Introduction

Thank you for this opportunity to appear before this Committee and to share with you our views on Bill C-19 and the Canadian Environmental Assessment Act (ACEAA@).

We appear here on behalf of a group of non-government members of the Regulatory Advisory Committee (ARAC@). The RAC is a multistakeholder committee established in 1992 to advise the Minister of Environment on regulations and other matters relevant to the CEAA. The RAC includes representatives of Aboriginal groups, environmental organizations, industry associations, provincial governments, and federal departments, all with a particular interest in environmental assessment.

The RAC was intensely engaged in the five-year review of the CEAA. Between January and April 2000 the RAC held a series of meetings focusing on the five-year review. The RAC produced its review of the CEAA titled *Report to the Minister of Environment* (the ARAC Report@). The RAC Report includes a discussion of and recommendations relating to key law reform issues. RAC recommendations were either by consensus, meaning having full support of the RAC, no consensus, or further work, meaning, the RAC found the issue to be important and that it should be pursued, but there was not adequate time to deal with it in the context of the five-year review meetings.

Each organization engaged in the RAC has its own set of key issues with the CEAA. Many of these organizations will have perspectives on issues that are not the same as those of the RAC. Some organizations will be making their own submissions to the Standing Committee. This submission is by the non-governmental RAC members in their role as RAC members and not as representatives of their organizations.

The RAC worked only on the issues that were identified by the Canadian Environmental Assessment Agency, and on issues that were otherwise agreed to be worked on by the RAC membership in general. A number of issues important to one or more RAC members were never discussed by RAC.

Scope of Submission to the Standing Committee on Environment and Sustainable Development

The RAC Report contained both consensus matters that called for changes to the CEAA and consensus matters that called for changes in environmental assessment administration, regulations and guidelines that did not necessarily require CEAA amendment. The RAC hopes that government will respond in a timely fashion to its recommendations that do not necessarily require a change to the CEAA.

The non-governmental members of the RAC are pleased that Bill C-19 reflects a number of the consensus items calling for CEAA changes. However, the Bill did not incorporate all of these consensus matters. The focus of this submission is on consensus matters that either directly or implicitly called for changes to the CEAA that were not incorporated in Bill C-19. These are matters where we, as a wide cross-section of organizations involved in environmental assessment under CEAA, have agreed by consensus would improve the functioning of CEAA, and thereby improve federal environmental assessment.

Many of the amendments that Bill C-19 would make to CEAA are of an administrative nature, and do not need extensive discussion. These comments directly incorporate consensus recommendations from the RAC Report and compare them to Bill C-19. The submitters recommend that these consensus matters be incorporated into the new CEAA by amendments proposed in Bill C-19.

RAC recommendations not fully reflected in Bill C-19

Scoping

The RAC Report addressed certainty of process related to scope of project and scope of assessment.

RAC consensus recommendations not adopted in Bill C-19 were to:

- Develop a more formal process for determination of the scope of project and scope of assessment factors as required under Sections 15 and 16 ("scope determination"). (RAC recommendation 5.1)
- Greater national consistency for scoping should be established through development of clear criteria addressing scope determination. (RAC 5.3)
- At a minimum, all assessments should be listed on the Federal Environmental Assessment Index (FEAI) and include scope determination results to help provide transparency. (RAC 5.2) (also RAC 19.1, 19.2 and 19.3 re "Strengthen Public Participation")
- Recognize either in the legislation or through policy that the results of Strategic Environmental Assessments and Regional Environmental Assessment Frameworks should provide a helpful context for scoping determinations including those related to cumulative environmental effects assessments. (RAC 5.6)

Improving the quality of environmental assessments - Coverage of the Act

RAC consensus recommendations not adopted in Bill C-19 were:

$ The nature of a land transaction (lease or otherwise) should not have the effect of avoiding an assessment. If a project is located on federal land (including Aboriginal lands), it should be assessed. (RAC 10.1) Y. The current wording of section 5(1)(c) should be clarified and be revised as necessary to more clearly convey the meaning of the term "disposal of an interest". (RAC 10.5)

Improving the quality of environmental assessments - Operation of transboundary provisions

RAC consensus recommendations not adopted in Bill C-19 were:

$ Allow the Minister to choose the appropriate review track (screening, comprehensive study, mediation or panel review). (RAC 12.2)
$ Allow the Minister to designate a lead federal authority for the assessment of a project. (RAC 12.3).

