



Canadian Environmental Assessment Agency

Agence canadienne d'évaluation environnementale



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31 March 2000

By Email: jim.clarke@ceaa-acee.gc.ca

And By Fax: 819.953.8592

Mr. Jim Clarke
 Director, Legislative and Regulatory Affairs
 Canadian Environmental Assessment Agency
 14th Floor, Fontaine Building
 200 Sacre-Coeur Boulevard
 Hull, Quebec K1A 0H3

Dear Mr. Clarke,

Re: Joint Submission by West Coast Environmental Law and Sierra Legal Defence Fund to the CEAA 5 Year Review

West Coast Environmental Law (WCEL) and the Sierra Legal Defence Fund (SLDF) offer the following comments for your consideration regarding the CEAA 5 Year Review. WCEL would like to confirm that these comments are a compliment to our participation in the Regulatory Advisory Committee (RAC), and recognizing that the RAC report is not yet final, we have limited our comments in this main document to those issues unlikely to be consensus recommendations.

These comments are not an exhaustive list of concerns and issues. Given our own time and resource constraints, we have opted to focus on key issues and specific recommendations based upon our experience with the application of the Act to date. We are also aware that there are a number of other avenues whereby public interest concerns are being considered in more detail, such as the work of the RAC; the results of the Public Consultation Workshops; and to some extent, other internal government review efforts. Finally, we generally endorse the recommended approaches identified in the Citizen's Briefing Kit published by the Canadian Environmental Network.

Additionally, we do not offer any recommendations on dealing with First Nations issues and participation in CEAA on the grounds that First Nations themselves are much better positioned to make specific recommendations which reflect their interests and needs with respect to EA. We do however, recommend the development of regulations for projects on First Nations land as a high priority. This regulation process should with full involvement of First Nations and potentially affected communities. Also, with respect to Section 1 of the discussion paper "Making the Process more Predictable, Consistent and

Timely", we note that a great deal of time could be saved during the EA process if the parties approached First Nations communities from the earliest point in the planning stages and assessed the potential for environmental and social impacts from the perspective of those individual communities.

We have structured our comments by providing some preliminary overarching points, and then providing more specific comments on the three thematic areas outlined in the Agency Discussion Paper. We also include three appendices offering in depth analyses and recommendations for specific aspects and provisions of CEAA:

APPENDIX 1 - Page 7 - S. Shrybman and L. Nowlan, WCEL.
Recommendations on Projects Outside of Canada.

APPENDIX 2 - Page 10 - S. Elgie, SLDF. Detailed Review of Key Issues.

APPENDIX 3 - Page 20 - C. Rolfe and B. Gibson (1994), WCEL and University of Waterloo. Assessment of Policies and Programs under the *Canadian Environmental Assessment Act* - Recommendations for Reform.

PRELIMINARY COMMENTS

The three thematic areas as described focus primarily on the process and implementation issues relating to the Act. While these areas are important, we note that both the preamble and the purposes of the Act address other objectives. The preamble recognizes the Government's goal of achieving "sustainable development by conserving and enhancing environmental quality and ... encouraging and promoting economic development that conserves and enhances environmental quality." One of the purposes of the Act is to encourage responsible authorities to take actions that "promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy."

We are concerned that the dominant focus on streamlining the process and implementation of the Act may come at the expense of evaluating our progress on these important objectives. In our view, this "comprehensive review of the provisions and operation of the Act" should include an evaluation of the Act's effectiveness in meeting these sustainable development and environmental quality enhancement objectives so well articulated in the preamble and purposes. Improving the process may not necessarily strengthen the Act, and we are concerned that by focussing almost exclusively on the process, we may limit the Act's ability to achieve its important objectives.

Our comments are premised on 3 key themes:

ENVIRONMENTAL ASSESSMENT IS AN IMPORTANT PLANNING TOOL WHEN EFFECTIVELY APPLIED

In order for EA to be used as a planning tool at the federal level, the Act needs to be triggered earlier than is currently the case. Experience with EA provincially, and in other jurisdictions has proven that all parties benefit when environmental impacts and mitigation options are evaluated early in any review process, far in advance of irrevocable decisions being taken. In addition, the Act should provide for assessments to be undertaken of policies, plans and programs. Effective assessment of policies, plans and programs would obviate the need for site specific assessments in certain instances. It would also mean that technical and public consultation efforts during an EA could focus on the specific issues associated with the proposal, and not on broader issues. Please see Appendix C for detailed submissions on how CEAA can be amended to

enable assessment of policies, plans and programs.

