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## **Submission regarding the proposed *Canada Offshore Renewable Energy Regulations (ORER)***

### **I. Introduction and Summary**

West Coast Environmental Law (West Coast) is a non-profit legal organization started in 1974, which is deeply engaged in advocating for ocean conservation law reform and responsible development in the ocean and in marine protected areas (MPAs).

West Coast supports the development of marine renewable energy as part of the clean energy response to the climate crisis. However, marine renewable energy must be managed responsibly and sustainably to minimize impacts to the marine environment. In particular, West Coast maintains that marine renewable energy projects must not take place within marine protected areas, or other areas set aside for conservation and protection.

As such, West Coast supports the proposed *Canada Offshore Renewable Energy Regulations (ORER)* but submits that the *Canadian Energy Regulator Act (CERA)* regime must include provisions that would protect the marine environment by preventing offshore renewable energy activities from taking place in MPAs and other conservation areas, as well as by prohibiting the issuance of offshore renewable interests because of serious environmental or social problems. To the extent possible, these measures should be included within the ORER. CERA should also be amended to provide any additional statutory authority required to achieve these measures.

West Coast also submits that specific information be proactively disclosed on a public registry; that target levels for safety, security and environmental protection be set by the Regulator rather than the operator; that government experts be used to review projects, or in the alternative, that the professional reliance approach be subject to review within five years of ORER coming into force; and that 500 m navigational safety zones are planned to ensure that additional shipping traffic is not diverted into MPAs.

### **II. Environmental Impacts of Offshore Renewable Energy**

Though offshore renewable energy projects are a necessary part of a clean energy transition, they can cause negative impacts to the marine environment and must be approached carefully to avoid negative impacts to marine ecosystems. For example, offshore wind installations (both fixed-foundation turbines and floating turbines) can cause the following negative marine ecosystem impacts:

- increased ocean noise, which could affect the behaviours of fish, whales, and other species;

- introduction of electro-magnetic fields that impact navigation, predator detection, communication, and the ability for fish and shellfish to find mates;
- changes to existing habitats by altering local or regional hydrodynamics;
- attraction/creation of a “reef effect” where marine life cluster around the hard surfaces of wind developments, drawing populations away from natural habitats and altering ecological dynamics, as well as damage to the seafloor through infrastructure and cables;
- impacts to organism life cycle stages, including larval dispersal and spawning;
- changes to species composition, abundance, distribution, and survival rates;
- increased vessel traffic, which could lead to more vessel strikes and increased pollution; and
- release of contaminants that can be consumed or absorbed by marine life.<sup>1</sup>

Other forms of offshore renewable energy – including tidal, wave, geothermal, ocean current and osmotic energy (all of which are much earlier in the research and development process than offshore wind energy) – may cause many of the same impacts.<sup>2</sup>

### III. International Approaches to Offshore Renewable Energy and Marine Protection

The international community is moving towards restricting industrial activities, including offshore renewable energy, within MPAs. Many jurisdictions around the world prohibit or strictly limit offshore renewable energy installations in MPAs. For example, in France offshore wind projects are prohibited in certain types of marine protected areas, and in many countries – including Germany, the United Kingdom, Spain, France, the Netherlands and Australia – there are specific zones in which offshore wind may be installed, and which have been identified through marine spatial planning.<sup>3</sup> Canada should follow the example of these countries with more established offshore wind regimes and carefully consider where offshore renewable energy projects are sited, and in particular, prohibit offshore renewable energy in MPAs.

### IV. Canada’s regulation of Offshore Renewable Energy should be Consistent

Part 5 of the CERA and the proposed ORER will be the primary legislation that governs offshore renewable energy projects in the federal offshore area, outside of the areas offshore Nova Scotia and Newfoundland and Labrador that fall under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* (collectively, the Accord Acts). Offshore renewable energy projects in these joint-management areas are intended to be governed by the

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<sup>1</sup> NOAA Fisheries, [Offshore Wind Energy: Protecting Marine Life](#) (accessed 25 March 2024); see also Tethys Knowledge Base, [Wind Energy Content](#) (accessed 20 March 2024) for a list of studies on the topic.

<sup>2</sup> Tethys Knowledge Base, see note 1.

