Submission to the Standing Committee on Environment and Sustainable Development of the House of Commons on

Bill C-19, The *Canadian Environmental Assessment Act*

by

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Presentation of the Environmental Law Centre to the House of Commons Standing Committee on Environment and Sustainable Development on Bill C-19, , the *Canadian Environmental Assessment Act*

I. Introduction

The Environmental Law Centre (Alberta) Society (ELC) was formed in 1982 to provide Albertans with a source of objective information about environmental and natural resources law. To this day, the Environmental Law Centre is a strong non-profit, charitable organization whose environmental law services are used across Canada and whose environmental law expertise and skills are sought after by governments, industry, environmental organizations and members of the public.

The ELC has been involved in *Canadian Environmental Assessment Act* (Act) since its beginnings. We participated in consultations on the proposed legislation and have had a member on the Regulatory Advisory Committee in a number of years. We also have had a representative on the Canadian Environmental Network (CEN) Environmental Assessment Steering Committee and Caucus.

We have read the brief the Canadian Environmental Law Association, the West Coast Environmental Law Association and the Sierra Legal Defense Fund, and we support their recommendations.

Our submission begins with a brief discussion of federal jurisdiction and environmental assessment and then focuses on what we believe are problems with Bill C-19.

II. The federal role and jurisdiction in environmental assessment

In the past some representatives of industry and provinces have argued both in and out of courts that under our constitution CEAA should be administered so that only matters clearly within federal constitutional legislative jurisdiction may be raised in conducting an assessment. We are even aware of recommendations that the CEAA be amended to ensure such narrow application. Those who hold these views are wrong in a number of ways. Here is why:

- The division of powers in the Constitution deals with the right to legislate a matter. CEAA does not concern the right to legislate a matter. CEAA sets out processes that a Responsible Authority ("RA") must to follow in order for a RA to exercise discretion under separate legislation under federal jurisdiction (for example whether or not to issue *Fisheries Act* permit).
- CEAA assessment processes do not take over or usurp an area of constitutional provincial legislative authority. The CEAA processes only enable government delegates to carry out legislation under federal jurisdiction, such as the *Fisheries Act* or the *Navigable Waters Protection Act* in a well informed, reasonable manner.

- Ruling Canadian cases dictate that RA's not only have the right, in some cases, they have a responsibility to go beyond matters within legislative federal jurisdiction when carrying out CEAA duties. For example, the Federal Court of Appeal states in the well known Sunpine case:

> "Under paragraph 16(1)(a), the Responsible Authority is not limited to considering environmental effects solely within the scope of a project as defined in subsection 15(1). Nor is it restricted to considering only environmental effects emanating from sources within federal jurisdiction. Indeed, the nature of a cumulative effects assessment under paragraph 16(1)(a) would appear to expressly broaden the considerations beyond the project as scoped. It is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered." , (*Minister of Fisheries and Oceans v. Friends if the West Country*, 12-10,1999, A-550-9834, paragraph 34]

The Federal Court of Appeal further stated that the RA "erred in declining to exercise the discretion conferred on it in its cumulative effects analysis … by excluding consideration of effects from other projects or activities because they were outside... federal jurisdiction".

III. Review and recommendations on Bill C-19

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
> Improvement of follow up provisions
> Injunction provisions to prohibit activities that could harm the environment prior to the environmental assessment being carried out.

However, we submit the following comments on what is missing, and, from a public interest environmental law perspective, could be improved.

1. Subsection 2(1) Definition of "environmental effect"

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 has been 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. 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.

Recommendation:

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*,*
> *(b)* any effect of any such change that the project may cause to the matters described in (a) and
> (c) 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.

Recommendation:
We recommend amendments to the Act to require RAs 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.

4. Section 7 -- prohibitory orders
Section 7 of the Bill would amend section 11 of CEAA. The Bill would enable the relevant minister or ministers to issue a prohibitory order to a proponent until the relevant RA or RAs 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, there are problems with it. 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.

5. Section 16.1 – Community knowledge and aboriginal traditional knowledge

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

Comment and Recommendation

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.

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

6. Section 16.2 – Regional studies

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 and Recommendation

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 (e.g. it might address only cumulative effects of existing projects).

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

7. Section 19 – Replacement and model class screenings

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 RA determines that a project falls within a replacement class screening report then provided that the RA ensures that any design standards and mitigation

measures described in the report are implemented, no further assessment is required. If and RA 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 a new exemption from environmental assessment 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 RA 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 RA can fulfill obligations under the Act by utilizing the replacement model.
- We are concerned at the great discretion given to the RA in making these important determinations. A RA cannot determine if a proposed project appropriately fits under the replacement or the model screening unless the RA 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 RA to assist in the determination of whether a project fits into the replacement category or should be screened as a model screening.