A STRONG FEDERAL ROLE IN ENVIRONMENTAL ASSESSMENT IS ESSENTIAL

Legislative and policy changes at the federal and provincial level in the past 10 or more years have seen a gradual reduction in the federal role in environmental protection. We wish to emphasize that it is essential that the federal government retain a meaningful role in the conduct of EAs in all areas where it has jurisdiction, and, if need be, exercise their paramount constitutional authority in this regard. Allocating appropriate resources to those authorities required to conduct EAs is an important element ensuring a strong federal role.

THE ROLE OF THE AGENCY SHOULD BE STRENGTHENED

Strengthening the role of the Agency has the potential to remedy many of the existing problems associated with the Act's implementation. It would ensure that there is a centralized, knowledgeable, expert body within the federal government that could be responsible and accountable for, more consistent application of the Act across government ministries. The Agency should function as a coordinating agency which provides notification and information about EA.

1. MAKING THE PROCESS MORE PREDICTABLE, CONSISTENT AND TIMELY

One of the significant criticisms of CEAA has been the ambiguity surrounding how discretion under the Act is exercised. This is addressed to a certain extent in the CEAA Responsible Authorities Guide, but standards and guidelines set out in the Guide are not law and therefore not enforceable. Many of the following recommendations underscore the need for more extensive use of regulation prescribing the Act's application.

RECOMMENDATION: Define "Scoping" in the Act

One particularly problematic area of ambiguity is the lack of definition of scoping in the Act both with respect to the scope of the project and scope of the assessment. The United States, which has a longer history of environmental assessment, has clarified many areas of ambiguity in the *National Environmental Protection Act* by enacting regulations which direct the exercise of discretion. In particular, determination of the scope of the project which will be subject to EA has been clarified through the use of regulations. These regulations have established clear benchmarks for the exercise of discretion that make the EA process easier to administer and simpler to predict.

RECOMMENDATION: Integrally Linked Components of a Project must be Assessed Together

Both section 15 or section 16 should be amended to make clear that all integrally linked components of a project must be assessed in a CEAA assessment. Either the integrally linked components should be considered part of the project or they should be assessed in the consideration of cumulative environmental effects. Piecemeal or incremental assessment should not be allowed. Such a clarification of the need to do one assessment for one project should result in the need for fewer assessments.

RECOMMENDATION: Need to put Substantive Limits on the Final Decision

It is often the case that good information is generated during the EA process is not always incorporated into decision making. There is a need to clarify the test against which final decisions pursuant to sections 20, 23 and 37 must be made. The responsible authority or the Minister of Environment must make decision consistent with the purposes of the Act or justify their decision not to (s. 37(1) (a)(ii)). These sections should be amended to clarify this requirement.

RECOMMENDATION: No Privative Clause

A privative clause is completely inappropriate, and has the potential to vitiate the Act. CEAA is a statute of general application, applied by all federal departments. It is largely an objective fact finding exercise with a limited role for the individual expertise of any of the line departments administering it. The breadth of individuals administering the act alone demands that implementation of provisions under the Act be consistent. Precluding judicial review of these decisions is likely to undermine rather than enhance consistent application of the Act.

RECOMMENDATION: Use the Unused Tools

Utilization of some of the existing tools available under the Act may also increase the predictability and consistency of its application. Three such examples are: the application of the class screening provisions in section 19; the mediation provisions in sections 29 to 32; and the follow up provisions in section 38. A broader use of the class screening provisions would mean that consistent and transparent criteria could be established for similar screenings. Application of the mediation provisions may obviate referrals to a panel in some cases. The implementation of follow up programs would enable some form of post EA evaluation, which could provide valuable information for the design and application of subsequent EAs on similar projects.

2. IMPROVING THE QUALITY OF ENVIRONMENTAL ASSESSMENTS

As we have learned from the recent report by the Panel on Ecological Integrity in Canada's National Parks, released last week, fulfilling a government mandate to protect the environment can require a cultural shift within a department. Although the Agency has worked hard to create a culture of doing EAs amongst the various federal departments, it will be important in coming years to create a culture of making decisions based on those EAs. We must start using the EA process as a means by which to ask ourselves whether a project should proceed at all instead of commencing the EA process with the question "how should this project go ahead?"

RECOMMENDATION: Define "Significant Adverse Environmental Effect"

A CEAA review results in one very significant determination at the end of a lengthy process: will the development of this project result in significant adverse environmental effects? Yet this term is not defined. "Environmental effect" is too broad to lend any assistance in the evaluation of either adversity or significance of environmental effects. Indicators should be added as a regulation to the Act, and definitions of "significant" and "adverse" should be included in the Act or in this regulation. At a minimum, "significance" for the purposes of section 16(1)(b) should be defined. The definition should include consideration of criteria such as those found in Table 1 (Factors in determining adverse environmental effects) of the CEAA Reference Guide: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effect.

