Moving Towards Next-generation Environmental Assessment in Nova Scotia:

A Report Supporting Engagement in the "Modernization" of Nova Scotia's Environmental Assessment Process

Tina Northrup, Staff Lawyer
East Coast Environmental Law

October 5, 2023

1.0 Introduction

In the autumn of 2021, the Government of Nova Scotia enacted the *Environmental Goals and Climate Change Reduction Act* ("*EGCCRA*"). Within the Act, the government set a goal of "modernizing" Nova Scotia's environmental assessment ("EA") process by 2024, taking into consideration: cumulative impacts; diversity, equity, and inclusion; independent review; *netukulimk*; and, climate change.

The government initiated an opportunity for public engagement on the "modernization" of Nova Scotia's EA process in the late summer of 2023.[1] An engagement guide entitled *Modernizing Environmental Assessment to support a Clean & Sustainable Future for Nova Scotia* suggests that the five priority considerations listed in *EGCCRA* will be understood at least to some extent through the lens of "sustainability".[2] This is indicated not only by the goal of supporting a "clean and sustainable future" expressed in the title of the engagement guide but also from numerous additional references to sustainability throughout the guide as a whole, including references to: "[a] future with a strong and sustainable economy";[3] "a prosperous and sustainable province";[4] the goal of "modernizing" Nova Scotia's EA process "so that it supports sustainable development";[5] and, an expression of the need for EA to "support sustainable solutions".[6] In addition to sustainability, the engagement guide also emphasises that "certainty", "flexibility", "transparency", and "accountability" will be essential to "modernized" EA in Nova Scotia, and it connects "transparency" to a recognition of the need to "build trust".[7]

The engagement guide was released contemporaneously with a public survey asking how the five priority considerations listed in *EGCCRA* might be brought into or enhanced within Nova Scotia's EA process to support sustainability and create more certainty, flexibility, transparency, and accountability within the EA regime. This report does not list the survey questions and respond to them directly, but its contents touch on all of them.

This report uses the government's public engagement on the "modernization" of Nova Scotia's EA process as an opportunity to advocate for movement towards next-generation EA. As is described in more detail below, next-generation EA is an advanced stage of the evolutionary progression of environmental impact assessment ("EIA"). Next-generation assessment regimes are distinguished from their predecessors by a sustainability-driven purpose that is centred and integrated with all regime components. Next-generation regimes go beyond asking whether the environmental, human health, cultural, and socioeconomic impacts of proposed projects will cause "acceptable" levels of harm—instead, they seek to determine whether proposed projects will make net contributions to sustainability and support the lasting wellbeing of affected communities.

---

[1] Government of Nova Scotia, "Environmental assessment: engagement" (undated).
[2] Government of Nova Scotia, *Modernizing Environmental Assessment to support a Clean & Sustainable Future for Nova Scotia* (undated).
[3] *Ibid* at page 1.
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid* at page 3.
[7] *Ibid*.

This report draws on scholarship by some of Canada's leading EIA experts to explore how core requirements of next-generation EIA could be enhanced or implemented in Nova Scotia to improve the provincial EA regime.

In Sections 2.0 and 3.0, fourteen core requirements of next-generation EIA are identified and discussed within the context of EA in Nova Scotia to inform a suite of recommended amendments to Nova Scotia's *Environment Act* and *Environmental Assessment Regulations*. In Section 4.0, recommended amendments are listed for ease of reference, and several of them are highlighted in a table that organizes them to correspond with the five priority considerations listed in *EGCCRA*. Throughout the report, opportunities to improve certainty, flexibility, transparency, and accountability within Nova Scotia's EA regime are also highlighted.

1.1 Notes on Terminology

In this report, specific references to Nova Scotia's environmental assessment regime use the acronym "EA". Additionally, the acronym "EIA" is used as an umbrella term to refer generally to project-level assessment and decision-making processes that go by different names in different jurisdictions. Within Canada, federal assessments of this kind are called "impact assessments" and are carried out under Canada's *Impact Assessment Act*, and the terms "environmental impact assessment" and "environmental assessment" are applied variously across the provinces and territories and by some Indigenous governments under statutes and regulations that establish local regimes.

In addition to project-level assessment and decision-making processes, strategic environmental assessments ("SEAs") and regional assessments ("RAs") are also used in Canada to address bigger-picture issues of concern. Depending on how their requirements are expressed, SEAs typically aim to predict and assess the environmental, human health, cultural, and socioeconomic effects of policies, plans, or programs, or some combination thereof.[8] Also depending on how their requirements are expressed, RAs can be used to predict and assess the combined effects of multiple activities within a region. The core requirements of next-generation EIA discussed throughout this report apply equally to SEA and RA, and this report argues that Nova Scotia's EIA regime should not only include project-level environmental assessments but should also enable sustainability-based SEA and RA. This is because one of the defining characteristics of next-generation EIA is that it provides for integrated and tiered assessments at all relevant levels of environmental planning, assessment, and decision-making—from the highest levels where strategic policies, plans, and programs are developed, down to the lowest levels where individual projects undergo assessment and permitting processes.

Within Nova Scotia's EA regime, proposed projects that trigger EAs are called "undertakings". Throughout this report, the phrase "proposed project" is sometimes used to enhance clarity and accessibility for non-specialist readers, but the word "undertaking" is used in passages that discuss specific powers and obligations that shape the EA process.

[8] SEA can also be applied in private contexts, such as by public utilities or private corporations wishing to predict and assess the environmental and socioeconomic effects of corporate policies, plans, or programs. This report focuses on the use of SEA by governments and governmental authorities.

2.0 The Core Requirements of Next-Generation EIA

Next-generation EIA is distinguished from its predecessors by a sustainability-driven purpose that is centred and integrated throughout the regime. Whereas many EIA regimes in Canada and around the world—including the current EA regime in Nova Scotia—focus on avoiding or mitigating environmental harms, next-generation EIA goes further by seeking to determine whether proposed projects will make net contributions to sustainability. The same can be said of next-generation SEA and RA. Next-generation assessment processes shift the focus from minimizing harms caused by proposed activities to identifying projects, policies, plans, and programs that will serve the public interest in the long term.[9]

Scholars Robert B. Gibson, John Sinclair, and the late Meinhard Doelle have described four evolutionary stages of EIA: the first is characterized by localized and reactive pollution control, often in closed processes excluding public input; the second is characterized by more proactive assessment and impact mitigation processes, focusing primarily on biophysical concerns and neglecting broader socioeconomic and cultural factors; the third is characterized by broader scoping to take numerous relevant factors into account, reflecting significant evolution but also retaining limiting foci on individual activities and avoidance of adverse effects; and, the fourth is characterized by "integrated planning and decision-making for sustainability, addressing policies and programs as well as projects and cumulative local, regional and global effects, with decision processes that empower the public, recognize uncertainties and favour precaution".[10] The fourth evolutionary stage is next-generation EIA.

Over many years of working together and in collaboration with other scholars and students in this field, Gibson, Sinclair, and Doelle have identified several core requirements of next-generation EIA. Earlier scholarship identified eleven,[11] twelve,[12] and sixteen[13] core requirements; however, in their more recent work together, the scholars settle on fourteen.[14] As expressed in a journal article published in 2022, those fourteen core requirements are:

---

[9] See Robert B. Gibson, "An Initial Evaluation of Canada's New Sustainability-Based *Impact Assessment Act*" *Journal of Environmental Law & Practice* 33:1 (March 2020) at page 4 ["An Initial Evaluation"]; see also A.J. Sinclair, M. Doelle, and R.B. Gibson, "Implementing next generation assessment: A case example of a global challenge" *Environmental Impact Assessment Review* 72 (2018) at pages 166-67 ["Implementing next generation assessment"].

[10] "Implementing next generation assessment", *supra* note 9 at pages 166-67.

[11] *Ibid*; see also A. John Sinclair, Meinhard Doelle, and Robert B. Gibson, "Next generation impact assessment: Exploring the key components" *Impact Assessment and Project Appraisal* 40:1 (2022) ["Exploring the key components"].

[12] "Exploring the key components", *supra* note 11.

[13] "An Initial Evaluation", *supra* note 9; see also Robert B. Gibson, Meinhard Doelle, and A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" *Journal of Environmental Law and Practice* 27 (2016) ["Fulfilling the Promise"]; see also Robert B. Gibson, Meinhard Doelle, and A. John Sinclair, *Next generation environmental assessment for Canada: basic principles and components of generic design* (3 August 2016) ["Basic principles and components of generic design"].

[14] See "Exploring the key components", *supra* note 11; see also Robert B. Gibson, A. John Sinclair, and Meinhard Doelle, "A Next-Generation Assessment Framework for Examining the *Impact Assessment Act*" in *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act*, ed. Meinhard Doelle and A. John Sinclair (Toronto: Irwin Law, 2021) ["A Next-Generation Assessment Framework"].

(1) "[s]ustainability-based purpose, scope and criteria for evaluations and decisions";
(2) "[a]pplication of integrated, tiered assessments covering all potentially significant undertakings at the regional, strategic and project levels";
(3) "[i]nterjurisdictional cooperation, collaboration and upward harmonization";
(4) "[r]espect for Indigenous knowledge, rights and authority and facilitation of reconciliation";[15]
(5) "[a]ssessment streams for assessments of projects and regional/strategic undertakings of different character and significance";
(6) "[m]eaningful public participation";
(7) "[f]ull-process learning";
(8) "[e]arly process initiation";
(9) "[r]igorous and credible impact assessments focused on cumulative and interactive effects and uncertainties";
(10) "[c]omparative evaluation of potentially reasonable alternatives, including the null option";
(11) "[c]redible, accountable and authoritative decision-making for assessed undertakings, policy making and other core initiatives under [assessment]";
(12) "[f]ollow-up of compliance with conditions, effect predictions, and effective response to monitoring findings";
(13) "[i]ndependent and impartial implementation and administration"; and,
(14) "[e]ffective, efficient and fair process".[16]

The sections that follow describe what each of these core requirements could look like in practice, assess to what extent each is reflected already in Nova Scotia's EA regime, and identify ways that each could be incorporated or enhanced to improve EAs and their outcomes in Nova Scotia.

[15] In "A Next-Generation Assessment Framework", *supra* note 14, the scholars add "encouragement of co-governance with Indigenous governing bodies" as an aspect of this component, at page 40.
[16] "Exploring the key components", *supra* note 11 at pages 11-15; "A Next-Generation Assessment Framework", *supra* note 14 at pages 37-50.

