

To: Dr. Bob Fournier  
From: East Coast Environmental Law Association

COMMENTS ON THE MARINE RENEWABLE ENERGY DISCUSSION PAPER  
November 15, 2010

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East Coast Environmental Law Association (ECE LAW) is a non profit organization established in 2007. ECE LAW promotes the development and just application of innovative and effective environmental laws in Atlantic Canada through:

- Awareness & Understanding - increasing public awareness of and access to environmental laws, for example by organizing workshops, publishing accessible materials on environmental law and responding to inquiries;
- Education - aiding in the education of future environmental law professionals by including law students in our work and managing a for-credit course at the Schulich School of Law at Dalhousie University; and
- Collaboration - working with the public, community groups and government to strengthen environmental laws.

Our Board includes lawyers in private practice, academics, law students and representatives of government and environmental ngo's.

For more background on what we do, please visit our website at [www.ecelaw.ca](http://www.ecelaw.ca).

Deborah Carver, Executive Director of ECE LAW, attended the consultation session on Marine Renewable Energy in Halifax on November 4, 2010. In addition to the comments made at that time, we offer the following remarks. They are organized by the topic headings used in the November 4 session.

### COMMENT SUMMARY

To complement legislation on marine renewable energy, the Province should develop an Integrated Coastal Zone Management strategy. This would provide the means to integrate the "framework for development of Nova Scotia's marine renewable energy industry" into a broader regulatory approach.

An alternative tool is a second phase to the Fundy Tidal Strategic Environmental Assessment that adds detail and maps issues that will affect siting choices for marine renewable energy projects.

The Province should use marine renewable energy as a model to focus on upward harmonization of the interjurisdictional Environmental Assessment process.

The decision maker awarding licenses and development rights for marine renewable energy should not have complete discretion to award these rights. There should be clear, legislated directions for the decision maker to consider and balance competing private, public and

environmental interests, as well as a review or appeal process available to interested parties as well as proponents.

## GENERAL COMMENTS

1. Both the Discussion Paper and Policy Background Paper (“the Papers”) are very thorough in canvassing the issues relevant to legislation that will regulate the development and governance of the new marine renewable resource sector.
2. The precursors to the Papers were the 2006 Opportunities for Sustainable Prosperity Policy, the 2007 Environmental Goals & Sustainable Prosperity Act, 2009 Renewable Energy Strategy Consultations, and 2010 Renewable Electricity Plan. The Government is to be commended for moving through this process with the aim of meeting a 2015 target of 25% renewable energy by 2015 and 40% by 2020.

## PUBLIC-PRIVATE INTERFACE

### Policy and planning level

3. Public engagement is the norm in decision-making that affects environmental and community issues. Early public engagement at the policy and regulatory level can ensure that later project level decisions are made more efficiently, effectively and fairly. At the policy level, and during the period when technology is being proven, municipalities, NGO’s and Aboriginal organizations can be effective in representing the public interest. Our thanks for considering our contributions at this point in the development of the marine renewable energy industry.
4. One planning tool that can provide broad and high level public input into policy and legislative development is the development of Integrated Coastal Zone Management (ICZM). Ideally, an ICZM framework for Nova Scotia would have preceded the development of legislation for marine renewable resources. An ICZM framework, including some form of spatial mapping or zoning, would be very useful in dealing with a number of issues raised in the Papers related to balancing economic, environmental, community and jurisdictional issues. ICZM should include both land and water areas.
5. Nova Scotia can and should still develop an overall coastal management framework and coastal legislation. Although the jurisdictional and environmental issues addressed in ICZM are complex, it is not an insurmountable challenge to put this in place. Many countries have implemented effective Coastal Zone Management. The work on a coastal strategy for the province should be integrated thoroughly with the marine renewable agenda and the aquaculture development policy of the Department of Fisheries and Aquaculture, while these industries are still at a relatively early stage of development. In the mean time, regulatory and jurisdictional solutions developed for the marine renewable sector can inform coastal policy as a whole.

