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

Submission to the Committee on Environment and Sustainable Development

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WEST COAST
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One of the primary initiatives taken by governments in rationalizing economic activity with environmental imperatives has been the enactment of statutes providing for environmental assessment. These measures have generally been aimed at moving away from correcting environmental problems ex post facto, towards preventing them from occurring ab initio or, at least, assuring that they are contained at tolerable levels. It is well to point out that this is not only environmentally sound but is economically desirable as well, inasmuch as the costs of rectifying long term effects often eclipse short term burdens. In any event, it appears just plain common sense to require development of resources to await the relatively short time that will be taken to allow adverse environment effects to be assessed and mitigated, if not eliminated.

Accordingly, it can be said that the process of environmental assessment is not a frill engrafted on the development process, nor should it be regarded as an administrative hurdle to be gotten over in the march towards economic development. It is, rather, an integral part of economic development.

— Labrador Inuit Association v. Newfoundland, Minister of Environment and Labour, Newfoundland Court of Appeal, 22 September 1997, paragraphs 9 and 10.

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INTRODUCTION

West Coast Environmental Law Association (West Coast) is a non-profit society that provides legal services for the protection of the environment. (See West Coast's website at http://www.wcel.org). Since its formation in 1974, West Coast has been extensively involved in the development and implementation of environmental law at both the federal and provincial levels in Canada.

Our involvement in environmental assessment extends back many years. Federally, we actively contributed to the development of the *Canadian Environmental Assessment Act* (CEAA) in the early 1990s; we participate in the Canadian Environmental Network's Environmental Planning and Assessment Caucus; and we have been a member of the Regulatory Advisory Committee (RAC), since its inception. At the provincial level, we participated in the development of the BC *Environmental Assessment Act* in the mid 1990s, and are a member of the provincial Environmental Assessment Advisory Committee. We regularly provide advice to the public and to environmental groups on the application CEAA and the BC *Environmental Assessment Act*.

West Coast Environmental Law welcomes Bill C-19, An Act to Amend the *Canadian Environmental Assessment Act* as an opportunity to strengthen the conduct of federal environmental assessment (EA), and as on opportunity to strengthen the ability of the Act achieve the objective of sustainable development, identified in both the preamble and the purposes of the Act.

CONTEXT

Achieving sustainable development is an ambitious task. After seven years of experience, CEAA has brought some positive change, but there are also many ways in which it could be better improved to accomplish this goal. Recent dramatic rollbacks in environmental regulation at the provincial level, particularly in provinces such as Alberta, Ontario, and most recently, BC, have highlighted the critical need for strong and effective federal environmental review mechanisms.[1]

[1] For example, proposed reforms to the British Columbia EA process, made public in January 2002, will introduce broad flexibility, increase proponent options as to how the review will be conducted, minimize the government's administrative burden, and increase certainty regarding the duration and

In its simplest form, environmental assessment is a planning tool that is an integral component of sound public decision-making. It has "both an information-gathering and a decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development."[2] This is the ideal that underlies CEAA. In the documentation regarding the Five Year Review, the Agency identified three challenges upon which it based much of the review: making the process more predictable, consistent and timely; improving the quality of environmental assessments; and strengthening opportunities for public participation.

While these areas are important, we note that both the preamble and the purposes of the Act address other objectives. The preamble recognizes the Government's goal of achieving "sustainable development by conserving and enhancing environmental quality and … encouraging and promoting economic development that conserves and enhances environmental quality." One of the purposes of the Act is to encourage responsible authorities to take actions that "promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy" (section 4(b)). One of the benefits of the Five Year Review is that it has presented an opportunity to evaluate CEAA's effectiveness in meeting the sustainable development and environmental quality enhancement objectives so well articulated in the preamble and purposes.

Bill C-19 proposes amendments that have the potential to improve elements of the process. We have read, and endorse the submissions of our colleagues at the Canadian Environmental Law Association, the Environmental Law Centre, and the Sierra Legal Defence Fund. In particular, we commend to this Committee the clause by clause recommendations prepared in the Canadian Environmental Law Association's comprehensive brief. Their review has identified a number of internal changes that, if adopted and applied throughout, would strengthen the application of CEAA.

