ENVIRONMENTAL LAW CENTRE

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Dear Ms. Stewart:

RE: Comments on CCME's Consultations on Canadian Environmental Assessment Processes

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 as a public source of information on environmental law and policy. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. The ELC is pleased to provide comments on the following two papers prepared by the CCME's Environmental Assessment Task Group (EATG):

- One Project-One Assessment Approach to Environmental Assessment (EA); and
- Regional Strategic Environmental Assessment (R-SEA).

(A) ONE PROJECT – ONE ASSESSMENT APPROACH TO EA

(1) Preferred model is the coordination model (harmonized approach)

The ELC agrees with EATG's general recommendation for a harmonized approach (the "coordination" model) of EA processes. Harmonization is the most realistic approach for coordinating efforts, as it is closest to our current model. We see great benefit in government agencies sharing their expertise, engaging and working together, rather than not getting involved or worse abrogating their authority over EAs. Further, for the reasons outlined below, we see this as the only model proposed by EATG that truly maintains each order of governments' authority to make its decision on projects as well as having some practical basis for being implemented.

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(2) Comments on other proposed models: joint process, delegation and substitution

The ELC believes that the "joint process" model built upon devising a single hybrid EA process to be used across different jurisdictions is not practical. Given the differences between provincial EA regimes across the country, creating a single hybrid process would be a daunting task. From a process perspective, EA requirements differ amongst provinces and amongst the two levels of government; differences include process triggers, the scope of the assessment, opportunities for public participation, and policies regarding monitoring, follow-up and evaluation.[1] In addition to process issues, there is also the very real concern about succumbing the lowest common denominator in order to get agreement on a standardized hybrid model for EAs.

Alternatively, if the "joint process" model involves creating a hybrid process developed on a jurisdiction-by-jurisdiction basis, we do not see this as much different than the harmonization approach, except that this may involve further legislative amendments to permit the creation of a hybrid model in each jurisdiction. Again, from a practical perspective, the joint model simply appears to be a more complex and unwieldy version of the harmonization approach.

The ELC is strongly opposed to using either the delegation or substitution models. We have serious concerns whether either of these models could be sustained under Canada's current constitutional structure.

Each level of government in Canada exercises its jurisdictional responsibilities surrounding EA as outlined in sections 91 and 92 of the *Constitution Act, 1867* (the division of power provisions). Due to the division of powers, the federal government cannot let a provincial agency make a decision on a project that is exclusively within its authority.

For example, the federal government has exclusive legislative jurisdiction over coastal and inland fisheries. If the federal government does not exercise its authority over fish habitat then fisheries suffer because provinces simply do not have the direct and clear legislative right to regulate for fish habitat protection. If a province tried to regulate fish habitat, a court could declare this regulation to be *ultra vires* (beyond its powers) under the Constitution. Accordingly, the province would not be permitted to make a regulatory decision that directly involves inland or coastal fisheries even as part of the EA process.[2]

Due to this jurisdictional split, there cannot be a total substitution or delegation of a provincial EA process that covers matters exclusive to the federal jurisdiction (such as fish habitat). Baring constitutional change, decision-making authority over environmental matters continues to rest with both the federal and provincial governments. As other legal

[1] P. Fitzpatrick P & A.J. Sinclair, "Multi-jurisdictional environmental impact assessment: Canadian experiences" (2009) 1 Environ Impact Asses Rev 1 at 2.

[2] The federal government's constitutional authority over fisheries management was recently confirmed by the courts in *British Columbia (Agriculture and Lands)* 2009 BCSC 136. Provincial legislation regulating fish farms was found to be *ultra vires* (outside of provincial authority) and the provincial laws were read down to exclude fisheries matters.

