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VIA EMAIL - Original to follow by mail

Also submitted online at: <http://www.discussionpaper.ca/>

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RE: Environmental and Regulatory Reviews, Discussion Paper, June 2017

Dear Ministers:

The Business Council of British Columbia (the Business Council) is pleased to submit these comments on the June 2017 Environmental and Regulatory Reviews Discussion Paper (the Discussion Paper).

We thank Minister McKenna for the in-person meeting with our members on August 24, 2017, and for the previous session with Marlo Reynolds and Jesse McCormick from her staff in May. These meetings offered opportunities to explore issues and concerns. We appreciate your government's willingness to engage.

In general, the Business Council supports efforts to facilitate continuous improvement across Canada's environmental regulatory regime. The completeness of the reviews of the *Canadian Environmental Assessment Act*, *National Energy Board*, *Navigation Protection Act*, and *Fisheries Act* is commendable, with a wide range of topics tackled in all four cases. The Discussion Paper proposes a moderate set of changes to current environmental laws and regulatory processes and seems to recognize Canada's already high standards in these domains.



We understand the challenges that policy-makers face in seeking to reconcile the diverse views and expectations of many interested parties with respect to environmental assessment and project development. That said, to maintain and improve Canada's competitiveness for new business investment, it is imperative that federal and provincial regulatory processes governing project development provide for process certainty, predictable costs, and clear timelines.

We believe the starting point for next steps is to acknowledge Canada's overall positive performance in environmental protection, in comparison to many other jurisdictions.¹ Policy-makers must also be aware of a pattern of weak investment in some Canadian industry sectors,² coupled with growing scepticism about our country's ability to make timely decisions around new projects, particularly in the natural resource and infrastructure sectors. Growing global demand for the resources and raw materials that Canada produces in abundance, and our dependence on exports of these same products,³ underpins Canada's high standard of living and is critical to the continued economic well-being of Canadians. Therefore, any changes to the assessment framework should aim to lessen uncertainty for Canadian industries and companies operating in highly competitive global markets. Otherwise, the potential benefits from Canada's resource wealth, as well as the clean tech innovation that is an increasingly important feature of our natural resource industries,⁴ will be at risk.

Turning to the details of the Discussion Paper, the first 17 pages are mainly focused on the context, summarizing considerations leading to the Proposed Program and Legislative changes beginning on page 18. If this assumption is valid, much of what is proposed in the Discussion Paper is acceptable to our members, subject to the important caveats noted below. In the comments that follow, we also offer our views on a number of issues raised in the front section of the Discussion Paper.

Environmental Assessments and the National Energy Board

With respect to **environmental assessment** and the **National Energy Board**, we offer the following comments:

- *Single government agency:* We favour a single federal government assessment agency for all project types except energy, and for non-designated projects where existing life-cycle regulators maintain a lead role. We re-iterate comments in our May 2, 2017 submission on this point, as well as on the proposed scope of the agency's authority. The plan to restructure the governance of the National Energy Board (NEB) addresses many of the concerns raised by stakeholders. It is essential to maintain the NEB's expertise, responsibilities, and western location. The NEB has specialized sector-relevant knowledge in both project reviews and energy

¹ <http://epi.yale.edu/country/Canada> and *An International Comparison of Leading Oil and Gas Producing Regions*, Environmental Regulation, Worley Parsons.

² *Equipment Failure: Feeble Business Investment Costs Canadians their Competitive Edge*, William B.P. Robson, Aaron Jacobs and Benjamin Dachis, C.D. Howe Institute, March 24, 2017.

³ <http://www.bcbc.com/bcbc-blog/2017/three-hard-truths-about-canadas-trade>.