3.0 Opportunities to Incorporate or Enhance Core Requirements for Next-generation EIA in Nova Scotia

As Gibson, Sinclair, and Doelle have noted throughout their work, the core requirements for next-generation EIA discussed in this report should be implemented as a package, as they are interconnected and mutually reinforcing.[17] Although implementing all fourteen requirements would go beyond the Government of Nova Scotia's stated intention to "modernize" Nova Scotia's EA process with five priority considerations in mind, we must continue to move towards next-generation EA in Nova Scotia if we are to achieve sustainability in this province. The best way to address the priority considerations of cumulative impacts, diversity, equity, and inclusion, independent review, *netukulimk*, and climate change—and to simultaneously improve certainty, flexibility, transparency, and accountability within the regime—is to implement the fourteen core requirements of next-generation EIA.

In this section, the fourteen core requirements of next-generation EIA are discussed within the context of EA in Nova Scotia to inform a suite of recommended amendments to Nova Scotia's *Environment Act* and *Environmental Assessment Regulations*. Some of the recommended amendments are surgical and could be achieved by targeted changes in the wording of legislative provisions; others would require significant structural changes. Before turning to the analyses presented in Subsections 3.2–3.15, I begin by highlighting an especially significant structural change that this report argues is necessary to implement sustainability-based decision-making criteria within Nova Scotia's EA regime while also improving certainty, flexibility, transparency, and accountability to serve the interests of proponents and members of the general public alike.

3.1 Significant Restructuring to Implement Sustainability-based Decision-making Criteria and Improve Certainty, Flexibility, Transparency, and Accountability

Subsection 34(1) of the *Environment Act* identifies six definitive decisions that the Minister of Environment and Climate Change (the "Minister") can make during an EA of an undertaking. The Minister can decide to:

- require additional information from the proponent;
- require the proponent to prepare a Focus Report;
- require the proponent to prepare an Environmental-assessment Report;
- refer part or all of the undertaking to alternate dispute resolution;
- reject the undertaking; or,
- approve the undertaking.[18]

Section 12, subsection 13(1), and section 18 of the *Environmental Assessment Regulations* condition the Minister's decision-making powers under subsection 34(1) of the *Environment Act*. Section 12 of the Regulations identifies specific kinds of information that the Minister must consider when formulating a decision under subsection 34(1) of the Act. Subsection 13(1) identifies the reasons why the Minister may choose to require additional information from a

[17] "Exploring the key components", *supra* note 11 at pages 10-11; "An Initial Evaluation", *supra* note 9 at page 9.
[18] *Environment Act*, SNS 1994-95, c 1 at subsection 34(1) ["*Environment Act*"].

proponent, require a Focus Report or an Environment-assessment Report (in a Class I assessment process) or reject or approve an undertaking. Section 18 identifies the reasons why the Minister, following the receipt of a Focus Report, may choose to require an Environmental-assessment Report or reject or approve the undertaking. Notably, there are no corresponding provisions within the Regulations that impose specific criteria for Ministerial decisions following the receipt of Environmental-assessment Reports.

Sustainability-based decision-making criteria are core components of next-generation EIA regimes, as are certainty and flexibility in the process and transparency and accountability in the formulation and communication of decisions. Currently, the intersecting structures of section 12, subsection 13(1), and section 18 of the *Environmental Assessment Regulations* impede sustainability-based decision-making and do not create sufficient certainty, flexibility, transparency, and accountability. The absence of specific criteria for Ministerial decisions following the receipt of Environmental-assessment Reports is an additional impediment to sustainability-based decision-making and to certainty, flexibility, transparency, and accountability throughout the process.

Whereas section 12 of the *Environmental Assessment Regulations* lists kinds of information that the Minister must consider in formulating all decisions under subsection 34(1) of the *Environment Act*, subsection 13(1) attempts to assign specific decision-making criteria to five of the six decisions that the Minister is empowered to make. One of the definitive decisions available to the Minister is neglected entirely (the decision to refer to alternate dispute resolution), and the criteria assigned to the decisions to require a Focus Report or Environmental-assessment Report are limited and vague. The criteria assigned to Ministerial decisions to approve or reject proposed projects are only slightly more clear: an undertaking may be approved if the assessment indicates that there are no "adverse effects" or "significant environmental effects" that may be caused by the undertaking or that such effects can be mitigated or are otherwise deemed to be acceptable;[19] and, an undertaking may be rejected if the assessment indicates that the undertaking will likely cause adverse effects or significant environmental effects that are unacceptable. These criteria are essentially replicated in section 18 within the context of Ministerial decisions following the receipt of Focus Reports.

Because subsection 13(1) of the *Environmental Assessment Regulations* is a single sentence broken down into six component parts, revising it to assign clear sustainability-based criteria for all six of the decisions available to the Minister under subsection 34(1) of the *Environment Act* would require significant structural changes to avoid convolution and illegibility. This report therefore recommends that the Regulations be restructured to contain separate provisions addressing all of the six decisions that are available to the Minister under subsection 34(1) of the Act, per the following comments.

3.1.1 *Decision to Require Additional Information from the Proponent*

The criterion indicated in clause 13(1)(a) of the Regulations—"that the registration information is insufficient to allow the Minister to make a decision and additional information is required"—

[19] The definitions of the terms "adverse effects" and "environmental effects" are discussed below in Subsection 3.2.1 of this report.

is relatively clear; however, its clarity can and should be enhanced by specifying that the key question is whether the registration information is sufficient to allow the Minister to decide whether to require a Focus Report or Environmental-assessment Report, refer to alternate dispute resolution, or reject or approve the undertaking. In other words, the nature of the decision or decisions being referred to within this clause should be clarified to remove ambiguity and avoid confusion, thereby improving certainty, transparency, and accountability. This criterion would also be improved by an amendment making it clear that the Minister can not only require additional information due to the insufficiency of the registration information but can also continue to require additional information due to the insufficiency of information provided subsequently by the proponent.

3.1.2 *Decision to Require a Focus Report*

The criterion indicated in clause 13(1)(c) of the Regulations—"that a review of the information indicates that the adverse effects or significant environmental effects which may be caused by the undertaking are limited and that a focus report is required"—is ambiguous and unhelpful to members of the public, proponents, and the Minister and their staff. At minimum, the Regulations should specify clear threshold criteria that describe the nature and extent of potential adverse effects or significant environmental effects that would ground a ministerial decision to require a Focus Report. These criteria should reflect a sustainability purpose and should identify ministerial discretion to require a Focus Report to address concerns raised by Indigenous peoples and the general public about predicted adverse effects or significant environmental effects. The Government of Nova Scotia should also consider requiring a Focus Report when registration information or subsequent information provided by the proponent indicates that the proposed project may meet a certain threshold for potential adverse effects or significant environmental effects—that is, the sustainability purpose of a next-generation EIA regime may be supported best by replacing some ministerial discretion with clear intensification responsibilities. Clear criteria to inform ministerial decision-making in this regard would maintain the flexibility of the current process while increasing certainty, transparency, and accountability.

3.1.3 *Decision to Require an Environmental-assessment Report*

The criterion indicated in clause 13(1)(d) of the regulations—"that a review of the information indicates that there may be adverse effects or significant environmental effects caused by the undertaking and an environmental-assessment report is required"— is ambiguous and unhelpful to members of the public, proponents, and the Minister and their staff. As with the recommended criteria for a decision to require a Focus Report, the Regulations should, at minimum, specify clear threshold criteria that describe the nature and extent of potential adverse effects or significant environmental effects that would ground a ministerial decision to require an Environmental-assessment Report. These criteria should reflect a sustainability purpose and should identify ministerial discretion to require an Environmental-assessment Report to address concerns raised by Indigenous peoples and the general public about predicted adverse effects or significant environmental effects. The Government of Nova Scotia should also consider requiring an Environmental-assessment Report when registration information or subsequent information provided by the proponent indicates that the proposed project may meet a certain threshold for potential adverse effects or significant environmental effects. Clear criteria to

inform ministerial decision-making in this regard would maintain the flexibility of the current process while increasing certainty, transparency, and accountability.

3.1.4 *Decision to Refer to Alternate Dispute Resolution*

As noted above, the Regulations currently provide no criteria for a ministerial decision to refer part or all of an undertaking to alternate dispute resolution. A criterion or criteria should be added to provide some context for this decision-making power. One possibility would be to indicate that this power can or should be exercised when the Minister is of the opinion that concerns raised by Indigenous peoples or the general public about potential adverse effects or significant environmental effects may benefit from a restorative justice process in which concerns and possible mitigation or compensation options could be discussed. One next-generation EIA factor that could be especially useful to foreground in this regard would be the requirement to take distributive equity into account when conducting EIA processes and formulating decisions.

3.1.5 *Decision Whether to Approve or Reject an Undertaking*

The Minister's decision whether to approve or reject an undertaking will arguably be the most impactful decision made in an EA process. It is absolutely critical that this decision be conditioned by transparent and accountable criteria that centre sustainability-based decision-making in the public interest.

The public-interest decision-making factors set out in section 63 of Canada's *Impact Assessment Act* offer a useful model in this regard. They require ultimate decisions to approve or reject proposed projects to be based on a consideration of five factors:

- "the extent to which the designated project contributes to sustainability";
- "the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant";
- "the implementation of mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate";
- "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*"; and,
- "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change".[20]

This report recommends that an analogous list of factors for sustainability-based decision-making in the public interest be added to the Regulations to condition the Minister's final decision whether to approve or reject an undertaking that has undergone an EA. The list should include, at minimum, factors requiring consideration of:

[20] *Impact Assessment Act*, SC 2019, c 28, s 1 at section 63 ["*IAA*"].

- the way in which and the extent to which the undertaking would contribute to sustainability;
- the effects that the undertaking may have on Indigenous peoples in Nova Scotia, any adverse effect that the undertaking may have on Indigenous rights that are recognized and affirmed under section 35 of the *Constitution Act, 1982*, and whether a decision to approve the undertaking would respect the rights recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*;
- whether any adverse effects or significant environmental effects of the undertaking would have disproportionate impacts on Mi'kmaw or African Nova Scotian communities in the province or on other communities susceptible to disproportionate harms;
- whether the undertaking would impede or contribute to the achievement of Nova Scotia's greenhouse gas ("GHG") emissions reduction goals; and,
- whether the undertaking accords with or would undermine the core values of the community or communities that it would affect.[21]

Ultimately, the Minister's consideration of these factors for sustainability-based decision-making in the public interest should inform the choice between one of two decisions which, drawing on the current language of clauses 13(1)(b) and 13(1)(e) of the Regulations, could be phrased like so:

> **Approval**
> […] that a review of the information and consideration of the factors indicates that there are no adverse effects or significant environmental effects which may be caused by the undertaking ~~or that such effects are mitigable~~ or the undertaking will make a net contribution to sustainability if such effects are mitigated and the undertaking is approved subject to specified terms and conditions and any other approvals required by statute or regulation;
>
> **Rejection**
> […] that a review of the information and consideration of the factors indicates that there is a likelihood that the undertaking will cause adverse effects or significant environmental effects ~~which are unacceptable~~ that will not make a net contribution to sustainability and the undertaking is rejected.

