



East Coast Environmental Law Association (2007)
University Avenue, PO Box 15000
Halifax, NS. B3H 4R2

January 30, 2024

Committee for the Regional Assessment of Offshore Wind Development in Nova Scotia
Impact Assessment Agency of Canada
200-1801 Hollis Street
Halifax, Nova Scotia B3J 3N4
OffshoreWindNS-EolienneExtracotiereNE@iaac-aeic.gc.ca

SENT VIA EMAIL

Dear Members of the Regional Assessment Committee,

Re: Feedback on Narrowing the Study Area to Identify Potential Future Development Areas

The following is a submission from East Coast Environmental Law (“ECEL”) as a member of the Scientific Information and Community Knowledge Advisory Group and the Fisheries and Other Ocean Uses Advisory Group for the Regional Assessment of Offshore Wind Development in Nova Scotia (the “RA”) in response to a request for feedback about identifying Potential Future Development Areas (“PFDA”).

1. Introduction

The Committee has interpreted its Terms of Reference in such a way that it must produce two deliverables, as follows:

- An “interim report” is to be prepared by March 23, 2024. It will contain a map, based on data and information, that narrows the committee’s current study area to identify potential future development areas appropriate for offshore wind projects.¹ The committee considers this interim report to be a working paper and has interpreted its Agreement to mean that preparation of this interim report is not subject to a “formal” public comment period.² The committee has indicated that it intends to post the interim report on the registry and encourage feedback.
- A final report is to be prepared by January 23, 2025. The draft version of this final report will be complete by September 23, 2024 and will be available for a 60-day public comment period.³

¹ James Wooder and Ann Wilkie, Committee Co-Chairs of the Regional Assessment for Offshore Wind Development in Nova Scotia, “Clarification and Approach of TOR” (October 25, 2023), online: <<https://iaac-aeic.gc.ca/050/documents/p83514/153519E.pdf>> at page 1.

² *Ibid* at page 2.

³ *Ibid*.

This approach was outlined in a letter to Minister Guilbeault on October 25, 2023, in which it sought clarification from the Minister about the Agreement and Terms of Reference for the RA (the “Agreement”). As the Committee is aware, ECEL sent a letter to Minister Guilbeault on January 19, 2024, in which we expressed our position about public participation requirements associated with delivery of each component of the Committee’s work. Our staff also engaged directly with members of the Committee during a community engagement session in Cheticamp, NS on January 24, 2024, in which we had an opportunity to discuss and clarify the substance of our letter to the Minister. In summation, our position is that meaningful public participation is vital to the Committee’s work. Stakeholders must have opportunities to provide input and shape the development of all analysis and conclusions drawn during the Committee’s work. We encourage the Committee to continue engaging with the public and other stakeholders to refine and further develop the analysis contained in its interim report.

With respect to the Committee’s work on refining its Study Area to identify PFDA’s, the Committee’s Terms of Reference are contained in Appendix A of the Agreement. Section A2 of the appendix sets out the requirements for the “Committee Report”. The language indicates that the committee will produce a single report that describes the conduct and results of the RA. Section A3 of the appendix sets out a schedule for the committee to deliver two “report components”. The first component will contain “information and analysis to inform future planning and licensing for offshore wind in the Study Area”. The second component will contain “identification of, and recommendations on, mitigation, and other approaches to address potential effects, and monitoring and follow-up requirements, to inform future impact assessments for offshore wind in the Study Area”. Each report component corresponds to various outcomes of the committees’ mandates found in Appendix A.⁴

ECEL understands the need to refine the Study Area to identify areas that may be suitable for offshore wind developments and areas which should be avoided. To that end, our comments that follow focus on our recommendations regarding the Committee’s approach to identifying PFDA’s.

2. The Committee should use a precautionary approach and articulate its approach to identifying Potential Future Development Areas for offshore wind.

