Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE GOVERNMENT OF CANADA REGARDING *CONSULTATION PAPER ON APPROACH TO REVISING THE PROJECTS LIST*

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I. INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") in relation to the Government of Canada's *Consultation Paper on Approach to Revising the Projects List: A Proposed Impact Assessment System* (2018).[1]

In essence, the *Consultation Paper* outlines various criteria that the federal government intends to use to review and revise the current projects list regulation[2] under the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*").

It is anticipated that *CEAA 2012* will be repealed and replaced by the proposed *Impact Assessment Act* ("*IAA*") in Part 1 of Bill C-69. To date, the *IAA* has received Second Reading in the House of Commons, and has been reviewed by the Standing Committee on Environment and Sustainable Development ("Standing Committee"). Nevertheless, the federal government hopes to have the *IAA* enacted and proclaimed in force in 2019.

The implementation of the *IAA* will depend upon a number of as-yet undrafted regulations, including those prescribing the types of projects that will be subject to the new information-gathering and decision-making requirements under the Act. However, CELA has a number of comments and concerns about the *Consultation Paper*'s proposed regulatory approach for triggering the application of the *IAA* to designated projects.

For the reasons described below, CELA concludes that the *Consultation Paper*'s narrow focus on "major projects" will not result in any material changes or improvements in how *CEAA 2012* is currently applied to a relatively small number of activities within federal jurisdiction. Similarly, CELA strongly disagrees with the *Consultation Paper*'s claim that the existing projects list regulation under *CEAA 2012* is an appropriate starting point for drafting the *IAA* regulation.

In our view, the forthcoming *IAA* regulation must go beyond the unjustifiable constraints suggested by the *Consultation Paper*, and must instead ensure that governmental decision-makers receive accurate, complete and reliable information about the environmental, health, social and economic effects of all projects which engage areas of federal interest or authority (e.g. issuance of approvals,

[1] See https://www.impactassessmentregulations.ca/project-list.
[2] Regulations Designating Physical Activities: SOR/2012-147.

provision of financial assistance, disposition of lands, and federal proponency), as formerly occurred under *CEAA 1992*.

II. BACKGROUND

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental and public health issues. For example, CELA has participated in various administrative and legal proceedings under *CEAA 2012* and its predecessors, *CEAA 1992* and the *Environmental Assessment and Review Process Guidelines Order*.

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

In our detailed submission to the Standing Committee,[3] CELA concluded that unless the *IAA* is substantially amended, the proposed statute will not achieve the federal government's stated objective of establishing federal assessment processes that "regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous persons, ensure good projects go ahead, and resources get to market."[4]

CELA's conclusion about the serious shortcomings of the *IAA* was shared by many other environmental groups, Indigenous representatives, and other persons who made presentations to the Standing Committee. Unfortunately, now that the Standing Committee has completed its clause-by-clause review of the *IAA*, it appears that few (if any) substantive changes are being made to fix this fundamentally flawed legislation.

III. OVERVIEW OF DESIGNATING PHYSICAL ACTIVITIES UNDER THE *IAA*

The proposed *IAA* continues the narrow *CEAA 2012* approach of developing a regulatory list of the major projects that may trigger an impact assessment ("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.

It should be recalled, however, that merely listing a particular type of project in the 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 to dispense with the need to conduct an IA for designated projects.[5] While CELA recommended that the Standing Committee should delete

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[3] CELA's written submission to the Standing Committee is posted at: https://www.cela.ca/proposed-IAA-appropriate-amendments. See also http://www.cela.ca/collections/justice/canadian-environmental-assessment-act.
[4] *Discussion Paper*, page 3.
[5] In addition, section 17 of the *IAA* authorizes the Minister to issue an order directing the Agency to not conduct an IA of a designated project in certain circumstances.

