

September 22, 2023

Committee for the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador
Impact Assessment Agency of Canada
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SENT VIA EMAIL

Dear Members of the Regional Assessment Committee,

Re: Submission on the Proposed Focus Area

The following is a submission from East Coast Environmental Law (“ECEL”) on the proposed Focus Area for the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador (the “RA”) in response to a request for feedback launched by the Committee on August 17, 2023.

1. Introduction

The Committee is proposing to apply a precautionary approach to its work because offshore wind development is a potential new industry in Canada. It is our understanding that the Committee is of the view that much of the area that is the subject of the RA (the “Study Area”) may not be technically suitable for offshore wind development in the near term.¹ Specifically, it is proposing to focus the remainder of the RA on areas where wind development is more likely to occur (the “proposed Focus Area”).

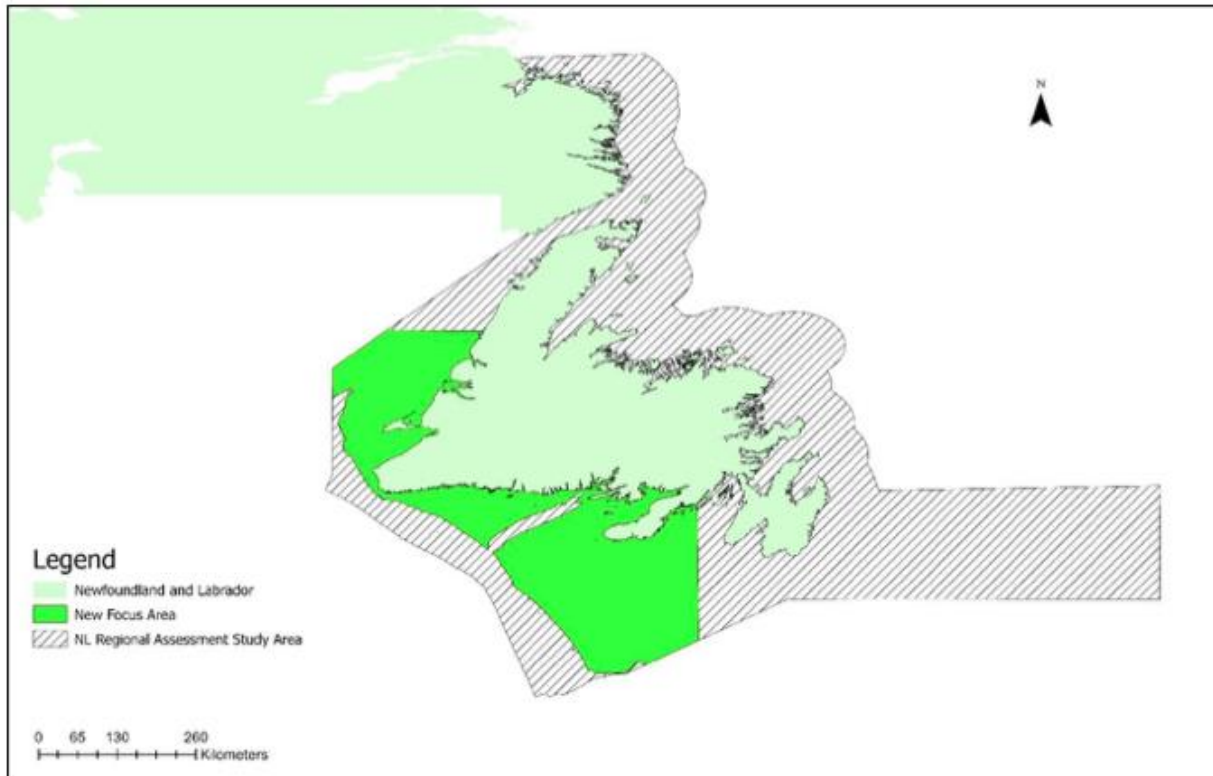
We understand that the proposed Focus Area will be an area that meets the criteria the Committee identifies as being required for offshore wind developments to be suitable. To this point, the criteria include good wind resource, water depths less than 300 metres, suitable substrate for platforms, absence of icebergs, and limited wave height.² As a starting point, the Committee has conducted constraints analyses that have led to the exclusion of all areas of the Study Area where presence of icebergs could preclude development and where water depths exceed 300 metres, and to the exclusion of the Exclusive Economic Zone of St. Pierre et Miquelon. This is an area south and southwest of the island of Newfoundland, which we understand as being represented by the map shown in Figure 1. The

¹ Committee for the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador, “The Proposed Focus Area for the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador – We Request Your Feedback” (August 17, 2023), online: <<https://iaac-aeic.gc.ca/050/evaluations/document/152815>> at page 1.

