Canadian Electricity Association | Association canadienne de l'électricité

August 28, 2017

The Honourable Catherine McKenna, P.C., M.P.
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The Honourable James G. Carr, P.C., M.P.
Minister of Natural Resources
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The Honourable Dominic Leblanc, P.C., M.P.
Minister of Fisheries and Oceans
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Minister of Transport
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Dear Ministers,

On behalf of the Canadian Electricity Association (CEA) and its members, I would like to thank you for the opportunity to comment on the federal discussion paper on Environmental and Regulatory Reviews. We very much appreciate your efforts to date on consulting us, listening to our previous feedback, and seeking a practical approach to many of the issues listed in the discussion paper. A practical approach is important as our infrastructure investment plans of $20B annually depend on an efficient and effective regulatory system—a system that provides certainty, clarity and predictability.

As you well know, Canada's electricity sector is also a key partner of the federal and provincial governments' climate change and clean growth agenda. We must continue to work together to ensure we create the right regulatory conditions for project investments that would enable our transition to a low carbon economy and meet the current and future needs of Canadians.

The enclosed submission provides detailed feedback for further refining some of the proposed changes to the Canadian Environmental Assessment Act (CEAA); National Energy Board (NEB) Modernization; Navigable Waters Protection Act (NPWP); and the Fisheries Act (FA). In some cases, we have provided specific legal language to guide your deliberations. We hope you find the latest submission useful as you finalize legislative changes later this fall.

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More specifically, I would like to bring to your attention the following key points:

Canadian Environmental Assessment Act (CEAA)

Relative to what was proposed by the CEAA Expert Panel in April 2017, CEA is pleased with the overall direction the federal government is taking, especially related to the following issues:

- Proponent-led early planning and engagement with clear guidance from government.
- Integration of strategic and regional assessments (although more work needs to be done on prioritization and sequencing of these assessments).
- Development of tools to integrate scientific and Indigenous traditional knowledge.
- Better federal departmental coordination and alignment.
- Final decisions on impacts assessments by elected officials.
- Greater transparency.

While the above elements provide a solid foundation for a robust impact assessment system, CEA and members have reservations on several issues—some requiring further details and others that are more concerning. Areas requiring further details include:

- **Early planning and engagement:** While we regularly engage Indigenous Peoples and local communities in early planning, specific information requirements at an early stage may create challenges. Thus, we need greater details around what this would entail beyond what is already being done by companies.
- **Designated project list:** While electricity projects are adequately covered by the existing project list, we would like further clarity on what criteria will be used to add new projects to the list.
- **Timelines:** This is crucial for ensuring timely completion of infrastructure projects, but it is unclear as to what duration of timeline extensions are being considered for enhancing public and Indigenous engagement.
- **One project, one assessment:** This is crucial for avoiding duplicative assessment processes, but further details are required on how this principle will be implemented for provincial, territorial and potentially Indigenous-led assessments.

Whereas, areas of concern include:

- **Role of Indigenous governments in impact assessments & monitoring:** Assessments delegated to Indigenous governments, should be held to the same standard as those applied to projects on non-Indigenous lands. On monitoring, while the governments may contract monitoring work to Indigenous Peoples, the final authority should rest with the Crown.

- **Broadening of public participation:** CEA suggests a system that encourages 'dedicated engagement' which would allow those specifically affected by the projects and/or have specific information related to the impacts of projects to be the more engaged and their input weighted more heavily.

- **Inclusion of non-designated projects:** Caution and restraint should be exercised in the inclusion of non-designated projects as this may lead to regulatory uncertainty in the absence of clear criteria.

How these proposed changes are implemented will determine the functionality of the whole impact assessment system. CEA looks forward to participating in the development of those details in the months ahead.

National Energy Board Modernization

CEA is pleased with several aspects of the federal discussion paper related to modernizing the National Energy Board, including government's recognition that proponents and investors require a predictable and fair process to support regulatory decisions; NEB's mandate should not be expanded; and assessments need to be scaled or proportional to the project. However, CEA continues to have concerns related to issues it raised in response to the Expert Panel report. In particular, CEA has concerns that the government is considering the proposal to remove the "standing test" to implement early engagement processes and mandate monitoring by Indigenous Peoples. The proposals as structured pose a risk to the duplication of functions within provincial jurisdiction. Specifically, on the "standing test" CEA believes that if the current standing test is eliminated and not replaced, proceedings will become overly burdensome and costly to the proponent. CEA suggests a system that encourages 'dedicated engagement' which would allow those specifically affected by the projects and/or have specific information related to the impacts of projects to be the more engaged and their input weighted more heavily.

Navigable Waters Protection Act

CEA understands that there are concerns regarding the protection of our waterways and we are committed to minimizing our impacts. While more consultations will need to be conducted in the coming months, we feel that if new waterways are to be added to the Schedule of the NWPA, then there should be clear evaluation criteria including factors such as, the size of waterway, amount and type of navigation on the waterway, and the presence of obstructions on the waterway that limit navigation.

Fisheries Act and Restoration of Lost Protections

The proposed approach to return to section 35 (Harmful Alteration, disturbance and destruction), and possibly section 32 (killing of fish by other than fishing), reverting the emphasis from impacts on fisheries to individual fish and fish habitat is of concern to the sector. CEA recommends that if the prohibitions are to be changed, the revisions should incorporate concepts such as sustainability of fisheries or impacts at a fish population level. A clear purpose in its preamble to direct overall activities under the *Fisheries Act* is necessary.

Overall, we commend the federal government for looking at these issues holistically and consulting industry and other stakeholders on the proposed way forward. While the thinking is more advanced on the impact assessment system, further consultations will have to be done on all of the above issues before legislative changes are introduced later this fall. CEA and our members stand ready to work with you, your staff, and other stakeholders to ensure a well functioning environmental and regulatory regime that will serve Canada well.

