



Our File: P-5000-540-5450

John McCauley
Director, Legislative and Regulatory Affairs
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, ON K1A 0H3

Email: RegulationsReglements2012@ceaa-acee.gc.ca

RE: Comments on Proposed Amendments to the *Regulations Designating Physical Activities* promulgated under the *Canadian Environmental Assessment Act, 2012 (CEAA, 2012)*

Dear Mr. McCauley,

The Environmental Law Centre (ELC) is an Edmonton-based charitable organization which was established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. The ELC's vision is an Alberta where the environment is a priority, guiding society's choices. It is the ELC's mission to ensure that Alberta's laws, policies and legal processes sustain a healthy environment for future generations.

Introduction

The ELC has a long history of involvement with federal and provincial environmental assessment issues, including participation in the statutory reviews of the previous *Canadian Environmental Assessment Act (CEAA)*. For ease of reference, the ELC's previous comments on the *Regulations Designating Physical Activities (RDPA)* are attached.

In prior comments, the ELC has expressed its disappointment in the process that led to the repeal of the previous *CEAA* and the adoption of *CEAA, 2012* and the *RDPA*. It is the ELC's hope that the current process for commenting on the *RDPA* will lead to meaningful review and revision of the existing *RDPA*.

With the exception of individual projects designated by the Minister in an *ad hoc* discretionary manner, only those physical activities/projects which appear on the *RDPA* may be subject to federal environmental assessment. Given the central role of the *RDPA* in the federal environmental assessment scheme, it is vital that the list be developed in a thorough and

thoughtful manner (as opposed to performing a patch job on a pre-existing regulation that was developed for an entirely different purpose under the previous *CEAA*).¹

Comments on the *Regulations Designating Physical Activities* promulgated under *CEAA, 2012*

At the outset, the ELC wishes to state that it does not agree that adoption of a list approach to determining the projects which will be subject to the federal environmental assessment process is the best approach. The concern with a list approach is that the list of projects will be incomplete at the outset and will quickly become outdated. With respect, the ELC does not agree that a completely discretionary, *ad hoc* process for the Minister designating additional projects for environmental assessment (as currently outlined in *CEAA, 2012* and the *Regulatory Impact Analysis Statement*) will address the concerns associated with an incomplete and outdated list.

It is the ELC's view that a better approach would be to include not only project/activity categories in the *RDPA* but to expand the list to include certain environmental impacts (such as impacts on fisheries habitat and on species at risk) and certain federal decisions (akin to the "law list" which existed under the previous *CEAA*).

The ELC restates its view that the *RDPA* should err on the side of inclusion of physical activities/projects. This is because - with the exception of a limited number of designated physical activities/projects linked either to the Canadian Nuclear Safety Commission, the National Energy Board or a federal authority designated by regulation - the decision to conduct an environmental assessment under *CEAA, 2012* is at the discretion of the CEAA Agency. This means that even if a project is on the *RDPA*, it is not necessarily subject to federal assessment.

The only certain consequence of a physical activity/project appearing on the *RDPA* is that a project description must be submitted to the CEAA Agency for review and determination of the need for environmental assessment. It is the ELC's view that this is not a particularly onerous

¹ The ELC notes that the *RDPA*, with some significant differences, is essentially the same as the *Comprehensive Studies List Regulations*, SOR 94/638 ("*CSLR*") under the previous *CEAA*. It is the ELC's view that this is not a sufficient list for designating physical activities under *CEAA, 2012*. It should be emphasized that the *CSLR* served a very different function under the previous *CEAA* than the *RDPA* does under the new federal environmental assessment regime set out in *CEAA, 2012*. The *CSLR* identified those physical activities/projects that were large, likely to have significant impacts and likely to be controversial thereby demanding a high level of scrutiny under the *CEAA* (i.e. comprehensive studies). Similar, but smaller, physical activities/projects would still be subject to federal assessment under the previous *CEAA* (i.e., screenings). In contrast, the *RDPA* represents the total extent of those physical activities/projects that will be subject to any form of environmental assessment (aside from the *ad hoc* discretionary Ministerial decisions to designate a particular project). This means that physical activities/projects that would have been subject to environmental assessment under the previous *CEAA* will now fall through the cracks of *CEAA, 2012*. The *CSLR* did not represent the only physical activities/projects that had potentially adverse environmental impacts; it represented those physical activities/projects likely to have significant impacts warranting a high degree of scrutiny.

requirement for project proponents. A more inclusive approach to designating physical activities/projects will result in better oversight and awareness of physical activities/projects that may cause environmental impacts without placing an undue burden on project proponents.