⁴ *Clean Technology in Canada's Natural Resource Sectors: A Discussion Paper*, Natural Resources Canada 2016.



company operations that is necessary to ensure sound regulatory decisions. Policy-makers should not overlook the fact that that energy, broadly defined, is Canada's largest export sector measured on a value-added basis, with crude oil ranking as the leading source of Canadian export earnings in the decade to 2015.⁵

- *Decision-making:* We recommend retaining Ministerial decision-making along with the option of referral to Cabinet, as well as maintaining Ministerial discretion to designate or exclude projects from review. We also support the idea of shared decision-making with Indigenous people, consistent with the laws of Canada. The Discussion Paper provides few details on how this is to be accomplished. We suggest that British Columbia, home to over 30% of Canada Indigenous groups, may be a source of relevant models and useful learning in this respect. The Business Council's 2016 Memorandum of Understanding with the BC Assembly of First Nations and the related Champions' Table initiative are examples of steps being taken in the BC context to facilitate more direct dialogue about options that respect the unique governance structures and aspirations of Indigenous people.
- *Early planning:* This is a laudable goal, in principle. Clear guidance is needed, but in our view, this does not necessarily require legislative change. Including the criteria and approach in guidance documents would be more efficient and make it easier to introduce adjustments as the process continues to evolve. The primary purpose of early planning is to canvas and collect information on the issues that must be included in the final application. In this regard, British Columbia's existing model for early planning, although not perfect, may be a promising approach. The process outlined in the Discussion Paper includes working group input (see comments on Advisory Committees below) and an opportunity for public input within a defined timeline. The end product is a scope of work for a subsequent application. Thus, proponents have a clearer idea of the studies and research needed to support an application, which facilitates the development of project cost estimates and budgets. This process also establishes expectations about consultation activities and time-frames for review, which should help to increase public confidence. We caution that while early planning may help to provide clarity to the EA process and create a roadmap for participants and other stakeholders, seeking to achieve consensus on the review process at this early stage is likely to be unrealistic in practice and, if not managed properly, could lead to more delays and higher overall costs.
- *Funding:* Working with industry to define recoverable costs is critical. Participant assistance should be reasonable and directed at promoting constructive, interest-based dialogue. Not all participants in a review process can or should be eligible for funding. As such, we reiterate our support for a "standing test." Those stakeholders who have the potential to be directly affected, or have relevant information and/or expertise to contribute, should play a more significant role than others with either an indirect or simple interest in a project.
- *Advisory committee:* The Business Council supports the idea of project advisory/working committees, but we do not see a need to legislate this requirement. The need for and scope of

⁵ That is, based on the real GDP of energy production and exports.



work for such committees can be determined by the CEAA/NEB/life-cycle regulator/project manager, based on the specific conditions of a project.

- *Project List*: Clarity on what is in/out of scope in a list is better than the uncertainty inherent in regulatory triggers; a list is easier to understand and more transparent. We are pleased to see a clear statement on this point. We support regular reviews of the list, using a structured evaluation process developed in consultation with stakeholders.
- *Transparency*: Greater transparency is the sum of many parts. It is often discussed as a concrete and executable concept unto itself. However, in practice transparency is aided by access to information and clearly defined roles, responsibilities, and behavioural expectations of government, project proponents, and stakeholders. The reasons for decisions should be articulated in clear writing that highlights areas of agreement and disagreement in plain language. The concept of transparency cannot be legislated.
- *Scope of assessments*: The business community supports including economic and social elements in project assessment, as well as considering both positive and negative impacts and the effects on the environment and the health of Canadians. In the experience of many of our members, this already occurs in practice. Any changes to the current design must respect provincial jurisdiction; in our view, the existing provisions for substitution are tailor-made for dealing with this issue. Importantly, the approach adopted by Canada must set clear criteria and ensure that project assessments do not become forums for inconclusive debates on broader questions around the types of business and industrial activity that Canada permits. These higher level policy questions are more appropriately dealt with at the legislative and government levels.
- *Gender Analysis*: There is insufficient detail on this topic for us to provide comments.
- *Peer Review*: In principle, the idea of peer review holds some appeal. The challenges include who pays, the criteria for selecting what warrants peer review, and the risk of peer review being used to obstruct the process. We are concerned that this proposal as outlined will duplicate work, add costs, and do little to improve transparency. There is also the potential for abuse by project opponents who may call into question the results of studies if they conflict with their hoped-for outcomes — even in cases where they were involved in helping to scope the original study terms of reference. In our view, a regulatory solution is not needed. A better approach is to focus on developing the conditions and criteria for studies such that subsequent peer-review is unnecessary, thus avoiding my-expert-versus-your expert outcomes.
- *Substitution*: We continue to support substitution and believe British Columbia is a success story in this area.
- *Indigenous people*: The business community supports full and direct engagement between the Crown and Indigenous people. The courts and existing case law are clear on this point. It is our view that CEAA 2012 does not need modification to accomplish this objective.