Regards,

Hon. Sergio Marchi
President & Chief Executive Officer

c.c. Dr. Stephen Lucas, Deputy Minister, Environment and Climate Change Canada (ECCC)
Ms. Christyne Tremblay, Deputy Minister, Natural Resources Canada (NRCan)
Ms. Catherine Blewett, Deputy Minister, Department of Fisheries and Oceans (DFO)
Mr. Michael Keenan, Deputy Minister, Transport Canada (TC)

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Environmental and Regulatory Reviews: Federal Discussion Paper

Canadian Electricity Association (CEA) Submission

August 28, 2017

Final

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Introduction

The Canadian Electricity Association (CEA) appreciates the opportunity to provide feedback on the federal discussion paper on environmental and regulatory reviews. Founded in 1891, CEA represents a broad range of companies that generate, transmit, distribute, and market electricity to industrial, commercial, and residential customers across Canada. CEA utility member companies are committed to delivering reliable, affordable, and sustainable electricity to support the growth of a low carbon, clean energy economy and advance Canada's international climate change commitments.

CEA is pleased with the federal government's pragmatic approach to the environmental and regulatory process renewal, particularly as it relates to the proposed impact assessment system. In particular, CEA supports the role envisioned for project proponents, early engagement of Indigenous peoples and the public (which is in fact the norm for electricity companies), strategic and regional environmental assessments (EAs), project decisions by elected officials, and greater transparency.

A well-functioning, predictable, credible and consistent regulatory process is of critical importance to investment in Canada's clean energy future. The principles of such a regulatory process include:

- Focusing on achieving acceptable environmental outcomes rather than the use of 'best technology available'.
- Establishing desired environmental outcomes at the outset of a project.
- Prioritizing consultation and engagement with directly impacted stakeholders and Indigenous communities.
- Pursuing opportunities to substitute or align assessment processes between levels of government in order to achieve the objective of One Project, One Assessment.
- Ensuring that there is alignment and consistency between the assessment decision and subsequent permitting/approvals.
- Continuing with time-bound process, an improvement in the Act that should not be discarded.

CEA has organized this submission based on the subject areas identified by the government in its discussion paper. As the focus was on the impact assessment system, CEA has primarily commented on that aspect of the regulatory regime. While CEA supports many aspects of the impact assessment system that is proposed in the discussion paper, there are several areas of concern and uncertainty. CEA believes that further discussions will need to take place on aspects such as the appropriate role for Indigenous Governments and the public in impact assessments (IA), follow-up monitoring and compliance requirements.

Significant details are also still unknown regarding the functioning of the National Energy Board (NEB), and the proposed approach to the *Fisheries Act* and *the Navigation Protection Act.* CEA would appreciate an opportunity to be engaged in the future development of those details. Specific to the NEB modernization process, CEA members have some concerns related to the practical aspects of increasing public participation, early engagement, monitoring by Indigenous Peoples and the risk of duplication of functions within provincial jurisdiction.

The primary concern in relation to the *Fisheries Act* is the recommendation to revert back to section 35, and consequently section 32 of the pre-2012 *Fisheries Act,* as those prohibitions were ambiguous and overly broad.

A. Rebuilding Trust in the Project Assessment System

CEA supports rebuilding trust in the project assessment system and believes that the basic foundations of an effective system are identified in the discussion paper. Implementation will determine whether this framework will result in a credible, science-based, predictable regime that all stakeholders can support.

1. Addressing Cumulative Effects

CEA agrees with the discussion paper that managing cumulative effects is beyond the scope of an individual project and individual proponent. The framework proposed is a good starting point; however, effective cumulative effects management will require an interim strategy to establish priorities and sequencing. This will involve the completion of relevant strategic (SEA) and regional (REA) environmental assessments that are efficiently integrated with the existing robust and complex environmental regulatory and management frameworks administered by different levels of government. These existing frameworks serve to avoid and reduce many adverse effects of projects by establishing prohibitions, permit requirements, and other obligations with which a proponent must comply before a project can proceed. The development of new SEAs and REAs must be integrated and coordinated with these in order to be effective and efficient.

CEA believes that a list of priority strategic initiatives should be established to focus efforts on key initiatives that require action in the short, medium and long-term. SEAs should be considered for significant strategic issues such as climate change, biodiversity, and innovation. For example, Canada's approach to meeting the Aichi 2020 biodiversity targets would be a short-term SEA. Ideally, SEAs should be undertaken prior to setting specific targets, in order to prioritize and sequence them through developing an understanding of their implications.

In terms of sequencing, CEA supports starting with topics or regions that are already facing or are perceived to be facing cumulative effect management challenges and/or are likely to involve development in the near future. The provinces and territories should be consulted in identifying key regions and participating/leading REAs in their jurisdiction. There are already processes underway or completed that can be emulated.

For example, Manitoba has designated several large areas in northern Manitoba as Resource Management Areas, co-managed by Resource Management Boards consisting of representation from the closest First Nation Community and the province. Mandates include the development of land use and natural resource management plans in anticipation of providing guidance to development activities.

2. Early Engagement and Planning

CEA is generally supportive of the government's decision to integrate early planning and engagement into the regulatory approvals process, wherein proponents engage with Indigenous Peoples, key regulators, technical experts and the public to inform them of initial considerations. This is something that CEA members typically already do for major projects once the project reaches a certain level of specificity. However, in order to achieve the benefits of early engagement that are envisioned by the federal government, statutory amendments and regulatory guidance must be appropriately framed so that an early engagement process is feasible for the proponent and worthwhile for those participating in engagement.

In addition, existing impediments to participating in engagement processes must be addressed. In this regard, the government could play a beneficial role in fostering greater involvement from federal agencies in an early engagement process, developing capacity for participants and developing clear statutory and/or regulatory guidance on the minimum requirements for an early engagement process. However, in developing guidance on engagement requirements, consideration should be given to transparency of process, outcomes, and the type of information that is being sought. It should also be born in mind that for engagement to be successful, timely responses to engagement materials must be received by the proponent in order to shape decision-making. Accordingly, there must be response time requirements for participants. CEA also believes that the level of early planning and engagement required should be commensurate with the size and nature of the project, with an emphasis on major projects.