The ELC notes that the proposed amendments would result in the removal of several project categories from the *RDPA*, namely:

- ground water extraction facilities,
- heavy oil and oil sands processing facilities,
- pipelines and electrical transmission lines not regulated by the NEB,
- potash mines and other industrial mineral mines (salt, graphite, gypsum, magnetite, limestone, clay, asbestos), and
- a variety of industrial facilities (pulp and paper mills, steel mills, metal smelters, leather tanneries, textile mills and facilities for the manufacture of chemicals, pharmaceuticals, pressure-treated wood, particle-board and plywood, chemical explosives, lead acid batteries and respirable mineral fibres).

The ELC objects to the removal of any projects from the *RDPA*. As previously stated, the ELC's position is that a broad, inclusive approach should be taken to compiling the *RDPA*.

The ELC also notes that increased thresholds are proposed for in-stream tidal power generating facilities, liquefied natural gas facilities and offshore metal mines. The ELC objects to increased thresholds being adopted in the *RDPA*. The ELC previously suggested, and maintains, that the current thresholds included in the *RDPA* should be thoroughly examined with a view to decreasing or eliminating thresholds to result in a more inclusive project list.

While the ELC notes some additions to the *RDPA* are proposed, it is disappointing that many items previously suggested for inclusion in the *RDPA* have not been included in the list of additions to the *RDPA*. These items include:

- activities within national parks or national park reserves such as development of commercial ski areas and golfing facilities,
- activities that may impact upon critical habitat designated pursuant to *SARA*,
- oil and gas seismic activity in marine areas,
- all exploratory oil and gas drilling in marine areas,
- aquaculture projects,
- underwater power cables,
- oilsands steam assisted gravity drainage (SAGD) or other *in situ* oil sands projects, and
- renewable energy projects.

Many of these activities fall into the federal jurisdiction and power over fish and fish habitat, and over federal lands or waters. Other activities have the potential for environmental effects on a

national scale and for transboundary impacts which bring them into the purview of federal jurisdiction and power.

Conclusion

The ELC thanks you for the opportunity to comment on the proposed amendments to the *RDPA*. As mentioned above, it is the ELC's hope that the current process for commenting on the *RDPA* will lead to meaningful review and revision of the existing *RDPA*.

Please feel free to contact the undersigned with any questions or comments.

Yours truly,



Brenda Heelan Powell
Staff Counsel
bhpowell@elc.ab.ca



August 14, 2012

Our File: P-5000-540-5450

John McCauley
Director, Legislative and Regulatory Affairs
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, ON K1A 0H3

Email: RegulationsReglements2012@ceaa-acee.gc.ca

RE: Comments on the *Regulations Designating Physical Activities* promulgated under the *Canadian Environmental Assessment Act, 2012 (CEAA, 2012)*

Dear Mr. McCauley,

The Environmental Law Centre (ELC) is an Edmonton-based charitable organization which was established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. The ELC's vision is an Alberta where the environment is a priority, guiding society's choices. It is the ELC's mission to ensure that Alberta's laws, policies and legal processes sustain a healthy environment for future generations.

Introduction

The ELC has a long history of involvement with federal and provincial environmental assessment issues, including participation in previous statutory reviews of the *Canadian Environmental Assessment Act (CEAA)*. It bears repeating that the ELC is dismayed by the process which has led to the repeal of the *CEAA* and replacement with *CEAA, 2012*.

The ELC had hoped that a comprehensive, substantive statutory review of *CEAA* would be conducted in late 2011. This was not the case. There was little guidance from the Standing Committee throughout the course of the statutory review process. Further, the statutory review process was rushed and ended abruptly without hearing from a variety of stakeholders. It is disappointing that the opportunity to conduct a thorough review of *CEAA* and to learn from years of experience under *CEAA* was not seized.

