Legal Analysis to Inform Ecology Action Centre Advocacy for Goals and Initiatives in Regulations under Nova Scotia's *Sustainable Development Goals Act*

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For Ecology Action Centre

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EXECUTIVE SUMMARY

Introduction and Overview of the Report

This report aims to support and inform the EAC's advocacy for several goals that it wishes to see included in regulations under Nova Scotia's *Sustainable Development Goals Act* ("the *SDGA*" or "the Act").

In October 2019, the Government of Nova Scotia passed the *SDGA*, intending for it to repeal and replace the existing *Environmental Goals and Sustainable Prosperity Act* ("*EGSPA*"). The *SDGA* is not yet in force, and subsection 14(1) of the Act signals the government's intent to establish regulations under the Act before it is proclaimed.

In *EGSPA*, numerous environmental goals and goals related to provincial climate change mitigation and adaptation efforts were set out in the statute itself. By contrast, when the Government of Nova Scotia enacted the *SDGA*, it decided that most goals and initiatives established under the Act would be set out in regulations rather than in the statute. This striking difference raises some concerns about the longevity of the goals and initiatives that will be established in the *SDGA* regulations. By their very nature as "subordinate" legislation, regulations can be amended more easily than statutes, and they are therefore more susceptible to the changing attitudes of governments in power.

Notably, although *EGSPA* contained numerous goals, the goals were not enforceable laws. Some *EGSPA* goals became enforceable laws when they were installed in other statutes or regulations that turned them into legal requirements and created consequences for failures to meet them; others were policy based and were not designed to be implemented by statute or regulation.

Like the goals established in *EGSPA*, the few goals established in the *SDGA* are not enforceable legal requirements under the Act. Specifically, the greenhouse gas ("GHG") emissions reduction targets established in section 7 of the *SDGA* will not become enforceable laws unless and until they are installed in legislation that turns them into binding legal requirements. Based on the approaches the Government of Nova Scotia has taken to date, it seems likely that the goals and initiatives set out in the *SDGA* regulations will follow the same pattern and will not be enforceable unless and until they are installed in other statutes or regulations that turn them into legal requirements and create consequences for failing to meet them.

The EAC has prepared a draft document that lists and discusses proposed goals that the EAC is recommending for inclusion in the *SDGA* regulations. This report does not address all of the proposed goals that appear in the EAC's draft document. Through discussions with EAC staff, five goals were selected on the basis that the EAC teams advancing them wished to know more about the legal landscapes in which the goals would likely be implemented if they were adopted. Those five goals are the "Renewable Energy", "Inclusive Deep Energy Upgrades", "Energy Efficiency", "End Environmental Racism", and "Protect Water" goals.

The legislative analyses conducted in the first half of this report assess if and how Nova Scotia's laws would need to change in order for the EAC's proposed goals to be implemented effectively

if they were adopted in the *SDGA* regulations. Where implementation would depend largely on discretionary policy initiatives, we do not attempt to chart ideal pathways forward: instead, we focus primarily on identifying legal barriers and opportunities.

The second half of this report responds to the EAC's concerns regarding accountability and enforcement under the *SDGA*. The EAC's draft document ends by emphasizing that the *SDGA* and its regulations must be enforceable, and it calls for "clear repercussions for industries and others who do not operate according to the principles of sustainability, environmental conservation, social inclusion, and climate responsibility which are laid out in the Act, or who contravene the regulations which are adopted". In the final sections of this report, we assess the government accountability mechanisms that are currently present in the *SDGA* and suggest ways to enhance them, and we also assess relevant enforcement mechanisms that exist in the other statutes and regulations where *SDGA* goals would likely be implemented.

Summary of Recommendations

Renewable Energy Goal

Our legislative analysis for the "Renewable Energy" goal concludes by recommending that in addition to proposing an *SDGA* goal of 90% renewable electricity by 2030, the EAC also:

- advocate for implementation of the 90% target as a legal requirement in the *Renewable Electricity Regulations*;

- consider conducting further analysis to assess how renewable electricity requirements imposed on Nova Scotia Power Incorporated ("NSPI") and municipal electric utilities could be most effective in the context of a competitive marketplace for renewable electricity in Nova Scotia, in order to clarify how a provincial target of 90% renewable electricity by 2030 could best be met;

- consider advocating that the Government of Nova Scotia not renew the Canada-Nova Scotia Equivalency Agreement when it terminates on December 31, 2024, so that coal-fired electricity generation will be phased out of the province more quickly; and,

- consider advocating for the Government of Nova Scotia to assign the Minister of Energy and Mines a legal obligation to ensure that province's renewable electricity requirements are met.

Inclusive Deep Energy Upgrades Goal

Our legislative analysis for the "Inclusive Deep Energy Upgrades" goal concludes by recommending that the EAC:

- consider recommending that the Government of Nova Scotia set a goal in the *SDGA* regulations of adopting a step code for Nova Scotia, with Net Zero Energy Ready ("NZER") standards at the highest tier, to facilitate private decisions to build new

constructions to standards higher than the provincial *Building Code Regulations* currently require.

Energy Efficiency Goal

Our legislative analysis for the "Energy Efficiency" goal concludes by recommending that the EAC consider suggesting amendments to the *Public Utilities Act* that:

- set a target of 3% total electricity system efficiency per year by 2030;
- direct NSPI to prioritize cost-effective electricity efficiency and conservation spending in accordance with that target; and,
- direct the Utility and Review Board ("UARB") to ensure that NSPI prioritizes cost-effective electricity efficiency and conservation spending in accordance with that target and, correspondingly, to approve proposed electricity efficiency and conservation purchases that seek to meet that target if such purchases will not cause unaffordable rate increases for NSPI's customers.

End Environmental Racism Goal

Our legislative analysis for the "End Environmental Racism" goal concludes by recommending that the EAC, in collaboration with representatives of Mi'kmaw and African Nova Scotian communities:

- consider advocating for the inclusion of an additional *SDGA* principle, established in the regulations, that will address environmental racism explicitly and assert a commitment to ending it;
- consider advocating for amendments to the *Environment Act* to have social justice or equity provisions included in the Act's purpose section and to have the Act itself require consideration of factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia in all environmental decision making;
- consider advocating for swift amendments to the *Environmental Assessment Regulations* to require Ministerial consideration of factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia when making environmental assessment decisions;
- consider advocating for swift amendments to the *Approval and Notification Procedures Regulations* to require Ministerial consideration of factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia when considering applications for relevant regulatory approvals; and,

- consider offering New Jersey bill S232/A2212 as a model for a new regulatory approach and recommending that the Government of Nova Scotia work with Mi'kmaw and African Nova Scotian communities in the province to:

    - establish a list of communities in the province that are already suffering or are otherwise vulnerable to disproportionate environmental harms;

    - establish a list of activities that could cause or exacerbate environmental harms if they were located in or near any of those communities; and,

    - establish effective environmental assessment and regulatory approval requirements to prevent such harms, potentially including features such as environmental racism impact analyses and required community hearings.

Protect Water Goal

Our legislative analysis for the "Protect Water Goal" concludes by recommending that the EAC:

- call for cumulative effects assessment to be added as a section 12 factor in the *Environmental Assessment Regulations*;

- call for corresponding policy guidance to be developed to ensure that adverse effects on water are considered thoroughly and holistically in environmental assessments and that adequate information is gathered and put before the Minister;

- call for amendments to the *Approval and Notification Procedures Regulations* requiring cumulative effects assessments as a component of all applications for regulatory approvals;

- call for corresponding policy guidance to be developed to ensure that adverse effects on water are considered thoroughly and holistically in the regulatory approval process and that adequate information is gathered and put before the Minister.

Accountability and Enforcement Mechanisms

In the first part of our analysis of accountability and enforcement mechanisms, which focuses on government accountability under the *SDGA*, we recommend that the EAC:

- consider advocating for a right of action in the *SDGA* regulations that would create a straightforward way for members of the public to initiate judicial review proceedings if the Government of Nova Scotia, the Premier, or the Minister of Environment fail to meet the legal obligations that the Act imposes; and,

- consider advocating for enhanced reporting requirements in the *SDGA* regulations, expanding on section 12 of the Act, to enhance government accountability by

heightening public awareness of the government's progress and improving public access to information.

In the second part of our analysis of accountability and enforcement mechanisms, which focuses on the enforceability of legal requirements related to goals adopted in the *SDGA* and implemented in other statutes and regulations, we recommend that the EAC:

- consider advocating for a government commitment, set out in the *SDGA* regulations, to devote additional resources to the enforcement of environmental laws, including ministerial orders issued under the *Environment Act* as well as *Environment Act* offences prosecuted by Nova Scotia's Public Prosecution Service.

LEGISLATIVE ANALYSIS 1: RENEWABLE ENERGY GOAL

The draft document provided to us by the EAC includes the following goal and commentary:

> **90% of Nova Scotia's electricity needs are supplied with renewable energy by 2030.**
>
> In 2017, Nova Scotia still relied on coal for about 55% of its annual electricity needs and now has the dirtiest electricity grid in Canada. Dramatically decarbonizing Nova Scotia's electricity grid is technically and economically possible by displacing coal, oil and large-scale biomass with increased levels of domestic wind, imported hydro, solar, small-scale biomass and community-scale projects. This goal is a key mechanism to reduce our province's overall GHG emissions and will ensure fewer Nova Scotians are made sick or die by air pollution each year. Meeting this goal would create more than 35,000 job-years in Nova Scotia between now and 2030.

Before turning to the legislative analysis conducted below, it should be noted at the outset that much of Nova Scotia's electricity legislation is under the purview of the Department of Energy and Mines. Our understanding is that the EAC is currently engaging primarily with Nova Scotia Environment ("NSE") on the *SDGA* regulations. Depending on the process that NSE has put in place for the bilateral meetings it is currently conducting, the EAC Energy Team may wish to engage with the Department of Energy and Mines as well in order to ensure that their recommendations are communicated appropriately.

The Current Legal Landscape

To date, binding renewable electricity targets for Nova Scotia have been established in the *Renewable Electricity Regulations*, which are regulations under Nova Scotia's *Electricity Act*. Both of these pieces of legislation have a role to play in ensuring that strong renewable electricity targets are set and met in the province.