The government's direction should align with current best practices of companies who already integrate a high-level of well-functioning Indigenous and public involvement (e.g., Manitoba Hydro and Ontario Power Generation) in their planning phases and beyond. While there is always room for improvement, we should be building upon existing processes

that have already demonstrated effectiveness. In addition, there are useful elements in the existing pre-application project description process under the National Energy Board that could be considered in determining details to be provided in an accompanying regulation/policy.

CEA proposes the following language for the early planning phase (preceding the current section 8(1) that would be renumbered to (6)):

8 (1) Prior to performance of its obligations under section 8(6), the proponent of a designated project must provide a preliminary project overview to the Agency that includes the information prescribed by regulations made under paragraph 84(b).

(2) If the Agency is of the opinion, that the preliminary project overview of the designated project does not include all of the required information, the Agency, within 10 days after receiving the preliminary project overview, must require the proponent to provide an amended preliminary project overview that includes the information and details that the Agency specifies.

(3) Within 10 days after receiving a preliminary project overview or amended project overview that includes all of the required information, the Agency must advise the proponent of the requirements for the early engagement process applicable to the designated project, including timeframes within which the proponent and participants must provide and/or respond to information.

(4) After receipt of the Agency's requirements for early engagement but prior to performance of its obligations under section 8(6), the proponent will file a preliminary consultation report that includes the information prescribed by the regulations made under paragraph 84(b) and satisfies the aforementioned requirements for early engagement.

(5) If the Agency is of the opinion, that the preliminary consultation report of the designated project does not either contain the required information or evidence compliance with the Agency's prescribed early engagement process, the Agency, within 10 days after receiving the preliminary consultation report, must require the proponent to provide an amended preliminary consultation report that includes the required information, or, in the case of a

deficiency in the conduct of the early engagement process, the Agency may itself take such actions as it reasonably determines necessary to remedy the deficiencies.

CEA notes that industry input will be crucial to the development of regulations specifying the informational requirements for a preliminary project overview, as referenced above. Requirements for information that are too detailed or specific at an early planning stage may create significant challenges for industry members.

For CEA, the key benefit of the early planning phase should be improvements to the consistency, capacity, transparency and participation of Indigenous communities, the public and government experts over current practices. This early planning and engagement phase should lead to better understanding and potential agreements on methods, approaches or mitigation measures resulting in a better scope for the assessment. For example, early planning stages have more flexibility regarding the location and construction techniques of access routes, transmission lines and facilities. Not all stakeholder concerns can be addressed via early engagement; however, getting the issues identified early leads to the best chance of addressing concerns. There must be a balance between attempting to address issues/reach consensus and the time required.

For example, the Wuskwatim Generating Project (with a nominal capacity of 211 MW on the Burntwood River), which went into service in 2012, and the Keeyask Generation Project (with a projected nominal capacity of 695 MW on the lower Nelson River), which is currently under construction, were both developed using very early engagement between Manitoba Hydro and the in-the-vicinity First Nations, several years before the regulatory approvals process was triggered. This early input into the project planning process influenced overall project designs - the alternative means for the projects, which in both cases resulted in modified project designs that reduced adverse environmental effects in exchange for reduced generating capacity.

The First Nations communities in-the-vicinity are also partners in these projects. While formal partnerships might not be feasible for all projects, Wuskwatim and Keeyask demonstrated that following a process that is guided by principles identified in the Discussion Paper helps to build constructive, long term working relationships with Indigenous Peoples and stakeholders. For transmission lines, such as the Manitoba-Minnesota Transmission Project, early engagement with public and Indigenous Peoples generated an understanding of concerns and priorities that was able to be factored into the final route location, two years

prior to filing an application for regulatory approvals. In all cases, Indigenous knowledge was fully incorporated into the environmental assessment process from the outset.

In another example, AltaLink's 853L Transmission Line Rebuild Project involved rebuilding approximately 20 kilometres of 138 kilovolt (kV) line. The Majorville Medicine Wheel and surrounding lands are considered sacred ground to the Blackfoot Confederacy and are regarded as one of Alberta's most historically significant sites. AltaLink began its engagement with the Blackfoot Confederacy at the project's conceptual phase. First Nations input was considered in all spatial aspects of the project. With over 120 Traditional Land Use features identified along the line, the project's access needs, temporary work spaces and new structure locations were all placed with the effort to avoid impacting these features. First Nations monitors were used during construction to assist construction crews setting up cranes and equipment in close proximity to Traditional Land Use features and ultimately ensured they met the mutually agreed upon mitigation commitments. AltaLink collaborated with its prime contractor, Arctic Arrow Powerline Group, to employ five labourers (25% of the project's peak labour force) recruited from the three First Nations. As requested by the Blackfoot Confederacy, AltaLink and its prime contractor hosted a number of First Nations ceremonies that were conducted before, during and after project construction. The construction launch also incorporated cultural orientation to build understanding about the importance of the area to the Blackfoot people.

3. Transparency and Public Participation

Transparency is crucial to improving public and Indigenous confidence in the impact assessment processes. CEA agrees the public must have access to relevant information in a timely manner and in a form and format that facilitates their participation. It should be noted that CEA members typically already use sophisticated methods to facilitate these processes. A comprehensive public registry would augment public confidence in the impact assessment regime especially if there is greater transparency on reasons for decisions and feedback on how public input was considered.