The ELC is also disappointed by the government's decision to bury substantive changes to federal environmental assessment law within the omnibus budget bill. It is the ELC's view that substantive changes of this magnitude ought to have been presented as a stand-alone bill to provide an opportunity for elected officials to review the amendments in a thoughtful and

thorough manner and to provide an opportunity for the general public to learn and understand the significance of the proposed changes.

The ELC is equally disappointed with the process that has led to the development and implementation of the *Regulations Designating Physical Activities* (the “*RPDA*”) pursuant to *CEAA, 2012*. The community of environmental non-governmental organizations (ENGOS) was not consulted on the *RPDA* prior to its implementation; rather, the CEA Agency is seeking comments on the *RPDA* after the fact.

It is the ELC’s view that the opportunity to improve upon *CEAA* and environmental assessment in Canada was squandered by not pursuing a more thorough and structured statutory review process. It is the ELC’s hope that, in the future, the government will take an approach which is respectful of the input of the ENGO and the academic communities in matters affecting environmental law and regulation in Canada.

Comments on the *Regulations Designating Physical Activities* promulgated under *CEAA, 2012*

The *RDPA* plays a central role in the federal environmental assessment scheme. With the exception of individual projects designated by the Minister in an *ad hoc* discretionary manner, only those physical activities/projects which appear on the *RDPA* **may** be subject to federal environmental assessment.

It is the ELC’s view that the *RDPA* should err on the side of inclusion of physical activities/projects. This is because - with the exception of a limited number of designated physical activities/projects linked either to the Canadian Nuclear Safety Commission, the National Energy Board or a federal authority designated by regulation – the decision to conduct an environmental assessment under *CEAA, 2012* is at the discretion of the CEA Agency. This means that even if a project is on the *RDPA*, it is not necessarily subject to federal assessment.

The only certain consequence of a physical activity/project appearing on the *RDPA* is that a project description must be submitted to the CEA Agency for review and determination of the need for environmental assessment. It is the ELC’s view that this is not a particularly onerous requirement for project proponents. A more inclusive approach to designating physical activities/projects will result in better oversight and awareness of physical activities/projects that may cause environmental impacts without placing an undue burden on project proponents.

The ELC notes that the *RDPA*, with some significant differences, is essentially the same as the *Comprehensive Studies List Regulations*, SOR 94/638 (“*CSLR*”) under the previous *CEAA*. It is the ELC’s view that this is not a sufficient list for designating physical activities under *CEAA, 2012*.

It should be emphasized that the *CSLR* served a very different function under the previous *CEAA* than the *RDPA* does under the new federal environmental assessment regime set out in *CEAA*,

2012. The *CSLR* identified those physical activities/projects that were large, likely to have significant impacts and likely to be controversial thereby demanding a high level of scrutiny under the *CEAA* (i.e. comprehensive studies). Similar, but smaller, physical activities/projects would still be subject to federal assessment under the previous *CEAA* (i.e., screenings). In contrast, the *RDPA* represents the total extent of those physical activities/projects that will be subject to any form of environmental assessment (aside from the *ad hoc* discretionary Ministerial decisions to designate a particular project). This means that physical activities/projects that would have been subject to environmental assessment under the previous *CEAA* will now fall through the cracks of *CEAA, 2012*. The *CSLR* did not represent the only physical activities/projects that had potentially adverse environmental impacts; it represented those physical activities/projects likely to have significant impacts warranting a high degree of scrutiny.

Following from this, the ELC recommends that the thresholds set out in the *RDPA* (carried forward from the *CSLR*) should be closely and thoroughly examined. It is the ELC's view that many, if not all, of the thresholds may no longer be appropriate in the new federal environmental assessment scheme. Removal of thresholds from designated physical activities/projects will ensure that smaller physical activities/projects - which can have significant adverse environmental impacts - will be brought to the attention of the *CEAA* Agency and, possibly, be subject to federal environmental assessment.

