Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE GOVERNMENT OF CANADA REGARDING *DISCUSSION PAPER ON THE PROPOSED PROJECT LIST* AND *DISCUSSION PAPER ON INFORMATION REQUIREMENTS AND TIME MANAGEMENT REGULATORY PROPOSAL*

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PART I - INTRODUCTION

These are the submissions of the Canadian Environmental Law Association (CELA) in relation to the Government of Canada's *Discussion Paper on the Proposed Project List* (2019) and *Discussion Paper on Information Requirements and Time Management Regulatory Proposal* (2019).

(a) Overview of CELA's Comments on the Discussion Papers

The first *Discussion Paper* describes certain activities that the federal government proposes to designate as "projects" to which the *Impact Assessment Act* (*IAA*) in Part 1 of Bill C-69 will apply if enacted. The second *Discussion Paper* sets out proposed regulations in relation to various assessment matters, including: the suspension or extension of timelines under the *IAA*; the documents to be prepared during the early planning stage; and the information to be provided by proponents in their project descriptions.

CELA has carefully reviewed both *Discussion Papers*, and attended a recent meeting in Ottawa in which representatives from the Canadian Environmental Assessment Agency (Agency), Natural Resources Canada (NRCan) and Environment and Climate Change Canada (ECCC) attempted to explain the rationale for these proposals. Despite this briefing, however, CELA has a number of significant unresolved concerns about the regulatory approaches described in the two *Discussion Papers*.

For the reasons described below, CELA concludes that the draft Project List represents an unfortunate step backwards from the current (and highly deficient) list being used under the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*). In our view, the proposed entries and thresholds in the draft Project List inexplicably omit far too many projects from *IAA* requirements, even if one accepts the *IAA*'s narrow definition of "effects within federal jurisdiction."[1]

In addition, CELA concludes that the entries/thresholds were not derived in an open, traceable and evidence-based decision-making process. For example, the proposed increases in the thresholds for many designated project types (especially in the mining, pipeline and transportation sectors)

[1] *IAA*, section 2.

lack credibility or scientific justification, particularly since the potential for adverse effects is often location-specific rather than dependent on the simple metric of production output or length of linear infrastructure.

In relation to the information requirements and time management proposals, CELA finds that the regulatory proposals for the initial and "updated" project descriptions are too limited, and they unjustifiably exclude an "alternatives" analysis. Accordingly, CELA concludes that these regulatory proposals fall considerably short of the mark if they are intended to provide the substantive basis for meaningful early planning and public engagement.

Similarly, CELA submits that there is insufficient detail in the *Discussion Paper* with respect to the "deliverables" that are supposed to emerge from the early planning phase (e.g. "tailored" Impact Statement Guidelines, Cooperation Plan, Indigenous Engagement and Partnership Plan, Public Participation Plan, and Permitting Plan). Moreover, in relation to the critical issue of "scoping" the factors set out in section 22 of the *IAA*, the *Discussion Paper* is unclear on when and how review panels (e.g. "integrated" review panels that include lifecycle regulators) will play a role in shaping the breadth and depth of impact assessments (IAs).

Accordingly, CELA's overall conclusion is that the regulatory proposals in the two *Discussion Papers* are inadequate, unintelligible and unacceptable from a public interest perspective. Therefore, CELA recommends that Agency staff should reconsider, revise and recirculate these proposals in an open, accessible and transparent manner long before the *IAA* is enacted.

In CELA's view, this step is both desirable and necessary since it is our understanding that the federal government intends to skip posting notice of the forthcoming regulations in the *Canada Gazette Part I*, and instead will only be posting them (with a Regulatory Impact Analysis Statement) in *Canada Gazette Part II*.[2] In our view, it is far more important to ensure that these implementing regulations are properly crafted and contain the correct details, rather than rushing them through the regulation-making process.

(b) CELA's 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* (*EARPGO*).

On the basis of our decades-long experience in environmental assessment (EA) matters, CELA has carefully considered the two *Discussion Papers* from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

[2] *Discussion Paper*, page 17.

PART II - THE PROPOSED PROJECT LIST

(a) Legal Context: The Continuing Debate over Appropriate Assessment Triggers

For over 20 years, the application of *CEAA 1992* was triggered by the exercise of certain powers, duties or functions (not a specific Project List), and an EA was required when a federal authority:[3]

- acts as the proponent of the project;
- makes or authorizes payments, loan guarantees or other financial assistance that allows the project to proceed;
- sells, leases or otherwise disposes of federal lands in order to enable a project to proceed; or
- issues a federal permit, licence or approval that is prescribed by the Law List regulation.[4]

In CELA's experience, these four triggers worked reasonably well to ensure that an appropriate level of assessment (e.g. screening, comprehensive study, or review panel) was carried out during the project's earliest planning stages, and before irrevocable decisions were made by federal authorities.[5] Nevertheless, CELA acknowledges that *CEAA 1992* was not problem-free, and that there were notable instances where *CEAA 1992* requirements were ignored or misinterpreted by federal authorities and proponents.[6] However, CELA's overall conclusion is that the *CEAA 1992* regime was a vast improvement over the *EARPGO*, and placed federal EA requirements on a solid legislative foundation.

In 2012, however, the previous federal government decided to repeal *CEAA 1992* and replace it with *CEAA 2012*, which jettisoned the above-noted EA triggers in favour of a regulatory Projects List. At the time, CELA filed submissions which identified the serious shortcomings in *CEAA 2012*[7] and numerous deficiencies in the underlying Project List,[8] many of which have unfortunately been carried forward into the *IAA* and draft Project List.

These and other concerns about the *CEAA 2012* regime were validated in 2017 by the current government's independent Expert Panel that reviewed and consulted upon the need to upgrade federal EA processes in order to regain public trust. Among other things, the Expert Panel concluded that new IA legislation was required in Canada in order to focus on sustainability considerations, particularly during project-level IAs.[9]

In addition, the Expert Panel recommended that the new assessment regime should contain a broad and inclusive approach to defining matters that engaged federal jurisdiction. For example, the Expert Panel recommended that federal IAs should be conducted:

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[3] *CEAA 1992*, section 5.
[4] SOR/94-636.
[5] *CEAA 1992*, section 11.
[6] See, for example, *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6.
[7] See https://www.cela.ca/sites/cela.ca/files/CELA%20Ltr%20to%20P.M.%20Harper%20-%20Bill%20C-38%20%28June%202012%29.pdf.
[8] See https://www.cela.ca/sites/cela.ca/files/900DraftCEAARegs.pdf.
[9] Expert Panel Final Report (2017), pages 2 to 6.

