

March 30, 2000

Canadian Environmental Assessment Agency
200 Sacré-Coeur Boulevard
Hull, Quebec
K1A 0H3

RE: Canadian Environmental Assessment Act ("CEAA") Five-Year Review

The Environmental Law Centre is a non-profit charitable organization that has operated in Alberta since 1982. The Environmental Law Centre provides services in environmental law education and assistance, environmental law reform and environmental law research to achieve its primary objective of making the law work to protect the environment. It is in pursuit of this objective that we provide our comments relating to five-year review of CEAA.

Five-year review themes and issues

The Canadian Environmental Assessment Agency (the "Agency") has identified three review themes: making the environmental assessment ("EA") process more predictable, consistent and timely; improving the quality of environmental assessment; and strengthening opportunities for public participation. These comments will address the three identified themes, and then they will address additional themes that have been discussed at public meetings and workshops during the review process. These latter are alleged overlap and duplication, scope of assessment, court review of actions and decisions under CEAA and policy EA.

Predictability, consistency and timeliness

We agree that the CEAA processes could be made more predictable, consistent and timely. To accomplish this we would recommend legislative changes to:

- Expand the Agency's role by requiring it to coordinate administrative aspects of EA
- Make the Agency a single window for all stakeholders
- Require the Agency to determine substantive matters relating to EA (e.g. scope of project, scope of assessment) where other statutory delegates (in particular responsible authorities) fail to act in a timely or consistent manner
- Provide for accountability in statutory delegates
- Provide enforcement provisions to compel statutory delegates to comply with statutory duties.

As well, we recommend more training and detailed training materials for statutory delegates, in particular, responsibility authorities.

Improving the quality of EA

EA quality should be improved. To this end, we recommend legislative changes to:

- Facilitate EA as a planning tool; this could be aided by mandating an "in until out" approach to EA
- Require examination of need and alternatives in all EA reviews, including screenings

Recycled Paper

- Require addressing follow up and monitoring
- Require public notice and opportunities for public involvement for all EA levels, including screenings, and important stages, including project and assessment scoping
- Make participant funding available for comprehensive study reviews
- Require more training for responsible authorities and federal authorities
- Give the Agency expanded authority to compel consistent, good quality EA.

As well, we urge that detailed manuals be prepared to assist statutory delegates in carrying out statutory duties, such as making determinations of scope of project and assessment, including cumulative effects.

Public participation

Early opportunity for effective public participation is essential to good quality EA. Effective public participation requires funding. We recommend legislative changes to:

- Expand the participant funding program to include comprehensive studies
- Expand the participant funding program to include screenings, as appropriate
- Provide funding earlier in the review process to allow best use of funding awards
- Expand requirements for public notice to include screenings.

Alleged overlap and duplication

We advocate a strong federal role in environmental assessment, including the federal government aggressively asserting its constitutional jurisdiction. Advocates of harmonization down to one -- the provincial --- EA process often try to justify their views on the basis of alleged overlap and duplication between federal and provincial processes.

There is much evidence that claims regarding overlap and duplication are not justifiable. An Agency commissioned background paper (*Multi-Jurisdictional Environmental Assessment* by David Lawrence) summarizes a review of projects subject to CEAA review from April 1995-March 1996 as follows:

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.

In any case where both federal and provincial processes apply to a project, agreements could apply so that each level of government carries out its legislative EA requirements with one joint EA. We emphasize, however, that joint reviews only are acceptable where each level of government carries out its own legislative requirements in the review. Joint reviews do not mean that only one level of government carries out an EA.

Scope of assessment

Some industry and provincial representatives have urged that CEAA be changed so as to limit scope of federal EA to matters strictly within federal legislative jurisdiction. We strongly disagree with this view. Our courts, including the Supreme Court of Canada, have confirmed the right and obligation of federal authorities to consider all relevant effects in carrying out federal EA regardless of whether the effects concern something under provincial jurisdiction. The Federal Government must fulfill its obligations to Canadians to ensure that all potential environmental effects including cumulative effects are examined in deciding whether it should allow activities governed under federal law, on federal land or funded with federal money.

Recycled Paper

No privative clause

We are aware that some industry and provincial representatives have recommended that CEAA be amended to include a privative clause. We urged the Government to reject their recommendation.

Here is why CEAA should not contain a privative clause:

- Most, if not all, of the CEAA litigation has occurred because statutory delegates did not carry out CEAA duties; they failed to follow the law. No persons are above the law. Instead of adding a privative clause to CEAA, CEAA should be amended to make statutory delegates accountable to compel their compliance with statutory duties. Where duties are unclear, CEAA should clarify them.
- Adding a privative clause to CEAA would not only severely limit environmental organizations from asking a court to review CEAA decisions, it would also limit industry and others affected by such decisions. Those advocating such a clause should think through the ramifications for their sector.
- Privative clauses normally are used only where it is appropriate to confer an extreme degree of deference to the decisions of statutory delegates because of their unique, technical expertise. Although in a democratic society privative clauses might never be justified, they certainly are not appropriate where the statutory delegates in question do not possess unique, technical expertise. Although authorities responsible for issuing permits or granting federal interests may be experts in their areas (e.g., fisheries, navigable waters, migratory birds), they normally are not trained EA specialists.

Policy EA

Rather than confining EA to discrete projects, EA could contribute to overall environmental quality in Canada through application to federal programs, plans, and policies. Since 1970, the *National Environmental Policy Act* has required environmental assessment of U.S. policies, and there is no good reason why CEAA should not require the same for Canada's policies, especially during their development. To that end, we recommend legislative changes to:

- Require the assessment of federal policies, plans and programs
- Ensure that EAs of policies are carried out early, and become an integral part of policy development
- Provide for public involvement in policy EAs
- Compel the development of federal policies regarding environmental matters.

We thank you for the opportunity to provide these comments. Should you have any questions regarding them, please do not hesitate to contact me.

Yours truly,

Arlene Kwasniak
Executive Director
Environmental Law Centre

Recycled Paper