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 *Consultation Paper* to suggest that "consideration of the full spectrum of positive and negative social, health, and environmental and economic effects will take place for those project types that are designated on the Project List."[6] Similarly, the Consultation Paper indicates that in the energy context, "going forward all projects prescribed in the Projects List would be assessed by the Impact Assessment Agency of Canada in cooperation with life-cycle regulators." In our opinion, these statements are patently false since section 16 of the Act clearly allows designated projects to proceed without conducting the requisite IA.

It should be further noted that section 9 of the *IAA* confers discretion upon the Minister to issue orders that apply the Act to non-designated activities. This open-ended provision appears to duplicate the discretionary power found in subsection 14(2) of *CEAA 2012*, which, to our knowledge, has rarely – if ever – been used to date.

IV. CONSULTATION PAPER QUESTIONS

The Consultation Paper poses two general questions for public feedback:

- **Question 1**: What are your views on using this criteria-based approach to guide the review of the Projects List?

- **Question 2**: Do you have any suggestions on the frequency for future reviews of the Projects List?

CELA's response to each of these questions is set out below. CELA's related concerns about the questionable consultation process being used to solicit public input on the *Consultation Paper* have been previously described in a joint letter[7] recently submitted to Minister McKenna by environmental groups across Canada, and need not be repeated here.

Question 1: The Proposed Criteria-Based Approach

In our view, the *Consultation Paper* is predicated on the erroneous assumption that the current projects list regulation under *CEAA 2012* provides an appropriate starting point for determining which activities should – or should not – be caught by the *IAA*. For the reasons described below, CELA submits that the current regulation 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.

1. It must be recalled that there was no public consultation on the *CEAA 2012* regulation before it was passed by the previous government in 2012. Instead, public input was belatedly sought after

[6] *Consultation Paper*, pages 2 to 3.
[7] See http://www.cela.ca/letter-mckenna-iaa-project-list.

the regulation was already in place.[8] In this regard, CELA acknowledges that the current government is duly consulting the public before crafting the new *IAA* regulation. However, the fact remains that the centerpiece of this consultation effort – the controversial *CEAA 2012* regulation – was never subject to meaningful public participation, and therefore 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 and "revising" the deficient approach embodied in *CEAA 2012* and the existing projects list regulation.

2. With 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 environmental assessment (i.e. comprehensive study). In other words, the CSLR was not intended to serve as a complete inventory of all projects that posed environmental risks and therefore warranted the application of *CEAA 1992*. Thus, the current *CEAA 2012* regulation (which was derived from the CSLR) cannot be regarded as the correct foundation 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 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) can also create direct, indirect and cumulative effects which are adverse and significant.

3. Even if one accepts the dubious proposition that only "major natural resource projects"[9] should be assessed under federal law, it is clear that there are a number of environmentally significant facilities and activities (e.g. *in situ* oil sands projects, 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.[10] 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.

4. The *Consultation Paper*'s insistence that IAs should only be required for projects having "the most potential for adverse environmental effects in areas of federal jurisdiction"[11] is clearly inconsistent with the recommendations of the federal government's own Expert Panel. For

[8] See http://www.cela.ca/publications/ceaa-re-amendments-projects-list-regulations.
[9] *Consultation Paper*, page 1.
[10] See http://www.cela.ca/publications/draft-ceaa-regs.
[11] *Consultation Paper*, page 2.

example, instead of endorsing the narrow "major projects" approach under *CEAA 2012*, the Expert Panel recommended that federal IA's should be conducted:

> … 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;
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> - 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.
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> 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).[12]

5. In CELA's opinion, there is nothing in the preamble, purposes or provisions of the *IAA* that supports the *Consultation Paper*'s contention that IA requirements should only apply to the "worst" projects that pose the greatest or most profound adverse effects within federal jurisdiction. 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 regulation-making authority under the *IAA* should not be narrowly construed or exercised in a manner that thwarts the overall objects of the Act.