> … on a project, plan or policy that has clear links to the matters of federal interest. These federal interests include, at a minimum, federal lands, federal funding, and federal government as proponent, as well as:
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> - species at risk;
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> - fish;
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> - marine plants;
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> - migratory birds;
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> - Indigenous Peoples and lands;
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> - greenhouse gas emissions of national significance;
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> - watershed or airshed impacts crossing provincial or national boundaries;
>
> - navigation and shipping;
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> - aeronautics;
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> - activities crossing provincial or national boundaries and works related to those activities; or
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> - activities related to nuclear energy.
>
> The careful consideration and incorporation of federal jurisdiction is the starting point from which to answer the question of when federal IA should apply (emphasis added).[10]

Furthermore, the Expert Panel recommended a broad effects-based approach to triggering IA requirements:

> The starting point for requiring a federal IA is to define "project" as a proposed physical activity that affects one or more matters of federal interest. Effects on federal interest should be the foremost factor when determining whether a federal IA is required…
>
> A new Project List should be created that would include only projects that are likely to adversely impact matters of federal interest in a manner that is consequential for present and future generations. Projects on the new Project List would automatically require a federal project IA. For projects not on the new Project List, two other triggering mechanisms should be provided…

[10] Expert Panel Final Report (2017), page 18.

> Compared to the current approach [under *CEAA 2012*], the proposed new approach will require more project IAs.[11]

However, despite the Expert Panel's sound advice on using broadly framed IA triggers, the Government of Canada has drafted the *IAA* with a narrow definition of "effects within federal jurisdiction," and adopted the same inadequate Project List mechanism under *CEAA 2012* for triggering assessment requirements. Moreover, the proposed entries/thresholds in the draft Project List will clearly result in fewer – not more – assessments under the *IAA* if enacted.

(b) The Questionable Criterion used to Create the Project List under the IAA

The *IAA* perpetuates the narrow *CEAA 2012* approach of developing a regulatory list prescribing a relatively small number of project types that may trigger an IA under the Act. In particular, subsection 109(b) of the *IAA* empowers the federal Cabinet to pass regulations specifying physical activities (or classes of physical activities) as "designated projects" under the Act.

As noted in CELA's brief[12] on the 2018 *Consultation Paper* on the project listing approach, section 109(b) and the brief *IAA* definition of "designated project" do not contain any express statutory criteria to drive the project listing process. Therefore, it appears that the federal Cabinet has been given virtually unfettered discretion to list – or not list – environmentally significant activities as "designated projects" under the Act. In our view, this omission undermines governmental claims that the *IAA* provides certainty, transparency and accountability.

In the absence of statutory criteria, the *Discussion Paper* indicates that the draft Project list is intended to "capture major projects with the greatest potential for adverse effects in areas of federal jurisdiction related to the environment."[13] However, there is no legislative requirement in the *IAA* that codifies or mandates this criterion for project-listing purposes. Thus, CELA submits that this criterion is simply a self-imposed (and unacceptable) policy constraint that was apparently adopted by the Agency in the *Discussion Paper*.

In CELA's view, there is nothing in the preamble, purposes or provisions of the *IAA* that entrenches this dubious constraint, or that compels the federal Cabinet to only designate a relatively small subset of the "worst" projects that affect areas of federal interest. To the contrary, the *IAA*'s statutory commitments to sustainability, precaution, environmental protection and reconciliation with Indigenous Peoples inevitably leads to the opposite conclusion, *viz*., that a more inclusive and comprehensive approach to triggering IA requirements should be undertaken under the Act. Thus, CELA submits that the project-listing exercise under the *IAA* should not be undertaken in a manner that thwarts or frustrates the above-noted purposes of the Act.

CELA's additional comments on how this criterion was misapplied by the Agency are set out below. The net result is that the draft Project List excludes too many environmentally significant activities, and is too narrowly framed to capture the full range of projects that may affect areas of federal interest.

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[11] *Ibid*, pages 56 to 57.
[12] See https://www.cela.ca/CELASubmissionsReProjectListingCriteria.
[13] *Discussion Paper*, page 3.

CELA therefore concludes that the *Discussion Paper*'s suggestion that IAs should only be required for projects having the "greatest potential" for adverse effects in areas of federal jurisdiction" is a normative statement that has no legislative basis in the *IAA*, and is clearly inconsistent with the recommendations of the federal government's own Expert Panel. Moreover, during our recent meeting with Agency staff to review the *Discussion Paper*, Agency officials were unable to precisely define or explain the actual comparator that was used to determine which project types satisfied the "greatest potential" criterion.

(c) The Discussion Paper Improperly Conflates IA with Regulatory Requirements

Aside from invoking the problematic "greatest potential" criterion, the *Discussion Paper* applies an additional – and highly inappropriate – constraint on the project-listing exercise.

In particular, the *Discussion Paper* states, without elaboration or explanation, that "in a mature regulatory environment such as Canada, it is intended that federal impact assessments apply only where incremental value can be added, over and above other federal regulatory oversight mechanisms (e.g. permits)."[14] In short, it appears that the default position in the *Discussion Paper* is that projects should only be subject to licencing requirements under the applicable regulatory regimes, unless an IA somehow adds undefined "incremental value."

However, a careful examination of the *IAA* reveals that no such Parliamentary intent is expressed in the purposes of the Act or anywhere else in the new legislation. Similarly, this so-called "value-added" consideration was not explicitly mentioned in the previous *Consultation Paper* on the project-listing approach. Accordingly, if the "value-added" factor is now serving as a *de facto* condition precedent for designating projects under the *IAA*, then CELA strongly objects to this unconscionable "bait-and-switch" approach.

