

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**

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Executive Summary

In recent years, the Government of Nova Scotia has demonstrated an ambition to foster a world-class offshore wind regime in marine areas within and around Nova Scotia. Canadian federalism, with its division of jurisdiction between Parliament and the provinces, makes provincial regulation of offshore wind development a complex matter. Several questions that are relevant to the Government of Nova Scotia's authority to make laws in this sphere have not been fully resolved, but there are strong indications that cooperation between the Government of Canada and the Government of Nova Scotia will support the exercise of provincial authority in at least some marine areas where offshore wind developments could be located.

Provincial claims to jurisdiction over marine areas within and around Nova Scotia are likely strongest in respect of waters "*intra fauces terrae*" ("within the jaws of the land"). Although the geographical boundaries of waters "within the jaws of the land" can be difficult to delineate, the term refers generally to areas such as bays, estuaries, and inlets that are surrounded at least to some extent by dryland portions of provincial territory.

The Government of Nova Scotia's existing arrangements with the Government of Canada that enable joint federal-provincial regulation of offshore oil and gas activities in the area covered by the Canada-Nova Scotia Petroleum Resources Accord indicate that there are several significant "bay" areas where Canada may be willing to recognize Nova Scotia's independent jurisdiction to regulate marine wind energy development. These areas are likely among the areas that the Government of Nova Scotia has in mind when it refers to provincial regulation of marine wind energy developments in "Nova Scotia waters".

Current indications suggest that the Government of Nova Scotia intends to regulate marine wind energy development in "Nova Scotia waters" under the *Marine Renewable-energy Act* ("*MREA*"). The *MREA* has been in force since 2018, and it could provide a strong foundation for a provincial marine wind energy regime. However, the Act as it stands now was not designed to provide a comprehensive regulatory structure for marine wind energy development, and considerable work is needed to build on the foundations the Act provides.

There are at least three clear opportunities to improve the *MREA* regime to make it better-equipped to regulate marine wind energy development in a sustainable manner. These are: expansion of strategic environmental assessment ("SEA") requirements under the *MREA*; effective tiering and coordination of *MREA* SEAs, *MREA* licence and permit applications, and *Environment Act* environmental assessments ("EAs"); and, proactive, informed development of environmental planning, monitoring, and management requirements and associated policy guidance.

First, the SEA requirements that the *MREA* and its *General Regulations* impose for the proposed establishment or alteration of Marine Renewable-electricity Areas should be expanded to require consideration of: the cumulative effects that could be caused by marine renewable-energy activities in any given area; competing uses (or potential uses) of the space and ways to avoid or resolve conflicts; and, potential impacts on Indigenous rights and interests, including Aboriginal and treaty rights that are protected under Canada's Constitution.

Second, SEAs and licence and permit applications under the *MREA* should be tiered and coordinated effectively with EAs under the *Environment Act*. This should be done by clarifying the relationship between the *MREA* and *Environment Act* regimes, particularly insofar as the regimes apply to marine wind energy developments; it would also be desirable to build structures to support the use of SEA as a kind of “living” assessment in which understanding of use interactions and cumulative effects can be refined continuously, with the more refined knowledge being brought to bear on each successive EA that is conducted within a Marine Renewable-electricity Area.

Third, the Government of Nova Scotia should work proactively to determine if more specific requirements for environmental monitoring plans, risk management plans, and decommissioning, abandonment, and rehabilitation plans should be imposed to address distinctive needs in respect of marine wind energy developments. If more specific requirements are needed, the government should establish those requirements by regulation and develop corresponding guidance documents to assist proponent and public understanding.

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1.0 Introduction

In recent years, the Government of Nova Scotia has demonstrated an ambition to foster a world-class offshore wind regime in marine areas within and around Nova Scotia. Canadian federalism, with its division of jurisdiction between Parliament and the provinces, makes provincial regulation of offshore wind development a complex matter. Several questions that are relevant to the Government of Nova Scotia’s authority to make laws in this sphere have not been fully resolved, but there are strong indications that cooperation between the Government of Canada and the Government of Nova Scotia will support the exercise of provincial authority in at least some marine areas where offshore wind developments could be located.

1.1 Nature and Purpose of the Report

This report is one of two companion pieces that build on legal research and analysis that East Coast Environmental Law conducted for the Ecology Action Centre in the winter of 2023. The earlier research sought to identify best practices for the assessment and permitting of offshore wind developments by examining regulatory regimes established within Germany and the European Union (“EU”), the United Kingdom of Great Britain and Northern Ireland (“UK”), and the United States of America (“US”). That research focused mainly on environmental assessment processes that existed at various levels of the regulatory regimes under study, and it considered the potential for tiered environmental assessment processes within Canada’s nascent offshore wind regime. The research did not explore site leasing or licencing at length—whether under Canadian laws or the laws of the foreign regimes—but leasing and licencing processes were identified as being important components of the foreign regimes, and it was understood that Canadian and Nova Scotian processes would be valuable topics for further study.

This report and its companion piece expand on that earlier work by examining the site leasing or licencing processes that can be expected to facilitate offshore wind development in marine areas within and around Nova Scotia.

This report focuses on the licensing regime that may be established to govern wind energy development in marine areas over which the Government of Nova Scotia asserts independent jurisdiction. Its companion piece, entitled “Joint Federal-Provincial Regulation of Marine Wind Energy Development in Offshore Nova Scotia: Understanding Anticipated Amendments to the *Accord Acts* Regime”, focuses on the licensing regime that has been proposed for wind energy development in marine areas where offshore oil and gas activities have been managed jointly by Canada and Nova Scotia under the Canada-Nova Scotia Offshore Petroleum Resources Accord (“CAN-NS Accord”) and its implementing statutes: the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* (“*Federal Accord Act*”) and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act* (“*Provincial Accord Act*”) (together, the “*Accord Acts*”).

1.2 The Evolving Legal Regimes for Wind Energy Development in Marine Areas within and around Nova Scotia

As of yet, no wind energy facilities have been installed in marine areas within and around Nova

Scotia—indeed, marine wind energy developments are still prospective throughout Canada as a whole. This may be due in part to the absence of coordinated law and policy that would signal Canada’s readiness to developers. If so, numerous expressions of ambition and enthusiasm by the Government of Canada and Government of Nova Scotia over the past year and a half in particular—combined with several noteworthy assessment, law reform, and policy initiatives—may succeed in attracting the industry attention that the two governments clearly desire.

Currently, the legal regimes that would govern wind energy development in marine areas within and around Nova Scotia are sparse. At the federal level, two statutes impose assessment and authorization requirements: the *Canadian Energy Regulator Act* (“CERA”) and the *Impact Assessment Act* (“IAA”). Notably, the status of the IAA is currently in flux due to a recent opinion of the Supreme Court of Canada that found the Act unconstitutional in part.¹ The Act remains in force pending anticipated amendments by the Government of Canada, and a policy statement by the government explains how the Act will be administered during this interim period.²

Part 5 of the CERA deals specifically with offshore renewable energy projects and offshore power lines. Essentially, this part of the Act establishes a general prohibition that forbids any person from carrying on any unauthorized work or activity related to an “offshore renewable energy project” or offshore power line within the “offshore area”; it also forbids any person from carrying on any unauthorized work or activity to construct, operate, or abandon any part of an offshore power line that falls within a province.³ This part of the Act also establishes the process that project proponents can use to apply for an authorization, and it imposes some requirements for decision-making by the Commission of the Canada Energy Regulator (the “CER Commission”).⁴

The CERA’s authorization process for offshore renewable energy projects is not extensive. Generally, it envisions individual project proponents approaching the CER Commission with project-specific applications for authorization, which the CER Commission must then consider by taking into account several factors, including: potential environmental effects of the proposed activity, including cumulative environmental effects; human safety and security; protection of property; protection of the environment; potential health, social, and economic effects, considered through an intersectional lens; Indigenous rights, interests, and concerns; whether the proposed activity would help or hinder the Government of Canada’s ability to meet its environmental commitments and commitments in respect of climate change; and, the findings of

¹ *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII). For an overview of this decision, see: Tina Northrup, “[Tailoring Federal Assessment Processes to Advance Sustainability: A Reflection on the Supreme Court of Canada’s Opinion in the Impact Assessment Act Reference](#)” *East Coast Environmental Law Blog* (27 October 2023).

² Government of Canada, “[Statement on the Interim Administration of the Impact Assessment Act Pending Legislative Amendments](#)” (26 October 2023).

³ For the purposes of these prohibitions, the phrase “offshore area” means the part of the internal waters of Canada or territorial sea of Canada that is not situated in a province, and it also includes the continental shelf of Canada and its superjacent waters; the phrase “offshore renewable energy project” means any of the following activities if they are carried on in the offshore area: “any research or assessment conducted in relation to the exploitation or potential exploitation of a renewable resource to produce energy”, “any exploitation of a renewable resource to produce energy”, “any storage of energy produced from a renewable resource”, and “any transmission of such energy, other than the transmission of electricity to a province or a place outside Canada”: see *Canadian Energy Regulator Act*, SC 2019, c 28 at section 2 [“CERA”].

⁴ See in particular CERA at sections 298-99.

any relevant regional assessment or strategic assessment conducted under the *IAA*.⁵ If a proposed activity also triggers an impact assessment (“IA”) under the *IAA*, the CER Commission’s consideration and decision-making are altered somewhat to intersect with the IA process.⁶

Under the *IAA* and its *Physical Activities Regulations*—which list the kinds of activities that trigger IA processes—a proposed activity involving the construction, operation, decommissioning, or abandonment of a wind energy facility in an “offshore area” or in “boundary water” will trigger the IA process if the proposed facility includes ten or more wind turbines.⁷ Likewise, the expansion of a wind energy facility in an offshore area or in boundary water will trigger the process if the expansion would increase production capacity by more than 50% and increase the total number of wind turbines to ten or more.⁸

IA processes under the *IAA* are project-specific. Like Part 5 of the *CERA*, the *IAA* envisions project proponents approaching the Impact Assessment Agency of Canada (“IAAC”) with initial project descriptions that trigger the process and require the IAAC to administer assessments and facilitate decision-making. Neither the *IAA* nor the *CERA* establish centralized processes through which governmental authorities identify areas deemed most suitable for marine wind energy development and decide, strategically, where and when to invite developer proposals. Centralized processes of this kind have been used in the EU, UK, and US to facilitate offshore wind development while also protecting other interests in marine areas, and arguably, they represent best practices for integrated and conscientious management of marine activities and protection of marine ecologies. It may be that the *CERA* will be amended in the future to support such processes in areas where marine renewable energy developments are not governed by other licencing regimes (whether provincial or joint federal-provincial), but such amendments are unlikely under the *IAA*, as the *IAA* is not designed for industry-specific governance and regulation.

Notably, centralized site identification and competitive bidding processes have been used for decades in the marine area where offshore oil and gas activities are managed jointly by the Government of Canada and Government of Nova Scotia under the CAN-NS Accord and its *Accord Acts*. These processes have been administered by the Canada-Nova Scotia Offshore Petroleum Resources Board (“CNSOPB”), and they are described in some detail in the companion piece to this report. In April 2022, the Government of Canada and Government of Nova Scotia announced that they would amend the *Accord Acts* to enable joint federal-provincial regulation of offshore renewable energy projects in jointly-managed waters.⁹ Without doubt, the long history of cooperative regulation of oil and gas activities in offshore Nova Scotia—along

⁵ *Ibid* at subsection 298(3).

⁶ *Ibid* at section 299.

⁷ Under the *Physical Activities Regulations*, the phrase “offshore area” has the same meaning described above in footnote 3: see *Physical Activities Regulations*, SOR/2019-285 at section 1 [“*Physical Activities Regulations*”], incorporating by reference the definition of “offshore area” contained in the *CERA*. The phrase “boundary water” refers to waters that are transected by the international boundary line between Canada and the US: see *Physical Activities Regulations* at section 1, incorporating by reference the definition of “boundary waters” contained in subsection 2(1) of the *Canada Water Act*, RSC 1985, c C-11.

