Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE GOVERNMENT OF CANADA REGARDING *CONSULTATION PAPER ON INFORMATION REQUIREMENT AND TIME MANAGEMENT REGULATIONS*

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I. INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") in relation to the Government of Canada's *Consultation Paper on Information Requirement and Time Management Regulations* (2018).[1]

In essence, the *Consultation Paper* outlines proposals for certain revisions to the current regulation[2] under the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*") that prescribes information requirements for project descriptions of designated projects. The *Consultation Paper* also generally describes approaches for developing other key documents arising from the early planning stages of federal assessment processes, and for suspending assessment timelines that are established by legislation.

The *Consultation Paper* has been released at this time for public comment because it is anticipated that *CEAA 2012* will soon be repealed and replaced by the proposed *Impact Assessment Act* ("*IAA*") in Part 1 of Bill C-69.

After receiving Second Reading in the House of Commons, the *IAA* has been reviewed by the Standing Committee on Environment and Sustainable Development ("Standing Committee"), and has been reported back to the House of Commons with proposed amendments.[3] After receiving Third Reading and undergoing Senate review in the coming months, the federal government hopes to have the *IAA* proclaimed in force in 2019.

The implementation of the *IAA* will depend upon a number of as-yet undrafted regulations, including those proposed in the *Consultation Paper*. However, CELA has a number of comments and concerns about the *Consultation Paper*'s proposals regarding information requirements, early planning documentation, and timing provisions for project-level IAs under the *IAA*, as discussed below.

[1] See https://www.impactassessmentregulations.ca/information-management-and-time-management.
[2] SOR/2012-148.
[3] These submissions by CELA are based upon the updated version of the *IAA* that was reported by the Standing Committee to the House of Commons on May 29, 2018.

II. BACKGROUND

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental and public health issues.

For example, CELA has participated in various administrative and legal proceedings under *CEAA 2012* and its predecessors, *CEAA 1992* and the *Environmental Assessment and Review Process Guidelines Order*.

On the basis of our decades-long experience in assessment matters, CELA has carefully considered the *IAA* and the *Consultation Paper* from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

In our detailed submission to the Standing Committee,[4] CELA concluded the unless the *IAA* is substantially amended, the proposed statute will not achieve the federal government's stated objective of establishing federal 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."[5]

CELA's conclusion about the serious shortcomings of the *IAA* was shared by many other environmental groups, Indigenous representatives, and other persons who made presentations to the Standing Committee.

Unfortunately, now that the Standing Committee has completed its clause-by-clause review and has reported the *IAA* to the House of Commons, CELA observes that few (if any) substantive changes are being made to fix this fundamentally flawed legislation.

III. CONSULTATION PAPER QUESTIONS

The Consultation Paper poses four general questions for public feedback:

- **Question 1**: What are your views on the proposed components in the initial project description (Annex I)?

- **Question 2**: What are your views on the proposed components in the detailed project description (Annex II)?

- **Question 3**: What are your views on the documents the Agency is required to provide to proponents if it is determined that an impact assessment is required?

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[4] CELA's written submission to the Standing Committee is posted at: https://www.cela.ca/proposed-IAA-appropriate-amendments. CELA's recent submission on the proposed designated projects listing criteria under the *IAA* is posted at: http://www.cela.ca/sites/cela.ca/files/1186-CELASubmissionsReProjectListingCriteria.pdf.

[5] *Discussion Paper*, page 3.

- **Question 4**: What are your views on the proposed criteria under which the clock for timelines in the proposed legislation could be stopped?

CELA's response to each of these questions is set out below.

Questions 1 and 2: Proposed Initial and Detailed Project Description

We have elected to address these two questions concurrently since both of these proposed documents are to be prepared by proponents during the early planning phase contemplated by the *IAA*, and both of proposed documents suffer from the same fundamental shortcomings.

At the outset, CELA must emphasize that it strongly supports the concept of an early planning phase that features meaningful public and Indigenous participation. In our view, however, the regulatory proposals for the initial and final project descriptions fall considerably short of the mark for the following reasons:

1. The initial project description is intended to "form the basis for early engagement on the proposed project,"[6] and Annex I of the Consultation Paper sets out the proposed content requirements for this document (e.g. general information, project information, and location information).[7] However, it appears to CELA that there is no material difference between paragraphs 1 to 11 of the Annex I checklist and paragraphs 1 to 12 of the existing *CEAA 2012* regulation.[8] CELA further notes that paragraphs 13 to 20 of the existing regulation have been omitted from Annex I, and have instead been placed instead in Annex II to prescribe the content requirements of the "detailed" project description, as discussed below.

