East Coast Environmental Law

BRIEF

To: Standing Senate Committee on Energy, the Environment and Natural Resources
From: East Coast Environmental Law
Re: 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
Date: June 10, 2024

East Coast Environmental Law is a regional charity that provides public-interest environmental law services throughout Atlantic Canada. We advocate for progressive environmental law and policy, provide public legal education, and share our legal skills to support others working to prevent or redress environmental harms. We have conducted considerable research on offshore wind regulation, looking at jurisdictions overseas and studying Canada's nascent regimes,[1] and we are participating actively in the Regional Assessment of Offshore Wind Development in Newfoundland and Labrador and the Regional Assessment of Offshore Wind Development in Nova Scotia (together, the "NL and NS Offshore Wind RAs").

We recognize the urgent need for a global transition from fossil fuels to sources of clean and renewable energy. Good law will be essential to facilitate that transition while also protecting marine ecosystems and biodiversity as we seek to harness new sources of energy at sea.

We support Bill C-49 in principle because we understand the benefit of jointly-managed, federal-provincial regimes for the planning, assessment, and authorization of renewable energy projects in offshore Newfoundland and Labrador and offshore Nova Scotia. However, we see significant deficiencies in the Bill that must be addressed to enable successful, stable, and sustainable renewable energy development in the offshore, with minimum conflict between ocean users and ecosystem needs.

Most significantly, we urge that Bill C-49 be amended to include requirements for tiered planning and assessment to inform decision-making in the offshore renewable energy regimes. These planning and assessment processes must also support meaningful opportunities for public participation. Requiring tiered planning and assessment would create opportunities for stakeholders like fisheries groups and other ocean users to provide input at the highest levels of planning and site selection down to the level of project-specific proposals. In doing so, it would help to minimize conflict and create regulatory certainty by building trust in balanced, informed, and participatory decision-making.

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[1] See: Mike Kofahl and Tina Northrup, *Comparative Jurisdictional Research Report on the Assessment and Regulation of Offshore Wind Development* (March 2023); Tina Northrup, *Joint Federal-Provincial Regulation of Marine Wind Energy Development in Offshore Nova Scotia: Understanding Anticipated Amendments to the Accord Acts Regime* (19 December 2023); Tina Northrup, *Provincial Regulation of Marine Wind Energy Development in "Nova Scotia Waters": Understanding the "Regulatory Path" that the Government of Nova Scotia Might Establish under the Marine Renewable-energy Act and Other Provincial Statutes and Regulations* (19 December 2023).

Tiered Planning and Assessment Can Minimize Conflict and Build Trust in Good Process

Our research has identified tiered planning and assessment as a best practice demonstrated by offshore wind regimes in the European Union and United Kingdom. When we speak of "tiered planning and assessment", we mean the combination and coordination of high-level planning and assessment processes with lower-level, project-specific assessments. In Canada, "regional assessments" ("RAs") and "strategic environmental assessments" ("SEAs") are examples of high-level planning and assessment processes. Federal impact assessments conducted under the *Impact Assessment Act* ("*IAA*") and environmental assessments conducted by independent regulators are examples of project-specific assessments.

High-level assessments like RAs and SEAs are best-suited to providing "big-picture" views of an area—pictures that can help us identify and understand competing uses and prospective uses of the space, synergies or conflicts between those uses, and the potential impacts of their interactions. At the lower level, project-specific assessments take that "big picture" and zero in on how a specific project proposed in a specific location could affect the surrounding environment and conflict or synergize with other uses and ecological components of the space.

In marine spaces like offshore Newfoundland and Labrador and offshore Nova Scotia, where there is a clear and pressing need to minimize conflict between sustainable fisheries and the sustainable development of offshore renewable energies, high-level planning and assessment processes like RAs and SEAs can use tools such as constraints analysis, cumulative effects assessment, and marine spatial planning to inform decision-making that balances competing ocean uses and ecosystem needs. When balance cannot be achieved without compromising one or more uses or needs, the information and perspectives gathered through robust, participatory RAs or SEAs can help decision-makers prioritize interests fairly and prudently.