⁸ *Physical Activities Regulations* at section 2, paragraphs 44-45.

⁹ Government of Canada, “[Canada and Nova Scotia Announce Intent to Expand the Mandate of Offshore Energy Regime to Support the Transition to a Clean Economy and Create Sustainable Jobs](#)” (11 April 2022).

with the CNSOPB’s corresponding experience managing site selection, competitive bidding, and staged licensing—are among the reasons why the two governments saw value in expanding the existing regime.

In May 2023, Canada’s Minister of Energy and Natural Resources introduced Bill C-49 in the House of Commons. Bill C-49 is a 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”.¹⁰ As concerns the evolving legal regimes for wind energy development in marine areas within and around Nova Scotia, the Bill is significant because it proposes amendments to the *Federal Accord Act* that will be necessary to facilitate joint federal-provincial regulation in the offshore area that is governed under the CAN-NS Accord. Included among the proposed amendments are changes that will rename the CNSOPB as the Canada-Nova Scotia Offshore Energy Regulator (“CNSOER” or the “Regulator”) and give the Regulator an expanded mandate to regulate offshore renewable energy projects of various kinds. These proposed amendments are discussed in detail in the companion piece to this report.

Additionally, an ongoing Regional Assessment of Offshore Wind Development in Nova Scotia (“NS Offshore Wind RA” or the “Regional Assessment”) that is being carried out under the *IAA* is expected to inform the centralized site selection and bidding processes that Bill C-49 proposes to establish for offshore renewable energy projects in jointly-managed waters. The Regional Assessment is expected to conclude in late 2024 or early 2025, and the Government of Nova Scotia has indicated that its conclusion, coordinated with *Accord Acts* amendments, will enable the first offshore wind energy Call for Bids in jointly-managed waters in 2025.¹¹

In addition to these initiatives focusing on offshore wind developments in jointly-managed waters, the Government of Nova Scotia is exploring opportunities to foster wind energy development in marine areas where the Province asserts independent jurisdiction. The government’s ambitions in this regard, the complexities of its claims to jurisdiction, and the provincial law reform that would be necessary to support such development are the subjects to which we now turn.

¹⁰ 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](#)”, as introduced and presented for First Reading in the House of Commons (30 May 2023) [“Bill C-49”].

¹¹ Government of Nova Scotia, [Nova Scotia Offshore Wind Roadmap: Module 1 \(Draft\)](#) (May 2023) at page 16 [“*Offshore Wind Roadmap*: draft Module 1”].

2.0 Provincial Jurisdiction in “Nova Scotia Waters”

2.1 The Government of Nova Scotia’s Stated Ambitions for Wind Energy Development in “Nova Scotia Waters”

In September 2022, the Government of Nova Scotia announced that it was setting an ambitious offshore wind target, aspiring to offer leases for 5 gigawatts (“GWs”) of offshore wind electricity by 2030.¹² The news release did not describe the government’s plans in detail, and it raised interesting questions about the Province’s jurisdiction to act independently to promote wind energy development in marine areas within and around Nova Scotia. On the whole, however, the language of the news release suggests that although the government was announcing a “provincial” offshore wind target, a primary (if not *the* primary) mechanism for reaching that target would be the expansion of the federal-provincial joint management regime through which offshore oil and gas activities are managed under the CAN-NS Accord and its *Accord Acts*.¹³

Later, in a draft module of the *Nova Scotia Offshore Wind Roadmap* published in May 2023, the provincial government signalled its intention to exercise independent jurisdiction in “Nova Scotia waters” that are outside the offshore area defined by the CAN-NS Accord and its *Accord Acts*.¹⁴ The government noted further that it envisioned granting access to seabed rights for offshore wind developments in “Nova Scotia waters” in 2024, before rights were likely to be granted under the amended *Accord Acts* regime.¹⁵ These statements suggested that the government intended to develop a provincial regime that would be in place before the *Accord Acts* amendments were finalized and operational. However, in November 2023, a news release issued by Nova Scotia’s Department of Natural Resources and Renewables (“NSNRR”) back-pedalled those suggestions, stating that the provincial government would “focus first on building the regulatory framework for offshore wind energy development in areas jointly managed with the federal government before considering waters under solely provincial jurisdiction”.¹⁶

Wherever the Government of Nova Scotia chooses to focus its immediate attention, it will likely not abandon its ambitions to foster wind energy development in “Nova Scotia waters”, which, in the government’s view, are within its exclusive authority to govern. It is therefore useful to understand the basis of the jurisdiction that the government asserts in respect of these marine areas within and around the province.

2.2 Contested Jurisdiction in the Offshore

2.2.1 The “Territorial” Nature of Provincial Jurisdiction under Canada’s Constitution

Canada’s colonial history led to the country’s constitution as a federal state, with governance

¹² Government of Nova Scotia, Office of the Premier and Department of Natural Resources and Renewables, “[Province Sets Offshore Wind Target](#)” (20 September 2022).

¹³ *Ibid.* This is suggested in particular by the language of the news release referring to leases being issued through “a competitive bid process jointly managed by the provincial and federal governments”.

¹⁴ *Offshore Wind Roadmap*: draft Module 1 at page 5.

¹⁵ *Ibid.* at pages 5 and 16.

¹⁶ Government of Nova Scotia, Department of Natural Resources and Renewables, “[Offshore Wind Projects in Jointly Managed Waters to be Regulated First](#)” (22 November 2023).

powers divided between Parliament and the provinces. Speaking generally, Parliament is responsible for matters that affect the nation as a whole, and each provincial government is responsible for matters that are local to its province. Provincial authority in this regard is a partial preservation of the powers that the provinces held before confederation, when they were independent colonies of Britain.

The constitutional division of powers between Parliament and the provinces is set out in Part VI of the *Constitution Act, 1867*. Sections 91 and 92 are the primary division sections, but section 92A assigns additional powers that are relevant to questions concerning provincial jurisdiction over electricity-generation activities.¹⁷

It has been said that the spheres of provincial authority established by the Constitution are “territorial in nature”.¹⁸ This description is based on the language of the division provisions that pertain to provincial authority, all of which refer to provincial jurisdiction being exercised “in” each province, and many of which refer to jurisdiction being exercised over matters that are likewise “in” the province. For example, subsection 92(13) recognizes provincial jurisdiction over property and civil rights in the province, and subsection 92(16) recognizes provincial jurisdiction over generally all matters that are of a merely local or private nature in the province. Subsection 92(5) recognizes provincial jurisdiction over the management and sale of public lands belonging to the province, and subsection 92A(1) provides:

92A(1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

The “territorial” nature of provincial jurisdiction under Canada’s Constitution raises potentially tricky questions about the authority that any Canadian province has to regulate wind energy development in marine areas. The most fundamental of these questions is: *What marine areas, if any, are “in” the province?* This question is fundamental because each provincial government’s constitutional authority to make laws related to electricity-generating sites and facilities¹⁹ cannot extend to marine areas if the marine areas in question are not “in” the province.

¹⁷ Section 92A of the *Constitution Act, 1867* was not part of the original division of powers established between Parliament and the provinces; it was added in 1982 as a product of the negotiations leading to the patriation of the Constitution.

¹⁸ Meinhard Doelle, Dawn Russell, Phillip Saunders, David VanderZwaag, and David Wright, “The Regulation of Tidal Energy Development Off Nova Scotia: Navigating Foggy Waters” *University of New Brunswick Law Journal* 55:27 (2006) at page 35 [“Navigating Foggy Waters”].

¹⁹ See *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, reprinted RSC 1985, App II, No. 5 at clause 92A(1)(c), quoted above [“*Constitution Act, 1867*”].

2.2.2 High-profile Reference Cases Contesting Jurisdiction in the Offshore

In the latter half of the twentieth century, some pertinent questions concerning the nature of provincial authority under the Constitution came to a head in four high-profile reference cases that queried whether Canada’s coastal provinces could assert ownership of and jurisdiction over marine areas.²⁰ The driving force behind these legal battles was the desire to profit from offshore oil and gas activities, but the outcomes are relevant to the offshore renewable energy activities that are now being promoted to assist the global transition from fossil fuels.

Across the four reference cases, the participating provinces sought to have their jurisdiction recognized within three different categories of marine areas that were said to belong to or be within each province: a three nautical-mile territorial sea; the continental shelf; and, waters *intra fauces terrae* (“within the jaws of the land”). To understand the resolutions of the reference cases, it is helpful to understand some key characteristics of each of these categories.

Coastal states’ ownership of and jurisdiction over “territorial seas” are rights and interests that are recognized under international law. International recognition of these rights and interests is a relatively recent development. In the late nineteenth century, when the colonies of British North America were considering confederation, international consensus on coastal states’ rights and interests in territorial seas had not yet taken shape. Importantly, at the time of Confederation in 1867, British common law held that the “realm” of Britain (including in British colonies) ended at the low-water mark.²¹ British courts recognized that the British Parliament had the right, under international law, to assert ownership of and jurisdiction over a three nautical-mile territorial sea, but this assertion could only be accomplished through legislation—the courts could not extend the “realm” through their application of the common law.²² As is discussed below, this historico-legal understanding of British territorial seas has informed how Canadian courts have considered provincial claims to ownership of and jurisdiction over marine territories.

Coastal states’ rights to explore and exploit the resources of their continental shelves are also rights that are recognized under international law. Speaking generally, the continental shelf is a submerged land area that extends from dryland territories until the point where it slopes or drops into deep oceanic waters. Under the 1958 Geneva Convention on the Continental Shelf—which is what the courts relied on in the reference cases described in this report—the continental shelf was defined as “the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of

²⁰ See: *Reference re Offshore Mineral Rights*, 1967 CanLII 71 (SCC) [“*BC Offshore Minerals Reference*”]; *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, 1984 CanLII 138 (SCC) [“*Georgia Strait Reference*”]; *Reference re Mineral & Other Natural Resources of the Continental Shelf*, 1983 CanLII 3089 (NLCA) [“*Newfoundland Continental Shelf Reference*”]; and, *Reference re Newfoundland Continental Shelf*, 1984 CanLII 132 (SCC) [“*Hibernia Reference*”].

²¹ *Reg v Keyn; The ‘Franconia’* (1876) 2 Ex D 63, as cited in *BC Offshore Minerals Reference* at pages 804-05; see also *Georgia Strait Reference* at pages 400-01.

²² *BC Offshore Minerals Reference* at pages 806-07; see also *Georgia Strait Reference* at page 400-01.

the superjacent waters admits of the exploitation of the natural resources of the said areas”, also including “the seabed and subsoil of similar areas adjacent to the coasts of islands”.²³

Key passages of the 1958 Geneva Convention on the Continental Shelf that were later incorporated into the United Nations Convention on the Law of the Sea grant sovereign rights to coastal states over the continental shelves extending from their dryland territories, for the purposes of “exploring and exploiting” the natural resources of the seabed and subsoil.²⁴ These rights are exclusive, and they do not depend on occupation or express proclamation by a coastal state.²⁵ The rights pertain to the “mineral and other non-living resources of the sea-bed and subsoil” of the continental shelf, “together with living organisms belonging to sedentary species”.²⁶ Importantly, coastal states’ rights and interests in their continental shelves are different from their rights and interests in their territorial seas. Rights and interests in the continental shelf are not proprietary: coastal states do not “own” the continental shelves that extend from their dryland territories.²⁷

Finally, waters “*intra fauces terrae*” (“within the jaws of the land”) are waters such as bays, estuaries, and inlets that are surrounded at least in part by the territorial land mass. Under British common law at the time of Confederation in 1867 (and in the proceeding years when subsequent provinces entered into the union), waters *intra fauces terrae* were considered to be within the “realm” and were thus under the jurisdiction of the common law.²⁸

The first of the four reference cases that are pertinent to this report is known as the “*BC Offshore Minerals Reference*”.²⁹ In it, the Government of Canada asked the Supreme Court of Canada (“SCC”) for its opinion on a series of questions stemming from two main issues:

- whether Canada (as represented by the federal government) or British Columbia (as represented by the provincial government) could claim ownership of or jurisdiction over a three nautical-mile territorial sea extending from the coast of British Columbia; and,
- whether Canada or British Columbia had jurisdiction over and the right to explore and exploit the mineral resources of the continental shelf extending from mainland British Columbia.³⁰

The questions framed by the Government of Canada explicitly excluded consideration of ownership of and jurisdiction over “harbours, bays, estuaries and other similar inland waters”.³¹

²³ Convention on the Continental Shelf at Article 1 [“Geneva Convention on the Continental Shelf”]. The definition of “continental shelf” contained within the Geneva Convention has now been superseded by an amended definition set out in Article 76 of the United Nations Convention on the Law of the Sea [“UNCLOS”].

