

# Comparative Jurisdictional Research Report on the Assessment and Regulation of Offshore Wind Development

## Report Summary

### 1. Introduction

Environmental advocates in the renewable energy and marine protection spheres of Canadian law and policy are witnessing and participating in a remarkable legal transition and flux as offshore wind development is considered in Canadian waters. The legal seascape is large and complex, but public-interest environmental advocates can navigate it by exploring ways to prioritize sustainability in decision-making, from the highest levels of planning and assessment down to project-level permitting. However, the future shape of Canada's offshore renewable energy regimes has not been fully defined. Amid this uncertainty, there are opportunities to contribute to setting a course for the years to come.

A comparative jurisdictional research report prepared by East Coast Environmental Law (ECEL) for the Ecology Action Centre (EAC) reviews the legal and policy landscape applicable to assessing and planning for the development of offshore wind within the context of several Canadian initiatives that will be used to assess and regulate offshore wind in Canada. Recognizing that the Regional Assessments and law reform initiatives discussed in this report will be used to establish a new legal regime for the review and regulation of offshore wind in Atlantic Canada, the report aims to support public-interest environmental advocacy by exploring how offshore wind developments are assessed and regulated in other jurisdictions, and by identifying potential best practices that could be considered for the Canadian context.

The jurisdictions selected for study are:

1. Germany,
2. The United Kingdom of Great Britain and Northern Ireland, and
3. The United States of America.

Given the considerable breadth and complexity of all regimes designed to assess and regulate offshore renewable wind developments, research and analysis were scoped to focus on whether and how the rules of comparative jurisdictions were intended to evaluate the sustainability of proposed actions; and incorporate cumulative effects assessment<sup>1</sup> into planning, assessment, and permitting processes.

Through research and analysis of primary sources, scholarship, and "grey literature," the following best practices were identified for consideration in the Canadian context:

- (i) the establishment of **marine policies or strategies**, maritime spatial plans, and/or sectoral marine plans to identify and reconcile competing human and ecological demands in marine spaces before considering site-specific developments;
- (ii) the use of **tiered assessment processes** that evaluate sustainability considerations and cumulative effects at the highest levels of regulatory planning and decision-making. This can ensure that project-specific assessments can be informed by and contextualized within a broader context which encompasses the "bigger picture;" and,

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<sup>1</sup> Cumulative effects assessment (CEA) is a sub-discipline of environmental impact assessment concerned with appraising the collective effects of human activities and natural processes on the environment.

- (iii) the use of **centralized site identification** by the government so that marine spaces opened to development are chosen not only for their economic potential but also for their conformity with marine policies and plans that aim to achieve sustainable development by appropriately balancing human and ecological needs.

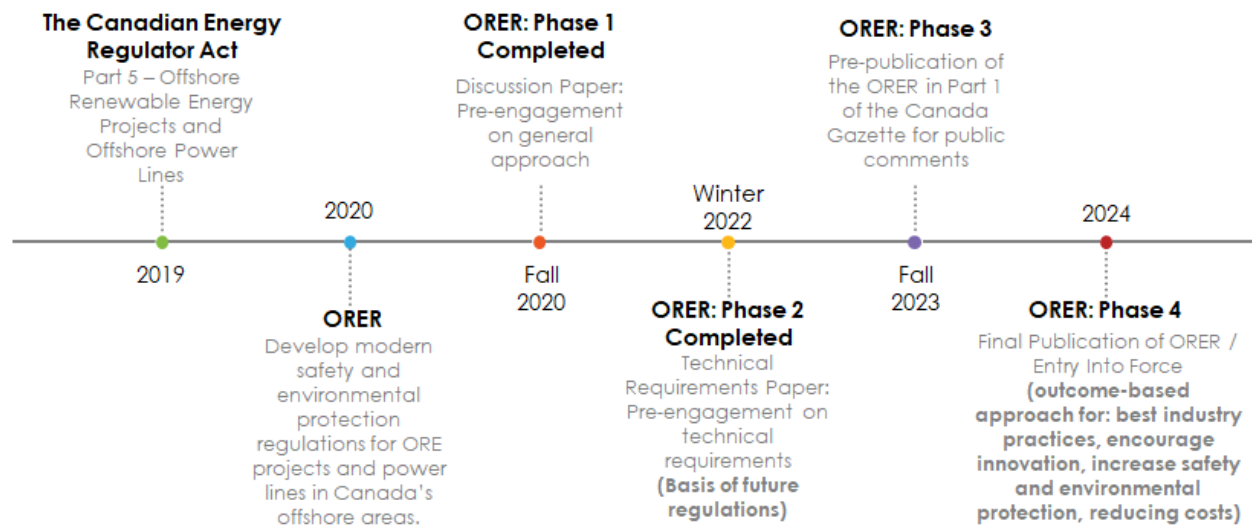
All these potential best practices are multi-layered, and in implementation, they can and do take many different forms. They are also interconnected and mutually supportive. Centralized site identification by the government is likely to achieve positive sustainability outcomes. Marine policies or strategies, maritime spatial plans, and/or sectoral marine plans address and prioritize competing demands in prospective development areas. However, the value of all these instruments depends on them being shaped by meaningful assessments of sustainability considerations and cumulative effects.

