

September 8, 2017

BY EMAIL

The Hon. Catherine McKenna
Minister of the Environment and Climate Change
200 Sacre-Coeur Boul., 2nd Floor
Gatineau, Quebec
K1A 0H3

Dear Minister McKenna:

RE: SUPPLEMENTARY SUBMISSIONS ON *ENVIRONMENTAL AND REGULATORY REVIEWS: DISCUSSION PAPER* (JUNE 2017)

We are writing to you on behalf of the Canadian Environmental Law Association (“CELA”) in relation to the Government of Canada’s *Environmental and Regulatory Reviews: Discussion Paper* (June 2017).

On August 28, 2017, CELA provided you and other Ministers with a copy of our detailed submissions on the *Discussion Paper*. However, it is our understanding that the public comment period on the *Discussion Paper* has now been extended to September 15, 2017.

Accordingly, the purpose of this letter is to set out CELA’s supplementary submissions regarding the public interest need to immediately repeal the *Canadian Environmental Assessment Act, 2012* and replace it with “next generation” legislation that focuses on sustainability.

First, we have received a copy of the letter to you dated August 30, 2017 from Nature Canada, Centre Quebecois du Droit de l’Environnement, West Coast Environmental Law, Mining Watch Canada, and Wildlife Conservation Society Canada with respect to the *Discussion Paper*. Please be advised that CELA fully adopts the findings, positions and recommendations set out in the joint letter, and we strongly commend them to you and your Cabinet colleagues. CELA further adds that the robust, participatory and evidence-based sustainability approach outlined in the joint letter should include a clear statutory obligation to undertake a comparative evaluation of reasonable alternatives as part of the assessment process for proposed undertakings.

Second, we have had an opportunity to peruse the numerous submissions posted on the *Discussion Paper* website (www.discussionpaper.ca) that were uploaded by individuals, residents’ groups, environmental organizations, academics, practitioners, and indigenous communities from across Canada. Our review of these materials indicates that there is broad-based public support for entrenching sustainability on a firm legislative basis, as recommended by the Expert Panel.

Canadian Environmental Law Association

T 416 960-2284 • 1-844-755-1420 • F 416 960-9392 • 55 University Avenue, Suite 1500 Toronto, Ontario M5J 2H7 • cela.ca

Third, we have also carefully examined the *Discussion Paper* submissions filed by proponents, industry associations, business interests, and other representatives of the resource development sector. Based on our review, it appears to us that many of the concerns, objections and recommendations put forward by these persons are the very ones that were duly considered and appropriately rejected by the Expert Panel on the evidence. CELA therefore submits that these unpersuasive and unsubstantiated arguments should be given little or no weight by Cabinet.

Fourth, the Expert Panel fully complied with its terms of reference by extensively consulting Canadians, assessing the voluminous hearing record, analyzing the competing public and private interests, and designing an evidence-based reform package that meets the Government of Canada's commitment to regain public trust and restore credibility to federal EA processes. In these circumstances, there is no reason to doubt the soundness or workability of the Expert Panel's vision for legislative reform, and there is no rational basis for your Government to prefer the sparse proposals in the *Discussion Paper* over the well-conceived recommendations put forward by the Expert Panel.

Fifth, CELA notes that several *Discussion Paper* submissions from members of Canada's energy sector tend to opine that so-called "lifecycle regulators" (e.g. National Energy Board and Canadian Nuclear Safety Commission) should remain jointly (or even solely) responsible for leading assessment processes for energy projects. In our view, these submissions are premised on the erroneous assumption that these regulatory bodies have the requisite expertise and institutional capacity to properly conduct sustainability assessments. For the reasons described in the Expert Panel report and in our August 28th brief, CELA submits that there is no merit to such submissions, particularly in light of recent practices at these tribunals. If the Government of Canada is serious about requiring robust reviews and ensuring public trust in federal assessment processes, then the authority of these regulatory bodies should be restricted to their current licencing functions, and an independent assessment authority or commission should be established and empowered to conduct assessments, including those involving energy projects.

In closing, CELA again reiterates that the *Discussion Paper's* proposals are inadequate, unacceptable and unlikely to achieve your Government's objective of delivering assessment processes that "regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous persons, ensure good projects go ahead, and resources get to market."¹ Accordingly, we hereby repeat our previously filed recommendations for federal assessment reform, which are appended to this letter for your convenience.

If you have any questions arising from these supplementary submissions, please contact the undersigned as soon as possible. If requested, we would be pleased to meet with you or your staff to further discuss the need for fundamental – not piecemeal – change within federal EA processes.

¹ *Discussion Paper*, page 3.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Theresa A. McClenaghan
Executive Director and Counsel



Richard D. Lindgren
Counsel

cc. The Hon. Jim Carr, Natural Resources Canada
The Hon. Dominic LeBlanc, Fisheries and Oceans Canada
The Hon. Marc Garneau, Transport Canada
Marlo Reynolds, Minister's Office
Jesse McCormick, Minister's Office

APPENDIX A – SUMMARY OF RECOMMENDATIONS IN CELA’S SUBMISSIONS DATED AUGUST 28, 2017

CELA RECOMMENDATION #1: The Discussion Paper’s proposals for EA reform should not be used as the primary basis for framing Cabinet’s drafting instructions to legislative counsel. Instead, Cabinet’s drafting instructions should more closely reflect and incorporate the findings, conclusions and recommendations of the final report of the Expert Panel on federal EA processes.