To ensure that all definitive decision-making powers under subsection 34(1) of the Act are conditioned appropriately within the Regulations, analogous amendments to section 18 are also required, and a provision should be added to stipulate that the Minister's final decision following the receipt of an Environmental-assessment Report in a Class I EA or the completion of all required processes in a Class II EA must also be based on listed factors for sustainability-based decision-making in the public interest.

---

[21] For an example of the consideration of a community's "core values" in determining whether a proposed project would make a net contribution to sustainability, see: Joint Review Panel for the Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, *Joint Review Panel Report: Executive Summary* (October 2007).

3.2 Sustainability-based Purpose, Scope and Criteria for Evaluations and Decisions

The requirement that next-generation EIA have a sustainability-based purpose, scope, and criteria for evaluations and decisions means several things. As regards purpose, the regime should be designed to determine whether proposed projects will serve the public interest by advancing sustainability.[22] This requires a shift from scoping, assessment, and decision-making criteria that support an ethos of "acceptable" harm by focusing primarily on identifying and mitigating unwanted effects.[23] In sustainability-based, next-generation EIA, the essential question is not whether a proposed project will have acceptable or unacceptable environmental impacts; instead, it is whether the proposed project would make a net contribution to sustainability.[24] Scoping, assessment, and decision-making criteria must be tailored to support that evaluation.

As regards scope, assessments must look beyond the biophysical and must take into account positive and adverse effects (direct, indirect, and cumulative) on the environment, human health, and cultural and socioeconomic conditions; assessments must also take into account factors such as scientific uncertainty, the precautionary principle, and distributive equity (including intergenerational equity as well as the equitable distribution of benefits and detriments in the present day).[25] Attention paid to distributive equity is one mechanism through which disproportionate detrimental effects on Indigenous and racialized communities can be addressed, making it a useful tool to address and prevent environmental racism. Intersectional analysis can also identify and address the potential for inequitable distribution of benefits and detriments on the basis of sex, gender, and other identity factors.

As regards decision-making, specific sustainability criteria should be imposed to prescribe the application of sustainability considerations in decision-making.[26] The scholarship suggests that the global agenda for sustainable development, including the seventeen Sustainable Development Goals ("SDGs") established by the international community, may offer useful structure in this regard.[27] Ultimately, the fundamental public-interest goal, as described by the scholarship, is to "deliver the best options for mutually reinforcing and fairly distributed contributions to lasting wellbeing, while minimizing trade-offs and avoiding significant adverse effects".[28]

3.2.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Nova Scotia's EA regime does not have an explicit sustainability-based purpose, nor does it have sustainability-based scoping, assessment, and decision-making criteria.

As regards purpose, neither the *Environment Act*—Part IV of which establishes the statutory framework for EA in Nova Scotia—nor the *Environmental Assessment Regulations*—which

[22] "An Initial Evaluation", *supra* note 9 at page 11.
[23] *Ibid* at page 4.
[24] *Ibid* at page 4.
[25] "Exploring the key components", *supra* note 11 at page 11; "An Initial Evaluation", *supra* note 9 at page 12.
[26] "Exploring the key components", *supra* note 11 at page 11; "An Initial Evaluation", *supra* note 9 at page 13.
[27] "Exploring the key components", *supra* note 11 at page 11.
[28] *Ibid*.

provide the more detailed components of the regime—express a sustainability-based purpose. One of the stated purposes of the *Environment Act* is "to support and promote the protection, enhancement, and prudent use of the environment" while recognizing the goal of "maintaining the principles of sustainable development".[29] Under the Act, "sustainable development" is defined as meaning "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs".[30] The Act identifies several "principles of sustainable development",[31] and although the Act and *Environmental Assessment Regulations* do not connect those principles to Nova Scotia's EA process explicitly, in general they should inform all processes administered under the Act. Additionally, the objective of achieving "sustainable prosperity" in Nova Scotia underpins the structure and contents of *EGCCRA* and is therefore among the stated motivations for "modernizing" EA in Nova Scotia.

As regards scoping and assessment criteria, EAs in Nova Scotia currently focus on avoiding or mitigating the "adverse effects" and "significant environmental effects" that proposed projects may cause. Under the *Environment Act*, an "adverse effect" is "an effect that impairs or damages the environment or changes the environment in a manner that negatively affects aspects of human health".[32] An "environmental effect", as that term applies within the EA regime, is:

> (i) any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archeological, paleontological or architectural significance, and
>
> (ii) any change to the undertaking that may be caused by the environment,
>
> whether the change occurs inside or outside the Province.[33]

These definitions set the basic scope of EAs in Nova Scotia and demonstrate that the regime currently requires some assessment of factors beyond the biophysical alone. Additional scoping and assessment criteria are indicated by section 9 and section 12 of the *Environmental Assessment Regulations*. Subsection 9(1A) lists the information that proponents must submit to the Department of Environment and Climate Change when they register proposed projects for EA; section 12 lists the factors that the Minister must consider when making definitive decisions under subsection 34(1) of the *Environment Act*. The section 12 requirements indicate that EAs should take into account, among other things: concerns expressed by Indigenous peoples and the general public about the adverse effects and environmental effects of proposed projects; other proposed projects and planned or existing land uses in the area where the proposed project would be carried out; and, effects on species at risk, species of conservation concern, and the habitats of such species.[34]

---

[29] *Environment Act*, *supra* note 18 at subsection 2(b).
[30] *Ibid* at subsection 3(aw).
[31] *Ibid* at subsection 2(b).
[32] *Ibid* at subsection 3(c).
[33] *Ibid* at subsection 3(v).
[34] *Environmental Assessment Regulations*, NS Reg 26/1995 (as amended) at section 12 ["*EAR*"].

As the summaries above illustrate, although there is some inclusion of health, cultural, and socioeconomic effects beyond the biophysical in Nova Scotia's EA process, several factors that would be needed for more complete sustainability-based scoping are missing, including, at minimum: requirements for cumulative effects assessment; requirements for the assessment of climate change considerations; and, requirements to assess effects on distributive equity and the potential for distinctive impacts on persons or groups due to identity factors such as Indigeneity, racialization, sex, or gender.

As regards decision-making, the scoping and assessment factors discussed above shape decision-making as well. Within Nova Scotia's EA process as it currently stands, the Minister's power to approve or reject a proposed project is exercised by determining whether the project will cause unacceptable adverse effects or significant environmental effects that cannot be mitigated.[35] The Minister is not required to consider whether proposed projects will make net contributions to sustainability: the assessment and decision-making ethos remains an ethos of allowing "acceptable" harms.

3.2.2 *How This Requirement Could Be Incorporated or Enhanced*

Nova Scotia's *Environment Act* and/or *Environmental Assessment Regulations* should be amended to express an explicit sustainability-based purpose and sustainability-based scoping, assessment, and decision-making criteria.

As regards a sustainability-based purpose statement, the *Environment Act* is the most appropriate place for one or more statements along such lines. Such a statement could be added to the general statements of purpose that inform the Act as a whole. Canada's *Impact Assessment Act* expresses a sustainability-based purpose by stating that one of the purposes of the Act is "to foster sustainability".[36] This report recommends a more ambitious purpose statement that speaks of "achieving", not simply "fostering", sustainability.

Subsection 2(b) of Nova Scotia's *Environment Act* states:

> 2 The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:
>
> […]
>
> (b) maintaining the principles of sustainable development […].[37]

Although the Act expresses a goal of "maintaining the principles of sustainable development",[38] advancing or achieving sustainability is not a clearly-stated purpose of the Act as a whole. Moreover, Part IV of the Act does not express additional purposes that are specific to the EA process.

---

[35] *Ibid* at subsection 13(1).
[36] *IAA*, *supra* note 20 at clause 6(1)(a).
[37] *Environment Act*, *supra* note 18 at subsection 2(b).
[38] *Ibid* at subsection 2(b).

Recommendation 1: The Purpose section of Nova Scotia's *Environment Act* should be amended as follows:

> 2 The purposes of this Act ~~is~~ are to achieve sustainability and support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals[…]

Additionally, purposes specific to EA in Nova Scotia could be identified in a list of purposes added to Part IV of the *Environment Act*, which establishes the legislative framework for Nova Scotia's EA regime. Alternatively, this specific list of purposes could be included in the *Environmental Assessment Regulations*.

Recommendation 2: Part IV of the *Environment Act* should be amended to include a list of purposes that are specific to Nova Scotia's environmental assessment process, including the purpose of achieving sustainability. In the alternative, this specific list of purposes should be added to the *Environmental Assessment Regulations*.

As regards scoping and assessment criteria, subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to add requirements for information about and consideration of a larger suite of factors needed to inform sustainability-based assessment and decision-making.

Recommendation 3: Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to add requirements for information about and consideration of a larger suite of factors needed to inform sustainability-based assessment and decision-making, including at minimum:

- a requirement in subsection 9(1A) for proponents to provide information about cumulative effects;
- a requirement in subsection 9(1A) for proponents to provide information about the GHG emissions that would be caused by their proposed projects;
- a requirement in subsection 9(1A) for proponents to provide information about predicted effects on distributive equity, including intergenerational equity and the potential for disproportionate impacts on persons or groups due to identity factors such as Indigeneity, racialization, sex, or gender;
- a requirement in subsection 9(1A) that proponents explain if and how their proposed projects will make net contributions to sustainability; and,
- corresponding requirements in section 12 for the Minister to take all of these considerations into account when formulating a decision under subsection 34(1) of the *Environment Act*.

As regards decision-making, criteria should be added or expanded to the *Environmental Assessment Regulations* to shift the focus from the question of whether proposed projects will have unacceptable adverse effects or significant environmental effects that cannot be mitigated to the question of whether proposed projects will make net contributions to sustainability. Transparent, accountable, and sustainability-based criteria for all decisions available to the

Minister under subsection 34(1) and section 40 of the *Environment Act* should be added to the Regulations, and the Minister's ultimate decision whether or not to approve an undertaking should be conditioned by a list of factors for sustainability-based decision-making in the public interest. That list of factors should include, at minimum, factors requiring consideration of:

- the way in which and the extent to which the undertaking would contribute to sustainability;
- the effects that the undertaking may have on Indigenous peoples in Nova Scotia, any adverse effect that the undertaking may have on Indigenous rights that are recognized and affirmed under section 35 of the *Constitution Act, 1982*, and whether a decision to approve the undertaking would respect the rights recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*;
- whether any adverse effects or significant environmental effects of the undertaking would have disproportionate impacts on Mi'kmaw or African Nova Scotian communities in the province or on other communities susceptible to disproportionate harms;
- whether the undertaking would impede or contribute to the achievement of Nova Scotia's greenhouse gas ("GHG") emissions reduction goals; and,
- whether the undertaking accords with or would undermine the core values of the community or communities that it would affect.[39]

Ultimately, consideration of these factors should inform the Minister's final decision to approve or reject an undertaking based on whether the undertaking would make a net contribution to sustainability.