Incorporating the following recommendations will also ensure that federal environmental assessment is better able to contribute to sustainable development.

RECOMMENDATIONS (CLAUSE OF BILL C-19)

INCLUSION OF CROWN CORPORATIONS (CLAUSE 5)

Clause 5 refines section 8 of CEAA, and clarifies that crown corporations do not have to conduct assessments of environmental effects in the absence of a regulation specifically designating CEAA's application. While we are pleased to see that steps are being taken to clarify this ambiguity, there are still problems and this new section 8 should be significantly strengthened.

Our concerns are twofold. First, proposed section 8 still means that CEAA will not apply to crown corporations unless they are specifically designated by regulation. So while it clarifies how crown corporations can be brought under the Act; it does not actually do so. Crown

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scope of the review. It is noteworthy that the BC statute is a recent enactment that already contains stringent timelines, and high threshold triggers.

[2] *Friends of the Oldman River Society* v. *Canada (Minister of Transport),* (1992) 7 C.E.L.R. (N.S.) 1 at 51-52 (S.C.C.), and discussion therein.

corporations are responsible for many projects that would be captured by CEAA if regulations were in place. These projects are undertaken with public support; their exemption is not justified. In the 7 years since CEAA has come into force, there has only been 1 regulation passed to extend its application to crown corporations.[3] If we are to encourage the necessary culture shift toward using EA as a planning tool to achieve sustainable development throughout government, then CEAA should be applied not only to federal departments, but to federal agencies, boards, and crown corporations.

Recommendation 1: That new section 8(1) remove the requirement that regulations be passed before crown corporations are subject to CEAA; and that it be mandatory for crown corporations to conduct environmental assessments of projects that would otherwise be captured by the section 5 triggers.

Second, even if regulations are passed, new section 8(1) does not oblige the crown corporation to conduct an EA under CEAA; rather, it requires that an "assessment of environmental effects" be conducted. We fail to understand why this distinction is being made. There is no procedure for an "assessment of environmental effects", and thus little accountability if such an assessment is undertaken, as no process is in place for it to be conducted. In contrast, CEAA offers an established and significantly more accountable and measurable regime for the conduct of environmental assessment.

Recommendation 2: That the phrase "assessment of environmental effects of a project" in new section 8(1) be replaced with "an environmental assessment of a project".

To accomplish these changes, incidental amendments of a similar nature would need to be made in other sections to ensure that all references that would involve other federal agencies or crown corporations are adjusted, and other references to "assessments of environmental effects" are replaced.

FEDERAL ENVIRONMENTAL ASSESSMENT COORDINATOR (CLAUSE 8)

We are pleased to see the proposal to establish a federal environmental assessment coordinator; this is a positive step to increase the consistency of application of the Act. We note however, that for most EAs, the coordinator will be the responsible authority, and that the Agency will only be the coordinator where the project involves another jurisdiction, a comprehensive study, or where there is agreement (new section 12.4). Given that the principle of self-assessment is entrenched in the Act, designating the Agency as the coordinator in all circumstances would ensure impartial, as well as consistent application of the Act.

Recommendation 3: Amend new section 12.4 to designate the Agency as the coordinator in all circumstances.

We also have concerns about the wording in new sections 12.2(a) and 12.3(a). These proposals elaborate on the scope of the coordinator's duties, enabling it to include "those that are or may be in possession of specialist or expert information or knowledge with respect to the project" to undertake coordinating duties and to participate on any

[3] Canada Port Authority Environmental Assessment Regulations, SOR/99-318.

committees established. In our view, only responsible authorities and federal authorities should be able to exercise the coordinator's duties and powers. As proposed, these provisions could be interpreted to permit anyone in possession of specialist or expert information to participate. This could potentially include the proponent, or consultants to the proponent, and others who may have an interest in the project. This would be inappropriate and unacceptable.

Recommendation 4: Delete the phrase "and those that are or may be in possession of specialist or expert information or knowledge with respect to the project" in new sections 12.2(a) and 12.3(a).