The existing legal regimes for assessing and regulating offshore wind development in Canada are only partially suited to incorporate the potential best practices discussed in the report, but they have promise.

## 2. Background on Canadian Context

In recent years, the Government of Canada, the Government of Newfoundland and Labrador, and the Government of Nova Scotia have set in motion several initiatives to form a new legal regime for assessing and regulating offshore wind developments in Canada. These initiatives include:

- **The Offshore Renewable Energy Regulations Initiative (ORER)**, which Natural Resources Canada oversees. The anticipated outcome will be new *Offshore Renewable Energy Regulations* under the **Canadian Energy Regulator Act**.



**Timeline for the Offshore Renewable Energy Regulations Initiative (ORER)**

Source: 2022, Natural Resources Canada

- Anticipated amendments to **the “Accord Acts”** (which establish and empower the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board) to give the boards regulatory authority over offshore renewable energy projects; and,

- The commencement of two Regional Assessments of offshore wind development in Nova Scotia, Newfoundland and Labrador. These regional assessments could either:
  - 1) chart courses for meaningful sustainability assessment and cumulative-effects assessment of offshore wind developments in Atlantic Canadian waters; or,
  - 2) be used as justifications to shorten project-specific impact-assessment processes.

Under the current state of the law, the assessment and regulation of offshore wind developments in Canada would be carried out primarily under the federal ***Impact Assessment Act (“IAA”)*** and the ***Canadian Energy Regulator Act***. Currently, these statutes do not give federal regulators clear powers and responsibilities to carry out the marine planning and centralized site identification used by the jurisdictions studied in the report.

Incorporating the combined use of maritime spatial planning, sectoral marine planning, and centralized site identification by the government into the Canadian regime would require law reform and law creation to identify, empower, and assign responsibilities to the government agencies or regulatory bodies that would be best suited to carrying out this work.

Further engagement and study by lawmakers and non-governmental bodies are necessary to fully assess and determine whether and to what extent such practices would meaningfully contribute to cumulative effects assessment and achieving sustainability objectives in Canada. Federal and provincial engagement with Indigenous peoples on a nation-to-nation or government-to-government basis should be a priority.

In its current form, Canada’s legal regime includes some requirements for tiered assessment processes. Also, it grants discretionary powers that could enable further tiering, but the use of effectively coordinated assessments from higher to lower levels is limited.

