

September 13, 2017

BY EMAIL

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

**RE: ENVIRONMENTAL AND REGULATORY REVIEWS: DISCUSSION PAPER
(JUNE 2017) – PROPOSED ROLE OF THE CANADIAN NUCLEAR SAFETY
COMMISSION**

We are writing to you on behalf of the Canadian Environmental Law Association (“CELA”) to provide follow-up submissions in relation to the proposed role of the Canadian Nuclear Safety Commission (“CNSC”) in the new environmental assessment (“EA”) regime outlined in the *Environmental and Regulatory Reviews: Discussion Paper* (June 2017).

1. BACKGROUND

On August 28, 2017, CELA provided you and other Ministers with a copy of our detailed submissions¹ on all aspects of the *Discussion Paper*. On September 8, 2017, CELA sent you a copy of our supplementary submissions² on the *Discussion Paper*. Both of these submissions expressed strong opposition to the *Discussion Paper*’s unacceptable proposal to have the CNSC co-lead or jointly conduct EAs of designated nuclear projects that are subject to the licencing provisions of the *Nuclear Safety and Control Act* (“NSCA”).

Since filing these submissions, CELA has obtained copies of “information notes” (dated April 7, 2017 and May 12, 2017) prepared by CNSC staff in relation to the final report of the Expert Panel that you appointed to review and consult upon federal EA processes. As you know, the Expert Panel recommended establishing a new independent quasi-judicial authority, rather than having the CNSC conduct EAs under the new regime. However, the CNSC information notes dispute this well-founded recommendation, and express “specific concerns” about the Expert Panel’s recommendation.

We presume that this CNSC perspective was subsequently conveyed to you and your Cabinet colleagues, particularly since the *Discussion Paper* appears to uncritically accept and reflect the CNSC’s self-declared prowess in conducting EAs. However, no reasons are offered in the *Discussion Paper* to explain the Government of Canada’s rejection of this important Expert Panel

¹ <http://www.cela.ca/publications/1130-cela-submissions-federal-discussion-paper>.

² <http://www.cela.ca/publications/1132-supplementary-submissions-environmental-and-regulatory-reviews-discussion-paper-june-20>.

recommendation, or to justify the *Discussion Paper*'s proposal to allow the CNSC (or the National Energy Board) to continue to conduct EA processes despite the Panel's findings and conclusions.

We further note that no CNSC submissions have been publicly posted on the *Discussion Paper* website (www.discussionpaper.ca), which leads CELA to conclude that the CNSC's views have been privately communicated to Cabinet behind closed doors. Indeed, the information notes confirm that the CNSC and its Major Projects Management Office "partner" intended to develop "policy advice to Cabinet," prepare a corresponding slidedeck, and make a presentation to Cabinet in May 2017. To our knowledge, however, none of these materials have been web-posted by either the CNSC or the federal government for public review and comment.

Accordingly, the purpose of this letter is to respond to the erroneous claims, misleading statements and untenable positions that are set out in the CNSC information notes. For the reasons described below, CELA urges the federal government to withdraw its proposal to empower the CNSC to co-lead EAs, and to instead adopt the Expert Panel's recommendation in favour of creating an independent impact assessment authority.

2. CELA COMMENTS ON THE CNSC BRIEFING NOTES

CELA's main concerns arising from the CNSC information notes are summarized below.

(i) CNSC's Narrow View of Nuclear "Stakeholders"

During the preparation of the information notes, it appears that CNSC staff went through the numerous written submissions filed with the Expert Panel, and then extracted and relied upon submissions from persons identified as "stakeholders" of the CNSC. These stakeholders were limited to nuclear proponents and industry associations, such as Bruce Power, Canadian Nuclear Association, Canadian Nuclear Laboratories, Cameco, Ontario Power Generation, and Nuclear Waste Management Organization.³ Significantly, this narrow list of stakeholders did not include any indigenous organizations, environmental groups, public health advocates, or other members of civil society.