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

6. CELA questions the *Consultation Paper*'s claim that "transparency and clear criteria will be central in the development of the Project List."[13] While various criteria are undoubtedly suggested in the *Consultation Paper*,[14] CELA notes that these criteria are conspicuously absent from the Act itself. Therefore, as a matter of law, the *Consultation Paper*'s suggested criteria are non-binding and unenforceable, ultimately leaving Cabinet with virtually unfettered discretion to pass or amend the projects list regulation as it sees fit under the *IAA*. In our view, this discretionary approach is identical to the heavily criticized project listing provisions in *CEAA 2012*, and is neither transparent nor accountable.

7. The *Consultation Paper* states that in determining which types of projects (or production thresholds) should be designated by regulation under the *IAA*, "consideration will be given to environmental objectives and standards set in relevant legislation, regulation and policy, such as those under the *Fisheries Act*, *Parks Canada Act*[15] and the *Canadian Environmental Protection Act, 1999* or under federal-provincial-territorial agreements."[16] CELA generally agrees that these considerations may be relevant, but we submit that predicted compliance with regulatory standards, objectives or policies does not necessarily mean that the activity cannot cause, or contribute to, significant environmental harm. For example, even if the continuing discharge of contaminants into air or water from a particular facility is within prescribed limits, overall environmental degradation may still occur over time, particularly if the discharged contaminants are persistent, mobile, bioaccumulative, or act synergistically with other substances. Accordingly, CELA urges caution if the Government of Canada intends to use "environmental objectives and standards" for the purposes of determining the potential for adverse environmental effects upon matters of federal interest.

8. The same concern applies to the *Consultation Paper*'s vague statement that consideration will be given to whether a "project type has well-defined standard mitigation measures" that are subject to "stringent" regulatory requirements, and that have been "proven to be effective."[17] Given that there has been no systematic assessment under *CEAA 2012* (or *CEAA 1992*) about the long-term effectiveness of "standard" mitigation measures or "adaptive management" approaches used under the Act, CELA submits that this specific consideration warrants a careful and precautionary approach. Where there is uncertainty about "standard" mitigation measures or their alleged effectiveness, then caution should be exercised in favour of the designating the projects in question. Furthermore, the question of whether "standard" mitigation measures should be used as the basis for not listing particular projects must be subject to meaningful public consultation. In our view, a proponent-centric view of what is "standard" mitigation may nevertheless fail to protect the environment from significant adverse effects, including cumulative effects.

9. The *Consultation Paper* outlines the circumstances under which projects could be retained or added to the Projects List (e.g. medium to high potential for adverse effects; complex effects

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[13] *Consultation Paper*, page 3.
[14] *Consultation Paper*, pages 4 to 5 and Annex B.
[15] We presume that the authors of the *Consultation Paper* intended to refer to the *Canada National Parks Act*, not the "Parks Canada Act."
[16] *Consultation Paper*, page 4.
[17] *Consultation Paper*, page 5.

requiring complex mitigation; or novel project with unknown effects or mitigation).[18] Conversely, projects may be de-listed or not added to the Project List if the potential for adverse effects is adjudged to be low, or if standard mitigation measures are available, as discussed above.[19] However, the scientific or evidentiary basis for making these kinds of determinations is unclear to CELA. We are therefore concerned that these determinations may, at best, reflect the subjective views, value judgments, presumed expertise or political priorities of the federal officials in charge of crafting the *IAA* regulation. Thus, despite the proposed criteria set out in the *Consultation Paper*, CELA suspects that the resulting *IAA* regulation may be as non-transparent, problematic and contentious as the deficient projects list regulation that emerged under *CEAA 2012*. To avoid this unfortunate outcome, CELA recommends that when the draft *IAA* regulation is released for public comment later this year, the Government of Canada should disclose (or provide online access to) all information, empirical data, records, studies, reports and other evidence relied upon to make the determinations on which project types, production thresholds or exempting provisions should be included in the projects list regulation.

