ENVIRONMENTAL LAW CENTRE

December 14, 2001

Jim Clarke
Canadian Environmental Assessment Agency
200 Sacre-Couer Blvd.
14th Floor
Hull, Quebec
K1A OH3

Dear Mr. Clarke:

RE: Comments on Bill C-19, An Act to amend the Canadian Environmental Assessment Act

Thank you for the opportunity for the Environmental Law Centre to comment on this Bill. Our comments are attached as schedules A and B. Schedule A contains general comments and recommendations and B contains comments and recommendations on specific sections.

Please do not hesitate to contact me should you wish to discuss anything in this letter or on the schedules.

Yours truly,

Arlene Kwasniak
Executive Director
Environmental Law Centre

A

General comments and recommendations

There is much in the Bill that improves the current CEAA. For example:

- An expanded role for the CEAA Agency to make environmental assessment more efficient and predictable
- Mandatory follow up
- Injunction provisions to prohibit activities that could harm the environment prior to the environmental assessment being carried out.

However, there is much missing, and, from a public interest environmental law perspective, much could be improved. The comments on the specific amendments that follow detail the latter. With respect to the former:

1. **Definition of "environmental effect" needs improvement:** Subsection 2(1) of the current CEAA defines "environmental effect" to mean, in respect of a project,

   "(*a*) any change that the project may cause in the environment*, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance,* and
   (*b*) any change to the project that may be caused by the environment, whether any such change occurs within or outside Canada;"

   The text in italics is interpreted to mean only secondary or indirect effects. In other words, a change that a project causes to health, socio-economic conditions, physical or cultural heritage, the use of land for traditional aboriginal purposes, or historical, archaeological, paleontological or architectural significance, may only be considered as an environmental effect only if it is an effect caused by an effect of the project. This is too narrow a definition of environmental effect. We see no reason why all of the italicized matters should not be considered if they simply are effects and not only secondary or indirect effects. In fact, relegating consideration of these matters to secondary effects makes no sense in many circumstances and goes against underlying government policy in the new CEAA. For example, it is almost duplicitous to on the one hand give formal recognition to *"community knowledge and aboriginal traditional knowledge*" (new section 16.1) while relegating consideration of effects on traditional uses or cultural heritage to effects caused by the effects of a project.

As well, as the Supreme Court of Canada first made clear in *Friends of the Oldman River v. Minister of Transport and Minister of Fisheries and Oceans,* ([1992] S.C.R. 3, 132 N.R. 321, [1992] 2 W.W.R. 193), federal environmental assessment is an information gathering exercize to help federal agencies exercize their discretion in determining the appropriate response when an environmental assessment is triggered. There is no reason in principle to limit the areas of what can be considered as an environmental effect.

Accordingly, we recommend that the definition be amended to read:

"(*a*) any change that the project may cause in the environment*,* and without limiting the generality of the forgoing, on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance*,* and
(*b*) any change to the project that may be caused by the environment, whether any such change occurs within or outside Canada;".

2. **Lack of strategic environmental assessment requirement:** The CEAA has long been criticized for not mandating environmental assessment of the federal government's own policies, plans and programs, in contrast to the United States' *National Environmental Protection Act*. We recognize that there is a Cabinet Directive on this matter, *The 1999 Cabinet Directive on the Environmental Assessment of Policy,* (Ottawa: Minister of Public Works and Government Services Canada and Canadian Environmental Assessment Agency, 1999) but this directive is no substitute for a statutory mandate. Requiring assessment of strategic level undertakings would demonstrate the federal government's commitment to environmental assessment. It would assist the government in its mission for cross-departmental sustainability by requiring proposed policies, plans and programs to be transparently assessed for their environmental and social impacts prior to making decisions on them.

