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Procedural Clerk
Standing Committee on Environment and Sustainable Development
House of Commons
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RE: Statutory Review of the Canadian Environmental Assessment Act

Dear Committee,

The Environmental Law Centre (ELC) is an Edmonton-based charitable organization 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.

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)*.¹ The ELC made written submissions to the Committee in March 2011 (a copy of which are attached for your reference).

Introduction

The ELC supports a comprehensive review of *CEAA* in this process. It is our view that a serious re-evaluation of *CEAA* by the Committee is necessary to ensure that each component of *CEAA* and the federal environmental assessment process meets the objectives stated in s. 4 of *CEAA*. At a minimum, the federal environmental process and *CEAA* should include:

1. assessment of the significance of adverse environmental effects in relation to cumulative effects and in relation to sustainability using an ecosystem approach;
2. mitigation, monitoring and follow-up procedures that are enforceable and transparent;
3. a robust mechanism to ensure the integrity of information relied upon in federal environmental assessments conducted pursuant to *CEAA*;
4. a strong federal role in environmental assessment;

¹ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37

5. a legislated, effective and transparent process for strategic assessments of federal government policies, plans and programs; and
6. assurance of timely and meaningful public participation in federal environmental assessments.

It is the ELC's view that all amendments to *CEAA* should be in accordance with s. 4 of *CEAA* and should meet the above-stated recommendations.

Why an Overhaul of the Environmental Assessment Regime in Canada is Necessary

Canada is experiencing serious environmental degradation in a number of areas. The *Canadian biodiversity: ecosystem status and trends 2010* report (the "*Trends Report*"),² prepared by the provincial, territorial and federal governments, describes of these areas of environmental degradation. The *Trends Report* noted that Canada faces the loss of some of our most productive and important ecosystems including, terrestrial and intertidal wetlands, eelgrass meadows, and boreal migratory bird nesting grounds.³

The *Trends Report* argues that:

A strategy of detecting ecosystem change and acting before thresholds are crossed has the greatest likelihood of preventing biodiversity loss. Examples throughout the assessment demonstrate the excellent return on investment from early response and prevention.⁴

The *Trends Report* emphasizes the importance of recognizing that rapid, irreversible change can occur when ecological thresholds are reached.⁵ Thresholds are likely to be crossed when "action is delayed until the evidence of change is clear."⁶ Once ecological thresholds are crossed, it may be too late because, at this point, interventions are drastic, costly and have a low likelihood of success.

Environmental assessment is a key tool for achieving sustainability in Canada. Properly structured and administered, environmental assessment is the core tool for achieving a precautionary, ecosystem-based approach to decision-making. Environmental assessment, applied properly, allows economic progress without crossing ecological thresholds thereby ensuring a sustainable future. However, the current *CEAA* regime does have shortcomings that need to be addressed to strengthen environmental assessment in Canada and to incorporate learnings from past environmental assessment processes.

² Federal, Provincial and Territorial Governments of Canada, "Canadian biodiversity: ecosystem status and trends 2010" (Ottawa: Canada, 2010) <www.biodivcanada.ca/ecosystems>

³ *Ibid.* 60% of terrestrial birds nest in the boreal forest.

⁴ *Ibid.* at 1.

⁵ *Ibid.* at 108.

⁶ *Ibid.* at 109.

Assessment of the Significance of Adverse Environmental Effects in Relation to Cumulative Effects and in Relation to Sustainability Using an Ecosystem Approach

The current *CEAA* regime seeks to determine whether a project subject to environmental assessment has “significant adverse environmental effects” and, if so, whether those effects are “justified in the circumstances”.⁷ This determination is made by the federal decision-makers (Responsible Authorities) as identified by *CEAA*.

