

**SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
TO THE GOVERNMENT OF CANADA REGARDING  
*DISCUSSION PAPER: DEVELOPING A STRATEGIC ASSESSMENT OF CLIMATE  
CHANGE***

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**I. INTRODUCTION**

This is the submission of the Canadian Environmental Law Association (“CELA”) in relation to the Government of Canada’s *Discussion Paper on Developing a Strategic Assessment of Climate Change* (2018).<sup>1</sup> The overarching purpose of the *Discussion Paper* is to ensure that the climate change implications of individual projects are assessed in a manner that is consistent with Canada’s climate change commitments. However, for the following reasons, CELA concludes that the *Discussion Paper*’s proposed approach will not achieve that goal because it unnecessarily and inappropriately constrains the scope of project-level assessments, particularly by excluding downstream effects from analysis and by potentially exempting some projects from the proposed *Impact Assessment Act* (IAA).

**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*.

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<sup>1</sup> See: <https://www.strategicassessmentclimatechange.ca/discussion-paper> (“Discussion Paper”).

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

### **III. DISCUSSION PAPER QUESTIONS**

The *Discussion Paper* poses a number of questions organized into four main categories for public feedback:

- **Issue 1: Quantification of a project's GHG emissions** - Determining how to define, scope and quantify GHG emissions for the proposed impact assessment process, where applicable;
- **Issue 2: GHG emission thresholds** - Considerations that should be taken into account when considering the assessment of a project;
- **Issue 3: Early planning** - Information related to GHG emissions that is pertinent to an impact assessment process; and
- **Issue 4: Impact assessment** - For projects that proceed to impact assessment, assessing a project's contribution to GHG emissions and determining a project's consistency with Canada's climate commitments and policies.

CELA's response to each of these general sets of questions is set out below. These comments build on CELA's related concerns about other elements of the proposed *IAA*, including our submissions to the Standing Committee on Environment and Sustainable Development<sup>2</sup> on regaining public trust and approaches to revising the Projects List as discussed in a recent Consultation Paper<sup>3</sup>.

In addition, CELA submits that it is somewhat of a misnomer for the *Discussion Paper* to describe the forthcoming document as a "strategic assessment" since it is not intended to identify and evaluate the climate change implications of federal plans, policies or programs. Instead, the *Discussion Paper* indicates that the forthcoming document will provide technical guidance to proponents on how climate change matters should be assessed in project-level assessments under the *IAA*. Accordingly, it would be more accurate to describe the document as a technical guideline (or operational policy statement) rather than a "strategic assessment."

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<sup>2</sup> CELA's written submission to the Standing Committee is posted at: <https://www.cela.ca/proposed-IAAappropriate-amendments>. See also <http://www.cela.ca/collections/justice/canadian-environmental-assessment-act>.

<sup>3</sup> See: <http://www.cela.ca/CELASubmissionsReProjectListingCriteria>.

Issue 1: Quantification of a project's GHG emissions

CELA is opposed to the *Discussion Paper*'s proposal to narrowly scope the quantification of a project's GHG emissions by ignoring downstream emissions.<sup>4</sup> This constricted approach to quantifying GHG emissions severely undermines the purpose and value of any assessment to determine whether a project is compatible with Canada's greenhouse gas reduction targets in the *Paris Agreement of the United Nations Framework Convention on Climate Change* (herein, the Paris Agreement).

To evaluate a project's overall sustainability and its contribution to (or interference with) Canada's commitments, it is necessary to not only consider the direct GHG emissions produced by the proposed project, during its construction, conversion, operation and eventual decommissioning, but also the emissions generated (or carbon sink impairments) during the extraction of raw materials, their processing and transportation, before being utilized by the proposed energy infrastructure. In addition, the assessment process should also consider the GHG emissions (or carbon sink impairments) that may be indirectly stimulated or facilitated by the approval and implementation of the project.