3. **Lack of sufficient enforcement mechanisms:** Although we welcome the new prohibitory orders (section 11 amendments) and new coordinating powers of the Agency, we do not find these to be sufficient for adequate enforcement of the Act. Enforcement is required at two levels:

    A. Mandatory provisions on those with statutory responsibilities under the to require them to carry them out
    B. Mandatory duties on proponents to require them to comply with the Act and actions taken under it.

We recommend amendments to the Act to require Responsible Authorities and others to carry out their responsibilities so that they are enforceable on judicial review. We also recommend that there it be made an offence for proponents to carry out projects that require environmental assessment without one, as well as an offence to fail to comply with mitigation conditions or follow up programs.

B
Comments and Recommendations on Specific Provisions

Section 7 of Bill C-16 – Section 11.1 of CEAA: prohibitory orders

Description

This section will amend section 11 of CEAA enables the relevant minister or ministers to issue a prohibitory order to a proponent until the relevant Responsible Authority or Responsible Authorities take action under subsection 20(1)(a) or 37(1). An order ceases to have effect if Cabinet does not approve it within 14 days. Subsection 11.1(5) states that if an order has been made prohibiting a particular proponent from doing a particular act or thing, then the minister or ministers may not make a subsequent order prohibiting the same proponent from doing the same thing.

Comment and recommendation

Although section 11.1 is a most welcome provision we find that there is a problem with subsection 11.1(5). Subsection 11.1(5) is appropriate where Cabinet determines not to approve an order, to prevent a minister from simply issuing another order. However, it is not appropriate where a project triggers the Act, a minister issues an order that cabinet approves and then the proponent drops the proposal. In this case, the minister should be able to issue another order if the proponent proposes the same project again. Subsection 11.1(5) now would prohibit this. To rectify the problem, we recommend that subsection 11.1(5) be reworded to make it clear that the minister may make a subsequent order prohibiting a proponent from doing a particular act or thing where the CEAA has been triggered at a subsequent time.

Section 12.1 – 12.5 of CEAA: The Federal Coordinator

Description, comment and recommendation

These sections create the role of a federal coordinator designed to improve process consistency, efficiency and timeliness when more than one authority is involved in an assessment. Although this role is a positive addition to the CEAA it does not include substantive powers where recalcitrant authorities fail to act. For example, section 12.5 requires federal authorities to comply with the federal coordinator's requirements and requests in a timely manner, but there is not legislated consequence if it does not. We recommend the addition of such consequences. As well, we hope to see timely regulations made under new subsection 59(1)(a) refining the federal assessment coordinator's authority to better ensure the authority's effectiveness.

Section 16.1 – Community knowledge and aboriginal traditional knowledge

Description

This amendment enables the consideration in an environmental assessment of community knowledge and aboriginal traditional knowledge.

Comment

Although we strongly agree that these sources of knowledge are important to environmental assessment, we wonder why this section is selectively permissive and so restrictive. By enabling these sources of knowledge to be considered in such narrow circumstances, the section probably excludes consideration of other sources of related information.

Recommendation

We recommend that the section be revised to state that the Responsible Authority may consider whatever it determines to be relevant to the assessment, including community knowledge and aboriginal traditional knowledge.

Section 16.2 – Regional studies

Description

This amendment enables the consideration in an environmental assessment of the results of regional studies of the environmental effects of future projects, provided that a federal authority participated outside of the scope of the CEAA with another jurisdiction.

Comment

We wonder why this section is selectively permissive and so restrictive. By enabling regional studies to be considered in such narrow circumstances, the section probably excludes their consideration in other circumstances, for example a regional study could not be considered if:

- it does not deal with the effects of future projects
- a federal authority was not involved in the study
- a federal authority was involved but it was in within the scope of the CEAA
- the regional study is relevant to the assessment but does not deal with environmental effects of future projects (it might address only cumulative effects of existing projects).

Recommendation

We recommend that the section be revised to state that the Responsible Authority may consider whatever it determines to be relevant to the assessment, including regional studies that deal with existing and potential projects in the region.