Bill C-49 gestures to the need for tiered planning and assessment by proposing to empower Offshore Energy Regulators to conduct regional assessments and "strategic assessments". The Bill also explains how offshore regulation would intersect with project-specific assessments under the *IAA* when impact assessments are triggered. However, the Bill does not make high-level assessments and project-specific assessments required components of the offshore renewable energy regimes. The current text of the Bill would give the Offshore Energy Regulators discretionary powers—not clear responsibilities—to conduct regional and strategic assessments, and the Bill is silent on whether the Regulators can or should conduct project-specific assessments when federal impact assessments are not triggered.

We therefore make the following recommendations to address these shortcomings.

<u>Amend Bill C-49 to empower the Offshore Energy Regulators to conduct SEAs, not "strategic assessments".</u> The phrase "strategic assessment" comes from the *IAA* and has a statute-specific meaning that does not make sense in the context of Bill C-49.[2] Furthermore, the use of the phrase "strategic assessment" is not in keeping with the existing practices of the Canada-Newfoundland

[2] Under section 95 of the *IAA*, "strategic assessments" are assessments of federal policies, plans, or programs that are relevant to conducting impact assessments or concern issues relevant to conducting impact assessments. In other words, their focus is limited to the federal impact assessment regime.

and Labrador Offshore Petroleum Board or the Canada-Nova Scotia Offshore Petroleum Board (together, the "Offshore Petroleum Boards"), both of which have been conducting SEAs under the purview of the federal Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals ("Cabinet Directive on SEAs") for nearly twenty years.

Amend Bill C-49 to prohibit the making of Calls for Bids in areas that have not been assessed through an RA or SEA that has studied the impacts of introducing offshore renewable energy activities. Marine areas in offshore Newfoundland and Labrador and offshore Nova Scotia that are under the jurisdiction of the amended *Accord Acts* regime should not be opened to renewable energy development without the benefit of the constraints analysis, cumulative effects assessment, marine spatial planning, stakeholder input, and other essential tools that RAs and SEAs provide.

Amend Bill C-49 to require project-specific environmental assessments by the Offshore Energy Regulators when impact assessments under the *IAA* are not triggered. Currently, the *IAA* and its *Physical Activities Regulations* require impact assessments of offshore wind power generating facilities with ten or more turbines. We recognize that the *IAA* will soon be amended to address the constitutional flaws that the Supreme Court of Canada identified in *Reference re Impact Assessment Act*, 2023 SCC 23; however, because federal jurisdiction to conduct impact assessments in the offshore is largely uncontroversial, we would not expect to see the impact assessment triggers for offshore wind projects changed for constitutional reasons. We are far more concerned by the possibility that offshore wind projects will be exempted from the impact assessment regime following the NL and NS Offshore Wind RAs through the use of the ministerial power set out in subsection 112(1) and section 112.1 of the *IAA*. That power was used to exempt exploratory oil and gas drilling from the impact assessment regime following the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador. Offshore renewable energy projects should be assessed at both the high level of RAs or SEAs and the lower level of project-specific assessments. The absence of project-specific assessments within the regimes could invite conflict with and legal challenges from fisheries groups, conservation interests, and other ocean users. The Offshore Energy Regulators should therefore have clear powers and responsibilities to conduct project-specific environmental assessments of offshore renewable energy projects when impact assessments are not triggered.

We Support Enhanced Powers for Marine Conservation and Protection

Although we are urging the Standing Senate Committee on Energy, the Environment and Natural Resources to advance several constructive changes to Bill C-49, we also support a number of the Bill's provisions as they stand. In particular, we welcome enhanced federal and provincial powers to protect marine ecosystems, including the proposed powers to prohibit offshore petroleum and offshore renewable energy activities in areas that are or may be protected by law as areas for wildlife conservation or protection.

Bill C-49 proposes to give the Governor in Council new power to make regulations prohibiting offshore petroleum or offshore renewable energy activities or the issuance of interests in areas that are or may be designated under federal or provincial law as areas for environmental or wildlife conservation or protection. This power would be subject to the federal Minister of

Energy and Natural Resources consulting with and getting approval from their provincial counterpart in Newfoundland and Labrador or Nova Scotia. We support this new regulation-making power because it strengthens the federal government's ability to protect the marine environment—in particular, marine areas that are already protected by law under federal or provincial statutes or that have been nominated for such protection. For example, regulations could be made using this power to prohibit offshore petroleum or offshore renewable energy activities in marine protected areas that have been designated under the *Oceans Act*, *National Marine Conservation Areas Act*, or the *Canada Wildlife Act*. This would accord with Canada's commitments to protect 30% of its ocean space by 2030 and would also accord with the minimum standards in the Marine Protected Areas Protection Standard.