It is the ELC’s view that the concepts of cumulative effects and sustainability need to be incorporated into the legal understanding of what constitutes a “significant environmental effect” under *CEAA*. This allows a project’s contribution to serious environmental problems – such as, climate change, growing levels of toxic pollution or biodiversity loss – to be considered within its environmental assessment. The incremental contribution of a particular project to wider serious environmental problems should not be assessed in isolation. Rather, a particular project’s effects should be considered significant if the project contributes to a wider environmental problem.

An ecosystem approach can be used to incorporate the concepts of cumulative effects and sustainability into the legal understanding of “significant environmental effects”. This is the approach used in Ontario and is described by the Ontario Divisional Court as follows:⁸

Under an ecosystem approach, decisions are made by measuring the effects on the system as a whole, rather than on their constituent parts in isolation from each other.

The ecosystem approach requires a determination of whether a project meets all applicable laws and guidelines and requires an evaluation of the cumulative and site-specific impacts of that project.⁹ It is the ELC’s view that this approach should guide decision-makers in the determination of whether a project has significant adverse environmental effects and whether those effects are justified in the circumstances.

The ELC recommends that *CEAA* be amended to provide definitions of “significant adverse environmental effects” that incorporate the concepts of cumulative effects and sustainability using an ecosystem approach.

⁷ *CEAA*, *supra* note 1, s.37.

⁸ *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 2008 CanLII 30290 (ON S.C.D.C.) at para. 60.

⁹ Mistakis Institute, “Sustainable Development a Review of Current Literature” (February 2004) at 78.

<<http://www.rockies.ca/files/reports/Sustainable%20Development%20A%20Review%20of%20Current%20Literature.pdf>>

The ELC recommends that *CEAA* be amended to include the following definition:

“significant adverse environmental effect” means any adverse environmental effect that, objectively and based on the best available information alone or together with other reasonably foreseeable or existing activities, trends, policies or approaches may:

- (a) contribute to the degradation in the quality or quantity of any renewable or non-renewable resources for future generations,
- (b) impede the restoration of healthy populations of a listed species under the *Species at Risk Act*,
- (c) contribute to the overall degradation trend of an ecosystem or one of its components,
- (d) contribute to adverse physical, geological, chemical, radiological, atmospheric or other changes that may be irreversible,
- (e) contribute to water or air pollution that may directly or indirectly adversely impact on human health,
- (f) contribute, temporarily or otherwise, to degradation of water supplies, fisheries, air or agricultural lands or ecological services, or
- (g) any other significance criteria provided for in the regulations.

The ELC recommends that *CEAA* be amended to include the following definition:

“justified in the circumstances” means that the project, policy, or approach complies with all federal laws and international obligations, is necessary to meet an important need and, objectively, based on the best available information is more likely than not to:

- (a) create significant adverse environmental effects that are temporary or substantially reversible through known means;
- (b) provide substantial economic and social benefits for the region and the country as a whole through employment, economic activity and enhanced well-being;
- (c) taken as a whole, provide a positive contribution to sustainability that could not be achieved through any identifiable less harmful means.

The ELC recommends that *CEAA* be amended to include the following definition:

“mitigation” means, the elimination of a likely adverse environmental effect of a project, through physical or operational technically feasible means to a point where it is no longer likely or actually significant, but does not include monitoring, follow-up programs, adaptive management or future plans to determine courses of action

Mitigation, Monitoring and Follow-up Procedures that are Enforceable and Transparent

It is not unusual, during the course of an environmental assessment, for serious environmental effects to be determined to be insignificant in light of proposed mitigation, monitoring and follow-up conditions. Often, these conditions take the form of non-binding recommendations which do not identify measures for mitigation or require such measures to be carried out. The consequence is that there is no assurance that serious environmental effects - deemed to be insignificant due to proposed mitigation, monitoring and follow-up conditions – can or actually will be mitigated. This is despite the fact that the project is approved under *CEAA* in light of the proposed mitigation, monitoring and follow-up conditions. Similarly, there is often reliance on mitigation, monitoring and follow-up to address uncertain effects that are potentially significant.

