Canadian Hydropower Association

Review of the *Canadian Environmental Assessment Processes*

Submission to the Expert Panel on the Review of Environmental Assessment Processes

December 22, 2016

Executive Summary and Main Recommendations

1. A timely, predictable and certain federal EA process that can easily be coordinated with all provincial EA processes and avoids excessive duplication is of critical importance not only to the hydropower industry, but also to all Canadians. Increasing clean power generation is essential if Canada is to continue to grow its economy while reducing GHG emissions. This will require the increased development of hydropower, including large hydropower with storage. Such development will be possible only if the federal EA process is timely, certain and credible.

2. No fundamental change should be made to CEAA 2012 as, in our opinion, the objectives of the review can be achieved through strong policy and guidance development combined with some minor amendments to the Act and regulations under the Act. Our recommendation assumes the proponent remains responsible for conducting all Environmental Assessment (EA) studies while the Responsible Authority reviews the EA pursuant to the existing CEAA 2012 process.

3. The current triggering mechanism (list of designated physical activities) should be maintained.

4. The role of the Environmental Assessment Agency as the sole Responsible Authority for the assessments of all projects that do not fall under the authority of the NEB or the CNSC should be maintained.

5. The timeliness of the environmental review and authorization processes is critical. The timelines included in CEAA 2012 represented a major improvement. However, the use of the "stop the clock provisions" of the Act to effectively buy time to complete federal activities when not absolutely necessary should be tightened.

6. A more effective mechanism is needed to ensure consistency and alignment between the EA decision statement conditions and conditions of authorizations under other federal statutes applicable to the same project.

7. The Act should include an explicit power for the Minister to amend Decision Statement conditions, as and when necessary and where there is no additional adverse impact.

8. Positive physical environmental effects generated by the project – such as GHG emissions avoided by new hydropower generation – should be taken into account.

9. The Expert Panel should encourage governments to cooperatively undertake Strategic Environmental Assessments (EA of policies, programs, etc.) and Regional Assessments. This will contribute to providing better focus for proponent led project specific assessments.

10. The requirements for Indigenous consultations, involvement in the process, and decision-making should be reviewed cooperatively by the federal and provincial governments at higher governmental levels in line with the recent recommendations of the Canadian Truth and Reconciliation Commission and the United Nations Declaration of the Rights of Indigenous People (UNDRIP). All parties need to keep in mind that Supreme Court decisions related to the duty to consult and Indigenous rights form the existing consultation framework. Once the government completes the current review, it can develop, if necessary, updated policy and guidance and integrate them into the current legal context. Flexibility will be critical in order to accommodate regional and cultural differences.

11. The government should strive to reduce duplication with the provinces by maintaining the focus of federal EA on major projects and environmental effects that fall under federal jurisdiction, by maintaining the current EA delegation, substitution and equivalency provisions, by working with the provinces to maximize the use of these provisions, and by renegotiating coordination agreements.

12. More detailed guidance is needed to improve the timeliness and predictability of the review of projects located on federal land.

13. The government should develop a more complete, easy to use project registry and project file that would cover projects from "cradle to grave" to improve the transparency and credibility of the EA process.

14. When deciding on mitigation, responsible authorities should focus on obtaining the best reasonably achievable environmental outcome instead of the technology used. They should take into account cost when deciding on mitigation measures.

Table of Contents

1.0 Introduction

1.1 Hydropower, Climate Change and Environmental Assessment

The Canadian Hydropower Association (CHA) is the national voice of the Canadian hydroelectricity industry. Hydropower is critical to our economic and environmental well-being. It provides more than 60% of Canada's electricity, while generating near zero greenhouse gas emissions (GHGs). By comparison, hydropower accounts for only 16% of electricity generation worldwide and only 6% in the US. The abundance of hydropower is the reason we have the lowest emitting and most renewable electricity system in the G7 and are the third largest hydropower producer in the world. Canada has an installed hydropower capacity of approximately 78 000 MW and a technical potential of 160 000 MW for further development: we could still more than double current hydropower generation.