While the scope of public participation in the regulatory process must be fair, transparent, and meaningful, the level of involvement should also be based on the specifics of the project. CEA has concerns related to the government's proposal to eliminate the "standing test" previously used by the NEB for those wishing to participate in a proceeding. While in general CEA members support increased public participation, we believe that if the current

standing test is eliminated and not replaced, proceedings will become overly burdensome and costly to the proponent. CEA suggests a system that encourages 'dedicated engagement' which would allow those specifically affected by the projects and/or have specific information related to the impacts of projects to be the more engaged and their input weighted more heavily. CEA recommends that the Agency and NEB/CNSC should have the ability to determine whether concerns are reasonable and pertinent to its review of the project and needed to make an informed public interest decision regarding a project.

Public engagement needs to improve through greater use of technology including social media, forums, webinars and an enhanced registry. The government and companies are already consulting Canadians through web-portals and other mechanisms and those tools should continue to be utilized. The electricity sector has been successful with a variety of techniques for engagement that can be found on the websites of recent projects such as the Keeyask Project and the Manitoba –Minnesota Transmission Project.

The Agency should review current best practices and incorporate what has been successful into future engagement guidance. Through targeted techniques, the process can achieve better engagement of the public and Indigenous Peoples through collaborative methods, without always requiring oral hearings for all subjects/projects, which are typically adversarial. The selection of techniques should be considered via the lens of incremental value versus effort. Part of the challenge for enhancing transparency will be managing the confidentiality of information, particularly Indigenous Knowledge (IK) and proprietary project information. The Agency should provide guidance on the management of confidential information.

4. Science, Evidence and Indigenous Knowledge

CEA supports the government's initiative to better integrate science, and work with Indigenous Peoples to help integrate IK in impact assessments. This approach will help foster a fair and transparent impact assessment system based on the development of trust and respect, which learns from research and studies of the past and provides for a more productive future.

Greater confidence in the science behind project assessments can be achieved by:

- **Enhancing transparency and improving access to the materials (e.g., more plain language summaries of technical documents and reasons for decisions).**
- **Testing the scientific basis through the use of the expert departments (such as DFO and ECCC), peer and critical review.**
- **Contributing to the design of an EA and the results of studies.**

It should be noted that many CEA utilities have developed processes to share understandings of IK and scientific perspectives on key issues. At the outset of the Wuskwatim and Keeyask Projects, for example, Manitoba Hydro and the partner First Nation(s) jointly developed environmental protocols, which established an understanding on the collection and use of Indigenous Knowledge, and included a defined committee structure to address community concerns and other environmental issues.

Subsection 19(3) of *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*) gives the responsible authorities the discretion to consider Indigenous traditional knowledge. This aspect of an assessment should be enhanced. CEA utilities have developed methods to use IK to help shape the study and analysis phases of individual project assessments, but guidance and policies to enhance consistency of approach, confidentiality issues, and expectations would be substantially beneficial. The Agency should develop transparent and consistent criteria on the use of IK in consultation with Indigenous Peoples, industry and other relevant parties. The criteria must be sufficiently flexible to adjust to the range of scenarios and Indigenous Peoples. Federal development of capacity for IK studies is a precursor to better integration and needs to occur prior to the commencement of the formal EA process.

To ensure that IK is respectfully and meaningfully incorporated it will be important for proponents to demonstrate within the EA documents that IK was carefully considered throughout the assessment. IK should be looked at to inform, support, and or challenge western science and the assessment process must identify how this was achieved. Where western science and IK differ, the assessment must acknowledge that there is a difference and assessment documentation should discuss whether options were explored or whether accommodations are required. If consensus of perspective is not achieved on any key topics, both perspectives can be reported as an input to the regulatory decision.

5. Impact Assessment

Designated/Non-Designated Project List

The Regulations Designating Physical Activities (SOR/2012-147) appropriately categorizes the types of major projects undertaken by the electricity sector. Requiring a federal impact assessment for projects with minor impacts lacks proportionality. These smaller projects[1] are assessed under other existing processes by the life-cycle regulators and permitting authorities. For electricity projects, the provincial/territorial EA and permitting processes already provide mechanisms to enable public and Indigenous participation.

Currently, federal environmental assessments are primarily triggered when a proposed project falls within the scope of the Project List. While CEA accepts there may be a need to capture some projects that are not currently included in the Project List, it believes the system proposed by the Expert Panel for example, casts too broad a net. While it may be desirable to expand certain existing permitting processes to include a form of public consultation, these permitting processes should not be subsumed under the EA umbrella as this would overwhelm the Agency, diverting limited resources from projects that have greater potential for significant impacts. Effective SEA and REA processes could effectively address the potential cumulative effects caused by smaller projects. Permitting of these smaller projects would continue to be done by the issuing regulators with conditions consistent with the results of the SEA/REA.

A Comparative Analysis of Impacts on Competitiveness of Environmental Assessment Requirements was done in 2000 and is available here. The study concluded that the Canadian EA regime (pre-2012) applied to small scale, medium and large-scale projects while most other EA regimes focus more on medium to large scale projects. Current European Union EA requirements include: Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, thermal power stations and other combustion installations with a heat output of 300 megawatts or more. Consistent with international practices, Canada should continue to focus federal EAs on large-scale, large-impact projects, as is currently the case.

[1] *Provinces such as Nova Scotia (tidal 2 MW, 50 MW hydro), N.B. (3 MW), B.C. (50 MW) have lower limits.*

Caution and restraint should be exercised in the expansion of the use of the EA process for non-designated projects as this may lead to regulatory uncertainty in the absence of clear criteria for inclusion and transparency regarding the inclusion decision. To ensure the process is open and transparent, there should be an opportunity available for individuals or organizations to petition/argue for the inclusion or removal of projects from the Project List. Requirements need to be in place for petitioners to make their case (i.e., based upon scientific rationale) and for the government to provide notice on why the petition has been accepted or rejected (reasons for decision).

