Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

July 30, 2014

Canadian Nuclear Safety Commission
P.O. Box 1046, Station B
280 Slater Street
Ottawa ON, K1P 5S9

Via Email

Re: Draft REGDOC-2.9.1, *Environmental Protection: Environmental Assessments*

The following constitute the submissions of the Canadian Environmental Law Association ("CELA") regarding the above matter.

Summary of Recommendations

1. Eliminate the unnecessary and retrograde EA timelines for public participation and discretionary process for the approval of public participants that would limit reviews so as to ensure a robust and meaningful federal EA process that safeguards the public interest.
2. Include the discretion, granted under s. 19 of the CEAA 2012, to require a proper "alternatives to" and "need for" analysis as part of the EA process to provide an important planning benchmark for evaluating the environmental and societal acceptability of a proposed project.
3. Include the discretion, granted under s. 19 of the CEAA 2012, to consider impacts on capacity of renewable resources as part of the EA process to ensure sustainable development, avoid or mitigate significant adverse environmental effects, and implement Canada's international obligations.

Background

CELA is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. One of CELA's objectives includes advocating for comprehensive laws, standards and policies that will protect and enhance public health and environmental quality in Ontario and throughout Canada.

Canadian Environmental Law Association

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CELA was involved in the original development of the *Canadian Environmental Assessment Act* 1992 ("CEAA") and the underlying regulations during the early 1990s and participated in its Parliamentary reviews. CELA also appeared before the Standing Committee on Environment and Sustainable Development on October 27, 2011 to provide recommendations regarding the conduct and content of the CEAA Review and has since drafted and submitted a number of letters and comments on the promulgation of the new *Canadian Environmental Assessment Act, 2012* ("CEAA 2012") and its regulations.

The vociferous concern of numerous ENGOs in relation to the repeal of CEAA and the subsequent promulgation of CEAA 2012 has been well documented. The new CEAA 2012 is seen as an unjustified and ill-conceived dismantling of federal environmental law. Criticism is directed at almost every relevant facet of the new Act, and rightly so. The original CEAA, while by no means perfect, was publicly reviewed over the years, and periodically amended by Parliament to ensure that the federal environmental assessment process was effective, efficient, and equitable. Disputes under CEAA also resulted in a number of key judgments by the Supreme Court of Canada and the Federal Court which affirmed the importance of the CEAA as an information-gathering and decision-making tool in the environmental context.

CEAA 2012 effectively rolled back the progress made over the last forty years by making a number of key changes to the CEAA, notably:[1]

- The number and scope of assessments conducted under CEAA 2012 are reduced compared to CEAA. Under CEAA 2012, only those projects under the *Regulations Designating Physical Activities* may be subject to a federal EA. In contrast, CEAA applied to all projects (unless specifically excluded) that involving the federal government as proponent, federal lands, a prescribed federal permit or federal financial assistance. Under
- Consideration of environmental effects under CEAA 2012 is limited to effects on fish and fish habitat, aquatic species at risk, migratory birds, federal lands and aboriginal peoples. Federal authority must also consider changes to the environment that are "directly linked or necessarily incidental" to that federal authority's exercise of power in relation to the project. CEAA considered effects to all aspects of the environment: land, water, air, organic and inorganic matter; all living organisms; and interacting natural systems.
- Under the previous CEAA, numerous federal departments were responsible for conducting EAs. In contrast, under CEAA 2012, a federal environmental assessment may

[1] Brenda Heelan, "The Difference a Year Makes: Changes to Canadian Federal Environmental Assessment Law in 2012" (2013), online: <http://www.lawnow.org/canadian-federal-environmental-assessment-law/#sthash.gRgl0e4v.dpuf>.

be conducted only by the CEA Agency, Canadian Nuclear Safety Commission ("CNSC"), National Energy Board ("NEB"), or review panel.

- Timelines for the completion of an EA have been introduced by the CEAA 2012.
- The previous CEAA required that environmental assessments were to provide opportunities for public participation. The term public was not restricted in any manner.

The Draft Regulatory Document

The CNSC is consulting the public on the draft regulatory document REGDOC-2.9.1, *Environmental Protection: Environmental Assessments.* REGDOC-2.9.1 describes the CNSC's process for conducting EAs either under the *Nuclear Safety and Control Act* ("NSCA") or the CEAA 2012.