Section 19 – Replacement and model class screenings

Description

The Agency may declare an environmental assessment report to be a class screening report that is either a replacement screening or a model screening. If a Responsible Authority determines that a project falls within a replacement class screening report then provided that the Responsible Authority ensures that any design standards and mitigation measures described in the report are implemented, no further assessment is required. If and Responsible Authority determines that a project falls within a model class screening report it shall ensure that adjustments are made to account for local circumstances and cumulative effects.

Comment and recommendations:

We have a number of concerns and recommendations regarding this new section:

- We see the class screening replacement model as essentially enabling new exemptions without the need for an amended regulation. We feel that exclusions should be left to Cabinet with the advice of the Regulatory Advisory Committee. It is possible to make exclusions subject to design standards and mitigation measures.
- We cannot see how a Responsible Authority could determine the environmental effects (as defined in the Act) of a project without taking into account local circumstances. Accordingly, we cannot see how a Responsible Authority can fulfill obligations under the Act by utilizing the replacement model.
- We are concerned at the great discretion given to the Responsible Authority in making these important determinations. A Responsible Authority cannot determine if a proposed project appropriately fits under the replacement or the model screening unless the Responsible Authority has considerable information about local conditions. If there must be a replacement screening category, then there should be an opportunity for the public to participate and provide information to the Responsible Authority to assist in the determination of whether a project fits into the replacement category or should be screened as a model screening.

Section 21 – New comprehensive study provisions

Description – irrevocable track determination

The current CEAA allows for a project to go to mediation or panel after it has completed the comprehensive study process if the comprehensive study report discloses significant uncertainties, unanticipated alternatives or new concerns about the significance and acceptability of predicted effect. The new provisions would require the Minister to make an irrevocable decision early in the environmental assessment process as to which track will be taken comprehensive study, mediation or panel. The Minister makes the decision on the basis of a Responsible Authority's report outlining the project scope, factors to be considered in the assessment, public concerns and potential for adverse environmental effects, and the anticipated adequacy of a comprehensive study to deal with the issues involved. Prior to preparing the report, the Responsible Authority must provide opportunity for public participation.

Comments and recommendations

- The legislation should require that the project scope be determined prior to making the project description available for public comment. Only if the project scope is determined at this time, will the public be able to appropriately comment on which track it thinks the project properly belongs on.
- As well, the legislation should require that the Responsible Authority make available for public comment what it proposed to include in its scope of assessment, including cumulative effects. Obviously, these matters are also critical in determining track.

- The list of matters that the report must contain should also include a statement of the project purpose, alternatives to the project, alternative means of carrying it out, potential cumulative effects, or uncertainties. Information on these matters will be useful to the Minister in determining the appropriate track.

Description – the comprehensive study track -- public involvement and funding

Where the track determination is that of comprehensive study, the new section 21.2 would apply. This section requires the Responsible Authority to ensure that the public is given opportunity to participate in the comprehensive study process. New section 58 of the CEAA would extend the potential for participant funding to comprehensive studies.

Comment and recommendation

The provisions for public participation and participant funding can be seen as trade offs between the public and private interests. They give proponents more certainty of process by the new Act's requiring a track determination early on in exchange for giving the public interest funding to provide information to decisionmakers on the environmental effects of the proposed project. It is critical that reasonable and fair guidelines for public participation and funding for participation be developed as soon as possible.