2. In our experience, the suggested elements in Annex I are so overgeneralized that it is difficult to foresee how they will facilitate informed discussions between proponents, stakeholders, members of the public, Indigenous communities, and governmental officials. CELA anticipates that the Impact Assessment Agency of Canada ("Agency") could develop (with public input) some instructive guidance materials or directions on best practices, but these documents are non-binding and non-enforceable as a matter of law. In our view, it would be preferable to build in as much prescriptive detail into Annexes I and II in order to provide much-needed clarity, transparency and certainty about precisely what is required during the early planning phase.

3. In relation to the proposed initial project description, CELA strongly objects to the inappropriate focus on the project itself, as opposed to reasonable alternatives to the project and alternative means of carrying out the project. On this point, CELA notes that section 22 of the *IAA* requires IA's to address both "alternatives to" and "alternative methods," but both of these critically important components are conspicuously absent from the initial project description proposed by the *Consultation Paper*. The net result is that prior to the early planning stage, proponents are still free to privately determine what the preferred alternative is well before the public and Indigenous communities are even consulted. This is precisely the problem that has plagued *CEAA*-based

[6] *Ibid*, page 4.
[7] *Ibid*, page 9.
[8] *Supra*, footnote 2, Schedule 1.

environmental assessments for years, and must be rectified in the *IAA* regulation by requiring the proponent to identify and consult upon a reasonable of alternatives at the commencement of the early planning phase.

4. CELA is aware that Annex II proposes to require the "detailed" project description to include "information" on "alternatives to" and "alternative means." In our view, this occurs far too late in the early planning process, and is still predicated upon the proponent's upfront selection of a preferred alternative as the project. The practical reality is that under the *Consultation Paper*'s proposed approach, proponents will have already predetermined what the project is without public or Indigenous input, and will then take a "3-D" (defend, deny, dispute) approach throughout the early planning and IA stages to steadfastly advocate its preferred project. Thus, even if alternatives are to be included in the detailed project description, CELA anticipates that the resulting IA (if required) will simply amount to a superficial comparison of "straw man" alternatives that the proponent has real intention to pursue. This cursory treatment of alternatives does not strike CELA as an improvement over current practices under *CEAA 2012*. In our view, the systematic, evidence-based comparison of alternatives is the cornerstone of sound assessment processes, but it is not reflected in the regulatory proposals outlined in the *Consultation Paper*.

5. Despite recent amendments passed at the Standing Committee, the *IAA* remains unclear on whether participant funding will be made available to individuals, organizations, or Indigenous communities that are engaged by the proponent during the early planning phase. In CELA's view, adequate participant funding is the *sine qua non* of meaningful public participation during the early planning phase. Accordingly, the forthcoming *IAA* regulation must expressly include provisions specifying that participant funding will be made available at this stage. We would further suggest that the Agency itself should be fully engaged in the proponent-driven early planning phase.

6. Both Annex I and Annex II do not specify how the project descriptions are to be prepared or disseminated during the early planning phase (e.g. locations, languages, format, etc.). Again, CELA notes that the *IAA* does not provide any particulars on how early planning consultation is to be undertaken by proponents (or the Agency). On this point, we concur with the Expert Panel's view that face-to-face meetings or workshops within the relevant communities are to be preferred over simplistic online posting of documents and soliciting of public or Indigenous feedback within relatively short timeframes.

7. At the present time, CELA is unclear whether the Government of Canada intends to promulgate an *IAA* regulation that specifically addresses public and Indigenous participation in all stages of the IA process (including post-approval monitoring, reporting and follow-up activities). An appropriate participation regulation would be strongly recommended by CELA in order to provide prescriptive requirements regarding this important matter. However, if the federal government does not intend to draft such a regulation, then, at the very least, the *IAA* regulation dealing with early planning phase must be expanded to prescribe requirements for meaningful public participation. In our view, leaving public participation methodology during the early planning phase to the discretion of the proponent (subject only to non-binding Agency guidance materials) is unacceptable if the Government of Canada is serious about ensuring meaningful participation at this critical upfront stage.

