November 29, 2024

SeaBlue Canada Submission on the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador Committee's Draft Report: Protecting Marine Protected Areas

1. Introduction

The following is a submission by the SeaBlue Canada coalition to the Newfoundland and Labrador Regional Assessment Committee (the "Committee") regarding its Regional Assessment of Offshore Wind Development in Newfoundland and Labrador draft report (the "Draft Report").[1]

SeaBlue Canada works collaboratively to ensure that Canada's marine protected area ("MPA") commitments are ambitious, equitable, and ultimately provide meaningful protection to marine species and habitats. The coalition comprises the Canadian Parks and Wilderness Society, the David Suzuki Foundation, East Coast Environmental Law, the Ecology Action Centre, Nature Canada, Oceans North, West Coast Environmental Law, and WWF-Canada.

SeaBlue Canada supports the development of offshore renewable energy ("ORE") projects as part of the clean energy response to the climate crisis. However, ORE projects, including offshore wind ("OSW") developments, must be managed responsibly and sustainably to minimize impacts to the marine environment, and in a way that advances equity by providing benefits to local communities.

SeaBlue Canada supported *Bill C-49, An 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* ("Bill C-49")[2], which will enable the prevention or prohibition of offshore interests within offshore areas that have been identified for conservation and protection. Provisions of the amended federal *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* ("Federal Accord Act") will be essential to protect marine biodiversity and will help to facilitate the clean energy transition through development of offshore renewable energy while supporting the protection of marine biodiversity. The necessary provincial mirror legislation, Bill #90, *An Act to Amend the*

[1] Newfoundland and Labrador Regional Assessment Committee, "Regional Assessment of Offshore Wind Development in Newfoundland and Labrador" (October 1, 2024) [Draft Report].
[2] Bill C-49, *An 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*, 1st Sess, 44th Parl, 2023 [Bill C-49].

Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act is currently before the Newfoundland and Labrador House of Assembly.[3]

For the reasons elaborated below, **SeaBlue Canada does not support the development of OSW developments in legally protected and conserved areas in Newfoundland and Labrador's offshore area**. While we maintain a different understanding of the precautionary principle than that used by the Committee (see pg. 8 of this document) we support the Committee's application of the precautionary principle, whereby the Committee removed a coastal buffer, marine critical habitat under the *Species at Risk Act,* MPAs including the South Coast Fjords National Marine Conservation Study Area, and areas near national parks and world heritage sites (i.e., Gros Morne National Park) as possible OSW Licencing Areas.[4] **We strongly support the inclusion of language explicitly recommending a set of actions that the responsible federal and provincial ministers and the Governor in Council ("GiC") take, respectively, to ensure protection of MPAs now and in the future**.

2. MPAs and OECMs Protect Marine Biodiversity

Canada has committed to protecting 25% of the ocean by 2025 and 30% by 2030 as part of its efforts to halt and reverse marine biodiversity loss under the *Kunming-Montreal Global Biodiversity Framework*.[5] The federal government protects areas of the ocean using MPA designations and other non-MPA legal mechanisms that provide spatial protections, known as "other effective area-based measures" ("OECMs"). MPAs are ocean areas that are set aside and protected for long-term conservation. OECMs are areas where conservation is not the primary objective, but where conservation outcomes are achieved.[6] The federal government has committed to prohibiting potentially harmful effects of industrial activities within all new federal MPAs,[7] and avoiding or mitigating industrial activities that pose risks to biodiversity outcomes within OECMs.[8]

MPAs in Canada include *Oceans Act* MPAs, National Marine Conservation Areas ("NMCAs"), and National Wildlife Areas ("NWAs") with marine components or Marine National Wildlife Areas ("mNWAs"). Generally, MPAs prohibit or restrict activities that threaten species and ecosystems. MPAs are managed in part under the *Marine Protected Areas Protection Standard* (the "MPA Protection Standard"), which is based on a recommendation from the National Advisory Panel on Marine Protected Areas Standards. The MPA Protection Standard applies to all MPAs established after April 25, 2019 and may be applied to MPAs that existed before that date. The standard prohibits oil and gas exploration, development and production; mineral exploration and exploitation; disposal at sea of waste and other