In any revision to the Project List, the following should be taken into account:

- **Is it likely that the project type will result in significant effects on areas of federal jurisdiction, or have nationally significant impacts? Is there potential to cause permanent damage to or loss of the resource or cause a long-term effect?**
- **Would the change create duplication or overlap between the EA process and other regulatory processes/jurisdictions?**
- **Are the environmental effects sufficiently managed by existing regulatory processes (e.g., permits) or regional/strategic EAs? Is there potential to exceed regulatory requirements or are the effects unregulated by another Act or regulation?**
- **Does the type of project involve the use of a novel technology with the potential for uncertain outcomes? Would the change significantly increase the number of projects subject to EA?**

CEA believes that similar criteria would be appropriate to determining whether to designate a non-listed project that could have adverse impacts on areas of federal jurisdiction. The process and criteria should be clearly defined in policy.

The process whereby a project that does not warrant a federal EA is excluded from the EA process should be maintained. The Agency should publish criteria and when such decisions are made, the reasons for the decision should be published on the registry.

The factors to be evaluated should include:

- **Is it likely that the project type will result in no significant effects on areas of federal jurisdiction?**

- **Are the environmental effects sufficiently managed by existing regulatory processes (e.g., permits) or regional/strategic EAs? This could include that the mitigation measures are established under other legislation or industry/provincial standards.**
- **Is an EA required under another jurisdiction's legislation?**

Scope of Assessments

CEA agrees that for assessments to be holistic they must consider more than environmental effects exclusively. Canadian electricity companies already have been assessing the impacts to social and economic factors as well as to nearby Indigenous communities. CEA supports the government's proposal that CEAA, 2012 be amended to specifically include social, economic and health effects.

In addition to changes to legislation, policy and guidance should be developed and/or updated to address several areas. One area is the scope of the assessment. **The scope of the assessment must be proportionate to the scope of the project.** For example, if the proposed project is unlikely to have impacts on surface water quality then this aspect should be either limited in scope or not part of the scope, with rationale provided. Good scoping focuses the assessment on those things that matter most to the key stakeholders and to the sustainability of the natural and human environment. It is widely understood that it is impractical to assess every effect of every project so tools must be utilized to direct the focus the scope on the project and site-specific considerations relevant to the project. There would be value in developing sector-specific guidance on scope, to avoid uncertainties.

Timelines

In addition to assessment scope, there should be sector-specific standards for assessments (within which discretion should be exercised to adjust to project-specific factors), with project-specific timelines determined at the start of the process. While the existence of legislated timelines provides welcome certainty, CEA seeks further clarity on the contemplated specific changes to timelines. In setting new timelines, government must ensure timely approval of infrastructure projects while also allowing adequate time for public and Indigenous involvement.

Impact Assessments on Federal Lands

With respect to the IA process on federal lands pursuant to section 67, CEA recommends that timelines for that process be specified in legislation, and supports the government proposal to address the current lack of delineated process for IAs on these lands. This process could be addressed through either legislation or written policy. The policy should differentiate between projects wholly on federal lands and those primarily on provincial or private lands.

Decision Statement

The current process whereby before the Minister issues the decision statement, proponents prepare the environmental impact statement, and then the Agency prepares the EA report, is effective and should be maintained. The Governor in Council is the appropriate decision maker in cases where there are significant effects. There should be a new subsection 54(7) to enable amendments to decision statements to enable adaptive management and adjust to changing knowledge:

54(7) The decision maker may either on the competent minister's own initiative or on application by the proponent amend the decision statement.

Permitting Processes

With respect to the permitting process, consistency is needed between conditions set out in decision statements and those included in permits and authorizations subsequently issued under different legislation. To avoid duplicative processes and the possibility of permit conditions being inconsistent with EA decisions, either the permit issuance (including conditions) and EA decision statement should be concurrent or the federal government should provide unambiguous guidance regarding the post-EA permit conditions.

6. Partnering with Indigenous Peoples

Project proponents should and do engage Indigenous Peoples through their preferred means and seek their support based on mutual respect and dialogue. To effectively ensure that any changes to Impact Assessment processes support Canada on its shared path to reconciliation, it is important for the federal government to continue to take a strong

leadership role and develop a clear and agreed upon understanding of what reconciliation means. A clear understanding of the desired outcomes will help proponents and government understand whether the actions being taken with respect to a specific assessment are supportive of the desired outcomes.

Most utilities in the electricity sector have been developing and operating projects in specific regions for several decades and have been working to improve engagement through the building of long-term trust and relationships. In many cases government staff responsible for regulatory approvals have not had the opportunity to develop long-term relationships with Indigenous Peoples potentially affected by major projects. There is a need for government staff to build relationships with key personnel within the communities. CEA member companies could share their experiences with regulators. These engagement activities and relationships are expected to grow as CEA members collaborate with Indigenous Peoples through joint ventures (equity ownership or profit/benefit sharing), Benefit Agreements, Power Purchase Agreements, service and supply arrangements, and other forms of partnerships as part of renewing and modernizing electricity infrastructure.

For example, NB Power recently signed an agreement with the Wolastoqey (aka Maliseet) in New Brunswick and is working towards an agreement with the Mi'kmaq, as well. These agreements provide a mutually agreed-upon workplan for engagement activities and timelines for projects and foster on-going dialogue and engagement outside of project-specific requirements.

Similarly, AltaLink rebuilt 8 kilometres of the 1043L Transmission Line through Enoch Cree Nation in 2016. The project required extensive collaboration with Enoch Cree Nation, from the planning phase through the post-construction reclamation phase. A steering committee was formed with members of the band council, a community liaison and project contractors, as well as AltaLink and the project management team. The steering committee collaborated on all matters, from the Traditional Land Use and environmental assessment in pre-construction, band member communications, band member recruitment for employment opportunities, and right-of-way mitigations during construction. This committee was essential to the success of the project, as was evident by the high rate of First Nations employment, with band members representing 45% of the peak labour force during construction.