Strengthening public participation

RAC consensus recommendations not adopted in Bill C-19 were:

$ Notification (of an authority and/or the public) should take place prior to or upon commencement of an environmental assessment. (RAC 19.1) Y. Such notification should include electronic format through use of the FEAI and some form of non-electronic notification as determined by the Responsible Authority. (RAC 19.2) [Note: Although Bill C-19 requires that notice of commencement of an environmental assessment be on the Registry, it does not require non-electronic notification].
$ Amend the Act to make it a mandatory requirement to submit information to the FEAI. (RAC 19.3) [Note: this was partially met by requiring the Agency to ensure that certain records are included. *See* Bill C-19, new subsection 55.1].
$ Departments should be required to post their screening decision reports on their websites, consistent with the recommendation of the Commissioner of the Environment and Sustainable Development. (RAC 20.3)

Improved public participation in screenings

RAC consensus recommendations not adopted in Bill C-19 were:

$ Responsible Authorities should be responsible for ensuring that, where appropriate, opportunities are provided for public participation in screenings, but the conduct of the participation could be delegated to the proponent. Recommended wording for such a requirement is as follows: "With respect to public participation in screenings, the Responsible Authority shall document that the criteria for determining public participation were considered and that if interactive public participation is deemed appropriate, indicate the extent and character of the public participation and how it

met the guidelines for the determination of <meaningful>". It is recognized that <meaningful> is somewhat difficult to characterize and thus guidance is needed. (see Issue 27) (RAC 21.3)

Comprehensive studies

RAC consensus recommendations not adopted in Bill C-19 were:

$ Public participation (consultation) at three of these stages should be mandatory, namely the *pre-scoping* phase (notification), the *scoping* phase and the *Comment on the Comprehensive Study Report* phase. (RAC 23.1)

Participation in review of key regulations

RAC consensus recommendations not adopted in Bill C-19 were:

$ The Act or the regulations themselves should have provisions for public input to any ongoing or specific review of the Exclusion List, the Inclusion List, the Law List, and the Comprehensive Study List. (RAC 28.1)

$ There should be proactive notice when public comment is being sought on proposed changes to these regulations. (RAC 28.2)

Public participation in follow-up

RAC consensus recommendations not adopted in Bill C-19 were:

$ Where follow-up is required under the Act, Responsible Authorities should be required to use the FEAI to notify when follow-up has commenced for a project and to provide access to follow-up documentation. It is recognized that this may require modification of some of the FEAI fields. (RAC 30.1) [Note: This was implemented in part by requiring that a description summarizing a follow-up program or an indication on how to access a full description be placed on the Registry. *See* new clause 55.1(p)]

International context

The RAC Report notes that Canada has committed to many different measures to protect the global environment by signing a number of international environmental agreements that have a relationship to CEAA.

RAC consensus recommendations not adopted in Bill C-19 were:

$ Reflect these commitments in the Act. (RAC 33.1)

$ RAC recommends that the Preamble to the Act be amended to recognize the multitude of international environmental agreements that the Government of Canada has signed and ratified. (RAC 33.2)

Environmental Assessment and Aboriginal Peoples

- In hindsight, a number of the RAC recommendations on Aboriginal issues could be read so as to apply to Metis people, when in fact the Metis were not represented on RAC through the 5-year review process. While the Metis are now represented on RAC, I believe that greater work needs to be done to understand the implications of this Bill on the rights and interests of the Metis people.

- One RAC consensus recommendation had specific significance for the Inuit. RAC agreed that the Act should specifically recognise environmental assessment processes and powers established in law, for example through Land Claims Agreements. This recommendation has not been implemented in the Bill. It was felt that doing so would help to clarify the relationship between the processes outlined in the Act and those created under these other agreements and their implementing legislation, which is a point that the Inuit representative on RAC was particularly concerned about.

- RAC presented six consensus Aboriginal recommendations and one that had the agreement of all but one member of the group. In addition to this, the RAC report had only one section that had a preamble. This was the Aboriginal section. It was in essence a statement of the conditions we considered to be very important in order to be able to adequately deal with the Act and Aboriginal peoples.