Energy analysts anticipate strong growth in electricity demand in the coming decades. Population and economic expansion will account for some of this increase. In addition, Canadians want to reduce the carbon intensity of our economy. Non-emitting electricity will be called upon to replace fossil fuel energy sources wherever possible, likely starting with transportation. Indeed, most experts agree that any major GHG reductions require increased electrification of the economy, combined with further decarbonisation of electricity production. This is illustrated, for example, in *Canada's Mid-Century Long-Term Low Greenhouse Gas Development Strategy*, submitted by the Government to the *United Nations Framework Convention on Climate Change* (UNFCCC) in November 2016. In all the scenarios studied that would lead to an emission reduction of 80% by 2050, hydropower generation increases by 120 % to 170 % between 2015 and 2050. As electricity demand grows and as generators retire aging fossil-fuel fired power plants throughout North America, the demand for non-greenhouse gas emitting electricity from Canada will likely increase at a faster pace than the demand for electricity generally.

Hydropower is ideal for meeting the challenge to decarbonize the Canadian economy. It is abundant, has virtually zero greenhouse gas emissions, and is the only form of renewable generation with large storage capacity. Storage makes it a powerful enabler of other, more variable, sources of renewable electricity like wind, solar, and tidal power.

The hydropower industry fully supports robust environmental assessments (EAs) that are based on sound science, take into account traditional knowledge, and invite broad public engagement and Indigenous participation. If hydropower is to play its critical role in combatting GHG emissions, Canadians at large and Indigenous communities in particular must understand and accept hydropower projects. That cannot be achieved without rigorous assessments of environmental impacts and appropriate mitigation measures. They are essential if Canadians -- and especially stakeholders directly affected -- are to be confident that the projects are acceptable.

Our industry has set as priorities the demonstration of our commitment to environmental stewardship and the maintenance of a social licence. Hydropower has evolved and matured along with the development of environmental regulation. Our extensive experience and remarkably long-term perspective inform our need and desire for effective environmental assessment. In fact, well-planned projects apply environmental principles and assessment in the earliest stages of project design. The industry strives to exceed regulatory requirements whenever possible. For example, it is standard industry practice to start consultation efforts long before any formal environmental assessment or regulatory approval process is triggered. Proponents begin meaningful engagement with affected communities and Indigenous people, as well as other stakeholders -- including environmental groups and civil society.

The federal and provincial governments both regulate how hydropower projects are built and operated. Hydropower facilities are capital intensive, involve extensive planning, and have extended construction timetables.

And when completed, they have a typical lifespan of 100 years or more. Prudent industry investments can only be made with confidence under stable, efficient and, predictable regulatory regimes.

Canada, North America, and, indeed, the planet are demanding more renewable energy. It is in everyone's interest to see continued improvements in environmental assessment efficiency, timeliness, and certainty for hydropower. This can be achieved without compromising the rigorous and comprehensive federal and provincial environmental processes that apply to hydropower projects.

1.2 Scope of this Submission

Although many of our recommendations would improve all federal EAs, the focus of this brief is on the EA process as it applies to hydropower generation projects located in regions where the *Canadian Environmental Assessment Act 2012* (CEAA 2012 or the Act) applies and is managed by the *Canadian Environmental Assessment Agency* (the Agency) in its capacity as Responsible Authority (RA) under the Act. We also discuss briefly situations in which CEAA 2012 is triggered because a non-designated project is in whole or in part on federal land.

2.0 Analysis and Recommendations

2.1 Overarching Recommendation

Hydropower projects that go through the federal EA process nearly always go through a provincial EA process in parallel. **In its recommendations, the Expert Panel (EP) should keep in mind the value of a timely, predictable, and certain federal EA process that coordinates with provincial EA processes. Avoiding duplication helps ensure that regulatory and industry resources are used in the most effective way possible. This serves the hydropower industry well, but more importantly it benefits all Canadians.** For projects that are subject to both a federal EA and a provincial EA, the goal should be one assessment. This can be achieved without compromising rigour or accountability through process substitution, equivalency agreements, joint reviews, or other harmonized processes. Federal legislation should facilitate such arrangements while taking into account the constitutional division of power.

2.2 Improving the Existing Process

Large investments in natural resources projects can be made with confidence only under stable, efficient, and predictable regulatory regimes. The predictability of a regulatory regime flows, to a large extent, from the familiarity and confidence of all those involved. After any significant change to a regime, they require several years to be re-established. The federal EA process was significantly modified in 2012. Typically the EA of a hydropower project takes more than two years to complete. Approved projects then need a number of additional authorizations before construction can start. Regulators' and industry's experience with CEAA 2012 is still limited, even when we consider all of the projects that have been subject to the Act. Government and industry are still in the early phases of its application.