Description – the comprehensive study track -- the decision

CURRENT CEAA

Under the current CEAA following the preparation of a comprehensive study report, the Minister or Responsible Authority must make some decisions on the basis of legislated criteria. Subsection 23(a) states that if the Minister finds that, after taking into account the implementation of any mitigation measures and comments, that the project (i) is not likely to cause significant adverse effects, or (ii) is likely to cause significant adverse effects that cannot he justified in the circumstances, then the Minister must refer the project back to the Responsible Authority for action under section 37. Where (i) applies, the Responsible Authority may approve the project, by, for example, issuing a regulatory permit. Where (ii) applies, the Responsible Authority must not issue the regulatory permit. If the Minister finds that after taking mitigation and comments into account the project is likely to cause significant adverse effects that can be justified, nevertheless the project goes to panel or to a mediator. In the last mentioned case, the panel or mediator refers its report back to the Responsible Authority and the Responsible Authority must determine whether, after taking into account the implementation of any mitigation measures and comments, that the project (i) is not likely to cause significant adverse effects, or (ii) is likely to cause significant adverse effects that can be justified in the circumstances, or (iii) is likely to cause significant adverse effects that cannot be justified in the circumstances. Where (i) or (ii) apply, the Responsible Authority takes the appropriate action, for example, issuing a permit. Where (ii) applies, he does not take the action (e.g. denies the permit application) (s.37 (1)).

PROPOSED AMENDMENTS

Under the new CEAA following consideration of the comprehensive study report and comments, the Minister issues an environmental assessment decision statement (s.23 (1)). This statement sets out the Minister's opinion as to whether (a) after taking into account the implementation of any mitigation measures that the project is or is not likely to cause significant adverse effects, and (b) sets out mitigation and follow up programs. The Minister's decision statement then goes to the Responsible Authority to take action under section 37.

The Responsible Authority's taking action under section 37 is modified by new subsection 37(1.3): When the Minister's environmental assessment decision statement concludes that the project is likely to cause significant adverse effects, the Responsible Authority cannot take any action under section 37 without Cabinet approval. The amendments do not provide any criteria to govern Cabinet's decision to allow or disallow the project, or to give reasons.

Comment

This new provision considerably undercuts the substantiveness of the current CEAA by making many decisions rendered in accordance with the Act to be simply political decisions. Here is why:

- There are two circumstances in which the Minister might find that a project is likely to cause significant adverse effect so that subsection 37 (1.3) applies: (1) where the significant adverse effects cannot he justified in the circumstances and (2) where the significant adverse effects can be justified in the circumstances
- Under the old rules, when (1) applied, the Responsible Authority had to decline from taking action such as granting a permit, granting an interest in federal land, or authorizing a loan.
- Under the new rules, when (1) applies, the matter goes to Cabinet, and Cabinet can allow the project to proceed, simply on political grounds.
- Under the old rules when (2) applies the project could go ahead, but only where a determination was made that the significant adverse effects can be justified in the circumstances.
- Under the new rules, the matter goes to Cabinet, and Cabinet can allow the project to go ahead on political grounds, regardless of whether the adverse effects can be justified in the circumstances.

Recommendation

It is unclear to us why Cabinet is involved at all in these processes. Perhaps it is so that the Minister will not be seen as being secondary to a Responsible Authority, in the sense that the Minister makes recommendations to the Responsible Authority. If this is the reason, why doesn't the CEAA just require the Minister to make the justification determination and require the Responsible Authority to follow the Minister's determination? If this is seen as somehow wrongly limiting the Responsible Authority's discretion under other legislation (though that is the main point of the CEAA), then Cabinet's involvement should be limited to only where the Responsible Authority does not agree with the Minister's justification assessment. In this case, the CEAA should require Cabinet to make a justification assessment such that a project may go ahead in

the face of significant adverse effects only if it is otherwise justified in the circumstances.

Description and recommendation – the mediation track

New subsection 29(4) states that where a project has been sent to mediation, and the mediator determines that the mediation will not work, the Minister must "order the conclusion of the mediation". The section does not then say what happens next.

We recommend that the Act authorize the Minister to determine on which track the assessment should proceed where mediation fails. Currently the Act requires that a failed mediation go to panel review. This provision recognizes that mediations normally fail because of irreconcilable differences of view, or because of uncertainties of environmental impact or ways to deal with impact. We do not see any reason why the amended Act should divert from the current provision.

