SUBMISSION TO THE EXPERT PANEL ON FEDERAL ENVIRONMENTAL ASSESSMENT

BY THE

CANADIAN CONSTRUCTION ASSOCIATION

1.0 INTRODUCTION

The Canadian Construction Association (CCA) represents the non-residential sector of the construction industry. The CCA has an integrated membership structure of some 70 local and provincial associations and 20,000 member firms. As a whole, the construction industry employs approximately 1.4 million Canadians and accounts for 7 per cent of Canada's overall gross domestic product.

The following is the association's formal submission to the Expert Panel on Federal Environmental Assessment (Expert Panel) with specific responses to some questions asked of CCA during the association's presentation on Wednesday, November 23, 2016, in Calgary, Alberta. The CCA formal presentation to the Expert Panel was delivered by Mr. Jeffery Barnes of Stantec Consulting Ltd. who is a former CCA Board member and the association's appointed representative to the Multi-Interest Advisory Committee (MIAC).

In questioning the CCA representative in Calgary, the Chair of the Expert Panel observed that industry is often critical of Federal Environmental Assessments (EA) and the role of other stakeholders in the process without offering feedback on what they would do to make it better. While CCA cannot comment on behalf of other industry stakeholders, the Association is of the view that EA has been an ongoing interest and concern to the construction industry since before the *Canadian Environmental Assessment Act* (CEAA) first came into effect in 1995. Though CCA members are rarely proponents or practitioners of EA, the timing of EAs, particularly delays, can have significant financial implications for member firms. As such, CCA remains a supporter of a strong, comprehensive federal EA process that includes reliable timeframes and timeliness, minimizes duplication with provincial-territorial and municipal assessments, and employs a consistent approach to the evaluation of projects under consideration.

This document represents CCA's final submission to the Expert Panel and should be viewed separately from the recommendations made by the MIAC, which represented a Committee consensus view and not necessarily the totality of the association's views on EA.

1.1 ONGOING STAKEHOLDER CONSULTATION

With regard to the MIAC, CCA has found participation in the group extremely productive as a means of discussing and synthesizing advice on complex issues where a variety of stakeholder opinions exist. Similar to the Regulatory Advisory Committee (RAC) of which CCA was a member, CCA finds the MIAC extremely useful and encourages the Expert

Panel to recommend the group be retained to assist the Minister of the Environment and Climate Change with the development of the anticipated amendments to CEAA and the subsequent regulations.

Recommendation 1: *Establish an ongoing advisory body such as MIAC to seek informed consensus-based advice on matters relevant to EA in Canada.*

2.0 WHAT DO CCA MEMBERS LIKE ABOUT CEAA 2012?

As indicated during the CCA presentation in Calgary, the Association was pleased with the fundamental changes introduced with the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). These amendments provided the opportunity for Canada to implement sound project planning in a more efficient, effective and predictable way.

CEAA 2012 appropriately limited federal EAs to federal jurisdiction and included a number of mechanisms to minimize duplication with other jurisdictions. Indeed, although not perfect, there is a lot to like about this Act, yet as we will describe later, there are some concerns with federal self-assessment and process administration where further improvements could be made.

2.1 TRIGGERING

The previous triggering mechanisms (proponent, funding, permits and land transfers) were replaced in CEAA 2012 by a project list for "designated projects." This simplified the bureaucratically complex triggering mechanisms that frequently confounded the initiation of EAs due to uncertainty around which authorities would be responsible, often resulting in unacceptable delays to the start of the EA process, sometimes by many months or even longer.

With the list-based approach to triggering, the proponent controls the initiation of an EA. Regulations clearly establish which project types and sizes require the filing of a Project Description and the scientific and socio-economic information necessary to proceed with the evaluation of the project. This is straightforward, predictable, and it provides proponents with the clear guidance required to proceed with a project EA.