It is worth mentioning at the outset that Nova Scotia's electricity legislation uses the term "renewable electricity" when addressing renewable electricity targets set in the province, and the *Renewable Electricity Regulations* assign specific definitions to the term which shape Nova Scotia's renewable electricity regime.[1] For this reason, we recommend using the term "renewable electricity" rather than "renewable energy" in the EAC goal.

[1] Subsection 3(1) of the *Renewable Electricity Regulations* defines "renewable electricity" as meaning "heritage renewable electricity", "renewable low-impact electricity generated after December 31, 2001", or "imported electricity that in the opinion of the Minister is generated from renewable resources". Subsection 2(1) of the same regulations defines "heritage renewable electricity" as meaning "all electricity that was contracted for or supplied by a load-serving entity in the Province before January 1, 2002, and that, in the opinion of the Minister, is generated from renewable sources". Since the term "renewable sources" is not defined in the regulations, it is noteworthy that two of the defined forms of "renewable electricity" in Nova Scotia rely largely on the Minister's discretionary opinion as to what sources are renewable. Additionally, subsection 2(2) of the *Electricity Act* states: "Commencing on such date as prescribed in the regulations, 'renewable electricity' includes hydroelectricity whether generated in or imported into the Province". Although the *Renewable Electricity Regulations* do not speak directly to that subsection of the *Electricity Act*, it is clear that the Government of Nova Scotia intends imported hydroelectricity to be considered a renewable electricity, and subsection 3(1) of the *Renewable Electricity Regulations* clearly empowers the Minister to categorize imported electricity as renewable electricity when, in the Minister's opinion,

Subsection 5(1A) of the *Electricity Act* required the Minister of Energy and Mines ("the Minister") to make regulations requiring the achievement of 40% renewable electricity in the province by 2020, and the *Renewable Electricity Regulations* were amended accordingly in 2013.

Currently, the *Electricity Act* does not require the Minister to set renewable electricity targets or requirements beyond 2020. If the Government of Nova Scotia were to adopt the EAC's "Renewable Energy" goal, its implementation could begin with an amendment to the *Electricity Act* obliging the Minister to make regulations requiring the achievement of 90% renewable electricity in the province by 2030. In all likelihood, the Minister would then amend the *Renewable Electricity Regulations* accordingly by establishing the new renewable energy requirement (with or without staged interim requirements) within them.

In this sense, the legislative implementation of the EAC's "Renewable Energy" goal could be relatively straightforward; however, as the Energy Team has raised several questions about the nuances of Nova Scotia's legislated electricity regime, we address some additional matters below.

(a) The Canada-Nova Scotia Equivalency Agreement for the Control of Greenhouse Gas Emissions from Electricity Producers in Nova Scotia

As we discussed in legal research conducted for the EAC Energy Team in the summer of 2020, the Government of Nova Scotia is currently a party to the Canada-Nova Scotia Equivalency Agreement for the Control of Greenhouse Gas Emissions from Electricity Producers in Nova Scotia (the "Equivalency Agreement"). Under that agreement, provincial greenhouse gas ("GHG") emissions reduction laws are operating in place of federal regulations that set strict standards for CO_2 emissions produced by coal-fired electricity generation. The agreement will terminate on December 31, 2024, but its terms state that it may be renewed at that time so long as any renewed agreement is set to terminate by December 31, 2029 at the latest.

To briefly review the legal landscape giving rise to the Equivalency Agreement, under the *Canadian Environmental Protection Act* ("*CEPA*"), the Government of Canada has authority to regulate the release of toxic substances, including GHG emissions. The federal government has developed a coal phase-out regime that is designed to steadily phase out coal-fired electricity generation across Canada, and the regime is set out in the federal *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, commonly called the *Coal-fired Electricity Regulations*, which exist under *CEPA*.

CEPA enables the Government of Canada to enter into equivalency agreements with provinces and territories that demonstrate that their own environmental laws can achieve the same

such electricity is generated from renewable resources. Finally, Nova Scotia's *Marine Renewable Electricity Regulations* add further nuances to the definitions discussed here: they define "marine renewable electricity" as meaning "electricity produced from marine renewable energy but, in respect of electricity produced from winds blowing over marine waters", as including "only electricity produced from a marine wind turbine", and they define "marine wind turbine" as meaning "a wind turbine affixed to the sea bed or situated on a platform that is completely surrounded by marine waters".

outcomes as federal regulations established under the Act. In May 2014, the Government of Canada and the Government of Nova Scotia entered into such an agreement after the federal government determined that if Nova Scotia's *Greenhouse Gas Emissions Regulations* (which exist under Nova Scotia's *Environment Act*) were allowed to apply in the province instead of the regime set out in the *Coal-fired Electricity Regulations*, Nova Scotia would achieve GHG emissions reductions that were equivalent to the reductions required by the federal regulations. Essentially, the agreement enabled Nova Scotia to continue producing coal-fired electricity so long as its total GHG emissions reductions were acceptable to the federal government.

That first agreement was the Agreement on the Equivalency of Federal and Nova Scotia Regulations for the Control of Greenhouse Gas Emissions from Electricity Producers in Nova Scotia between the Government of Canada as Represented by the Minister of the Environment ("Canada") and the Government of Nova Scotia as Represented by the Minister of Environment ("Nova Scotia") (the "2015-2019 Equivalency Agreement").

The 2015-2019 Equivalency Agreement was set to terminate on December 31, 2019, but the parties committed to initiating its renewal if Nova Scotia's legislative regime continued to mandate GHG emission reductions equivalent to those that the *Coal-fired Electricity Regulations* would produce. The current Equivalency Agreement came into force on January 1, 2020.

Unlike the 2015-2019 Equivalency Agreement, the current Equivalency Agreement clearly compares the total amount of carbon dioxide equivalent ("CO_2e") emissions that Nova Scotia's electricity sector would be allowed to produce before December 31, 2029 if the *Coal-fired Electricity Regulations* applied in the province versus the total amount of CO_2e that the sector could produce under Nova Scotia's *Greenhouse Gas Emissions Regulations* within the same period. According to the current Equivalency Agreement, Nova Scotia's *Greenhouse Gas Emissions Regulations* will lower GHG emissions even further than the *Coal-fired Electricity Regulations* would, by a difference of 7.9 megatonnes.

The Equivalency Agreement does not present a legal barrier to more stringent GHG emissions reductions in Nova Scotia, nor is it a legal impediment to phasing out coal-fired electricity generation more rapidly than the province has signalled it wishes to do. The Equivalency Agreement's purpose is to ensure that Nova Scotia meets a minimum standard of GHG emissions reductions despite the fact that the province continues to generate electricity with coal.

However, although the Equivalency Agreement is not a legal *impediment* to phasing out coal-fired electricity generation more rapidly in Nova Scotia, it is a significant *disincentive* to doing so.

The Equivalency Agreement reflects the federal government's willingness to balance environmental and economic concerns. Provinces like Nova Scotia wish to avoid the economic losses that result when generation facilities cease operating before the ends of their useful lives, and agreements like the Equivalency Agreement accept and accommodate such concerns. The Equivalency Agreement recognizes that the Government of Nova Scotia has a stake in ensuring that coal-fired generation facilities in the province are not shut down prematurely (from an economic perspective), and it enables Nova Scotia to continue generating electricity with coal so

long as the province reduces its GHG emissions in other ways. Essentially, the Equivalency Agreement is a permission slip from the federal government saying that Nova Scotia can continue to generate electricity with coal until December 31, 2024, and possibly until December 31, 2029. Under the circumstances, it may be very difficult for the EAC to convince the Government of Nova Scotia to abandon coal more quickly.

Because the Equivalency Agreement terminates on December 31, 2024, the EAC may wish to focus some advocacy efforts there and recommend that the Government of Nova Scotia choose not to renew the agreement at that time. Because the Equivalency Agreement has practical financial ramifications—among other things, it affects the way NSPI does business, affects the corporation's economic projections, and therefore affects the electricity rates that NSPI's customers pay now and may pay in years to come—the government will probably not make any sudden moves that could cause unwelcome economic fallout. Not least for this reason, targeting the December 31, 2024 termination date could be convenient for advocacy purposes, as a commitment to fully terminate and not renew the Equivalency Agreement three years from now would give the government time to prepare.

(b) The "Green Choices" Program

As we discussed in legal research conducted for the Energy Team in the summer of 2020, in March 2020, the Government of Nova Scotia amended the *Electricity Act* through *An Act to Amend Chapter 25 of the Acts of 2004, the Electricity Act*, which has received royal assent but has not yet been proclaimed in force. According to a news release issued by the provincial government, the amendments are designed to enable a program called the Green Choice Program, which will give "large electricity customers the ability to purchase clean electricity from new, renewable energy projects through an independent and competitive process" and "will enable Nova Scotia to move forward with its agreement with the federal government to procure 100 per cent renewable electricity for all federally owned facilities in the province by 2022".[2]

When they come into force, the *Electricity Act* amendments will add new provisions to chapter 25 of the *Electricity Act* and will empower the Minister of Energy and Mines to create a renewable low-impact electricity procurement program. The actual program details will be set out in regulations, but those regulations have not yet been created. Judging by the pattern with which the provincial government has established regulations for other procurement programs under the *Electricity Act*, it seems likely that these new regulations will be established through amendments to the existing *Renewable Electricity Regulations*.

The EAC Energy Team has asked how the Green Choice Program will fit with Nova Scotia's renewable electricity requirement. The short answer is that it is too soon to say, but there is one significant point worth noting.

Currently, the renewable electricity requirement of 40% per year for 2020 and the years beyond is a requirement that is specific to NSPI and all other "load-serving entities" to whom the requirement applies (i.e., municipal electric utilities). Subsection 6A(1) of the *Renewable Electricity Regulations* states:

[2] Government of Nova Scotia, "Government Amends Electricity Act" (26 February 2020).

> Each year beginning with the calendar year 2020, each load-serving entity must supply its customers with renewable electricity in an amount equal to or greater than 40% of the total amount of electricity supplied to its customers as measured at the customers' meters for that year.

Subsequent provisions in the regulations clarify how that requirement must be met.