The Government of Canada’s *Cabinet Directive on the Environmental Assessment of Policy, Plan, and Program Proposals* requires the federal government to conduct strategic environmental assessments. Such appraisals take sustainability considerations and cumulative effects into account when:

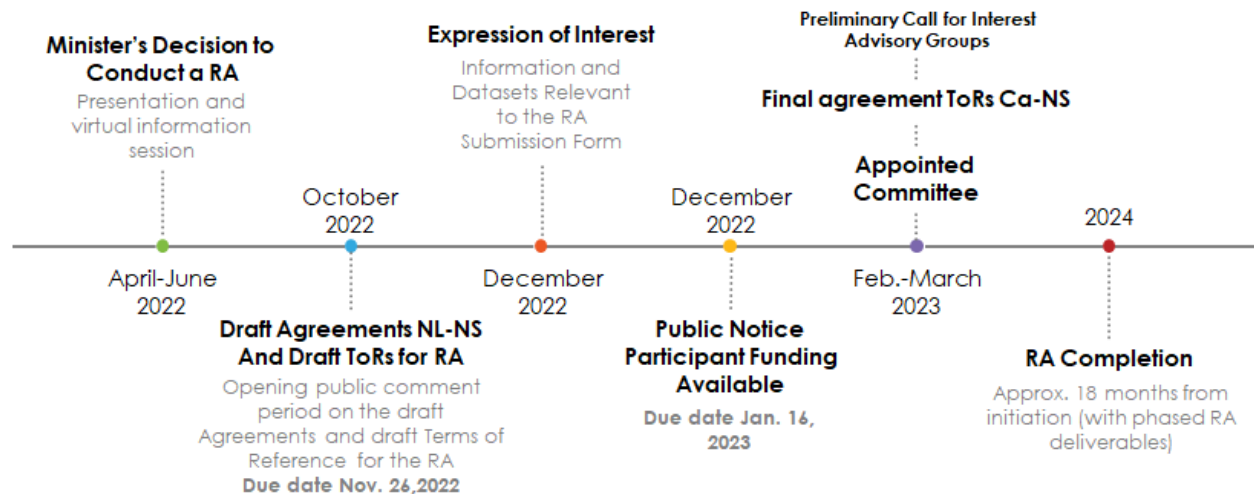
- Federal policies, plans, or programs related to the evaluation and regulation of offshore wind developments require approval by a federal Minister or the federal Cabinet; and,
- Implementation of the proposal will result in “important environmental effects.”

Regional assessment and impact-assessment processes under the *IAA* offer the potential for further tiering assessment processes for offshore wind developments in Atlantic Canadian waters. The sustainability and the cumulative effects of actions could be assessed at a regional scale before conducting project-specific assessments.

The experience of the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador demonstrated that regional assessment processes under the *IAA* will not necessarily enable effective tiering of assessments from larger to project-specific scales but may instead be used to justify the truncation of project-specific impact assessments. This possibility is a matter of concern for the ongoing Regional Assessments of Offshore Wind Development in Newfoundland, Labrador, and Nova Scotia.

As these Regional Assessments move forward, advocates for an environmentally responsible and sustainable offshore wind industry should work to ensure that knowledge and information generated by participants, and synthesized by the Regional Assessment Committees, is suited to

enable effectively tiered assessment processes. These processes must ensure that project-specific impact assessments, or other environmental reviews, are shaped by sustainability assessments and cumulative-effects assessments conducted at a high level and on a larger scale.



**Timeline for the Regional Assessment of Offshore Wind Development in NL and NS**

Source: 2022, Natural Resources Canada

### 3. Conclusions and Potential Best Practices

The report arrives at the following guidance, considering:

#### a) The Comparative Jurisdictions and their practices within the Canadian context:

- European Union (EU) laws and regional treaties strongly influence regional/national efforts on marine planning. This factor has contributed to the more expansive development of offshore wind.
- Canada and US have no effective regional coordination on strategic marine planning.
- More regional, national, and local integration on regulatory regimes is needed. Germany, the UK, and the US have assessment and regulatory regimes more integrated between national, regional, and local levels than Canada's nascent regime for offshore renewable energy.

#### b) The Role of broad marine assessment and planning:

- The assessment and regulation of offshore wind developments in Germany and the UK are informed by governmental authorities' broad marine assessment and planning activities, particularly establishing strategies governing the use, exploitation, and protection of the marine environment.
- Broad marine assessment and planning provide crucial foundations for assessment and regulation processes by establishing base points from which sustainable development in marine areas and cumulative effects can be considered.