Recommendation 2*: CEAA 2012 greatly simplified the triggering mechanism for project EA and significantly improved the timeliness and predictability of the initiation of assessments. Therefore, CCA supports retaining the list-based triggering mechanism as a means of maintaining the efficiencies created under CEAA 2012.*

2.2 APPROPRIATE RESPONSIBLE AUTHORITIES

CEAA 2012 concentrated the administration of EA into the Canadian Environmental Assessment Agency (CEA Agency), and as applicable, the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC). This eliminated the diffuse administration of the previous CEAA where 75 agencies and authorities were "responsible authorities." As noted in relation to triggering, the involvement of 75 responsible authorities led to confusion as to which agencies were responsible for conducting an EA, often involving several for the same project. It also meant that agencies with no core expertise in EA were responsible for carrying out these reviews. It was an outrageously bureaucratic and inefficient diffusion of responsibility. As such, CCA is pleased with the CEAA 2012 amendments concentrating EA administration in fewer agencies.

Recommendation 3: *The concentration of EA administration for designated projects should be retained by the CEA Agency, National Energy Board, and Canadian Nuclear Safety Commission.*

2.3 TIMELINES

CEAA 2012 included clear timelines for the administration of the EA process. This provided proponents with greater certainty regarding the timeframes required to obtain project approvals. While welcomed by industry, these new timelines did have the unintended effect of limiting the ability of stakeholders to adequately comment on projects under review.

The CCA strongly supports the use of timelines as part of the EA process; however, some consideration should be given to extending public comment periods to ensure that all stakeholders with information germane to the review have sufficient time to review and participate in project EAs.

Recommendation 4: *Maintain current timeframes to enhance certainty of process for project reviews with possibly establishing more time for review of the Project Description and EA guidelines by the public to improve the effectiveness of scoping and the overall efficiency of the review of Environmental Impact Statements.*

2.4 DUPLICATION

It is true that CEAA 2012 eliminated the annual conduct of thousands of EA screenings. While this has drawn criticism from some, it was the experience of CCA that the vast majority of those screenings were for minor projects with little or no chance of adverse environmental effects of any consequence or significance. A majority of these were only marginally within the jurisdictional authority of the federal government, if at all, and conducted by agencies

with little or no relevant expertise or mandate for environmental protection. As many screenings were duplicative of federal permitting (e.g., *Fisheries Act*, *Navigable Waters Protection Act,* etc), and of provincial and municipal EA processes, and their complementary environmental protection laws, regulations, guidelines and policies, the changes eliminated unnecessary duplication and by omission, provided a more streamlined approval process within the existing legislative framework. Overall, this has improved certainty and timeliness for projects being constructed by member firms.

The CCA feels that the substitution and equivalency provisions in CEAA 2012 offer governments an opportunity to minimize duplication. The CCA was pleased to see the province of British Columbia take advantage of the substitution provisions, while at the same time, disappointed that other provinces have yet to pursue this opportunity.

Another area of concern for CCA members is the length of time it can take to obtain permits from relevant departments upon successfully concluding an EA. It would be helpful if federal permits and authorizations could be issued coincident with EA approval where the details of project design are sufficiently advanced to facilitate permitting.

Recommendation 5: *Ensure that the federal EA is mindful of provincial-territorial and municipal EAs and the overall legislative framework for environmental protection, to avoid unnecessary duplication. Harmonize with provincial-territorial and municipal EAs when evaluating the same project with the goal of "one project—one assessment" using substitution, equivalency, or other mechanisms.*

Recommendation 6: *Facilitate issuance of permits and related authorizations by federal authorities coincident with EA approval where the information needed to do so is available.*

2.5 FEDERAL RESPONSIBILITY AND LEADERSHIP

CCA was supportive of the approach taken in the drafting of CEAA 2012 with respect to federal jurisdiction. We believe that limiting the federal government's involvement in EA to areas of federal jurisdiction is fundamental to eliminating duplication in our complex federation. CCA believes, though, that the federal government does have a responsibility to provide leadership in how it exercises its fiduciary responsibility for Indigenous peoples and the protection of the environment where it has the authority to do so. Consequently, CCA agrees with the definition of "environmental effect" in section 5 of CEAA 2012, particularly, as it relates to projects on federal lands or projects that may affect Indigenous peoples. However, in the interest of minimizing duplication, CCA believes where projects are not on federal lands or do not affect Indigenous peoples, the definition of "environmental effect" should be limited to federal jurisdiction as appropriately defined in section 5(1)(a) of CEAA 2012.