If the government were to make major changes to the Act or introduce a completely new process it would inevitably create uncertainty and risk. That could easily delay or even jeopardize sound capital-intensive projects, including hydropower projects.

The government does not need to make large-scale changes. The Act includes some significant improvements over previous legislation. **We are convinced that the objectives of the ongoing review can be achieved through a combination of policy and guidance development under CEAA 2012 with only a small number of targeted amendments to the Act.**

The improvements in clarity and efficiency that resulted from the changes made in 2012 should not be lost. Otherwise one of the objectives of the current review, which is to help get resources to market[1], will not be achievable.

Prior to 2012, the *Canadian Environmental Assessment Act* was often a source of particular frustration for hydropower producers. This was owing to a number of factors, including:

- Non-existent, long and/or uncertain assessment timelines;
- Unnecessarily complex triggering mechanisms that caused uncertainty and made many well-known and low-risk project endeavours subject to a federal EA, despite the fact they were already well managed through other federal and provincial environmental regulations;
- Difficulties experienced by federal departments and agencies in effectively balancing the responsibilities of their core mandates with their responsibilities as a Responsible Authority;
- Excessive overlap and insufficient coordination between federal and provincial processes;
- Lack of consideration for the emissions reduction benefits of clean and renewable power in the assessment of major electricity generation projects.

The 2012 changes that brought improvements to the review of projects include:

- Clear and practical assessment timelines;
- Provisions for several forms of delegation to the provinces, including substitution and equivalency agreements that open the door to the highly desirable goal of one project assessment and the elimination of duplication;
- Clearer, simpler triggering mechanisms;
- Focus on large projects that have the potential for material environmental risk;
- Focus on environmental effects in areas of federal jurisdiction (this aligns with the mandate given to the Minister for this review, see note 1, page 3);
- One single Responsible Authority for each assessment (the Canadian Environmental Assessment Agency in the case of hydropower projects).

2.3 Maintaining the Designated Activities List Triggering System and the Screening Mechanism

Environmental Assessment is a planning tool. A project EA starts long before the engineering is complete and the design frozen. In fact, the EA process helps to design projects in such a way as to reduce impacts. The early start of an EA can lead to situations where it is difficult to know with certainty what authorizations or other federal decisions will be required. This caused the old triggering mechanism to be a source of risk and delays. Moreover, it opened the door to court challenges. It also multiplied the number of federal agencies that had to be involved even before the EA was officially initiated.

[1] The mandate letter of Minister Catherine McKenna mentions the following: "*Supported by the Ministers of Fisheries, Oceans and the Canadian Coast Guard, and Natural Resources, immediately review Canada's environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes that will . . .*"

The designated activities list in CEAA 2012 provides proponents and government authorities alike with a clear, quick, and simple mechanism to determine if a project is subject to a federal assessment or not.

A federal EA should be triggered when there are potential significant adverse environmental impacts in areas of federal jurisdiction that are not effectively managed through other regulatory processes. Today, the federal government as well as provinces and territories have EA legislation and processes that protect important environmental resources -- fisheries, migratory birds, species at risk, etc. In this increasingly regulated context, regulatory efficiency demands that duplication be avoided. Thus, the CEAA 2012 process should apply only where it can bring added value (ie, better protection of the environment or a more sustainable form of development beyond what is ensured by other legal or regulatory processes) and for projects of national importance. This is what the current triggering mechanism and screening provisions of the Act achieve.

Officials developed the *Regulations Designating Physical Activities* to ensure that a federal EA is triggered when there are potential significant adverse environmental impacts in areas of federal jurisdiction. As an additional precaution, CEAA 2012 gives the Minister of the environment a degree of discretionary power. The Minister may designate a physical activity not listed in the regulations to be subject to an EA if she (he) is of the opinion that the project might cause significant adverse environmental effects or there are public concerns about such effects.

The Act also allows certain designated projects (proposals comprised of one or more activities that are on the designated physical activities list) to be screened out. They are exempted from an EA, but only after a project description has been filed and made available to the public, and the Agency has concluded that the project is not likely to have significant adverse environmental effects. This provision has prevented situations where the proponent and the agency would otherwise both have had to apply resources to a federal EA even when it was clear that it would bring no incremental environmental benefit over those which other federal and provincial regulations provide.

The combination of, the designated activities list mechanism; the thresholds provided by the Regulations; and the screening out mechanism results in a generally effective and efficient use of the federal EA process.

