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September 28, 2018

**Re: Consultation on Draft RegDoc-1.1.5 Licence Application Guide: Small Modular Reactor Facilities**

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The Canadian Environmental Law Association (CELA) provides the following comments in response to the Canadian Nuclear Safety Commission's (CNSC) draft RegDoc-1.1.5 "Licence Application Guide: Small Modular Reactor Facilities" (herein "RegDoc 1.1.5").<sup>1</sup>

## **I. 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 the *Nuclear Safety and Control Act*, *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 nuclear and environmental assessment matters, CELA has carefully considered the draft RegDoc 1.1.5 from the public interest perspective. CELA's response to the draft RegDoc are set out below. These comments build on CELA's related submissions about environmental assessment law reform in Canada,<sup>2</sup> and the sufficiency of environmental protection under the *Nuclear Safety and Control Act*.<sup>3</sup>

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<sup>1</sup> CNSC, "REGDOC-2.10.1 Emergency Management and Fire Protection Volume II: Framework for Recovery After a Nuclear Emergency," online: <https://www.nuclearsafety.gc.ca/eng/acts-and-regulations/regulatory-documents/history/regdoc2-10-1-vol2.cfm> [Draft RegDoc]

<sup>2</sup> See Canadian Environmental Law Association, "Submission to the Government of Canada regarding the Consultation Paper on Approach to Revising the Projects List" (28 May 2018), online: <http://www.cela.ca/CELASubmissionsReProjectListingCriteria> [CELA Project List]

<sup>3</sup> See Canadian Environmental Law Association, "Submission on Pickering Licence Renewal," (2018) online: <http://www.cela.ca/pickering-licence-renewal>; "Submission on Bruce Licence Renewal," (2018) online: <http://www.cela.ca/publications/brucepower-refurb-emergprep> [CELA Submissions]

### **III. RESPONSE TO PROPOSED SMALL MODULAR REACTOR LICENCE APPLICATION GUIDE**

#### **1. Transparency and Public Disclosure**

As discussed in section 1.2, the CNSC offers “pre-licensing review of a vendor’s reactor design” prior to the proponent submitting a licence application. As explained in Appendix B of the RegDoc and as additionally discussed on the CNSC’s website, the pre-licensing vendor design review is a multi-phased process which involves an assessment by the CNSC, to verify the acceptability of proponent’s design in relation to nuclear regulatory requirements and standards.

CELA does not support the inclusion of a pre-vendor review process which is predominantly not publicly available, nor provide an equal opportunity for individuals to comment on the acceptability of project proposals. According to the CNSC, due to the “commercially sensitive and proprietary information” contained in the proponent’s reports, they are not openly disclosed. Not only does this erode the public’s right to know, it sets a precedent for public disclosure at the earliest of review stages, which permits the withholding of information by proponents, and prioritizes private interests over those of the public.

Whether real or perceived, procedural fairness requires that decisions made by the Commission be free from a reasonable apprehension of bias.<sup>4</sup> Processes which do not facilitate transparent and public view – whether they occur during the pre-licensing or licensing phases – should not be permitted by the CNSC as a quasi-judicial body, nor its Regulatory Documents.

While pre-vendor review is a service currently provided by the CNSC, the CNSC does not provide well-documented, public reasons explaining how vendors graduate through the three phases of review.<sup>5</sup> Lacking measures to maintain a public record or public summary of all confidential information on the record, the CNSC has not fulfilled its duty as a quasi-judicial tribunal to ensure transparency in its proceedings.

#### **2. Applicability of Federal Environmental Assessment Law**

As discussed in the RegDoc, the CNSC will advise the applicant if there is a need for an environmental assessment. The CNSC RegDoc states it may also “provide information on the following: applicability of an environmental assessment; public and Indigenous consultation; considerations with respect to nuclear liability, security and safeguards; and potential licensing

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<sup>4</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

<sup>5</sup> See CNSC, “Pre-Licensing Vendor Design Review,” online: <https://nuclearsafety.gc.ca/eng/reactors/power-plants/pre-licensing-vendor-design-review/index.cfm>

timelines.”<sup>6</sup> Other than environmental assessment, each of the items listed are requirements of licensing. For instance, Indigenous consultation is required to uphold the Honour of the Crown and advance reconciliation, Canada’s *Nuclear Liability and Compensation Act* is to applicable NSCA licensees, security and safeguards are requirements of licensing and licensing timelines will follow once application materials are submitted the proponent. Therefore, to include environmental assessment within a list of information which is otherwise certain to apply, gives the impression that it will also apply to some degree.