²⁴ Geneva Convention on the Continental Shelf at Article 2.1; UNCLOS at Article 77.1.

²⁵ Geneva Convention on the Continental Shelf at Articles 2.2 and 2.3; UNCLOS at Articles 77.2 and 77.3.

²⁶ Geneva Convention on the Continental Shelf at Article 2.4; UNCLOS at Article 77.4.

²⁷ *Hibernia Reference* at pages 95-97.

²⁸ “Navigating Foggy Waters” at page 38.

²⁹ See full citation above at footnote 20.

³⁰ *BC Offshore Minerals Reference* at page 796.

³¹ *Ibid.*

This led to a second reference case, known as the “*Georgia Strait Reference*”,³² that focused on British Columbia’s claims to ownership of and jurisdiction over the Strait of Juan de Fuca, Strait of Georgia, Johnstone Strait, and Queen Charlotte Strait—areas that were not considered in the *BC Offshore Minerals Reference*. The governments of New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island participated in the *BC Offshore Minerals Reference* as intervenors, all supporting British Columbia’s position, and the governments of New Brunswick, Newfoundland, and Nova Scotia participated in the *Georgia Strait Reference* as well, again supporting British Columbia’s position.

The SCC’s conclusions in the *BC Offshore Minerals Reference* were favourable to Canada. Under Canada’s Constitution, the territories of a province—the lands, and, potentially, the waters,³³ over which the province has jurisdiction—include the territories that the province held at the time it entered Confederation.³⁴ In this case, the SCC concluded that British Columbia did not have ownership of or jurisdiction over a three nautical-mile territorial sea extending from the province’s coast, because when the colony of British Columbia joined the Dominion of Canada in 1871, territorial seas were not part of the territories of British colonies under the common law. Although ownership of and jurisdiction over a territorial sea could have been established through legislation enacted by the British Parliament, the British Parliament had not moved to establish such rights for the colony. Therefore, British Columbia did not bring a territorial sea with it into Confederation as part of its provincial territory, and no subsequent developments in British, Canadian, or international law ever resulted in British Columbia acquiring ownership of or jurisdiction over a territorial sea. Concerning the competing claims to the continental shelf, the Court held that international law recognizing coastal states’ rights to explore and exploit the natural resources of their continental shelves did not crystallize until more than half a century after British Columbia entered Confederation, so British Columbia could not claim to have brought any rights to continental shelf resources with it into Confederation; moreover, the province had not acquired such rights through any subsequent developments in international or Canadian law.

In the *Georgia Strait Reference*, the SCC’s conclusions were favourable to British Columbia. In the Court’s opinion, British Columbia succeeded in demonstrating that the British Parliament had recognized the straits in question as being part of British Columbia’s colonial territory before the colony entered Confederation in 1871. As a result, the submerged lands of the straits and the natural resources contained therein were property that British Columbia brought with it into Confederation.

The next two reference cases proceed somewhat strangely, with the Government of Canada and Government of Newfoundland giving separate but related reference questions to the SCC and the Newfoundland Court of Appeal (“NLCA”) in quick succession. The Government of Newfoundland submitted its question first, asking the NLCA for its opinion on whether “the

³² See full citation above at footnote 20.

³³ In the *Georgia Strait Reference*, the Supreme Court of Canada applied a rebuttable presumption that the “ordinary” or “primary” meaning of the word “territory” refers to dry land. The Court held that the presumption had been rebutted in that case by the Attorney General of British Columbia, who argued successfully that British Columbia’s territories at the time of the province’s entry into Confederation included the submerged lands and waters between mainland British Columbia and Vancouver Island: see *Georgia Strait Reference* at pages 419-21.

³⁴ *BC Offshore Minerals Reference* at page 799; see also “Navigating Foggy Waters” at page 35.

lands, mines, minerals, royalties or other rights, including the right to explore and exploit and the right to legislate, with respect to the mineral and other natural resources of the seabed and subsoil from the ordinary low-water mark of the Province of Newfoundland to the seaward limit of the continental shelf or any part thereof belong or otherwise appertain to the Province of Newfoundland”.³⁵ Just a few months later, the Government of Canada asked the SCC for its opinion on essentially the same question, though the ambit of the federal government’s query was confined more narrowly to a defined area in offshore Newfoundland, the “Hibernia field”, where oil and gas exploration was being conducted.³⁶ This report refers to the reference case before the NLCA as the “*Newfoundland Continental Shelf Reference*”, and it adopts the common usage of the name “*Hibernia Reference*” for the reference case before the SCC.

The NLCA provided its opinion in the *Newfoundland Continental Shelf Reference* in February 1983. In it, the Court took a two-pronged approach to the Government of Newfoundland’s question, separating its consideration of Newfoundland’s potential claims to a territorial sea from the Province’s claims to the continental shelf. Ultimately, the Court determined that Newfoundland had ownership of and jurisdiction over a three nautical-mile territorial sea but had no jurisdiction over the continental shelf. On the latter point, the Court held that the SCC’s reasons for rejecting British Columbia’s claims to the continental shelf in the *BC Offshore Minerals Reference* were relevant in this case too, though not definitive. The NLCA held that international law recognizing coastal states’ rights to explore and exploit the natural resources of their continental shelves had crystallized by the time Newfoundland entered Confederation in 1949; however, in the Court’s view, Newfoundland had not taken steps that were necessary for it to lay claim to those rights as an independent state before it entered Confederation.

The SCC’s decision in the *Hibernia Reference* followed roughly a year later, in March 1984. The Court reached the same conclusion as the NLCA concerning Newfoundland’s claims to the continental shelf, but for different reasons. Unlike the NLCA, the SCC did not conclude that Newfoundland had failed to take necessary steps to claim rights to explore and exploit continental shelf resources before it entered Confederation. In the SCC’s view, international law recognizing coastal states’ rights to explore and exploit continental shelf resources had not in fact crystallized by 1949.³⁷

2.2.3 *Waters Intra Fauces Terrae*

Although the deliberations of the courts in these cases focused primarily on questions concerning territorial seas and continental shelves, some attention was also given to the legal status of waters *intra fauces terrae* (“within the jaws of the land”).

As noted above, waters *intra fauces terrae* are waters that are surrounded at least in part by the territorial land mass, such as bays, estuaries, and inlets. Under British common law at the time of Confederation in 1867 (and in the proceeding years when subsequent provinces entered into the

³⁵ *Newfoundland Continental Shelf Reference* at paragraph 1.

³⁶ *Hibernia Reference* at pages 86-87.

³⁷ Other arguments that the SCC considered in the alternative as possible ways in which continental shelf rights could have accrued to Newfoundland all led to the conclusion that Newfoundland could not have claimed or could no longer claim such rights.

union), waters *intra fauces terrae* were considered to be within the “realm” and were thus under the jurisdiction of the common law.³⁸ Among other things, this meant that the common law recognized such waters as being part of the territories of colonies like Nova Scotia, which also meant that they were part of the territories that the colonies brought with them into Confederation. These historico-legal dynamics mean that there is strong legal support for provinces’ claims to ownership of and jurisdiction over waters *intra fauces terrae*. That being said, legal scholarship has noted that it can be difficult to delineate the boundaries of such waters with precision.³⁹ It is not simply a matter of looking at a map and drawing a line around a province’s land mass without including indentations for bays, estuaries, and inlets: both geography and history are relevant to the delineation.⁴⁰

2.2.4 *Ramifications for Nova Scotia*

Nova Scotia’s claims to ownership of and jurisdiction over certain marine areas within and around the province have not been litigated, but it is possible to draw some inferences about the strengths and weaknesses of those claims from the reference cases discussed above.

Legal scholarship suggests that the Province, as represented by the Government of Nova Scotia, might potentially be able establish a claim to ownership of and jurisdiction over a three nautical-mile territorial sea, but success in this regard would not be guaranteed.⁴¹ A stronger argument might be made with respect to the southern half of the Bay of Fundy, on the basis that the British Parliament asserted ownership of the Bay of Fundy since at least the seventeenth century and established various pre-Confederation grants and commissions that spoke of the Bay of Fundy being included within the colony of Nova Scotia.⁴² These acts of Britain could possibly be recognized as having extended the territory of Nova Scotia beyond the low-water mark and into some or all of the Bay of Fundy, meaning that Nova Scotia and New Brunswick could both claim to have brought territorial ownership of part of the Bay of Fundy with them into Confederation.⁴³

By contrast, the Province would almost certainly not be successful in claiming jurisdiction over the continental shelf that extends from the provincial land mass, because international law concerning coastal states’ rights to explore for and exploit the resources of their continental shelves did not crystallize until long after Nova Scotia entered into Confederation in 1867.

Finally, the Province has grounds to feel reasonably confident in its claims to jurisdiction over waters that are *intra fauces terrae*; however, as noted above, there are practical difficulties in delineating the boundaries of such waters, and there may be disagreements as to where such boundaries should be drawn.⁴⁴

It is worth noting that, even in marine areas where Nova Scotia may be able to demonstrate ownership and jurisdiction, Canada would still have significant roles to play in facilitating

³⁸ “Navigating Foggy Waters” at page 38.

³⁹ *Ibid.*

⁴⁰ *Ibid* at pages 38 and 40.

⁴¹ *Ibid* at pages 38-39.

⁴² *Ibid* at pages 39-41, 45-46, and 68.

⁴³ *Ibid* at pages 39-41, 45-46, and 68.

⁴⁴ *Ibid* at page 38.

regulation of marine wind energy development. Public rights and interests in marine areas—such as public rights of navigation and shipping—are rights that can be qualified and restricted through legislation, but the *Constitution Act, 1867* gives the Government of Canada exclusive authority to make laws in respect of navigation and fisheries.⁴⁵ In the same way that federal authorities need to provide relevant authorizations for activities that affect navigation and fisheries in watercourses that are vested within a province, so too would federal contributions be necessary to regulate activities in “provincial” marine waters.

2.3 Resolutions to Contested Jurisdiction in the Offshore

Ultimately, instead of asking the courts to resolve the problems of contested jurisdiction in offshore Nova Scotia, Nova Scotia pursued collaborative arrangements with Canada, leading ultimately to the establishment of the CAN-NS Accord in 1986. The *Accord Acts* regime that followed was designed to facilitate oil and gas activities in the region, but it holds promise for the joint management of marine renewable energy resources as well.

Notably, one of the attributes that the Government of Nova Scotia and Government of Canada highlight as a significant asset in their ambitions to foster an offshore wind economy is the “uniquely large continental shelf” that extends from Nova Scotia, which has been described as being “ideal for floating and fixed wind platforms”.⁴⁶ This attribute and others that are touted as making offshore Nova Scotia ideal for marine wind energy development suggest that significant mutual benefits could be realized if the federal and provincial governments choose to collaborate instead of bringing legal claims to court.

