully failed to exercise his jurisdiction to consider and authorize the impacts of seismic

000004 D

testing on endangered and threatened species under s.73(1) of the *SARA*;
and

- e. Whether the seismic testing qualifies under s.73(3) of *SARA* for a permit authorizing impacts on endangered or threatened species.

Irreparable Harm

12. The seismic testing will cause irreparable harm to the marine environment and irreparable harm to the Applicants' interests in marine conservation.
13. Harassment and disturbance of marine mammals, including species-at-risk, and disturbance of marine organisms and habitat in a marine protected area, is irreparable harm not compensable by monetary damages.
14. Harassment and disturbance of marine mammals is not merely speculative. The L-DEO has applied for authorization from United States authorities to harass marine mammals.

Balance of Convenience

15. The balance of convenience favours maintaining the *status quo* by restraining the proposed seismic testing until the merits of the Applicants' judicial review application can be determined.
16. The Applicants have a strong case that any harassment of marine mammals and disturbance of their habitat may not occur in Canada without legal authorization.
17. L-DEO will not be materially prejudiced by the granting of an interlocutory injunction.
18. L-DEO will not suffer any monetary damages or financial losses if the proposed seismic testing is temporarily restrained.
19. The proposed seismic testing is not for the purpose of financial gain or profit. Its purpose is to collect data on the sub-seafloor structure of volcanic and hydrothermal features that form as a result of movements of the Earth's plates.

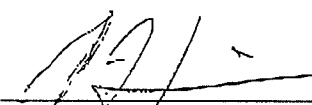
000005 E

20. If the Applicants' judicial review application is dismissed, the L-DEO can conduct seismic testing and collect data in Canadian waters at a future date. A temporary injunction will not remove L-DEO's ability to do seismic research in Canada at a future date, nor will it threaten the availability or quality of data.
21. There is no urgency to the conduct of this marine research. This seismic testing proposal was originally proposed for 2008, and postponed to 2009.
22. The public interest favours postponing marine seismic research so as to ensure protection of endangered and threatened whales.
23. While the L-DEO is the operator of the vessel, it is not paying for the use of the vessel or funding the costs of the seismic research. The *R.V. Marcus G. Langseth* is provided to the L-DEO by the U.S. National Science Foundation (NSF), the owner of the vessel. The seismic research is also funded by grants from the NSF.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied on:

1. The Affidavit of Anna Johnston affirmed August 10, 2009; and
2. Such further and other material as counsel may advise and this Honourable Court may permit.

Date: August 10, 2009


per: Lara Tessaro
Solicitor for the Applicants Living Oceans Society
and Canadian Parks and Wilderness Committee

214-131 Water Street
Vancouver BC V5B 4M3
Tel: (604) 685-5618 ext 245
Fax: (604) 685-7813