The designated activities triggering mechanism of CEAA 2012 offers many advantages when compared to the former *Law List Regulations* or to other EA triggering mechanisms that could be considered[2]. The current mechanism should be maintained.

2.4 Maintaining the Respective Roles of the Environmental Assessment Agency and the Proponent

Under CEAA 2012, the responsibility for conducting an environmental assessment rests with one of three Responsible Authorities, the Canadian Environmental Assessment Agency; the National Energy Board (NEB); and the Canadian Nuclear Safety Commission (CNSC) or -- upon referral by the Minister -- with a review panel. The project proponent conducts the studies required by the RA and then submits an environmental assessment report, which is reviewed by the RA and any other federal authorities involved. The proponent then responds to the questions and comments from the RA. Following the public consultations mandated by the Act, the RA or the Minister makes a decision on the project and specifies any conditions that might apply to an approval.

This is an optimal division of responsibilities between the RA and the proponent. It should be maintained.

In an attempt to avoid any risk of bias, some jurisdictions in the world have tried to have an independent organization carry out the studies and produce the environmental assessment report. This is an approach that is fraught with problems. For example, it creates a disconnect between the multidisciplinary team that carries out

[2] As an example, some jurisdictions use a screening of projects for potential effects on the environment as the main triggering system. This approach does not use a project size threshold. The process requires many more resources from the regulator than the CEAA 2012 approach.

the environmental studies and the team that does the engineering of the project. That split makes it much more difficult to optimize the design to reduce environmental impacts.

Under the older versions of CEAA there were often two or more RAs involved in the EA of a single project. And many federal departments or agencies had to play the role of RA. This was a significant source of difficulty for both the proponent and the federal authorities. It made coordination of the EA difficult and forced each federal department that had the potential to become a RA to develop some in-house EA expertise. This was beyond their departmental mandates and led to significant inconsistencies in the application of the Act.

Limiting Responsible Authorities to the Agency, the NEB and the CNSC under CEAA 2012 has allowed for the development of stronger EA expertise and, consequently, more consistent EAs. As indicated in Section 1.2, the focus of this submission is on projects for which the RA is the Agency. **In our experience the fact that the Agency is now the only Responsible Authority for the assessment of hydropower generation projects and that it can draw upon the expertise of specialized departments on an as-needed basis is a major step forward in comparison to previous legislation.** It makes more efficient use of federal resources, simplifies communications between the federal government and proponents, and supports consistency and predictability in the EA process.

2.5 Maintaining and Improving Timelines

In all projects where the objective is to deliver resources to market or to satisfy the need for a public service, planning and execution that allows delivery at the time when the resource or service is needed are critical. Delay can have significant consequences. If a power generation project were to be unexpectedly delayed, electricity might have to be secured from adjacent markets. This might mean electricity purchases at high prices. It might also mean that old, high-emitting, fossil-fuel fired generation might have to be used beyond its scheduled retirement date. Measures to curtail the consumption might have to be implemented that cause negative impacts elsewhere in the economy. On the other hand, building a project too early can result in considerable additional costs and in capacity surpluses that are difficult to sell. Timely project delivery is possible only if the EA and authorization process are carried out in a reasonable and predictable period of time.

The establishment of clear statutory timelines for the federal EA process was amongst the most beneficial changes made in 2012. The provisions that direct officials to make every effort to ensure that the EA process is completed and reported within in a reasonable time add credibility to environmental assessments. They hold officials accountable and they incentivize proponents to be forthcoming with information. We recognize that in some cases important aspects of the review will need to accommodate timing flexibility. For example, consultations with Indigenous peoples sometimes require additional time to ensure that the Crown has met its legal obligations.

While the timelines included in CEAA 2012 are generally reasonable and should be maintained, improvements are needed in two areas:

A) Period between the completion of screening and the inception of the environmental assessment

CEAA 2012 establishes timelines for screenings and for environmental assessments, but there is no time limit for the period between the end of the screening (posting of the Agency decision under s.12) and the beginning of the EA (posting of the Notice of Commencement under s.17). Although the track record of the Agency in this regard has been excellent, we suggest, for additional certainty, a maximum of 15 days for this interval. Section 17 would be amended as follows:

> *17.* ***For projects that are subject to a screening, within 15 days after the posting of a decision to conduct an environmental assessment under s.12,*** *the responsible authority with respect to a designated project must ensure that a notice of the commencement of the environmental assessment of a designated project is posted on the Internet site.*