Importantly, the 40% renewable electricity requirement does not oblige the Government of Nova Scotia to ensure that 40% of the electricity supplied to electricity customers across the province is renewable electricity: instead, the requirement is that NSPI and other electric utilities make sure that 40% of what they each provide, individually, is renewable.

Because the Green Choice Program is designed to foster a competitive marketplace for renewable low-impact electricity within the province, we assume that suppliers operating within the program will be required by law to ensure that 100% of the electricity they supply to their provincial customers is renewable low-impact electricity. We do not have the expertise required to assess how this could impact total renewable electricity supply within the province, but it raises interesting questions about the approach that the Government of Nova Scotia could take in setting renewable electricity requirements. If, for example, the goal is to ensure that 90% of Nova Scotia's total electricity needs are met with renewable electricity by 2030, and if provincial efforts to create a competitive marketplace for renewable electricity are successful, then NSPI and municipal electric utilities could conceivably have individual targets that are lower than 90% if other significant suppliers were operating above that standard.

As noted above, the Government of Nova Scotia currently has no legal obligation to ensure that provincial renewable electricity requirements are being met: the legal responsibility sits with NSPI and the other load-serving entities to whom the requirements apply. Whether or not NSPI's current monopoly is reduced to the point that significant supplies of renewable electricity in the province fall outside of NSPI's control, it would be valuable for the Government of Nova Scotia to assign the Minister of Energy and Mines a legal obligation to ensure that province's renewable electricity requirements are met. This would significantly enhance the government's responsibility to ensure that new requirements and initiatives achieve the desired result.

(c) <u>Commissioned Capacity versus Connected Capacity</u>

The EAC Energy Team has raised concerns about the difference between commissioned capacity and connected capacity and the way that difference affects renewable electricity targets in Nova Scotia. By "commissioned capacity" and "connected capacity", we understand the Energy Team to be referring, respectively, to the renewable electricity capacity that will prospectively be available to NSPI through purchase agreements or other contractual arrangements but is not yet contributing to NSPI's supply, versus the renewable electricity capacity upon which NSPI can actually draw at present. If the Energy Team is instead referring to the difference denoted by the terms "installed capacity" and "generation", our comments below should still apply.

Because subsection 6A(1) of the *Renewable Electricity Regulations* requires NSPI and municipal electric utilities to *actually supply* their customers with renewable electricity "in an amount equal

to or greater than 40% of the total amount of electricity" supplied to their customers in each given year, the difference between commissioned capacity and connected capacity, as we understand the Energy Team to be using those terms, should not affect the application of the requirement.

If the EAC's own research and experience indicate that NSPI is not meeting its renewable electricity requirements and that a lack of clarity concerning requirements for commissioned capacity versus connected capacity is part of the problem, the EAC may wish to raise the issue with government or, alternatively, with the UARB.

Recommendations

In light of the analysis above, we recommend that in addition to proposing an *SDGA* goal of 90% renewable electricity by 2030, the EAC also:

- advocate for implementation of the 90% target as a legal requirement in the *Renewable Electricity Regulations*;

- consider conducting further analysis to assess how renewable electricity requirements imposed on NSPI and municipal electric utilities could be most effective in the context of a competitive marketplace for renewable electricity in Nova Scotia, in order to clarify how a provincial target of 90% renewable electricity by 2030 could best be met;

- consider advocating that the Government of Nova Scotia not renew the Canada-Nova Scotia Equivalency Agreement when it terminates on December 31, 2024, so that coal-fired electricity generation will be phased out of the province more quickly; and,

- consider advocating for the Government of Nova Scotia to assign the Minister of Energy and Mines a legal obligation to ensure that province's renewable electricity requirements are met.

LEGISLATIVE ANALYSIS 2: INCLUSIVE DEEP ENERGY UPGRADES GOAL

The draft document provided to us by the EAC includes the following goal and commentary:

> **100% of Eligible Social Housing is Net-Zero Energy Ready (NZER) by 2030.**
>
> This goal will help Nova Scotians living in social housing save energy, save money and be more comfortable in their homes, thereby contributing to their quality of life and reducing energy poverty within the province, and aid in boosting the energy efficiency industry. This goal can be achieved by reducing energy consumption in all eligible existing social housing by 60% or more, and ensuring all new construction is built to NZER standards. This would create more than 9,000 job-years in Nova Scotia between now and 2030.

Our understanding is that this goal is focused specifically on public housing—also known as social housing—which is subsidized rental housing that is owned and managed by the Province of Nova Scotia acting under the *Housing Act* and *Housing Nova Scotia Act*. Provincially owned social housing is different from affordable housing made available through the private and not-for-profit sectors, and the legislative requirements needed to ensure that new social housing is built to Net-Zero Energy Ready ("NZER") standards are different from those that would be required to ensure that all affordable housing is built that way.

The Current Legal Landscape

(i) Reducing Energy Consumption in Eligible Existing Social Housing

Investments in deep energy upgrades (energy conservation measures for existing buildings) to reduce energy consumption in social housing units appear to be within the scope of the *Housing Act* and *Housing Nova Scotia Act*. Although neither statute mentions such improvements specifically, the statutes clearly provide for the acquisition, construction, maintenance, and improvement of public housing. Our research suggests that if the Government of Nova Scotia wished to invest directly in the deep energy upgrades envisioned by the EAC, it could do so without requiring any legislative amendments.

(ii) Building Code Standards

In Canada, building code standards are within the jurisdictions of the provinces and territories. To encourage and enable consistency, the Government of Canada promotes model codes that the provinces and territories can choose to adopt with or without modifications: they are the *National Building Code of Canada* and the *National Energy Code of Canada for Buildings*, and they are updated regularly. Local governments also share significant jurisdiction by exercising core administrative responsibilities delegated by the provinces and territories.

Nova Scotia's *Building Code Regulations*, established under the provincial *Building Code Act*, currently adopt the *National Building Code of Canada*, 2015, and the *National Energy Code of*

Canada for Buildings, 2017, including all revisions, errata, and corrected errata made to those codes on or before March 1, 2019. The regulations also list provincial amendments to the codes.

The adoptions and amendments set out in the *Building Code Regulations* establish the minimum requirements that new constructions in the province must meet, and those standards do not yet attain the level of net-zero energy readiness. One of the federal goals established in the *Pan-Canadian Framework on Clean Growth and Climate Change* was to develop a model building code that would set net-zero energy readiness as the standard for 2030, but we are not there yet.

Because Nova Scotia's *Building Code Regulations* set minimum requirements, private parties can choose to build new constructions to higher standards. To our knowledge, a commitment to build new social housing owned by the province to NZER standards would not require legislative amendments: the *Housing Act* and *Housing Nova Scotia Act* and their corresponding regulations do not appear to limit the provincial government's ability to build new social housing to higher standards than the provincial building code requires.

The introduction of a provincial step code could facilitate private decisions to build new constructions to higher standards, and we were informed by the EAC Energy Team that Nova Scotia's current Minister of Energy and Mines may be establishing a committee to consider a step code for Nova Scotia; however, we were unable to verify this information ourselves through public information available online.

Recommendation

Because the "Inclusive Deep Energy Upgrades" goal can be implemented without legislative amendment, and because the EAC has been informed that a government committee may soon be considering a step code for Nova Scotia, the EAC may wish to consider recommending that the government set a goal in the *SDGA* regulations of adopting a step code for Nova Scotia, with NZER standards at the highest tier, to facilitate private decisions to build new constructions to standards higher than the *Building Code Regulations* currently require.

LEGISLATIVE ANALYSIS 3: ENERGY EFFICIENCY GOAL

The draft document provided to us by the EAC includes the following goal and commentary:

> **The Province increases the level of total electricity system efficiency (Demand Side Management) to 3% per year by 2030.**
>
> Nova Scotia has a strong history of energy efficiency programming, but we consistently limit ourselves in what is possible to save energy, create jobs, address energy poverty and make all Nova Scotians more comfortable in their homes. Increasing the level of total electricity system efficiency to 3% per year by 2030 would nearly triple the work happening in the efficiency sector. This can be achieved by purchasing more demand-side management programming through Efficiency Nova Scotia.

Before turning to the legislative analysis conducted below, we note that the current holder of Nova Scotia's "efficiency franchise" under the *Public Utilities Act* is EfficiencyOne, not Efficiency Nova Scotia.

Additionally, the EAC's commentary accompanying the "Energy Efficiency" goal does not specify whom should be purchasing more demand-side management ("DSM") programming from EfficiencyOne. Our analysis focuses on NSPI's current responsibility to purchase electricity efficiency and conservation activities, including DSM programming, from EfficiencyOne.

The Current Legal Landscape

EfficiencyOne was created by statute and holds the "efficiency franchise" established under Nova Scotia's *Public Utilities Act*. In that role, the corporation has "the exclusive right to supply Nova Scotia Power Incorporated with reasonably available, cost-effective electricity efficiency and conservation activities" in accordance with the *Public Utilities Act*.[3] Correspondingly, the *Public Utilities Act* requires NSPI to "undertake cost-effective electricity efficiency and conservation activities that are reasonably available in an effort to reduce costs for its customers".[4]

The *Public Utilities Act* does not require NSPI to purchase any set amount of DSM programming from EfficiencyOne. Instead, the Act gives Nova Scotia's Utility and Review Board ("the UARB" or "the Board") the responsibility to oversee the activities of both NSPI and EfficiencyOne. Importantly, section 79H gives the UARB a specific mandate to "determine the cost-effective electricity efficiency and conservation activities that must be undertaken for the purpose of this Act", and, under subsection 79L(1), no purchase agreements between NSPI and EfficiencyOne are valid until they have been approved by the Board.

Subsections 79L(8) and 79L(9) of the *Public Utilities Act* identify certain factors that the UARB

[3] *Public Utilities Act*, clause 79C(2)(a).
[4] *Ibid*, subsection 79I(1).

must consider when deciding whether or not to approve a purchase agreement between NSPI and EfficiencyOne. They state:

> (8) The Board shall approve an agreement pursuant to this Section if, in addition to any other matters considered appropriate by the Board, it is satisfied that the agreement, including the proposed electricity and conservation activities that are the subject of this agreement, is in the best interests of Nova Scotia Power Incorporated's customers and satisfies the requirements of Section 79J.
>
> (9) The Board's assessment of the proposed electricity efficiency and conservation activities for the purpose of the approval must take into account their affordability to Nova Scotia Power Incorporated's customers, along with any other matters considered appropriate by the Board or as may be prescribed.

