RE: BILL C-19, AN ACT TO AMEND THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

Date: February 19, 2002

FROM: **THE SIERRA CLUB OF CANADA**
Presentation by: **Elizabeth E. May**
Executive Director

INTRODUCTION

The Sierra Club of Canada is a national, non-profit, membership-based environmental organization with approximately 10,000 members and supporters across Canada. We have chapter and group offices in Victoria, Vancouver, Edmonton, Toronto, Halifax, and Sydney. The Sierra Club's national office is in Ottawa.

The Sierra Club of Canada has participated at every stage in the legislative development of the current Canadian Environmental Assessment Act (CEAA) as well as in the five-year review process.
Sierra Club of Canada (SCC) participates in the Canadian Environmental Network Caucus in environmental planning and assessment. From November 1993-September 1995, I represented SCC on a sub-committee of the Regulatory Advisory Committee (RAC) to develop regulations for Projects Outside Canada.

SCC has been involved in many reviews of projects under both the guidelines order and CEAA, both through reviewing EIS and in panel reviews.

On a personal basis, I am a graduate of Dalhousie University Law School and, although no longer in practice, was a practitioner of environmental law in Nova Scotia and Ontario. I have been deeply involved in environmental assessment, having been in the Minister of Environment's office from 1986-1988, during which time Cabinet approved in principle the legislating of environmental assessment, issuing a white paper to begin public consultation. My resignation from the Minister's office was due to the decision to approve the Rafferty and Alameda dams in Saskatchewan without following the Guidelines Order. As some of you may recall, that issue was litigated by the Canadian

Wildlife Federation (with counsel Stephen Hazell, an acknowledged expert in environmental assessment who will soon be appearing before you on behalf of the Canadian Parks and Wilderness Society). The Federal Court ruled in the Rafferty case that the Guidelines Order was legally binding and the permits were quashed. In an experience typical of the flaws in Canadian environmental assessment law, the dams were built anyway.

Environmental groups and dedicated individuals, like Dr. Martha Kostuch, have many war wounds from chasing environmentally damaging projects through the courts in an attempt to force government to honour its own laws. It is cold comfort to win a court case after a bad project has been built. While one would have hoped that CEAA improved the record, sadly we are still forced to go to court when recalcitrant governments refuse to allow short-term political ends to be thwarted by sound planning.

The current review process and amendments to CEAA create an important opportunity to improve a flawed, but valuable process. In order to focus on some case histories and make some suggestions that have not yet been made, this brief is not an exhaustive review of the Act. I have, however, reviewed the briefs of the Canadian Environmental Law Association, the West Coast Law Association, the Environmental Law Centre of Alberta and Sierra Legal Defence Fund. Sierra Club of Canada wishes to support the helpful proposals for strengthening the bill found in those submissions.

An imperfect law in an imperfect world

As numerous commentators, and at least one federal minister, have observed, environmental assessment in Canada is plagued by conflict of interest inherent in self-assessment. The Responsible Authority is often the same entity promoting the development in the first place. All key decisions (panel or no? effects that can be mitigated or no?) in are the hands of the proponent agency. The fact that the provision that an Environment Minister can over-ride the RA has never been used speaks volumes.

Both industry and environmental groups have been frustrated by the uneven application of environmental assessment, as documented in Andrew Nikiforuk's review, "The Nasty Game." (which can be found on our website at "www.sierraclub.ca/national")

Steps in C-19, such as the creation of a Federal Environmental Assessment Coordinator, move in the right direction. Still, in a higher order discussion, repairing the process requires more sweeping measures. The commitments of the 1993 Red Book come closer to the mark -- creating a stronger agency designed along the lines of the CRTC. Such an agency would develop internal expertise, have capable and competent practitioners, thus providing better consistency in the Act's application, with decisions binding unless rejected by Cabinet.

Another corner stone of CEAA is public participation. From the Act's Preamble, throughout the process, public participation is central to the application of environmental assessment in Canada. Yet, this aspect is also often little more than a paper commitment. When rights to public participation are uncomfortable, they have been trampled.

I want to focus on two case histories (a.k.a.: horror stories) to frame your deliberations in some unpleasant realities. The two experiences are not atypical: the financing of CANDU reactor sales to China, and the establishment of an intensive aquaculture project on Cape Breton Island. I could give you more examples (the CIDA funding of an environmental assessment for a Canadian multinational wishing to build a dam in Belize, where the funding decision was not subject to an EA, the practice of DFO writing letters to assist proponents in avoiding EA, the EA of logging hundreds of thousands of acres of forest being restricted to the impact of a single bridge, structuring in-shore oil and gas development without EA, all spring to mind), but in the interests of time, I'll confine myself to reactors and mussels.