- Two of these recommendations have for the most part been implemented and we are very much in support of their continued inclusion in the Bill. These are:
  Ensuring, through modification of section 10 and section 59(l), that projects on reserve are subject to an environmental assessment. As we see it, the proposed Bill has approached the issue in a straightforward fashion by rewording 10(1) and eliminating 10(2). We commend the Agency for their decisive move in this regard and are very pleased to see this previously very troubling section made useful.

  As well, the Agency has begun to demonstrate a strong commitment to giving effect to section 59(l) through the process they have undertaken with a number of First Nation communities in Nova Scotia. We are highly supportive of this initiative and think it is an excellent example of the level of cooperation that is both required and achievable.

  Despite this, we believe First Nations may still have some difficulty with section 10, for two reasons. First, it is not clear that they have the power to enforce or ensure that an environmental assessment is conducted regarding an off-reserve proponent. In fact, it could be argued that they do not have sufficient powers even regarding on-reserve proponents. The Indian Act only applies on reserve, and it does not clearly provide the power to a First Nation to enact by-laws relating to

environmental assessment. Many First Nations may argue that they have other authority under either their Aboriginal traditional laws or through the common law, but the courts have not as yet articulated this. So First Nations may be in the untenable situation of having to ensure something that they have no power to ensure. This could be remedied through amending either Bill C-19 to deal with both on- and off-reserve situations, or just amending the Indian Act to provide for this power regarding the on-reserve situation.

Second, First Nations are sorely in need of assistance and in particular, capacity-building resources in order to be in the position to able to fulfill these responsibilities. This is so important that RAC stated it as one of its preamble assumptions. RAC strongly believes that resources must be identified to develop the capacity at the community, tribal council, and broader institutional levels to be able to implement sections 10 and 59(l). Further, it is very important to distinguish between resources that are directed to First Nation capacity-building, and resources that are for increasing the ability of Indian Affairs to discharge whatever responsibilities they may have in this regard. If at all possible, scarce resources need to be directed at the former, rather than the latter.

RAC made a preamble statement recognising the rights that are protected through section 35(1) of the *Constitution Act,* and further recognising the relationship between those rights and the Act. We provided this statement because believe that recognition of the obligations created by section 35 is critical. We feel that this principle has not received enough attention. The critical importance of ensuring that projects do not impact treaty and Aboriginal rights requires more explicit recognition in the Bill (for example, in the definition of “lands in which Indians have interests [CEAA s. 48(1)(e)], the definition of environmental effect, and through the section 5 triggers).

Finally, greater attention needs to be directed at developing consultation mechanisms that can meet the legal requirements imposed by cases such as *Sparrow* and *Delgamuukw*, but which can also work cooperatively with regular public participation mechanisms.

RAC recommendations reflected in Bill C-19

Creating a Canadian Environmental Assessment Registry

Bill C-19: sections 1(4) and 26
CEAA: sections 2(1) definition of ARegistry@, 55, 55.1, 55.2, 55.3, 55.4

The current CEAA creates certain obligations for informing the public of an assessment but leaves details of delivery to individual Responsible Authorities. The result has been inconsistency, and problems of timely access to information necessary for meaningful public participation

Bill C-19 proposes a single, consistent, electronic registry. We support this as necessary to improved public participation and functioning of the Act.

Provision for improved public participation in screening-level assessments

Bill C-19: section 10(2)
CEAA: sections 18(3) and (4)

This amendment would confirm explicitly that public participation can be made more extensive in screening-level assessments, as appropriate to the nature of the project. It further provides for criteria to guide the decision on the circumstances, timing, nature, and extent of public participation. We support this amendment, noting that under Bill C-19 as currently worded, public participation in screenings is a matter to be determined at the discretion of the Responsible Authority in every case.

Improved monitoring of the implementation of the Act

Bill C-19: sections 28, 31, 32(1) and 32(2)
CEAA: sections 56.1, 62, 63(1), 63(2)

The five-year review of CEAA identified gaps in the information available on the operation of the Act. Such information gaps are an obstacle to verifying whether the Act is being implemented as intended, and to identifying where the Act or its implementation need improvement. CEAA created no consistent record-keeping or gathering requirement.

Bill C-19 proposes to correct this by obliging Responsible Authorities to gather and submit information to the Agency, and by designating the Agency=s leadership role. The Agency is further required to develop a quality assurance program with the objective of continuous improvement in the environmental assessment process. The proposal is consistent with the improvements recommended by RAC.