Since the RA is being conducted under the *Impact Assessment Act* (“IAA”), it must be guided by the purposes of the IAA, including ensuring that projects are considered “in a careful and precautionary manner”.⁵ The IAA further requires the Government of Canada, the Minister of Environment and Climate Change, the Impact Assessment Agency of Canada (“IAAC” or the “Agency”), and federal authorities to “exercise their powers in a manner that fosters sustainability, respects the Government’s commitments with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle”.⁶ The Agency’s *Practitioner’s Guide to Federal Impact*

⁴ See the *Agreement to Conduct a Regional Assessment of Offshore Wind Development in Nova Scotia* (March 23, 2023), online: <<https://www.iaac-aeic.gc.ca/050/documents/p83514/147038E.pdf>>. Report Component 1 deals with outcomes in Section A2.3 – specifically, Objective A, items (a) to (d); Objective B, item (a); Objective D, item (a) – and items (a) to (e) of Section A2.4. Report Component 2 deals with outcomes in Section A2.3 – specifically, Objective C, items (a) to (b); Objective D, items (a) to (b) – and items (d) to (e) of Section A2.4.

⁵ *Impact Assessment Act*, SC 2019 c 28 s 1 at subsection 6(1).

⁶ *Ibid* at subsection 6(2).

Assessment also makes application of the precautionary principle one of its four guiding sustainability principles, which are meant to help inform analysis of sustainability.⁷

There are not universally agreed definitions of the “precautionary principle” and the phrase “precautionary approach”, but, fundamentally, the principle and approach mean that, when an activity may cause environmental harm, lack of full scientific certainty does not justify the avoidance of measures to prevent that harm. It may also be said that the precautionary approach demands conservation measures in the face of unavoidable or irreversible harm,⁸ and that, when faced with uncertainty, the party wishing to pursue an activity has the burden of proving that their actions will not be harmful.

The precautionary approach is commonly applied during the development of new resources and has received support from courts across Canada. For example, in its landmark decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, the Supreme Court of Canada (“SCC”) adopted the precautionary principle and applied it as an element of statutory interpretation, discussing how it might be observed. The SCC used the definition of the principle, which it adopted from the Bergen Ministerial Declaration on Sustainable Development (1990):⁹

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.

The SCC noted that Canada had advocated for inclusion of the precautionary principle in the Bergen Declaration. As the SCC also noted, the principle has been included in virtually all recently adopted treaties and policy documents related to environmental protection and preservation, and the SCC highlighted the status of the principle as being a norm under customary international law.¹⁰

It is our view that the Committee should take a precautionary approach to refining its Study Area and identifying PFDA, and we encourage the Committee to think deeply about ways that a precautionary approach can shape the Committee’s analysis of environmental and socio-economic factors within those areas to inform its conclusions and recommendations. For example, the Committee can use a precautionary approach to identify and scope out offshore areas where offshore wind developments would cause serious or even irreversible damage to the environment, especially considering that offshore wind is a new industry in Canada.

More specifically, ECEL supports the exclusion of offshore wind development from marine protected areas (“MPAs”), *Species at Risk Act* (“SARA”) critical habitats, and other ecologically important marine areas such as other effective area-based conservation measures, or “OECMs”.

⁷ Impact Assessment Agency of Canada, “Guidance: Considering the Extent to which a Project Contributes to Sustainability” Part 2.2 of the *Practitioners Guide to Federal Impact Assessments* (6 December 2021), online: <<https://www.canada.ca/content/dam/iaac-acei/documents/policy-guidance/pp-pp/guidance-considering-extent-project-contributes-sustainability.pdf>>

⁸ For example, see Department of Fisheries and Oceans Canada, “Marine Protected Area (MPA) Networks: Guiding Principles” (February 19, 2018), online: <<https://www.dfo-mpo.gc.ca/oceans/networks-reseaux/principles-principes-eng.html>>

⁹ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at paragraph 31.

¹⁰ *Ibid* at paragraph 32.

This is an approach that the Newfoundland and Labrador regional assessment committee is considering as part of its work of identifying and refining a focus area for its work.

3. If the Committee proceeds to focus its attention on select areas within the full RA Study Area, the Committee should formally recommend that future regional assessments or other similar studies be carried out in areas excluded from the proposed Focus Area before such areas are opened for offshore wind development.

We accept the Committee’s interpretation of its mandate as allowing it to focus on areas that are most suitable for offshore wind development, and we recognize the practicality of this interpretation in light of the vastness of the full RA Study Area and the tight timeline in which the Committee must complete its work. However, narrowing the focus of the RA from the full Study Area to PFDAs will affect the role that the RA can play under the *IAA* and the broader regulatory regime for offshore wind development that is currently taking shape (for example, through proposed amendments to the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*).