More fundamentally, CELA submits that the *Discussion Paper* improperly conflates IA with regulatory requirements under federal or provincial law. This unfortunate merging of these two distinct processes permeates much of the *Discussion Paper*, and undoubtedly goes a long way in explaining the fundamental inadequacy of the draft Project List.

For example, the *Discussion Paper* contends that IA requirements will only be applied if they add value to "other" federal regulatory processes, as noted above. Similarly, the *Discussion Paper* asserts that IA "is a key element of a larger regulatory landscape," and that IA "works alongside other regulatory processes at the federal, provincial and territorial levels."[15]

In addition, the "decision tree" outlined in the *Discussion Paper*[16] indicates that when determining the Project List entries/thresholds, consideration was given to factors such as the "role of provincial/territorial/federal regulatory regimes", or "is there a federal lifecycle regulator?" It appears to CELA that the existence of such factors militated against designating projects where the Agency apparently opined that "other" regulatory regimes could be relied upon instead of

[14] *Discussion Paper*, page 3.
[15] *Discussion Paper*, page 4.
[16] *Discussion Paper*, page 6.

applying IA. In response, CELA submits that the presence/absence of regulatory regimes (or their alleged robustness) is an irrelevant consideration to the overarching question of whether a project type has the capability of causing adverse effects in areas of federal interest.

In CELA's view, the foregoing suggestions in the *Discussion Paper* reflect a profound misrepresentation of IA and regulatory processes, and constitute a misleading "apples to oranges" comparison. In general, IA is an environmental planning process that addresses projects' larger policy, socio-economic and sustainability implications, while regulatory processes are more narrowly focused on the technical acceptability of proposed facilities, equipment or activities. As the Expert Panel correctly concluded, "regulation and assessment are two quite distinct functions that require different processes and expertise."[17] In short, IA is not synonymous with regulatory regimes, and these terms should not be used interchangeably in the *Discussion Paper*.

In addition, the *Discussion Paper* fails to provide any particulars that demonstrate why other regulatory regimes should be relied upon instead of the IA process for non-designated projects. For example, the *Discussion Paper* discloses no indicia, benchmarks or analysis used by the Agency to evaluate the robustness of regulatory regimes, or to assess the efficacy, fairness or credibility of federal lifecycle regulators.

On this latter point, CELA notes that the Expert Panel found on the evidence that there was widespread public distrust of lifecycle regulators for various reasons.[18] There is nothing in the *Discussion Paper* that addresses or refutes the Panel's critical findings. Nevertheless, the *Discussion Paper* endorses these regulators as appropriate venues for licencing projects that, in CELA's view, warrant IAs due to their environmental significance in areas of federal interest.

CELA is also alarmed by the *Discussion Paper*'s simplistic assurance that non-designated projects "will continue to be subject to other regulatory instruments and regimes, including assessment by the lifecycle regulator" (e.g. the proposed Canadian Energy Regulator, Canadian Nuclear Safety Commission (CNSC) and the Offshore Boards).[19] Given the debatable efficacy (and questionable enforcement) of other federal and provincial environmental laws, CELA draws no comfort from the *Discussion Paper*'s unpersuasive attempt to rationalize the exclusion of non-designated projects from the proposed *IAA* regulation on the grounds that other legislative regimes may be applicable. In our view, the mere fact that a project may be subject to other federal or provincial laws is not dispositive of the question of whether the project should be designated under the *IAA*.

For example, in the nuclear energy context, CELA notes that the Ontario government no longer applies its own *Environmental Assessment Act* to nuclear facilities (or long-term energy plans) within the province, such as nuclear power plants or radioactive waste dumps owned, operated or proposed by Ontario Power Generation. In CELA's view, leaving non-designated nuclear activities to be solely evaluated and licenced by the CNSC under the *Nuclear Safety and Control Act* (rather

[17] Expert Panel Final Report (2017), page 50.
[18] *Ibid*, pages 49 to 51.
[19] *Discussion Paper*, page 5.

than *CEAA 2012* or the *IAA*) has greatly diminished participatory rights, and resulted in less robust assessments of the direct, indirect and cumulative effects of nuclear projects.[20]

Furthermore, the CNSC's regulatory mandate does not include more broadly framed environmental planning issues, and there is no equivalent purpose in the CNSC's enabling statute that requires projects to foster sustainability, consider effects on environment, health and socio-economic conditions, or consider alternatives to the undertaking.[21] While these considerations are mandatory under the IA process, they are not requirements of the *Nuclear Safety and Control Act*.

It should also be recalled that the 2006 proposal to refurbish and extend the life of the Bruce A nuclear reactors was properly subject to an EA process under *CEAA 1992*. However, the proponent's current refurbishment/life extension proposal for the Bruce B reactors is not designated under the existing Project List under *CEAA 2012*, and is therefore proceeding without an EA under this Act. Instead, the project is subject only to the narrowly cast (and less participatory) licencing process administered by the CNSC under the *Nuclear Safety and Control Act*. Significantly, the draft Project List under the *IAA* does not prescribe refurbishment/life extension proposals as designated projects, but the *Discussion Paper* provides no specific reasons why the status quo should be continued.

CELA also notes that the *Discussion Paper* reveals that a third factor may have unduly influenced the project types found in the draft Project List. In particular, the *Discussion Paper* contends that the proposed Project List "respects provincial jurisdiction."[22] In our opinion, the constitutionality of federal EA requirements has long been recognized by the Supreme Court of Canada in the leading case of *Oldman River*.[23] Accordingly, it is unnecessary and inappropriate for the *Discussion Paper* to refer to, or rely upon, "provincial jurisdiction" as a basis for screening out project types which, by definition, only include activities which may affect areas of federal interest. This is particularly true since the *IAA* and other provincial EA laws expressly provide for harmonized, cooperative or joint assessments where a single project may trigger federal and provincial assessment requirements.