CASE HISTORY #1 (CANDU)

With the passage of the Canadian Environmental Assessment Act, it was clear that Canada intended its environmental assessment regime to apply to Canadian activities in other countries. The view was taken, and not without legal doubt, that the entire CEAA regime applied immediately to CIDA and other federal government activities overseas (DND, DFAIT), but would only apply to Crown Corporations on promulgation of specific regulations.

In 1993, the Canadian Environmental Assessment Agency struck a sub-committee of the RAC to tailor the CEAA regime for use in projects outside Canada (POC). The POC subcommittee included environmental groups, the nuclear industry, exporters associations, development ngos, as well as representatives of affected federal departments. For nearly two years the committee worked in constructive, multi-stakeholder fashion to develop a scaled-down version of CEAA's requirements, suitable for POC. Central to our deliberations was the need to ensure the rights of the Canadian public to participate in reviews, even though full panel reviews would not be available under the POC regulation. We compromised on an expedited process. At its most accelerated, Canadians and others would only have the right to review written documentation and file comments. POC would continue to apply to all POC.

Some within the RAC felt we had gone too far in the draft POC reg in short-circuiting the process. The time frame to allow written comments could theoretically have been reduced to 24 hours, as time frames were to be set on a case by case basis. Still, the right of the public to review EA and the requirement that an EA be performed before financing projects overseas was preserved.

The consensus regulation of the POC subcommittee was accepted by the full RAC in September 1995. And there it sat gathering dust for more than a year.

On November 5, 1996, I received an extremely troubling phone message. Someone had called anonymously and painstakingly related that the POC regulation was about to be gutted. Key sections of the regulation requiring comprehensive study of all mega-projects were to be deleted. A revised and emasculated version of the POC regulation was to go to Cabinet for approval the next evening in a special Cabinet meeting.

Subsequent conversations with people in four different agencies of government confirmed the following: The Prime Minister's Office had just been advised that the pending financing of $1.5 billion for the sale of two CANDU 6 700 megawatt reactors to China would trigger CEAA. A

determination had been made that there was not time to conduct a review of the reactors in Qinshan, China before the Prime Minister's participation in the signing ceremony, slated for Shanghai, November 26, 1996. Passage of the POC regulation deleting mandatory review or public participation in projects within the comprehensive study list was the required quick fix.

On November 6, 1996, the Cabinet voted approval of the hijacked POC regulation.

On November 7, 1996 the POC regulation received Royal Assent, without prior listing in the Canada Gazette and without the usual 60 day period for public comment.

On November 26, 1996, the Prime Minister witnessed the signing in Shanghai of a deal relying on the largest external loan in the history of Canada.

On November 27, 1996, the POC Regulation was listed on the Canada Gazette.

On January 20, 1997, the Sierra Club of Canada filed an application for Judicial Review in the Trial Division of the Federal Court. We named as respondents the Ministers of Finance and International Trade whose signatures were required under the Export Act to guarantee $1.5 billion to the Canada Account from the Consolidated Revenue Fund of the Government of Canada. Our central argument was that providing a $1.5 billion loan guarantee fell within the financing trigger of CEAA and required an EA.

The impact of the gutted regulation was absurd. We are left with a situation in which mega-dams and nuclear reactors do not require an environmental review, but latrines in development projects, and even an ostrich manure management project in China funded by CIDA, have.

Believe it or not, we are still in court. We have had more than 14 different motions and court appearances costing over $100,000 thus far. We are grateful for the efforts of our two counsel, Franklin Gertler of Montreal and Tim Howard from Sierra Legal Defence Fund. In April of 1998, fifteen months after we filed our application for judicial review, AECL requested that the court allow it to join the proceedings as a respondent. The court refused that request, but did allow AECL intervener status. AECL has been largely responsible for slowing down the progress of our case, initially challenging our right to bring the case at all (they lost after several levels of court), then to strike out our pleadings (again they lost), and then to allow AECL to introduce evidence of environmental assessment of the Qinshan reactors conducted in China, but only if the court agreed to treat the evidence as confidential. AECL has lost that argument in the Federal Court Trial and Appeal Divisions as the court ruled in both instances that the public interest in open court proceedings was not outweighed by AECL's commercial considerations. Unfortunately for us, AECL succeeded in receiving leave to appeal to the Supreme Court of Canada. AECL has pursued with vigour its bid to introduce confidential Chinese EA, which, in any event, remains completely irrelevant to the point of law for which we went to court: did the Ministers trigger CEAA when they financed the sale?