CELA RECOMMENDATION #2: *CEAA 2012* must be wholly repealed and replaced by new comprehensive “next generation” legislation that fully entrenches the principles, processes and policies required to implement sustainability assessments at the federal level.

CELA RECOMMENDATION #3: The new legislation should require cumulative effects analysis within strategic, regional and project assessments.

CELA RECOMMENDATION #4: The new legislation should entrench strategic and regional assessments on a firm statutory basis, and, at a minimum, should specify triggers, content requirements, procedural steps, and opportunities for public and indigenous participation in such assessments.

CELA RECOMMENDATION #5: The new legislation should mandate an early engagement and planning phase in the assessment process, which must be led by the independent assessment authority established by the legislation, rather than proponents.

CELA RECOMMENDATION #6: The new legislation should not contain the “interested person” standing rule, nor any other standing rule that limits Canadians from participating in the federal assessment process.

CELA RECOMMENDATION #7: The new legislation should include prescriptive details on when and how opportunities for meaningful public participation will be guaranteed in law for all stages of strategic, regional and project assessments, including:

- (a) provisions for expanded and effective participant funding programs that are commensurate with the costs of engaging in federal assessment processes;
- (b) provisions for public involvement in post-approval monitoring, compliance and adaptive management activities.

CELA RECOMMENDATION #8: The new legislation should establish statutory duties which require all experts offering technical, scientific or opinion evidence in federal assessment processes to provide evidence that is fair, objective, non-partisan, and focused only on matters within their area of expertise.

RECOMMENDATION #9: The new legislation should include meaningful opportunities for parties to test technical, scientific or opinion evidence tendered during assessment processes, and

should codify basic procedural safeguards (e.g. evidence under oath, cross-examination of witnesses, etc.) where public hearings are held under the new legislation.

RECOMMENDATION #10: The new legislation should entrench and define the precautionary principle in accordance with international law, and should specify how this principle applies where scientific uncertainty exists in relation to predicted impacts, proposed mitigation, or related matters.

CELA RECOMMENDATION #11: The new legislation should contain a purpose section that establishes “contribution to sustainability” as the paramount goal of the federal assessment regime. In addition, the new legislation should incorporate sustainability considerations to delineate the scope of assessments and the overall test for approval/rejection of proposed undertakings. Similarly, the new legislation should prescribe explicit decision-making criteria and trade-off rules in order to achieve environmental, social, economic, health and cultural sustainability.

CELA RECOMMENDATION #12: The new legislation should not include any references to “significant adverse environmental effects”, “justified in the circumstances”, or other vague terminology or inappropriate approval tests currently used in *CEAA 2012*.

CELA RECOMMENDATION #13: The new legislation should clearly specify the triggers for strategic, regional and project assessments. In relation to project assessments, the new legislation should entrench three types of triggers:

- (a) listing of prescribed undertakings, as amended from time to time;
- (b) decision-based triggers involving federal powers under other statutes or regulations; and
- (c) discretionary trigger to compel assessments of non-prescribed undertakings.

CELA RECOMMENDATION #14: The new legislation should not limit the information-gathering components of the assessment process to specific heads of exclusive federal jurisdiction (e.g. fisheries, migratory birds, etc.).

CELA RECOMMENDATION #15: The new legislation should impose a clear statutory duty on decision-makers in the federal assessment process to consider and apply the “contribution to sustainability” test and all applicable sustainability criteria and trade-off rules, based on the facts and evidence adduced during the assessment process. The legislation must also specify that the decision, and the reasons for decision, must adequately explain why the proposed undertaking was approved or rejected. Similarly, the new legislation should place an onus upon the proponent to demonstrate, on a balance of probabilities, that the proposed undertaking satisfies the “contribution to sustainability” test and the applicable sustainability criteria and trade-off rules.

CELA RECOMMENDATION #16: The new legislation should establish and empower an independent assessment authority (or commission), with quasi-judicial functions and powers, to lead federal assessment processes, to conduct public hearings, and to render a final binding decision, subject to an appropriate judicial or administrative appeal mechanism. The new

legislation should not require or permit the NEB or CNSC to lead, or co-lead, federal assessment processes, but should instead direct these regulatory bodies to participate in assessments led by the independent authority.

CELA RECOMMENDATION #17: The new legislation should not establish generic, fixed or arbitrary timelines for each stage of federal assessment processes, and should instead enable the independent authority, upon consultation with the parties during the early engagement/planning phase, to develop appropriate case-specific guidelines for the timing of the assessment process.

CELA RECOMMENDATION #18: The new legislation should entrench appropriate mechanisms for comprehensive and cooperative strategic, regional and project assessments when multiple jurisdictions (e.g. provincial, territorial and/or indigenous governments) may be engaged in reviewing the same proposed undertaking.

CELA RECOMMENDATION #19: The new legislation should not include, authorize or facilitate the use of “equivalency” or “delegation” mechanisms.

CELA RECOMMENDATION #20: The new legislation should not permit substitution by other jurisdictions’ regimes for the federal assessment process. In the alternative, if substitution is to become available as an option, then the new legislation must specify that substitution may only be used where the independent assessment authority decides, with written reasons, that the substituted regime meets or exceeds all legal requirements imposed under the new legislation.