It is the ELC’s view that there must be accountability for mitigation, monitoring and follow-up conditions. The ELC proposes that a permitting system be implemented under *CEAA*. We note that this proposal is consistent with that made by the Committee in the 2003 *CEAA* review.

The ELC recommends that mitigation, monitoring and follow-up must be enforceable through permitting under *CEAA*. Further, compliance steps and monitoring reporting should be required to be posted on the registry so that the public can understand the effects as a project is carried out.

Robust Mechanism to Ensure the Integrity of Information Relied upon in Federal Environmental Assessments Conducted pursuant to *CEAA*

The vast majority of environmental impact statements prepared under *CEAA* are put together by consultants. This is a concern because the Canadian consulting industry that exists for the purpose of preparing environmental impact statements is unregulated. It is often not clear who authored a particular environmental impact statement and whether the author is qualified to conduct research, assess data or make conclusions. The ELC recommends a mechanism be implemented to ensure the scientific integrity of claims made in the environmental assessment

process. There should be a means to challenge information as being flawed, incorrect, incomplete, mistaken, misleading or inaccurate.

Another concern associated with the integrity of information arises from the model of self-assessment that currently exists under *CEAA*. This concern is best explained as follows:¹⁰

It likely does not take an expert to understand that for any environmental assessment regime to be perceived as legitimate and credible in the eyes of the public, it should, at least in theory, be built upon a fundamental premise that the objectivity of the assessor and the impartialities of science must rule the day...Although it may be difficult to quantifiably determine the extent of the impact of the self-assessment model on the integrity of the decision-making process under the *CEAA*, it is not difficult to conclude that the adoption of such a model has, at the very least, eroded public confidence given the self-serving nature of such a regime.

The ELC recommends that the model of self-assessment under *CEAA* be abandoned while maintaining the principle that the person wishing to pursue activities with a potential for environmental harm must bear the costs of environmental assessment. The ELC proposes that *CEAA* be amended to allow centralized assessment by the *CEAA* Agency.

The ELC recommends that *CEAA* be amended to ensure the scientific integrity of claims made in the environmental assessment process. Credible oversight of scientific information can be provided by providing a mechanism to challenge information as being incomplete, inaccurate or otherwise flawed.

The ELC recommends that the model of self-assessment under *CEAA* be abandoned. In its place, the ELC recommends that *CEAA* be amended to allow centralized assessment by the Agency. Further, there should be a mechanism for cost recovery and to ensure the independence of the Agency.

Strong Federal Role in Environmental Assessment

The ELC's position is that, due to the realities of the Canadian constitutional division of powers, the federal government is obligated to play a strong role in the Canadian environmental assessment regime. The environmental effects of a particular project may relate to federal or provincial constitutional heads of power or, as in many cases, to both. In the event that a particular project impacts upon matters within federal jurisdiction, only the federal government

¹⁰ Teri Cherkewich, *supra* note 8

has the constitutional and legislative authority to effectively deal with those effects. This remains true even if the project has effects that impact upon matters within provincial jurisdiction. It is the ELC's position that the federal government cannot abdicate, delegate or otherwise download its responsibility for environmental assessment of matters within its constitutional and legislative powers to a provincial environmental assessment process.

There have been assertions that the current Canadian environmental assessment regime is inefficient and duplicative. The ELC notes that there is a lack of compelling evidence that this is indeed the case. In any event, the ELC agrees that improving the current environmental assessment regime by improving efficiency and reducing needless duplication is beneficial. However, it is the ELC's position that any amendments to *CEAA* designed to address concerns of inefficiencies and duplication, must not result in a reduction of the federal role in environmental assessment or of the overall quality of environmental assessments.

The ELC notes that - due to the nature of the Canadian constitution and the complexity and diversity of departmental mandates – overlap is an inescapable reality. In itself, overlap is not the cause of inefficiency or needless duplication. As such, it is the ELC's position that inefficiency and needless duplication will not be effectively addressed by reducing the federal role in the Canadian environmental assessment regime. Rather, steps toward improved coordination and cooperation among various governmental departments and levels of government is the appropriate means to reduce any inefficiency and needless duplication that might exist.