6. Another tool that could be useful for planning for marine renewable energy would be to take the 2008 Fundy Tidal Energy Strategic Environmental Assessment to a second phase that maps out criteria for commercial and community projects (as opposed to pilot projects) and delineates how project level EA would proceed for both the few large and possibly many small opportunities that will become available in this industry. Marine spatial mapping could also be a result of a Phase 2 SEA – providing red light, yellow, green light indicators for locations dependent on environmental and community issues.
7. As noted in the Papers, Federal Government involvement is essential due to their Constitutional jurisdiction over Fisheries, Navigable Waters, Shipping, etc.. Nova Scotia and Canada have not come to agreement on jurisdiction over the offshore seabed. Even if the Bay of Fundy is accepted to be Nova Scotia territory, some projects, in particular wind, may be installed in waters that many would agree are beyond provincial ownership based on legal principles such as the “jaws of the land”.

#### Project and operational level

8. As noted in the Papers, the Nova Scotia Environmental Assessment Regulations were amended in 2008 to require a Class 1 EA for facilities that produce more than 2MW of energy from tides or waves. Federal Assessment is triggered under the Canadian Environmental Assessment Act (CEAA) by reason of the need for federal permits under the Fisheries and Navigable Waters Protection Act, among others.

Integration of federal and provincial Environmental Assessment processes is essential. Significant discrepancies exist between and among current EA regimes. The CEAA has just been amended and more amendments are likely to arise out of the 7 Year Review to be undertaken by the House of Commons Standing Committee on Environment and Sustainability in 2010-11. The general trend is for “downloading” of EA responsibility to the provinces and it is therefore incumbent on Nova Scotia to examine and improve its process. Unlike other provinces, Nova Scotia does not have an MOU with the federal government to govern joint EAs. The tidal in-stream pilot project is being reviewed jointly under a project specific agreement. Again, this issue is a larger one than marine renewable energy.

Because there was a joint federal-provincial SEA for tidal energy and there is currently an agreement to cover the pilot project, there is an opportunity to use marine renewable energy as a model to focus on upward harmonization of the EA process. This could result in finding ways of strengthening both the efficiency and effectiveness of the EA process by combining the best aspects of the coordinated regimes and integrating emerging best practice in, for example: integrated attention to social and ecological systems; attention to Aboriginal rights and interests; and application of a sustainability test, rather than mere mitigation of significant adverse effects.

ECELAW is a member of the Canadian Environmental Network, EA Caucus and has developed expertise in environmental assessment.

9. At the project and operational level, public engagement requires legislating rights to access to information and participation. This is a broader concern than the proposed Marine Renewable Energy legislation. Nova Scotia should enact an environmental Bill of Rights to ensure that all have access to adequate environmental information and effective mechanisms for participating in environmental decision-making. An Environmental Registry and creation of the Office of Environmental Commissioner would support these aims.

#### REGULATION: GOVERNANCE AND ALIGNMENT

10. To build confidence in the development of the marine renewable energy industry, the process for decision-making should be clearly set out in binding legislation (statute or regulations) requiring decision makers to consider and balance competing interests, including environmental ones. Decision makers for licenses and development rights should not have complete discretion to award these rights, there should be legislated guidance developed with public input. Providing a right of appeal to interested parties other than the proponent is also important.
11. “Regulatory capture” is a big concern of the public and there is an opportunity in this new industry to develop mechanisms that provide confidence. The public has difficulty accepting that a single department of government, or a single Board, can be both the promoter and an effective enforcement arm of an industry in the public interest (such as for health and environmental concerns). For example, at both provincial and federal levels the Department of Fisheries promotes aquaculture development and has responsibility for monitoring environmental impacts. The same concern exists with respect to the oil and gas industry and the role of the NEB, CNSOPB and CNLOPB. Legislation for Marine Renewable Energy should take this into account and separate responsibilities.

Therefore, it would be desirable if the system for licensing and awarding development rights is overseen by a department that is not responsible for promoting the industry, but rather, with regulating it.

Respectfully submitted,



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