(d) The CEAA 2012 Project List is an Improper Starting Point under the IAA

The *Discussion Paper* is predicated on the erroneous assumption that the current Project List regulation under *CEAA 2012* provides an appropriate starting point for determining which activities should – or should not – be caught by the *IAA*. For example, there is nothing in the *IAA* which dictates that the current Project List should be retained and merely "revised." In our view, passage of the new statute should have been accompanied by a fresh new look at the activities which warrant an IA, irrespective of whether they are caught by the truncated *CEAA 2012* list developed by the previous government. It may well have been expedient for the federal

[20] See https://www.cela.ca/CELASubmissionsReProjectListingCriteria and https://www.cela.ca/sites/cela.ca/files/FederalEADiscPaper-CvrLtrandSubmission.pdf.
[21] The CNSC has publicly recognized that they do not consider socio-economic aspects in their review of projects: see Canadian Nuclear Safety Commission (2018) Transcript of Proceeding dated 28 June 2018.
[22] *Discussion Paper*, page 9.
[23] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.

government to start with the Project List under *CEAA 2012*, but there is nothing inevitable or inherently beneficial in using the current list as the basis for the Project List under the *IAA*.

First, it must be recalled that there was no public consultation on the *CEAA 2012* regulation before it was promulgated. Instead, public input was belatedly sought after the regulation was already in place.[24] Thus, the controversial *CEAA 2012* regulation lacks credibility, legitimacy and acceptability from the public interest perspective. In our view, it would been far more preferable for the current government to start with a clean slate in terms of developing suitable project triggers under the *IAA*, rather than simply adopting the deficient approach embodied in *CEAA 2012* and the existing projects list regulation.

Second, subject to some exceptions, the existing *CEAA 2012* regulation is largely restricted to the various projects previously described on the *Comprehensive Study List Regulations* (*CSLR*) under *CEAA 1992*. It is beyond dispute that the *CSLR* listed the types of major projects which required a higher (or more rigorous) level of EA (i.e. comprehensive study). However, the *CSLR* was not intended to serve as a complete inventory of all projects that posed environmental risks in areas of federal interest, and therefore warranted the application of *CEAA 1992*.

Third, the current Project List under *CEAA 2012* regulation (which was derived from the *CSLR*) cannot be regarded as an appropriate basis for designating projects under the *IAA* that should be assessed. This is because the regulation excludes a large number of environmentally significant projects that warrant an IA, as described below. Thus, the current regulation cannot serve as an acceptable substitute for the preferable "all-in-unless-excluded" approach previously utilized under *CEAA 1992*. Moreover, the current regulatory focus on "major projects" overlooks the fact that medium- and small-sized projects (or groups of smaller projects in the same geographic area and timeframe) can also create direct, indirect and cumulative effects in areas of federal interest which are both adverse and significant.

Fourth, even if one accepts the dubious proposition that only "major" projects should be assessed under federal EA legislation, it is clear that there are a number of environmentally significant facilities and activities (e.g. decommissioning of nuclear facilities, refurbishment/life extension of nuclear power plants, etc.) that were inexplicably omitted from the current *CEAA 2012* regulation. In 2012 and again in 2013, CELA identified these significant omissions, and strongly recommended that these activities should be included in the projects list regulation; however, this recommendation was not acted upon by the previous government.[25]

CELA's updated candidates for listing in the *CEAA 2012* regulation are reproduced below in Appendix A, and CELA submits that they should be included in the new *IAA* regulation since they undeniably have considerable potential to affect areas of federal interest. CELA further submits that there are other currently non-listed activities (e.g. the construction, operation and dismantling of small modular reactors, or large-scale projects requiring permits under the amended *Fisheries Act* or the proposed *Canadian Navigable Waters Act*) which should also be designated under the *IAA* regulation.

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[24] See http://www.cela.ca/publications/ceaa-re-amendments-projects-list-regulations.
[25] See http://www.cela.ca/publications/draft-ceaa-regs.

(e) Absence of Evidence: The Misapplication of the Project Listing Criterion

Arguably, the most objectionable aspect of the *Discussion Paper* is its failure to provide any rational, technically sound or science-based justification for the proposed entries/thresholds in the draft Project List. Even if one accepts that the "greatest potential" criterion (or the "value-added" factor) are appropriate tests for designation under the *IAA*, there is a dearth of detail in the sparse *Discussion Paper* to explain why candidate projects satisfied (or did not satisfy) these tests, or why certain thresholds were substantially increased in the draft Project List.

This omission is compounded by the *Discussion Paper*'s claim that "the Government is committed to a transparent, evidence-based approach to creating the new Project List."[26] Despite this claim, the *Discussion Paper*[27] indicates that a project's potential effects were "analyzed" (presumably by Agency staff) based on past EAs,[28] scientific literature,[29] and consultations with expert government departments.[30] In CELA's view, these closed-door deliberations are anything but "transparent," and the resulting Project List has not been accompanied by any compelling evidence or analysis in the *Discussion Paper* to justify the proposed entries/thresholds.

CELA notes that Annex 1 of the *Discussion Paper* ("What We Heard") purports to summarize the public input received on the earlier *Consultation Paper*. However, it appears to CELA that our previous comments (and those of other non-governmental organizations) are not adequately summarized in Annex 1, nor are they reflected in the draft Project List. Thus, Annex 1 strikes CELA as an incomplete and unhelpful summary unless it is expanded to include reasonably detailed explanations why public input was – or was not – accepted by the Agency.

At our recent meeting with the Agency to review the *Discussion Paper*, one official conceded that abstractly predicting projects' potential impacts within federal jurisdiction was more of an art rather than a science. CELA generally concurs with this sentiment, and but it is our respectful submission that the *Discussion Paper* attempts to place a veneer of scientific rigour, certainty and objectivity over the proposed entries/thresholds. However, this veneer is easily pierced when the proposals are closely scrutinized for any evidence-based reasoning that substantiates the Agency's claims about the project types that are included (or excluded) in the Project List. Thus, in the absence of any supporting evidence, it appears to CELA that the draft Project List essentially reflects subjective opinions masquerading as fact.

The Agency officials who attended this meeting further stated that the entries/thresholds were premised on the perceived nature and extent of the risk(s) posed by project types. However, the *Discussion Paper* does not include or even mention any formal risk/benefit assessments (or

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[26] *Discussion Paper*, page 5.
[27] *Discussion Paper*, page 7.
[28] This particular source of information is inherently limited since past EAs only pertain to projects already designated under federal EA legislation, and will not shed any light on whether non-designated projects should continue to be excluded from the Project List.
[29] No references to any scientific literature are provided in the *Discussion Paper*.
[30] These "expert departments" are not identified in the *Discussion Paper*, but CELA presumes that ECCC and NRCan staff provided considerable input to the Agency during the project listing exercise. We further presume that federal lifecycle regulators also provided input to the Agency in relation to the draft Project List, although these regulators are not mentioned as a source of information in the *Discussion Paper*.

probabilistic risk analyses) that were conducted by federal staff in order to review or screen out project types.