Many of the concerns voiced by environmental groups are borne out by the CNSC's process for an EA and assessment for public participation; both outlined in REGDOC-2.9.1. CELA has significant procedural and process concerns with the draft regulatory document.

Procedural and Process Concerns

Public Participation and Binding Timelines

According to the draft REGDOC 2.9.1, public participation opportunities in EAs conducted under the NSCA or CEAA 2012 will be determined on a case-by-case basis. The assessment for granting a member of the public or an Aboriginal group participant status and the extent of that participation is left entirely to the discretion of the CNSC. While this does provide an "opportunity" for public participation as required by ss. 4(1) (e) and 24 of the CEAA 2012, it is not as inclusive as CEAA provided the opportunity for public participation without restriction. Restricting the criteria for participation to the sole discretion of the CNSC will result in limited and incomplete input that leads to a less rigorous EA process; the outcome of which will lack public confidence.[2]

CEAA 2012, unlike its predecessor, requires EAs to be completed in set time periods. While CELA does not object to a timely and efficient EA process, it is unclear whether the imposition of deadlines is the best way to achieve these goals, especially considering delays are commonly caused by a proponent's reluctance to provide complete information. Binding timelines have also been attempted within provincial EA programs with questionable efficacy. For example, Ontario passed a timelines regulation under its *Environmental Assessment Act* that the Ministry of Environment has not been able to fully comply with for various reasons. Timelines should be viewed as realistic and reasonable targets that do not legally bind EA administrators and force

[2] Meinhard Doelle, "CEAA 2012: The End Of Federal EA As We, Know It?" (2012) 24 JELP 15.

hasty ill-considered decisions.[3] The binding timelines are also troubling because of their inequitable implementation. Essentially, the time required by a proponent to provide information, undertake consultation, conduct studies or answer questions is not included in the time counted toward the deadline. This incentivises a proponent to move things along quickly rather than efficiently and provide information that is incomplete. Binding timelines also provide a disincentive for EA administrators to encourage greater public participation. An increased number of participants would make it harder to meet a strictly imposed deadline. As stated in an earlier submission by CELA, Responsible Authorities under CEAA 2012 should not be compelled to fast-track EAs, limit review, reduce technical scrutiny, restrict public participation, or otherwise cut corners in order to meet inflexible deadlines. [4] The overall purpose of the CEAA is to safeguard the public interest, and if this takes a bit more time in relation to particularly significant, complex or controversial projects, then this is time well-spent, particularly since this allows informed decisions to be made about such projects.[5] Finally, the strict timelines and discretionary approval for participation are also troubling considering that the reduced number of federal EAs under CEAA 2012 already reduces opportunities for the public to have meaningful engagement in the EA decision-making process.

While CELA understands that the CNSC does not have the authority to vary the CEAA 2012 imposed time limits for rendering an EA decision, the CNSC does seem to have the discretion to allocate the time available to different stages of an EA. Under these constraints, CNSC should allow for public participation from the moment a licence application is received and continuing throughout the entire EA process.

Consideration of "Alternatives to" or "Need for" a Proposed Project

Unlike the CEAA s. 16 factors,[6] s. 19 of CEAA 2012 does not include an assessment of alternatives to the proposed project for carrying out the proposed projects objective or an assessment of the need of the project in the EA. Consequently, Step 9: Commission Hearing on the EA Guidelines under REGDOC 2.9.1 does not include these factors as part of the CNSC's decision making process under CEAA 2012. While these factors were not mandatory under the CEAA, they had become a standard factor in comprehensive reviews and for review panels.

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[3] Richard D. Lindgren, *Legal Analysis Of The Report Of The Standing Committee On Environment And Sustainable Development Regarding The Canadian Environmental Assessment Act*, (Canadian Environmental Law Association, 2012) at 12.

[4] *Ibid*.

[5] *Ibid*.