> **Recommendation 4:** The Minister's ultimate decision whether or not to approve an undertaking should be conditioned by a list of factors for sustainability-based decision-making in the public interest. The current language of clauses 13(1)(b) and 13(1)(e) of the Regulations could be amended as follows:
>
> > **Approval**
> > […] that a review of the information and consideration of the factors indicates that there are no adverse effects or significant environmental effects which may be caused by the undertaking ~~or that such effects are mitigable~~ or the undertaking will make a net contribution to sustainability if such effects are mitigated and the undertaking is approved subject to specified terms and conditions and any other approvals required by statute or regulation;
> >
> > **Rejection**
> > […] that a review of the information and consideration of the factors indicates that there is a likelihood that the undertaking will cause adverse effects or significant environmental effects ~~which are unacceptable~~ that will not make a net contribution to sustainability and the undertaking is rejected.

[39] For an example of the consideration of a community's "core values" in determining whether a proposed project would make a net contribution to sustainability, see: Joint Review Panel for the Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, *Joint Review Panel Report: Executive Summary* (October 2007).

3.3 Application of Integrated, Tiered Assessments Covering All Potentially Significant Undertakings at the Regional, Strategic, and Project Levels

The requirement that next-generation EIA apply integrated, tiered assessments covering all potentially significant undertakings at the regional, strategic, and project levels means that EAs should be required for all proposed projects that could impede sustainability, and project-level assessments should not be the only tool in Nova Scotia's toolbox. RAs and SEAs should also be available as assessment tools, and RAs, SEAs, and EAs should be designed and implemented to support process integration and effective tiering.[40] Assessment triggers should be transparent and reflective of public input.[41] RAs and SEAs should have sustainability-based purposes, scoping, and assessment and decision-making criteria, and intersections between processes should be designed and implemented to meet the sustainability purpose that underpins the assessment regime on the whole.[42]

3.3.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Nova Scotia's EA regime currently focuses on project-level assessments. The *Environment Act* defines the word "undertaking" as meaning:

> […] an enterprise, activity, project, structure, work or proposal that, in the opinion of the Minister, causes or may cause an adverse effect or an environmental effect, and may include, in the opinion of the Minister, a policy, plan or program or a modification, extension, abandonment, demolition or rehabilitation, as the case may be, of an undertaking.[43]

Because this definition includes policies, plans, and programs that, in the Minister's opinion, cause or may cause an adverse effect or environmental effect, the regime technically empowers the Minister to require SEAs; however, this power has rarely been used, and the regime imposes no requirements or even guidance concerning its use. RAs are not currently contemplated by the *Environment Act*, and there are no clear sources of authority within the Act that empower the Minister to initiate them.

The lists of designated undertakings in Schedule A of Nova Scotia's *Environmental Assessment Regulations* establish a basic level of transparency about the kinds of proposed projects that will trigger EAs. Some descriptions of designated projects are clearer than others, however, and amendments should be made to clarify ambiguities. To give just one example, one of the designated Class I undertakings is "[a]n undertaking that disrupts a total of 2 ha or more of any wetland".[44] Environmental organizations, community groups, and many members of the public have long argued that this designation should be interpreted to require an EA of any proposed project that would disrupt two or more hectares of wetland; however, experience indicates that the Department of Environment and Climate Change interprets the designation to require an EA

[40] Exploring the key components", *supra* note 11 at page 11.
[41] "An Initial Evaluation", *supra* note 9 at page 15.
[42] *Ibid*.
[43] *Environment Act*, *supra* note 18 at subsection 3(az).
[44] *EAR*, *supra* note 34 at Schedule A, F.2.

only when two or more hectares of a single wetland may be disrupted. The Department's interpretation produces a counterintuitive result in which a proposed project that would disrupt numerous wetland areas that are each, individually, smaller than two hectares will not necessarily trigger an EA even if the project's cumulative impacts on wetlands within the province would be far greater than a project that would disrupt two or more hectares of a single wetland.

Because the *Environmental Assessment Regulations* include lists of designated undertakings, some proponents and members of the public may have the impression that only those projects meeting the description of a designated undertaking can be subjected to EA. However, as noted above, the definition of "undertaking" in the *Environment Act* is not restricted to "designated" activities. This means that the Minister has a discretionary power to require EAs of proposed projects that have not been listed as designated undertakings in the *Environmental Assessment Regulations*. This is an important power, as it gives the Minister necessary flexibility and discretion to require EAs of novel projects that have not previously been contemplated by the government.

3.3.2 *How This Requirement Could Be Incorporated or Enhanced*

Although the definition of "undertaking" in the *Environment Act* empowers the Minister to require SEAs, that power is not widely known or understood, and it is not conditioned by any further requirements or guidance in the Act. At a minimum, the Minister's existing, discretionary power to require SEAs should be identified more clearly in the Act, in a standalone provision that makes the power obvious. Furthermore, the Minister's power to require SEAs should ultimately be conditioned by triggering, scoping, assessment, and decision-making criteria that are transparent and sustainability-based. The possibility of imposing obligations to require SEAs in certain circumstances should also be considered. This report does not provide more detailed consideration of these matters because integrating SEAs within Nova Scotia's EA regime is not a stated government priority at this time; the report therefore recommends that the government begin by making the Minister's existing power clearer and commit to carrying out further research and consultation to inform the use of SEAs within the province.

> **Recommendation 5:** The Minister's existing power to require strategic environmental assessments should be identified more clearly in the *Environment Act*, in a standalone provision that makes the power obvious:
>
> > The Minister may require a strategic environmental assessment of a policy, plan or program that, in the opinion of the Minister, causes or may cause an adverse effect or environmental effect that may impair sustainability.
>
> **Recommendation 6:** The Government of Nova Scotia should commit to carrying out further research and consultation to inform the use of strategic environmental assessments within the province.

Additionally, the Minister should be empowered to require RAs to assess multiple activities within a region. Such a power would not only serve the public interest by supporting big-picture assessment and planning but could also remove considerable financial, technical, and

administrative burdens from the shoulders of proponents, because it would allow cumulative effects assessments to be carried out thoroughly and dynamically in processes that are designed to take multiple activities into account, as opposed to the project-specific EAs for which proponents are directly responsible.

As with the Minister's power to require SEAs, the Minister's power to require RAs should ultimately be conditioned by triggering, scoping, assessment, and decision-making criteria that are transparent and sustainability-based. The possibility of imposing obligations to require RAs in certain circumstances should also be considered. This report does not provide more detailed consideration of these matters because integrating RAs within Nova EA regime is not a stated government priority at this time. The report therefore recommends that the government begin with an incremental first step that expands the Minister's existing powers to require EAs and SEAs under the *Environment Act*. The expanded power could be rooted in the current definition of "undertaking" and could enable the Minister to require RAs when multiple undertakings are proposed or could be proposed within a region of the province. This report also recommends that the government commit to carry out further research and consultation to inform the use of RAs within the province.

> **Recommendation 7:** The Minister's existing powers to require environmental assessments and strategic environmental assessments should be expanded to enable the Minister to require regional assessments when multiple undertakings are proposed or could be proposed within a region of the province. A standalone provision of this kind should be added to the *Environment Act*:
>
> > The Minister may require a regional assessment when multiple undertakings are proposed within a region of the province or, in the opinion of the Minister, multiple undertakings could be proposed to exploit resources or development opportunities available within a region of the province.
>
> **Recommendation 8:** The Government of Nova Scotia should commit to carrying out further research and consultation to inform the use of regional assessments within the province.

As regards the lists of designated undertakings that appear in Schedule A of the *Environmental Assessment Regulations*, the process of listing designated projects provides a basic level of transparency about the kinds of proposed projects that will trigger EAs, and it should therefore be retained; however, some existing designation descriptions should be amended for clarity. Additionally, the lists of designated undertakings should be amended to ensure that EAs are required for all proposed projects that may have adverse effects or environmental effects that could impair sustainability. Furthermore, to enhance transparency and provide greater certainty to members of the public and proponents, the *Environmental Assessment Regulations* should be amended to stipulate the criteria that require designation as a Class I or Class II undertaking and should provide for periodic public review of Schedule A to ensure the lists of designated undertakings remain current in a rapidly changing world.

Recommendation 9: The method of listing designated undertakings should be retained, but designation descriptions should be amended for clarity as needed. In particular, the "wetlands" designation in the list of Class I designated projects should be amended as follows:

> F.2. An undertaking that disrupts a cumulative total of 2 ha or more of ~~any~~ wetland.

Recommendation 10: The lists of designated Class I and Class II undertakings should be amended to ensure that environmental assessments are required for all proposed projects that may have adverse effects or environmental effects that could impair sustainability.

Recommendation 11: To enhance transparency and provide greater certainty to members of the public and proponents, the *Environmental Assessment Regulations* should be amended to stipulate the criteria that require designation as a Class I or Class II undertaking.

Recommendation 12: The *Environmental Assessment Regulations* should provide for periodic public review of Schedule A to ensure the lists of designated undertakings remain current in a rapidly changing world and continue to require environmental assessments for all proposed projects that may have adverse effects or environmental effects that could impair sustainability. A review should be conducted at least every three years.

3.4 Interjurisdictional Cooperation, Collaboration, and Upward Harmonization

The requirement that next-generation EIA enable interjurisdictional cooperation, collaboration, and upward harmonization means that the law should at minimum recognize potential intersections between federal, provincial, and Indigenous jurisdiction and include mechanisms for collaboration when appropriate.[45] Collaboration can support efficiency by avoiding redundancy and duplication and can also help to ensure that assessment processes improve over time when the highest standards among the collaborating jurisdictions create a trajectory of "upward harmonization".[46]

3.4.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Section 47 of the *Environment Act* contemplates situations where a proposed project will trigger an EA under Nova Scotia's regime and will also trigger other EIA processes, whether they be other processes administered by the Government of Nova Scotia or processes administered by the Government of Canada, another province, or a municipality. Ministerial powers to facilitate joint assessments in such situations are set out accordingly. These provisions addressing joint assessments do not envision joint assessments or other cooperative or collaborative arrangements being entered into with Indigenous governing bodies. Additionally, the provisions do not specifically require that the highest standards among joined assessment processes be met.

---

[45] "An Initial Evaluation", *supra* note 9 at page 20; "Exploring the key components", *supra* note 11 at pages 11-12.
[46] "An Initial Evaluation", *supra* note 9 at page 20.

3.4.2 *How This Requirement Could Be Incorporated or Enhanced*

To ensure respect for Indigenous rights—including not only Aboriginal rights and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982* but also Indigenous rights to self-determination recognized under international law—section 47 of the *Environment Act* should be amended to enable joint assessments conducted in partnership with Indigenous governing bodies.