<sup>3</sup> Josep Lloret et al, [“Floating offshore wind farms in Mediterranean marine protected areas: a cautionary tale”](#) (2023) 0 *ICES Journal of Marine Science* 1 at 2; see also Government of New Zealand, Ministry of Business, Innovation & Employment, [“Annex 3: International models for offshore renewable energy regulation”](#) in *Enabling investment in offshore renewable energy discussion document* (December 2022); Mike Kofahl & Tina Northrup, [Comparative Jurisdictional Research Report on the Assessment and Regulation of Offshore Wind Development](#) (Ecology Action Centre, March 2023).

proposed amendments to the Accord Acts through Bill C-49.<sup>4</sup>

The CERA regime issues authorizations for works and undertakings, while the Accord Acts regime issues submerged land interests, but both provide frameworks that would allow for offshore renewable energy projects to proceed. With two different legislative frameworks governing offshore renewable energy in the country, it is important that they remain consistent. This is acknowledged in the Regulatory Impact Analysis Statement for the proposed ORER: “It is [Natural Resource Canada’s] intent to replicate, to the extent possible, the proposed [ORER] in the Canada–Nova Scotia and Canada–Newfoundland and Labrador offshore areas once Bill C-49 receives royal assent and the Accord Acts are amended to expand their application to ORE.”<sup>5</sup>

## V. Marine Protected Areas must be protected from impacts of Offshore Renewable Energy Projects

Canada has committed to protecting 25% of the ocean by 2025, and to working towards protecting 30% by 2030, and to working to halt and reverse biodiversity loss.<sup>6</sup> The federal government protects areas of the ocean using MPA designations, as well as other non-MPA legal tools that provide spatial protection, known as “other effective area-based measures” (OECMs). The federal government has committed to prohibiting four of the most harmful industrial activities within all new federal MPAs,<sup>7</sup> and avoiding or mitigating industrial activities that pose risks to biodiversity outcomes within OECMs.<sup>8</sup>

Whether offshore renewable energy projects are permitted in MPAs in Canada has not yet been addressed in law or policy. However, Bill C-49 contains provisions that would allow the government to prevent offshore renewable energy activities from taking place in areas that have been identified for conservation or protection, as well as prohibiting the issuance of offshore renewable interests because of serious environmental or social problems<sup>9</sup>:

- Bill C-49 introduces a new regulatory power that would allow the Governor-in-Council to make regulations prohibiting offshore renewable energy activities within areas that have been, or may be, identified for environmental or wildlife conservation or protection. These areas may be identified for protection under either federal or provincial law. These regulations could prohibit the commencement or continuation of work, as well as the issuance of any interests.<sup>10</sup> The CERA

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<sup>4</sup> [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.

<sup>5</sup> [Canada Gazette, Part I, Volume 158, Number 8: Canada Offshore Renewable Energy Regulations](#) (24 February 2024).

<sup>6</sup> Government of Canada, Office of the Prime Minister, [Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter](#), by Right Honourable Justin Trudeau (Ottawa: Office of the Prime Minister, 16 December 2021).

<sup>7</sup> Fisheries and Oceans Canada, [Marine Protected Areas \(MPA\) Protection Standard](#) (Ottawa: Fisheries and Oceans Canada, 2023).

<sup>8</sup> Fisheries and Oceans Canada, [Other Effective Area-Based Conservation Measures \(OECM\) Protection Standard](#), online (8 February 2023).

<sup>9</sup> These are found in Bill C-49 clauses 27-28 (which amend the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*) and 136-137 (which amend the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*); see note 4.

<sup>10</sup> See Bill C-49 clause 28 (adding s. 56.1) and clause 137 (adding s. 59.1); see note 4.

regime must include a similar mechanism to enable the federal government to prohibit the issuance of offshore renewable energy authorizations within areas that have been identified for environmental or wildlife conservation or protection. For example, the ORER could specify that new authorizations will not be granted in such areas. In addition, the CERA regime should allow for the prohibition of offshore renewable energy in areas that may be identified for environmental or wildlife conservation or protection in the future, as well as allow for the Canada Energy Regulator to prohibit the commencement or continuation of work in such areas under existing authorizations.