In its decision in *EfficiencyOne (Re)*, 2015 NSUARB 204 (CanLII), the UARB interpreted the requirement set out in subsection 79L(9) to mean that it must "take into account an increased focus on short term rate impacts" to NSPI's customers as opposed to long-term impacts alone. As the Board went on to explain, this does not mean that it will focus solely on short-term rate impacts and ignore the potential for long-term savings, but it does mean that when the UARB assesses proposed spending on energy efficiency and conservation activities, short-term impacts will be given greater weight than they would receive in other assessments by the Board.

Because the regime explicitly requires NSPI to purchase "cost-effective" electricity efficiency and conservation activities, and because the UARB has the primary responsibility to assess how proposed purchases will impact NSPI's customers, our view is that the Government of Nova Scotia would probably not impose a legal requirement obliging NSPI to purchase more DSM programming in order to increase the level of total electricity system efficiency to 3% per year by 2030 at any cost. Instead, if the government were to adopt and implement the EAC's "Energy Efficiency" goal, we believe it would likely do so in a way that directed NSPI to invest in more DSM programming only if doing so would not cause unaffordable rate increases for NSPI's customers. Likewise, the government would probably continue to make the UARB responsible for assessing and approving proposed purchases and protecting ratepayer interests.

Recommendations

In light of the analysis above, the EAC may wish to suggest amendments to the *Public Utilities Act* that:

- set a target of 3% total electricity system efficiency per year by 2030;
- direct NSPI to prioritize cost-effective electricity efficiency and conservation spending in accordance with that target; and,
- direct the UARB to ensure that NSPI prioritizes cost-effective electricity efficiency and conservation spending in accordance with that target and, correspondingly, to approve proposed electricity efficiency and conservation purchases that seek to meet

that target if such purchases will not cause unaffordable rate increases for NSPI's customers.

Given the UARB's interpretation of the "affordability" requirement in subsection 79L(9) of the *Public Utilities Act*, it would also be useful for the government to clarify how the terms "affordability" and "unaffordable" should be interpreted if such amendments are made.

LEGISLATIVE ANALYSIS 4: END ENVIRONMENTAL RACISM GOAL

The draft document provided to us by the EAC includes the following goal and commentary:

> **The Province will update its existing environmental decision-making process to include a race-equity lens by 2021.**
>
> The purpose of the race-equity lens is to ensure that hazardous industries, large industrial projects and waste sites are no longer disproportionately sited near or in Mi'kmaw and African Nova Scotian communities. By 2022, the government must identify and facilitate remediation of sites, so that the long history of environmental racism is no longer a factor in Nova Scotia. This must be accomplished in partnership through shared decision making and leadership with Mi'kmaw and African Nova Scotian communities.

Before turning to the legislative analysis conducted below, it is worth noting that subsection 4(d), clause 5(2)(c), and clause 14(2)(b) of the *SDGA* all indicate that the *SDGA* regulations can establish additional principles that will guide the implementation of the Act. We therefore recommend that the EAC advocate for the inclusion of a principle that will address environmental racism explicitly and assert a commitment to ending it.

The Current Legal Landscape

The EAC's "End Environmental Racism" goal currently refers to Nova Scotia's environmental decision making process in the singular; however, there are multiple processes through which environmental decisions relevant to this goal are made. This section of the report highlights the most significant processes to illustrate where legislative amendments could make the biggest impacts.

Nova Scotia's *Environment Act* plays an overarching role in the kinds of decisions that are most relevant to this goal. The Act does not currently include principles or purpose provisions that incorporate social justice or equity concerns into the Act directly, but the inclusion of such language would not contradict the stated purpose of the Act and would arguably enhance it. For example, the Act's purpose section currently states, among other things, that the Act's purpose is to "support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals":

> (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
>
> [...]
>
> (e) Government having a catalyst role in the areas of environmental education, environmental management, environmental emergencies, environmental research and the development of policies, standards, objectives and guidelines and other measures to protect the environment;

[...]

(h) providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment, including opportunities to participate in the review of legislation, regulations and policies and the provision of access to information affecting the environment;

(i) providing a responsive, effective, fair, timely and efficient administrative and regulatory system.

As we discuss in more detail in our analysis of the EAC's "Protect Water" goal, the *Environment Act* enables several forms of environmental decision making. Proposed projects that trigger the environmental assessment ("EA") process are called undertakings and are dealt with under the *Environmental Assessment Regulations*, and undertakings that receive EA approvals will also require regulatory approvals in accordance with the *Activities Designation Regulations* and *Approval and Notification Procedures Regulations*. Other proposed projects do not trigger EAs but are instead dealt with under the *Activities Designation Regulations* and *Approval and Notification Procedures Regulations* alone. Some will require regulatory approvals, and others—for example, watercourse alterations that NSE has deemed to be low-risk—are authorized by notification alone.

The differences in these processes can be illustrated by considering two hypothetical scenarios based on well-known examples of environmental racism in Nova Scotia.

(a) Scenario 1: A Pulp Mill and Effluent Treatment Facility In or Near a Mi'kmaw Community

The history of the pulp mill at Abercrombie Point, most recently owned and operated by Northern Pulp, and its effects on the community of Pictou Landing First Nation are well known in Nova Scotia and beyond. Although the pulp mill and its effluent treatment facility were in place before the *Environment Act* and *Environmental Assessment Regulations* were created, it is useful to consider how a proposed new pulp mill would be assessed under the province's current environmental assessment regime.

First, a proposed pulp mill would trigger the EA process and would be a Class II undertaking, as established by "Schedule A—Designated Class I and Class II Undertakings" of the *Environmental Assessment Regulations*.

As a Class II undertaking, the proposed pulp mill would require, at minimum:

- an environmental registration document prepared by the proponent;
- terms of reference established by the Minister of Environment ("the Minister") with input from the public;

- an environmental-assessment report prepared by the proponent in accordance with the terms of reference established by the Minister; and,

- a review of the environmental-assessment report by an appointed review panel, incorporating additional public consultation.

Under the *Environmental Assessment Regulations*, the terms of reference for a proposed Class II undertaking must take into consideration comments from "any affected aboriginal people or cultural community", as well as comments from the public more generally; however, the Minister is not required by law to consider factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia.

(In addition to the requirements of the *Environment Act* and *Environmental Assessment Regulations*, the Government of Nova Scotia would also have a constitutional duty to consult with any Indigenous community with protected interests that could be affected negatively by the proposed undertaking, but that duty to consult would not be defined by the provincial EA process.)

If the proposed undertaking was approved under the EA process, the proponent would also need to seek a regulatory approval—sometimes called an "industrial approval"—in accordance with the *Activities Designation Regulations* and *Approval and Notification Procedures Regulations*. These regulations do not require the Minister to consider factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia when deciding whether or not to grant a regulatory approval.

When the Minister of Environment considers an application for a regulatory approval submitted under the *Approval and Notification Procedures Regulations*, the Minister "must determine whether the impact of the activity on the environment conforms with the Act and applicable regulations and standards".[5] In practice, it would be unusual for the Minister to deny a regulatory approval to a proposed project that had already passed through the EA process successfully, as the concerns addressed at the regulatory approval stage have usually been assessed in detail during the EA.

Depending on where it is situated, a project of this kind would typically trigger requirements for other provincial and municipal authorizations as well; however, none of those authorization processes would be equipped to address factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia as thoroughly as they could be addressed during an EA process.

This means that for environmental decisions that begin with an EA process, the EA process is the most important place to incorporate a robust analysis of factors such as racialization, racism,

[5] *Approval and Notification Procedures Regulations*, subsection 9(1).

social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia.

(b) Scenario 2: A Landfill In or Near an African Nova Scotian Community

There are multiple examples of African Nova Scotian communities that have suffered the consequences of landfills being discriminatorily located in or near their neighbourhoods: Africville, Lincolnville, and Shelburne are three.

In Nova Scotia, proposed landfills do not trigger the EA process. Instead, they are authorized through the combined force of the *Activities Designation Regulations*, the *Approval and Notification Procedures Regulations*, and the *Solid Waste-Resource Management Regulations*.[6] All of these regulations are regulations under the *Environment Act*.

Section 2 of the *Solid Waste-Resource Management Regulations* defines a landfill as "a facility for the disposal of municipal solid waste by placing it in or on land", and the same section defines "municipal solid waste" as meaning "garbage, refuse, sludge, rubbish, tailings, debris, litter and other discarded materials resulting from residential, commercial, institutional and industrial activities which are commonly accepted at a municipal solid waste management facility", excluding "waste from industrial activities regulated by an approval issued under the Act".

Under subsection 8(2) of the *Activities Designation Regulations*, the "construction, operation or reclamation of a solid waste management facility" is a designated activity and therefore requires a regulatory approval. Together, the *Approval and Notification Procedures Regulations* and *Solid Waste-Resource Management Regulations* identify several factors that an application for a regulatory approval must include, and the *Approval and Notification Procedures Regulations* identify factors that the Minister must take into account when deciding whether or not to approve an application; however, none of these are factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia.

The *Approval and Notification Procedures Regulations* establish the core elements of the application process. Because the *Solid Waste-Resource Management Regulations* simply supplement that process, they do not need to reiterate requirements contained in the *Approval and Notification Procedures Regulations*.

For these reasons, the *Approval and Notification Procedures Regulations* would be the most effective place to incorporate a legal requirement for the Minister to consider factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia when deciding whether or not to approve an application for a proposed landfill—or, indeed, for any proposed project that does not trigger the EA process but is a designated activity under the *Activities Designation Regulations.*

[6] The core elements of the application process are set out in the *Approval and Notification Procedures Regulations*, and the *Solid Waste-Resource Management Regulations* add additional requirements that must be met.

Applying a Race-Equity Lens Comprehensively

Amendments to Nova Scotia's *Environmental Assessment Regulations* and *Approval and Notification Procedures Regulations* could ensure that considerations such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia are incorporated into the most relevant environmental decision making processes that exist under the *Environment Act*.