The CAN-NS Accord was the outcome of several years in which the Government of Canada and the governments of the four Atlantic Canadian provinces considered how best to share (or decline to share) the potential benefits of offshore oil and gas activities across the country.

In 1977, the Government of Canada established a Memorandum of Understanding (“MOU”) with the governments of New Brunswick, Nova Scotia, and Prince Edward Island on the “Administration and Management of Mineral Resources of the Maritime Provinces”.⁴⁷ The MOU envisioned the establishment of a joint administrative authority—to be called the Maritime Offshore Resources Board—that would have representation from all three Maritime provinces and be responsible for regulating oil and gas activities across the Maritime offshore region.⁴⁸ Ultimately, the MOU was never implemented.⁴⁹

In 1982, the Government of Canada and Government of Nova Scotia established the Canada-Nova Scotia Agreement on Offshore Oil and Gas Resources Management and Revenue Sharing

⁴⁵ *Constitution Act, 1867* at paragraphs 91(10) and 91(12). For further discussion on this point, see “Navigating Foggy Waters” at page 42.

⁴⁶ Government of Nova Scotia, Office of the Premier and Department of Natural Resources and Renewables, “[Province Sets Offshore Wind Target](#)” (20 September 2022).

⁴⁷ Peter Clancy, *Offshore Petroleum Politics: Regulation and Risk in the Scotia Basin* (2021) Vancouver: UBC Press at page 80 [“*Offshore Petroleum Politics*”].

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

(the “1982 Agreement”).⁵⁰ Within the context of the Government of Canada’s attempts to establish cooperative federal-provincial arrangements for offshore oil and gas activities in Atlantic Canada, the 1982 Agreement was the first of its kind, representing an important step forward for the federal government and a significant, strategic move by the Government of Nova Scotia, intended to demonstrate that Nova Scotia was open for business.⁵¹ The 1982 Agreement was implemented through mirrored federal and provincial statutes—the *Canada-Nova Scotia Oil and Gas Agreement Act* and *Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act*—which established a defined “Offshore Area” in which petroleum exploration and exploitation would be managed jointly by a Canada-Nova Scotia Offshore Oil and Gas Board, whose authority would intersect with management by the Canada Oil and Gas Lands Administration.⁵²

The 1982 Agreement was superseded four years later by the CAN-NS Accord. The *Newfoundland Continental Shelf Reference* and *Hibernia Reference* described above were important motivators in this regard. After the SCC released its opinion in the *Hibernia Reference*—concluding that Canada, not Newfoundland, held the legal rights to explore and exploit the natural resources of the continental shelf—the Government of Newfoundland agreed to cooperative management of oil and gas activities in offshore Newfoundland. The arrangement between Canada and Newfoundland was expressed in an agreement called the Atlantic Accord, and it was implemented through mirrored federal and provincial statutes: the *Canada-Newfoundland Atlantic Accord Implementation Act* and the *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*. In many ways, the Atlantic Accord and its implementing statutes drew on the 1982 Agreement between Canada and Nova Scotia, but it also made some improvements on the model, including arrangements for more equitable representation on and independent functioning of the offshore regulator, the Canada-Newfoundland Offshore Petroleum Board.⁵³ The Government of Nova Scotia understood the significance of those improvements, so it negotiated with Canada for an amended agreement that would offer greater benefits to Nova Scotia.⁵⁴ The CAN-NS Accord and its *Accord Acts* were the results of those negotiations.

The CAN-NS Accord and its *Accord Acts* apply to a defined “Offshore Area”, the boundaries of which are described in several schedules to the Acts. Importantly, Schedule 1 of each of the *Accord Acts* defines the inner limit of the Offshore Area as the low-water mark of Nova Scotia, except in respect of several “bay” areas that are described.⁵⁵ These bay areas include Chedabucto Bay, Chignecto Bay, Minas Channel, St. George’s Bay, St. Mary’s Bay, and “any bay where a straight closing line of ten kilometres or less may be drawn between points on the low water mark of the bay so that the area of the bay landward of the closing line is greater than that of a semi-circle whose diameter is the closing line”.⁵⁶

⁵⁰ *Ibid* at page 85.

⁵¹ *Ibid* at page 84.

⁵² *Ibid* at page 85.

⁵³ *Ibid* at pages 88-91.

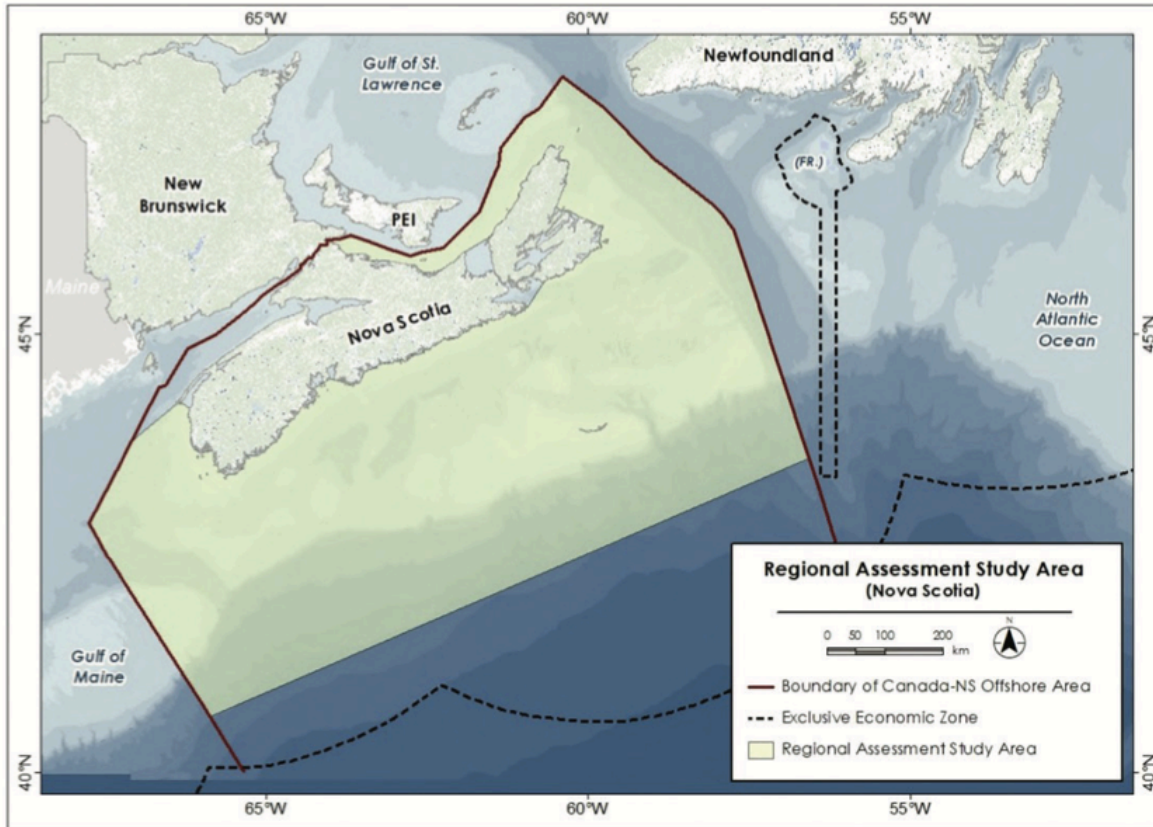
⁵⁴ *Ibid* at pages 91-95.

⁵⁵ For the purposes of Schedule 1 of each Act, the meaning of the word “bay” includes “harbour, port, cove, sound, channel, basin or other inlet”: see *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988 c 28 at Schedule 1, clause (f)(i) [“Federal Accord Act”] and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act* at Schedule 1, clause (f)(i) [“Provincial Accord Act”].

⁵⁶ *Federal Accord Act* at Schedule 1, paragraphs (a)-(f); *Provincial Accord Act* at Schedule 1, paragraphs (a)-(f).

The draft Module 1 of the *Nova Scotia Offshore Wind Roadmap* includes a map that illustrates the outer limits of the defined Offshore Area and also indicates several marine areas that were excluded from study under the NS Offshore Wind RA:⁵⁷

Figure 1: Outer Limits of CAN-NS Accord Offshore Area, and Study Area for the NS Offshore Wind RA



Source: Final Agreement and Terms of Reference between the Governments of Canada and Nova Scotia, Impact Assessment Agency of Canada

Although this map offers limited detail, it illustrates that most of the marine areas that were excluded from study under the NS Offshore Wind RA are the bay areas that are excluded from the defined Offshore Area under CAN-NS Accord and its *Accord Acts*.

Arguably, these bay areas could be characterized as being “within the jaws of the land”, which would bring them within the territory—and constitutional authority—of the Province. Their exclusion from the Offshore Area defined by the *Accord Acts* indicates that the Government of Nova Scotia may be able to establish jurisdiction over these areas for the purposes of regulating marine wind energy development. Although the Government of Canada might challenge any assertion of jurisdiction along such lines, recent developments in Canada’s offshore arrangements with Newfoundland and Labrador suggest that Canada would recognize Nova Scotia’s jurisdiction within the bay areas described above.

⁵⁷ *Offshore Wind Roadmap*: draft Module 1 at page 8.

On December 6, 2023, the Government of Canada and Government of Newfoundland and Labrador announced the establishment of a new MOU between them (the “CAN-NL Offshore Wind MOU” or “MOU”). The agreement expressed in the MOU recognizes Newfoundland and Labrador’s independent jurisdiction to regulate offshore wind developments in sixteen “inland bays” that, for the purposes of the MOU, are considered to be within the province.⁵⁸

The CAN-NL Offshore Wind MOU is designed to intersect with and clarify a clause in Bill C-49 that proposes to amend the definition of “offshore area” that applies within the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*. That clause states:

3(2) The definition *offshore area* in section 2 of the Act is replaced by the following:

***offshore area* means**

(a) in the case of petroleum, those submarine areas lying seaward of the low water mark of the Province and extending, at any location, as far as

(i) any prescribed line, or

(ii) if no line is prescribed at that location, the outer edge of the continental margin or a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is the greater, and

(b) in the case of offshore renewable energy, the areas referred to in paragraph (a) that are not within the Province[.]⁵⁹

Essentially, these proposed amendments would change the definition of “offshore area” to exclude areas that are “within the Province”, but only in respect of the governance of offshore renewable energy activities. The CAN-NL MOU intersects with and clarifies this definition by specifying sixteen bay areas that will be recognized as being “within the province” for the purposes of this part of the Act. Additionally, the MOU recognizes that other bay areas may likewise be recognized as being “within the province” if they meet certain geographic requirements.⁶⁰

Notably, the intersection between the CAN-NL MOU and Bill C-49’s proposed changes to the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* would bring the Canada-Newfoundland and Labrador offshore arrangement more closely in line with the existing

⁵⁸ Government of Newfoundland, “[Provincial and Federal Governments Sign Memorandum of Understanding to Advance Offshore Wind Power and Good Jobs](#)” (6 December 2023).

⁵⁹ Bill C-49 at Part I, clause 3(2).

⁶⁰ Clause 1.0(ii) of the MOU refers to “any other bay where a geodetic closing line of 24 nautical miles or less may be drawn between points on the low water mark of the bay so that the area of the bay landward of the closing line is greater than that of a semi-circle whose diameter is the closing line”: see Government of Canada and Government of Newfoundland and Labrador, “[Memorandum of Understanding between the Government of Canada and the Government of Newfoundland and Labrador Regarding Offshore Wind Development](#)” (6 December 2023).

state of affairs under the Canada-Nova Scotia regime.⁶¹ As described above, the Canada-Nova Scotia regime already excludes several bay areas from the defined “Offshore Area” that is managed jointly under the *Accord Acts* regime. The Canada-Newfoundland and Labrador regime does not. This means that, while the Government of Nova Scotia is already in a reasonably strong position to assert provincial authority to regulate wind energy development in certain bay areas that could be said to be within the province, the Government of Newfoundland and Labrador will not be in a similar position unless the changes proposed in Bill C-49 are made.