8. The *IAA* is intended to "foster" sustainability, and a project's "contribution to sustainability" is a key part of the public interest determination to be made by federal decision-makers under section 63 of the Act. Alarmingly, however, the word "sustainability" is not found in either Annex I or Annex II of the *Consultation Paper*. In CELA's view, this is a major oversight that must be corrected in the draft regulation by requiring the initial and final projection descriptions to provide information on the extent to which the project may make a contribution to sustainability. More generally, CELA reiterates that in order to give proper meaning and full effect to the "contribution to sustainability" requirement, the federal Cabinet must forthwith develop appropriate regulations that: (i) flesh out this paramount consideration; (ii) provide clear criteria for assessing claimed "contributions to sustainability"; and (iii) set out explicit sustainability-based rules for trade-offs (if any) that may be made during the decision-making process. In this regard, we look forward in due course to reviewing and commenting upon a *Consultation Paper* focused on "sustainability" requirements under the *IAA*.

9. CELA similarly notes that for the most part, Annexes I and II appear to be narrowly focused on biophysical effects on specific matters within federal jurisdiction, but there is no mention of cumulative effects despite the requirements of section 22(1)(a) of the *IAA*. While paragraph 4 of Annex II refers obliquely to regional "studies,"[9] it is clear that regional and strategic assessments remain discretionary under the Act, even though, in CELA's view, they are the preferred vehicle for evaluating cumulative effects. Therefore, if project-level assessments of cumulative effects will, by default, have to be undertaken in the IA process, then CELA submits that information about cumulative effects should be required in the initial and final project descriptions. On a related note, CELA submits it will be necessary to promulgate *IAA* regulations to prescribe the information requirements for regional and strategic assessments, if and when such assessments are actually commenced under the Act.

Question 3: Agency Documents for the IA

The *Consultation Paper* generally describes various documents that the Agency is to provide to the proponent if an IA is to be conducted.[10] On this point, we note that section 16 still exists within the *IAA* (despite CELA's recommendation for its deletion), which permits the Agency to decide, on a case-by-case basis, that a designated project can proceed without conducting the requisite IA, in which case the proposed documentation requirements (Impact Assessment Cooperation Plan, Public Engagement Plan, Indigenous Engagement Plan, Tailored Impact Statement Guidelines, and Permitting Plan) would be wholly inapplicable to the project.

CELA finds it curious that the objectionable authority under section 16 to dispense with IA requirements is not discussed or even mentioned in the *Consultation Paper*. In our view, the existence of this provision undermines the clarity and certainty that the Government of Canada has promised to restore to the federal assessment process.

In any event, CELA's main concerns about the proposed Agency documents may be summarized as follows:

[9] Similarly, paragraph 23 of Annex II refers to the "health, social and economic setting in the region where the project is located."
[10] *Consultation Paper*, pages 5-6.

1. CELA notes that none of the foregoing Agency documents are actually required, mentioned or even defined by the *IAA*. Similarly, the concept of an "Impact Statement" to be prepared by the proponent is not referenced in the *IAA*, and, although it appears to play a key role in the IA process, the *Consultation Paper* inexplicably proposes no generic information requirements for the Impact Statement. Thus, if Cabinet decides that the forthcoming *IAA* regulation will not include some (or all) of the proposed documents, then there is no legal recourse since these documents are not required by law. In our view, this is another key example of the excessive political discretion conferred under the *IAA*.

2. Similarly, because the *IAA* does not address any of these specific documents, it follows that the *IAA* has not stipulated the content to be included in these documents. This leaves the door wide open for the forthcoming *IAA* regulation to prescribe the substantive and/or procedural requirements as broadly or as narrowly as Cabinet sees fit. Again, CELA submits that this kind of open-ended regulatory discretion is not conducive to ensuring predictability, traceability or accountability under the *IAA*.

3. Unlike the regulatory proposals for initial and final project descriptions, the *Consultation Paper* does not include an Annex (or Annexes) describing the proposed content of the Agency documents. Instead, the Consultation Paper sets out short bullet point summaries of the proposed purpose of the documentation. In our view, the paucity of content detail in the *Consultation Paper* makes it difficult to meaningfully comment on the proposed Agency documents. CELA acknowledges that some of the relevant details will likely be contained in the draft regulation when it is released for public comment in due course. However, if the Government of Canada wanted to solicit public input on the regulatory content of the proposed Agency documents, then it would be been helpful to provide further and better details in the *Consultation Paper*.