#### c) The use of tiered assessment

- In Germany and the UK, EU law has heavily influenced the establishment of multi-layered and tiered assessment processes that begin at a high level with broad and often regional strategic environmental assessments. These usually consider sustainability and cumulative effects. Subsequent assessment processes move towards more targeted, project-specific assessments.
- Effective tiering can help to advance sustainability objectives and enable more meaningful cumulative effects assessment by ensuring that individual projects are not assessed in isolation from the broader picture.

**d) The Role of Centralized Site Identification**

- Regarding the importance of comprehensive marine planning and tiered assessments, there are indications that centralized, pre-emptive efforts by the government to identify sites that would be feasible or likely to support offshore wind projects benefit environmental stewardship efforts for proponents seeking to develop projects.

The following table presents a comparative overview across the jurisdictions assessed:

Level →	High-level Planning			Planning for Wind	Project-level
Jurisdiction ↓	Marine Spatial Planning (MSP)	Strategic Environmental Assessments (SEAs) of Plans, Policies, and Programs	Regional Assessments	Centralized Site Assessment	Project-Level Assessments of Offshore Wind
<b>Canada</b>	<p><b>Not applicable</b></p> <p><i>Note: Canada is in the process of establishing MSP, but it does not currently serve as a basis for regional marine planning activities or offshore permitting.</i></p>	SEAs of policies, plans and programs are conducted under a federal directive, considering sustainability and cumulative effects. The federal government can designate a “strategic assessment” under the Impact Assessment Act (IAA) to assess plans, policies, and programs.	Under the Impact Assessment Act, the federal government can designate a “regional assessment” to assess a marine area. Considers sustainability and cumulative effects.	<p><b>Not applicable</b></p> <p><i>Note: As per subsection A1.6(e) of the Terms of Reference for the Regional Assessments in Nova Scotia and Newfoundland and Labrador, one of the roles of the advisory groups will be to identify “key locations of interest for future offshore wind development activities in the Study Area [..].”</i></p>	All offshore wind projects with ten or more turbines must undergo an impact assessment process unless exempted by regulation after a regional or strategic assessment.
<b>Germany</b> EU directives inform requirements.	MSP must support sustainable development. Development of marine strategies based on considering sustainability and assessing cumulative effects.	SEAs are required for plans and programs (including MSP) likely to impact the environment significantly. Sustainable development goals are factored into SEAs.	Marine Strategy requires assessment and monitoring of the status of the marine environment. Assessment feeds into MSP.	Maritime sectoral planning is used to make Site Development Plan. Areas are identified where offshore wind may occur. This informs the tendering process. An open-door process exists where proponents propose potential development sites.	Environmental Impact Assessments (“EIAs”) and nature conservation assessments are required at a project level. Information from the Site Development Plan (SDP) will inform EIAs.
<b>United Kingdom</b> EU directives inform current requirements.	UK Marine Policy Statement governs marine planning in designated regions. The creation of marine plans is informed by assessing sustainability. Public authorities must make decisions or give authorization by maritime policy documents.	SEAs are conducted to support the relevant government authority to support the administration of competitive leasing for offshore wind. For example, the Scottish government requires cumulative effects and a project’s relevance to sustainable development to be considered.	<b>Not applicable</b>	<p>Scotland uses sectoral marine planning and analysis to identify prospective lease sites.</p> <p>The Crown Estate (all the UK except Scotland) has used spatial analysis to assess future lease sites. The UK relies exclusively on competitive leasing where the government identifies areas.</p>	EIAs are required for offshore wind projects. Offshore wind projects considered Nationally Significant Infrastructure Projects undergo an assessment before receiving consent. Projects are assessed with the achievement of sustainable development in mind. Cumulative effects should be considered.
<b>United States</b>	<b>Not applicable</b>	The federal government must pre-emptively review the environmental effects of “major federal actions.” High-level National Environmental Policy Act (NEPA) review is conducted during the offshore site planning phase.	<b>Not applicable</b>	When proponents apply for a lease, the federal government assesses whether there is competitive interest, including identifying Wind Energy Areas.	Individual wind project assessments are also required before licensing (i.e., operations).