> **Recommendation 13:** Section 47 of the *Environment Act* should be amended to enable joint assessments conducted in partnership with Indigenous governing bodies.

Additionally, section 47 of the Act should be amended to facilitate upward harmonization by requiring that, among the requirements imposed by processes being joined, the most stringent requirements for environmental protection, Indigenous rights recognition, public participation, and sustainability-based scoping, assessment, and decision-making must be followed when joint assessments are carried out.

> **Recommendation 14:** Section 47 of the *Environment Act* should be amended to require that among the requirements imposed by processes being joined, the most stringent requirements for environmental protection, Indigenous rights recognition, public participation, and sustainability-based scoping, assessment, and decision-making must be followed when joint assessments are carried out.

3.5 Respect for Indigenous Knowledge, Rights, and Authority and Facilitation of Reconciliation

The requirement that next-generation EIA be designed to respect Indigenous knowledge, rights, and authority and to facilitate reconciliation—including by creating opportunities for co-governance with Indigenous governing bodies—means that the law should recognize and affirm the constitutionally-protected rights of Indigenous peoples in Nova Scotia and the rights of Indigenous peoples under international law, including but not limited to the Indigenous rights expressed in the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"). The law should include mechanisms for Indigenous engagement in EIAs and environmental decision-making, including mechanisms for incorporating Indigenous knowledge and mechanisms enabling cooperation through joint assessment processes.[47]

In accordance with *UNDRIP* and to advance reconciliation, Crown consultation with Mi'kmaq in Nova Scotia should recognize Mi'kmaw rights to "own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired",[48] and should seek free, prior, and informed consent to proposed activities that would affect Mi'kmaw lands, territories, and resources. Participation and joint assessment arrangements and other opportunities for collaboration under the *Environment Act* should recognize Mi'kmaw jurisdiction to approve or reject proposed projects within or affecting Mi'kmaw lands, territories, and resources.

---

[47] "Exploring the key components", *supra* note 11 at page 12; "An Initial Evaluation", *supra* note 9 at page 18.
[48] *United Nations Declaration on the Rights of Indigenous Peoples* at Article 26.2.

3.5.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

The *Environmental Assessment Regulations* currently include very limited recognition of Indigenous rights and interests. Proponents are required to provide information about concerns expressed by Indigenous peoples about the adverse effects or environmental effects of proposed projects, and they are also required to describe the steps they have taken to identify and address such concerns.[49] These factors must also be considered by the Minister when formulating decisions under subsection 34(1) of the *Environment Act*.[50]

Notably, the Indigenous concerns contemplated by the *Environmental Assessment Regulations* are concerns about adverse effects and environmental effects, not concerns about associated impacts on Indigenous rights, including Aboriginal and treaty rights that are recognized and affirmed by section 35 of the *Constitution Act, 1982.* The Regulations' current silence on the topic of Aboriginal and treaty rights and Indigenous rights recognized under international law is a known problem. Among other things, it leads easily to situations in which inexperienced proponents fail to sufficiently address the potential for adverse impacts on Aboriginal or treaty rights and therefore fail to equip the Crown to fulfil even the minimum requirements of its constitutional duty to consult. Failures to address the potential for adverse impacts on Aboriginal or treaty rights and to explore appropriate options for mitigation and accommodation not only impose unjust burdens on Indigenous communities but also create unwelcome uncertainty and risk for proponents.

Indigenous knowledge is not addressed in the *Environmental Assessment Regulations*: proponents are not required to seek Indigenous knowledge when preparing registration documents, and the Minister is not required to take Indigenous knowledge into account when making definitive decisions under subsection 34(1) of the *Environment Act*.

As discussed above, section 47 of the *Environment Act* does not envision joint assessments or other cooperative or collaborative arrangements being entered into with Indigenous governing bodies.

3.5.2 *How This Requirement Could Be Incorporated or Enhanced*

As an absolute minimum, the *Environmental Assessment Regulations* should be amended to acknowledge the relevance of Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982.* In line with Recommendation 2 of this report—which recommends that Part IV of the *Environment Act*, or, in the alternative, the *Environmental Assessment Regulations*, be amended to include a list of purposes that are specific to Nova Scotia's EA process—respect for Indigenous knowledge, rights, and authority and the facilitation of reconciliation should also be foregrounded as explicit purposes of EA in Nova Scotia.

> **Recommendation 15:** Part IV of the *Environment Act*, or, in the alternative, the *Environmental Assessment Regulations*, should be amended to include a list of purposes that are specific to Nova Scotia's environmental assessment processes, and this list of

[49] *EAR*, *supra* note 34 at clauses 9(1A)(xiii)-(xv).
[50] *Ibid* at subsections 12(c)-(d).

purposes should include purposes foregrounding respect for Indigenous knowledge, rights, and authority and the facilitation of reconciliation.

Proponents should be required to address potential impacts on Indigenous rights when preparing EA documents—including constitutionally-protected Aboriginal and treaty rights as well as further rights recognized under international law—and the Minister should be expressly required to take such rights into account when formulating decisions under subsection 34(1) of the *Environment Act*. The requirement for Ministerial consideration already exists under the common law of the duty to consult, but acknowledging it expressly in the *Environmental Assessment Regulations* would enhance transparency and serve as an important reminder to all involved.

> **Recommendation 16:** Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to address potential impacts on Indigenous rights when preparing environmental assessment documents and to require the Minister to take such rights into account when formulating a decision under subsection 34(1) of the *Environment Act*.

Crucially, adverse impacts on Indigenous peoples and Indigenous rights and interests should not simply be taken into account by the Minister but must also be included in the list of factors for sustainability-based decision-making in the public interest that has been recommended and described at length above.

In light of the Government of Nova Scotia's stated interest in weaving the Mi'kmaw principle of *netukulimk* into Nova Scotia's EA process, a consideration concerning *netukulimk* may be another appropriate addition to the recommended list of factors for sustainability-based decision-making in the public interest and/or to the *Environmental Assessment Regulations*' section 12 considerations for all Ministerial decision-making under subsection 34(1) of the *Environment Act*. Recommendations throughout this report that call on the Government of Nova Scotia to advance Indigenous rights recognition and make space within Nova Scotia's EA regime for Mi'kmaw communities to exercise jurisdiction over activities affecting their lands, territories, and resources are also central to the implementation of *netukulimk* in Nova Scotia, as *netukulimk* is not simply about the sustainable use of nature's gifts but is also an expression of Mi'kmaw worldview, Mi'kmaw law, Mi'kmaw governance, and Mi'kmaw rights and responsibilities to the land.

Proponents should be required to seek Indigenous knowledge and include it in EA documents if Indigenous communities wish to make such knowledge available, and the Minister should be required to take such knowledge into account when formulating decisions under subsection 34(1) of the *Environment Act*.

> **Recommendation 17:** Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to seek Indigenous knowledge and include it in environmental assessment documents if Indigenous communities wish to make such knowledge available and to require the Minister to take such knowledge into account when formulating a decision under subsection 34(1) of the *Environment Act.*

3.6 Assessment Streams for Assessments of Projects and Regional/Strategic Undertakings of Different Character and Significance

The requirement that next-generation EIA provide "assessment streams" for assessments of projects and regional and strategic undertakings of different character and significance recognizes that assessment processes should be applied to many different kinds of proposed activities, some larger in scope and with greater complexity or level of risk than others.[51] Although minimum standards for next-generation EIA should be met across all assessment streams, EIA scholarship recognizes the value of having different streams available that enable more or less intensive and extensive assessment processes. Characteristics of "more demanding" assessment streams can include "more detailed proponent submissions, longer timelines, more extensive review by government agencies and independent experts, more openings for effective public engagement including public-hearings, final decision-making by a higher authority (e.g. Cabinet rather than a minister) and/or opportunities for appealing key decisions throughout the assessment process".[52] Scholarship recommends that EIA regimes "pre-assign predictable types of undertakings to the appropriate streams", not least to create transparency and enable proponents to anticipate in advance what kind of assessment will be required for their proposed project;[53] however, scholarship also recommends enabling flexibility and providing discretion for the intensification of assessment processes as needed so that a project that triggers a less demanding stream may nevertheless be put through a more intensive assessment if reasons to do so emerge.

3.6.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Nova Scotia's current use of the Class I and Class II EA streams is generally in accordance with the recommendations for project-level assessments that appear in the scholarship, as is the Minister's discretionary ability to require more intensive processes in a Class I assessment as needed, such as by requiring a Focus Report or Environmental-assessment Report, the latter of which may also be accompanied by the establishment of an independent review panel. As discussed above, the definition of "undertaking" in the *Environment Act* provides ministerial authority to require SEAs, but the *Environment Act* does not currently empower the Minister to initiate RAs.

3.6.2 *How This Requirement Could Be Incorporated or Enhanced*

This requirement would be enhanced by amendments to the *Environmental Assessment Regulations* to provide clear guidance as to the circumstances that can or should require the intensification of Class I EA processes. This report recommends that section 13 of the Regulations be restructured significantly to impose clear, sustainability-based criteria for the decisions that are available to the Minister under subsection 34(1) of the *Environment Act*. As regards assessment streams, criteria for ministerial decisions to require a Focus Report or Environmental-assessment Report in a Class I EA are especially important.

---

[51] "Exploring the key components", *supra* note 11at page 12.
[52] *Ibid.*
[53] *Ibid*.

Recommendation 18: Section 13 of the *Environmental Assessment Regulations* should be restructured to impose clear, sustainability-based criteria for the decisions that are available to the Minister under subsection 34(1) of the *Environment Act*. As regards the available decisions to require a Focus Report or Environmental-assessment Report in a Class I EA, at minimum the Regulations should specify clear threshold criteria that describe the nature and extent of potential adverse effects or significant environmental effects that would ground a ministerial decision to require an intensified process.

3.7 Meaningful Public Participation

The requirement that next-generation EIA provide for meaningful public participation means that the law should at minimum provide "public notice, timely and easy access to information", including through digital means, "realistic opportunities for informed public comment, public hearings, deliberative forums, mandatory reporting on how public contributions were addressed, and participant financial assistance, impartially administered".[54] Enabling "early and active involvement" by the public is also a priority,[55] as is enabling involvement of 'the full range of interested and informed participants".[56]

3.7.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Within Nova Scotia's current EA regime, basic public participation opportunities are required in all Class I assessments, but these typically take the form of short (30-day) windows for public comments on Environmental Assessment Registration Documents, which most members of the public find to be insufficient time to review, understand, and respond meaningfully to information submitted by proponents. Additional public participation opportunities can be added to Class I EAs if assessment processes are intensified to require Environmental-assessment Reports or review panel hearings, but the discretionary nature of the intensification process means that members of the public cannot count on having such opportunities, and, in practice, these opportunities are presented rarely. The most extensive public participation opportunities are available in Class II EAs, but most EAs in Nova Scotia proceed through the Class I process. Comments received from the public are posted online on project pages maintained by the Department of Environment and Climate Change, but departmental staff do not synthesize and report publicly on submissions from the public, and formal responses to public submissions are generally not provided. There is no public participation funding administered for provincial EAs.