Turning back to what all of this may mean for Nova Scotia’s ability to assert independent provincial jurisdiction over some marine wind energy development, the CAN-NL MOU could be interpreted as a signal that Canada is willing to recognize provincial jurisdiction to govern wind energy development independently within so-called inland bays. This would accord with the common law’s longstanding approach to waters “within the jaws of the land”, and it would also obviate the need for litigation to resolve competing claims in such areas.

It is possible that the Government of Canada and Government of Nova Scotia will establish an MOU similar to the CAN-NL MOU to make it clear that Canada will recognize Nova Scotia’s jurisdiction to govern wind energy development in bay areas that the province considers “Nova Scotia waters”. Under the existing *Accord Acts* regime, an MOU along such lines may not be strictly necessary, from a legal point of view; nevertheless, given the constitutional complexities of competing claims to jurisdiction in the offshore, greater clarity would doubtless be beneficial to government, industry, and the public alike.

⁶¹ In this regard, it is noteworthy that the approach taken to defining bay areas within the CAN-NL MOU draws significantly on the language of Schedule 1 of the Canada-Nova Scotia *Accord Acts*.

3.0 The Nova Scotia Offshore Wind Roadmap: The Government of Nova Scotia’s Current Vision for the “Regulatory Path” Ahead

The Government of Nova Scotia has stated that it intends to develop a *Nova Scotia Offshore Wind Roadmap* that will span three volumes, called “modules”, to “establish the framework for building wind farms in the ocean around the province” (“*Offshore Wind Roadmap*”).⁶² In May 2023, the government released a draft version of Module 1 for public review and comment. A finalized version has not yet been published, and draft versions of Modules 2 and 3 have not yet been shared.

The stated purpose of Module 1 of the *Offshore Wind Roadmap*, as released in its draft form, is to “[establish] lines of sight for industry and other interested parties by mapping the federal and provincial regulatory path for offshore wind”.⁶³ The “regulatory path” that Module 1 envisions is two-pronged, including:

- joint federal-provincial management in the Offshore Area that is defined by the CAN-NS Accord and its *Accord Acts*; and,
- independent provincial management of marine areas that “fall entirely under the jurisdiction of the Province of Nova Scotia”.⁶⁴

The draft contents of Module 1 indicate that Nova Scotia’s *Marine Renewable-energy Act* (“*MREA*”) will be the primary statute through which provincial regulation of marine renewable energy development in “Nova Scotia waters” will be carried out.

Concerning the anticipated management approach for jointly-managed waters under the amended *Accord Acts* regime, the draft contents of Module 1 indicate that the Government of Canada and Government of Nova Scotia will work together to identify “Wind Energy Areas” within the Offshore Area, drawing on information from “developers, Mi’kmaq and Indigenous peoples from other communities, other interested parties, and the independent regional assessment committee recommendations”.⁶⁵ Further, the draft envisions that the re-mandated CNSOPB, which will become the CNSOER under the amended *Accord Acts*, will issue its first Call for Bids for offshore renewable energy projects in 2025, with one or more identified Wind Energy Areas being opened to proposals from developers.⁶⁶ The draft states that Canada and Nova Scotia are still evaluating whether to use “government-led, developer-nominated or a hybrid approach” for project-specific siting within Wind Energy Areas.⁶⁷

Concerning the anticipated management approach for marine wind energy development in “Nova Scotia waters”, the draft contents of Module 1 provide few details. The draft envisions a Request

⁶² Government of Nova Scotia, “[Offshore Wind](#)” (undated).

⁶³ *Offshore Wind Roadmap*: draft Module 1 at page 3.

⁶⁴ *Ibid* at page 10.

⁶⁵ *Ibid* at page 12.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

for Information being issued as early as 2023⁶⁸—referring, presumably, to a process in which proponents who are interested in pursuing developments in “Nova Scotia waters” will be invited to identify areas of interest—followed by a competitive process initiated in 2024, presumably using a Call for Bids or Call for Applications mechanism.⁶⁹

The draft contents of Module 1 refer to “Nova Scotia waters” as waters in Nova Scotia’s “nearshore”;⁷⁰ however, the draft provides no examples of the marine areas or other water bodies that the Government of Nova Scotia has in mind in this regard. As discussed above, it is possible to draw some inferences from the exclusion of certain bay areas from the Offshore Area defined by the CAN-NS Accord and its *Accord Acts*, and likewise from the exclusion of those same bay areas from the scope of the NS Offshore Wind RA.⁷¹ It may also be possible to draw inferences from Nova Scotia’s *MREA* regime, which in 2015 established two areas of “Marine Renewable-energy Priority” in the Bay of Fundy and Bras d’Or Lake area. The legal nature of areas of Marine Renewable-energy Priority under the *MREA* is discussed in more detail below. For the purposes of this discussion, it suffices to say that the current existence of such areas in the Bay of Fundy and Bras d’Or Lake area demonstrates that the Government of Nova Scotia views these areas as “Nova Scotia waters” over which it has jurisdiction.

It is clear from numerous comments made throughout the *Offshore Wind Roadmap*’s draft Module 1 that the Government of Nova Scotia is keen to support offshore wind development in order to foster a local green hydrogen industry. On balance, the draft suggests that supporting green hydrogen production and export may be the government’s primary motivation for promoting offshore wind,⁷² although the opportunity to support the decarbonization of Nova Scotia’s electricity grid is mentioned as well. This apparent focus raises some concerns that the government may be caught up in the spirit of a “hydrogen rush” and may therefore overlook or ignore the need to build appropriate checks and balances into its marine wind energy regime.

That being said, the draft Module 1 also makes reference to sustainability and indicates that the government recognizes the need to develop a management regime that supports sustainability.⁷³ For example, it states that “[t]he offshore wind sector must be established in a structured and sustainable manner”,⁷⁴ and it also states that Canada and Nova Scotia “are evaluating what data and studies support sustainable offshore wind sector development, including looking to comprehensive data available from Nova Scotia’s petroleum sector and evaluating what gaps may exist”.⁷⁵ Moreover, the draft comments on the governments’ potential roles in “leading regional studies”⁷⁶ that could help to fill data gaps and enhance understanding of offshore

⁶⁸ *Ibid* at page 11.

⁶⁹ *Ibid*

⁷⁰ *Ibid* at page 10.

⁷¹ See the map presented in Figure 1, above, delineating the outer limits of the Offshore Area and the study area for the NS Offshore Wind RA.

⁷² This suggestion is confirmed in large part by the *Green Hydrogen Action Plan* that the Government of Nova Scotia released in December 2023: for example, see Government of Nova Scotia, [Green Hydrogen Action Plan](#) (December 2023) at page 14.

⁷³ *Offshore Wind Roadmap*: draft Module 1 at page 15.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

conditions, and it suggests that environmental assessment and monitoring activities conducted by developers can feed into this knowledge as well.⁷⁷ These indications and suggestions are positive, but it will be important to ensure that they are implemented meaningfully within the actual regime that is developed.

⁷⁷ *Ibid.*

4.0 Regulation of Marine Wind Energy Development under Nova Scotia's *Marine Renewable-energy Act*

4.1 The Current Purpose and Design of the *Marine Renewable-energy Act*

The *MREA* was enacted in 2015 but was not proclaimed in force until January 2018. In large part, the Act is designed to facilitate efforts by the Government of Nova Scotia to encourage research, development, and other activities related to marine renewable energy from various kinds of marine renewable-energy resources, including “ocean waves”, “tides and currents”, and “winds blowing over marine waters”.⁷⁸ There are two regulations under the Act: the *Marine Renewable-energy Fees Regulations*,⁷⁹ which set out a fee schedule for the application fees associated with licences, permits, approvals, and consents under the Act, and the *Marine Renewable-energy General Regulations* [“*General Regulations*”], which provide specific details that supplement a number of processes and requirements under the Act.⁸⁰

As is stated in the *MREA*'s purpose section, the Act's purpose is to “provide for the responsible, efficient and effective development of marine renewable-energy resources”, through:

- (a) a regulatory system that
 - (i) is staged, collaborative, consultative and adaptive, and
 - (ii) integrates technical, environmental and socio-economic factors; and
- (b) programs and initiatives that promote the sustainable growth and management of the marine renewable-energy sector in the Province.⁸¹

Nova Scotia's Minister of Natural Resources and Renewables (the “Minister”) has the primary authority and responsibility to administer the *MREA*. The Act assigns a number of specific duties to the Minister: among them are legally-binding duties to “promote the sustainable development of marine renewable-energy resources”, “measure and analyze the socio-economic and environmental effects of marine renewable-energy activities”, and “develop programs to enhance any benefits and mitigate any concerns associated with these activities”.⁸² The Act also gives the Minister discretionary powers that can be used to support sustainable development of marine renewable-energy resources, including powers to enter into agreements with the Government of Canada, the government of another province of Canada, a municipal government, or a foreign government for “the sustainable development and management of marine renewable-energy resources”, “the co-ordination of regulatory activities relating to the development of marine renewable-energy resources”, “marine renewable-energy research and development”, and “the undertaking and sharing of research and knowledge relating to the development and management

⁷⁸ The phrase “marine renewable-energy resources is defined in subsection 3(n) of the *Marine Renewable-energy Act*, SNS 2015, c 32 at subsection 3(n) [“*MREA*”].

⁷⁹ *Marine Renewable-energy Fees Regulations*, NS Reg 18/2018.

⁸⁰ *Marine Renewable-energy General Regulations*, NS Reg 8/2018 [“*MREA General Regulations*”].

⁸¹ *MREA* at section 2.

⁸² *Ibid* at clauses 5(2)(a) and 5(2)(g).

of marine renewable-energy resources and to any socio-economic or environmental impacts of marine renewable-energy activities”.⁸³

4.1.1 *Areas of Marine Renewable-energy Priority*

When it was enacted in 2015, the *MREA* established two areas of Marine Renewable Energy Priority (“MREP Areas”): the Bras d’Or Area of Marine Renewable-energy Priority and the Fundy Area of Marine Renewable-energy Priority.⁸⁴ The *MREA* empowers the Governor in Council (effectively, the provincial Cabinet) to establish further MREP Areas “upon the report and recommendation of the Minister”,⁸⁵ which means that a report and recommendation from the Minister are prerequisites to the establishment of additional MREP Areas under the Act.

The establishment of MREP Areas under the *MREA* serves the primary function of empowering the Minister to control the pacing and location of marine renewable-energy development within those areas. If the Minister could not exercise these powers under the *MREA*, the pacing and location of marine renewable-energy development would be controlled primarily by Nova Scotia’s Minister of Environment and Climate Change through the province’s environmental assessment (“EA”) and environmental approvals processes. This reality highlights another important function of the *MREA*, which not only empowers the Minister to authorize marine renewable-energy developments in MREP Areas but also establishes centralized site-identification and controlled licence application processes that assist in managing the pacing and location of developments. Ministerial powers to administer centralized site selection and controlled application windows are not part of Nova Scotia’s EA and environmental approvals regimes. These powers under the *MREA* are in keeping with the Act’s stated purpose of using a “staged” approach to develop marine renewable-energy resources responsibly, efficiently, and effectively.

The *MREA* imposes a general prohibition that prohibits any person from constructing, installing, or operating various kinds of energy infrastructure in MREP Areas without first obtaining a licence or permit issued by the Minister.⁸⁶ Whether a person will require a licence or permit will depend on the activity being proposed, as discussed in more detail below.