To make sure that amendments are made comprehensively and capture all relevant decision making, the EAC may wish to present a model for the Government of Nova Scotia to consider. In October 2020, the State of New Jersey adopted an impressive environmental justice bill that could provide an inspiring model for legislative amendments to end environmental racism in Nova Scotia. Although the bill (S232/A2212) does not refer to environmental racism explicitly, it is clearly designed to protect Indigenous and racialized communities, among others, from suffering disproportionate environmental harms.

Essentially, the bill targets permitting processes that authorize the construction, operation, expansion, and operation of harmful "facilities" in "overburdened communities". The bill defines "facility" as meaning any of the following:

- major source of air pollution;
- resource recovery facility or incinerator;
- sludge processing facility, combustor, or incinerator;
- sewage treatment plant with a capacity of more than 50 million gallons per day;
- transfer station or other solid waste facility, or recycling facility intending to receive at least 100 tons of recyclable material per day;
- scrap metal facility;
- landfill, including, but not limited to, a landfill that accepts ash, construction or demolition debris, or solid waste;
- medical waste incinerator [with some exceptions].

Correspondingly, the bill defines "overburdened community" as meaning:

> [...] any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency.

The bill requires New Jersey's Department of Environmental Protection to create a list of overburdened communities in the state and update that list every two years. It also requires the department to adopt rules and regulations establishing that all applications for permits for new facilities, expansions of existing facilities, or renewals of major source permits for existing facilities located wholly or partly in overburdened communities must include environmental justice impact statements and that project proponents must conduct a public hearing in the community and provide the transcripts of that hearing to the department as well. Additionally,

the law prohibits the department from approving such applications if it determines that approval would cause or contribute to the overburdened community suffering "adverse cumulative environmental or public health stressors that are higher than those borne by other communities within the State, county, or other geographic unit of analysis" unless the department determines that the community would benefit from a compelling public interest if approval is granted.

The basic approach taken by the New Jersey bill could be used to prevent further environmental racism in Nova Scotia, with or without an independent statute created for that purpose. As the EAC discusses its "End Environmental Racism" goal with NSE, it may wish to recommend that NSE follow the approach taken in the New Jersey bill and:

- establish a list of communities in the province that are already suffering or are otherwise vulnerable to disproportionate environmental harms;

- establish a list of activities that could cause or exacerbate environmental harms if they were located in or near any of those communities; and,

- establish effective EA and regulatory approval requirements to prevent such harms, potentially including features such as environmental racism impact analyses and required community hearings.

Amendments to the *Environmental Assessment Regulations* and *Approval and Notification Procedures Regulations* could be accomplished without the creation of a standalone statute such as the proposed *Act to Address Environmental Racism* that NDP MLA Lenore Zann tabled in the provincial House of Assembly in 2017.

The Government of Nova Scotia's ability to alter the EA and regulatory approval processes without statutory amendments presents an attractive option for relatively quick movement on this issue; however, any changes contemplated should be informed by the perspectives of the affected communities, and meaningful consultation processes should be carried out.

Among other things, Mi'kmaw and African Nova Scotian communities may wish to advocate for amendments to the *Environment Act* to have social justice or equity provisions included in the Act's purpose section and to have the Act itself require consideration of factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia in all environmental decision making. Amendments along these lines would require the legislative enactment of an amending statute and would therefore require significant support by the entire provincial government. The process would be more involved than making amendments to the *Environmental Assessment Regulations* and *Approval and Notification Procedures Regulations* alone, but, if successful, it would make it more difficult for a future government to reverse any progressive changes that the current government may wish to make.

Recommendations

In light of the analysis above, we recommend that the EAC, in collaboration with Mi'kmaw and African Nova Scotian communities:

- consider advocating for the inclusion of an additional *SDGA* principle, established in the regulations, that will address environmental racism explicitly and assert a commitment to ending it;

- consider advocating for amendments to the *Environment Act* to have social justice or equity provisions included in the Act's purpose section and to have the Act itself require consideration of factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia in all environmental decision making;

- consider advocating for swift amendments to the *Environmental Assessment Regulations* to require Ministerial consideration of factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia when making EA decisions;

- consider advocating for swift amendments to the *Approval and Notification Procedures Regulations* to require Ministerial consideration of factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia when considering applications for relevant regulatory approvals; and,

- consider offering New Jersey bill S232/A2212 as a model for a new regulatory approach and recommending that the Government of Nova Scotia work with Mi'kmaw and African Nova Scotian communities in the province to:

    - establish a list of communities in the province that are already suffering or are otherwise vulnerable to disproportionate environmental harms;

    - establish a list of activities that could cause or exacerbate environmental harms if they were located in or near any of those communities; and,

    - establish effective EA and regulatory approval requirements to prevent such harms, potentially including features such as environmental racism impact analyses and required community hearings.

LEGISLATIVE ANALYSIS 5: PROTECT WATER GOAL

The draft document provided to us by the EAC includes the following goal and commentary:

> **The province will update its environmental impact assessment process to consider the cumulative impacts of any development that would potentially affect wetlands, rivers, lakes, or other aquatic environments.**
>
> Effective water stewardship and management is critical to the health of our environment, our economy and to Atlantic Canadians. Pollution from industrial developments, wastewater, and runoff can change the ecology and chemistry of rivers, and coastal systems, with immediate and long-term impacts on drinking water quality and the well-being of wild fish species. Likewise, hydroelectric dams and water extraction projects can interfere with fish passage and healthy aquatic ecosystems. Provincial environmental assessments currently deal with developments on a case-by-case basis. The policy and practice must be changed such that the impacts of any development that may affect a wetland, stream, river, lake or other aquatic ecosystem are considered in concert with those of all other developments affecting that same water system. Any new developments that may cause the cumulative impacts on a particular body of water to progress to a point of ecological unsustainability must be prevented from going forward.

Before turning to the legislative analysis conducted below, we wish to flag two points for the EAC's consideration.

First, although we understand that the EAC's "Protect Water" goal is concerned primarily with the protection of water in the province, we would argue that cumulative impacts assessments (also called cumulative effects assessments) should be required in Nova Scotia's EA process for *all* environmental considerations, and not only with respect to aquatic ecosystems. Rather than advocating specifically for the inclusion of cumulative effects assessments for proposed developments that would affect aquatic ecosystems, we would recommend advocating for the inclusion of cumulative effects assessments as a section 12 factor in Nova Scotia's *Environmental Assessment Regulations*. We explain the significance of the section 12 factors in more detail below.

Second, as our legislative analysis describes in detail, the EA process is not the only regulatory process in which proposed projects affecting water are assessed and authorized in Nova Scotia. Currently, the EAC's "Protect Water" goal focuses on the provincial EA process specifically, but our impression is that the EAC would like to see cumulative effects considerations be applied to aquatic environments for all regulated development in the province. For this reason, our analysis describes other significant regulatory processes through which proposed projects affecting water are assessed and authorized in Nova Scotia, and we recommend that the EAC consider advocating for changes to one of those processes as well.

The Current Legal Landscape

Nova Scotia's *Environment Act* ("the Act") and the Minister of Environment ("the Minister")

play an important role in water stewardship and management in the province. With only a few exceptions, section 103 of the *Environment Act* vests every watercourse and the right to use or divert water in any watercourse in the provincial Crown.

In addition, section 104 of the Act designates NSE as the lead agency with responsibility to:

> (a) promote sustainable management of water resources;
>
> (b) allocate water resources among competing users in a manner that will further sustainable development;
>
> (c) take such measures as are reasonable to provide access to safe, adequate and reliable water supplies for individual, municipal, industrial and agricultural uses;
>
> (d) promote the health and integrity of aquatic ecosystems, to protect habitats for animals and plants and to provide for continued recreational benefits; [and,]
>
> (e) promote informed decision making in water-resource management through public education and participation.

To fully understand the role and authority of the Minister in the protection and management of water in the province, it is important to begin with the definitions used by the *Environment Act* and the regulations that exist beneath it. The terms "water resource", "watercourse", "watershed", and "wetland" are all defined in section 3 of the Act, as follows:

> (bc) "water resource" means all fresh and marine waters comprising all surface water, groundwater and coastal water;
>
> (be) "watercourse" means
>
> > (i) the bed and shore of every river, stream, lake, creek, pond, spring, lagoon or other natural body of water, and the water therein, within the jurisdiction of the Province, whether it contains water or not, and
> >
> > (ii) all groundwater;
>
> (bf) "watershed" means the area drained by, or contributing to a stream, lake or other body of water;
>
> (bg) "wetland" means land commonly referred to as a marsh, swamp, fen or bog that either periodically or permanently has a water table at, near or above the land's surface or that is saturated with water, and sustains aquatic processes as indicated by the presence of poorly drained soils, hydrophytic vegetation and biological activities adapted to wet conditions.

Additionally, subsection 2(ab) of the Act defines "groundwater" as meaning "all water naturally occurring under the surface of the Province". The EAC's "Protect Water" goal does not currently

refer to groundwater, but the EAC may wish to consider addressing that form of water in its advocacy as well.

Several regulations under the *Environment Act* create processes to authorize projects that affect water stewardship and management. These include Nova Scotia's *Environmental Assessment Regulations*, *Activities Designation Regulations*, and *Approval and Notification Procedures Regulations*.

(a) The *Environmental Assessment Regulations*

Proposed projects that require provincial EAs are listed in Schedule A of Nova Scotia's *Environmental Assessment Regulations*. Within the provincial EA regime, proposed projects requiring EAs are called "undertakings" and are divided into two classes: Class I undertakings and Class II undertakings. Class I undertakings include, among other things, certain kinds of industrial facilities, mining, energy generation, and waste management facilities. Class II undertakings include similar activities but have greater footprints than those in Class I.[7]

The only undertakings listed in the *Environmental Assessment Regulations* that specifically reference impacts to water are listed as Class I undertakings in the section entitled "Other". They are:

1. An undertaking that involves transferring water between drainage basins, if the drainage area containing the water to be diverted is larger than 1 km^2.

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

Many, if not most, of the other undertakings listed in the *Environmental Assessment Regulations*, including mining and transportation undertakings, could have an adverse effect on water.