3.7.2 *How This Requirement Could Be Incorporated or Enhanced*

Two recommendations to enhance meaningful public participation are obvious from the comments presented above:

Recommendation 19: The typical 30-day window for public comments on Environmental Assessment Registration Documents should be extended. A minimum of 90 days should be provided.

---

[54] *Ibid* at page 12.
[55] "An Initial Evaluation", *supra* note 9 at page 21
[56] "Exploring the key components", *supra* note 11 at page 12.

Recommendation 20: The Government of Nova Scotia should establish a participant funding program to support public participation in environmental assessments. At minimum, this program should offer funding support that participants could access to engage consultants to help them to review, understand, and provide comment on technical submissions by proponents.

Additionally, meaningful public participation would be enhanced if departmental staff overseeing EAs were required to prepare reports, to be publicly released, that synthesize and summarize comments received from the public on Environmental Assessment Registration Documents and other information submitted by proponents. It is to be assumed that such syntheses are being prepared to some extent already as departmental staff conduct EAs and prepare materials for the Minister's review; requiring a public-facing component would increase transparency and accountability by enabling members of the public to see that their concerns are being heard.

Recommendation 21: Departmental staff overseeing environmental assessments should be required to prepare public reports that synthesize and summarize comments received from the public on information submitted by proponents.

3.8 Full-process Learning

The requirement that next-generation EIA enable full-process learning means that assessment processes should be designed to foster "mutual learning" amongst participants (including proponents, governmental staff, and members of the public) as opposed to one-way flows of information from proponents and government to the public; moreover, assessment processes should also be viewed as opportunities to engage in continuous learning and improvement about best practices for sustainability-based assessments.[57] Among other things, continuous learning should give attention to the accuracy and efficacy of effects predictions made during assessment processes so that requirements for effects predictions can be improved as needed, which means that effective monitoring and follow-up are also important elements of this requirement.[58]

3.8.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

There are no explicit indications that continuous learning is an element that has been incorporated consciously in Nova Scotia's EA regime; however, the scholarship suggests that continuous learning is enabled through processes such as "early engagement, opportunities for collaborative partnerships, open access to information and science through searchable data platforms, independent and impartial processes, full transparency and accountability, and participative engagement in specifying clear sustainability-based decision-making criteria".[59] This means that where such processes exist in the regime, continuous learning can be fostered even if it is not advertised explicitly as a core feature or goal of the regime.

[57] *Ibid* at page 13.
[58] *Ibid*.
[59] *Ibid.*

3.8.2 *How This Requirement Could Be Incorporated or Enhanced*

Continuous learning can be enabled through Nova Scotian EAs by implementing or strengthening the good processes described above, such as early engagement, collaborative partnerships, meaningful public participation, and effective monitoring and follow-up. As these issues are addressed in other subsections of this report, this report does not offer specific recommendations concerning them here.

3.9 Early Process Initiation

The requirement that next-generation EIA require early initiation of assessment processes means that the law should facilitate early consideration of the purpose for and options available for proposed projects so that public and other stakeholder interests can inform the proposal that is registered for assessment.[60]

3.9.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Subsection 9(1) of the *Environmental Assessment Regulations* states that proponents must submit Environmental Assessment Registration Documents ("EARDs") before they proceed with the "final design" of their undertakings, which suggests that the EA process is understood, at least to some extent, as a process that should begin early enough to allow for public input into final project design. Additionally, subsection 9(1A) of the Regulations requires proponents to describe in their EARDs all of the steps that they have taken up to that point to identify Indigenous and general public concerns about the adverse effects or significant environmental effects of their proposed projects, which suggests that engagement with Indigenous communities and members of the general public should be carried out before EARDs are submitted.[61] However, the Regulations do not explicitly require proponents to engage with Indigenous communities and members of the public before preparing EARDs. In practice, it is often the case that by the time a proponent submits an Environmental Assessment Registration Document to the Department of Environment and Climate Change, the proponent's preferred location, scale, scope, and technical dimensions for the proposed project have already been determined, leading members of the public to feel that they can make little or no contribution to the proponent's plans.

3.9.2 *How This Requirement Could Be Incorporated or Enhanced*

There are at least two directions that the Government of Nova Scotia could take to enhance early process initiation for Nova Scotian EAs.

The first option would be to implement a formal "planning phase" analogous to the first of the five phases in an impact assessment ("IA") under Canada's *Impact Assessment Act*. Under the federal Act, the IA process begins when a proponent submits an Initial Project Description, which must meet certain basic information requirements but is not expected to be very detailed. As the planning phase unfolds, proponents are expected to work with the Impact Assessment

---

[60] "An Initial Evaluation", *supra* note 9 at page 23.

[61] Early engagement in the project planning stages is encouraged in Nova Scotia Environment, *A Proponent's Guide to Environmental Assessment* (February 2001; revised September 2017) at page 3 ["*Proponent's Guide to EA*"].

Agency of Canada, Indigenous peoples, and members of the general public to develop a Detailed Project Description that reflects issues being raised by contributors to the process. Indigenous peoples and members of the public also contribute to the development of Tailored Impact Statement Guidelines during this phase, which means that they have a significant opportunity to help identify the kinds of studies that the proponent will be required to conduct to support a thorough assessment.

The establishment of a formal planning phase in Nova Scotia's EA process could potentially be of great benefit to Mi'kmaw communities and members of the general public, as it would not only facilitate early process initiation but would also enhance meaningful public and Indigenous participation. As an alternative to establishing a formal planning phase, new requirements could be added to section 9 of the *Environmental Assessment Regulations* to explicitly require proponents to engage with Indigenous communities and members of the public before preparing EARDs.

Whichever option is preferred, "[t]he key is to ensure the public process begins before a preferred alternative has been selected, and while there is still time for sustainability-based case/context-based scoping and criteria development".[62] Indigenous peoples and members of the general public should be included in proponents' early considerations of the studies that will be undertaken to develop EARDs, as well as in proponents' decisions as to when such studies will be carried out.[63] As regards the latter point, local knowledge should be recognized as a valuable resource that can support the efficiency and the effectiveness of EAs. For example, many proponents experience avoidable assessment delays because they fail to carry out wildlife surveys or other studies on local species at appropriate times of the year and must wait for the next appropriate season; significant oversights such as these can be avoided if proponents engage with local communities early and meaningfully and invite the benefit of local knowledge.

> **Recommendation 22:** Early process initiation should be required in Nova Scotia's environmental assessment process, either by the establishment of a formal planning phase or by the addition of new requirements to section 9 of the *Environmental Assessment Regulations*.

3.10 Rigorous and Credible Impact Assessments Focused on Cumulative and Interactive Effects and Uncertainties

The requirement that next-generation EIA conduct rigorous and credible assessments focused on cumulative and interactive effects and uncertainties means that cumulative effects assessments and recognition of uncertainties must be centered in assessment processes, as they are central to the goal of using assessment to achieve integrated and sustainable planning.[64] This requirement also reiterates the importance of using higher-level or more broadly scoped assessment processes such as RAs and SEAs to enable effective and efficient tiering, allowing for cumulative effects

[62] "An Initial Evaluation", *supra* note 9 at page 21.
[63] *Ibid* at page 23.
[64] "Exploring the key components", *supra* note 11 at page 14.

assessments to be conducted at levels and scales where they can more effectively take bigger picture issues into account, which can then be used to inform project-level assessments.[65]

3.10.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Cumulative effects assessment is not currently a legal requirement in Nova Scotia's EA regime, and policy guidance prepared for proponents does not encourage its use.[66] Uncertainty is addressed to some extent by the presence of the precautionary principle in the *Environment Act*, but this connection is not strong, and application of the precautionary principle is not an explicit requirement of ministerial decision-making in the EA process.

3.10.2 *How This Requirement Could Be Incorporated or Enhanced*

Several recommendations follow clearly from the assessment above. Proponents should be required to provide information about cumulative effects in the information they provide to the Minister, and the Minister should be required to take cumulative effects assessments into account when formulating decisions under subsection 34(1) of the *Environment Act*.

> **Recommendation 23:** Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to provide information about cumulative effects in the information they provide to the Minister and require the Minister to take cumulative effects assessments into account when formulating a decision under subsection 34(1) of the *Environment Act*.

Additionally, cumulative effects considerations should inform the new decision-making criteria that have been recommended to condition the Minister's exercise of discretionary powers to intensify Class I EA processes, such as by requiring Focus Reports or Environmental-assessment Reports.

> **Recommendation 24:** Cumulative effects considerations should inform the new decision-making criteria that have been recommended to condition the Minister's exercise of discretionary powers to intensify Class I environmental assessments.

Proponents should also be required to address uncertainty in the information they provide to the Minister, and the Minister should be required to take uncertainty and the precautionary principle into account in decision-making under subsection 34(1) of the *Environment Act*. Additionally, new criteria imposed for decisions under subsection 34(1) of the Act should require the Minister to apply the precautionary principle in all such decisions.

> **Recommendation 25:** Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to address uncertainty in the information they provide to the Minister and require the Minister to take uncertainty and the precautionary principle into account when formulating a decision under subsection 34(1) of the *Environment Act*.

---

[65] *Ibid*.
[66] *Proponent's Guide to EA*, *supra* note 61.

Recommendation 26: New criteria imposed for decisions under subsection 34(1) of the *Environment Act* should require the Minister to apply the precautionary principle in all such decisions.

3.11 Comparative Evaluation of Potentially Reasonable Alternatives, Including the Null Option

The requirement that next-generation EIA include comparative evaluation of potentially reasonable alternatives, including the "null option" (meaning, the possibility of not going forward with the proposed project) means that the law must require proponents to identify and evaluate potentially reasonable alternatives to their proposed undertakings (i.e., alternative activities involving "fundamentally different approaches" to achieve the desired objective) as well as potentially reasonable alternative means for their proposed undertakings (i.e., alternatives to design elements such as location, technology, scale, production intensity and timeline, etc.).[67] Benefits and detriments of alternatives should be evaluated in light of a sustainability purpose and sustainability criteria.[68] This shifts the focus from assessing whether a proposed project is acceptable from the perspective of causing minimal or acceptable adverse effects or significant environmental effects to a new focus on what kind of project would be most beneficial from a sustainability perspective. Consideration of alternatives should also shift the focus from the proponent's perspective on the need for and benefit of the project to a public-interest perspective on whether and how the project will advance sustainability.

3.11.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Subsection 9(1A) of the *Environmental Assessment Regulations*, which lists the information that proponents must provide in their Environmental Assessment Registration Documents, does not require proponents to provide information about alternatives to the project or alternative means for carrying out the project. The subsection does require proponents to describe the "purpose and need for" their undertakings,[69] but there is no requirement that proponents consider anything other than their own economic interests in doing so.