Under existing provisions of the *Accord Acts*, the Offshore Petroleum Boards can make orders to prohibit the issuance of petroleum interests in any portions of their respective offshore areas, and they can also make orders prohibiting interest owners from commencing or continuing any work or activity in the face of serious environmental or social problems or in dangerous or extreme weather conditions that affect health or safety. Bill C-49 preserves these powers, and it also proposes to empower the federal and provincial ministers to jointly direct an Offshore Energy Regulator to make an order prohibiting the issuance of submerged land licences or offshore renewable energy activities. We support this additional power because it gives the federal and provincial ministers flexibility to jointly prohibit or restrict offshore renewable energy activities when necessary.

Additionally, Bill C-49 proposes to establish processes by which the federal and provincial ministers can negotiate the surrender of offshore petroleum or offshore renewable energy interests in areas that are or may be identified under federal or provincial law as areas for environmental or wildlife conservation or protection. The ministers would also have the power to jointly cancel interests in such areas when negotiations fail. We support these provisions because they signal the Government of Canada's, the Government of Newfoundland and Labrador's, and the Government of Nova Scotia's shared interests in protecting the marine environment, and they create mechanisms for the cooperative rescinding of offshore energy interests that threaten existing marine protections and conservation objectives.

We are aware that some offshore petroleum stakeholders have expressed concern about these enhanced powers for marine conservation and protection and worry they may create uncertainty within the offshore petroleum regime. Although we do not share that view, we can appreciate industry concerns about investing in development in areas that are subsequently nominated for legal protection. In our opinion, such concerns underscore our points above about the long-term, collective benefit of implementing tiered planning and assessment in the offshore. When governments use robust, participatory processes to identify the areas that are deemed most suitable for development *vis à vis* the areas that should be conserved for ecological reasons or protected to support the fisheries, greater certainty can be established for all users of the space.

Additional Recommendations to Support Good Governance in the Offshore

In addition to our key recommendations concerning tiered planning and assessment in the offshore, the following changes to Bill C-49 would further support good governance.

Amend Bill C-49 to require expertise on offshore renewable energy technologies and their environmental impacts within the Offshore Energy Regulators. Bill C-49 appears to reflect an assumption that much of the expertise currently held by the Offshore Petroleum Boards will transfer readily to the regulation of offshore renewable energy activities. Although we accept that some of the expertise held by the Offshore Energy Boards will be relevant to the regulation of offshore renewable energy activities, offshore renewable energy technologies such as offshore wind turbines are significantly different from offshore petroleum exploration and production technologies, and they carry different risks to marine ecologies and existing ocean uses like fisheries. The Offshore Energy Regulators will not be equipped to carry out their functions and fulfill their responsibilities unless their composition, staff complements, and operating structures are expanded to include expertise on offshore renewable energy technologies and the environmental impacts of such technologies. Fisheries expertise would also be a meaningful addition to the Regulators' competencies.

Require public notice of recommendations and decisions by the Offshore Energy Regulators. Bill C-49 proposes to require the Offshore Energy Regulators to provide notice in the *Canada Gazette* when offshore renewable energy recommendations are approved by the federal and provincial ministers. The Regulators should be required to provide public notice of the recommendations they make to the federal and provincial ministers and should also be required to provide public notice of key decisions made under their own authorities. This would enhance transparency and accountability within the offshore regimes. Additionally, members of the public may have procedural rights to participate in planning and assessment processes or appeal regulatory decisions, and those rights cannot be exercised meaningfully without timely and effective communication by the Regulators.

Require participant funding programs to support public participation in RAs, SEAs, and environmental assessments conducted by the Offshore Energy Regulators. Bill C-49 proposes to empower the Offshore Energy Regulators to create participant funding programs to facilitate public participation and participation by the Indigenous peoples of Canada in consultations concerning "any matter respecting the offshore area".[3] We support empowering the Regulators to create participant funding programs, but we believe such programs should be required components of RA, SEA, and environmental assessment processes conducted by the Regulators.