Section 38 – Mandatory follow up

Description and recommendation

This amendment would require responsible authorities to consider whether a follow up program for a project is appropriate. If so, they must design follow-up programmes and ensure their implementation. As well, section 38 clarifies that responsible authorities are not limited to their own immediate departmental or agency legislation in designing a follow up program.

Comment and recommendation

We are very supportive of this provision. We recommend that guideline materials be developed to help responsible authorities in designing follow up programs. Specifically we suggest that responsible authorities be made aware of the importance of setting appropriate conditions in permits, leases and other regulatory authorizations to ensure that they can implement and enforce follow-up programs. Where government funding triggers the CEAA, follow up requirements could be made enforceable conditions of the loan. If adaptive management is to be part of a follow up program it is critical that the conditions in regulatory authorizations or loans be flexible enough to enable the responsible authority may require changes if the need is indicated through adaptive management.

Section 55 -- Registry

Although this section has improved (e.g. by having the Agency maintain the registry instead of the responsible authority) we believe it could be made better as follows:

- We question the exclusion of notice of commencement of assessment for projects that may fall under the model or replacement class screenings (subsection 19(5) or (6)). As noted earlier in these comments, in order for the responsible authority to determine whether a project fits under a model or replacement, the authority must make a determination as to whether local conditions or circumstances require it to be a model. Here it is important for the responsible authority to get information

from the public in the area in order to make an informed determination. If a project fits under the model class screening, then we suggest that opportunity for public comment should be made to assist the responsible authority in making appropriate adjustments and to account for cumulative effects. We note that clause 55(2)(c) requires a "statement of the projects in respect of which a class screening is used under subsection 19(5) or (6)", however, this does not require publication in the registry prior to the determination as to whether a project fits under 19(5) or 19(6).

- Clause 55(2)(i) should not exclude model class screening reports since they will have been adjusted for local circumstances and cumulative effects.
- Clause 55(2)(l) should also require that a statement of what step will next be taken when mediation fails be on the registry.
- Clause 55(2)(o) should not exclude projects that fit under model class screenings (19(6)) since the responsible authority must still make a decision in respect of them.
- We question why the new section 55, in contrast to the old 55, does not require comments filed by the public to be posted, terms of reference for a panel review or mediation and documents requiring mitigation?
- As recommended earlier, we would like to see notice of project and assessment scope determination on the registry.
- Although we are pleased that there will be an electronic registry, accommodation should be made for those who do not have internet access.

Clause 59(c)(iii) and 59(c.1)(iii) – Prescribed cost exemption

Clause 59(c)(iii) authorizes regulations exempting projects or classes of projects from assessment requirements that "have a total cost below a prescribed amount and meet certain prescribed conditions". Clause 59(c.1)(iii) authorizes regulations for the exemption in respect of projects outside of Canada, projects on federal lands and for Crown corporations. We find these provisions to be problematic for the following reasons:

- There is no obvious connection between cost of project and potential environmental damage.
- The exemption is not acceptable since it does not apply depending upon a cumulative effects assessment; no matter how little a project costs, it could be the straw that breaks the camel’s back
- We understand that the Regulatory Advisory Committee explored this matter in the past and recommended against a minimum cost exclusion.
- We find it to be dangerous that the cost would be prescribed with no criteria to govern the prescription. There is nothing to prevent Cabinet from setting a high prescribed cost thereby excluding projects that should be included. If this provision is to stay in, the legislation should set appropriate criteria for Cabinet's exercizing this regulatory authority.
- We are concerned with clause 59(c.1)(iii). As members of the Regulatory Advisory Committee are aware, it is a struggle getting crown corporations subject to the Act. This potential exclusion could undermine successes. As well, as regards the Canadian International Development Agency (CIDA), there already is considerable flexibility in environmental assessment of their projects. We do not see the necessity to authorize an exemption with such uncertain parameters in addition to

this flexibility. In addition, because of the economies of many developing countries, a CIDA project might not cost a lot in money, though it still could have considerable environmental effect.