In 2016, the federal government established two expert panels vested with restoring public trust in the federal environmental assessment processes and its institutions: the environmental assessment Expert Panel (herein, "CEAA Expert Panel") and the National Energy Board Modernization Panel (herein, "NEB Modernization Panel"). On this issue, the NEB Modernization Expert Panel found that in determining whether a project was aligned with the national interest, the assessment should include a "climate test for upstream and downstream activities (including considerations of any relevant emissions targets or caps) (emphasis added)."<sup>5</sup>

It is not only contrary to the recommendations and observations of the Expert Panels to exclude downstream effects, but premature to define the scope of quantification of GHG emissions in the context of a *Discussion Paper* whose purpose should be to facilitate -- not constrain -- public feedback. Further, the *IAA* will depend upon a number of as-yet undrafted regulations, and as public comments received thus far on the proposed approaches to the regulations have not yet been addressed, we are concerned that the federal government has predetermined its approach to calculating a project's GHG emissions outside of that process.

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<sup>4</sup> Discussion Paper, p 5.

<sup>5</sup> Natural Resources Canada, "Forward Together – Enabling Canada's Clean, Safe and Secure Energy Future" (2018), p 22 [**NEB Modernization Report**].

The *Discussion Paper* also asks how uncertainty related to the analysis of GHG emissions can be managed and communicated. While ecosystems are always in a state of flux, climate change accelerates and exacerbates that flux.<sup>6</sup> Therefore, before deciding upon the mitigation measures needed for a project, it is important to understand the (1) the project's potential effects on climate change, (2) climate change's effects on the project, and (3) the local environment's resiliency to climate change.

A precautionary approach which addresses decision-making in uncertain and risky conditions should be also adopted. All mitigation and offset proposals should also be monitored and account for numerous ecological variables, including species composition, habitat requirements, historical environmental conditions, and possible pending changes to ecosystems.<sup>7</sup> Based on monitoring reports, a project's GHG emissions should inform the post-decision regulatory phase of compliance and enforcement.

### Issue 2: GHG emission thresholds

The IAA Projects List should not be solely based on a narrow consideration of whether – or to what extent - a particular type of project emits GHGs. In our view, exempting a project based perceived climate attributes or a GHG emission threshold would thwart the overall objects of the IAA, whose statutory commitments to principles of sustainability, precaution, environmental protection and reconciliation with Indigenous Peoples should lead to a more inclusive and comprehensive approach to impact assessment.

In determining the GHG emission threshold or criteria which could be used when considering the assessment of a project, we propose the inclusion of the following principles, based on Dr. Gibson's recent commentary on sustainability assessment:<sup>8</sup>

- *Socio-ecological system integrity*: Build human-ecological relations to establish and maintain the long term integrity of socio-biophysical systems and protect the irreplaceable life support functions upon which human as well as ecological well-being depends.
- *Intragenerational equity*: Ensure that sufficiency and effective choices for all are pursued in ways that reduce dangerous gaps in sufficiency and opportunity (and health, security, social recognition, political influence, etc) between the rich and the poor.

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<sup>6</sup> Benjamin Richardson, "Time and Environmental Law: Telling Nature's Time" (Cambridge University Press: London, 2017), p 212 [Richardson].

<sup>7</sup> *Ibid*, p 226.

<sup>8</sup> Gibson, R.B. (2012). In full retreat: The Canadian government's new EA law undoes decades of progress. *Impact Assessment and Project Appraisal*, 30(3), 179-188; Gibson, R.B. (2017). (Ed.). *Sustainability Assessment: Applications and Opportunities*. London, New York: Routledge.

- *Intergenerational equity*: Favour present options and actions that are most likely to preserve or enhance the opportunities and capabilities of future generations to live sustainably.
- *Precaution and adaptation*: Respect uncertainty, avoid even poorly understood risks of serious or irreversible damage to the foundations for sustainability, plan to learn, design for surprise, and manage for adaptation.

Project review should not be based just on a project's purported GHG emissions, but the full range of sustainability assessment principles which should cumulatively inform a project's IA and subsequent decision-making by federal Cabinet ministers. On this basis, we again urge the federal government to designate a wide range of nuclear projects under the IAA. Nuclear power plants, their refurbishment or life extension, and ultimate decommissioning, pose serious, intergenerational environmental and social impacts, and should not be exempt based on any alleged climate benefits.