The *Environment Act* and *Environmental Assessment Regulations* do not explicitly require cumulative impacts assessment. Rather, the requirements imply that potential cumulative effects should be considered throughout the EA process. For example, when a proponent registers a proposed undertaking with NSE, the registration document must identify the location of the proposed undertaking, provide details concerning the nature and sensitivity of the area surrounding the proposed undertaking, and provide environmental baseline information relevant to the proposed undertaking, among other information.[8] Likewise, when the Minister considers whether to approve, reject, or require additional assessment of a proposed undertaking, the Minister must consider several factors. These factors are listed in section 12 of the *Environmental Assessment Regulations*, and they are:

(a) the location of the proposed undertaking and the nature and sensitivity of the surrounding area;

(b) the size, scope and complexity of the proposed undertaking;

[7] *Environmental Assessment Regulations*, Schedule A—Designated Class I and Class II Undertakings.
[8] *Ibid*, subsection 9(1A), clauses (ii), (vi), and (x).

(c) concerns expressed by the public and aboriginal people about the adverse effects or the environmental effects of the proposed undertaking;

(d) steps taken by the proponent to address environmental concerns expressed by the public and aboriginal people;

(e) whether environmental baseline information submitted under subclause 9(1A)(b)(x) for the undertaking is sufficient for predicting adverse effects or environmental effects related to the undertaking;

(f) potential and known adverse effects or environmental effects of the proposed undertaking, including identifying any effects on species at risk, species of conservation concern and their habitats;

(g) project schedules where applicable;

(h) planned or existing land use in the area of the undertaking;

(i) other undertakings in the area;

(j) whether compliance with licences, certificates, permits, approvals or other documents of authorization required by law will mitigate the environmental effects;

(k) such other information as the Minister may require.

Theoretically, these requirements lay a foundation for cumulative effects assessments, but such assessments are not required by provincial law, and NSE currently provides no guidance on cumulative effects assessments to proponents. A quick review of some recent EA registration documents (which are documents that proponents must prepare and submit to the Minister as the basis for the Minister's assessment) shows virtually no cumulative effects assessment, with the closest approximation of such assessment appearing in the form of identifying "other undertakings in the area".

Table 1: Cumulative Effects Assessment in Recent EA Registration Documents

	Project	Proponent	Class	Status	Cumulative Effects	Other Undertakings
1	Quarry Expansion	Nova Construction Ltd.	I	Under Review	Not addressed	2 paragraphs
2	LiquAsphalt Storage Facility	General Liquids, Municipal Group	I	Approved with Conditions	1 paragraph	Not addressed
3	Quarry Expansion	Spicer Construction	I	Approved with Conditions	Not addressed	1 paragraph

	Project	Proponent	Class	Status	Cumulative Effects	Other Undertakings
4	Highway Project	NS DTIR	I	Under Review	Not addressed	1 page

Given this limited consideration of cumulative effects, we agree that there is a significant gap in Nova Scotia's EA process when it comes to considering potential impacts on water. As we noted above, although we understand that the focus of the EAC's "Protect Water" goal is the protection of water specifically, our own view is that cumulative effects assessments should be required for all environmental considerations addressed in the EA process, and not simply for considerations related to aquatic ecosystems. Including cumulative effects assessments as a factor that the Minister must consider under section 12 of the *Environmental Assessment Regulations* would oblige the Minister to consider cumulative effects in all EAs, and that would lay a strong foundation for the EAC's goal. However, to ensure that adverse effects on water are considered thoroughly and holistically in the EA process, NSE would also need to develop additional policy guidance to ensure that adequate information is gathered and put before the Minister during the EA registration process.

(b) The *Activities Designation Regulations* and *Approval and Notification Procedures Regulations*

As we noted above, many large and small projects affecting water in Nova Scotia are authorized without EAs, including golf courses, agriculture operations, housing developments, application of pest control products, and sewage treatment facilities. Projects such as these do not require EAs but do require some form of provincial authorization, particularly if they will have a direct impact on a watercourse. These activities are authorized through the processes set out in Nova Scotia's *Activities Designation Regulations* and *Approval and Notification Procedures Regulations*.

The *Activities Designation Regulations* and *Approval and Notification Procedures Regulations* create two categories of activities that are authorized outside of the EA regime:

- activities authorized through the receipt of notifications; and,
- activities authorized through the approval of applications.

The notification process was established in 2014 and was designed to create a streamlined channel through which watercourse alteration activities that NSE considers to be low-risk could be authorized without formal review by government.[9] The watercourse alteration activities that are now authorized through notifications are listed in subsection 5B(1) of the *Activities Designation Regulations*, and they include activities such as work to improve fish habitat, the construction or modification of culverts, and the construction or modification of small bridges. Specific conditions defining the permissible nature and scope of each activity are also provided.

[9] For a detailed overview of the process, see Nova Scotia Environment, "Watercourse Alteration" and the reference materials provided therein.

A proponent wishing to conduct one of these activities must submit a Notification Form to NSE and wait for a notification receipt from the department. NSE reviews the form for completeness but does not assess it for environmental concerns. Once the proponent has received a notification receipt from the department, the work may begin.

All work authorized through the notification process must be conducted in compliance with the most recent edition of the *Nova Scotia Watercourse Alterations Standard*, and any work that cannot be conducted in accordance with that standard requires an application instead of a notification. All of these requirements are enforceable under the *Environment Act*, and all work authorized through the notification process is subject to compliance monitoring by the NSE.

The notification process does not accommodate cumulative effects assessment. The process involves minimal government oversight and relies primarily on the imposition of a detailed and enforceable standard with which all applicable watercourse alteration activities must comply. Because the process is relatively new and was designed specifically to streamline the authorization process for watercourse alteration activities that NSE considers to be low-risk, it seems unlikely that NSE would amend the process now to include cumulative effects considerations.

As compared to the notification process for watercourse alteration activities that NSE considers to be low-risk, the application process for higher risk activities involving water is more involved, and, in our view, could accommodate cumulative effects considerations more easily.

The *Activities Designation Regulations* require applications and approvals for a number of activities involving water. Some of these are identified in Division I of the regulations, which deals with water specifically, while others appear in other divisions, such as those dealing with pesticides, municipal waste, solid waste, dangerous goods, metals, minerals, oil and gas, etc.

To distinguish between the approvals issued under the *Activities Designation Regulations* and *Approval and Notification Procedures Regulations* and the approvals issued under the *Environmental Assessment Regulations*, we refer to the former as "regulatory approvals" and to the latter as "EA approvals".

Under the *Approval and Notification Procedures Regulations*, which are designed to work hand-in-hand with the *Activities Designation Regulations*, most applications for activities requiring regulatory approvals must address the following:

- "the location of the site and the capacity and size of the activity to which the application relates";
- "details of site suitability and sensitivity, including proximity to watercourses, residences and institutions, geology and hydrogeology";
- "copies of any environmental assessment study reports that may pertain to the activity";

- "a description of any substance that will or might be released into the environment as a result of the activity";

- "a description of any adverse effect, including surface disturbance, that may or will result from the activity and how it will be controlled";

- "contingency plans to deal with any reasonably foreseeable sudden or gradual release of a substance that is likely to have an adverse effect"; and,

- "a description of any public consultation undertaken or proposed by the applicant".[10]

This is not an exhaustive list, and the regulations set out other information requirements as well.

When the Minister reviews an application for a regulatory approval, the Minister "must determine whether the impact of the activity on the environment conforms with the Act and applicable standards and regulations",[11] and it is expected that the environmental information provided in the application will be taken into account.

Currently, the *Activities Designation Regulations* and *Approval and Notification Procedures Regulations* do not expressly require cumulative effects considerations to be taken into account during the regulatory approval process. The EAC's concerns regarding the absence of cumulative effects assessments are particularly relevant here, as a wide variety of activities—such as the spraying of pesticides over or near watercourses, the construction and operation of landfills and other waste management facilities, and the direct alteration of wetlands—can all be approved outside of the EA regime, and the regulatory approval process proceeds more quickly and with less public engagement than the EA process requires. We therefore recommend that the EAC consider calling for amendments to the regulatory approval regime as well as the EA regime, and that the EAC propose cumulative effects assessment requirements for both.

Finally, we wish to emphasize again that although the *Activities Designation Regulations* have a division that deals specifically with water, many activities affecting water are dealt with in other divisions of the regulations. If cumulative effects assessments are going to be incorporated into applications for approval for activities affecting water, we would recommend that they be applied in all relevant activities requiring regulatory approval, not simply those appearing in the division that deals specifically with water.

As with our commentary on the inclusion of cumulative effects assessments within provincial EAs, our view is that it would be most efficient to require cumulative effects assessments as a component of all applications for regulatory approvals under the *Approval and Notification Procedures Regulations*, not simply those involving water. Considerations that are specific to aquatic ecosystems could then be addressed directly in policy guidance and the application packages required for relevant activities.

[10] *Approval and Notification Procedures Regulations*, subsection 6(1), clauses (b), (i), (k), (m), (r), (s), (u).
[11] *Ibid*, subsection 9(1).

Recommendations

In light of the analysis above, we recommend that the EAC:

- call for cumulative effects assessment to be added as a section 12 factor in the *Environmental Assessment Regulations*;

- call for corresponding policy guidance to be developed to ensure that adverse effects on water are considered thoroughly and holistically in EAs and that adequate information is gathered and put before the Minister;

- call for amendments to the *Approval and Notification Procedures Regulations* requiring cumulative effects assessment as a component of all applications for regulatory approvals;

- call for corresponding policy guidance to be developed to ensure that adverse effects on water are considered thoroughly and holistically in the regulatory approval process and that adequate information is gathered and put before the Minister.

ACCOUNTABILITY AND ENFORCEMENT MECHANISMS 1: ENHANCING GOVERNMENT ACCOUNTABILITY UNDER THE *SDGA*

This section of our report assesses the accountability measures included in the *SDGA* and explores whether the *SDGA* regulations could include legal mechanisms to enhance government accountability under the Act.

Assessing the Government's Legal Obligations under the *SDGA*

As we have discussed already, the goals established in the *SDGA* are not enforceable requirements, and we expect that when additional goals and initiatives are set out in the *SDGA* regulations, they will share the same legal status.