10. CELA is alarmed by the *Consultation Paper*'s simplistic assurance that non-designated projects "with potential for smaller effects in areas of federal jurisdiction would continue to be subject to other federal regulatory processes such as those under life-cycle regulators (e.g. the proposed Canadian Energy Regulator, Canadian Nuclear Safety Commission ("CNSC") and the Offshore Boards) or through protection found under other legislation."[20] The *Consultation Paper* further suggests that non-designated projects may also be subject to provincial environmental assessment laws or regulatory statutes.[21] Given the debatable efficacy (and questionable enforcement) of other federal and provincial environmental laws, CELA draws no comfort from the *Consultation Paper*'s unpersuasive attempt to rationalize the exclusion of "smaller" projects from the *IAA* regulation on the grounds that other legislative regimes may be applicable. In our view, the 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*.

In the nuclear energy context, for example, CELA notes that the Ontario government no longer applies its *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. Moreover, in our experience, the federal approach of leaving non-designated nuclear activities to be solely evaluated and licenced by the CNSC under the *Nuclear Safety and Control Act* (rather than *CEAA 2012*) has greatly diminished participatory rights, and resulted in less robust assessments of the direct, indirect and cumulative effects of nuclear projects.

For instance, it should be recalled that the 2006 proposal to refurbish and extend the life of the Bruce A nuclear reactors was properly subject to an environmental assessment process under *CEAA 1992*. However, the proponent's current refurbishment/life extension proposal for the Bruce B reactors is not designated under the existing projects list regulation under *CEAA 2012*, and is therefore proceeding without an environmental assessment under this Act. Instead, the project is

[18] *Ibid*.
[19] *Ibid*.
[20] *Consultation Paper*, page 3.
[21] *Ibid*.

subject only to the narrowly cast (and less participatory) licencing process administered by the CNSC under the *Nuclear Safety and Control Act*. These and other concerns about the environmental planning implications arising from the non-designation of this particular project under *CEAA 2012* are more fully described in Appendix B below.

Question 2: Periodic Review of the Projects List Regulation

The *Consultation Paper* correctly commits to the periodic review of the new projects list regulation in order to ensure that it is "functioning appropriately."[22] However, the *Consultation Paper* fails to propose any specific timeframe for the review process, nor does it specify how – or by whom – the review should be conducted.

Moreover, no qualitative or quantitative measures are provided in the *Consultation Paper* to determine whether – or to what extent – the regulation is working "appropriately" (e.g. *IAA* purposes, or number of IAs per year? Direct, indirect or cumulative effects of non-designated projects? Other factors?).

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 projects list. 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 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, Agency staff 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.

To accomplish this objective, it appears to CELA that the Standing Committee should play a key role in reviewing, and soliciting public input on, the projects list regulation under the *IAA*. Indeed, the Standing Committee could be tasked with reviewing and reporting upon the entire package of the various implementing regulations under the *IAA*, at least during the early years of the new statute. In CELA's view, it would be preferable to have the Standing Committee consider the entire package of inter-related *IAA* regulations, rather than simply focusing upon the projects list regulation in isolation.

[22] *Consultation Paper*, page 7.

On this point, CELA notes that section 117 of the *IAA* specifically requires the Minister to establish an advisory council that provides annual reports containing advice on IA and other related matters. Given this broad mandate, we reasonably anticipate that the ongoing adequacy of the project list regulation may form an important part of the advisory council's reports.

At this time, however, it is unknown how the advisory council intends to engage members of the public or Indigenous communities when formulating advice to the Minister. Similarly, it is unclear whether the council will be sufficiently funded to undertake cross-Canada consultations about the projects list regulation or other aspects of the *IAA* regime. Accordingly, CELA submits that it may be more effective, equitable and efficient to have the Standing Committee conduct the periodic regulatory review.