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scholars have noted, "if substitution is to have a role in the environmental assessment process [in Canada], it must be within one jurisdiction's family."[3]

The substitution model as proposed by EATG, where one jurisdiction "is no longer accountable for ensuring that its process requirements are met," could violate the division of powers provisions of the *Constitution Act, 1867.* In fact, including substitution provisions could expose to the EA process to constitutional challenge in the courts, which could have the effect of making such an EA process less certain, predictable, efficient and timely (and contrary to the desired outcomes for EATG's work as noted on page 4). While the delegation model indicates that both entities remain legally accountable for ensuring all EA requirements are met, this may be difficult to do if one jurisdiction conducts and administers the EA process exclusively. Delegation could still leave the EA process vulnerable to constitutional challenge in the courts.

In addition to constitutional constraints, there are other reasons why EATG should be cautious about provincial substitution for or delegation of federal EA processes. A review of the first federal/federal substitution, the National Energy Board (NEB) substitution of the CEAA process in the 2006 (the Emera Brunswick Pipeline panel review), noted several impediments to effective public participation in the substituted NEB process, including:

- lack of pre-hearing consultation;
- the difficulties that participants had with the formal and complex NEB process;
- the need to retain legal representation;
- overly tight timelines and heavy-handed scheduling; and
- putting public interest participants through the rigors of formal proceedings and cross examination.[4]

The authors of this review noted that "in a regular CEAA Review Panel process the opportunity to present arguments and raise questions is well-accommodated within a less formal and less intimidating forum."[5] If public interest values and citizens' concerns cannot be easily aired at a federal substituted EA process, consider how problematic it would be for these values and concerns to be effectively put forth at a provincial substituted or delegated EA process.

Furthermore, provincial processes vary across the country and so would effective opportunities for citizen input. Some provinces have very narrow requirements for allowing the general public to participate by providing evidence or making submissions in EAs. For example, in Alberta, only those who are "directly affected" by a proposed activity have a

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[3] A. Kwasniak, "Harmonization in environmental assessment in Canada: The good, the bad and the ugly" (2008) at 12 [unpublished, archived online at Canadian Environmental Network <http://www.cen-rce.org/eng/caucuses/assessment/docs/Harmonization.pdf>; see also S. Kennett, "Meeting the intergovernmental challenge of environmental assessment" in P.C. Fafard & K. Harrison K, eds., *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston, ON: Queen's University; 2000) 107.

[4] G. Schneider, J. Sinclair & L. Mitchell, "Environmental Assessment Process Substitution: A Participant's View" (2007) unpublished, archived online at Canadian Environmental Network <http://www.cen-rce.org/eng/caucuses/assessment/docs/Final%20Substitution%20Paper%20March29.pdf>.

[5] *Ibid.*

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right to participate in a provincial EA. In this case, allowing the provincial process to effectively "stand in the shoes" of the federal process could drastically limit public participation in EA processes.

Lastly, there is the issue of the practical capacity for governments to deal with the legislative mandates of other government departments. For example, no provincial department has the legislative (or constitutional) mandate that reflects the federal Department of Fisheries and Ocean's role over fish habitat. Provincial governments may not have the capacity (in terms of human resources or finances) to deal with federal roles. Therefore, expectations that substitution or delegation would be effective as an "one assessment" option are not practically supportable.

(3) EATG's recommendations

Based on the reasoning above, the ELC does not support EATG's recommendation #1 that all jurisdictions ensure that their statutory regimes include a range of models including delegation and substitution, or recommendation #5 that jurisdictions could decide which model would be most appropriate. The ELC does not support the use of either substitution or delegation models and does not believe statutory amendments should be encouraged which would allow these models to be used. These models are not consistent with EATG's objectives of a one project – one EA approach as stated on page 8, specifically, that the models fulfill the "strong expectations that each order of government should and must fully assume its responsibilities toward the environment."

Further, recommendation #5, which contemplates that we may have different models used at varying degrees across the country, is also problematic. Not only would this allow for the possibility of substitution or delegation models to be used, but this recommendation could lead to the situation where a federal project could undergo drastically different EA requirements depending on the jurisdiction where that project occurs. This approach would not ensure predictability in EA processes because it would not offer stakeholders a clear sense of what the procedural or substantive requirements will be.