- Bill C-49 introduces amendments allowing for the relevant Minister to negotiate for the surrender of offshore renewable energy interests that are within areas that have been identified for conservation or protection. This framework would enable the federal Minister to negotiate for the surrender of interests, in exchange for compensation, within federally protected areas and would grant the provincial Minister similar authority within provincially protected areas. If the negotiations are unsuccessful, the federal and provincial Ministers may jointly cancel the interest.<sup>11</sup> The CERA regime should likewise grant the Canada Energy Regulator the ability to rescind authorizations for offshore renewable energy projects within protected or conserved areas.
- Bill C-49 introduces amendments granting the federal and provincial ministers the authority to prohibit the issuance of offshore renewable interests and allowing the Regulator to prohibit the commencement or continuation of work because of serious environmental or social problems, or dangerous or extreme weather conditions.<sup>12</sup> The CERA regime should allow the relevant Minister to issue orders prohibiting the issuance of offshore renewable energy authorizations and the Canada Energy Regulator the ability to prohibit the commencement or continuation of work that is already subject to an authorization because of those same reasons (serious environmental or social problems, or dangerous or extreme weather conditions).

The CERA regime should incorporate the content of the above-listed Bill C-49 provisions. This will contribute to achieving Canada's conservation goals and result in more regulatory certainty for project proponents and other stakeholders.

## **VI. Additional Considerations**

In addition to the above submission on ensuring that offshore renewable energy projects do not take place in MPAs, West Coast is concerned about the following measures as currently drafted in the ORER:

- **Public access to information:** There are several pieces of information and documents that the ORER requires of offshore renewable energy operators throughout the project phases that are not required to be disclosed to the public. This lack of transparency does not further the goals of the offshore renewable energy regulatory regime of safety, security, and environmental protection; rather, it impedes them. This information includes that listed under ORER sections 40 (*documents and information at each operations site, control centre and emergency response operations centre*), 50 (*reportable incidents*) and 51 (*periodic reports*). The ORER should be amended to provide that these

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<sup>11</sup> See Bill C-49 clause 28 (adding ss. 56.2-56.5) and clause 137 (adding ss. 59.2-59.5); see note 4.

<sup>12</sup> See Bill C-49 clause 27 (adding s. 56(1), (2.1)) and clause 136 (adding s. 59(1), (2.1)); see note 4.

documents be proactively disclosed on a public registry.

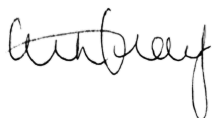
- Certifying authority: As with any professional reliance regime, the ORER's scheme requiring operators to use a "certifying authority" (or third-party certifier) carries with it the potential for issues with professional competence, bias and conflicts of interest.<sup>13</sup> The CERA regime should employ the best practice of using government experts to review projects, to ensure full independence. In the absence of this, ORER should specify that this approach be subject to review within five years of coming into force.
- Target levels: The target levels for safety, security and environmental protection, required under ORER section 31, should be set by the regulator, not the operator. There is a clear incentive for the operator to use lower standards than what may be required by science and best practices. Standards set by the regulator could be based on measurable targets identified through an impact assessment, or that have already been established in policy or other standards (for example, the Ocean Noise Strategy currently being developed by Fisheries and Oceans). The ORER should be amended to reflect this.
- Navigational safety zones: ORER section 27 prescribes 500 m navigational safety zones around offshore renewable energy projects. These must be planned so that the safety zone does not drive any additional shipping traffic into MPAs, which can threaten the ecological values protected by the MPA designation.

## VII. Conclusion

For Canada to achieve its conservation goals and to effectively protect marine biodiversity using tools like MPAs and OECMs, it is crucial that offshore renewable energy be prohibited from legally protected areas. West Coast recommends that the marine conservation provisions mirroring the above-listed Bill C-49 provisions are implemented as soon as possible.

In addition, we recommend that specific information be proactively disclosed on a public registry; that target levels for safety, security and environmental protection be set by the Regulator rather than the operator; that government experts be used to review projects, or in the alternative, that the professional reliance approach be subject to review within five years of ORER coming into force; and that 500 m navigational safety zones are planned to ensure that additional shipping traffic is not diverted into MPAs.

Sincerely,



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<sup>13</sup> Concerns are outlined in Mark Haddock "[Professional Reliance Review: The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making](#)" (18 May 2018).