Based on the existing text of the proposed *Impact Assessment Act* legislation, it is unknown if SMRs will trigger a federal environmental assessment. Therefore, CELA requests this language be clarified in the RegDoc so it does not give the impression that federal EA laws necessarily apply. While CELA has submitted that SMRs, which are currently a non-listed activity should be designated under the *IAA* regulation, their inclusion remains to be determined.

Lastly, while section 2.2.9 of the RegDoc notes the Environmental Protection SCA will include “assessment and monitoring” and “environmental risk assessment,” CELA reiterates that these NSCA-based environmental reviews are not equivalent to a federal EA. First, the NSCA is a regulatory statute, guiding licensing decisions. Secondly, the NSCA lacks the central hallmarks of sound EA legislation. For instance, there is no equivalent purpose in the CNSC’s enabling statute that requires projects foster sustainability, nor consider the project’s effects on environment, health and socio-economic conditions.<sup>7</sup> Likewise, there is no statutory equivalent outside of the *IAA* requiring the CNSC consider the purpose and need for the proposed project, and alternatives.<sup>8</sup>

While a RegDoc is primarily intended as guidance and does not have the same weight as a statute, the RegDoc as drafted has not attempted to address these gaps. For these reasons, CELA submits that should SMRs not be a designated project requiring IA under the proposed *IAA*, the CNSC should exercise its discretion as an authority for environmental assessment and per s. 90 of the proposed *IAA*, refer SMRs for federal review.

### 3. Waste Management and Long-term Solutions

Section 2.2.11 of the RegDoc states that the “waste management SCA covers internal waste-related programs that form part of the facility’s operations up to the point where the waste is removed from the facility to a separate waste management facility” (emphasis added). This

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<sup>6</sup> Draft RegDoc-1.1.5, p 19

<sup>7</sup> Bill C-69, *Impact Assessment Act*, s 6

<sup>8</sup> *Ibid*, s 22

statement assumes the availability of a facility which is capable of accepting waste. Currently, Canada lacks a comprehensive waste framework and of the two waste management facilities currently undergoing review, both have been delayed and their potential timeframe for completion unknown.

For instance, the proposed Deep Geological Repository in Kincardine, Ontario, has been put on hold since August 2017 when Environment and Climate Change Canada Minister McKenna requested the proponent update its cumulative-effects analysis, and the potential cumulative effects of the project on the physical and cultural heritage of the Saugeen Ojibway Nation.<sup>9</sup> Similarly, the review of the Near Surface Disposal Facility in Chalk River, Ontario, has also been delayed because of extensive, outstanding information gaps. While the hearing date for the NSDF was once planned for July 2018, the revised Environmental Impact Statement is not anticipated until the Summer 2019.

Therefore, until Canada has a socially acceptable and environmentally sound means of storing long-lived radioactive waste, the RegDoc should be forthright about Canada's lack of waste disposal options. The availability of these sites should also serve as prerequisite to authorizing any new nuclear development, which creates additional waste streams and adds to Canada's growing nuclear waste legacy.

## **CONCLUSION**

Due to deficiencies in CNCS's SMR licensing process, specifically as it relates to transparency, federal environmental assessment and waste management, there remain critical gaps in the legislative framework overseeing potential SMR activity in Canada. CELA submits it would have been more appropriate to first seek public input on the social acceptability of SMRs in Canada, prior to seeking input on their licensing. Thank you for this comment opportunity.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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<sup>9</sup> CEAA, "Deep Geologic Repository Project for Low and Intermediate Level Waste" (21 August 2017), online: <https://www.ceaa.gc.ca/050/documents/p17520/120095E.pdf>