In CELA's view, this is not merely a matter of semantic debate over who is – or is not – a "stakeholder" in the context of nuclear projects in Canada. Instead, identifying just pro-nuclear interests as CNSC stakeholders lends credence to the numerous public submissions to the Expert Panel that raised concerns about regulatory capture and industry advocacy by the CNSC. On this point, the Expert Panel correctly concluded that:

An authority that does not have concurrent regulatory functions can be better held to account by all interests than can entities that are focused on one industry or area and that operate under their own distinct practices.

Second, regulation and assessment are two quite distinct functions that require different processes and expertise. Regulatory licencing typically focuses on determining the

³ Information Note (May 12, 2017), page 1.

technical acceptability of a proposed project against the requirements set out in a governing piece of legislation, with a consequent emphasis on technical expertise and a tendency for the regulator and the regulated industry to be in regular contact and discussions. Assessment is a planning process that considers both technical and non-technical matters and engages in public review to select the best options. The scope of assessment is much broader and requires more diverse expertise, especially in consideration of the sustainability approach being proposed by the Panel. Even under the current regime, the narrow mandate of regulators prevents them from fully assessing projects in specific situations (emphasis added).⁴

In light of the Expert Panel’s sound conclusions, CELA submits that no weight should be given by the Government of Canada to the “stakeholder” musings reflected in the CNSC information notes (or subsequent Cabinet briefings) since these were predicated upon a small and non-representative subset of the several hundred written submissions received by the Expert Panel.

(ii) CNSC Claim that the Expert Panel’s Recommendation is based on “Perception”

In the April 7, 2017 information note, CNSC staff take strong exception to the Expert Panel’s recommendation that an independent authority – not CNSC – should conduct assessments under the new regime. In particular, the information note contends that the Panel’s recommendation was based upon submissions from a “quadrant” of public submitters who perceive that there is a lack of independence and neutrality when the CNSC conducts EAs of nuclear projects:

This conclusion [the need for a new authority] seems to be based on what was heard from one quadrant of those interviewed, as it was not reflected in the report to have come from federal, provincial or industry entities. It is CNSC staff’s opinion that some of the recommendations being proposed are reactions to a perceived need for change, rather than an evidence-based need for change.⁵

CELA has several responses to these specious arguments contained within the information note. First, with respect to the “quadrant” reference, we have reviewed virtually all of the public submissions that were filed with the Expert Panel, and it is abundantly clear that the number of submitters who raised concerns about CNSC independence and oversight far outweigh the number the small number of pro-industry submissions that supported continuation of the status quo. While this is not necessarily dispositive of this issue, it is readily apparent that the majority of Canadians who made submissions to the Expert Panel support the creation of a new independent authority.

Second, the information note appears to suggest that these public submissions, and the Expert Panel’s corresponding recommendations, should be discounted because they were not reflected in submissions from “federal, provincial or industry entities.” In response, CELA simply notes that it is inappropriate and unreasonable for the Government of Canada to refuse the Expert Panel recommendation regarding the new authority merely because it did not arise from governmental or proponent submissions. To the contrary, it is readily apparent that the Expert Panel consultations

⁴ Expert Panel Report, pages 50-51.

⁵ Information Note (April 7, 2017), page 4.

revealed a divergence of opinion between the public and the nuclear sector on this particular issue. However, there is no rational basis for the federal government to prefer the views of pro-industry interests over the legitimate concerns expressed by numerous submitters throughout Canada.