Creation of Federal Environmental Assessment Coordinator

Bill C-19: section 8
CEAA: sections 12.1, 12.2, 12.3, 12.4, 12.5

Assessment of larger projects can involve several Responsible Authorities and often the province. The assessment itself becomes a large project, with many parties involved. CEAA does not currently provide for any one organization to lead and manage the assessment itself, potentially jeopardizing quality, consistency, efficiency, and timeliness. The creation of a coordinator proposed by Bill C-19 would provide for leadership and management, and generally reflects RAC consensus recommendations regarding a ALead Responsible Authority@ (RAC recommendations 2.1-2.4).

Areas for further improvement

Creating regulations for the Canadian International Development Agency

Bill C-19: section 6
CEAA sections 10.1 (1), (2), and (3)

RAC explored, through a sub-committee, whether a special process is required to meet the environmental assessment needs of projects funded by CIDA, but this work did not come to a consensus conclusion.

Comprehensive Study process

Bill C-19: sections 1(1), 13, 14, 29
CEAA: sections 2(1) definition of Acomprehensive study@, 21, 21.1, 21.2, 23(1) and (2), 58(1.1)

CEAA currently provides for limited mandatory public participation in comprehensive studies, and no participant funding. Where seen as necessary, projects can be referred to a panel review during or after a comprehensive study. The result creates concerns for both the public (potential for inadequate public participation) and for the proponent (unpredictability, potential for two tandem processes).

Bill C-19 proposes an alternative approach. It would increase the extent of mandatory public participation in comprehensive studies and provide for participant funding. It would also force a decision, after the scope determination step, on whether a project will go through a comprehensive study or a panel review, but would remove the option of a panel review following a completed comprehensive study.

RAC did not reach consensus on the approach proposed by Bill C-19. There are differences of views on several aspects. Different groups see the increased public participation as potentially inadequate or as excessive for some projects. There is a difference in views on the desirability of mandatory participant funding. The removal of the option of a panel review following a comprehensive study, while decreasing uncertainty and potential delays for the proponent, is seen as removing a safety net for inadequate studies.

However, most groups did agree that the proposed comprehensive study process has a great flaw in the lack of transparency it would create for the scope determination step of a comprehensive study. We refer to scope determination as the process whereby the Responsible Authority(ies) or the Minister decide

- the scope of the project in relation to which an environmental assessment is to be conducted [section 15(1) of CEAA] and
- the scope of the factors to be taken into consideration in the assessment [section 16(3) of CEAA].

It is essential that the proponent and the public know what will be assessed. Bill C-19, as currently written, does not provide (and may even prohibit) publication of the scope determination [Bill C-19 section 13 creating new CEAA section 21(a)(i)].

Consistent with RAC=s consensus recommendations on scoping, we recommend that Bill C-19 be amended to make it mandatory that the scope determination be documented and published for all assessments. Further, if the comprehensive study process proposed by Bill C-19 is retained, it should be amended to ensure that the scope determination for comprehensive studies is published for public review and comment prior to the Minister making a decision on whether a comprehensive study or a panel review is required.

Enabling assessment of policies, programs, and regions

Bill C-19: section 8
CEAA: section 16.2

CEAA, as it now is, and as Bill C-19 would amend it, allows for assessments only of physical works and physical activities. Bill C-19 would allow the Act to consider the results of regional studies, but does not provide for such assessments to be carried out under the Act, and makes no mention of program or policy assessment.

RAC did not reach consensus on the desirability of including assessment of policies, programs, and regions under the Act.

However, there was some common ground among the non-government members of RAC, with the main area of disagreement being whether such assessments should be mandatory or discretionary.

The potential benefits of enabling assessment of policies, programs, and regions under the Act would be:

- to provide a transparent framework for how such an assessment would be conducted, what information must be made public, what factors should be considered, and how the public would participate;
- to provide a mechanism to streamline the assessment of groups of disparate small projects (for example, the management plan for a park);
- to provide a mechanism for better addressing cumulative effects issues;
- to provide a forum for policy debate which, in the absence of such a forum, currently takes place in the assessment of specific physical works.

The concerns about bringing such assessments under the Act would be:

- the practical challenge of defining what constitutes a Apolicy@ or a Aprogram@ for the purposes of assessment, and when an assessment should be initiated;
- the challenge of ensuring consistency of application;
- adding enormously to the complexity of an already complex Act.