Removal of thresholds will also alleviate the potential problem of physical activities/projects being intentionally designed to fall below thresholds with the intention of incremental expansion (which can lead to the result of projects ultimately exceeding thresholds without undergoing federal environmental assessment). At the very least, to address this potential problem, the requirements of *CEAA, 2012* should apply to any expansion that brings an existing physical activity/project to the threshold for new physical activities/projects of the same kind (this approach has been taken with some, but not all, physical activities/projects in the *RDPA*).

The ELC notes that some significant physical activities/projects that were included in the *CSLR* have been removed from the *RDPA*. Of particular concern is the decision to remove activities relating to national parks or national parks reserves, namely:

- The proposed construction, decommissioning or abandonment in relation to a physical work in or on a national park, national park reserve, national historic site or historic canal that is contrary to its management plan.
- The proposed increase in the size of an area that is used for golfing in a national park or national park reserve, or the proposed increase in the number of holes that are used for golfing within such an area.
- The proposed development of a commercial ski area in a national park or national park reserve:
 - as set out in a large-range development plan that is to be submitted to the Minister responsible for the Parks Canada Agency for approval;

- that is not consistent with a long-range development plan approved by the Minister responsible for the Parks Canada Agency; or
- that is consistent with a long-range development plan approved before 1999 but that involves development of currently undeveloped, unskied or unserviced terrain.

The ELC recognizes that sections 67 to 72 of *CEAA, 2012* provide that a federal authority (which includes the Parks Canada Agency) must not carry out or allow a project on federal lands unless it is not likely to cause significant adverse environmental effects or the federal cabinet has determined that such effects are justified in the circumstances. Presumably, in light of these provisions, the decision has been made to not include activities relating to national parks, national parks reserves, national historic sites or historic canals in the *RDPA*.

The ELC **strongly disagrees** with this approach. It is the ELC's view that sections 67 to 72 do not provide the benefits of a federal environmental assessment (such as public participation, access to information, transparency and so forth). The ELC recommends that the activities relating to national parks or national parks reserves should be included in the *RDPA* to provide for the possibility of federal environmental assessment of such physical activities/projects.

The ELC also notes that the *RDPA* makes no mention of physical activities/projects which may impact on listed species and their critical habitat designated pursuant to the federal *Species at Risk Act* (“*SARA*”). Recognizing that *SARA* contains provisions to protect listed species and their critical habitat, there is still a need for environmental assessment of potential impacts on listed species and their critical habitat (i.e., proactive protection rather than reactive responses). The ELC recommends that the *RDPA*'s existing references to “in a wildlife area or migratory bird sanctuary” be amended to include “critical habitat under *SARA*”. In concert with this amendment, the *Prescribed Information for the Description of Designated Projects Regulations* under *CEAA, 2012* should be amended to require a description of changes that may be caused to **both aquatic and non-aquatic** species at risk and to the critical habitat of species at risk.

The ELC recommends that the reference to “new right-to-way” be removed from ss. 5, 14, 28, 34 and 38 of the *RDPA*. Regardless of whether the physical activity/project is to occur on a new or existing right-of-way, there is potential for adverse environmental effects. The *RDPA* should provide for the possibility of federal environmental assessment of electrical transmission lines, oil and gas pipelines, railway lines and all-season public highways regardless of whether these occur on new or existing right-of-ways.

Finally, the ELC considers that many other physical activities/projects should be included in the *RDPA*. These include:

- oil and gas seismic activity in marine areas,
- exploratory oil and gas drilling in marine areas,
- aquaculture projects,
- underwater power cables,

- steam assisted gravity drainage (SAGD) oil sands projects,
- transboundary bridges, and
- renewable energy projects.

Many of these activities fall into the federal jurisdiction and power over fish and fish habitat, and over federal lands or waters. Other activities have the potential for environmental effects on a national scale and for transboundary impacts which bring them into the purview of federal jurisdiction and power.

Conclusion

While the ELC is not terribly pleased with the approach taken to the development and implementation of *CEAA, 2012* and the *RDPA*, we thank you for the opportunity to participate in the ENGO Meeting on *CEAA, 2012* and to provide comments on this matter. The ELC looks forward to an improved consultation process from the government and the CEA Agency in the future.

Please feel free to contact the undersigned with any questions or comments.

Yours truly,



Brenda Heelan Powell
Staff Counsel
bhpowell@elc.ab.ca