Third, the information note contends that the Expert Panel's recommendation is merely based on public perception rather than evidence. In CELA's view, this claim is manifestly untrue. In our review of the public submissions to the Expert Panel, we have observed detailed fact-based submissions about the inadequacy of the CNSC's information-gathering activities and decision-making procedures under current federal EA regime. Many of these factual complaints and specific concerns were referenced by CELA in our preliminary⁶ and final⁷ submissions to the Expert Panel, and in our first submission⁸ on the *Discussion Paper*, and need not be repeated here. The fact that the CNSC staff apparently limited its review to submissions filed by a small handful of CNSC "stakeholders" may partially explain why the briefing note glosses over or ignores the evidence provided by numerous submitters to the Expert Panel. We further note that many of the public submissions recently posted on the *Discussion Paper* website also contain broad-based support for the Expert Panel's recommendation.⁹

Fourth, and perhaps mostly importantly, it must be recalled that one of the main objectives of the current EA review is to regain public trust in federal assessment processes. Viewed through this lens, it is ultimately immaterial whether the public concerns about the CNSC are premised on probative evidence or not, although CELA submits that the record before the Expert Panel provides a strong evidentiary basis for the Expert Panel's recommendation, as described above.

⁶ <http://www.cela.ca/preliminary-submissions-federal-ea-act>, pages 14-16.

⁷ <http://www.cela.ca/publications/legal-path-sustainability-top-five-reforms-needed-next-generation-assessments>, pages 13-16.

⁸ <http://www.cela.ca/publications/1130-cela-submissions-federal-discussion-paper>, pages 27-29.

⁹ See, for example, Aroland First Nation, *Submissions to the Government of Canada* (n.d.), page 9; Barry Stemshorn, *Comments* (n.d.), page 1; Carla Sbert, *Comments on Environmental and Regulatory Reviews: Discussion Paper* (September 12, 2017), page 1; Canadian Coalition for Nuclear Responsibility, *CNSC Should Not be Given Power over Environmental Assessment* (n.d.), pages 1-2; Concerned Citizens of Renfrew County and Area, *Comments* (n.d.), pages 1-2; Council of the Haida Nation, *Response to Government of Canada's June 2017 Environmental and Regulatory Reviews Discussion Paper* (August 28, 2017), page 6; Ecojustice, *Response to Discussion Paper on Environmental and Regulatory Reviews* (August 28, 2017), pages 2-3; Environmental Defence Canada, *Comments on the Environmental and Regulatory Reviews Discussion Paper* (August 25, 2017), pages 6-7; Environmental Planning and Assessment Caucus, *Submissions on the Environmental and Regulatory Reviews Discussion Paper* (August 28, 2017), page 9; Eugene Bourgeois, *Comments concerning the Canadian Environmental Assessment Agency's Discussion Paper about the Findings of the Expert Panel* (July 31, 2017), pages 1-2; Mark Winfield, *Environmental and Regulatory Reviews Discussion Paper* (August 25, 2017), page 6; MiningWatch Canada, *Comments on the Government of Canada Discussion Paper on Review of Environmental and Regulatory Processes* (August 28, 2017), pages 3-4; Nature Canada, *Comments on Environmental and Regulatory Reviews Discussion Paper* (August 2017), page 4; Northwatch, *Comments on EA Discussion Paper* (August 28, 2017), pages 1-3; Peter Usher, *Response to the Government Discussion Paper on EA Reform* (August 24, 2017), page 1; Martin Olszynski *et al.*, *Strengthening Canada's Environmental Assessment and Regulatory Processes: Recommendations for Model Legislation* (August 18, 2017), pages 20-21; Sunil Nijhawan, *Comments on Environmental and Regulatory Reviews Discussion Paper* (n.d.), pages 1-2; Swim Drink Fish Canada, *Submissions on Environmental and Regulatory Reviews Discussion Paper* (August 28, 2017), pages 4-5; Robert Gibson, *Sustainability Foundations for New Federal Assessment Law* (August 28, 2017), pages 50-51; West Coast Environmental Law, *Submissions on EA Aspects of the Environmental and Regulatory Reviews Discussion Paper* (August 28, 2017), pages 6-8.