B) Minimizing the use of the "stop-the clock provisions"

The time required by proponents to carry out the studies prescribed by the Agency and to respond to any request for more information from the Agency is not included in the maximum duration established by the Act for the assessment. This is fine as the time needed to carry out certain studies and the seasonal constraints that may apply to such work are impossible to predict. In some cases, however, proponents have been confronted with series of questions on the same subject or on closely related topics that are not asked at the same time, or with questions at a level of detail or on an issue that is such that it is hard to understand why the process must be suspended until a complete response is submitted. It would be difficult and counterproductive to try to prevent such unwarranted suspension of the EA process through amendments to the Act or regulations, but we suggest that the Agency could develop administrative guidance on the use of the *Excluded Periods* provisions of CEAA 2012 (Section 48), in consultation with proponents and government departments. The objective should be to limit the delays only to situations where they are necessary to contribute to the EA, and not for any collateral purpose.

2.6 Ensuring Consistency with Downstream Federal Authorizations

Once the EA process has been completed, hydropower projects still need authorizations or approvals under various other federal and provincial statutes. Proponents whose projects are subject to the *Fisheries Act* (FA), the *Species at Risk Act* (SARA), or the *Migratory Birds Convention Act* (MBCA) have to ensure during the EA process that their projects meet the requirements of these Acts.

Departments that must authorize permits or approvals under other legislation also participate in the EA. They, and the officials from the RA, work with the proponents under CEAA 2012 to arrive at a Decision Statement that usually contains enforceable conditions. Once the Decision Statement has been issued, those departments that are responsible for a specific resource (in the case of hydropower that is often fisheries) and which have already been involved in the EA review the application for authorization submitted by the proponent. In some cases the review leads to a new assessment of the effects of the project that is not consistent with the EA and/or leads to additional mitigation measures beyond those already called for in the decision statement:

- **Ensuring better consistency throughout the overall project review and authorization process is critical to provide the certainty needed by proponents to invest.**

In some projects, as detailed engineering progresses and more information becomes available after completion of the EA, more detailed data on local impacts becomes available and more refined mitigation measures need to be developed. This is the normal process of progressive refinement of a large multi-year hydropower generation project and is not problematic as long as consistency with decisions and agreements at a higher level made during the EA is maintained.

Proponents face significant problems when the conditions of an authorization or permit do not align with those attached to a Decision Statement. The situation is compounded when permit conditions impose obligations that go well beyond what could have been foreseen during the EA preparation.

We propose the following:

- Develop administrative guidance, interdepartmental MOUs or a Cabinet directive to clarify how EA and other legislation should interact during project reviews and to ensure that permit conditions from other federal authorities are aligned with the findings of the Environmental Assessment and the conditions set out in the Decision Statement[3];

[3] Each piece of legislation accords the responsible Ministers concurrent powers and duties. Each is obliged to administer the various acts in the way that best serves the public interest, and no act is subordinate to any other. We thus suggest to improve

- Allow proponents to ask the Major Projects Management Office (MPMO) to monitor the consistency between EA and downstream authorizations;
- Provide, through policy, a provision to allow proponents to opt for the concurrent review of applications for authorizations and permits during the EA process. Authorizations and permits could then be issued shortly thereafter. This will be a useful tool in those projects in which project design is sufficiently refined at the time of the EA to support applications for authorization under the Fisheries Act.

2.7 Including a Formal Power to Amend Decision Statements

Currently, there are no provisions in CEAA 2012 for amending the conditions of the decision statement, even if subsequent construction and operation of a project indicate the need for changes. The Act does not prohibit such changes either, but the absence of a specific provision in this regard is a cause of uncertainty.

As detailed engineering progresses or new information becomes available during construction, after the decision under the CEAA 2012, often changes to project design or mitigation measures become necessary. As the project then enters into operation, the monitoring program might show that some impacts are identical to or less than the predicted impacts, and remain stable over time. Continuing to monitor such impacts year after year, or in some cases for decades, provides no useful information and amounts to simply an unnecessary project cost.