### Issue 3: Early planning

While CELA supports the inclusion of an early planning phase under the IAA, as noted in our comments to the Standing Committee on Environment and Sustainable Development,<sup>9</sup> it is necessary to clearly articulate how meaningful public participation will be facilitated during this phase. As the CEAA Expert Panel found, "early engagement is critical to a fully inclusive and informed IA processes," and recommended that "federal IA should begin with a legislated Planning Phase that, for projects, occurs early in the development before design elements are finalized."<sup>10</sup>

The *Discussion Paper* suggests that during the early planning phase, certain types of information be provided by the proponent. In response to the paper's suggested information list, CELA provides the following comments:

1. Information should not be limited to a project's "estimated direct and upstream emissions associated with the project." Instead, CELA proposes the project's estimated direct, and upstream **and downstream** emissions associated with the project, be considered. This approach is congruous with the NEB Modernization Panel which foresaw the first phase of project review as dealing with "upstream and downstream components."<sup>11</sup>

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<sup>9</sup> See: <https://www.cela.ca/proposed-IAAappropriate-amendments>

<sup>10</sup> Environment and Climate Change Canada, "Building Common Ground: A Vision for Impact Assessment in Canada" p 18 – 19 [CEAA Expert Panel Report].

<sup>11</sup> NEB Modernization, *supra* note 5, p 59.

2. Information should not be limited to “best environmental practices which are economically achievable” (emphasis added). While the economic effects of a project are a consideration in project review, we do not support the limiting of review of best environmental practices to those which are economically achievable at this early stage of the IA process. Respect for the principle of sustainable development requires consideration of the need for the undertaking and investigation of alternatives. A robust alternatives analysis would capture economic effects, in addition to social, environmental and health effects. It would be detrimental to narrow review to considerations of economic viability (particularly from the proponent’s perspective) at the early planning stage.
3. Project proponents should demonstrate how a climate-focused approach frames the proposed undertaking. This requires detailed information demonstrating how qualitative effects, such as potential mitigation measures and GHG avoidance, and quantitative expert-based GHG emission calculations, were considered.
4. Project siting should also account for climate effects at the regional and local level. A region’s climate vulnerabilities should also be directly considered, as climate change is projected to occur at a greater pace or extent in certain regions of the country.

#### Issue 4: Impact assessment

The *Discussion Paper* seeks comments on the establishment on an expert advisory panel for the strategic assessment of climate change and anticipates a draft strategic assessment report in Fall 2018. Due to the exceptionally short timeframe for the expert panel to conduct its review - in which independent, climate policy expertise is required - we do not expect that a panel as proposed will be able achieve its intended goal.

A fast-tracked expert panel review would compromise the rigour of the review and not provide time to accomplish the following recommended requirements:

- Establishment of a panel of 5-7 members, with at least one being Indigenous. CELA submits no membership should be permitted from fossil fuel companies, who have directly lobbied the government to delay or stop action on action change;<sup>12</sup>
- Resourcing for climate policy expert review and Indigenous analysis of information
- Public consultation on the panel’s Terms of Reference (TOR);
- Establishment of a TOR which are not prescriptive and broadly scoped, to facilitate a comprehensive review (and not narrowed by the conclusions of this Discussion Paper)

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<sup>12</sup> Richardson, *supra* note 6, p 93.

- which have pre-determined downstream GHG emissions, for instance, do not merit consideration); and
- In-person engagement to enable a more effective public voice<sup>13</sup>

## **CONCLUSION**

CELA is disappointed by the very short timeline for input on this *Discussion Paper*. Canada is on track to miss meeting its international climate change mitigation commitments. Canada's climate change record cannot improve if we continue to make decisions about GHG-intensive projects without accurately understanding their impacts on our overall GHG emissions reductions goals.

Given the significance and urgency of addressing climate change, it would have been more appropriate to create interim guidance and seek input from the public in a more thorough process. Any expert panel should have a broad mandate and sufficient resources to conduct a fulsome review.

The *Discussion Paper's* climate change proposal must be strengthened in order to advance the purposes of the *IAA*, which supports a comprehensive and inclusive application of climate considerations in impact assessments. The *Discussion Paper* proposes unjustified constraints on the scope of climate assessment, by excluding downstream effects and by exempting projects from the *IAA* if they purportedly provide net climate change benefits.

Yours truly,

## **CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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<sup>13</sup> See NEB Modernization, *supra* note 5, p 72; CEAA Expert Panel report, *supra* note 10, p 35 – 41.