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[3] https://www.assembly.nl.ca/HouseBusiness/Bills/ga50session2/
[4] NFLD Draft Report, p. 96. See also maps of constraints from pages 97-109.
[5] Government of Canada, Office of the Prime Minister, "Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter", by Right Honourable Justin Trudeau (Ottawa: Office of the Prime Minister, December 16, 2021). See also: signatory to Kunming-Montreal Agreement at COP15.
[6] SeaBlue Canada, "A Technical Review of Canada's Other Effective Area-Based Conservation Measures: Alignment with DFO Guidance, IUCN-WPCA Guidance and CBD SBSTTA Guidance" (January, 2019) at page 10.
[7] Fisheries and Oceans Canada, "Federal Marine Protected Area Protection Standard" (Ottawa: Fisheries and Oceans Canada, (2023).
[8] Fisheries and Oceans Canada, "Other Effective Area-Based Conservation Measures (OECM) Protection Standard", online (February 8, 2023).

matter; dumping of fill; deposit of deleterious drugs and pesticides; and bottom-trawling. It also restricts vessel discharges inside Canada's Territorial Sea (up to 12NM from shore).

In Canada, the primary type of OECM is a "marine refuge", which is a fisheries area closure established under the *Fisheries Act*.[9] Specifically, the *Fisheries Act* allows the Minister of Fisheries and Oceans (the "Minister") to prohibit fishing of one or more species or to prohibit any type of fishing gear in an area, using one of two mechanisms: 1) regulations for the purposes of conservation and protection of marine biodiversity[10] or 2) a fisheries management order (lasting up to 45 days with the possibility of renewal), if they are of the opinion that prompt measures are required to address a threat to "the proper management and control of fisheries and the conservation and protection of fish".[11] Marine refuges account for approximately 50% of the protected areas that Canada counts towards its conservation targets. OECMs are managed using the OECM Protection Standard, which is also based on a recommendation from the National Advisory Panel on Marine Protected Areas Standards. It is implemented through Fisheries and Ocean Canada's (DFO) *Guidance for Recognizing Marine Other Effective Area-Based Conservation Measures*.[12]

The MPA and OECM protection standards are a recognition that industrial activities are known to undermine the conservation of biodiversity and achievement of the conservation objectives and outcomes identified for individual sites. The standards reflect findings of the National Advisory Panel on Marine Protected Areas Standards, which recommended that the government adopt the International Union for the Conservation of Nature standards (i.e., prohibiting industrial activities in MPAs) and that the government be satisfied that the risks to intended biodiversity outcomes are avoided or mitigated in OECMs.[13] However, while they represent many international best practices, the MPA and OECM protection standards do not address nascent and emerging ORE industries, despite the fact many jurisdictions around the world prohibit or strictly limit ORE installations, including offshore wind developments, in MPAs. For example, in France, offshore wind projects are prohibited in certain types of MPAs, and in many countries – including Germany, the United Kingdom, Spain, France, the Netherlands and Australia – there are specific zones in which offshore wind may be installed, and which have been identified through marine spatial planning.[14]

Although ORE projects, including OSW developments, provide an alternative to fossil fuel-based energy sources and will be necessary as part of a clean energy transition, they must be approached carefully to avoid negative localized and cumulative impacts to marine

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[9] SeaBlue Canada, "A Technical Review of Canada's Other Effective Area-Based Conservation Measures: Alignment with DFO Guidance, IUCN-WPCA Guidance and CBD SBSTTA Guidance" (January, 2019) at page 4.
[10] *Fisheries Act*, section 43.3(1).
[11] *Fisheries Act*, section 9.1(1).
[12] Fisheries and Oceans Canada, "Other Effective Area-Based Conservation Measures (OECM) Protection Standard", online (February 8, 2023).
[13] Mary Simon and Remi Bujold, et al ,"Final Report of the National Advisory Panel on Marine Protected Area Standards" (September 26, 2018).
[14] Josep Lloret et al, "Floating offshore wind farms in Mediterranean marine protected areas: a cautionary tale" (2023) 0 ICES Journal of Marine Science 1 at 2; see also Government of New Zealand, Ministry of Business, Innovation & Employment, "Annex 3: International models for offshore renewable energy regulation" in Enabling investment in offshore renewable energy discussion document (December 2022); Mike Kofahl & Tina Northrup, Comparative Jurisdictional Research Report on the Assessment and Regulation of Offshore Wind Development, (Ecology Action Centre, March 2023).

ecosystems. For example, OSW installations (both fixed foundation and floating turbines) can cause the following negative marine ecosystem impacts:

