

August 28, 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: CELA COMMENTS ON *ENVIRONMENTAL AND REGULATORY REVIEWS: DISCUSSION PAPER (JUNE 2017)*

Please find attached the comments of the Canadian Environmental Law Association (CELA) in relation to the Government of Canada's *Environmental and Regulatory Reviews: Discussion Paper* (June 2017).

On the basis of our decades-long experience in federal and provincial environmental assessment (EA) matters, CELA has carefully considered the *Discussion Paper* from the public interest perspective of our client communities.

For the reasons outlined in the attached submissions, CELA's overall conclusion is that the *Discussion Paper's* proposals are inadequate, unacceptable and unlikely to achieve the federal government's objective of delivering EA and regulatory 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."

In reaching this conclusion, CELA notes the various commitments made in the current government's election campaign platform, and set out in the mandate letter that you received in 2015 from the Prime Minister. In our view, if the Government of Canada truly intends to create a robust assessment process, restore public trust, and facilitate meaningful participation, then Parliament must enact new legislation that goes well beyond the vague and incomplete suggestions contained within the *Discussion Paper*.

Accordingly, CELA recommends that the *Discussion Paper's* sparse proposals should not serve as the starting point for Cabinet's drafting instructions for the new legislative regime. Instead, CELA's specific recommendations for Cabinet's drafting instructions are as follows:

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.

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CELA RECOMMENDATION #2: *CEAA 2012* must be wholly repealed and replaced by new comprehensive “next generation” legislation that fully entrenches the principles, processes and policies required to implement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

In closing, CELA looks forward to our continued involvement in Parliament’s timely development of a new “sustainability assessment” law that properly reflects the above-noted recommendations.

If you have any questions arising from the attached comments, please contact the undersigned at your earliest convenience.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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