We recommend giving the decision-maker under CEAA 2012 a clear power to amend the conditions of decision statements, including modifications to follow-up programs. To this effect, we suggest the following changes to the Act:

> Consequential amendment to s. 54
>
> *(7) For greater certainty, a decision statement issued under this section includes an amendment to the decision statement made under section 54.1*.
>
> Amending power
>
> *54.1 (1) For the purpose of this section, the following definitions apply:*
>
> *"new information" means information regarding*
>
> *(a) additional detail or changes to the design, construction, or operation of the designated project;*
>
> *or*
>
> *(b) additional detail or changes to the environmental effects referred to in subsection 5(1) that was not available at the time the decision was made under section 52.*
>
> *"existing conditions" means conditions included in a decision statement under section 54.*
>
> *(2) Subject to subsections (3) to (5) the decision maker referred to in sections 27, 36, 47 and 51 may amend a decision statement issued under section 54*.
>
> Scope of amendments
>
> *(3) An amendment to the decision statement issued under subsection 54.1(2) may:*
>
> *(a) amend the existing conditions;*
>
> *(b) add new conditions; or*
>
> *(c) delete the existing conditions*.
>
> Pre-conditions for amendments – amending existing conditions or adding new conditions

consistency between EAs and authorization by improving coordination through a directive or guidance and not through changes to legislation.

(4) An amendment to amend the existing conditions or add new conditions to a decision statement under subsection 54.1(3)(a) and (b) may be made, only if the decision maker

(a) has received new information; and

(b) is of the opinion that the amendments to the existing conditions or the proposed additional conditions are necessary to ensure the conclusions in section 52(1)(a) or (b) regarding the adverse environmental effects of the designated project are not significantly altered.

Pre-conditions for amendments – deleting conditions

(5) An amendment to delete conditions in a decision statement under subsection 54.1(3)(c) may be made, only if the decision maker

(a) has received new information; and

(b) is of the opinion that the conditions are not necessary to ensure that any significant adverse environmental effects of a designated project are mitigated.

2.8 Environmental Benefits of Renewable Non-Emitting Power Projects

CEAA 2012 is focused almost exclusively on the avoidance of significant adverse environmental effects. Biophysical environmental benefits, like those that occur when a hydropower project creates new fish habitat or a cleaner electricity generation project displaces existing or proposed higher-emitting sources of electricity, are not taken into account.

In order to ensure a more balanced consideration of all biophysical effects that fall under federal jurisdiction we suggest the Expert Panel explore taking into account positive biophysical environmental effects, such as those mentioned above, without requiring significant changes to CEAA 2012**.**

2.9 Making Increased Use of Strategic Environmental Assessment and Regional Environmental Assessment

Environmental assessment is a planning and decision-making tool used to anticipate adverse environmental effects of physical projects before they occur, to provide plans to minimize and monitor those effects, and to facilitate public involvement in the review of projects. Over time the scope of assessment and the issues considered have often broadened into more of a public policy debate rather than a tight consideration of the effects of the project under study. The result has been a process of increasing complexity, longer decision timelines, and expectations that the EA process is the platform for debating broad public policy issues. We believe these expectations are misplaced. CEAA 2012 has provided a more predictable and better structured process for EA. However, it is still perceived by some stakeholders to be a public policy forum with a frame of reference that extends well beyond the project under consideration. In addition to slowing the process and making it needlessly complex, this trend undermines the usefulness of the EA. Properly conducted, an EA can establish baseline conditions and acceptable thresholds that can guide and inform subsequent cumulative effects analyses. We believe that some of the issues that are outside the scope of the project EA can be dealt with through a regional environmental assessment (REA) or a strategic environmental assessment (SAE).

In order for federal project EA legislation to be able to play its role without creating undue expectations while ensuring that REA and SAE are used effectively we make the following recommendations:

1) Affirm in the Act that its first goal is to contribute to the planning of designated **future** projects (physical activities) by protecting from significant adverse environmental effects the components of the environment that are within the legislative authority of Parliament;

2) **The Expert Panel should encourage governments to cooperatively undertake Strategic Environmental Assessments (EA of policies, programs, etc.) and Regional Assessments** to provide better focus for proponent led project specific assessments;

3) The provisions of CEAA 2012 that provide for the consideration of the results of regional studies in screening decisions and as a factor in an EA should be maintained and broadened to include the consideration of the results of regional studies conducted by other governments as well as the results of strategic assessments.

SEA and REA can only be carried out by governments and are beyond the scope and capacity of any single proponent. While useful in providing much needed background information and helping to inform project planning and decision-making, they cannot be seen as a substitute for a project EA. What is required is a willingness to fund such endeavours, engage stakeholders, and make results widely available. It also requires close coordination and co-operation between federal and provincial jurisdictions.