- Increased ocean use, which could affect behaviours of fish, whales and other species;
- Introduction of electro-magnetic fields that impact navigation, predator detection, communication, and the ability for fish and shellfish to find mates;
- Changes to existing habitats by altering local or regional hydrodynamics;
- Creation of the "reef effect", where marine life clusters around the hard surfaces of wind developments, drawing populations away from natural habitats and altering ecological dynamics;
- Damage to the seafloor because of infrastructure and cables;
- Impacts to organism life cycle stages, including larval dispersal and spawning;
- Changes to species composition, abundance, distribution, and survival rates;
- Increased vessel traffic, with associated increases in vessel strikes and increased pollution; and
- Release of contaminants that can be consumed or absorbed by marine life.[15]

In its Draft Report, the Committee identified that impacts from OSW include underwater noise and vibration from construction and operation; benthic disturbance; entanglement risks; and the introduction of artificial lighting, electromagnetic frequency ("EMF") emissions and high-voltage direct current ("HVDC") emissions which could interfere with fish and their habitats.[16]

In its assessment of the impacts of offshore wind development on protected areas, the Committee highlighted that:

> Proper siting of a project, utilizing the precautionary principle, is the primary method of mitigation, as placing turbines away from protected areas, vulnerable habitats or species reduces the overall impact to these aspects. It is also crucial for the proper legislative framework be in place prior to development occurring, including the need for marine spatial planning to ensure sustainable use of the sea by prioritizing the protection of species and spaces, harvesting wisely, reducing pollution streams and avoid increasing stressors where ecological value is considered high (Lloret et al., 2023). These primary mitigations are enforced and followed in other jurisdictions, such as in Europe.[17]

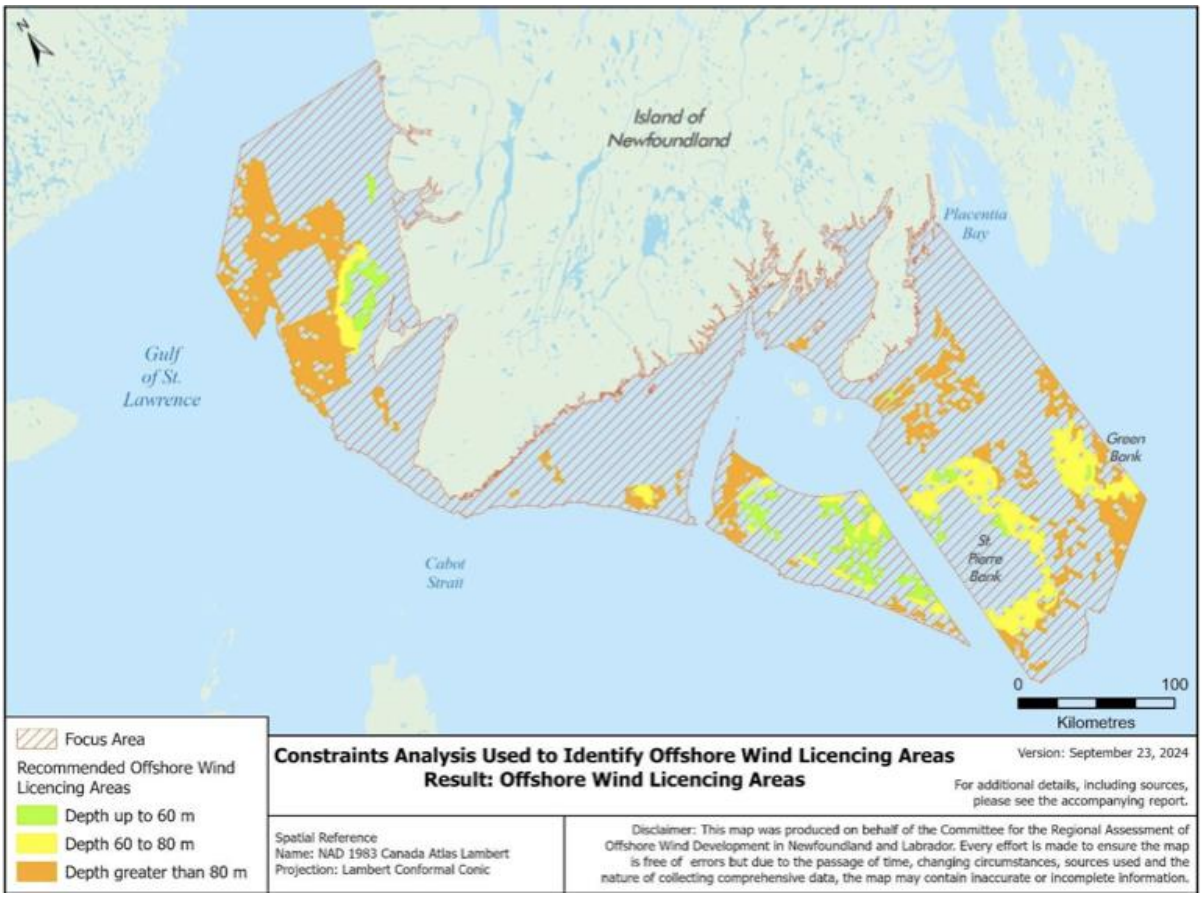
The Committee concluded that avoidance of protected areas on the basis of the precautionary approach is the best way to minimize negative effects of offshore wind developments on vulnerable habitats and species.[18] SeaBlue Canada agrees. Accordingly, in order for Canada to achieve its conservation goals and to effectively protect marine