3.11.2 *How This Requirement Could Be Incorporated or Enhanced*

It follows clearly from the analysis above that subsection 9(1A) of the *Environmental Assessment Regulations* should be amended to require proponents to identify and evaluate potentially reasonable alternatives to and alternative means for undertakings, including by identifying and evaluating the option of not carrying out proposed projects.

Recommendation 27: Subsection 9(1A) of the *Environmental Assessment Regulations* should be amended to require proponents to identify and evaluate potentially reasonable alternatives to and alternative means for undertakings, including by identifying and evaluating the option of not carrying out proposed projects.

---

[67] "An Initial Evaluation", *supra* note 9 at page 14.
[68] *Ibid*.
[69] *EAR*, *supra* note 34 at paragraph 9(1A)(b)(vii).

Additionally, the current requirement that proponents describe the "purpose and need for" their undertakings should be amended to stipulate that proponents must frame this description by considering whether and how their proposed projects will contribute to sustainability and the public interest—in other words, it must be clear that proponents cannot simply describe purpose and need from their own economic vantage points.

> **Recommendation 28:** The current requirement in paragraph 9(1A)(b)(vii) of the *Environmental Assessment Regulations* should be amended to stipulate that proponents must frame this description by considering whether and how their proposed projects will contribute to sustainability and the public interest.

3.12 Credible, Accountable, and Authoritative Decision-making for Assessed Undertakings, Policy-making, and Other Core Initiatives under EIA

The requirement that next-generation EIA include credible, accountable, and authoritative decision-making for assessed undertakings, policy-making, and other core initiatives means several things. One is that decision-making should be based in law and not subject to undue discretion—some discretion is appropriate and necessary, but decision-making criteria to be weighed in the exercise of discretion should be transparent and designed to advance sustainability-based decision-making.[70] Statutory rights of appeal should also be included.[71] Other requirements for credible, accountable, and authoritative decision-making in EIA include "arm's-length administration", the mobilization of "impartial expertise", and the publication of "analyses of options and justification of decisions in light of explicit sustainability-based criteria and trade-off rules".[72]

3.12.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

As is discussed above, section 12, subsection 13(1), and section 18 of the *Environmental Assessment Regulations* condition the Minister's decision-making powers under subsection 34(1) of the *Environment Act* by listing several factors that the Minister must take into consideration when formulating decisions under subsection 34(1) and by imposing some decision-making criteria for certain of those decisions. As has also been discussed above, the decision-making criteria presented in subsection 13(1) and section 18 of the Regulations are incomplete and also create significant ambiguity about how ministerial discretion may be exercised, particularly with regard to ministerial decisions to intensify Class I EAs by requiring Focus Reports or Environmental-assessment reports.

EAs in Nova Scotia are not administered by an independent, "arm's length" agency: they are administered by staff in the Department of Environment and Climate Change, the work of which is overseen directly by the Minister. Within the EA process, departmental staff administering EAs are not required to prepare formal reports and recommendations to the Minister that will be made available to the public. Approval or rejection decisions by the Minister are typically accompanied

[70] "Exploring the key components", *supra* note 11 at pages 14-15.
[71] *Ibid* at page 14.
[72] *Ibid*.

by minimal reasons, making it difficult for members of the public to determine whether and how concerns they raised have been addressed.

There is no statutory right to appeal ministerial decisions made under subsection 34(1) of the *Environment Act*, but judicial review is available under the common law.

3.12.2 *How This Requirement Could Be Incorporated or Enhanced*

This report has already recommended that the considerations listed in section 12 of the *Environmental Assessment Regulations* and the decision-making criteria presented in subsections 13(1) and 18 of the Regulations be expanded to provide for thorough, transparent, and accountable sustainability-based decision-making in the public interest. Those recommendations need not be repeated here.

It is open to Indigenous peoples, members of the public, environmental non-governmental organizations, and other stakeholders to call for the creation of an independent, "arm's length" agency to administer EAs in Nova Scotia. This report does not make that recommendation at this time. Whether or not an independent, arm's length agency is established, there are a number of viable, low-cost options that could improve transparency and accountability in EA processes. These include in particular the publication of reports, recommendations, and detailed reasons that would give members of the public and other stakeholders valuable insight into how expressions of support and concern are taken into account and addressed when assessments are conducted and decisions are made.

Recommendation 21 of this report has already recommended that departmental staff overseeing EAs be required to prepare public reports that synthesize and summarize comments received from the public on Environmental Assessment Registration Documents and other information submitted by proponents. The following additional recommendations build on Recommendation 21 in the interests of improving transparency and accountability.

> **Recommendation 29:** Departmental staff administering an EA should prepare a formal report and recommendation to the Minister, to be publicly released, that provides a transparent and accountable summary of the environmental assessment and a thorough analysis of all relevant assessment and decision-making factors.
>
> **Recommendation 30:** Ministerial decisions under subsection 34(1) and 40 of the *Environment Act* should be accompanied by detailed written reasons that explain how all relevant assessment and decision-making factors have been taken into account.

3.13 Follow-up of Compliance with Conditions, Effect Predictions, and Effective Response to Monitoring Findings

The requirement that next-generation EIA include follow-up of compliance with conditions and effect predictions, as well as effective response to monitoring findings, means that the regime should be designed to require terms and conditions for ongoing monitoring and should also be prepared to devote resources to reviewing and responding to monitoring results, including by

taking compliance and enforcement actions when necessary, but more generally to enable continuous learning, to test effect predictions, and to enable responsive and adaptive management as needs arise.[73] Additionally, scholarship states that the legal regime "should provide for regular independent review and revision of follow-up programs and associated methods, and ongoing monitoring of how the overall assessment regime performs, including the strengths and deficiencies of impact predictions, public engagement efforts, trade-off avoidance, [and] compliance and effects monitoring".[74]

3.13.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

The *Environmental Assessment Regulations* contemplate that EA approvals may be subject to specified terms and conditions, and the broader *Environment Act* regime enables compliance and enforcement actions to be taken when terms and conditions are not met; however, the legislation does not address the need for follow-up and monitoring programs and does not explicitly require or encourage the use of such programs to evaluate effects predictions and enable effective responses or adaptive management when needed.

Research and advocacy by environmental non-governmental organizations, academics, and community groups in Nova Scotia indicate that ineffective follow-up and monitoring of terms and conditions imposed in EA approvals is a significant concern. A related concern is that EA approvals often defer the finalization of important design details to the Industrial Approval stage, which means that the project that ultimately goes forward under an Industrial Approval may be considerably different from what was approved in an EA. Successive amendments to Industrial Approvals that slowly change the nature of a project over time can exacerbate this problem significantly.

3.13.2 *How This Requirement Could Be Incorporated or Enhanced*

Given the absence of specific requirements for terms and conditions that enable appropriate follow-up and monitoring, the *Environmental Assessment Regulations* should be amended to include one or more provisions that require EA approvals to be subject to such terms and conditions as are necessary to compare effects predictions with actual effects and to enable timely and effective response and adaptive management as needed.

> **Recommendation 31:** The *Environmental Assessment Regulations* should be amended to include one or more provisions that require environmental assessment approvals to be subject to such terms and conditions as are necessary to compare effects predictions with actual effects and to enable timely and effective response and adaptive management as needed.

Additionally, Part IV of the *Environment Act* should be amended to include a requirement for periodic independent review of the follow-up, monitoring, and compliance programs administered by the Department of Environment and Climate Change after EA approvals are

[73] *Ibid* at page 15.
[74] *Ibid.*

granted. Such independent reviews should form the basis for necessary revisions to such programs when revision needs are identified.

> **Recommendation 32:** Part IV of the *Environment Act* should be amended to include a requirement for periodic independent review of the follow-up, monitoring, and compliance programs administered by the Department of Environment and Climate Change after environmental assessment approvals are granted. Such reviews should be carried out every five years at minimum, beginning in 2025.

3.14 Independent and Impartial Implementation and Administration

The requirement that next-generation EIA have independent and impartial implementation and administration means that assessments should be carried out by an "impartial, arm's length body" that is "designed, located and empowered to be an independent and impartial servant of the long-term public interest" and "insulated to the extent possible from political interest that tends to favour immediate partisan priorities".[75] While decision-making should ultimately remain with elected decision-makers[76] (whether individual ministers or Cabinets), decision-making should be based on impartial and transparent assessment, reporting, and recommendations by independent bodies.[77]

3.14.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

As noted above, Nova Scotia does not have an independent, arm's length body to administer EAs. Establishing an independent agency analogous to the Impact Assessment Agency of Canada is a theoretical possibility but is understood to be something that the Government of Nova Scotia is not contemplating at this time.

3.14.2 *How This Requirement Could Be Incorporated or Enhanced*

The discussion above in Subsection 3.12.2 of this report is equally relevant in the context of this core requirement and need not be repeated here.

3.15 Effective, Efficient, and Fair Process

The requirement that next-generation EIA be an effective, efficient, and fair process highlights the fact that regime design does not have to choose between effectiveness and efficiency: these characteristics go hand-in-hand.[78] Many of the elements of the core requirements discussed above support effective, efficient, and fair processes, including especially: early initiation, "clarity and consistency in core process requirements while facilitating flexibility of application in different contexts", and full-process learning.[79]

---

[75] *Ibid*.
[76] *Ibid* at page 14.
[77] *Ibid* at page 15.
[78] *Ibid.*
[79] *Ibid* at pages 15-16.

3.15.1 *What Exists Currently in Nova Scotia's Environmental Assessment Regime*

Effectiveness, efficiency, and fairness are evaluated as characteristics of the regime on the whole, through the lens of most of the other core requirements for next-generation EIA that have been described above. For these reasons, a more comprehensive analysis will not be conducted here, although some key points should be noted.

In its current form, the Class I EA stream tends to favour "efficiency" as that term is understood from the perspective of proponents and, to some extent, government. The process proceeds quickly with minimal opportunity for public engagement, and the swift timeline also raises significant concerns about the meaningful fulfilment of the Crown's constitutional obligations to consult and accommodate Mi'kmaq when proposed projects could adversely affect their Aboriginal or treaty rights. That being said, although the swift process may often benefit proponents, it also comes with risks, as it can ultimately lead to inefficiencies in the form of protracted legal challenges that could have been avoided with a process that invited more inclusive and meaningful public and Indigenous engagement.

3.15.2 *How This Requirement Could Be Incorporated or Enhanced*

Several of the recommendations that have been made throughout this report can help to support effectiveness, efficiency, and fairness. Key recommendations in this regard are those pertaining to early process initiation, meaningful public engagement, and transparent and accountable decision-making criteria that improve certainty while also retaining necessary flexibility.