In particular, if the Committee proceeds to focus its attention on PFDAs, many areas within the full Study Area will be excluded from cumulative effects assessments and other important assessment measures that were intended for this RA. Although we agree that the identification of suitable development sites can be an important outcome of this RA, that is not the only outcome that was envisioned for the RA or set out in the Committee’s Terms of Reference. Furthermore, in practice, the Committee’s recommendations will not limit offshore wind developments to the areas or sites deemed most suitable by the Committee. The governmental and regulatory authorities that will ultimately be responsible for assessing and licensing proposed offshore wind projects may seek to enable developments in areas beyond the Committee’s proposed PFDAs, and, in such circumstances, project-specific assessment and licensing processes would not have the benefit of cumulative effects assessments or other important assessment measures conducted as part of the more narrowly focused RA.

We believe that the Committee should recommend that future regional assessments or other similar studies be carried out in areas excluded from the proposed Focus Area before such areas are opened for offshore wind development. We believe that a recommendation to that effect will be crucial if the Committee chooses to proceed with the RA by focusing its attention on select areas within the full Study Area, and we urge the Committee to craft a recommendation along such lines.

As a point of interest, we note that Bill C-49—the proposed *Act to amend the Canada-Newfoundland and Labrador Atlantic Accord Implementation Act and the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and to make consequential amendments to other Acts*—envisions the Canada-Nova Scotia Offshore Energy Regulator (“CNSOER”) being empowered to conduct regional assessments and strategic assessments of the effects of any existing or future works or activities related to offshore renewable energy projects within its jurisdiction. These assessment powers are not currently held by the Canada-Nova Scotia Offshore Petroleum Board under the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* as it currently stands, which means that the CNSOER will be exploring new territory as it considers whether and how to exercise these new assessment powers if and when

they are granted. In our view, the Committee's work conducting this RA can be greatly beneficial to the CNSOER if it is established, as the Committee's experience will make Committee members particularly well-equipped to describe what future assessments in areas not identified as PFDAs should take into account. We urge the Committee to bear this in mind as it moves forward and to consider carefully how the Committee's learning and experience can be translated into a suite of recommendations to support future assessments by the CNSOER.

As an example, we note that one risk of reducing the scope of the RA to PFDAs is that future impact assessments for offshore wind developments outside of that area may be affected. Under subsection 112(1)(a.2) of the *IAA*, the Minister of Environment and Climate Change (the "Minister") may make regulations that designates a physical activity or classes of physical activities from among those specified in the *Physical Activities Regulations*. The regulation may establish conditions that, when met, exclude a physical activity or class of physical activities from designation under the *Physical Activities Regulations*, and establish the conditions that a proponent must provide to the Agency for a proposed project exempted.

The Minister has discretion to create a regulation under subsection 112(1)(a.2) and the Minister must first consider either a regional assessment or a strategic assessment that was conducted for the type or class of project to which the regulation would apply. Subsection 2(2) of *Physical Activities Regulations* allows offshore wind projects to be excluded from impact assessments by the Minister using a regulation contemplated by subsection 112(1)(a.2). This means that, following the conclusion of the RA that is focused on PFDAs, offshore wind developments in areas not studied by the Committee could still be subject to regulations exempting them from impact assessment requirements under the *IAA*.

It is important for the Committee to consider the potential implications of subsection 112(1)(a.2) and to recommend that, in a scenario where regulations are used to exclude offshore wind developments from impact assessments, that a condition for exclusion must be that a future regional assessment or other similar studies be carried out in any areas not originally identified as a PFDA. Otherwise, much of the full Study Area will be excluded from cumulative effects assessments and other important assessment measures that were intended for this RA and are required by the *IAA* during project impact assessments.

4. Conclusion

We recommend that the Committee use a precautionary approach to identify PFDAs which will be the focus of the RA. We also urge the Committee to use a precautionary approach to identify and recommend areas in which offshore wind development should be excluded because of potential serious impacts on the environment (for example, in MPAs and SARA critical habitats).

We urge the Committee to bear in mind that government and regulatory authorities will not be bound by its recommendations. In the future, if offshore wind developments are proposed for areas of the full RA Study Area that are not in a PFDA, government and regulatory authorities will not have the benefit of the Committee's assessment of environmental and socio-economic impacts, cumulative effects, and sustainability, in those areas. We recommend that the Committee

recommend that future regional assessments or other similar studies be carried out in those areas before they are opened for offshore wind development.

Sincerely,

<Original signed by>

Mike Kofahl
Staff Lawyer