CEA recommends that the Agency work with proponents and Indigenous Peoples to develop more standards and guidelines for the requirements of engagement with Indigenous Peoples and seek their input early in Impact assessments. Industry best practices and guidance from the Supreme Court should be incorporated into the Agency's guidance materials while still reflecting the unique nature of each community and history/relationship with the proponents/regulators. CEA supports the recommendation that the government fund programs to build capacity and IA expertise in Indigenous communities so that they can meaningfully participate.

CEA is cautious about the role of Indigenous-led assessments and delegation to Indigenous governments of impact assessments. There has been limited experience to-date and thus there are concerns about implementation. Assessments delegated to Indigenous governments, should be held to the same standard as those on non-Indigenous governments. Ultimately, section 52 should still apply to the project, thus the Minister or the Governor in Council must consider the implications of the project for all Canadians including the people served by the project's electricity. There should be a process for resolving potential conflicts in the recommendations/approaches between different jurisdictions. The principle of "One project, One Assessment" should also apply to Indigenous-led assessments; thus, the comments on cooperation with other jurisdictions are applicable.

CEA supports further engagement with Indigenous Peoples beyond the project assessment phase, including their safe and secure participation, based on size and scope of the project, in monitoring activities. CEA cautions against the establishment of monitoring requirements that are "one-size-fits-all" or that leave little discretion to the proponent. The nature of the project and the expertise of the proponent should be taken into consideration in the implementation of an Indigenous role in monitoring.

7. Cooperation with Jurisdictions

The principle of One Project, One Assessment should be considered in all measures taken to improve cooperation between jurisdictions. In many cases, the same environmental resources are protected by both federal and provincial legislation. Therefore, cooperation between jurisdictions is critical to an efficient regulatory regime. The range of scenarios for jurisdictional cooperation on individual projects means that it is highly unlikely that there is a permanent, single answer to the question of how to coordinate IAs across jurisdictions. The

practical approach is to be flexible and better enable mechanisms and incentives that allow and encourage better coordination and effective and timely processes. Investors and proponents need certainty of process and timelines. An update of the existing national framework under the Canadian Council of Ministers of the Environment (CCME) Accord on Harmonization with provincial sub-agreements could provide the overall framework.

Ideally, there should be a single comprehensive assessment for each project. Where more than one environmental assessment of a project is unavoidable, there needs to be close alignment between assessment guidelines and the main decision points in the process. The goal should be to ensure that the areas of concern are addressed regardless of the authority leading the assessment.

It is recommended that the federal and provincial/territorial governments consider the renewal of bilateral cooperation agreements on Environmental Assessments, as these agreements have previously assisted in strengthening cooperation. Additionally, the federal government should provide further clarity on what "alignment with federal standards" requires. It is still early to determine whether substitution and equivalency under CEAA (2012) are effective, since only the province of British Columbia (BC) has taken steps towards this. The experience in BC has been positive to-date.

CEA members believe that discussions that lead to cooperation agreements and memorandums of understanding significantly assist project coordination by clearly defining the roles, responsibilities and timelines for the execution of various project stages. However, unless such agreements are established expeditiously, project review may be significantly delayed. In this regard, CEA would encourage the establishment of model cooperation agreements[2] that set out clearly defined roles for each government to eliminate opportunity for duplication and legislation that establishes clear responsibility for execution of such agreements within specific timelines. These documents would be helpful for joint assessments with the NEB/CNSC.

CEA supports the recommendation that advocates flexibility in timelines throughout the EA process to ensure coordination with provincial EA processes, as long as this is established at

[2] Or update the CCME Harmonization agreement and sub-agreements.

the start of the process. If substitution is not possible, a thorough harmonization with the timelines of the stricter of the two jurisdictions should be implemented. The key decision points need to be synched. For example, determining the scope of assessment needs to be done at the same time for both processes. The changes to the mandatory timelines would be project-specific and defined during the early planning process. There should be clear criteria to ensure consistency between projects.

B. Modern Energy Regulation

CEA is pleased with several aspects of the government's discussion paper related to modernizing the National Energy Board (NEB). However, CEA has significant concerns regarding three features related to NEB proceedings mentioned in the Discussion Paper. There are also a number of proposals that require further clarification and would benefit from additional industry input.

Foremost, CEA is pleased with the government's recognition that proponents and investors require a predictable and fair process to support regulatory decisions and that regulatory assessments need to be scaled or proportional to the project. Generally, CEA is pleased that the government has recognized that the mandate of the NEB should not be expanded to include an energy data collection role[3], and that the role and function of the NEB should not overlap or duplicate functions that fall within provincial jurisdiction. Finally, CEA is pleased that the government proposes to modernize the governance of the NEB by the following: (i) creating a corporate- style executive board that leads and provides strategic direction to NEB; (ii) creating separate Hearing Commissioners to review projects and provide regulatory authorizations; and (iii) giving the NEB decision-making authority to make final decisions on certain matters under the NEB Act such as variances to certificates, licenses and export authorizations.

CEA does continue to have some concerns related to a few proposals noted below that were put forward by the Expert Panel and that appear to be under consideration by the federal government.

[3] CEA supports oversight of energy data collection being within one federal body or agency and not diffused over several federal bodies. This aspect of its responsibilities should be handed over to another federal entity.

Member Concerns Related to Recommendations:

Public Participation

CEA has concerns related to the government's proposal to eliminate the standing test previously used by the NEB for those wishing to participate in a proceeding. While in general CEA members support increased public participation, CEA members believe that if the current standing test is eliminated and not replaced, proceedings will become overly burdensome and costly to the proponent. As noted previously, CEA recommends that public participation use a scaled approach that encourages more focused, dedicated engagement with those specifically affected by the project and/or who have specific information related to its impacts. Further, CEA reiterates the position expressed in its comments filed on June 14 2017 with the NEB Expert Panel that predictable and transparent regulatory processes require stakeholder adherence to proceeding deadlines. Compliance with proceeding deadlines and accountability of all stakeholders is an essential ingredient to ensuring procedural fairness and predictability.