The ELC recommends that the importance of a strong federal role in Canada's environmental assessment regime be recognized in *CEAA*. The ELC also recommends that the federal government undertake an evaluation of provincial capacity and environmental assessment processes to identify and address areas of inefficiency, needless duplication and legislative gaps.

Legislated, Effective and Transparent Process for Strategic Assessments of Federal Government Policies, Plans and Programs

It is the ELC's view that strategic environmental assessment provides a mechanism for the federal government to address major issues that affect matters of federal jurisdiction. Strategic environmental assessment can be used to address issues such as industry-wide standards, mitigation techniques and technologies, ecosystem management, cumulative effects and regional planning issues. Strategic environmental assessment considers government policies, plans and programs in the context of wider environmental concerns and, in so doing, creates a framework for assessment of individual projects leading to sustainable decision-making. For example, the greenhouse gas production of a particular project could be assessed in light of a federal policy,

plan or program regarding overall greenhouse gas production (which policy, plan or program has already been subject to environmental assessment).

When *CEAA* was first enacted, the Canadian Bar Association commented that the use of a policy-based, rather than legislated, strategic environmental assessment process has:¹¹

...some obvious weaknesses: it is not based on statute and therefore can be altered without public knowledge or debate; the criteria for assessment are not known; compliance may be a problem, since there is no legal enforcement mechanism; departmental turf-protection and competition will undermine enthusiasm for the practice...

Accordingly, the Canadian Bar Association recommended that *CEAA* be amended to provide that policy decisions be subject to environmental assessment. The Canadian Bar Association's concerns about a policy-based strategic environmental assessment process have proven valid. In March 2008, the Commissioner of the Environment and Sustainable Development issued a report that repeated the concerns with a policy-based approach.¹² The Commissioner found that there was a weak accountability structure, the Privy Council Office did not ask whether the directive had been complied with when submissions to Cabinet were delivered, and the assessments were not transparent. In light of the shortcomings of a policy-based approach, the ELC recommends that *CEAA* be amended to provide a **legislated** process for strategic environmental assessment.

The ELC recommends that *CEAA* be amended to provide a legislated, effective and transparent process for strategic environmental assessment of federal government policies, plans and programs.

Assurance of Timely and Meaningful Public Participation in Federal Environmental Assessments

It is the ELC's position that public participation is a fundamental aspect of effective environmental assessment and of sustainable development. Inherently, the determination of whether a particular environmental effect is "significant" or "justified" requires consideration of the values of the public engaged in the environmental assessment process.

¹¹ Canadian Bar Association, "Submission on Bill C-18 Canadian Environmental Assessment Act" (November 1990) at 7.

¹² Status Report of the Commissioner of the Environment and Sustainable Development to the House of Commons (March 2008) Chapter 9 - Strategic Environmental Assessment.

The ELC considers that “participation” goes beyond a mere opportunity to make a written complaint or a presentation. An environmental assessment process must provide members of the public with meaningful rights to obtain information and with the opportunity to test that information on reasonable timelines. It is the ELC’s view that the public ought to be given an opportunity to engage in the broader policy issues involved in project assessments under *CEAA*.

The ELC recommends that public participation be assured for **all** levels of environmental assessment under *CEAA*, including screenings. As well, the ELC recommends that *CEAA* be amended to provide rights to appeal substantive determinations by the decision-maker about environmental effects.

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Conclusion

In the ELC’s view, *CEAA* requires extensive revision to address concerns with the federal environmental assessment regime. The ELC is pleased to provide you with some of the recommendations that, in our view, would partially address these concerns with federal environmental assessment.

The ELC thanks the Committee for the opportunity to provide this written submission. Further to our letter dated November 4, 2011, the ELC requests the opportunity to appear as a witness before the Committee via videoconference or in person.

Yours truly,

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