The bottom line is that there is considerable public distrust of the CNSC's institutional ability or willingness to undertake credible and comprehensive EAs of nuclear projects, particularly if the focus of the federal assessment process is changed to the sustainability approach recommended by the Expert Panel and supported by Canadians across the country. In this regard, the Expert Panel properly found that:

The apprehension of bias or conflict of interest, whether real or not, was the single most often cited concern by participants with regard to the NEB and CNSC as Responsible Authorities...The apprehension of bias on the part of these two Responsible Authorities has eroded confidence in the assessment process (emphasis added).¹⁰

CELA submits that this well-documented erosion of public confidence cannot be remedied by the *Discussion Paper's* proposal to have the CNSC (or National Energy Board) continue to conduct assessments under the new regime. Accordingly, the information notes are best characterized as unpersuasive attempts by the CNSC to rationalize its continued role in conducting assessments, and should not be adopted or implemented by the Government of Canada.

(iii) CNSC Claim that it is a Quasi-Judicial Tribunal for EA Purposes

Arguably, the most astounding claim in the information notes is the suggestion that the Expert Panel's recommendation for a new assessment authority is redundant and "needlessly costly" because the CNSC already exists as a quasi-judicial tribunal. In particular, the CNSC staff make the following assertions:

CNSC staff question the assumption that the proposed tribunal will increase trust in EA, when that is the very model that the CNSC currently has. In fact, much of the report recommendations mimic the CNSC model.¹¹

In response, it appears to CELA that these protestations fundamentally miss the point of the Expert Panel's recommendation. As a matter of law, it is beyond dispute that the CNSC is a court of record and has been structured as a quasi-judicial tribunal under the NSCA.¹² However, it begs the question of whether the CNSC, and its current hearing procedures,¹³ enjoy public trust and ensure robust assessments. On the evidence, the Expert Panel answered this question in the negative, and CELA concurs with this conclusion.

It should be further noted that the licencing process under the NSCA does not constitute a comprehensive assessment process since it largely focuses on technical issues rather than larger environmental planning considerations (e.g. purpose or need for the project; alternatives to the project; alternate means of carrying out the project; net contribution to sustainability, etc.). Thus,

¹⁰ Expert Panel Report, page 49.

¹¹ Information Note (April 7, 2017), page 4.

¹² See, for example, NSCA, section 20.

¹³ CNSC proceedings typically lack timely production/disclosure of all relevant documents; sworn testimony from witnesses; establishment of expert qualifications regarding opinion evidence; cross-examination by parties; and other procedural safeguards employed by other adjudicative tribunals in order to ensure a robust testing of the evidence and to facilitate fair, informed and accountable decision-making.

the NSCA process is not duplicative of the assessment process recommended by the Expert Panel, and cannot be seriously construed as an appropriate substitute or proxy for addressing sustainability assessment requirements under the new regime. In addition, CELA notes that the CNSC website inexplicably continues to claim that the Commission conducts “EAs” under the NSCA,¹⁴ when it is clear that this is not accurate terminology to describe the licencing process under the NSCA. In short, the NSCA is a regulatory statute, not an EA statute.

This is not say that the CNSC should be wholly excluded from the sustainability assessment process under the new regime recommended by the Expert Panel. To the contrary, CELA maintains that in light of its technical experience in licencing matters under the NSCA, the CNSC can and should participate in the new process, along with other federal departments and agencies with in-house expertise that may be relevant to matters being considered by the new independent authority that conducts the assessment.

CELA further submits that while the CNSC may have acquired certain regulatory expertise in the context of the nuclear sector, there is still considerable room for improvement in terms of the CNSC’s environmental protection mandate under the NSCA.¹⁵ For example, a recent report prepared by CELA has raised a number of concerns about whether – or to what extent – the CNSC has been effectively monitoring, managing and reporting upon the potential environmental and/or health effects (and the efficacy of measures to prevent, minimize or mitigate such effects) regarding the use and handling of nuclear substances across Canada.¹⁶ In addition, CELA submits that there is a continuing need for the federal government to commence a thorough public review of NSCA, as discussed below.