[6] CEAA, 16 (1)(*e*): any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the *need for* the project and *alternatives to* the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered. [*emphasis added*]

Regardless of the omission of these factors from CEAA 2012, any EA conducting under the CEAA 2012 would be nothing more than information-gathering exercises without an assessment of the need for or alternatives to a proposed project. It should not be assumed that a proponent has already canvassed reasonable alternative to or a need for the proposed project. CELA has been involved in a number of EAs where proponents have not adequately considered these factors. A failure to consider these factors undermines the CEAA 2012 overarching objective – sustainable development.[7] This objective cannot be achieved unless it is properly demonstrated that a particular project is the best (or not the worst) for addressing the specific need or opportunity identified by the proponent. After all, the primary purpose of the CEAA is not to guarantee corporate profits or return on investment; instead, it is to promote sustainable development and safeguard the environment for the benefit of present and future generations.[8] For these reasons the evaluation of "alternatives to" should occur at the earliest opportunity in the planning process before irrevocable decisions are made, and should include opportunities for public participation. Where a proponent can demonstrate that it duly considered appropriate "alternatives to" or "need for" before selecting a particular project, the supporting documentation should enable it to proceed efficiently through the EA process. Where a proponent has proposed a project without proper consideration of "alternatives to" or "need for," it is in the public interest for the EA process to weigh the environmental pros and cons of the project as compared to other reasonable "alternatives to" which address the purpose of the project, but have fewer adverse effects on the environment or greater socio-economic benefits. In short, retaining the discretion to require a proper "alternatives to" and "need for" analysis will provide an important planning benchmark for evaluating the environmental and societal acceptability of the proponent's preferred alternative.[9] Inclusion of these factors in the CNSC EA process may be accomplished under the authority granted by ss. 19(1) (j) & 19(2) (a) of the CEA 2012.[10]

Consideration of Impacts on Capacity of Renewable Resources

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[7] *Supra* note 3 at 10.
[8] *Ibid*; CEAA, preamble, s. 4; CEAA 2012, s. 4.
[9] *Ibid*.
[10] CEAA 2012, s. 19. (1) The environmental assessment of a designated project must take into account the following factors:

> …(j) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.

s. 19(2) (2) The scope of the factors to be taken into account under paragraphs (1)(*a*), (*b*), (*d*), (*e*), (*g*), (*h*) and (*j*) is determined by
(*a*) the responsible authority

Like the forgoing section, an EA under the CEAA 2012 does not include, as a factor, the assessment of the effects of projects upon the capacity of renewable resources to meet current and future needs. However, unlike the assessment of "alternatives to" and "need for" consideration of the impact on renewable resources was a mandatory factor in the CEAA EAs.[11] Since renewable resources do not just exist on lands or waters under provincial jurisdiction, but also on lands and waters under federal jurisdiction, omission of this as a factor would eliminate the obligation (under certain circumstances) to consider a change that may be caused to the environment that would occur on federal lands.[12]

If the federal government intends to continue to rely upon the CEAA 2012 as a mechanism for ensuring sustainable development, avoiding or mitigating significant adverse environmental effects, and implementing its international obligations under the 1993 Rio Convention on Biological Diversity and 1992 Rio Declaration on Environment and Development, then consideration of impacts on capacity of renewable resources should be included as a factor in the EA process.[13] Just as previously mentioned, inclusion of this factor in the CNSC EA process may be accomplished under the authority granted by ss. 19(1)(j) & 19(2)(a) of the CEA 2012.

Conclusion

Accordingly, CELA makes the following recommendations:

1. Eliminate the unnecessary and retrograde EA timelines for public participation and discretionary process for the approval of public participants that would limit reviews so as to ensure a robust and meaningful federal EA process that safeguards the public interest.
2. Include the discretion, granted under s. 19 of the CEAA 2012, to require a proper "alternatives to" and "need for" analysis as part of the EA process to provide an important planning benchmark for evaluating the environmental and societal acceptability of a proposed project.
3. Include the discretion, granted under s. 19 of the CEAA 2012, to consider impacts on capacity of renewable resources as part of the EA process to ensure sustainable

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[11] CEAA, s. 16(2): In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

> …(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

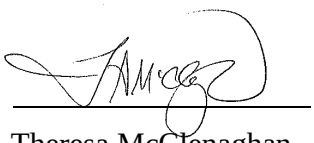
[12] CEAA 2012, s. 5(b)(i)

[13] *Supra* note 3 at 10.

development, avoid or mitigate significant adverse environmental effects, and implement Canada's international obligations.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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