Additionally, under the *MREA*, the existence of a MREP Area is a prerequisite for the establishment of a “Marine Renewable-electricity Area”.⁸⁷ In this regard, MREP Areas serve an important gatekeeping function that helps to determine where commercial-scale marine renewable-energy projects will be located.

4.1.2 *Marine Renewable-electricity Areas*

As noted above, the *MREA* envisions the establishment of Marine Renewable-electricity Areas within MREP Areas. Marine Renewable-electricity Areas have a crucial function under the

⁸³ *Ibid* at subsections 9(a), 9(b), 9(d), and 9(e).

⁸⁴ *Ibid* at clauses 10(1)(a) and 10(1)(b).

⁸⁵ *Ibid* at subsection 10(2).

⁸⁶ *Ibid* at subsection 12(1).

⁸⁷ *Ibid* at subsection 17(1).

MREA regime: they are the only areas where marine renewable-energy projects can be located if those projects will involve one or more generators that are interconnected with “the electrical grid of a public utility in the Province” or “an onshore electricity consumer in the province” (subject to a limited exception that the Act provides for demonstration projects).⁸⁸ Effectively, this means that the establishment of a suitable Marine Renewable-electricity Area is a prerequisite for site-specific licencing for commercial-scale wind energy developments.

Four Marine Renewable-electricity Areas have already been established under the *MREA*: the FORCE Marine Renewable-electricity Area,⁸⁹ the Digby Gut Marine Renewable Electricity Area,⁹⁰ the Grand Passage Marine Renewable Electricity Area,⁹¹ and, the Petit Passage Marine Renewable-electricity Area.⁹² The *MREA* requires that Marine Renewable-electricity Areas be established with specific requirements stipulating the technologies that can be used and the aggregate nameplate capacities of licenced generators that can be constructed, installed, or operated within them. Within the four Marine Renewable-electricity Areas that have already been established, technologies are restricted in all cases to in-stream tidal energy converters. For all but one, the aggregate nameplate capacity of licenced generators constructed, installed, or operated within the area is 1,999 kilowatts (“kW”). In the FORCE Marine Renewable-electricity Area, the aggregate nameplate capacity is 64 MW. These restrictions are set out within the *MREA* itself and are legally binding, but the Act permits them to be amended by regulation. The authority to make such amendments by regulation belongs to the Governor in Council, but the Minister must first make a report and recommendation to that effect.⁹³

The *MREA* imposes public consultation and strategic environmental assessment (“SEA”) requirements that must be met before Marine Renewable-electricity Areas are established or altered through “material modifications” to their enabling legislation. Public consultation requirements are set out in sections 18 and 19 of the Act. Section 18 establishes the Minister’s core obligation in this regard, and section 19 describes various procedural requirements that must be met. Section 19 also envisions that further details will be established by regulation, and indeed the *MREA*’s *General Regulations* provide some additional specifics concerning the time and manner of issuing notice of public consultations.⁹⁴

On the whole, the public consultation requirements imposed within the *MREA* are fairly strong. Among other things, the Minister must begin by preparing a report that “includes a summary of baseline information on the resource potential of, and any socio-economic or environmental factors associated with, the proposed or existing marine renewable-electricity area that is the subject of the public consultation process”.⁹⁵ That report must be made available to the public, and it will form the basis for public consultation on the proposed establishment or alteration of a Marine Renewable-electricity Area. The *General Regulations* envision, but do not require, that

⁸⁸ *Ibid* at section 24.

⁸⁹ *Ibid* at section 13.

⁹⁰ *Ibid* at section 14.

⁹¹ *Ibid* at section 15.

⁹² *Ibid* at section 16.

⁹³ *Ibid* at subsection 17(2).

⁹⁴ *General Regulations* at section 3.

⁹⁵ *MREA* at subsection 19(3).

one or more public events may be held as part of the public consultation.⁹⁶ After conducting public consultation, the Minister must prepare and publish a second report that summarizes the information obtained from the public and provides additional information about what the Minister proposes to allow in the Marine Renewable-electricity Area under discussion; this report must also address the anticipated impacts of the proposed activities.⁹⁷ The public must then have an opportunity to comment on that report as well.⁹⁸

SEA requirements are set out in section 20 of the *MREA*. The requirements imposed by this section are qualified by a provision stating that, before January 1, 2024, the requirements do not apply if an SEA document that has been identified by regulation exists in respect of an existing or proposed Marine Renewable-electricity Area.⁹⁹ The *MREA*'s *General Regulations* identify several existing SEA documents for the purposes of this provision, meaning that new SEAs would not be required for any areas to which those documents apply; however, this qualification will expire soon unless the *MREA* is amended to extend the provision's application beyond January 1, 2024. The SEA requirements imposed by the *MREA* and its *General Regulations* are described in more detail below.

As noted already, the establishment of a suitable Marine Renewable-electricity Area is a prerequisite for site-specific licencing for commercial-scale wind energy developments. This means that, in order for the Government of Nova Scotia to foster a marine wind energy industry in "Nova Scotia waters" under the *MREA*, the government must first establish one or more suitable Marine Renewable-electricity Areas—whether by establishing entirely new areas or by altering one or more of the existing areas to accommodate marine wind energy technologies.

4.1.3 *Licensing and Permitting*

Under the *MREA*, site-specific licences and permits can only be granted for sites within MREP Areas; moreover, as noted above, projects that involve interconnection with the electrical grid of a public utility or an onshore electricity consumer in Nova Scotia can only be carried out in Marine Renewable-electricity Areas (subject to a narrow exception for demonstration projects).¹⁰⁰

Licences granted under the Act are for the commercial-scale activities that involve interconnection with the provincial grid or the facilities of an onshore electricity consumer. Permits are for non-interconnected research and demonstration activities, as well as for a limited range of interconnected demonstration activities that can be authorized under the Act.

4.1.3.1 Licensing

The licencing process established by the *MREA* is a tightly-controlled process that follows a centralized site-selection and call for bids model. In this sense, it is analogous to the licencing

⁹⁶ *General Regulation* at subsection 3(b).

⁹⁷ *MREA* at subsection 19(4).

⁹⁸ *Ibid* at subsection 19(5).

⁹⁹ *Ibid* at subsection 20(2).

¹⁰⁰ *Ibid* at section 24.

process that the CNSOPB administers for oil and gas activities in the Offshore Area defined by the CAN-NS Accord and its *Accord Acts*.

Per section 25 of the *MREA*, a person can only apply for a licence in response to and in accordance with a Call for Applications. The Act gives the Minister discretionary power to issue Calls for Applications,¹⁰¹ but there are several important restrictions on that power. Among other things, the Minister can only issue a Call for Applications that pertains to an area within a Marine Renewable-electricity Area.¹⁰² Additionally, the call for applications must be consistent with:

- (a) the regulations establishing the marine renewable-electricity area to which the call for applications relates;
- (b) any terms, conditions or requirements specified by the Minister that, in the Minister's opinion,
 - (i) support the achievement of the public-policy goals and objectives of the Government, and
 - (ii) are consistent with any policies, plans and strategies of the Government relating to the development of marine renewable-energy resources; and
- (c) any requirements for a call for applications prescribed by the regulations.¹⁰³

The *MREA* allows the Minister to delegate authority to a Procurement Administrator who may then exercise the Minister's powers to issue Calls for Applications, and who may even be empowered to issue corresponding licences.¹⁰⁴ The Minister may also delegate selectively and authorize a Procurement Administrator to issue Calls for Applications but not the corresponding licences.¹⁰⁵ In other words, the Minister may choose to retain the ultimate authority to issue licences even if a Procurement Administrator is authorized to administer an application process.

Section 7 of the *MREA's General Regulations* list several kinds of information that applicants must provide when responding to Calls for Applications. Among other things, applicants must submit:

- (g) a draft environmental monitoring plan;
- (h) a risk management plan;
- (i) a description of all steps taken by the applicant to identify the concerns of the public and aboriginal people with respect to the proposed generator and any cable or other equipment or structure intended to be constructed, installed or operated under the licence;

¹⁰¹ *Ibid* at subsection 26(1).

¹⁰² *Ibid* at subsection 26(2).

¹⁰³ *Ibid* at subsection 26(3).

¹⁰⁴ *Ibid* at subsection 7(1) and section 26.

¹⁰⁵ *Ibid* at sections 26-27.

(j) a list of all concerns expressed by the public and aboriginal people with respect to the proposed generator and any cable or other equipment or structure intended to be constructed, installed or operated under the licence; [and],

(k) a description of all steps taken or proposed to be taken by the applicant to address concerns of the public or aboriginal people identified under clause (j).

Notably, clauses 7(i) to 7(k), quoted above, closely resemble analogous requirements for the environmental assessment registration documents (“EARDs”) that proponents must provide to Nova Scotia’s Minister of Environment and Climate Change under the provincial EA process. This close correspondence suggests some possibilities concerning the intersection between licencing under the *MREA* and provincial EAs—a subject discussed in more detail below.

The *MREA* imposes a six-month timeline for the issuance of licences following the closing dates of Calls for Applications.¹⁰⁶ The Minister’s power to issue licences following Calls for Applications is discretionary, which means that the Minister is not obliged to issue any licence after receiving responses to a Call for Applications.

The *MREA* envisions that licences will be subject to various terms and conditions prescribed by the Minister, and the Act lists a number of matters that such terms and conditions might address.¹⁰⁷ The potential terms and conditions envisioned by the Act are within the Minister’s discretionary power to impose, which means that the Minister is not obliged to impose them. However, the Act also stipulates that certain conditions related to environmental monitoring and compliance *must* be included in all licences, which means that the Minister has no discretionary power to exclude them. These mandatory conditions are set out in subsection 31(2) of the Act, which states:

31(2) It is a condition of every licence that the licence holder shall

(a) not install any connected generator, including any cable or any other equipment or structure owned by the licence holder and used or intended to be used with the generator, before submitting an environmental monitoring plan to the Minister and obtaining the Minister’s approval of the environmental monitoring plan; and

(b) comply with the requirements prescribed by the environmental monitoring plan.

The *General Regulations* provide specific requirements for the contents of environmental monitoring plans. These requirements are fairly extensive. They include requirements for descriptions of baseline data, assessments of potential effects of activities, and identification of the steps that will be taken and the procedures that will be used to collect environmental effects monitoring data and evaluate changes to the environment over time.¹⁰⁸

¹⁰⁶ *Ibid* at section 28.

¹⁰⁷ *Ibid* at subsection 31(1).

¹⁰⁸ *MREA General Regulations* at subsection 16(1).

The *MREA* indicates that a licence issued under the Act is, effectively, a form of Crown land lease. Section 32 of the Act states: “Notwithstanding the *Crown Lands Act*, the *Beaches Act* and the *Beaches and Foreshores Act*, a licence holder is not required to enter into any lease or obtain any licence or other authorization under that Act in respect of any activity authorized by the licence and undertaken within the licence area”. Additionally, the *MREA* requires the Registrar appointed under the *Crown Lands Act*, who maintains Nova Scotia’s Registry of Crown Lands, to keep records of the licence areas established in licences under the *MREA*.¹⁰⁹

Notably, the *MREA* attempts to deal preemptively with potential conflicts concerning some competing uses of marine space. The Act includes restrictions that prevent Marine Renewable-electricity Areas from being established in areas where there are existing rights or interests that have been granted or issued under Nova Scotia’s *Beaches Act*, *Beaches and Foreshores Act*, or *Crown Lands Act*, as well as in areas where there are aquaculture leases, licences, permits, or authorizations in force, and over sub-aquatic lands that have been designated as aquaculture development areas under the *Fisheries and Coastal Resources Act*.¹¹⁰

The *MREA* requires the Minister to notify the public about several of the steps that are taken in the licencing process, such as the issuance of Calls for Applications and individual licences,¹¹¹ but the Act does not require the Minister to invite public comment on these steps.