Recommendation 7: *Should amendments to CEAA 2012 be warranted, CCA recommends that any proposed changes be respectful of other orders of government and their laws, regulations and policies, and therefore, the amendments be limited in scope so as to apply strictly in areas of federal jurisdiction.*

3.0 EXPERT PANEL'S LINES OF INQUIRY

The CCA has gained a lot of insight through our ongoing involvement in RAC, MIAC and in the development of its expert advice to Parliamentary Committees over the past two decades. As an active participant in domestic projects and through our continued involvement in discussions about EA in Canada, we believe CCA has valuable insight to areas where, practically-speaking, federal EA could be improved. We trust these recommendations and supporting discussion will be of assistance in your deliberations and that you will consider them in providing your own advice to the Minister of Environment and Climate Change.

3.1 ROBUST OVERSIGHT

CCA members construct projects throughout Canada and the industry is well aware of the applicable laws, regulations, policies and guidance that exist with respect to environmental protection in the broadest sense—everything from the protection of endangered species to the protection of the health and safety of our workers. From a CCA perspective, Canada is well regulated for environmental, socio-cultural and economic protection.

Based on the experience of our members, it is our view that the perception that CEAA 2012 "gutted" environmental protection in Canada tends to misrepresent the intent and nature of the changes made. It is our considered view that CEAA 2012 is a good law for the federal government to fulfill its mandate for EA and does so with considerable effectiveness and efficiency in comparison to the antecedent CEAA. There is of course room for further improvement in the federal law as well as its administration and implementation.

3.2 ENFORCEABLE CONDITIONS

CEAA 2012 did establish mechanisms for applying enforceable conditions as part of an EA project approval—a fact, it would seem, often overlooked by its critics. The CEA Agency, however, has limited experience with using its new authority to establish and enforce conditions. Ensuring authorities have the capacity to provide oversight and enforcement may be an area for improvement where the Expert Panel might consider making recommendations. If the perception that there is currently a lack of oversight is valid, it may be related to a lack of resources, not a lack of legislative mandate or authority, and that is

where the federal government should focus its attention before new mechanisms for oversight are considered. That being said, the CCA does feel that there are indeed some areas where oversight needs to be improved and we specify those areas in the following sections regarding assessment on federal lands and in relation to administrative processes during the review of proponent information.

Recommendation 8: *The federal government should ensure its authorities have the capacity to provide oversight and enforcement of its EA and other federal laws and regulation pertaining to environmental matters.*

3.3 ENVIRONMENTAL ASSESSMENT ON FEDERAL LANDS

CCA strongly supports the federal government conducting environmental reviews of projects on federal lands that are non-designated projects. Currently, CEAA 2012 requires (sections 66-72) a quasi-EA review be carried out by federal authorities to ensure that a non-designated project on federal lands will not result in adverse significant environmental effects. The resulting impact has been to again push these reviews onto federal departments, most of whom have little or no environmental expertise to carry them out. Consequently, there is little consistency to these reviews which take place absent public input. As such, it is the view of our members that the Act needs amending to re-establish elements of CEAA regulations for screenings of projects on federal lands, including the development of an inclusion and exclusion list, a public registry, opportunity for public engagement, and timelines appropriate for screening-level assessments. The present situation provides for no public accountability, appropriate oversight, or timelines.

Recommendation 9: *Establish appropriate and transparent EA process requirements for EA of non-designated projects on federal lands, including inclusion and exclusion regulations, and a public registry.*

3.4 THE USE OF STOP-CLOCK TIME

CCA believes that there is a need for guidance and oversight of the CEA Agency regarding the fair and effective use of "stop-clock time" and their management of the Information Requests (IRs) process for standard EAs. Mr. Barnes mentioned this issue in his presentation and Mr. Horswill questioned him on this subject. Mr. Barnes co-authored a paper with Dr. John Boyle in 2015 that was presented at the annual meeting of the International Association for Impact Assessment in Florence Italy (Barnes and Boyle 2015) that speaks to the issue of stop-clock time and related issues and makes recommendations to address those.