Finally, in the absence of any credible costing estimates or detailed fiscal comparisons in the information note, CELA submits that no credence should be given to the CNSC’s speculative claim that creating a new independent authority would be “needlessly costly.” On the question of need, CELA agrees with the Expert Panel that the establishment of a new authority is absolutely necessary in order to achieve the stated objectives of the EA review. On the question of cost, the financial implications of establishing and staffing the new authority would have to be weighed against the undesirable socio-economic costs of continuing the status quo and needlessly creating or perpetuating process uncertainty and potential project delays if the CNSC continues to conduct controversial EAs under the new regime.

In our view, if the new assessment regime includes the various procedural and substantive improvements recommended by the Expert Panel (including those relating to early engagement/planning, collaborative decision-making with indigenous communities, and the UNDRIP principle of free, prior and informed consent), then the consequential process efficiencies and avoidance of intractable impasses or legal challenges within the assessment process will be well worth the expense of setting up the new authority.

¹⁴ <http://www.nuclearsafety.gc.ca/eng/resources/environmental-assessments/index.cfm>.

¹⁵ Subsection 24(4) of the NSCA simply requires the CNSC to be satisfied that the licensee is “qualified” to carry out the proposed activity, and will make “adequate provision” to protect the environment and public health and safety.

¹⁶ <http://www.cela.ca/1131-publications/environmental-review-cnscs-2016-regulatory-oversight-report-use-nuclear-substances>.

(iv) The Need to Review and Modernize the NSCA

As recommended by the Expert Panel, the CNSC should be supplanted by a new independent authority that gathers information and makes binding decisions under the new federal assessment legislation, subject to an appropriate appeal mechanism. CELA fully supports this recommendation, and urges the Government of Canada to abandon the ill-advised suggestion in the *Discussion Paper* that this important responsibility should be assigned to the CNSC (or the National Energy Board) instead of an independent authority.

At the same time, CELA submits that the NSCA itself should not be left intact even if the CNSC continues to exercise its licencing powers and regulatory functions under this statute. On this point, it should be noted that last year, CELA and a dozen other environmental organizations¹⁷ from across Canada jointly called for a comprehensive public review of the NSCA, which is now 20 years and long overdue for Parliamentary scrutiny. To date, CELA has received no response from the federal government confirming that such a review will be undertaken.

Accordingly, CELA hereby reiterates its request that the Government of Canada should immediately commence an open and accessible review of the NSCA to ensure that it contains modern safeguards and is fully effective in protecting the environment and public health. As a potential model for the NSCA review, CELA would point to the successful appointment of an Expert Panel to review and consult upon modernizing the National Energy Board and its constituent legislation.

In our view, regardless of whether the Government of Canada decides that the CNSC should play the lead role or a participatory role in the new impact assessment regime, CELA submits that Cabinet should clearly commit to undertake a comprehensive public review of NSCA, including the provisions relating to the mandate, composition, licencing and inspection/enforcement powers of the CNSC.

3. CONCLUSIONS

For the foregoing reasons, CELA concludes that the federal government should not proceed with the *Discussion Paper's* proposal that the CNSC should co-lead or jointly conduct EAs in relation to nuclear projects. In our view, the public interest would be better served if this critically important task is exclusively given to the impact assessment authority recommended by the Expert Panel.

At all material times, this new authority must be – and must be seen to be – an independent, objective, and accountable entity that is unburdened by regulatory responsibilities. In our view, and in the view of the Expert Panel, the CNSC does not meet this fundamental criterion. Therefore, it is imperative for the Government of Canada to establish a new impact assessment authority that is required by law to conduct robust reviews, hold procedurally fair proceedings, and deliver credible, transparent and evidence-based decisions.

¹⁷ <http://www.greenpeace.org/canada/Global/canada/pr/2016/03/Trudeauletter.pdf>.

If you have any questions arising from this letter, please contact the undersigned as soon as possible. If requested, we would be pleased to meet with you or your staff to further discuss why the CNSC should participate in – but not conduct or co-lead – assessments of nuclear projects.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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cc. The Hon. Jim Carr, Natural Resources Canada
The Hon. Dominic LeBlanc, Fisheries and Oceans Canada
The Hon. Marc Garneau, Transport Canada
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