[15] NOAA Fisheries, *Offshore Wind Energy: Protecting Marine Life,* online; see also Tethys Knowledge Base, Wind Energy Content for a list of studies on the topic.
[16] Draft Report at pages 415 to 423.
[17] Draft Report at page 494.
[18] Draft Report at page 495.

biodiversity using tools like MPAs and OECMs, it is crucial that offshore wind be prohibited from legally protected and conserved areas.

3. Protect Existing MPAs from Offshore Wind Developments

On August 17, 2023, the Committee proposed a Focus Area that outlined regions likely to attract OSW interest in the foreseeable future.[19] In its Draft Report, the Committee identified parts of the Focus Area as preliminary offshore wind ("OSW") Licencing Areas, which are intended to inform the first rounds of licencing.[20] The OSW Licencing Areas are the areas that remained of the Focus Area once the Committee had conducted a constraints analysis and removed areas using a precautionary approach.



SeaBlue Canada supports the approach that the Committee used to identify OSW Licencing Areas, in which it removed as possible OSW Licencing Areas, a coastal buffer, marine critical habitat, the Laurentian Channel MPA, the South Coast Fjords National Marine Conservation Study Area, and a buffer zone adjacent to the Gros Morne National Park.[21]

The Committee's OSW Licencing Areas excludes the Laurentian Channel MPA, reflecting a growing recognition of the ecological significance of this area. The Laurentian Channel

[19] Draft Report, *supra* note 1, at page 59.
[20] *Ibid*, *supra* note 1, at page 107.
[21] *Ibid, supra note 1,* p. 96. See also maps of constraints from pages 97-109.

MPA, covering an area of approximately 11,580 km^2, was designated in 2019 as part of Canada's broader conservation goals, including its previous commitment to protect 10% of marine and coastal areas by 2020.[22] This MPA plays a critical role in preserving biodiversity, offering essential habitats to various marine species, including those at risk, such as the Northern wolffish and the leatherback sea turtle.[23] The primary objective of this MPA is to conserve its biodiversity through the protection of key species and their habitats, ecosystem structure and function, and through scientific research.[24] By prohibiting activities that may disturb, damage, or destroy marine organisms or habitats, the *Laurentian Channel Marine Protected Area Regulations* aim to mitigate the risk to biodiversity posed by human activity and intervention.[25] Though OSW development is not explicitly prohibited within this MPA, the potential impacts posed by such projects are captured by the general prohibition in the MPA regulations.

The Committee's OSE Licencing Areas also excludes the South Coast Fjord NMCA Study Area. The Government of Canada, Government of Newfoundland and Labrador, Miawpukek First Nation, Qalipu First Nation, and the Town of Burgeo signed a Memorandum of Understanding in June 2023 to establish a steering committee, which works to assess the feasibility of creating an NMCA in the South Coast Fjords area.[26] The feasibility assessment is anticipated to be completed within 2 years of the signing of the MOU.[27]

The Committee has not excluded OECMs as part of its constraints analysis, although its coastal buffer does preclude many existing OECMs (as well as critical habitat, bird colonies, sea duck key habitat sites, Important Shorebird Sites, KBAs, and provincially protected areas) from being part of its proposed OSW Licencing Areas.[28] The Committee identified 19 marine refuges within Newfoundland and Labrador's coastal and offshore areas.[29] Most of these areas prohibit bottom contact fishing or otherwise limit types of fishing activities in order to conserve existing ecological or biological functions.[30] Four of these marine refuges are within or adjacent to the Committee's Focus Area.