CELA also points out that for some project types (e.g. new nuclear reactors), the chance of an accident or malfunction may be relatively low, but the catastrophic consequences of a worst case scenario (e.g. unplanned release of radioactive substances from a cascading multi-reactor accident such as the Fukushima disaster) means that it would be prudent to apply IA requirements to all new reactor projects. However, the draft Project List improperly excludes many large and small reactor projects, as described below.

In these circumstances, CELA submits that there is no air of reality to the Agency's claims that the designated projects have the "greatest potential" to cause adverse effects within federal jurisdiction, or conversely, that non-designated projects are environmentally benign undertakings that pose low (or no) risk to the environment, health, or socio-economic conditions. In CELA's view, the *Discussion Paper*'s assurances about project-related risks (or lack thereof) are unpersuasive and unacceptable. Put another way, assertions of Agency expertise, or purported exercises of professional judgment by government experts, are no substitute for robust, transparent and evidence-based decision-making about project entries/thresholds.

Since the scientific or evidentiary basis for the draft Project List is not provided in the *Discussion Paper*, CELA remains highly concerned that the proposed entries/thresholds simply reflect the value judgments of (or political directions received by) the federal officials in charge of drafting the Project List under the *IAA*. Thus, despite the *Discussion Paper*'s commitment to evidence-based decision-making, CELA concludes that the draft Project List is as non-transparent, problematic and contentious as the deficient Project List that emerged under *CEAA 2012*.

Accordingly, CELA repeats the request that we made at our recent meeting with Agency officials, *viz*., that the underlying evidence or analysis prepared by or for the Agency for the purposes of the draft Project List should be disclosed to CELA and to any other member of the public who requests such information. To date, CELA has received no formal response or documentation from the Agency in relation to this request.

(f) The Proposed Entries/Thresholds: Problematic Energy Examples

It is beyond the scope of these submissions to comment on all of the entries/thresholds proposed in Annex 2 of the *Discussion Paper*. Suffice it say that in CELA's view, the *Discussion Paper*'s curious choices to include or exclude project types are puzzling, inconsistent and unjustified by science or supporting analysis.

For example, the *Discussion Paper* proposes to **decrease** the IA thresholds for certain renewable energy projects (e.g. in-stream tidal power generating facility over 15 MW, and all other tidal power generating facilities regardless of production output[31]), but to significantly **increase** the IA threshold for new nuclear reactors (e.g. small modular reactors over 200 MW thermal, and certain

[31] *Discussion Paper*, page 20.

larger reactors over 900 MW thermal[32]). However, no empirical evidence has been offered to rationalize these arbitrary cut-off points. While nuclear proponents often characterize EA requirements as duplicative and unnecessary on the basis that "most nuclear sites have undergone full environmental assessments,"[33] CELA submits that such arguments are misleading since the original siting and construction of Canada's nuclear generating stations predated federal EA legislation. Moreover, CELA submits that it is highly ironic that these renewable energy projects will have to undergo more rigorous federal assessment under the *IAA* than most new nuclear reactors that may be proposed in Canada.

CELA also notes that offshore wind farms (e.g. over 10 turbines) will also require an IA, but not if there has been a regional impact assessment (RIA) for the area and if the Minister has approved conditions arising from the RIA that exempt wind farms from project-level IA requirements.[34] A similar dispensation from IA requirements is being proposed for offshore exploratory well projects where there has been an RIA.[35]

CELA strongly supports the timely development of RIAs under the *IAA*, and it has been our understanding that the results of RIAs would feed into and inform the requirements of project-level IAs, especially in relation to cumulative effects. However, the *Discussion Paper* now proposes to use RIAs as a "shield" to preclude IA requirements for individual projects, although this was never expressly suggested in the earlier *Consultation Paper*. In fact, the *Consultation Paper* recognized that regional and strategic assessments "will inform and potentially scope and streamline the impact assessment," not displace IAs entirely.[36] In CELA's view, RIAs (and their generic "conditions" that are not site-specific in nature) should not be used as the basis for wholly exempting certain projects from IA requirements.

Similarly, the *Discussion Paper* proposes to include new or expanded *in situ* oil sands facilities in the draft Project List, but then proceeds to grant these projects an open-ended dispensation from IA requirements if there is a "hard cap on greenhouse emissions."[37] As an illustrative example of a "hard cap," the *Discussion Paper* provides a footnote reference to the Pan-Canadian Framework on Clean Growth and Climate Change,[38] which does not quantify or codify a "hard cap" on greenhouse gas emissions. CELA is also concerned that even if the Alberta government maintains a "hard cap" in an enforceable statutory form, there will be a wide-ranging IA exemption if the cap is set at an unrealistically high level. Thus, CELA submits that while it is appropriate to include *in situ* oil sands facilities in the draft Project List, the ill-defined "hard cap" exemption should be deleted forthwith.

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[32] *Discussion Paper*, page 26.
[33] Canadian Nuclear Association (6 April 2018), Submission on Bill C-69 to the House of Commons Standing Committee on Environment and Sustainable Development; see https://cna.ca/news/submission-on-bill-c-69-to-the-house-of-commons-standing-committee-on-environment-and-sustainable-development/.
[34] *Discussion Paper*, page 20.
[35] *Discussion Paper*, page 22.
[36] *Consultation Paper*, page 10.
[37] *Discussion Paper*, page 22.
[38] *Ibid*.

In addition, the draft Project List's treatment of nuclear activities is of particular concern to CELA and other non-governmental organizations.[39] The *Discussion Paper* indicates that while some existing nuclear entries in the *CEAA 2012* Project List will remain unchanged, several environmentally significant activities (e.g. expansions of certain existing facilities) will be wholly removed and will not trigger IA requirements.[40] Similarly, the *Discussion Paper* proposes new or increased thresholds for uranium mining and milling activities, and imposes significantly higher IA thresholds for nuclear fission or fusion reactors,[41] as noted above.