Monitoring by Indigenous Peoples

CEA supports further engagement with Indigenous Peoples including their safe and secure participation in monitoring activities. However, CEA cautions against the establishment of monitoring requirements that are "one-size-fits-all" or that leave little discretion to the proponent. The nature of the project and the expertise of the proponent should be taken into consideration in the implementation of an indigenous role in monitoring. CEA also believes further discussions are necessary to understand the envisioned role for Indigenous Peoples and how this role would coordinate with the responsibilities of the proponents, the life-cycle regulators and the existing accountabilities of the federal government.

Early Engagement

As noted above, CEA generally supports the government's proposal to incorporate early planning and engagement into the requirements for NEB-regulated projects, but believes that an earlier interface between the regulator and proponent is necessary to ensure there is sufficient guidance on who must be engaged, when, and how. Engagement that is triggered too early in the planning of a project may not be an efficient use of time and resources of the proponent, the regulator and those engaged. In this regard, CEA notes that on page 10 of the Discussion Paper, the government proposes to establish timelines and

expectations for the assessment process. CEA believes clear government and regulatory guidance will be necessary to frame the early engagement process as well. Given that the purpose of engagement is to elicit response to a proposal, timelines must include deadlines for providing input by those who are engaged

Duplication with Provincial Jurisdictions

One of CEA's key concerns that it has expressed in each of its submissions filed in response to the NEB Expert Panel relates to the significant risk of overlap[4] with provincial/territorial jurisdictions, and the potential that this raises for costly and inefficient process duplication. For these reasons, CEA was pleased to see on page 20 of the Discussion Paper that the government proposes to encourage the development of cooperation agreements with "interested jurisdictions", which are defined on page 17 as provinces, territories and Indigenous.

CEA members support government to government discussions that take place very early in project planning processes. CEA members believe that federal/provincial/territorial discussions that lead to cooperation agreements and memorandums of understanding significantly assist project coordination by clearly defining the roles, responsibilities and timelines for the execution of various project stages. However, unless such agreements are established expeditiously, project review may be significantly delayed. In this regard, CEA would encourage the establishment of model cooperation agreements[5] that set out clearly defined roles for each government to eliminate opportunity for duplication and legislation that establishes clear responsibility for execution of such agreements within specific timelines.

Areas Requiring Clarification

Much remains unclear from the government's Discussion Paper regarding how each of the new assessment/regulatory processes will be implemented and how each will interface with and be informed by the other. More industry dialogue is needed to determine the purpose and timelines of each new process and to determine how each of the processes will involve the others. CEA recommends that the government develop a more detailed process map of

[4] An example is the potential for overlapping processes when reviewing transmission projects that have federal oversight of offshore renewables.
[5] Or update the CCME Harmonization agreement and sub-agreements

the map set out on page 8 of the Discussion Paper. This type of process diagram is necessary to ensure processes are fair and predictable for proponents and investors and that legislative amendments may be crafted with clarity and certainty of process.

In addition to general concerns related to the objectives and mechanics of the new processes and how these processes will interface, CEA finds that details remain elusive on the following specific aspects of the new or revised processes, clarity for which are necessary to avoid costly delays and duplication.

1) Major Projects

It remains unclear whether major projects are the same as designated projects and if not how major projects will be defined. CEA recommends that projects of significance such as international power lines that require more rigorous assessment should continue to be treated as a "major project" but that projects such as those built entirely within the territory of one province, tie lines between provinces, or projects that are not new construction, should not be deemed major projects. When assessing whether a project is a major project, a cost-benefit analysis of NOT going forward with the project and the downstream long-term impacts should be undertaken. The NEB Act currently allows an applicant for international power line approval to designate the application of provincial law for the EA and land acquisition components of its project, and to receive an authorization without the need for federal Governor in Council approval. CEA reiterates the importance of retaining this aspect of international powerline regulation moving forward.

2) NEB Processes

The Discussion Paper proposes the use of an issues list, clearly defined project assessment expectations and a specified anticipated decision timeline for NEB processes. CEA believes these are important mechanisms that will contribute to greater predictability for proponents and recommends that they be adopted for all NEB proceedings.

3) Joint Assessments

While CEA supports the concept of "One Project, One assessment", it remains unclear as to how the proposal for a joint assessment by NEB and the Agency will be carried out. Specifics regarding whether a joint decision must be rendered by the two agencies and the roles and responsibilities of each participating agency are integral components of amended legislation

so that opportunities for confusion and judicial review of regulatory decisions are minimized. CEA recommends that amendments to CEAA 2012 and the NEB modernization process should be coordinated to ensure they are complementary and do not contradict or duplicate one another. Also, it is also unclear how the early engagement process would work in the joint assessment process.

4) NEB Decision Making Authority

The government is considering giving NEB the authority to make final decisions on "certain functions", including import/export licenses and variances or transfers to certificates and licenses. CEA supports the NEB having more authority to make final decisions, however, the full scope of "certain functions" over which the NEB is proposed to have final decision-making authority is unclear and accordingly requires clarification.

5) Alternative Dispute Resolution (ADR)

The government proposes to establish alternatives to formal adjudicative processes such as dispute resolution. While CEA is not opposed to using ADR as a means of resolving disputes, it remains unclear when and how an alternative dispute resolution process would be used and the extent to which the timelines for such processes would be overseen by regulators.

C. Restoring Lost Protections to the Navigation Protection Act

CEA understands that there are concerns regarding the protection of our waterways and ensuring their navigability. The Canadian electricity sector are committed to minimizing our impacts on waterways. There are means of managing the impacts on waterways and balancing regulatory efficiency and the rights of navigation. Further clarification is required to understand the implications of the proposed approach. As a result, CEA recommends further consultation with affected stakeholders prior to drafting amendments. The *Navigation Protection Act* has the potential for significant implications for hydroelectric facilities that should be part of the considerations. These facilities already have an extensive regulatory regime that considers the implications for navigation on waterways. Once these facilities are approved and determined to be in the public interest, the corresponding permits should be focused on minimizing the site-specific impacts consistent with the

existing conditions of the project. The government should examine ways to standardize mitigation and/or applications via class permits or standards for routine activities where appropriate (if there are to be significantly more listed waterways).