To strengthen the protections for existing MPAs in the Focus Area, as contemplated by the Committee, and to protect OECMs, we point to the provisions of Bill C-49, which have already received Royal Assent in Parliament but are not yet in force:

- Section 26 of Bill C-49 (section 54 of the amended NFLD Accord Act) will allow the responsible Federal Minister and Provincial Minister to issue a joint direction to the Offshore Energy Regulator (currently, the Offshore Petroleum Board) to prohibit the issuance of submerged land licences.
- Section 28 of Bill C-49 (section 56.1 of the amended NFLD Accord Act) will allow the Governor in Council, for the purpose of protection of the environment, to make regulations prohibiting offshore renewable energy projects (including

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[22] Government of Canada, "Laurentian Channel Marine Protected Area (MPA)" at <https://www.dfo-mpo.gc.ca/oceans/mpa-zpm/laurentian-laurentien/index-eng.html> [Laurentian Channel MPA].
[23] Laurentian Channel MPA, *supra* note 20.
[24] Laurentian Channel MPA, *supra* note 20.
[25] *Laurentian Channel Marine Protected Area Regulations,* SOR/2019-105, s.4.
[26] Parks Canada, "Proposed South Coast Fjords National Marine Conservation Area", at https://parks.canada.ca/amnc-nmca/cnamnc-cnnmca/fjords-cote-sud-south-coast-fjords
[27] *Ibid*.
[28] Draft Report at page 96.
[29] *Ibid* at page 468.
[30] *Ibid*.

> OSW developments) in any part of the offshore area that is, or in the opinion of the GiC, may be identified under an Act of Parliament or the provincial legislature as an area for environmental or wildlife conservation or protection.

Once in force, these amendments to the Accords Act (with the provincial mirror legislation anticipated to have equivalent amendments) will enable greater and clearer protection of existing *and* future MPAs.

Therefore, SeaBlue Canada advocates that the Committee recommend in its Final Report that, once the Accord Act and its provincial mirror legislation is brought into force:

1) the responsible federal and provincial Ministers issue a joint direction to the Offshore Energy Regulator for Newfoundland and Labrador to prohibit issuance of submerged land licences in MPAs, and

2) that the GiC create a regulation under the amended Accord Act to prohibit OSW developments in existing and future MPAs.

4. Protect Future Legally Protected and Conserved Areas from Offshore Wind Developments

Gaps in available information (including western science, Indigenous Knowledge, and community knowledge), as well as a lack of understanding of the individual and cumulative effects of OSW development on biodiversity and marine ecosystems has prompted the Committee to utilize a precautionary approach to guide their conduct and approach to analysis of OSW development and to its recommendations.[31]

The Committee's application of the precautionary principle is important and laudable because it can play a critical role in safeguarding marine biodiversity. A guiding tenet of international and Canadian environmental law, the precautionary principle says that:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.[32]

Our understanding of the precautionary principle, which is in line with the definition above, differs from the definition used by the Committee, which is as follows:

> This use of the precautionary principle means basing decisions on evidence available now that demonstrates technical feasibility of turbine technologies and shows potential impacts to environmental, health, social, and economic components can be avoided or mitigated before offshore wind development can proceed in a given area.[33]

SeaBlue Canada does <u>not</u> support the Committee's suggestion that "as gaps are filled, projects are installed, impact assessments are conducted, and local evidence and knowledge builds, governments may be able to gradually ease precautionary measures."[34] However, putting aside differences in understanding of the precautionary principle, its application by the Committee underscores the need for a cautious approach that

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[31] Draft Report at page 28.
[32] For example, see: *Canadian Environmental Protection Act*, SC 1999, c 33, preamble.
[33] Draft Report at page 28.
[34] Draft Report at page 28.

prioritizes environmental preservation to avoid unforeseen negative impacts from OSW development, especially given the lack of understanding of the new OSW industry.

SeaBlue Canada recommends that the Committee go further than it has already by applying the precautionary principle (as we have defined it above) to future legally protected and conserved areas – even those which have not yet been identified. We note that the Committee has not provided any recommendations with respect to how the OSW regulatory regime can or should address and deal with future proposed protected areas, and it is critical that regulators, proponents, Indigenous groups, the public and other stakeholders have certainty with respect to which offshore areas will not be open to future bids for OSW development. To that end, **SeaBlue Canada recommends that the Committee be explicit that OSW development must not be allowed in future legally protected and conserved areas.** This means that if a future site is identified for protection, new and existing interests in OSW will be prohibited or cancelled, respectively. **We reiterate our recommendation that the responsible Ministers and the GiC take appropriate actions under the amended Accord Act once it has the force of law. We furthermore recommend that such legal protection include OECMs.**

5. Conclusion and Recommendations

Environmental impacts can occur throughout the various phases of OSW development, from the initial construction and installation of turbines to the long-term operational presence of infrastructure and, eventually, the decommissioning of these projects. Each stage presents its own set of challenges and risks to marine ecosystems, with direct, indirect, and cumulative effects on species and habitats protected by this MPA. By no longer including MPAs in the preliminary OSW Licencing Areas, the Committee is prioritizing the protection of the marine environment under the precautionary principle.