As noted in Section 2.3, CCA is in favour of timelines as they afford the opportunity to make the EA process more predictable. As Mr. Barnes indicated in response to Mr. Horswill's questions in Calgary, it would appear that EAs are taking longer with CEAA 2012 than before. The use of stop-clock time has become pervasive, with most EAs now requiring typically three rounds of IRs or more (Barnes, et al. 2013). While we have heard various arguments as to the necessity for IRs, including reasonably, deficiencies in proponent submitted information, there is another side to this. The timelines introduced in CEAA 2012 have caused the emergence of administrative processes that enable the CEA Agency to stop the clock with no rules governing its use or oversight. Notwithstanding issues that may exist with proponent information, the use of stop-clock time emerged coincident with the advent of timelines (under CEAA as amended in 2010 and CEAA 2012). Stop-clock time allows EA administrators the opportunity to stall to fulfill duties that would otherwise be completed "on the clock" (e.g., fulfilling Duty to Consult). These processes are not mandated by the law and should be regulated with some level of oversight to ensure that stop-clock time is used judiciously and with reasonable limitations. The use of stop-clock time has become the single greatest element of uncertainty for federal EA in Canada and this must be addressed as it undermines the very rationale for timelines, namely, the desire of Parliament to provide proponents with process predictability.

Recommendation 10: *There needs to be some oversight, guidance, and limitations on the use of stop-clock time by the CEA Agency to ensure its fair use and to verify that it is not being used to unnecessarily undermine project reviews.*

3.5 THE INFORMATIONAL BASIS FOR EA

The information gathered in EA is aimed at making an informed decision on how to plan not only an acceptable project but also a better project, that is, if approved in the public interest, balancing those interests in the face of a broad range of socio-political and environmental factors.

CCA believes that the scientific basis of EA and the information gathered for decision-making under CEAA and CEAA 2012 are more than adequate. Critics arguing a lack of scientific basis in the decision-making process are overlooking the essential nature of EA as a planning tool based on a wide range of information sources including that provided by science, public engagement, and Indigenous traditional and community knowledge. CCA is particularly supportive of the chapter in MIACs advice to the Expert Panel regarding this subject. There are a lot of myths and misunderstandings about the role of science and other information in EA and we believe that the MIAC advice provides a reasonable perspective on the issue that puts some of the general concerns around science and other information in EA in a better, more balanced context.

CCA believes that officials within the CEA Agency, the CNSC and the NEB have the expertise to review a project proposal and assist decision-makers in making informed decisions. Officials within these responsible authorities typically request information from scientific experts when gaps exist regarding the impact of a project on the environment. As such, many of the concerns raised by critics regarding a lack of scientific rigor being applied to project reviews are unfounded. While the expanded role and responsibilities of the CEA Agency has strained the institutional capacity of the organization to perform these duties in a timely manner -- particularly in scoping, administering the IR process, and fulfilling the Duty to Consult – this challenge appears related to a lack of resources and not any deficiencies regarding the technical capacity of the organization to carry out a thorough EA.

Recommendation 11: *There is a need to strengthen resources within the CEA Agency as its expanded role and responsibilities has strained the institutional capacity of the organization to carry out its duties in a timely manner, particularly in scoping, administering the IR process, and fulfilling the Duty to Consult.*

3.6 INDEPENDENCE OF PROJECT CONSULTANTS

It was evident based on the questions from the Expert Panel to witnesses that the notion of the independence of proponents and their consultants to conduct EA studies has emerged as a preoccupation. It is our view that proponents certainly have an obligation to pay for an EA of their proposals and that any concerns regarding the bias or manipulation of evidence by professional consultants to support a project approval are simply unfounded. Most consultants employed by proponents to collect information in support of their proposals are bound by professional codes of conduct and ethics, and many of them (e.g., engineers, geoscientists, biologists, medical doctors) are governed by legislation and provincial licensing bodies. Transferring the role these consultants currently play in the EA process to federal scientists or academia would only create further strain on finite federal resources. Few of the agencies responsible for conducting EAs have the capacity to take on this role nor could they, in a timely manner, establish the depth of corporate memory and institutional capacity of the professional consulting industry. Consequently, the federal government would be forced to retain consultants, no doubt the same professionals that work for proponents now, resulting only in a perceptual change but no meaningful improvement in the quality of work currently utilized as the basis of EAs. Furthermore, such a change would result in the loss of:

- The ability for consultants to work with proponents to plan their projects directly as members of the project team;
- The impetus to advance the proposal; and
- The desire to move forward on a timeline that is sensitive to commercial pressures.