4.0 Connecting the Core Requirements for Next-generation EIA to the *EGCCRA* Considerations

Section 3.0 of this report presented 32 numbered recommendations for amendments to the *Environment Act* and *Environmental Assessment Regulations* to advance movement towards a next-generation Nova Scotian EA regime. This section lists all 32 recommendations for ease of reference and then organizes several of them to correspond with the five priority considerations listed in *EGCCRA*.

4.1 List of Numbered Recommendations

Recommendation 1: The Purpose section of Nova Scotia's *Environment Act* should be amended as follows:

> 2 The purposes of this Act ~~is~~ are to achieve sustainability and support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals[…]

Recommendation 2: Part IV of the *Environment Act* should be amended to include a list of purposes that are specific to Nova Scotia's environmental assessment process, including the purpose of achieving sustainability. In the alternative, this specific list of purposes should be added to the *Environmental Assessment Regulations*.

Recommendation 3: Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to add requirements for information about and consideration of a larger suite of factors needed to inform sustainability-based assessment and decision-making, including at minimum:

- a requirement in subsection 9(1A) for proponents to provide information about cumulative effects;
- a requirement in subsection 9(1A) for proponents to provide information about the GHG emissions that would be caused by their proposed projects;
- a requirement in subsection 9(1A) for proponents to provide information about predicted effects on distributive equity, including intergenerational equity and the potential for disproportionate impacts on persons or groups due to identity factors such as Indigeneity, racialization, sex, or gender;
- a requirement in subsection 9(1A) that proponents explain if and how their proposed projects will make net contributions to sustainability; and,
- corresponding requirements in section 12 for the Minister to take all of these considerations into account when formulating a decision under subsection 34(1) of the *Environment Act*.

Recommendation 4: The Minister's ultimate decision whether or not to approve an undertaking should be conditioned by a list of factors for sustainability-based decision-making in the public interest. The current language of clauses 13(1)(b) and 13(1)(e) of the Regulations could be amended as follows:

Approval
[…] that a review of the information and consideration of the factors indicates that there are no adverse effects or significant environmental effects which may be caused by the undertaking ~~or that such effects are mitigable~~ or the undertaking will make a net contribution to sustainability if such effects are mitigated and the undertaking is approved subject to specified terms and conditions and any other approvals required by statute or regulation;

Rejection
[…] that a review of the information and consideration of the factors indicates that there is a likelihood that the undertaking will cause adverse effects or significant environmental effects ~~which are unacceptable~~ that will not make a net contribution to sustainability and the undertaking is rejected.

Recommendation 5: The Minister's existing power to require strategic environmental assessments should be identified more clearly in the *Environment Act*, in a standalone provision that makes the power obvious:

> The Minister may require a strategic environmental assessment of a policy, plan or program that, in the opinion of the Minister, causes or may cause an adverse effect or environmental effect that may impair sustainability.

Recommendation 6: The Government of Nova Scotia should commit to carrying out further research and consultation to inform the use of strategic environmental assessments within the province.

Recommendation 7: The Minister's existing powers to require environmental assessments and strategic environmental assessments should be expanded to enable the Minister to require regional assessments when multiple undertakings are proposed or could be proposed within a region of the province. A standalone provision of this kind should be added to the *Environment Act*:

> The Minister may require a regional assessment when multiple undertakings are proposed within a region of the province or, in the opinion of the Minister, multiple undertakings could be proposed to exploit resources or development opportunities available within a region of the province.

Recommendation 8: The Government of Nova Scotia should commit to carrying out further research and consultation to inform the use of regional assessments within the province.

Recommendation 9: The method of listing designated undertakings should be retained, but designation descriptions should be amended for clarity as needed. In particular, the "wetlands" designation in the list of Class I designated projects should be amended as follows:

F.2. An undertaking that disrupts a cumulative total of 2 ha or more of ~~any~~ wetland.

Recommendation 10: The lists of designated Class I and Class II undertakings should be amended to ensure that environmental assessments are required for all proposed projects that may have adverse effects or environmental effects that could impair sustainability.

Recommendation 11: To enhance transparency and provide greater certainty to members of the public and proponents, the *Environmental Assessment Regulations* should be amended to stipulate the criteria that require designation as a Class I or Class II undertaking.

Recommendation 12: The *Environmental Assessment Regulations* should provide for periodic public review of Schedule A to ensure the lists of designated undertakings remain current in a rapidly changing world and continue to require environmental assessments for all proposed projects that may have adverse effects or environmental effects that could impair sustainability. A review should be conducted at least every three years.

Recommendation 13: Section 47 of the *Environment Act* should be amended to enable joint assessments conducted in partnership with Indigenous governing bodies.

Recommendation 14: Section 47 of the *Environment Act* should be amended to require that among the requirements imposed by processes being joined, the most stringent requirements for environmental protection, Indigenous rights recognition, public participation, and sustainability-based scoping, assessment, and decision-making must be followed when joint assessments are carried out.

Recommendation 15: Part IV of the *Environment Act*, or, in the alternative, the *Environmental Assessment Regulations*, should be amended to include a list of purposes that are specific to Nova Scotia's environmental assessment processes, and this list of purposes should include purposes foregrounding respect for Indigenous knowledge, rights, and authority and the facilitation of reconciliation.

Recommendation 16: Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to address potential impacts on Indigenous rights when preparing environmental assessment documents and to require the Minister to take such rights into account when formulating a decision under subsection 34(1) of the *Environment Act*.

Recommendation 17: Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to seek Indigenous knowledge and include it in environmental assessment documents if Indigenous communities wish to make such knowledge available and to require the Minister to take such knowledge into account when formulating a decision under subsection 34(1) of the *Environment Act.*

Recommendation 18: Section 13 of the *Environmental Assessment Regulations* should be restructured to impose clear, sustainability-based criteria for the decisions that are available to

the Minister under subsection 34(1) of the *Environment Act*. As regards the available decisions to require a Focus Report or Environmental-assessment Report in a Class I EA, at minimum the Regulations should specify clear threshold criteria that describe the nature and extent of potential adverse effects or significant environmental effects that would ground a ministerial decision to require an intensified process.

Recommendation 19: The typical 30-day window for public comments on Environmental Assessment Registration Documents should be extended. A minimum of 90 days should be provided.

Recommendation 20: The Government of Nova Scotia should establish a participant funding program to support public participation in environmental assessments. At minimum, this program should offer funding support that participants could access to engage consultants to help them to review, understand, and provide comment on technical submissions by proponents.

Recommendation 21: Departmental staff overseeing environmental assessments should be required to prepare public reports that synthesize and summarize comments received from the public on information submitted by proponents.

Recommendation 22: Early process initiation should be required in Nova Scotia's environmental assessment process, either by the establishment of a formal planning phase or by the addition of new requirements to section 9 of the *Environmental Assessment Regulations*.

Recommendation 23: Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to provide information about cumulative effects in the information they provide to the Minister and require the Minister to take cumulative effects assessments into account when formulating a decision under subsection 34(1) of the *Environment Act*.

Recommendation 24: Cumulative effects considerations should inform the new decision-making criteria that have been recommended to condition the Minister's exercise of discretionary powers to intensify Class I environmental assessments.

Recommendation 25: Subsection 9(1A) and section 12 of the *Environmental Assessment Regulations* should be amended to require proponents to address uncertainty in the information they provide to the Minister and require the Minister to take uncertainty and the precautionary principle into account when formulating a decision under subsection 34(1) of the *Environment Act*.

Recommendation 26: New criteria imposed for decisions under subsection 34(1) of the *Environment Act* should require the Minister to apply the precautionary principle in all such decisions.

Recommendation 27: Subsection 9(1A) of the *Environmental Assessment Regulations* should be amended to require proponents to identify and evaluate potentially reasonable alternatives to and

alternative means for undertakings, including by identifying and evaluating the option of not carrying out proposed projects.

Recommendation 28: The current requirement in paragraph 9(1A)(b)(vii) of the *Environmental Assessment Regulations* should be amended to stipulate that proponents must frame this description by considering whether and how their proposed projects will contribute to sustainability and the public interest.

Recommendation 29: Departmental staff administering an EA should prepare a formal report and recommendation to the Minister, to be publicly released, that provides a transparent and accountable summary of the environmental assessment and a thorough analysis of all relevant assessment and decision-making factors.

Recommendation 30: Ministerial decisions under subsection 34(1) and 40 of the *Environment Act* should be accompanied by detailed written reasons that explain how all relevant assessment and decision-making factors have been taken into account.

Recommendation 31: The *Environmental Assessment Regulations* should be amended to include one or more provisions that require environmental assessment approvals to be subject to such terms and conditions as are necessary to compare effects predictions with actual effects and to enable timely and effective response and adaptive management as needed.

Recommendation 32: Part IV of the *Environment Act* should be amended to include a requirement for periodic independent review of the follow-up, monitoring, and compliance programs administered by the Department of Environment and Climate Change after environmental assessment approvals are granted. Such reviews should be carried out every five years at minimum, beginning in 2025.

4.2 Recommendations Organized under the Priority Considerations Listed in *EGCCRA*

The following table highlights several of the numbered recommendations made in this report by organizing them under the priority considerations listed in *EGCCRA*. Recommendations highlighted here do not necessarily address the priority considerations directly but are nevertheless integral to sustainability-based EAs that effectively and meaningfully address cumulative impacts, diversity, equity, and inclusion, independent review, *netukulimk*, and climate change.

Cumulative Impacts	Diversity, Equity, and Inclusion	Independent Review	*Netukulimk*	Climate Change
Recommendation 1 Recommendation 2 Recommendation 3 Recommendation 4 Recommendation 5 Recommendation 6 Recommendation 7	Recommendation 1 Recommendation 2 Recommendation 3 Recommendation 4 Recommendation 10 Recommendation 14 Recommendation 18	Recommendation 21 Recommendation 29 Recommendation 30 Recommendation 32	Recommendation 1 Recommendation 2 Recommendation 3 Recommendation 4 Recommendation 5 Recommendation 6 Recommendation 7	Recommendation 1 Recommendation 2 Recommendation 3 Recommendation 4 Recommendation 5 Recommendation 6 Recommendation 7

Cumulative Impacts	Diversity, Equity, and Inclusion	Independent Review	*Netukulimk*	Climate Change
Recommendation 8 Recommendation 10 Recommendation 14 Recommendation 18 Recommendation 23 Recommendation 24 Recommendation 28	Recommendation 19 Recommendation 20 Recommendation 21 Recommendation 22 Recommendation 28 Recommendation 29 Recommendation 30		Recommendation 8 Recommendation 10 Recommendation 13 Recommendation 14 Recommendation 15 Recommendation 16 Recommendation 22 Recommendation 28 Recommendation 17 Recommendation 18	Recommendation 8 Recommendation 10 Recommendation 14 Recommendation 18 Recommendation 28