Lastly, the ELC also does not support EATG's recommendation #4 that small-scale projects could use the substitution model, for the reasons outlined above on opposing the substitution and delegation models.

(4) Focus on efficiencies, overlap, duplication and lack of timeliness

The words "efficiency," "overlap," "duplication" and "timeliness" (or the lack thereof) are peppered throughout this document. Even in paragraph one, page one it states that "major development projects are *often* subject to EA and regulatory requirements of more than one jurisdiction"[emphasis added]. While there is nothing inherently wrong with any of these terms, to include them without some evidence or statistics substantiating these allegations suggests that the one EA initiative is geared more towards "how do we have less federal government involvement in EAs?" rather than "how do we fix the problem of duplication when it does exist?"

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First, there is an important distinction to be made between overlap and duplication. Based on our constitutional division of powers, some overlap between provincial and federal responsibility over environmental matters is inevitable. This type of overlap is not necessarily bad or inefficient because each level of government has specific matters that it has the jurisdiction to address as part of the EA process. This is a different issue than duplication which arises when a proponent, often because of overlap, is asked to provide the same information to both levels of government or to different departments within one level of government. This may or may not be onerous depending on the situation, including the timing of the requests, and the required formats. There may be inefficiencies relating to duplication, but the way to address any such inefficiency is to reduce the duplication, not the overlap.

Second, while there is no doubt that a certain amount of duplication occurs, it is not clear from CCME's document how often duplication actually occurs. There is concern that the whole issue of duplication might be overblown.[6] It would be useful as part of EATG's analysis to see what proportion of EAs are subject to both federal and provincial requirements; having concrete data on the scope of the duplication issue will help to craft recommendations appropriate to the scale of the problem.

(B) REGIONAL STRATEGIC ENVIRONMENTAL ASSESSMENT (R-SEA)

Strategic environmental assessment (SEA) has been cited as a mechanism to move toward sustainable development by incorporating environmental assessments with respect to plans, policies and programs of government.[7] The CCME working paper *Regional Strategic Environmental Assessment in Canada: Principles and Guidance*[8] (*R-SEA Guidance Report*) sets out various ideas for moving regional strategic environmental assessment (R-SEA) forward. While pursuing R-SEA is laudable there are areas of significant uncertainty that should be addressed prior to pursuing R-SEA.

In particular the ELC submits that issues of the authority of a R-SEA, jurisdictional issues surrounding R-SEA, capacity to conduct R-SEA, and public participation in the R-SEA process should be clarified. In addition, there is a need to advocate for the production of more substantive guidelines and analysis of cumulative effects assessment in project specific EAs.

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[6] In August 1999, the Canadian Environmental Assessment Agency (the Agency) commissioned a report on *Multi-Jurisdictional Environmental Assessments* in preparation for the Five-Year Review. David Lawrence summarized projects subject to CEAA review from April 1995 to March 1996 and found that "A large majority of projects (98 percent) subject to the Act [CEAA] were not subject to provincial EA legislation. Both levels of government assessed only about two percent of projects. Overall 7.5 percent of projects subject to EA under provincial legislation also were subject to review under the Act." He concluded that, EA duplication is rare, sometimes positive and avoidable where there is a will on the part of the parties involved.

[7] See the EU, *Council Decision* of 20 October 2008 on the approval, on behalf of the European Community, of the *Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context* [2008] O.J.L. 308.

[8] Canadian Council of Ministers of Environment, (Canadian Council of Ministers of the Environment, 2009, working paper).

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(1) The authority of an R-SEA

To be effective, R-SEA must have some legal bearing on individual decisions being made within a region. As noted in the *R-SEA Guidance Report* the current approach to dealing with cumulative effects is not working as it should.[9] EAs that attempt to assess cumulative effects typically fall short in their scope and breadth of analysis and decision-makers appear hesitant to require substantive analysis of cumulative effects on a regional basis. Most projects continue to be assessed on project specific impacts with a limited environmental scope.