In CELA's view, the *Discussion Paper*'s superficial one-page review of nuclear activities does not provide any persuasive reasons or technical analysis to justify the above-noted nuclear entries/thresholds. For example, the *Discussion Paper* acknowledges that aside from small modular reactor (SMR) types at some Canadian universities and Canadian Nuclear Laboratories, "there is no current deployment" of SMRs in Canada.[42] Nevertheless, the *Discussion Paper* contends that the effects of SMRs are "well known", and that SMRs "share core characteristics with regulated conventional reactor technology."[43] In CELA's view, this overgeneralized statement is misleading, and ignores the technological variability of proposed SMR types in terms of fuel (e.g. enriched or re-processed), coolant materials (e.g. water, liquid metal or molten salt) and waste characteristics.

The *Discussion Paper* also provides a positive review of the CNSC's regulatory regime under the *Nuclear Safety and Control Act*, which, according to the *Discussion Paper*, contains numerous "protective measures" such as off-site emergency preparedness arrangements.[44] Since CELA and other non-governmental organizations have long identified significant shortcomings in nuclear emergency planning,[45] we do not share the *Discussion Paper*'s optimistic view that such existing measures are sufficiently "protective." We further note that the *Discussion Paper*'s endorsement of the CNSC stands in stark contrast to the critical findings of the Expert Panel in relation to the lack of public trust in lifecycle regulators (including the CNSC), as discussed above.

The *Discussion Paper* then provides a bullet point list of the nuclear project types that allegedly have the "greatest potential" for adverse environmental effects within federal jurisdiction,[46] but provides no supporting information, analysis or references to explain or justify this outcome. Conversely, the *Discussion Paper* provides no reasons why the nuclear activities that are being excluded from the Project List do not have "great potential" to adversely affect areas of federal interest. Accordingly, CELA submits that it is incumbent upon the Agency to reconsider and revise the nuclear entries/thresholds based on cogent and compelling evidence, rather than wholesale acceptance of the CNSC's views about its own effectiveness in regulating matters under the *Nuclear Safety and Control Act*.

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[39] See https://www.cela.ca/newsevents/media-release/mr050719.
[40] *Discussion Paper*, page 26.
[41] *Discussion Paper*, pages 26 to 27.
[42] *Discussion Paper*, page 14.
[43] *Ibid*.
[44] *Ibid*.
[45] See https://www.cela.ca/test-emergency-planning-around-canadian-nuclear-plants.
[46] *Discussion Paper*, page 14.

(g) The Discussion Paper Downplays Section 16 of the IAA

The Discussion Paper attempts to provide assurances that designated projects will automatically undergo an IA:

> Any individual project that matches the description of a project type and meets or exceeds the established threshold set out in the Project List would be a "designated project" and would be subject to the *Impact Assessment Act*.[47]

It should be recalled, however, that merely listing a particular type of project in the Project List regulation does not actually guarantee that an IA will be carried out. This is because section 16 of the *IAA* empowers the Impact Assessment Agency of Canada (IA Agency) to dispense with the need to conduct an IA for designated projects. While CELA has consistently recommended the deletion of section 16 due to the uncertainty and inconsistency that it creates, this problematic provision remains intact within the *IAA* at the present time.

Accordingly, CELA submits it is inaccurate (if not misleading) for the *Discussion Paper* to imply that designated projects cannot proceed without conducting the requisite IA.

(h) Discretionary Designation is an Inadequate Backstop for the Project List

The *Discussion Paper* correctly notes that section 9 of the *IAA* confers discretion upon the Minister to issue orders that apply the Act to non-designated activities.[48] This open-ended provision appears to duplicate the discretionary power found in subsection 14(2) of *CEAA 2012*, which, to our knowledge, has been used infrequently to date.

In light of this track record, CELA submits that the discretionary Ministerial designation of non-prescribed projects is not an acceptable substitute for promulgating an appropriate and comprehensive Project List at first instance. In short, CELA is unconvinced that the numerous gaps in the draft Project List will be satisfactorily addressed by case-by-case designation orders.

CELA further observes that the *Discussion Paper* goes on to provide a number of factors that the IA Agency "may" take into account when formulating a recommendation to the Minister on whether or not a particular activity should be designated.[49] However, none of these factors are actually prescribed by section 9, and, at best, they only represent a non-binding set of administrative considerations.

Similarly, it is unclear to CELA where (or on what basis) these factors originated since they were not mentioned in the previous *Consultation Paper*, which only prescribed criteria for the project-listing approach rather than section 9 of the *IAA*. In addition, some of the factors are ambiguous (e.g. the project is "near" a threshold on the Project List), while others seem aimed against designation (e.g. "standard" design/mitigation can address adverse effects; other existing legislative/regulatory mechanisms can "adequately manage" adverse effects, etc.).

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[47] *Discussion Paper*, page 7.
[48] *Discussion Paper*, page 9.
[49] *Discussion Paper*, page 9.

Accordingly, CELA derives no comfort from the mere existence of the Minister's residual discretion to issue designation orders under section 9 of the *IAA*. Rather than rely upon the unlikely exercise of this discretion in the future, CELA submits that it is imperative to ensure that the Project List is sufficiently broad to capture all environmentally significant activities that may affect areas of federal interest.

(i) The Need for Meaningful Public Review of the Project List

The *Discussion Paper* correctly commits to the periodic review of the new Project List under the *IAA* in order to determine if further additions, deletions or adjustments should be made.[50] However, the *Discussion Paper* proposes that such reviews would only be carried out once every five years.

No rationale has been provided in the *Discussion Paper* to substantiate this timeframe, although CELA notes that five years is the mid-point of the one- to ten-year timeframes suggested by persons who commented on the earlier *Consultation Paper*. In addition, CELA notes that no qualitative or quantitative benchmarks are provided in the *Consultation Paper* to help determine the effectiveness of the Project List regulation once it is under review.