The *MREA* envisions that licence and permit holders will pay fees, rents, or royalties that are prescribed by regulation for the use of Crown lands or marine renewable-energy resources.¹¹² Some fees have been established in the *Marine Renewable-energy Fees Regulations*, but these are only for applications of various kinds. Section 23 of the *General Regulations* includes a schedule of rental fees.

Per section 8 of the *General Regulations*, an *MREA* licence cannot last longer than 10 years.

4.1.3.2 Permitting

As noted above, permits under the *MREA* are for research and demonstration activities that are not interconnected with the electrical grid of a public utility or an onshore electricity consumer in Nova Scotia (subject to a narrow exception that allows some demonstration projects to be interconnected for demonstration purposes).¹¹³

The permitting process is set out in sections 35 and 36 of the *MREA*. This report does not describe the permitting process in detail, because the licencing process described above will be most relevant to the anticipated development of commercial-scale wind energy projects in “Nova Scotia waters”. However, some similarities and differences between the licencing and permitting processes are worth noting.

¹⁰⁹ *MREA* at section 33.

¹¹⁰ *Ibid* at section 21.

¹¹¹ *Ibid* at section 34.

¹¹² *Ibid* at section 63.

¹¹³ *Ibid* at section 24.

On the whole, the *MREA*'s permitting process is not as regimented as the licencing process under the Act. Whereas licence applications under the Act can only be accepted in response to and in accordance with Calls for Applications, the same restriction does not apply to permit applications. The *MREA* enables the Minister to establish an "application window" for permit applications, but the Minister is not explicitly required to do this.¹¹⁴

Permit applications are subject to information requirements that are substantially similar to the requirements imposed for licence applications.¹¹⁵ Several additional requirements are imposed specifically for demonstration permit applications that propose activities involving interconnection with the electrical grid of a public utility or an onshore electricity consumer in Nova Scotia.¹¹⁶ Moreover, the Minister's powers to permit interconnected demonstration projects are limited by the *MREA*. Permits for interconnected demonstration projects can only be issued if the generators in question will be situated wholly or partially within a MREP Area¹¹⁷ and if the aggregate nameplate capacity of the demonstration facility is 5 MW or less.¹¹⁸ Additionally, the Minister must ensure that the combined aggregate nameplate capacities of all interconnected demonstration projects that are permitted to operate at any given time do not exceed 10 MW,¹¹⁹ and there is a list of public-interest factors that the Minister must take into account when considering whether or not to permit a proposed facility.¹²⁰ Permits authorizing interconnected demonstration facilities must include the same environmental monitoring and compliance conditions as licences issued under the *MREA*.¹²¹

Like licences issued under the *MREA*, permits serve the same effective function as Crown land leases.¹²²

4.1.4 *Strategic Environmental Assessments*

Clause 20(1)(a) of the *MREA* requires the Minister to conduct (or cause someone else to conduct) an SEA before a new Marine Renewable-electricity Area is established or the legislation establishing an existing Marine Renewable-electricity Area is materially modified.

The requirements that the Act imposes in respect of SEAs are minimal. In this regard, the Act simply states that each SEA must be "conducted in accordance with any requirements prescribed by the regulations" and "completed within such period before the establishment of the marine renewable-electricity area as is prescribed by the regulations".¹²³ These provisions make it clear that regulations under the *MREA* will be the primary source of requirements for SEAs conducted under the Act.

¹¹⁴ *Ibid* at subsection 35(9).

¹¹⁵ *General Regulations* at section 9.

¹¹⁶ *Ibid* at section 10.

¹¹⁷ *MREA* at clause 35(7)(a).

¹¹⁸ *Ibid* at clause 35(7)(b).

¹¹⁹ *Ibid* at clause 35(7)(c).

¹²⁰ *Ibid* at clause 35(7)(d).

¹²¹ *Ibid* at subsection 38(2).

¹²² *Ibid* at sections 39-40.

¹²³ *Ibid* at subsection 20(3).

The *MREA's General Regulations* do establish more detailed requirements for SEAs conducted under the Act.¹²⁴ Among other things, the Regulations require the person conducting an SEA to prepare an initial report that contains information about:

- (i) the environmental and socioeconomic conditions in the area,
- (ii) marine renewable-energy technologies,
- (iii) the potential interactions between the use of marine renewable-energy technologies and the environmental and socioeconomic conditions in the area, [and]
- (iv) any gaps in the information available about the matters set out in subclauses (i) to (iii).¹²⁵

This initial report must be made available for public review.¹²⁶ Following the preparation and publication of the initial report, at least one public meeting must be held “in a location near the proposed marine renewable-energy area”.¹²⁷ The Regulations also include associated requirements concerning notices that must be given to the public.¹²⁸

Although these SEA requirements are positive in many ways, they have some clear shortcomings. Given the important role that *MREA* SEAs are supposed to play in informing the establishment or alteration of Marine Renewable-electricity Areas, there is a striking absence of specific requirements to consider factors such as: the cumulative effects that could be caused by marine renewable-energy activities in any given area; competing uses (or potential uses) of the space and ways to avoid or resolve conflicts; and, potential impacts on Indigenous rights and interests, including Aboriginal and treaty rights that are protected under Canada’s Constitution. It may be argued that these assessment factors could be considered under the broad umbrellas of “environmental and socioeconomic conditions” and “potential interactions”, but explicit requirements would be preferable for several reasons. Among other things, legislated requirements that are clear and unequivocal would help to ensure that *MREA* SEAs give meaningful consideration to all relevant factors. Additionally, explicit requirements would enhance transparency and predictability for government, industry, and the public alike.

4.1.5 *Intersections with the Provincial Environmental Assessment Regime*

The *MREA* is silent in respect of Nova Scotia’s EA regime.

Importantly, the *MREA* does not include any provisions that clearly displace the EA regime by stating that licencing or permitting processes under the Act will take the place of provincial EAs if proposed activities would otherwise trigger the EA process. Likewise, Nova Scotia’s

¹²⁴ See generally *MREA General Regulations* at section 4.

¹²⁵ *Ibid* at subsection 4(1).

¹²⁶ *Ibid* at clause 4(1)(b).

¹²⁷ *Ibid* at clauses 4(1)(e)-(f).

¹²⁸ *Ibid*.

Environment Act and *Environmental Assessment Regulations* do not suggest that EAs are not required for activities licenced or permitted under the *MREA*.

As noted above, the *MREA* currently requires licence and permit applicants to assemble application information that is substantially similar to the information that proponents must include in EARDs under Nova Scotia's EA regime. Additionally, the *MREA* requires licence and certain permit applicants to prepare and comply with environmental monitoring plans and various other plans that address environmental protection issues. The presence of these requirements could be interpreted to suggest that the *MREA* regime could be substituted for the EA regime for the purposes of assessing, approving, and regulating marine wind energy development. However, given the absence of explicit language displacing the EA regime, I would instead interpret the *MREA* requirements as having been designed to require meaningful assessments of licence and permit applications that would not otherwise trigger EAs.

Under Nova Scotia's *Environmental Assessment Regulations* as they currently stand, a proposed energy generating facility with a production rating of at least 2 MW derived from wind, tides, or waves will trigger a Class I EA.¹²⁹ Additionally, a corridor for electric power transmission lines will also trigger the Class I process if the lines have a cumulative voltage rating equal to or greater than 345 kVA.¹³⁰ Certain kinds of proposed energy-generating facilities will trigger the Class II EA process, which requires more extensive data collection, analysis, and public participation. However, none of the current triggers for the Class II process apply to marine wind energy facilities.¹³¹

In the autumn of 2023, the Government of Nova Scotia initiated a public consultation on the "modernization" of the provincial EA process. The government's stated intentions in this regard are to meet Goal 12 of the *Environmental Goals and Climate Change Reduction Act*, which set a goal of "modernizing" the EA process by 2024, taking into consideration: "cumulative impacts", "diversity, equity and inclusion", "independent review", "Netukulimk", and "climate change".¹³²

Public information materials published by Nova Scotia Environment and Climate Change ("NSECC") as part of the public consultation on the EA "modernization" indicate that the Government of Nova Scotia wishes to balance several objectives through its EA regime. These objectives include using "sustainable solutions" to build a "sustainable future", "sustainable province", "sustainable economies", "sustainable development", and "sustainable prosperity" within and for Nova Scotia, and they also include taking action to become a "superpower" and "global leader" in renewable energy.¹³³ This suggests that the EA "modernization" may seek to balance regulatory streamlining of renewable energy projects while also ensuring that core requirements of meaningful EA are met.

¹²⁹ *Environmental Assessment Regulations*, NS Reg 26/95 at Schedule A, Class I Undertakings, clause D(2)(a).

¹³⁰ *Ibid* at Schedule A, Class I Undertakings, subsection D(1).

¹³¹ *Ibid* at Schedule A, Class II Undertakings, subsection B(1). The Class II triggers for energy-generating facilities are for hydroelectricity facilities and facilities powered by fuels.

¹³² *Environmental Goals and Climate Change Reduction Act*, SNS 2021, c 20 at section 12.

¹³³ Nova Scotia Environment and Climate Change, [Modernizing Environmental Assessment to Support a Clean & Sustainable Future for Nova Scotia](#) (undated) at pages 1, 3, 5, and 10.

One possible outcome of the EA “modernization” is for marine wind energy projects to be listed as requiring Class II EAs. I am not aware of any indications from NSECC or other government departments that this possibility is being considered. There are good arguments to be made that government, industry, and the public alike would benefit from a Class II EA process for marine wind energy developments, given the novelty of such projects in the region, NSECC’s current inexperience assessing them, and the absence of local data from other projects of this kind that proponents could draw on to inform their assessment activities. On the other hand, the Government of Nova Scotia could just as easily take the view that the SEA and public consultation requirements imposed by the *MREA* will supplement the Class I EA process well enough to make the expanded Class II process unnecessary.

In whatever way the “modernized” EA process may intersect with the *MREA* regime, the one result that should definitely be avoided is the total displacement of the EA regime by *MREA* licencing and permitting. It is worth bearing in mind that the Government of Nova Scotia has the power to exclude marine wind energy activities from the lists of undertakings that trigger the EA process, and it is conceivable that the government would choose to do so in order to consolidate all relevant EA and SEA activities under the *MREA* regime. The result would likely be cumbersome and inefficient, and so displacement of this kind may be unlikely; however, it will be worthwhile to continue paying attention to developments in the “modernization” of provincial EA and the establishment of the provincial marine wind energy regime.

4.1.6 *Intersections with the Federal Impact Assessment Regime*

In addition to intersecting with Nova Scotia’s EA regime, the *MREA* may also intersect with Canada’s *IAA*. In the same way that certain undertakings proposed to be constructed and operated on land within Nova Scotia will trigger the federal IA process (as it currently stands), so too may marine wind energy developments in “Nova Scotia waters” require IAs.

Under Canada’s *Physical Activities Regulations*, the following marine wind energy activities trigger the IA process:

- “[t]he construction, operation, decommissioning and abandonment in an offshore area or in boundary water of a new wind power generating facility that has 10 or more wind turbines”;¹³⁴ and,
- “[t]he expansion in an offshore area or boundary water of an existing wind power generating facility, if the expansion would result in an increase in production capacity of 50% or more and a total number of wind turbines of 10 or more”.¹³⁵

In situations where a project proposed under an *MREA* licence or permit would trigger both a federal IA and a provincial EA, the two processes would likely be carried out simultaneously and in coordination to create efficiency and avoid duplication. However, in such circumstances, independent decisions under the *IAA* and Nova Scotia’s *Environment Act* would still be necessary, meaning that both the federal Minister of Environment and Climate Change (or the

¹³⁴ *Physical Activities Regulations*, SOR 2019/285 at Schedule – Physical Activities, section 44.