It is implied in the document that R-SEA will be an effective method to deal with this incremental approach to assessing cumulative effects but further detail as to how an R-SEA will alter individual project decisions is required.

Where an R-SEA is conducted and plans, programs and policies are assessed for their environmental impacts there is a need to ensure that individual decisions are impacted. Therein lies an inherent conflict in the proposed approach to R-SEA. R-SEA is presented as a flexible and adaptive approach to assessing regional impacts and planning around them. But R-SEA must also provide a level of certainty in how plans, programs and policies will be applied. Some guarantees (regulatory or otherwise) must be made that project based decisions will be made within the context of the R-SEA and that the discretion of individual decision-makers to alter policies and programs will be constrained.

For this reason there is a need to ensure that there are significant policy or regulatory links between the hierarchy of assessments that are conducted. Individual assessments must be nested within the context of R-SEA otherwise the approach to individual project assessments will not change.

(2) Jurisdictional issues of R-SEA

The issue of jurisdiction is likely to arise in any proposed R-SEA. Specifically issues around constitutional jurisdiction and individual government agency jurisdiction must be considered.

SEA is focused on the policies, plans and programs of specific departments and its decision-making entities. The *R-SEA Guidance Report* deals with the issue of roles and responsibilities generally through development of a "reference framework." Further clarity around roles and responsibilities of different levels of government needs to be addressed. Theoretically the most effective planning, whether through R-SEA or otherwise, would be through an individual decision-maker, with a single legislative mandate, and control over individual land use decisions. Such a planning and environmental management system is impossible in light of constitutional realities in Canada.

[9] *Ibid.* at 6.

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In this regard, R-SEA must recognize and work within the *Constitution*, recognizing that jurisdiction over specific issues cannot be wholly delegated to a regional planning process. Similarly, if R-SEA is to be effective, there is a need to develop a mechanism by which all relevant legislative mandates are working in tandem and in alignment with R-SEA outcomes.

(3) Capacity to conduct R-SEA

In light of the jurisdictional issues likely to arise there is a need to delineate how individual departments (among all levels of government) will obtain the capacity and expertise to conduct R-SEA. Capacity and resource issues are also very relevant to the methodology proposed in the *R-SEA Guidance Report*. Gathering and evaluating baseline information on a regional scale of sufficient accuracy and detail, modeling of alternatives, substantive evaluation of alternatives and prioritization processes all have significant costs related to them, particularly if they purport to be anything more than subjective assessments and evaluations.

(4) Public participation

Public participation is key to effective environmental assessments. Public participation must be incorporated at the earliest stages, including in the drafting of the terms of reference and in the scoping decisions that are proposed.

In addition, public participation may be highly impacted by the likely nature of the outcome. If the final R-SEA appears to be no more than a paper weight with little bearing on individual decisions of municipal, provincial or federal governments, the public is less likely to see value in participating in this process.

(5) Individual cumulative impact assessments

There is a need to increase the robustness of cumulative effects assessment for individual assessments. The undertaking of a R-SEA alone will not solve all cumulative effects issues. The scale of a R-SEA assessment is unlikely to capture whether individual projects may create significant cumulative effects. The R-SEA process should not be viewed as an adequate proxy for cumulative effects assessments on a project basis.

In this regard there is a need to increase the rigor of cumulative environmental impact assessment and its evaluation by decision-makers. This will entail developing further guidance around terms of reference in scoping cumulative effects and prescribing techniques for quantifying cumulative effects. Guidelines around assessing whether cumulative effects are "significant" are also needed.

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Thank-you for the opportunity to provide comments on the CCME's Consultation on EA processes. If you have any questions or concerns, please do not hesitate to contact us.

Yours truly,

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