Given the novelty of certain aspects of the forthcoming *IAA* regime, the central importance of the projects list to the overall IA process, and the existence of new and emerging environmental technology (especially in the energy sector), CELA submits that the initial regulatory review should proceed sooner than later (e.g. two years after the regulation first comes into force). Thereafter, the review interval can be somewhat longer (e.g. every three to four years).

In addition, the new *IAA* regulation should enable any person to formally apply to the Minister and Cabinet for proposed additions or revisions to the Project List between scheduled formal reviews. The federal government should be required to decide such applications, with reasons, within 90 days of receipt. If regulatory changes are to be undertaken as a result of an application, then public consultation, issuance of a Regulatory Impact Analysis Statement, and publication in the *Canada Gazette* should occur in due course.

CELA further submits that the periodic regulatory review should not be an internal "closed door" evaluation by the Minister, IA Agency or other federal officials. Instead, in accordance with the *IAA*'s commitment to meaningful public engagement, the review process should be open, participatory and accountable. Among other things, timely public notices and appropriate comment opportunities (including webinars, workshops and public meetings across Canada) should be provided within the review process.

PART III – THE INFORMATION REQUIREMENTS AND TIME MANAGEMENT PROPOSALS

In essence, the *Discussion Paper* outlines proposals for certain revisions to the current regulation[51] under the *CEAA 2012* that prescribes information requirements for project descriptions of

[50] *Discussion Paper*, page 16.
[51] SOR/2012-148.

designated projects. The *Discussion Paper* also generally describes approaches for developing other key documents arising from the early planning stages of the proposed IA process, and for suspending or extending assessment timelines that are established by the new legislation.

As described below, CELA has a number of comments and concerns about the *Discussion Paper*'s proposals regarding information requirements, early planning documentation, and timing provisions for project-level IAs under the *IAA*.

(a) Proposed Initial and Updated Project Description

At the outset, CELA must emphasize that we strongly support 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 "updated" project descriptions fall considerably short of the mark for the following reasons:

First, CELA notes that the proponent's initial project description must contain sufficient information to allow the IA Agency to determine if an IA is required, and to "enable early discussions between the proponent, Indigenous groups, stakeholders and governments."[52] To achieve these and other objectives, the *Discussion Paper* sets out the proposed content requirements for this initial document (e.g. general information, project information, location information, potential effects, etc.).[53] However, it appears to CELA that subject to some limited exceptions (e.g. the new requirement to provide an "estimate of direct greenhouse gas emissions"), there is little or no material difference between paragraphs 1 to 24 of the Annex 1 checklist and paragraphs 1 to 20 of the existing *CEAA 2012* regulation.[54]

Second, in CELA's experience, the suggested components of the initial project description 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 IA 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 the regulation in order to provide much-needed clarity, transparency and certainty about precisely what is required during the early planning phase.

Third, 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 IAs 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 *Discussion 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 EAs

[52] *Discussion Paper*, page 15.
[53] *Discussion Paper*, Annex 1.
[54] SOR/2012-148.

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

Fourth, CELA is aware that the *Discussion Paper* proposes that the project description should be regarded as an "evergreen" document that would be "updated" and continue to evolve if an IA is conducted.[55] During CELA's recent meeting with the Agency, an official pointed out that the IA itself would have to address alternatives due to the mandatory language of section 22 of the *IAA*. In our view, commencing the alternatives analysis at the subsequent IA stage means that it will occurs far too late in the planning process. In addition, CELA remains concerned that the IA Agency and Minister have wide-ranging discretion to narrow (or screen out) alternatives in the exercise of their "scoping" powers under subsection 22(2) of the *IAA*, even before a review panel may be appointed to conduct the IA. CELA submits that the consideration of a reasonable range of alternatives should occur at the earliest planning phase, rather than be tacked on as afterthought in a subsequent IA phase.

Fifth, the practical reality is that under the *Discussion 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 considered in the IA, CELA anticipates that the resulting alternatives analysis will simply amount to a superficial comparison of "straw man" alternatives that the proponent has no 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 EA processes, but it is not reflected in the regulatory proposals outlined in the *Discussion Paper*.

Sixth, the *Discussion Paper* does 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 **meaningful** early planning consultation is to be undertaken by proponents (or the IA 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.

Seventh, the *Discussion Paper* does not commit the Government of Canada 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). CELA strongly recommends that such a stand-alone regulation should be made under the *IAA* in order to provide prescriptive requirements regarding this important matter. However, if the federal government does not intend to draft a separate 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 IA Agency guidance

[55] *Discussion Paper*, pages 6, 15, 20.

materials) is unacceptable if the Government of Canada is serious about ensuring meaningful participation at this critical upfront stage.

Eighth, 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 Annex 1 of the *Discussion Paper*. In CELA's view, this is a major oversight that must be corrected by requiring the initial and "updated" project descriptions to provide information on the extent to which the project may make a contribution to sustainability.

Ninth, CELA reiterates its previous comments 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 *Discussion Paper* focused on "sustainability" requirements under the *IAA*.

Tenth, CELA notes that for the most part, Annex 1 of the *Discussion Paper* appears 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 paragraphs 5 and 6 of Annex 1 refers to "regional assessments" and "strategic assessments"[56] it is clear that such assessments remain discretionary under the *IAA*, 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 "updated" 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.

(b) Agency Documents for the IA Process

The *Discussion Paper* generally describes various documents that the IA Agency is supposed to generate if an IA is to be conducted.[57] CELA's main concerns about the proposed IA Agency documents are summarized below.

First, CELA notes that none of the IA Agency documents are actually required, mentioned or even defined by the *IAA*. 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 the federal 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*.

[56] *Discussion Paper*, page 20.
[57] *Discussion Paper*, pages 7 to 8.

Second, unlike the regulatory proposal for initial and "updated" project descriptions, the *Discussion Paper* does not include a detailed description the proposed content of the Agency documents. Instead, the *Discussion Paper* sets out extremely brief summaries of the proposed purpose of the documentation.[58] In our view, the paucity of detail in the *Discussion Paper* makes it difficult to meaningfully comment on the proposed IA Agency documents.