Future planning for new MPAs is crucial, especially as ongoing research continues to reveal previously unknown marine ecosystems. Identifying new areas that may require federal or provincial protection underscores the need for forward-thinking conservation strategies to ensure marine biodiversity can coexist with OSW development. Marine spatial planning approaches could have delivered a more comprehensive approach to both conservation and offshore wind. In lieu of this, it is vital that the Committee actively considers these future conservation needs in its decision-making process.

On October 3, 2024, Bill C-49 received Royal Assent.[35] Bill C-49 expands the powers of the Governor-in-Council's (the "GIC") and, thereby, strengthens the OSW development regime as it relates to environmental protection. Through Bill C-49, the Council can make regulations prohibiting the commencement or continuation of offshore renewable energy activities within areas that have been, or can be, identified for protection under federal or provincial law.[36] These expanded powers allow the Council to take a precautionary and pre-emptive approach to protecting sensitive marine areas, even before formal designation. As such, this framework reinforces Canada's commitment to sustainable development and environmental protection.

SeaBlue Canada recommends that the Committee leverage and recommend Bill C-49 to proactively safeguard all potential future protected areas. The Bill provides a legal

[35] Bill C-49.
[36] Bill C-49, *supra* note 30, cl 28.

mechanism to take preventive action in potential future MPAs. The Committee's active advocacy of Bill C-49 will pave the way for a more sustainable and forward-thinking approach to OSW development.

Appendix A – Comments on Committee Conclusions and Recommendations Related to Protected and Special Areas (section 7.6.6 at page 499)

Recommendation	Support	Comment
The Committee recommends that application of additional buffers to MPAs be considered during project-level impact assessments.	Yes	We consider project-level impact assessments to be a necessary component of the regulation of offshore wind development projects and support consideration of buffer zones around existing and future MPAs as part of project-level assessments.
The Committee recommends offshore wind project proponents undertaking project level impact assessments consider, in consultation with DFO, setback distances from areas important for the various species on which MPA conservation objectives are based.	Yes	We recommend that offshore wind project proponents consult with Indigenous groups, as well as environmental and community organizations, industry groups, the public, and other applicable stakeholders, in addition to government, when considering and implementing setback distances. We note that MPAs also include NMCAs and wildlife areas, which are not the responsibility of DFO, and so ECCC and Parks Canada also need to be consulted.

The Committee recommends further research and monitoring to be completed on both positive and negative effects of offshore wind on protected areas, but developments should not occur as pilots within these areas.	Yes	We note that offshore wind projects with fewer than 10 turbines do not trigger an impact assessment under the *Impact Assessment Act*. This leaves a legislative gap that could allow pilot projects with a small number of turbines to not be assessed.
The Committee recommends that for licencing areas identified within EBSAs, offshore wind project proponents assess potential impacts to key features or species identified within the specific EBSA and avoid or, where appropriate, apply mitigation measures to ensure projects are not damaging/disturbing these components.	Partially	We recommend a precautionary approach, whereby EBSAs not be opened as licencing areas. This is especially important given that some EBSAs have a likelihood of becoming MPAs in the future.
The Committee recommends further work in defining migratory routes within EBSAs prior to issuing call for bids, in consultation with the applicable regulators.	Yes	As above, we recommend EBSAs not be opened for bids at this time.
The Committee recommends that project-level impact assessments identify SiBAs overlapping a proposed project and ensure the least amount of disturbance to those areas as possible.	Partially	We recommend a precautionary approach, whereby significant benthic areas be avoided as areas open to offshore wind interests. This is important because some SiBAs have a likelihood of becoming MPAs in the future.
The Committee recommends that developers consult with respective departments to ensure any legislation of a protected area within or adjacent to an offshore wind development be adhered to and that protections are fully met.	Yes	We recommend that proponents of offshore wind developments also consult with Indigenous groups to ensure Indigenous rights are respected, and to ensure protections of Indigenous protected and conserved areas are fully met.