RECOMMENDATION: Need for and Alternatives to the Project should be Evaluated in every Assessment

In order to ensure the necessary cultural shift to using EA as a planning tool for sustainable development these two aspects of development should be considered in all assessments, including screenings. Therefore, we recommend that section 16(2)(b) and (c) be moved to section 16(1) of the Act.

RECOMMENDATION: Amend the Definition of Mitigation to include "known and economically feasible technology"

The definition of mitigation should include the qualifying phrase 'known and economically feasible technology', similar to the definition of mitigation used in the *Environmental Assessment and Review Guidelines Order*. Mitigative techniques which are untested, or that the proponent cannot afford should not be considered in section 16 analysis of environmental effects.

RECOMMENDATION: Amend the Transboundary Provisions so that they are Operable

The federal government has a unique and important role to play in and responsibility for protecting neighbouring jurisdictions from environmental harm from provincial development. For this reason the federal government must have the authority to prescribe EAs where there is a perceived threat of transboundary harm flowing from a proposed provincial development.

RECOMMENDATION: Canada's International Environmental Obligations should be factors to be considered in all Environmental Assessments

Canada is signatory to an increasing number of international environmental conventions. In order to live up to these obligations, it is essential that the federal government give effect to these commitments domestically. Section 16 should be amended to include consideration of the impact and consistency of the development with Canada's international environmental obligations. This should include obligations in treaties Canada has signed, but not yet ratified.

RECOMMENDATION: Coverage of the Act should be extended to Federal Agencies, Boards, and Crown Corporations

In order to encourage the necessary culture shift toward using EA as a planning tool, the Act should be applied not only to federal departments, but to federal agencies, boards and in particular, crown corporations. The current exemption for crown corporations has resulted in numerous environmentally significant undertakings not being subjected to an EA. In recognition of the fact that some federal agencies, boards and crown corporations may have existing and effective environmental assessment processes, a "meet or exceed" requirement could be included in the provisions of the Act which apply to these entities.

RECOMMENDATION: The Act needs a Better Enforcement Mechanism

Monitoring and enforcement mechanisms in the Act are extremely limited. In all cases where an EA approval has been granted by a responsible authority, monitoring the terms of the approval and the implementation of any mitigation measures should be obligatory for the Agency. In addition, the Act should be amended to include a penalty section authorizing the imposition of fines for non-compliance with the Act. 3. **STRENGTHENING OPPORTUNITIES FOR PUBLIC PARTICIPATION**

Meaningful public participation is a key component of effective EA. The level of community and public support for a project is a significant factor in obtaining political approval. Public participation requires two way communication: the

proponent must make information available in a timely and comprehensive way in order for the public to be able to effectively respond, and provide input into the development of options for the prevention and mitigation of adverse effects. Unfortunately, in many cases to date, opportunities for public participation have been inadequate and not meaningful.

RECOMMENDATION: Opportunities for Public Participation need to be Established earlier in the Process

Rights of public participation are effectively rendered meaningless if the public is not provided adequate notice, and thereby an opportunity to prepare comments on a proposal.

RECOMMENDATION: Opportunities for Public Participation should be Mandatory during a Screening

Given that the vast majority of federal EAs are conducted through screening, public participation at this level should be mandatory. Section 18(3) should be amended to require the responsible authority to provide notice and comment opportunities in all circumstances.

RECOMMENDATION: Need for Significant Improvements for Public Participation during a Comprehensive Study

We understand that consideration may be given to abandoning the possibility of bumping up a comprehensive study to a panel review in certain circumstances. In our view, this should not occur at all unless the opportunities for public participation, including participant funding, are significantly strengthened for the comprehensive study. The minimal application of participant funding to date has severely limited the ability of public interest participants to meaningfully contribute to the federal EA process.

Thank you for providing us with the opportunity to comment. We would be pleased to discuss our concerns further.

Yours truly,

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| WEST COAST ENVIRONMENTAL LAW | SIERRA LEGAL DEFENCE FUND |
| Karen Campbell | Margot Venton |
| Staff Counsel | Staff Lawyer |

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APPENDIX 1 - APPLICATION OF THE ACT TO PROJECTS OUTSIDE CANADA, Steven Shrybman and Linda Nowlan, WCEL

As you will know Steven Shrybman, the Executive Director of WCEL is a member of RAC and both he and Karen Campbell, West Coast Counsel, participated the deliberations of the RAC Subcommittee dealing with the Projects Outside Canada Regulation. We believe the Committee made good progress on many issues. However on some issues we failed to reach consensus, and we believe others might benefit from being given greater emphasis. It is in the vein that we offer these submissions.

At present, implementation of CEAA requirements is primarily being carried out