8. Section 21 – New comprehensive study provisions

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 RA'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 RA must provide opportunity for public participation.

Comments and recommendations

As an alternative to these complex and, for reasons set out below, unsatisfactory provisions, we suggest that the new CEAA adopt the approach suggested by other

public interest groups. With this approach the comprehensive study list become a review panel list. All projects on the list would be subject to EA by a review panel. This facilitates thorough EA while also assuring certainty of process for proponents.

However, if the new comprehensive study provisions are to stay, we recommend the following:

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 RA 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.

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 RA 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 promptly and be made a legislative requirement.

The comprehensive study track -- the decision

Current CEAA

Under the current CEAA following the preparation of a comprehensive study report, the Minister or RA 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 RA for action under section 37. Where (i) applies, the RA may approve the project, by, for example, issuing a regulatory permit. Where (ii) applies, the RA 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 RA and the RA 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 RA 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 RA to take action under section 37.

The RA'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 RA 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.

Comments and recommendations

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 RA 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.

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 RA, in the sense that the Minister makes recommendations to the RA. If this is the reason, why doesn't the CEAA just require the Minister to make the justification determination and require the RA to follow the Minister's determination? If this is seen as somehow wrongly limiting the RA's discretion under other legislation (though that is a major objective of the CEAA), then Cabinet's involvement should be limited to only where the RA 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.

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.

Recommendation

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.

9. Section 55 -- Registry

Although this section has improved (e.g. by having the Agency maintain the registry instead of the RA) 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 RA 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 RA 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 RA 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 RA 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.

10. Clauses 59(c) (iii) Exemptions prescribed cost

The Bill amends clause 59(c) by adding (c)(iii) which authorizes regulations exempting projects or classes of projects from assessment requirements that "(iii) have a total cost below a prescribed amount and meet certain prescribed conditions".

Comments and recommendations:

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.

11. Clause 59(c.1) Exemptions for Crown corporation, CIDA and in respect of federal lands

This clause extends the exemption mentioned above (and existing exemptions in 59(c)(i) and (ii) to Crown Corporations, CIDA, or projects on federal lands. We have concerns for this extension for the same reasons noted above e. As well, we note that a members of the Regulatory Advisory Committee are aware, it is a struggle getting crown corporations subject to the Act. This potential exemptions could undermine successes. As well, as regards the Canadian International

Development Agency (CIDA), there already is considerable flexibility in environmental assessment of their projects.

12. Red Hill Creek problem

This comment concerns a problem with the CEAA resulting from the November 2001 Federal Court of Appeal case. *Regional Municipality of Hamilton- Wentworth v. Minister of Environment, Minister of Fisheries and Oceans et al* ("Red Hill Creek case"). The case has not been appealed.

The proponent in the case, the Regional Municipality of Hamilton-Wentworth, argued that the CEAA should not apply to the proposed construction of an expressway in an environmentally sensitive area in Hamilton, Ontario. Its main two arguments were:

1. CEAA did not apply because the project fell under the grandfather clause in subsection 74(4). This section reads:

   > Where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, this Act shall not apply in respect of the issuance or renewal of a license, permit, approval or other action …. .

   The proponent argued and the Federal Court agreed that the section applied even though no on the ground construction had commenced on the stated date. On that date, the project was only in the planning stage.

2. The project should not be assessed on account of section 11 of the CEAA which states:

   > Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the RA in relation to the project.

   The proponent argued and the Federal Court agreed that under this section, since irrevocable decisions by the proponent the Act could not apply.

In our view, both findings of the Court of Appeal are wrong and can pervert the intention and operation of the CEAA.

The interpretation of subsection 74(4) is wrong because the intent of that subsection requires that construction has begun for the grandfather clause to apply.

The Court's interpretation of section 11 is not only wrong, it exhibits faulty logic and is inconsistent with the purposes of the CEAA. If it stands then any proponent can circumvent federal assessment by commencing a project prior to the environmental assessment process. It is obvious that the true intent of section 11 is to make it clear that it is the RA that has the responsibility to see that environmental assessment is conducted as required and that it proceeds early in the project proposal's process. This section should be amended to make its intent plain.

Recommendations

We recommend that:

Subsection 74(4) be deleted. It refers to construction that was initiated almost 20 years ago, and is not longer necessary.

Subsection 11 be amended by adding to 11(1):

and for better certainty, non-compliance with this section does not in any way affect requirements for assessment under this Act.