Require gazetting of, and opportunities for public comment on, proposed regulations made under Part II of the amended *Accord Acts*. Currently, the *Accord Acts* empower the Governor in Council to make regulations for the purpose of carrying out the purposes and provisions of Part II of the Acts, which deals with key processes such as the issuance of interests, licences, and prohibition orders. There are two requirements associated with that power: (1) a copy of a proposed regulation must be published in the *Canada Gazette*; and (2), interested persons must be given a reasonable opportunity to make representations about the proposed regulations. Bill C-49 proposes to remove both of those existing requirements, which would remove opportunities for members of the public and other stakeholders to voice their perspectives on and help to shape the offshore regulatory regimes. We do not support this, and we urge the Standing Senate Committee on Energy, the Environment and Natural Resources to recommend that the existing requirements be retained.

[3] Bill C-49, clause 62 adding section 138.021 and clause 170 adding section 142.022.

Table 1: Summary of Recommendations

	Recommendation	Rationale
1	Amend Bill C-49 to empower the Offshore Energy Regulators to conduct "strategic environmental assessments", not "strategic assessments".	The phrase "strategic assessment" comes from the *IAA* and has a statute-specific meaning that does not make sense in the context of Bill C-49. Furthermore, the use of the phrase "strategic assessment" is not in keeping with the existing practices of the Offshore Petroleum Boards, which will become the Offshore Energy Regulators.
2	Amend Bill C-49 to prohibit the making of Calls for Bids in areas that have not been assessed through an RA or SEA focused on the impacts of introducing offshore renewable energy activities.	Marine areas in offshore Newfoundland and Labrador and offshore Nova Scotia that are under the jurisdiction of the amended *Accord Acts* regime should not be opened to renewable energy development without the benefit of the constraints analysis, cumulative effects assessment, marine spatial planning, stakeholder input, and other essential tools that RAs and SEAs provide.
3	Amend Bill C-49 to require project-specific environmental assessments by the Offshore Energy Regulators when impact assessments under the *IAA* are not triggered.	Offshore renewable energy projects should be assessed at both the high level of RAs or SEAs and the lower level of project-specific assessments. The absence of project-specific assessments within the regimes would invite conflict with and legal challenges from fisheries groups, conservation interests, and other ocean users. The Offshore Energy Regulators should therefore have clear powers and responsibilities to conduct project-specific environmental assessments of offshore renewable energy projects when impact assessments are not triggered.
4	Amend Bill C-49 to require expertise on offshore renewable energy technologies and the environmental impacts of such technologies within the Offshore Energy Regulators.	The Offshore Energy Regulators will not be equipped to carry out their functions and fulfill their responsibilities unless their composition, staff complements, and operating structures are expanded to include expertise on offshore renewable energy technologies and the environmental impacts of such technologies. Without appropriate expertise, the effectiveness of tiered planning and assessment processes may be greatly diminished.

5	Amend Bill C-49 to require public notice of recommendations and decisions by the Offshore Energy Regulators.	Members of the public may have procedural rights to participate in planning and assessment processes or appeal regulatory decisions, and those rights cannot be exercised meaningfully without timely and effective communication by the Regulators.
6	Amend Bill C-49 to require participant funding programs to support public participation in RAs, SEAs, and environmental assessments conducted by the Offshore Energy Regulators.	We support empowering the Regulators to create participant funding programs, but we believe such programs should be required components of RA, SEA, and environmental assessment processes conducted by the Regulators.
7	Amend Bill C-49 to require gazetting of, and opportunities for public comment on, proposed regulations made under Part II of the amended *Accord Acts*.	Bill C-49 proposes to remove existing requirements for gazetting of regulations made under Part II of the *Accord Acts* and corresponding opportunities for public comment on proposed regulations. We do not support this, and we urge the Standing Senate Committee on Energy, the Environment and Natural Resources to recommend that the existing requirements be retained.