¹³⁵ *Ibid* at Schedule – Physical Activities, section 45.

federal Cabinet, in some circumstances) and Nova Scotia’s Minister of Environment and Climate Change would need to approve the proposed project in order for it to proceed.

Finally, it is worth repeating that even when a federal IA would not be required, the Government of Canada would still have significant roles to play in facilitating regulation of marine wind energy development in “Nova Scotia waters”. Public rights and interests in marine areas—such as public rights of navigation and shipping—are rights that can be qualified and restricted through legislation, but Canada’s Constitution gives Parliament exclusive authority to make laws in respect of navigation and fisheries.¹³⁶ In the same way that federal authorities need to provide relevant authorizations for activities that affect navigation and fisheries in watercourses like lakes and rivers that are vested within a province, so too would federal contributions be necessary to regulate activities in provincial marine areas.

4.2 Amendments Needed to Support Regulation of Marine Wind Energy Development

As discussed above, the *MREA* is currently designed to require a staged identification of areas where marine renewable-energy developments will be prioritized and where commercial-scale marine renewable-electricity projects could be allowed. This staged process begins with the establishment of MREP Areas. Within MREP Areas, specific Marine Renewable-electricity Areas may be established. Under the current structure of the *MREA*, commercial-scale marine wind energy developments supplying electricity to public utilities or onshore electricity consumers in Nova Scotia could only be located within Marine Renewable-electricity Areas.

None of the four Marine Renewable-electricity Areas that have already been established under the *MREA* authorize the construction, installation, or operation of marine wind energy projects: in all of them, technologies are restricted to in-stream tidal conversion. Thus, in order to create the required “regulatory path” for marine wind energy developments under the *MREA*, the Government of Nova Scotia must either establish one or more new Marine Renewable-electricity Areas where wind energy developments would be suitable or, alternatively, alter one or more of the existing Marine Renewable-electricity Areas to accommodate wind energy technologies.

As discussed above, SEA and public consultation requirements are triggered by the processes of establishing new Marine Renewable-electricity Areas and altering existing Marine Renewable-electricity Areas through the material modification of their enabling legislation. Therefore, although the *MREA* is already designed to allow the provincial government to take necessary steps to establish marine areas where wind generation facilities will be allowed, those steps require public involvement in the process.

4.3 Anticipated Interactions with the Regional Assessment of Offshore Wind Development in Nova Scotia

As discussed above and illustrated by the map replicated in Figure 1, many of the marine areas that are potentially of interest to the Government of Nova as potential sites for marine wind energy activities have been scoped out of the study area for the NS Offshore Wind RA. The Bras

¹³⁶ *Constitution Act, 1867* at paragraphs 91(10) and 91(12). For further discussion on this point, see “Navigating Foggy Waters” at page 42.

d'Or Lake and Bay of Fundy areas are noteworthy, given that the Province has already demonstrated interest in these regions by establishing MREP Areas within them. Several other bay areas to which the Province may claim jurisdiction as being *intra fauces terrae* ("within the jaws of the land") are noteworthy as well.

The Government of Nova Scotia has been supportive of the NS Offshore Wind RA since its inception, and it is to be expected that the government will draw general insights from the data gathered and analyses conducted by the NS Offshore Wind RA Committee. However, because the marine areas that are most likely to be governed independently by the Province have been scoped out of the Regional Assessment's study area, the Regional Assessment should not be expected to provide specific guidance or suitable site identification for those areas.

5.0 Opportunities to Improve Laws and Policies Governing Marine Wind Energy Development in “Nova Scotia Waters”

The *MREA* regime has served a useful purpose in fostering research and development on renewable energy activities in waters in and around Nova Scotia, and it could provide a strong foundation for a provincial marine wind energy regime. However, the *MREA* as it stands now was not designed to provide a comprehensive regulatory structure for marine wind energy development, and considerable work is needed to build on the foundations that the Act provides.

There are at least three clear opportunities to improve the *MREA* regime to make it better-equipped to regulate marine wind energy development in a sustainable manner. These are: expansion of SEA requirements under the *MREA*; effective tiering and coordination of *MREA* SEAs, *MREA* licence and permit applications, and *Environment Act* EAs; and, proactive, informed development of environmental planning, monitoring, and management requirements and associated policy guidance.

5.1 *Expansion of Strategic Environmental Assessment Requirements under the MREA*

First, the SEA requirements that the *MREA* and its *General Regulations* impose for the proposed establishment or alteration of Marine Renewable-electricity Areas should be expanded to require consideration of: the cumulative effects that could be caused by marine renewable-energy activities in any given area; competing uses (or potential uses) of the space and ways to avoid or resolve conflicts; and, potential impacts on Indigenous rights and interests, including Aboriginal and treaty rights that are protected under Canada’s Constitution.

5.2 *Effective Tiering and Coordination of Strategic Environmental Assessments under the MREA, MREA Licence and Permit Applications, and Environmental Assessments under the Environment Act*

Second, SEAs and licence and permit applications under the *MREA* should be tiered and coordinated effectively with EAs under the *Environment Act*.

As discussed above, the *MREA* currently requires licence and permit applicants to assemble application information that is substantially similar to the information that proponents must include in EARDs under the EA regime. Additionally, the *MREA* requires licence and certain permit applicants to prepare and comply with environmental monitoring plans and various other plans that address environmental protection issues. The presence of these requirements could be interpreted to suggest that the *MREA* regime could be substituted for the EA regime for the purposes of assessing, approving, and regulating marine wind energy developments. However, given the absence of explicit language displacing the EA regime, I would instead interpret the *MREA* requirements as having been designed to require meaningful assessments of licence and permit applications that would not otherwise trigger EAs.

The lack of clarity on this point should be addressed through legislative amendments that clarify how the *MREA* and EA regimes will intersect in respect of marine wind energy projects. Ideally, such amendments would make it clear that the *MREA* regime will not be used to displace

provincial EAs for proposed marine wind energy projects. From there, whether proposed projects trigger a Class I or Class II EA, it should be understood that the proponent's EARD and NSECC's review of the information contained therein should draw on and be used to fill data gaps that were left by the *MREA* SEA that was conducted for the Marine Renewable-electricity Area in question.

Effective tiering of SEAs under the *MREA* and EAs under the *Environment Act* will require significant coordination by NSNRR and NSECC. This will be especially needful to support efficient and effective cumulative effects assessment across the SEA and EA processes.

Because SEAs have traditionally focused on identifying and assessing the potential effects of policies, plans, and programs, and because they are prospective, they are typically used to take a "big-picture", "high-level" view. As such, it may be difficult to conduct cumulative effects assessments at a fine-grained, technical level during the initial SEA of a new or altered Marine Renewable-electricity Area. However, high-level consideration of cumulative effects is both possible and crucial at this stage.

An SEA is an ideal process through which to identify competing human uses and ecological needs in a marine area and consider their interactions. It is also an ideal process for high-level consideration of the cumulative effects that may be caused by introducing significant changes and new activities to the area in question. For example, an SEA of a proposed new Marine Renewable-electricity Area could and should identify fisheries interests within area, and it could apply constraints analyses and mapping tools to determine where fishing activities within the area are most concentrated and needful to local communities. From there, it may be possible to identify one or more sites within the area where marine wind energy developments could be located without creating irreconcilable conflicts with fisheries. High-level cumulative effects assessment at this stage could and should be applied to support a consideration of the "carrying capacity" of the area—that is, a consideration of how much marine wind energy development could be borne before irreconcilable conflicts might occur. Potential conflicts with fisheries are just one example of the considerations that could and should be taken into account by cumulative effects assessment at this level; potential conflicts with ecosystem components, such as migratory bird and marine species habitats, should of course be considered as well.

High-level cumulative effects assessment of this kind could and should be informed by existing data and analysis that could assist in predicting how competing uses and ecological needs within an area could interact or come into conflict. However, in a region like offshore Nova Scotia, where no marine wind energy developments have yet been located, the data and analysis that will be available to support initial cumulative effects assessments at this level will be limited. This is why cumulative effects assessment remains an essential component of project-specific EAs, and it is also why SEA and EA regimes should be designed to coordinate. When marine wind energy proponents are ready to propose specific projects for marine sites within and around Nova Scotia, they will be in the best position to provide data and analysis that assess how the specific technologies they propose to use will interact with the existing environmental and human interests of the sites they wish to develop. Proponents can use the high-level cumulative effects assessment conducted in an SEA to show them what interests in the area need to be considered, and they can use cumulative effects assessment at the EA level to fill information gaps and

provide more fine-grained details—for example, details addressing how the specific kinds of platform fixtures proposed would be expected to affect local benthic habitats, and how those effects might interact with other pressures on local groundfish populations and fisheries. Ideally, information of this kind generated during an EA will be used to supplement and expand the knowledge gained through the earlier SEA, allowing the SEA to be treated as a kind of “living” assessment in which understanding of use interactions and cumulative effects is continuously refined, with the more refined knowledge being brought to bear on each successive EA that is conducted within the area.

Environmental effects monitoring and follow-up are the other crucial activities that support continuous refinement of understanding. Both the *MREA* and provincial EA regime require environmental effects monitoring of approved activities, but neither regime makes it clear that the information generated through such monitoring should be used to continuously enhance governmental, industry, and public understanding of cumulative impacts to an area on the whole. In an ideally-coordinated SEA and EA system, the knowledge gained by monitoring the operations of approved activities will be harvested strategically to feed back up into the “living” assessment of the area as a whole.

One of the questions raised by the current requirements of the *MREA* and EA regime is how environmental effects monitoring and reporting requirements should be coordinated under both regimes or consolidated under one. Currently, the environmental effects monitoring and reporting requirements that exist separately under the *MREA* and EA regimes indicate that, without legislative amendments to coordinate the two regimes, marine wind energy developments that are licenced under the *MREA* and approved following an EA will require dual reporting to both NSNRR and NSECC. Dual reporting is not necessarily a problem in and of itself, particularly if it is simply a matter of sending the same information to both departments. The more significant issue is the distribution of responsibility between the two departments and their Ministers. Duplicated responsibilities under the *MREA* and *Environment Act* could lead easily to a situation in which neither NSNRR nor NSECC reviews environmental effects monitoring reports closely because each thinks the other is doing so. Moreover, it will be very difficult to foster a continuously-improving understanding of cumulative effects within a Marine Renewable-electricity Area unless one of the departments has a clear responsibility to review and update the relevant SEA periodically.

For all of these reasons, it would be highly beneficial for the Government of Nova Scotia to consider the SEA, licencing, and permitting requirements under the *MREA* together with the anticipated amendments to Nova Scotia’s EA regime in order to establish a clear, efficient, and effective distribution of powers and responsibilities between NSNRR and NSECC concerning marine wind energy developments. Powers and responsibilities should be distributed so as to maximize the benefits of meaningful and effective SEAs, EAs, and environmental effects monitoring and reporting, and they should reflect a commitment to treating SEA and EA processes as essential components of a “living” assessment that facilitates continuous refinement of understanding.

5.3 *Proactive, Informed Development of Environmental Planning, Monitoring, and Management Requirements and Associated Policy Guidance*

Finally, it should be noted that although the *MREA* and its *General Regulations* impose several requirements concerning the contents of environmental monitoring plans, risk management plans, and decommissioning, abandonment, and rehabilitation plans, these existing requirements are general, and they will not necessarily provide sufficient guidance to proponents of marine wind energy developments. It would be advisable for the Government of Nova Scotia to work proactively to determine if more specific requirements should be imposed to address distinctive needs in respect of marine wind energy developments, and, if so, to establish those requirements by regulation and develop corresponding guidance documents to assist proponent and public understanding.