- *Monitoring and Compliance:* The Business Council does not support the transformation of the assessment framework into a permitting process. Assessment is and should remain mainly an information gathering and planning tool, as confirmed by the courts over time. Permitting and licensing decisions and subsequent compliance and enforcement (C&E) activities are the responsibility of line-agencies with authorities under non-CEAA legislation and of the provinces, as appropriate. Any amendments to the C&E provisions of CEAA 2012 must avoid duplicating provincial capacity and responsibilities.
- *Amendments to Project Certificates:* We support the inclusion of a clear and statutorily enshrined amendment procedure.
- *Timelines and flexibility:* We support maintaining timelines for review and rigorous adherence by CEAA project managers who understand the time-cost-scope trade-offs and constraints involved in review processes.
- *Information/Data:* The business community and ENGOs occupy common ground when it comes to improvements in information/data management. The federal and provincial governments must strive to resolve data-sharing protocols, data definitions/format conflicts, and improve data storage capacity, along with developing accessible tools for mapping and analytics. We support investments in data infrastructure which can help to resolve concerns expressed by stakeholders about cumulative impact assessment, regional/strategic assessment, and consultation/public participation, as discussed next. We also encourage the development of guidance for preparing plain language summaries of technical and scientific information so that applications and their supporting studies are less confusing, ambiguous, or overwhelming.
- *Cumulative Impact Assessment and Regional Assessment/Strategic Assessments:* We agree with the need for a more complete picture of the state of the environment and note that cumulative impact assessment (CIA) in CEAA 2012 is already enabled – sections 4(1)(i) and 19(1)(a). As such, we conclude that no legislative change is needed. Governments around the world struggle with the concept of CIA and its implementation, since “practically speaking there is real no way that [impact assessment], because of its site-specific, single development orientation, can do the job of [CIA].”⁶ We suggest that resolving cumulative impacts is partly achieved with better information/data (as discussed above) and the adoption of a robust risk assessment framework, and that it can be supported by targeted regional assessments (i.e., land use planning), especially in areas where there are significant development pressures. However, as you know, British Columbia completed comprehensive land use planning exercises in the 1990s. It was a costly effort that required substantial time and resources and did not necessarily increase certainty for industry, communities, or Indigenous people. The utility of regional assessment depends on the terms of reference, being clear about what it can and cannot accomplish, and a commitment to collaboration with provinces in design and delivery. The lack of a regional assessment must not be used as reason to delay project reviews or decisions.

⁶ *Cumulative Effects: A Binational Perspective*, W. James Erckmann, Institute for Environmental Studies, University of Washington, 1986.



- *Consultation and Public Participation:* We acknowledge the importance of consultation with affected stakeholders in project development. How best to engage is an evolving field of behavioural and social science. “Meaningful” engagement must lead to a focus on actual differences, rather than imagined ones. As such, one size does not fit all. The Business Council recommends that the government avoid prescribing specific methods of engagement (e.g., town hall meetings), since much of what is done in-the-field involves experiments that actively explore in real-time how best to discover and address changing stakeholder interests and values. We welcome opportunities for input to guidance documents, drawing on the experience of our members in a wide array of project types affecting communities, stakeholders, and Indigenous groups.
- *Indigenous knowledge:* We support the inclusion of Indigenous knowledge as part of the data set for evaluating projects. While the insight from Indigenous people varies depending on their “place”, transforming this information into usable inputs for assessing the potential impacts of a project depends on a consistent form and analytical approach. We encourage the federal government (and provinces) to work with Indigenous people in this regard.