V. CONCLUSIONS

For the foregoing reasons, CELA submits that the project listing criteria must be interpreted and applied in a manner that ensures all environmentally significant activities which engage federal decision-making, and which may affect sustainability, 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 projects list regulation 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 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 is possible that a listed project may not necessarily trigger an IA in certain circumstances.

Accordingly, from the public interest perspective, there is no real downside in broadening the reach of the *IAA* regulation 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 make future case-specific orders designating specific non-listed projects under section 9 of the *IAA*.

Once the new *IAA* regulation has been in place for two years, it should be systematically reviewed by the Standing Committee 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 projects list regulation.

We trust that CELA's comments will be taken into account as the Government of Canada prepares and consults upon the draft projects list regulation in the fall of 2018.

May 28, 2018

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

In 2012-13, CELA's submissions on the Projects List Regulation under *CEAA 2012* recommended that the following activities should be designated as projects under the Act. This list has been updated to include some additional candidates.

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

- constructing, operating or dismantling small modular reactors;

- 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;

- constructing, operating, modifying, or decommissioning facilities for generating electricity from geothermal power or off-shore wind farms;

- 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 or infrastructure within protected federal lands[23] (i.e. National Parks, National Park Reserves, National Marine

[23] We note that the general duty imposed by section 82 of the *IAA* upon certain authorities to self-assess the environmental effects of projects on federal lands does not constitute an IA. Accordingly, CELA submits that these physical activities, if proposed upon nationally protected lands, should be caught by the new IAA regulation and potentially trigger an IA environmental assessment.

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, visitor centres or ancillary facilities.

APPENDIX B
The Imperative for Nuclear Projects to Trigger the Federal Impact Assessment Process: A Case Study

At the present time, projects involving the refurbishment and/or life extension of nuclear power plants do not trigger a federal environmental assessment ("EA") under the *Canadian Environmental Assessment Act, 2012*[24] ("*CEAA, 2012*"). This is because such activities are not included in the existing projects list regulation[25] under *CEAA 2012*. In effect, this omission allows refurbishment/life extension projects[26] to proceed without conducting a federal EA. The result is that refurbishment/life extension projects are only subject to the licencing provisions of the *Nuclear Safety and Control Act* ("*NSCA*"), which provides drastically reduced opportunities for public participation and review by independent technical experts.

In this regard, Bruce Power's proposed refurbishment of the Bruce B reactors at its nuclear power plant in Ontario provides a timely case study. Bruce Power is currently seeking a ten-year licence renewal which would allow it to refurbish and extend the operational life of the Bruce B reactors to a contemplated date of 2064.[27] While the reactors at Bruce A were refurbished and subject to a screening-level EA under *CEAA 1992*,[28] the life extension and refurbishment of Bruce B is not subject to a similar federal EA process, and is therefore Canada's first nuclear power plant rebuild to not undergo a *CEAA*-based EA.

Despite the non-application of *CEAA 2012* to the Bruce B project, the Canadian Nuclear Safety Commission ("CNSC") frequently asserts that it conducts "environmental assessments" within its relicensing and hearing process, pursuant to subsection 24(4) of the *NSCA.* This provision simply states that no licence shall be issued, renewed, amended or replaced unless the Commission, *inter alia*, is of the opinion that the applicant will "in carrying on that activity, make adequate provision for the protection of the environment [and] health and safety of persons..."[29] It is apparently on this sparse statutory basis that the CNSC contends that it conducts EA's of nuclear projects, including those involving refurbishment/life extension activities.

For various reasons, however, CELA submits that the licencing process under the *NSCA* is neither an adequate nor equivalent substitute for an EA conducted under *CEAA 2012*. For example, subsection 24(4) of the *NSCA* omits virtually all of the important environmental planning considerations set out in section 19 of *CEAA 2012*, such as purpose of the project, alternative means of carrying out the project, and cumulative effects analysis. In short, the *NSCA* is a regulatory statute, not EA legislation.