4. The *Consultation Paper* suggests that the Agency documents (presumably in draft form) "would be made available on the Agency website for public comment."[11] No specific review/comment period is suggested, and no other means of soliciting public or Indigenous input on these documents (e.g. face-to-face meetings in local communities) is suggested in the *Consultation Paper*. CELA submits that this is an unjustifiable and wholly unacceptable approach, and it clearly will not ensure meaningful public or Indigenous participation in the development of these key documents, contrary to the amended *IAA*. For example, expecting informed feedback solely based on web-posting IA-related documentation is predicated on a number of questionable (if not unfounded) assumptions (e.g. that all persons interested in, or potentially impacted by, the project speak English/French, and that they have computers, broadband connections, and sufficient internet/website navigational skills to find and comment on voluminous, jargon-laden materials). Accordingly, CELA strongly recommends the promulgation of regulatory standards for meaningful public participation on all IA stages, including the Agency's efforts to engage the public and Indigenous communities on documents intended to direct (or scope) the IA process.

[11] Ibid, page 5.

Question 4: Stopping Legislated Timelines for the IA

As noted in our submissions to the Standing Committee,[12] CELA objects to the establishment of fixed or arbitrary legislated timelines, especially those currently set out in the *IAA*. In our view, it would be far more equitable and efficient to enable the Agency and review panels, in consultation with the proponent and other IA participants, to establish fair and reasonable timelines for the conduct and completion of the information-gathering and report-drafting phases of the IA process.

However, since legislated timelines remain in the *IAA* as reported by the Standing Committee to the House of Commons, CELA has carefully considered the proposals in the *Consultation Paper* in relation to stopping or pausing these deadlines in appropriate circumstances.

In principle, CELA agrees with the *Consultation Paper* that "there may be circumstances in which the clock may need to be stopped for the legislated timelines."[13] CELA further agrees that the *IAA* regulation should set out clear criteria for the Minister (or his/her delegate) to stop the clock in specified circumstances, and that the Minister should be required to web-post his/her decision, with reasons, on the Agency website.[14]

In terms of the criteria proposed in the *Consultation Paper*, CELA concurs that the clock could be stopped where:

- the proponent asks for the timeline to be suspended;
- there is a design change[15] in the project that could alter its potential impacts;
- if critical information is missing, or has been requested by federal authorities.[16]

However, this should not be construed as an exhaustive list, and CELA submits that there are other criteria that should be included in the *IAA* regulation, such as:

- there has been a material change in circumstances, or significant new information has emerged, since the commencement of the IA process; and
- stopping the clock is necessary for, and consistent with, the purposes of the *IAA*.

The *Consultation Paper* goes on to suggest that there will be a "review mechanism" that allows proponents and IA participants to submit comments and concerns about the "management" of legislated timelines.[17] However, it is unclear whether this mechanism will be built into the *IAA* regulation, or whether this represents an extraneous commitment by the Government of Canada.

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[12] *Supra*, footnote 4.
[13] *Consultation Paper*, page 7.
[14] *Ibid*.
[15] By "design change", CELA presumes that this term includes changes in the location, operation, technology, mitigation measures, or other significant alterations of the project as originally proposed. If these additional matters are not intended by the *Consultation Paper* to warrant a clock stoppage, then CELA submits that they should be expressly included in the *IAA* regulation.
[16] *Consultation Paper*, page 7.
[17] *Ibid*.

For the purposes of greater certainty and enforceability, CELA recommends that this review mechanism (including its participatory provisions) should be established by regulation.

IV. CONCLUSIONS

For the foregoing reasons, CELA concludes that the minimalist regulatory proposals outlined in the *Consultation Paper* are unlikely to ensure that IA's of designated projects will be conducted under the *IAA* in a robust, participatory, transparent and science-based manner.

To the contrary, CELA submits that the proposed approach will do little more than perpetuate the status quo under *CEAA 2012*, despite the findings of the Expert Panel that the existing process is deeply flawed and requires fundamental revisions for a variety of reasons.

Despite such well-founded criticisms, however, it appears to CELA that since the *IAA* will likely be enacted in due course, it is necessary for Cabinet to move beyond the *Consultation Paper*'s deficient suggestions, and to ensure that the forthcoming regulations entrench clear, comprehensive and enforceable provisions regarding project-related documentation and timelines under the *IAA*.

We trust that CELA's comments will be taken into account as the Government of Canada prepares and consults upon the draft information requirement and time management regulations in the fall of 2018.

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