On November 6, 2001, five years to the day that the Cabinet gutted the POC regulation, the case for confidential Chinese EA was heard before the Supreme Court of Canada. We await the court's ruling. The hearing of our case on its merits may be another year away. Meanwhile the Qinshan reactors are nearing completion. (details on the case and updates can be found on our website, as

above.)
The hard political reality is that when the powers that be want a project and environmental review is perceived to be an obstacle, environmental review, and the public's participation rights will be trampled.

Proof of this, as if more were needed, came in the form of a leaked Cabinet Memorandum revealed by the media in November of 1997. The document dealt with a Cabinet meeting on April 24, 1997 which dealt with the proposed financing of nuclear reactors to Turkey. Cabinet approved proceeding with a financing scheme identical to the one used for the Qinshan reactors -- $1.5 billion loan guarantee through the Canada Account, without any environmental review.

Cabinet actually considered the current litigation brought by Sierra Club. According to media reports, the Cabinet document revealed that the Justice Department "has advised that its case is not strong and that the Federal Court may well rule in favour of the Sierra Club." Incredibly Cabinet then went on to devise an invisible "shadow" environmental assessment for the Turkey sale, which could be quickly converted into a screening to meet CEAA requirements if we won our case.

In the end, Turkey decided not to go the nuclear route, but it hardly matters once you have had a glimpse of the exercise of raw political power and the trashing of basic democratic principles in the process. In my view, we are being deliberately denied a timely hearing of our case in the hopes that the case will break us financially. It very well may.

RECOMMENDATION

This committee can do something to plug the Canada Account loophole until the court rules, if it ever does in the CANDU case. By listing the sections of the Export Development Act and Financial Administration Act on the law list, it will confirm two triggers for EA under CEAA for the spending of money for POC. As well, SCC supports the proposal from the CELA that the Export Development Act, Bill C-31, be pulled back for review to ensure consistency with CEAA.

CASE HISTORY #2 (BOUNTY BAY)

This case does not provoke the same level of outrage, yet it is outrageous. Sierra Club of Canada has been working with a local group of concerned citizens, Stewards of St. Ann's Harbour in Nova Scotia. The group is concerned that an intensive mussel aquaculture operation proposed for a relatively small harbour, with very limited tidal action, will destroy the areas's ecology. SCC shares that concern as the proposal involves the largest intensive mussel aquaculture operation yet undertaken in Canada -- 1400 acres. The proponent is a Prince Edward Island aquaculture company called Bounty Bay Shellfish.

The project required an environmental review within CEAA due to its federal triggers, including permits required under the Navigable Waters Protection Act. The Department of Fisheries and Oceans (DFO) became the RA for the review. The Environmental Assessment was released on April 9, 2001 with comments due to DFO by May 16, 2001. But incredibly, the environmental

assessment was not available publicly. DFO Atlantic Region agreed to allow the proponent to treat the document as copyrighted. The EA was conducted by AMEC Earth and Environmental Ltd, from its Fredericton office. The EA's cover page included the warning "This report is the property of Bounty Bay Shellfish Incorporated and 5M Aquafarms Limited. This report is not to be distributed and/or copied without permission of the owners listed above."

The report was placed in five public locations in the immediate area, but DFO Atlantic Region refused to provide one to SCC in Ottawa. Even local residents were disadvantaged in their rights of public participation. The "access" to the proponent's EA included travelling to a local library, signing a permission book to review the document and being watched to ensure no copying or transcribing of the document was taking place. Local residents told me they found the experience intimidating.

I phoned the Agency and requested that CEAA provide SCC with a copy. As of early May, the Agency did not have the document either. I finally received a copy on May 14, 2001. The May 16 deadline was extended to June 1, but SCC was effectively deprived of our opportunity to adequately review the EA. Normally we would have had an expert in the field review and provide comments to us. A number of scientists volunteer their time to assist in reviewing such documents, but with only two weeks available, we had to review the document without expert assistance.

The provisions of C-19 establishing a public registry under CEAA's management and not the RA should help. But this recent example should be taken as proof that public participation rights must be nailed down firmly with penalties for shenanigans such as the Bounty Bay experience.

RECOMMENDATION:

Public participation rights must be strengthened in Bill C-19. SCC endorses the CELA, West Coast and Environmental Law Centre briefs, specifically to ensure public participation in the scoping, screening, panel and at every stage. Participant funding and public rights to participate must not be discretionary.

Thank you for your time and the thorough and careful work you will bring to the task of reviewing C-19. As hard as it is to be an environmental activist in this country, I think it may be more discouraging to be a Member of Parliament when the products of intense and painstaking deliberations are rejected by the Government. On behalf of our thousands of members, please allow me to close by thanking all the members of this committee, and especially its chairman, for your diligence and commitment to public service and environmental sustainability.