Other Legislative Changes

On the proposed changes to the **Navigation Protection Act (NPA)** and **Fisheries Act (FA)**, our comments on public participation, funding, and Indigenous roles and responsibilities noted above are applicable for both the NPA and FA.

- *NPA – General:* The protection of navigation should not be conflated with environmental protection. It is important to maintain a distinction between these to ensure effective and efficient regulation.
- *NPA Schedule Amendment:* We recommend developing clear criteria for deciding if and how a river is added to the list of scheduled waters.
- *Regulating obstructions and certain classes of works:* We oppose this proposal, in the absence of additional details. A plain reading suggests the provision effectively introduces a “trigger” to the NPA. It also appears to conflict with developing criteria for adding a river to the list of scheduled waters, and could overlap with provincial land and resource management responsibilities.
- *Complaint procedure:* Adding a complaint procedure makes sense in principle. But the Business Council is concerned this could be used as a back door for designating projects. It will be important to “[clarify] the criteria used for the aqueous highway test in determining whether a given water is navigable.”
- *Fisheries Act – HADD:* The Business Council is concerned that a reversion to HADD will re-add uncertainty to decision-making and increase costs. As noted in our December 2016 letter to Ministers Leblanc and Garneau, the current language around “serious harm to fish” includes the killing of fish and/or the permanent disruption or destruction of fish habitat. It also grounds a



science-based investigation of the consequences of a project or activity in the analysis of habitat impacts in a less arbitrary way than would be the case under the HADD language.

- *Programming:* The Business Council supports the identification of restoration and rebuilding priorities, but we do not believe this requires legislative change.
- *Capacity-building:* We strongly recommend strengthening federal government staff capacity for science, monitoring, and compliance activities, accompanied by strong guidance for fisheries officers on interpretation of the FA.

Final Comments

Although not addressed in any of the reviews, we are concerned that Canadians lack a common set of facts about our economy, what drives it, the complexity of our regulatory systems, and the extent to which safeguards already exist to protect the environment and human health. Too often, we see this foundational understanding missing in the discussion of economic and industrial development projects, leading to ill-informed conclusions, unjustified negative commentary, and unnecessary conflict. The Business Council supports stepped-up investment in education and communication about Canada's economy, improved access to information in forms and at levels understandable by the average citizen, and a renewed effort by Parliamentarians to understand and defend the kinds of businesses and industrial activities that Canada permits and encourages.

Finally, we urge caution in any transition process. A protracted timeline would extend current uncertainty, fuel negative sentiment towards industrial development, and exacerbate the growing rural-urban divide. "Modernizing" a process must be about becoming more efficient and effective at identifying the core issues. Ultimately, improved economic and environmental performance is achievable if our system can adapt to changing science and social expectations in a logical and moderated fashion.

Our members stand ready to work with your government on all these issues.

The Business Council, established in 1966, is an association representing 260 large and medium-sized enterprises active in every sector of British Columbia's economy. We are a public policy organization, providing research, analysis, commentary, and advocacy on issues relevant to strengthening Canadian and BC competitiveness and prosperity. We support competitive taxes, effective and nimble regulation, and responsible fiscal policies to enable vigorous business activity and provide the resources necessary to pay for education, health care, and other public services for citizens. We have a proven record of constructive policy advocacy on environmental sustainability, reconciliation with First Nations, innovation and productivity, climate change and energy, tax and fiscal policy, sound regulation, trade policy, and the development and attraction of skills and talent.



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Our members come from all major sectors of the province's economy, including forestry, energy, mining, manufacturing, transportation, advanced technology, health research and life sciences, tourism, retail and wholesale trade, construction, utilities, post-secondary education, and professional, scientific, and technical services. Taken together, the enterprises, academic institutions, and sectoral associations affiliated with the Business Council account for approximately one-quarter of all private sector payroll jobs in BC.

Yours sincerely,

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DM/vjc

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