From a CCA perspective, the focus really needs to be on ensuring that the informational requirements of EA be made very clear to proponents (i.e., in guidelines, guidance, and policy) and that that information be transparently presented and subject to review by regulatory authorities, the public, and Indigenous groups.

Recommendation 12: *The obligation to conduct EA studies should be maintained with proponents as the alternatives would undermine the impetus for high quality, timely, efficient and effective EAs.*

3.7 IMPROVING THE ENGAGEMENT OF CANADIANS DURING SCOPING

While there are opportunities for engagement, we would agree it may be necessary to expand timeframes for consultation and public comment, particularly during scoping—the review of the Project Description to better inform the decision related to the identification of key issues and concerns for inclusion in the EA guidelines for proponents.

To date, the CEA Agency has demonstrated no apparent ability to reflect effectively the specific issues and attributes of a project in draft EA guidelines. Even though, by regulation, proponents are required to provide a very detailed Project Description, the CEA Agency issues only generic draft EA guidelines that are templated and that do not reflect information provided by the proponent (Barnes, et al. 2013). This may be due to the brief timeframes provided for Project Description reviews and the limited time available for public input into this process. The public is expected to digest the detailed Project Description and generic draft EA guidelines in very brief review periods. The compression and limitation of scoping in this way is, in our view, a major contributor to the lack of clear direction to proponents on the informational requirements for a proponent's Environmental Impact Statement and is a contributing factor for multiple iterations of IRs during the review to address informational gaps and misunderstandings regarding what actually is the required informational basis for an EA.

Recommendation 13: *Expand timeframes for consultation and public comment periods on scoping documents and Project Descriptions. This would improve decision making on key issues such as the need to require an EA and to support the identification of key issues and concerns for inclusion in the EA guidelines for proponents.*

3.8 EA PARTICIPATION

CCA feels that it is important to manage the public engagement process to allow those affected by a project to meaningfully participate while limiting participants in a panel, commission, and board review to those parties with something germane and of relevance to the review.

Recommendation 14: *Manage the public engagement process to allow those affected by a project to meaningfully participate while limiting participants in a panel, commission, and board review to those parties with something germane and of relevance to add to the EA of a project.*

3.9 CONSIDERATION OF POLICY MATTERS AND CUMULATIVE EFFECTS

EA should be focused on matters within the purview of proponents as outlined in the specific project scoping documents. For example, the consideration of a project's contribution to GHG emissions should be limited to the project itself and not ancillary upstream or downstream emissions that may be caused as a result of the project proceeding or unrelated market demands unforeseeable at the time of the review. Canada's climate change policy cannot and should not be developed through project EA, rather, EAs should be used to help evaluate how well a project relates to established policy and provide guidance to proponents on measures and means to minimize the impacts of the proposed project on the environment.

Similarly, the consideration of cumulative environmental effects should be limited to the extent to which the project contributes to those effects and its proponent can reasonably be expected to evaluate and mitigate its contribution to them.

It is indeed in this area where CCA feels that much of the apparent dissatisfaction with EA by environmental and Indigenous groups relates to the lack of an appropriate mechanism for dealing with broader policy and cumulative effects matters. The lack of mechanisms for dealing with these matters outside of project EA is, not surprisingly, frustrating for these groups. However, their interventions in EA often lead to the inclusion of matters in EA that should not be the burden of proponents. Further, the failure to limit such discussion reasonably is often at the center of endless iterative debates during the IR process. The inability to address such matters impedes project EA, frustrates its many participants and is a key contributor to the dissatisfaction of intervenors with EA decisions and the inefficiency and unpredictability of process for proponents.