2.10 Reviewing the requirements for Indigenous consultations at higher governmental levels and making adjustments to the EA process that may be needed once the review is completed

The most senior officials of government need to clarify for regulators, stakeholders, and proponents what are the government's consultation obligations with respect to Indigenous peoples in areas where the government must issue decisions. Any implications for government decision-making or consultation arising from the recommendations of the *Canadian Truth and Reconciliation Commission* and the government's endorsement of the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) need to be spelled out, keeping in mind the legal context and particularly the Supreme Court's decisions. At that point the Environmental Assessment process should be informed of the outcome, and policies and guidance documents updated. Until the government completes its high-level whole government review of requirements for Indigenous consultation it will find it difficult to update policy and guidance under CEAA 2012.

The factors that will need to be considered in adopting updated policies and procedures under CEAA 2012 and in updating the March 2011 *Guidelines for Federal Officials to Fulfill the Duty to Consult* include:

- Legislation or policy cannot mandate participation or the acquisition of skill sets. Government and proponents can only offer opportunities to participate in the planning and assessment, but actual participation is always on a volunteer basis (although financial assistance may be available) and depends on the willingness to get involved. Such willingness often depends on the existence of a long-term relationship with the project proponent. In the hydropower industry, early engagement with Indigenous and other local communities is common practice and contributes to fostering willingness to engage in project planning activities.
- The panel must remain cognizant of "consultation fatigue". Indigenous groups are on a never-ending cycle of consultation and requests to participate from all levels of government and developers. The panel should look for ways to rationalize their workload and the demands made on them both in terms of manpower and timing.
- Guidance on the manner of inclusion of Métis and non-status Indians is needed.
- Sufficient flexibility should be provided in the consultation requirements of CEAA 2012 to facilitate harmonization with other consultation processes.
- There needs to be a clear delineation of the role and responsibilities of proponents and government with respect to constitutionally mandated and statutory consultation. The proponent's engagement with Indigenous groups should be more fully taken into account by the federal departments that consult these groups.

- There should be full coordination between all federal departments involved, not only during the EA process, but also throughout the EA and authorization phases. The federal government should initiate its consultations early and ensure better continuity and coordination throughout the consultation processes.
- Consultations by the federal and the provincial governments should be carried out jointly or be fully coordinated.
- The consultation effort ought to be proportional to the potential impact on Indigenous rights and it should reflect the sliding scale enunciated by the courts. Although strength of claim analysis is done under current practices, consultation efforts do not seem to always be proportional to the potentially impacted rights.
- Maintaining flexibility to respond and adapt to regional and cultural differences to help promote new relationships with Indigenous and non-Indigenous stakeholders is of paramount importance.

2.11 Work with the Provinces to Reduce Duplication

In the hydropower industry, nearly all large projects are subject to both a federal EA and a provincial EA. This leads to significant process duplication. In addition, the EAs of such projects are often poorly coordinated between jurisdictions. This results in losses of time and energy without creating environmental benefits beyond those that one single assessment would have brought.

Coordination agreements between federal and provincial governments have helped to harmonize processes between jurisdictions to an extent, but they do have major limitations. First, and with the exception of joint panel reviews or substitution agreements, these agreements do not change the fundamental flaw in the system. Projects are subject to two parallel environmental assessments. The agreements only provide a limited degree of coordination. Experience shows that their effectiveness varies depending upon the region and the project. The majority of these agreements have not been updated since the adoption of CEAA 2012. They badly need to be reviewed and reinvigorated.

In summary, given the concurrent federal and provincial responsibilities, it is essential to ensure that EAs are conducted in a non-duplicative manner. If that can be guaranteed it would fully respond to the Canadian Council of Ministers of the Environment (CCME) recommendation to avoid duplication. Where CEAA 2012 is triggered and an EA is also undertaken under another jurisdiction, the *one project - one assessment principle* should be the objective. During and at the end of the EA process, decisions by federal and provincial governments should be coordinated. All federal and provincial Indigenous consultations should also be coordinated. In keeping with the *one project - one assessment principle* we recommend the following:

- The delegation, substitution, and equivalency provisions of CEAA 2012 should be maintained and the EP should explore the possibility of making these provisions easier to use and more accommodating of the requirements of provincial EA legislation;
- Wherever possible, process substitution should be used; if full process substitution is not possible, a thorough harmonization with the timelines of the stricter of the two jurisdictions should be implemented.