Table 2: Proposed Amendment Language for Key Recommendations on Tiered Planning and Assessment

In light of the ten-page limit for this brief, the table below proposes amendment language for provisions in Bill C-49 that would amend the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*. Identical provisions that would amend the *Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act* appear in clauses 147 and 170 of the Bill. Our proposed amendment language applies equally to the mirrored CAN-NL and CAN-NS provisions, but relevant section numbers will be different for the CAN-NS provisions.

Clause	Proposed Amendment Language
38	**90 (1)** Subject to section 94, the Regulator shall not issue a submerged land licence in relation to Crown reserve areas unless (a) prior to issuing the licence, the Regulator has made a call for bids in relation to those Crown reserve areas by publishing a notice in accordance with this section and section 98.1~~; and~~ (b) prior to making a call for bids in relation to those Crown reserve areas, the Regulator has conducted a regional assessment or strategic environmental assessment to assess the impacts of offshore renewable energy projects in those Crown reserve areas, or the Regulator has determined that a previous regional assessment or strategic environmental assessment conducted in respect of those Crown reserve areas has assessed the impacts of offshore renewable energy project therein; and ~~(b)~~ (c) the licence is issued to the person who submitted, in response to the call, a bid selected by the Regulator in accordance with subsection 94(1).
62	**138.01 (1)** The Regulator may, on application containing any information required by the Regulator or prescribed, issue an authorization with respect to each work or activity proposed to be carried out in relation to an offshore renewable energy project. **(2)** On receipt by the Regulator of an application for an authorization referred to in subsection (1) or of an application to amend the authorization, the Regulator shall provide a copy of the application to the Chief Safety Officer. **(3)** On receipt by the Regulator of an application for an authorization referred to in subsection (1) or of an application to amend the authorization, the Regulator shall conduct an environmental assessment of the proposed work or activity if the proposed work or activity is not subject to an impact assessment under the *Impact Assessment Act*. ~~(3)~~ **(4)** An authorization is subject to any terms and conditions be required by the Regulator or prescribed, including terms or conditions with respect to (a) approvals;

	(b) deposits of money; (c) liability for loss, damage, costs or expenses related to *debris*, as defined in subsection 183.17(1); (d) the carrying out of safety studies or environmental programs or studies; (e) conditions established under the *Impact Assessment Act*, including those established under section 64 of that Act or by regulations made under paragraph 112(1)(a.2) of that Act; ~~and~~ (f) an environmental assessment conducted by the Regulator; and ~~(f)~~ (g) certificates of fitness and who may issue them.
62	**138.015** Every federal authority, as defined in section 2 of the *Impact Assessment Act*, shall provide the Regulator, on request and within the period specified by the Regulator, with any specialist or expert information or knowledge the authority possesses and that the Regulator may require in order to (a) decide whether to authorize a work or activity under subsection 138(1) or 138.01(1); (b) decide whether to approve a development plan under subsection 139(4) or any amendment to that plan under subsection 139(5); or (c) conduct a regional assessment under section 138.017 or a strategic environmental assessment under section 138.018.
62	**138.018 (1)** The Regulator may conduct a strategic environmental assessment of any proposed or existing policy, plan or program respecting the offshore area or of any issue that is relevant to any existing or future work or activity referred to in sections 137 or 137.01.
62	**138.18 (2)** The Federal Minister and the Provincial Minister may enter into an agreement with any jurisdiction authorized under any other federal or provincial legislation to conduct a strategic environmental assessment of any proposed or existing policy, plan or program respecting the offshore area or of any issue that is relevant to any existing or future work or activity referred to in sections 137 or 137.01, including to specify the time limits and terms of that strategic environmental assessment.
62	**138.021** For clarity, the Regulator's powers to conduct regional assessments and strategic environmental assessments under this section are independent from regional assessment and strategic assessment powers provided under the *Impact Assessment Act.*

About East Coast Environmental Law

East Coast Environmental Law is a regional charity that provides public-interest environmental law services throughout Atlantic Canada. We envision a future in which laws and legal systems protect ecological health and promote environmental and climate justice in Atlantic Canada. To that end, our mission is to advocate for progressive environmental laws and policies, provide public legal education, and share our legal skills to support others who are working to prevent or redress environmental harms. Our lawyers engage regularly with laws addressing climate change mitigation and adaptation, marine conservation and protection, and the renewable energy transition.

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