Recommendation 15: *It is essential to limit the discussion of policy matters in project EA to the extent that the project may relate to established policy.*

Recommendation 16: *The consideration of cumulative environmental effects should be limited to the extent to which the project contributes to those effects and its proponent can reasonably be expected to evaluate and mitigate its contribution to them.*

3.10 STRATEGIC ENVIRONMENTAL ASSESSMENT AND REGIONAL STUDIES

The CCA would support the establishment of Strategic Environmental Assessment (SEA) and improved Regional Assessment mechanisms to address broader policy and cumulative environmental effects matters that are beyond the reach of project EA in order to streamline and focus it in future. We are wary, however, of any measures that might further burden proponents in the interim while government develops these mechanisms—the current burden is already inappropriately heavy on proponents. During scoping and the administration of EA, responsible authorities need to limit such considerations to that which can be reasonably considered by a proponent. Project EA should not be a tool used to develop policy but rather to demonstrate established policy is being met. Over time, the implementation of SEA and Regional Assessment could mitigate some of the dissatisfaction with Project EA as noted in Section 3.9.

Recommendation 17: *The CCA supports the establishment of Strategic Environmental Assessment (SEA) and improved Regional Assessment mechanisms to address broader policy and cumulative environmental effects matters that are beyond the reach of project EA in order to streamline and focus it in future, provided project EAs are not held hostage to the absence of policies yet to be developed.*

3.11 USE OF BEST AVAILABLE TECHNOLOGIES TO MINIMIZE THE ENVIRONMENTAL EFFECTS ON THE ENVIRONMENT

Most proponents already use best available technologies to minimize the environmental effects of a proposed project. The assessment of "alternative means of carrying out a project" should and does consider such technologies. Such matters are a reasonable consideration in project EA. However, there should be no requirement to assess "alternatives to" a project (e.g., a proponent of a hydro project should not have to speak to why they are not building a wind or solar farm—that is the domain of policy and best addressed by other mechanisms like SEA).

Recommendation 18: *Project EA should consider the use of best available technologies through the consideration of "alternative means of carrying out the project" but should not have to consider "alternatives to" the project.*

3.12 INDIGENOUS ISSUES

Indigenous issues are a source of great uncertainty for many projects under review under CEAA 2012. The dissatisfaction of Indigenous groups with project EA is quite evident. Although the CCA has some concern regarding specific aspects of the Indigenous issues chapter of the

MIAC advice, in general, we support that document and believe it does much to elaborate on what Indigenous people feel needs to be incorporated in EA (not just Project EA).

The issues around Duty to Consult and accommodation are complicated and tied to treaty rights and titles that frequently go beyond the environmental effects of a project. As such, CCA believes that responsible authorities and/or the federal government require mechanisms and processes that enable timely and predictable decisions regarding projects being reviewed under CEAA 2012 as they relate to Indigenous issues. These mechanisms must acknowledge that the proponent's obligation relates to mitigating their specific environmental effects and that they should not be burdened with broader policy matters or legacy issues that are beyond their ability to resolve.

Furthermore, the federal government lack of leadership in initiating consultations with Indigenous peoples where unextinguished Indigenous rights would be infringed upon by a proposed project remains a considerable source of proponent frustration. The view that Indigenous people should be decision makers in such circumstances until a modern land claim agreement can be put in place presents a situation with which we cannot agree. We believe, with the greatest of respect, that it is the responsibility of the federal government to fulfill its Duty to Consult and resolve whether there is a need for accommodation and by whom. This is the foundation of our recommendation for the federal government to establish mechanisms to deal with these circumstances in a timely and constructive manner in parallel with an EA.

Recommendation 19: *Responsible authorities and/or the federal government require mechanisms and processes that enable timely and predictable decisions regarding projects being reviewed under CEAA 2012 as they relate to Indigenous issues. Such mechanisms need to provide the opportunity for Indigenous rights holders and the federal government to speak to the environmental effects of a project specifically and in a timely, constructive manner, in parallel with an EA.*

4.0 REFERENCES

Barnes, Jeffrey L., and John Boyle. 2015. The Weak Link in EIA Effectiveness: Challenges in Process Administration. Proceedings, International Association for Impact Assessment, IAIA15: Impact Assessment in the Digital Era, April 20-23, Florence, Italy. http://conferences.iaia.org/2015/Final-Papers/Barnes,%20Jeffrey%20-%20The%20Weak%20Link%20in%20EIA%20Effectiveness.pdf

Barnes, Jeffrey L., Sandra Webster, Neil Cory and Mary Murdoch. 2013. Scoping under New Federal EA Regime in Canada. Presented at International Association for Impact Assessment, IAIA 2013: Impact Assessment The Next Generation, Calgary, Canada.