2.12 Improving the Process for Projects Located on Federal Land

The treatment of non-designated projects on federal lands (S. 66 & S. 67 of the Act) currently lacks the predictability and timeliness of other elements of CEAA 2012, and should be considered in the current review. Proponents of hydropower projects may have projects that are located in whole or in part on federal land. They

need to know in advance the requirements they will face in terms of environmental studies, consultations, timelines, etc. Screening, as it existed under the CEAA prior to 2012, was inflexible and often put an undue burden on proponents of small, low-environmental risk projects.

We do not suggest including in legislation a simplified EA process for non-designated projects on federal land nor do we suggest getting rid of the current self-assessment principle of Section 67. **The difficulties related to the application of Sections 66 and 67 of CEAA 2012 can be addressed through the further development of guidance and policy but the Agency's current guidance is imprecise. We would like to see it include, typical desired timelines; examples of project size thresholds above which consultation is required;** and a list of typical environmental effects to be expected from various types of projects -- especially for the type of projects frequently undertaken by federal authorities.

Some authorities – for example, *Indigenous and Northern Affairs Canada* – have produced their own guidance documents. The government should make an effort to improve consistency amongst them. It is most important that timelines are specified for process milestones. **The EP might consider recommending Cabinet guidelines that would specify maximum time limits applicable to all government agencies.**

2.13 Improving Transparency

In keeping with the government's objective of restoring public trust in the environmental assessment process we would suggest creating a central information source on federal EAs. **The government could maintain key EA documents – including follow-up and monitoring reports – on the CEAA registry or in some other web-accessible form. It could further enhance the transparency and credibility of the overall process by ensuring the databases are easily searchable.**

2.14 Focus on the best environmental outcome not on best technology and take into account cost when deciding on mitigation measures

One of the objectives of the review, as described in the mandate letter of the Minister of the Environment is to *require project advocates to choose the best technologies available to reduce environmental impacts*. The objective is to reduce the impacts as much as possible. It is often difficult and can, in fact, be counterproductive for government agencies to specify in legislation or regulation what technologies should be used. Regulations cannot take into account the specific characteristics of each project nor can they keep pace with technological change. Moreover, imposing "the best technology" without considering cost both limits the considerations of what is meant by "best" and can make an otherwise sound project unfeasible. It can also force a proponent to implement a very costly mitigation measure for an inconsequential environmental gain. It distorts the allocation of environmental investment away from measures that could provide material environmental benefits. For example, in a hydropower project, it may be much more beneficial to use offsets than to use a special turbine to maintain the productivity of fisheries.

Striving to create the best environmental outcome economically achievable is a desirable objective. But this can only be done by incorporating flexibility in the means to do it. **Consequently, legislation or regulations should not force the choice of technology. The government's concerns in this area can be satisfied through outcome-based decision-making and an RA practice of asking proponents, in EA guidelines, to justify their technology choices.**

3.0 Conclusion

The Canadian Hydropower Association believes that few changes to CEAA 2012 are needed. The issues described in the terms of reference of the EP can all be addressed through a combination of new or updated policies and guidance, accompanied by some relatively minor, targeted amendments to the statute. CEAA 2012 is barely 4 years old. Repealing, replacing, or seeking major amendments to the Act would inevitably create undue regulatory uncertainty. That uncertainty could slow investments, including investments in the renewable electricity generation that is critical to Canada achieving its ambitious greenhouse gas emissions reduction objectives.

The priority must be on fine-tuning a responsive process through policy refinement, guidance and some regulatory improvements to improve efficiency, inclusiveness, and the quality of environmental assessments.

The federal environmental assessment process is and should remain focused on major projects and avoiding or minimizing the adverse effects on the environment in areas of federal jurisdiction. It should continue to be science-based, to facilitate the integration of traditional and community knowledge, and to foster participation by the public and Indigenous communities. It should to be easy to harmonize with provincial processes, avoid duplication and be flexible to accommodate regional and cultural differences and a diversity of projects.

By ensuring that adverse environmental effects are minimized, the federal EA mechanism will play a significant role in supporting sustainable development. When looking at how to steer Canada's development towards a more sustainable path, CEAA 2012 should not be considered in isolation; there are many other federal and provincial policy and regulatory instruments that already exist, including provincial project EA mechanisms that look at a broader diversity of effects including socio-economic effects, strategic environmental assessment, regional assessments, publicly debated energy policies, etc.