Another factor to consider for determining the appropriate mechanism for review of potential impacts on navigation is whether the activity is new construction activity versus maintenance or operational activities that are required and consistent with an existing approval. CEA believes that a higher level of protection should be applied in those instances where a development has potential to permanently impede anticipated or known navigation (i.e. new dams of substantial size and impact). Temporary obstructions need to have different mechanisms available to provide protection of public navigation rights.

If new waterways are to be added to the Schedule then there should be clear criteria to evaluate including factors such as:

- **Size of waterway**
- **Amount and type of navigation on the waterway**
- **Presence of obstructions on the waterway that limit navigation**

Regarding a potential complaint mechanism, there must be a consideration and respecting of regulatory processes that have already considered the impacts on public navigation. The level of engagement during the complaint process should be commensurate with the potential impacts of the project on navigation and the level of public consultation already conducted or regulatory process already undergone.

D. Enhanced Protection for Canada's Fish and Fish Habitat

CEA is supportive of the government's decision to review the *Fisheries Act* to incorporate modern safeguards into its implementation and improve public and Indigenous engagement. The sector is committed to protecting and conserving natural resources and heritage for the use of future generations. CEA believes the *Fisheries Act* continues to provide the same level of protection as before 2012, with some amendments strengthening aspects of it. However, the implementation has been significantly constrained through the lack of adequate policy and definition, and due to a shortage of experienced staff in the Department of Fisheries and Oceans (DFO) Regions to implement the *Fisheries Act* and

related policies. CEA supports enhancing DFO's staffing and resources, particularly at the regional level.

CEA will be providing a supplementary submission on the changes to the Fisheries Act directly to DFO through the online portal on August 28th. Below is a summary of the major comments in that submission.

A. Partnering and Collaboration

CEA supports the recommendations related to partnering and collaboration. Better cooperation, stewardship and communication will lead to better fisheries management. To improve implementation, CEA agrees that a multi-stakeholder advisory committee with a focus on policy guidance for the implementation of the *Fisheries Act* should be created as soon as possible. As the electricity sector's national organization, CEA should be part of the advisory committee.

B. Regulation and Enforcement

The re-introduction of section 35 (harmful alteration disruption or destruction - HADD) and section 32 may make any unauthorized incidental death of a fish or change in fish habitat a potential criminal offence – regardless of its effect on the sustainability of a fishery. CEA is concerned that a reversion to this style of prohibitions is very restrictive on industry yet does not accomplish significant incremental environmental protection. CEA believes the focus should be on conservation outcomes and the government should instead focus on avoidance and mitigation of impacts on fish and fish habitat.

CEA believes the purpose of the *Fisheries Act* and its mitigation efforts should be anchored based on a fish population level (not individual fish level). Industry can manage impacts such that there is no population level impact; however, it is not possible to prevent entirely the incidental killing of fish or any harm to fish habitat.

If the decision is made to revert to the prior prohibitions in section 32 and 35 then CEA recommends the incorporation of the concepts of fisheries, priority habitats/ecosystems, science-based decisions as well as the use of the following tools:

- Risk management framework

- Pathways of effects
- Fisheries management objectives (FMOs) and Section 6 factors
- Operational statements

C. Planning and Integrated Management

Conceptually, CEA supports improved planning and integrated management. The challenge is how principles such as cumulative effects, the precautionary approach, and ecosystem-based management will be implemented. For example, the precautionary approach can be challenging in areas with insufficient baseline data. In the absence of sufficient information, the principles of due diligence and adaptive management should be encouraged to facilitate a culture of continuous improvement in the regulatory process.

There should also be changes made to the habitat offset policies and definitions. There needs to be more focus on achieving meaningful, impactful offsets rather than restrictive rules, especially regarding the ownership of dams and culverts. Conservation agreements (similar to section 11 of SARA) could be an ecosystem-based approach to offsets. Third party banks could enable larger scale offsets that result in substantial environmental improvements. Appropriate safeguards can be developed based on knowledge gained from wetlands banks run by provinces.

Conclusion

CEA is pleased with the federal government's pragmatic approach to the environmental and regulatory process renewal, particularly as it relates to the proposed IA system. In particular, CEA supports the role envisioned for project proponents, early engagement of Indigenous peoples and the public, strategic and regional EAs, project decisions by elected officials, and greater transparency.

While CEA supports many aspects of the proposed IA system, further discussions will need to take place on the details of the system. Specifically, CEA members have some reservations regarding the following:

- Early planning and engagement: CEA wants this to be building upon the successful approaches of electricity companies and not being overly prescriptive at an early stage.

- Applicable projects: The current thresholds are appropriate for the electricity sector and consistent with a focus on major projects. Specific criteria have been proposed in this submission.
- Role of Indigenous Governments: CEA supports enhancing engagement of Indigenous Peoples; however, further details are required on the process for Indigenous-led and delegation to Indigenous Governments. Ultimately, elected officials should make the determination under section 52, the same as for provincial-led assessments.

Implementation will determine the effectiveness of the regulatory regime, and CEA looks forward to further engagement on the IA process as well as legislative and regulation amendments to the *Fisheries Act* and *Navigation Protection Act* and the modernization of energy regulation.

CEA continues to have some concerns about the modernization of energy regulation and the role of the NEB. Those concerns mirror the concerns raised about the IA process relating to: public participation (removing the "standing" test without incorporating a different test based on differential impacts to stakeholders), early engagement process, monitoring by Indigenous Peoples, and the risk of duplication for projects under provincial jurisdictions.

CEA members continue to be concerned about a reversion to the old HADD prohibition. If there is a reversion, then the HADD should be linked to the sustainability of fisheries or impacts at a fish population level.