² *Ibid.*

Committee is proposing to consider other factors important for informing future planning, licensing, and impact assessment processes during the remainder of the RA.³

Figure 1: Proposed Area for the Regional Assessment⁴



It is our understanding that the Committee’s work to date has included a review of ice modeling, data, technical reports, and other industry, government, and academic resources as evidence to support its selection of the proposed Focus Area.⁵ It is also our understanding, based on information provided by the Committee during engagement sessions with the public and advisory groups in September 2023, that the Committee proposes to remove the following areas from the Focus Area in the near future: Marine Protected Areas (“MPAs”) and marine critical habitats that have been designated under Canada’s *Species at Risk Act* (“SARA”). Finally, we understand that the Committee is considering other constraints (for example, shipping routes and fisheries areas).

ECEL’s comments on the proposed Focus Area, as it has been presented to date, are as follows.

2. We support the Committee’s use of a precautionary approach and are generally supportive of the approach taken to identify a Focus Area.

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

³ *Ibid.*

⁴ *Ibid* at page 2.

⁵ Committee for the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador, “The Proposed Focus Area for the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador – We Request Your Feedback” (Deadline Update and St. Pierre et Miquelon EEZ Clarification) (August 23, 2023), online: <<https://iaac-aeic.gc.ca/050/evaluations/document/152855>> at pages 4-6.

manner”.⁶ 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”.⁷ The Agency’s *Practitioner’s Guide to Federal Impact Assessment* also makes application of the precautionary principle one of its four guiding sustainability principles, which are meant to help inform analysis of sustainability.⁸

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,⁹ 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):¹⁰

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.¹¹

Based on what we heard when we participated in public engagement sessions and Advisory Group meetings, and by the materials provided during those sessions, it seems to us that the Committee’s constraints analysis and its proposal that offshore wind developments be excluded from MPAs and SARA critical habitats signals the Committee is taking a precautionary approach. It is our view that the Committee seems to be identifying areas where offshore wind developments would cause serious or even irreversible damage to the environment, taking note that offshore wind development in Canada is

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

⁷ *Ibid* at subsection 6(2).

⁸ 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>>

⁹ 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>>

¹⁰ *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40 at paragraph 31.

¹¹ *Ibid* at paragraph 32.

a new industry, and is thus taking measures to prevent environmental degradation. We support the application of a precautionary approach in this manner and encourage the Committee to think deeply about additional ways that a precautionary approach can shape the Committee's analysis of environmental and socio-economic factors within the proposed Focus Area and inform its conclusions and recommendations.

More specifically, we support the exclusion of offshore wind development from MPAs and SARA critical habitats and recommend that other important ecological areas also be considered for exclusion. We hope that the Committee will continue to apply a precautionary approach as it refines its proposed Focus Area and that the Committee will consider refining the Focus Area to exclude important ecosystems and areas that are not MPAs or SARA critical habitats, such as other effective area-based conservation measures, or "OECMs".

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 a smaller Focus Area 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-Newfoundland and Labrador Atlantic Accord Implementation Act*).

In particular, if the Committee proceeds to focus its attention on the proposed Focus Area, 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. We know from our participation in public engagement sessions and Advisory Group meetings that the Committee understands its mandate as being to identify sites within the Study Area that are most suitable for offshore wind development in the near term. 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 ("TOR"). 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 Focus Area, 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 know from our participation in public engagement sessions and Advisory Group meetings that the Committee is already considering these possibilities and that Committee members are contemplating a formal recommendation 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-Newfoundland and Labrador Offshore Energy Regulator (“CNLOER”) 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-Newfoundland and Labrador Offshore Petroleum Board under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* as it currently stands, which means that the CNLOER 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 CNLOER if it is established, as the Committee’s experience will make Committee members particularly well-equipped to describe what future assessments in areas excluded from the proposed Focus Area 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 CNLOER.

As an example, we note that one risk of reducing the scope of the RA to the proposed Focus Area 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 the proposed Focus Area, 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 originally excluded from the proposed Focus Area. 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 are supportive of the Committee’s use of a constraints analysis and the use of a precautionary approach to identify a Focus Area which will be the focus of the RA. In particular, we are supportive of

the Committee's intention to identify areas within the proposed Focus that will 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 were excluded from the proposed Focus Area, 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 areas excluded from the proposed Focus Area before such areas are opened for offshore wind development.

Sincerely,

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