However, even though the goals established in the *SDGA* are not enforceable requirements, and even though the goals set out in the *SDGA* regulations will likely share the same status, that does not mean that the Government of Nova Scotia will have no obligation to further the goals established in and under the *SDGA*.

When it comes into force, the *SDGA* will impose several legal obligations on the Government of Nova Scotia. The following table identifies the *SDGA* provisions that will create legal obligations for the provincial government and briefly explains the nature of each obligation.

Table 2: Government Obligations and Accountability under the *SDGA*

***SDGA* Provision**	**Legal Obligation**
Subsection 5(1) states that the province's long-term objective is "to achieve sustainable prosperity", and subsection 5(2) states that in order to achieve that long-term objective, the provincial government "shall" do a number of things: (a) raise awareness of the importance of sustainable prosperity and the elements that contribute to it; (b) create the conditions necessary for sustainable prosperity, including regulation, programs and initiatives to encourage actions and innovation by local government, business, non-government organizations and Nova Scotians for the purpose of making progress in sustainable prosperity; and (c) adopt, support, and enable goals and initiatives that are aligned with the principles and focus areas in this Act and the regulations.	In legislation, use of the word "shall" denotes a binding legal obligation. As a result, subsection 5(2) of the *SDGA* legally obliges the Government of Nova Scotia to do all of the things listed in clauses (a) to (c). In practical terms, this means that the Government of Nova Scotia has a legal obligation to "adopt, support, and enable" relevant goals and initiatives and a corresponding legal obligation to "create the conditions necessary for sustainable prosperity". Although the *SDGA* does not legally oblige the Government of Nova Scotia to meet all of the goals it sets, this portion of the Act makes it absolutely clear that the government must demonstrate commitment and action. Because subsection 5(2) of the Act creates binding legal obligations, if the Government of Nova Scotia fails to create necessary regulations or programs in furtherance of its sustainable prosperity goals or initiatives, or if it fails to provide other necessary supports that are within its means, those failures could potentially ground judicial review proceedings.

SDGA Provision	Legal Obligation
Section 10 states: "The Premier shall meet with the Round Table annually to discuss progress on sustainable prosperity and may include any member of the Executive Council the Premier deems appropriate at the meeting."	The use of the word "shall" section imposes a binding legal obligation on the Premier. Failure to meet with the Round Table annually to discuss progress on sustainable prosperity could potentially ground a judicial review proceeding.
Section 11 states: "The Premier shall ensure that sustainable prosperity is included in the mandate of every Government department."	The use of the word "shall" in this section imposes a binding legal obligation on the Premier. Failure to mandate provincial government departments as required could potentially ground a judicial review proceeding.
Section 12 creates reporting requirements that the Minister of Environment must meet annually. Specifically, subsections 12(1) and (12)(2) state: (1) The Minister, in consultation with the members of the Executive Council as appropriate in relation to their respective mandates, shall report annually to the House of Assembly on the progress made toward the long-term objective of sustainable prosperity, including progress toward achievement of sustainable prosperity goals and initiatives and any changes made thereto, as established under this Act and the regulations. (2) The Minister shall table the annual report referred to in subsection (1) in the House of Assembly on or before July 31 or, where the House is not then sitting, file it with the Clerk of the House.	The use of the word "shall" in these subsections imposes binding legal obligations on the Minister. Failures to prepare or table the annual report as required could potentially ground judicial review proceedings.
Section 13 states: "The Minister shall request the Round Table to carry out a public review of this Act and the regulations (a) no later than five years after this Act comes into force; and (b) at any other time, as needed."	The use of the word "shall" in this section imposes a binding legal obligation on the Minister. Failure to initiate periodic review by the Round Table as required could potentially ground a judicial review proceeding.

Taken together, these legal obligations mean that although the *SDGA* does not require the Government of Nova Scotia to meet the goals established in the Act, the government will have clear obligations to further the goals established in and under the *SDGA* by employing the powers and using the resources within its means. Additionally, the government will have clear obligations to report regularly on its progress and periodically subject its efforts to external review.

To illustrate the relationship between the government's obligations and the goals established in and under the *SDGA*, consider section 7 of the Act, which states:

> The Government's goals in relation to greenhouse gas emissions reductions are that greenhouse gas emissions in the Province are
>
> (a) by 2020, at least 10% below the levels that were emitted in 1990;
>
> (b) by 2030, at least 53% below the levels that were emitted in 2005; and
>
> (c) by 2050, at net zero, by balancing greenhouse gas emissions with greenhouse gas removals and other offsetting measures.

As they exist within the *SDGA*, these GHG emissions reduction goals are not enforceable requirements. If provincial greenhouse gas emissions are only 40% below 2005 levels by 2030, the government could not be taken to court for the sole reason that it had failed to meet the goal set out in subsection 7(b). However, if by 2030 the government had done nothing within its power to further that goal—if, for example, it had chosen not to create regulatory requirements that were necessary to support and enable the goal's achievement—the government's failure to further the goal could potentially ground a judicial review proceeding.

Enhancing Government Accountability under the *SDGA*

(a) Exploring a Right of Action under the *SDGA*

Government failures to meet the legal obligations listed in Table 2 could theoretically give rise to judicial review proceedings; however, a member of the public or an organization such as the EAC would face some legal barriers to taking action of that kind: specifically, the "standing" required to initiate such a proceeding would need to be established.

Canadian courts regularly apply the doctrine of "public-interest standing", which enables individuals, groups, and organizations to bring public-interest issues to the courts even when they have not been harmed directly by the circumstances that inspired their proceedings. Although the doctrine of public-interest standing creates avenues through which the EAC or others could seek judicial review of government failures to meet the requirements of the *SDGA*, the additional work required to establish public-interest standing could be eliminated if the Government of Nova Scotia created a statutory or regulatory right of action for members of the public under the *SDGA*.

Statutory and regulatory rights of action are used to create straightforward paths to court. They do this by granting or recognizing rights to initiate legal proceedings. In doing so, they essentially bestow clear "standing" through legislation.

For example, this autumn, the State of Vermont passed a bill called the *Vermont Global Warming Solutions Act* which offers a useful model for a statutory right of action under the *SDGA*. In addition to creating enforceable requirements for GHG emissions reductions within

the state, the law also creates a statutory right of action (which it refers to as a "cause of action") that gives members of the public a straightforward way to hold the state government accountable with respect to its climate commitments. Specifically, the law allows anyone to begin a legal proceeding on the grounds that the state government failed to meet critical obligations established within the law. The legal proceedings envisioned are closely analogous to judicial review proceedings in Canada, and a successful proceeding would likely end with a court order requiring the state to meet its responsibilities within a timeframe that the court determined was reasonable.

Creating a right of action of this kind under the *SDGA* would be unusual, but perhaps not impossible, at this stage of the legislative process. In Canada, such rights of action are typically established in statutes, and when they are established in regulations instead, the "parent statutes" that authorized the regulations typically grant explicit authority to create regulations establishing rights of action, or they include other language that clearly contemplates liabilities and rights to seek legal remedies for harms.

To understand why this is so, it is important to understand the relationship between a statute and the regulations that exist under it. In Canada, statutes are enacted federally by Parliament and provincially and territorially by the legislative assemblies of the provinces and territories. In each case, the whole government participates in the process, not least by voting to pass or reject a proposed bill. By contrast, regulations are created with authority that governments delegate specifically for the purpose. Some statutes grant executive councils authority to make regulations without further approval from the rest of government; others empower specific government ministers to make regulations.

Because regulations are created through authority that has been delegated specifically by government, there are limits to what they can do. Regulatory authority exercised by an executive council or by a government minister needs to be within the scope of the authority envisioned by the statute that delegated the authority to make the regulations. Governments typically describe the scope of such authority within enabling statutes by listing specific regulatory powers; however, it is also common for governments to set non-exhaustive lists of regulatory powers so that the person or body creating regulations will have flexibility if unanticipated issues arise.

Subsection 14(2) of the *SDGA* gives Nova Scotia's Governor in Council (effectively, the executive council) power to make regulations, and none of the clauses listed within it refer to a right of action of the kind described above. In addition to the specific powers listed from clauses (a) to (h), clause 14(2)(i) also grants the power to make regulations "respecting any matter that the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act". Broad language like this is often included in statutes to indicate that a list of specific regulatory powers is not exhaustive.

On the face of it, clause 14(2)(i) of the *SDGA* could arguably grant authority to establish a regulatory right of action enabling members of the public to initiate judicial review proceedings if the Government of Nova Scotia, the Premier, or the Minister of Environment fail to meet any of the legal obligations that the Act imposes.

If the Government of Nova Scotia is unwilling to create a regulatory right of action in the *SDGA* regulations, the EAC may wish to raise this issue again when the *SDGA* itself is being reviewed (as it must be at least every five years after it comes into force). Future advocacy for a statutory right of action within the *SDGA* could strengthen the Act in ways that may be more difficult now.

(b) Enhancing the *SDGA*'s Reporting Requirements

Finally, it is worth noting that the annual reporting requirements required by section 12 of the *SDGA* could easily be enhanced in the *SDGA* regulations.

The *SDGA* currently requires the Minister of Environment to prepare an annual report addressing "progress made toward the long-term objective of sustainable prosperity, including progress toward achievement of sustainable prosperity goals and initiatives and any changes made thereto", as established under the Act and its regulations, and to table or file that report by July 31st of each year. The *SDGA* regulations could enhance these requirements by adding additional responsibilities to make the annual report conveniently accessible to the public, such as by making it available on the NSE website and announcing its annual publication through press releases.

Regulatory additions of this kind, building on specific requirements established in "parent statutes", are common, and clause 14(2)(f) of the *SDGA* grants explicit authority to make regulations "governing reporting and record-keeping requirements for any purpose related to this Act". For these reasons, advocating for enhanced reporting requirements in the *SDGA* regulations—expanding on section 12 of the Act—would be a relatively straightforward way to enhance government accountability under the *SDGA* by heightening public awareness of the government's progress and improving public access to information.

Recommendations

In light of the analysis above, we recommend that the EAC:

- consider advocating for a right of action in the *SDGA* regulations that would create a straightforward way for members of the public to initiate judicial review proceedings if the Government of Nova Scotia, the Premier, or the Minister of Environment fail to meet the legal obligations that the Act imposes; and,

- consider advocating for enhanced reporting requirements in the *SDGA* regulations, expanding on section 12 of the Act, to enhance government accountability by heightening public awareness of the government's progress and improving public access to information.