Third, the *Discussion Paper* suggests that the IA Agency documents "would be developed collaboratively for each project,"[59] with input from interested parties, Indigenous representatives and governmental officials. However, no specific review/comment period is suggested in the *Discussion Paper*, 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 *Discussion Paper*. CELA submits that this vague approach will not ensure **meaningful** public or Indigenous participation in the development of these key documents, contrary to the *IAA*.

Fourth, if the *Discussion Paper* expects informed public feedback on web-posted IA Agency documents, then this expectation 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, as noted above, CELA strongly recommends the promulgation of regulatory standards for meaningful public participation in all IA stages, including the IA Agency's development of documents intended to direct (or scope) the IA process.

(c) Stopping or Extending Legislated Timelines for the IA

For the reasons outlined in our submissions on the previous *Consultation Paper*, 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 IA 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*, CELA has carefully considered the proposals in the *Discussion Paper* in relation to suspending or extending these deadlines in appropriate circumstances.

In principle, CELA agrees with the *Discussion Paper* that there may be instances where, for proponent-related reasons, it is appropriate to stop the running of the legislated timelines.[60] CELA further agrees that the Minister and the federal Cabinet should be empowered to extend timelines, provided that reasons for the extension are web-posted.[61]

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[58] *Discussion Paper*, pages 7, 16 to 17.
[59] *Discussion Paper*, page 7.
[60] *Discussion Paper*, page 13.
[61] *Discussion Paper*, page 14.

The *Discussion Paper* goes on to suggest that the IA Agency will "review" timeline management under the *IAA* at five-year intervals.[62] However, it is unclear to CELA whether this review mechanism will be built into the *IAA* regulation, or whether this simply represents an administrative commitment by the Government of Canada. For the purposes of greater certainty and enforceability, CELA recommends that the basic components of the regulatory review (including its public participation provisions) should be established by regulation.

PART IV - CONCLUSIONS

For the foregoing reasons, CELA submits that the draft Project List is unsupportable, unacceptable and unjustified. We therefore recommend that the proposed list be withdrawn by the Agency, and that renewed public and Indigenous consultations on a proper, inclusive and scientifically defensible Project List should be immediately undertaken long before the *IAA* is enacted.

In CELA's view, the updated and expanded Project List must ensure that all environmentally significant activities which engage federal decision-making are designated by regulation under the *IAA*. Where there is uncertainty regarding the nature, extent, frequency, mitigability or significance of "effects" associated with a particular activity, then, in accordance with the precautionary principle, the activity should be prescribed by the *IAA* regulation.

This prudent and inclusive approach to crafting the Project List does not necessarily mean that an IA will be conducted in every instance where a listed activity is being proposed by a public or private proponent. As noted above, the *IAA* empowers the IA Agency to conduct a case-by-case screening of specific proposals in order to determine if, in fact, an IA should be conducted. Thus, it remains open to the IA Agency to dispense with an IA for a designated project.

CELA submits that from the public interest perspective, there is no downside in broadening the reach of the *IAA* Project List to at least preserve the option of requiring an IA where necessary or desirable. In CELA's view, the upfront inclusion of a greater range of activities in the *IAA* regulation would provide more certainty and predictability to both proponents and the public alike, as opposed to leaving certain activities off the list and leaving it to the Minister's discretion to fill the gaps by making future case-specific orders that designate specific non-listed projects under section 9 of the *IAA*.

Once the new *IAA* Project List regulation has been in place for two years, it should be systematically reviewed in a timely and public manner. Thereafter, the regulation should be formally reviewed every three to four years. However, between these periodic reviews, it should be open to all persons to apply to the Minister and Cabinet to request additions to the Project List regulation.

With respect to the regulatory proposals regarding information requirements and time management, CELA generally agrees with the regulatory proposals for suspending or extending legislated timelines. However, CELA concludes that the high-level proposals for the early

[62] *Ibid.*

planning phase and for IA Agency documents are unlikely to ensure that IAs 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 regulatory 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.

Accordingly, CELA recommends that the Cabinet move beyond the *Discussion Paper*'s deficient suggestions for early planning and IA stages, and to ensure that the forthcoming regulations entrench clear, comprehensive and enforceable provisions regarding project-related documentation under the *IAA*.

We trust that CELA's comments on the two *Discussion Papers* will be taken into account as the Government of Canada considers its next steps in relation to the implementing regulations under the *IAA*.

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May 29, 2019

APPENDIX A
CELA'S UPDATED SUGGESTIONS FOR EXPANDING THE *CEAA 2012* PROJECTS LIST

CELA's primary position is that the *CEAA 2012* Project List is an inappropriate starting point for designating projects under the *IAA*.

In the alternative, if the *CEAA 2012* Project List is utilized as the basis for the *IAA* Project List, then CELA submits that in addition to the projects currently found on the Project List under *CEAA 2012*, the following activities should be prescribed as designated projects under the *IAA*.

- any proposed refurbishment or life extension of an existing nuclear generating station;

- constructing, operating or dismantling small modular reactors;

- decommissioning or dismantling of nuclear facilities;

- importing, exporting or transporting low-, intermediate- or high-level radioactive wastes from a Class IA or IB nuclear facility to any other public or private facility for storage, processing, recycling or disposal purposes;

- constructing, operating, modifying, or decommissioning an ethanol fuel production facility;

- constructing, operating, modifying, or decommissioning oil or gas development projects involving the following technologies:

  (i) hydraulic fracturing (fracking);

  (ii) exploratory drilling or seismic surveys for off-shore oil or gas deposits; and

  (iii) steam-assisted gravity drainage oil sands projects.

- constructing, operating, modifying or decommissioning marine or freshwater aquaculture facilities;

- all physical activities prescribed by the previous *Inclusion List Regulations* (SOR/94-637);

- major works requiring permits under the amended *Fisheries Act* and *Canadian Energy Regulator Act*;

- constructing, operating, modifying or decommissioning buildings, visitor facilities or infrastructure within protected federal lands (i.e. National Parks, National Park Reserves, National Marine Conservation Areas, National Wildlife Areas, Marine National Wildlife Areas, Marine Protected Areas, Migratory Bird Sanctuaries, etc.), such as:

(i) building new roads or rail lines, or widening/extending existing roads or rail lines; or

(ii) building or expanding golf courses, ski resorts, ski trails, or ancillary facilities.