Moreover, as compared to *CEAA 2012*, the *NSCA* licencing process is less robust and participatory, particularly in relation to the level of public engagement and opportunities for review by

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[24] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA, 2012*].
[25] SOR/2012-147.
[26] For example, the latest life extension project at the Pickering nuclear generating station has been permitted to proceed without conducting an EA under *CEAA 2012*.
[27] Canadian Nuclear Safety Commission, "CMD 18-H4, A Licence Renewal – Bruce Power Inc., Bruce Nuclear Generating Station A and B – Environmental Assessment Report" (12 February 2018), p 11 [CNSC Report].
[28] *Canadian Environmental Assessment Act,* SC 1992, c 37 [*CEAA 1992*].
[29] *Nuclear Safety and Control Act,* SC 1997, c 9, s 24(4).

independent technical experts. The following sections highlight some of the key differences in an EA carried out under *CEAA* (as occurred for the Bruce A rebuild in 2006) and the licencing process under the *NSCA* for the proposed rebuild of the Bruce B reactors (see Figure 1 below).

i. Scope of EA vs. NSCA Licencing

When the Bruce A rebuild project was subject to a federal EA under *CEAA 1992*, the scope of the EA process was restricted to the activities and operations necessary to carry out refurbishment and thereby extend the operating life of the units to 2043. As the screening-level EA report stated, "this project does not pertain to other separately licensed facilities within the Bruce Power site, including the Bruce B reactors and the on-site radioactive waste management facilities." [30]

In contrast, a similar level of in-depth review is not provided within the CNSC's licencing process for the Bruce B project, where the proposed refurbishment activity is but one of many issues considered by the CNSC outside the coverage of *CEAA 2012*.

The length of extension being sought by Bruce Power also distinguishes the Bruce A and Bruce B projects. The Bruce A project sought an extension of operation life of 37 years from date of the screening report in 2006.[31] Conversely, the life extension sought for the Bruce B project would extend the reactors' lifespan by a proposed 46 years from the date of the proposed licence start date.[32]

ii. Public Participation Opportunities

The EA process under *CEAA 1992* for the Bruce A project provided 121 days for public comment. Significantly, 81 of these days were exclusively devoted to comments on the EA documentation, including the draft screening report and guidelines for review. In addition, the 121 day public comment window was divided into three separate and distinct public comment opportunities.

In contrast, the *NSCA* licencing process for the Bruce B project provided a shorter timeframe and considerably fewer opportunities for public comment. For example, during the *NSCA* process, the CNSC only allowed 61 days for public comment. Of these 61 days, none were specifically focused on the "environmental assessment" of the refurbishment/life extension project. Rather, the comment window pertains to the licencing hearing, generally. In addition, unlike the *CEAA*-based EA for Bruce A project, the CNSC did not release a draft Bruce B report for public review/comment, nor did the CNSC seek the public's comments on guidelines or directives used to guide its *NSCA* review of the Bruce B project.

iii. Technical and Expert Review

The EA screening report under *CEAA 1992* for the Bruce A refurbishment project notes that the project's assessment was "supported by expert technical review of the Draft EASR by CNSC Staff,

[30] Canadian Nuclear Safety Commission, "CMD 06-H12 Bruce A Refurbishment for Life Extension and Continued Operations Project" (19 May 2006), p 6 **[**Screening Report].
[31] Screening Report, p 3.
[32] CNSC Report, p 4.

as well as other federal departments including Health Canada, Environment Canada, Natural Resources Canada, Department of Fisheries and Oceans, and the Department of Indian Affairs and Northern Development."[33] The responses from these external experts resulting from their technical review was made publicly available and consolidated into a 227 page chart. The chart not only summarizes the reviewers' comments, but provides a response explaining how the issue would be addressed.

