Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

March 29, 2016

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. Ensure a robust and meaningful federal environmental assessment ("EA") process that safeguards the public interest by eliminating the EA timelines for public participation and discretionary process for the approval of public participants.
2. Allow for public participation from the moment a licence application is received and continuing throughout the entire EA process.
3. Require an "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.
4. Consider the impact 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. Funded by Legal Aid Ontario, CELA is one of 76 community legal clinics located across Ontario, 18 of which offer services in specialized areas of the law. CELA also undertakes additional educational and law reform projects funded by government and private foundations.

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. This is the second request for public consultation on this particular iteration of REGDOC-2.9.1, the first occurring in 2014 when CELA also provided commentary and feedback.[1]

Unfortunately, the input provided by CELA in the 2014 comment have been unaddressed in this draft of REGDOC-2.9.1. As a consequence, CELA continues to have significant procedural and process concerns with the draft regulatory document.

Procedural and Process Concerns

Public Participation and Binding Timelines

According to the current 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 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 providing an 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]

While *CEAA 2012* does not set regulated timelines for EAs conducted by the CNSC, the CNSC has committed to completing this process and making a licensing decision within 24 months under the integrated approach. This approach is but a variation on the proposed timelines presented in the 2014 draft of REGDOC-2.9.1. In 2014, REGDOC-2.9.1 included a breakdown of the days estimated for each step of the EA process conducted by the CNSC with a total time estimated at between 272-730 calendar days. The current proposal of 24 months is essentially the same as the estimate of 730 days of 2014. While the 24 months is objectively longer than 272 days, the amended estimate does not address the substantive concern of imposing timelines on the EA process.

As mentioned in the 2014 comment, CELA does not object to a timely and efficient EA process. It is however unclear whether the imposition of deadlines is the best way to achieve this goal, especially considering delays are commonly caused by a proponent's reluctance to provide complete information. Binding timelines have also been attempted in the past 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

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[1] Letter to the Canadian Nuclear Safety Commission Re Draft REGDOC-2.9.1, Environmental Protection: Environmental Assessments, http://www.cela.ca/publications/Comments-to-CNSC-re-Env-Protection-EA; Feedback Comments from CELA: Letter to the Canadian Nuclear Safety Commission Re Draft REGDOC-2.9.1, Environmental Protection: Environmental Assessments, http://www.cela.ca/publications/feedback-comments-cela-letter-canadian-nuclear-safety-commission-re-draft-regdoc-291-en.

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

targets that do not legally bind EA administrators and force 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. 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.[4] 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

As presented in CELA's 2014 comment on REGDOC-2.9.1, unlike the *Canadian Environmental Assessment Act*, SC 1992, c 37 ("*CEAA*") s. 16 factors,[5] s. 19 of *CEAA 2012* does not include an assessment of "alternatives to" a proposed project or an assessment of the "need for" the project. Consequently, Step 5: Commission Hearing on the EA Guidelines under the current draft of 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.

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.[6] 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

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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] *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*]

[6] *Supra* note 3 at 10.

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.[7]

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.[8] 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 *CEAA 2012*.[9]

Consideration of Impacts on Capacity of Renewable Resources

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. Unlike the assessment of "alternatives to" and "need for" however, consideration of the impact on renewable resources was a mandatory factor in the *CEAA* EAs.[10] 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.[11]

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[7] *Ibid*; *CEAA*, preamble, s. 4; *CEAA 2012*, s. 4.

[8] *Supra* note 3 at 10.

[9] *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.

CEAA 2012, 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

[10] *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.

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

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.[12] 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 *CEAA 2012*.

Conclusion

Accordingly, CELA makes the following recommendations:

1. Ensure a robust and meaningful federal environmental assessment ("EA") process that safeguards the public interest by eliminating the EA timelines for public participation and discretionary process for the approval of public participants.
2. Allow for public participation from the moment a licence application is received and continuing throughout the entire EA process.
3. Require an "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.
4. Consider the impact 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.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Theresa McClenaghan
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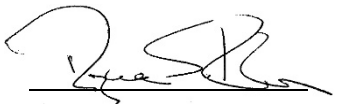

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[12] *Supra* note 3 at 10.