ACCOUNTABILITY AND ENFORCEMENT MECHANISMS 2:
ASSESSING EXISTING ENFORCEMENT MECHANISMS IN RELEVANT LEGISLATION

The EAC's draft document ends by emphasizing that the *SDGA* and its regulations must be enforceable, and it calls for "clear repercussions for industries and others who do not operate according to the principles of sustainability, environmental conservation, social inclusion, and climate responsibility which are laid out in the Act, or who contravene the regulations which are adopted".

When the Government of Nova Scotia established goals in *EGSPA*, the Act itself did not authorize the government to enforce public compliance with statute's principles or ambitions. Goals that were established within the Act did not become enforceable until they were installed in other statutes and regulations that turned them into legal requirements (as opposed to mere "goals") and created consequences for failures to meet them. Additionally, some goals were policy based and were not designed to be turned into enforceable laws.

Like the goals established in *EGSPA*, the goals in the *SDGA* are not enforceable under the Act. Based on the approaches the Government of Nova Scotia has taken to date, it seems likely that the goals and initiatives set out in the *SDGA* regulations will follow the same pattern and will not be enforceable unless and until they are installed in other statutes or regulations that turn them into legal requirements and create consequences for failing to meet them.

This section of the report assesses the enforcement mechanisms contained within the statutes and regulations in which the EAC's proposed goals would likely be implemented if they were adopted. Our analysis shows that if the Government of Nova Scotia were to adopt the EAC's proposed goals and implement them accordingly, most would be enforceable or reviewable (that is, subject to judicial review) if they were installed as legal requirements in relevant pieces of legislation.

Assessing the Enforceability of the Proposed EAC Goals

(a) Renewable Energy Goal

The renewable electricity goals that were established under *EGSPA* and installed as legal requirements in Nova Scotia's *Renewable Electricity Regulations* were enforceable under those same regulations.

Section 47 of the *Renewable Electricity Regulations* states:

> 47 (1) A person who does any of the following is liable to a daily penalty of no more than $500 000 to a maximum aggregate of 10 000 000 per occurrence:
>
> (a) fails to comply with the requirements of Section 4, 5, 6 or 6A;
>
> (b) fails, neglects, omits or otherwise refuses to do any act or thing required in respect of Section 4, 5, 6 or 6A;

(c) fails, neglects, omits or otherwise refuses to comply with a direction or order of the Minister to comply with Section 4, 5, 6 or 6A.

(2) Unless otherwise provided in the Act, a person is not subject to a penalty under subsection (1) if the person establishes that they

(a) exercised due diligence; or

(b) reasonably and honestly believed in the existence of facts that, if true, would render the conduct of the person excusable.

(3) No public utility may recover any penalty imposed on it under this Section through its rates.

Notably, section 6A of the regulations is the section that imposes the current renewable electricity target of 40% for 2020 and beyond.

Together, these provisions mean that if NSPI or a municipal electric utility fails to meet the current renewable electricity requirement, they could be penalized with substantial fines. If new renewable electricity requirements are established in the *Renewable Electricity Regulations*, and if section 47 of the regulations is retained and updated accordingly, the new renewable electricity requirements will be enforceable.

We recommend that in its communications to government, the EAC emphasize that the enforcement section of the *Renewable Electricity Regulations* should be retained and updated accordingly if new renewable electricity requirements are set.

(b) Inclusive Deep Energy Upgrades Goal

As we discussed in our legislative analysis of this goal, the Government of Nova Scotia's *Building Code Act* and *Building Code Regulations* do not currently require new constructions to be built to NZER standards. Until they do, the government has no legal obligation to build new social housing to NZER standards: any decision that it may make to do so will be a discretionary decision rather than a decision required by law. There is therefore no enforcement mechanism for this goal.

(c) Energy Efficiency Goal

As we discussed in our legislative analysis of this goal, Nova Scotia's legislated electricity regime requires NSPI to purchase cost-effective electricity efficiency and conservation activities from EfficiencyOne, and it requires the UARB to approve proposed purchases, taking into account their affordability (emphasizing short-term rate impacts) to NSPI's customers.

For these reasons, we believe that the Government of Nova Scotia would probably not impose a legal requirement obliging NSPI to purchase more DSM programming in order to increase the

level of total electricity system efficiency to 3% per year by 2030 at any cost. Instead, we believe that if the government were to adopt the EAC's "Energy Efficiency" goal, it would likely do so in a way that directed NSPI to invest in more DSM programming only if doing so would not cause unaffordable rate increases for NSPI's customers.

Let us assume for the purpose of this analysis that the government were to:

- set a target of 3% total electricity system efficiency per year by 2030,
- direct NSPI to prioritize cost-effective electricity efficiency and conservation spending in accordance with that target, and
- direct the UARB to ensure that NSPI prioritizes cost-effective electricity efficiency and conservation spending in accordance with that target and, correspondingly, to approve proposed electricity efficiency and conservation purchases that seek to meet that target if such purchases will not cause unaffordable rate increases for NSPI's customers.

Under those circumstances, the 3% target would not be enforceable *per se*, but a decision by the UARB to approve purchases that fell below the target could potentially by appealed to the Nova Scotia Supreme Court under the appeal provisions of the *Utility and Review Board Act* or could potentially ground a judicial review proceeding, depending on the nature of the challenge.[12]

(d) End Environmental Racism Goal

If Nova Scotia's EA process and other regulatory authorization processes were amended to incorporate requirements to address factors such as racialization, racism, social equity, and the disproportionate burden of environmental harm borne by Indigenous peoples and other racialized communities in Nova Scotia, those amendments could create consequences for proponents and government.

Proponents applying for EA or other regulatory approvals would be legally obliged to provide whatever information was required by the amended approval processes, and failure to provide the necessary information could result in failure to secure approval. Moreover, any terms or conditions attached to an EA or other regulatory approval would be enforceable by NSE under subsection 158(f) of the *Environment Act* and, if NSE failed to enforce, could be prosecuted by one or more private citizens instead.

Additionally, because ministerial decisions to grant EA and other regulatory approvals are subject to judicial review, if an affected community believed that the Minister granted an EA or other regulatory approval without properly considering whatever factors were required by law, then the community (or one or more members) could take the issue to court and ask a judge to assess the reasonableness of the Minister's decision.

[12] Section 30 of the *Utility and Review Board Act* creates a statutory right of appeal upon questions concerning the UARB's jurisdiction or questions of law; a judicial review proceeding would be needed if the decision under review turned largely on questions of fact or mixed fact and law.

(e) Protect Water Goal

As with the amendments envisioned in our commentary on the "End Environmental Racism" goal, if Nova Scotia's EA process and other regulatory authorization processes were amended to require cumulative effects assessments, those requirements would create consequences for proponents and government.

Proponents applying for EA or other regulatory approvals would be legally obliged to provide whatever information was required by the amended approval processes, and failure to provide the necessary information could result in failure to secure approval. Moreover, any terms or conditions attached to an EA or other regulatory approval would be enforceable by NSE under subsection 158(f) of the *Environment Act* and, if NSE failed to enforce, could be prosecuted by one or more private citizens instead.

Additionally, because ministerial decisions to grant EA and other regulatory approvals are subject to judicial review, if an individual or organization with a stake in the Minister's decision (including a public-interest litigant) believed that the Minister granted an EA or other regulatory approval without properly considering whatever factors were required by law, that individual or organization could take the issue to court and ask a judge to assess the reasonableness of the Minister's decision.

Additional Comments on Enforcement

Nova Scotia's environmental laws offer several enforcement mechanisms that could be used to great effect if they were used more regularly. In general, the problem is not that Nova Scotia's environmental laws are not enforceable: it is that they are not consistently enforced.

To give just a few brief examples, Nova Scotia's *Environment Act* includes mechanisms that allow members of the public to request investigations by NSE when they believe that an offence has been committed under the Act; the Act gives the Minister of Environment power to issue a ministerial order when the Minister believes on reasonable and probable grounds that a person has contravened or will contravene the Act; and, the Act also sets out a number of regulatory offences that can be prosecuted in a court of law. The provisions concerning ministerial orders and the prosecution of offences are particularly strong enforcement mechanisms, but they grant discretionary powers rather than imposing legal requirements to take action.

The experiences of the community of Harrietsfield illustrate the consequences of government failure to enforce environmental laws. As two corporations successively operated construction and demolition waste processing businesses in Harrietsfield—one of which necessitated the construction of a massive containment cell to contain materials that had been stockpiled unlawfully on the site for years—several Harrietsfield residents observed increasing groundwater contamination affecting their domestic wells. A series of ministerial orders was issued by the Minister of Environment, requiring the persons responsible for the contamination to take action, but the orders were appealed. During the appeal processes, the Minister chose not to take additional actions that were available under the *Environment Act*, such as directing NSE to carry out the terms of the orders so as to prevent further contamination. After the appeal processes

were over and the Minister's final orders were upheld by the courts, the persons named in the orders continued not to comply with them. They were not prosecuted for their non-compliance, despite the fact that contravening an order is an offence under the *Environment Act*. Ultimately, East Coast Environmental Law stepped in to assist a Harrietsfield community member in privately prosecuting the failure to comply. That private prosecution was soon taken over by Nova Scotia's Public Prosecution Service, which has absolute authority to assume control of private prosecutions, and the prosecution has stagnated ever since. In the past three years, we have watched over and over again as the parties have come to court and adjourned the matter to a later date, ostensibly to enable further discussions that may someday lead to a resolution.

As frustrating as this reality is, our law does not compel the government to enforce the rules it makes. The mechanisms are available, but government must be willing to devote the attention and resources required to use them effectively. The primary barriers to the effective enforcement of environmental laws in Nova Scotia are political, not legal.

Recommendation

In light of the analysis above, we recommend that the EAC:

- consider advocating for a government commitment, set out in the *SDGA* regulations, to devote additional resources to the enforcement of environmental laws, including ministerial orders issued under the *Environment Act* as well as *Environment Act* offences prosecuted by Nova Scotia's Public Prosecution Service.