In contrast, the CNSC's *NSCA* review of the current Bruce B refurbishment project lacks a similar or equal opportunity for external expert review. Instead, the proponent's own documentation was heavily relied upon by the CNSC. As stated in the CNSC's environmental review report, "Bruce Power's ERA [environmental risk assessment] was the primary source of information used to inform the Environmental Effects Assessment for Continued Operations and the Environmental Effects Assessment for MCR [refurbishment]…and various sections of this EA report."[34]

iv. Summary of Findings

Since nuclear reactor refurbishment/life extension is not a designated project under *CEAA 2012*, a federal EA for the rebuild of Bruce B is not required. Instead, the less rigorous (and less participatory) process under the *NSCA* was used to evaluate this environmentally significant proposal.

CELA submits that this glaring oversight must be rectified by designating refurbishment/life extension activities as projects to which the proposed *Impact Assessment Act* ("*IAA*") automatically applies. More generally, CELA further submits that a larger suite of nuclear projects should trigger mandatory EAs under the *IAA*, as opposed to leaving such projects to be reviewed and licenced by the industry's regulator.[35] Our overall comments provided herein are summarized below in Figure 1.

In conclusion, CELA notes that under *CEAA 1992*, projects requiring a licence under section 24 of the *NSCA* triggered a mandatory obligation to conduct an EA in accordance with applicable statutory requirements.[36] Similarly, regulations[37] under *CEAA 1992* specified that particularly significant nuclear projects were subject to more robust EA requirements (e.g. comprehensive study), and in some instances, nuclear EAs were referred to joint review panels for public hearings. In our view, this inclusive approach to triggering assessments of nuclear projects should be replicated within the forthcoming projects list regulation under the *IAA*.

[33] Screening Report, p 1.
[34] CNSC Report, p 9.
[35] It should be noted that the federal Expert Panel found that there was public mistrust and lack of confidence in the CNSC's ability to conduct independent, transparent and evidence-based assessments of nuclear projects: see Final Report of the Expert Panel for the Review of Environmental Assessment Processes (2017), p 50-51.
[36] Law List Regulations, SOR/94-636, Part 1, para 12.1 (NSCA licences).
[37] Comprehensive Study Regulations, SOR/94-638, Part VI, para 19 (nuclear and related facilities).

Figure 1: Comparison of Bruce A and Bruce B Projects

Bruce A – CEAA Environmental Assessment (2006)	**Bruce B – CNSC's *NSCA* Licencing (2018)**
Scope of Assessment/Review	
• EA limited to review of activities and operations necessary for refurbishment and life extension only; explicitly excludes other on-site licensed activities • Screening Report with appendices is 420 pages in length • Life extension sought spanned 37 years	• Licence review is not exclusively focused on the refurbishment/life extension project • "Environmental Assessment" Report is 85 pages in length • Life extension sought spans 46 years
Public Participation Opportunities	
121 days for public comment **81 days pertain exclusively to the EA** • EA Guidelines Public Comment: 43 days (Jan 14, 2005 to Feb 25, 2005) • Screening Report Public Comment: 38 days (Jan 6, 2006 to Feb 13, 2006) • Relicensing Hearing Public Comment: 40 days (March 9, 2016 – April 18, 2006)	**61 days for public comment** **0 days pertain exclusively to *NSCA*-led EA** • CNSC Staff CMD was made publicly available February 15, 2018 to April 16, 2018 for a 61 day comment period. However, the EA Report is one component of a much larger licensing report.
Technical and Expert Review	
• Experts Consulted: o CNSC Staff o Health Canada o NRCan o Department of Fisheries and Oceans o Then, Department of Indian Affairs and Northern Development • Comments from experts consolidated into 227 page chart	• Experts Consulted: o No direct reference to consultation with Health Canada, Natural Resources Canada, o 4 instances in which Environment and Climate Change Canada are referred to; 6 instances in which Department of Fisheries and Oceans is mentioned. In neither instance are their exact comments provided. • No chart consolidating comments from expert review

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