FACTORS TO BE CONSIDERED IN THE ASSESSMENT (CLAUSE 9)

Clause 9 proposes changes to section 16, which lists factors to be considered in the conduct of an EA. In particular, it provides that community and aboriginal traditional knowledge may be considered, and that the results of studies on the environmental effects of possible future projects in a region may be considered as well. These provisions are a welcome addition to the section 16 factors, but in our view, this clause would be strengthened further if further changes were made. For example, new section 16.1 is currently discretionary.

Recommendation 5: That new section 16.1 be amended to require that the consideration of community knowledge and aboriginal traditional knowledge be mandatory, instead of discretionary.

New section 16.2 regarding regional studies is unduly restrictive of the circumstances in which such studies may be considered. A regional study could be valuable in a wide variety of circumstances, regardless of whether a federal authority has participated, and beyond the consideration of cumulative environmental effects that are likely to result. It is possible that this provision could be construed as exclusionary, and limited to the evaluation of cumulative environmental effects when in fact regional studies may serve a number of different informational needs in the EA process. This restrictive wording should be eliminated to provide that regional studies can be used in any circumstances relevant to the assessment.

Recommendation 6: That the phrases "in which a federal authority participates, outside the scope of this Act, with other jurisdictions referred to in paragraph 12(5)(a), (c) or (d)" and particularly in considering any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have or will be carried out" be deleted from new section 16.2.

Additional changes to section 16 would strengthen its application. Currently, CEAA only requires that the need for, and alternatives to, the project only be considered in comprehensive studies, mediations, or panel reviews; and not in screenings, which account for over 99% of projects. Given the Government's strong commitment to sustainable development, and if we are to ensure that EA is more than just an exercise in identifying project mitigation measures, section 16 should require that need and alternatives be evaluated in screenings as well. By avoiding these two vital issues for screenings, it means that most options for accomplishing the objectives of the proposed project in a less environmentally harmful way cannot be considered. Requiring consideration of need and alternatives in all cases would not be onerous; the level of consideration could be

commensurate with the scale of the screening. Both the Ontario and federal US EA legislation require consideration of alternatives in all EAs.

Recommendation 7: That section 16(2)(b) and (c) of the existing Act be moved to section 16(1).

Strategic Environmental Assessment

Proposed section 16.2 appears to be an initial attempt to extend the factors to be considered beyond the specifics of the proposed project, which we applaud. However, when EA is not triggered until the project stage, the goal of sustainable development is that much more difficult to achieve. An EA that begins at the project stage means that the ability to consider issues such as needs and alternatives is limited, and already constrained, whereas an EA of a policy or program allows for the consideration of environmental factors at the earliest stage of planning and decision-making. It is only when few resources have been invested into a particular course of action, and most options are still open, that the possibilities for "thinking big" and truly pursuing sustainable development are greatest. Permitting the consideration of regional studies in the context of a project specific EA is a start, but more is needed if the Act is to achieve its goals.

We have advocated the need for policy and program environmental assessment in the federal process since 1990. The Government took a first step toward this in 1999, through the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals, which is discretionary, not binding, and not transparent. New section 16.2 opens this door a bit further, but still does not go far enough. After 7 years of application, we now have a solid understanding of how to conduct project EA at the federal level in Canada; it is time to extend the application of the Act to policies and programs as well. The European Union recently passed a directive legislating strategic environmental assessment. This directive complements the EU's earlier directive on project environmental assessment, enacted in 1985.[4] Previously, West Coast drafted detailed amendments to CEAA to enable the conduct of EAs for policies and programs.

Recommendation 8: Bill C-19 should incorporate our earlier proposed amendments to require EAs of policies and programs be mandatory under CEAA. See www.wcel.org/wcelpub/6743.html.

PUBLIC PARTICIPATION IN SCREENINGS (CLAUSE 10)

Section 18(3) of CEAA provides that a responsible authority has discretion to decide whether to seek public comments on a project. When the Act was passed, it was expected that this would be done in the large majority of cases. Yet Agency research reveals that public participation has occurred in only 10 to 15% of screenings. This is a disappointingly low figure.

New section 18(3) would relieve Government of the expectation that it will pass a regulation to require public participation in screenings, and instead enables it to provide for public

[4] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301L0042.html

participation in screenings "in prescribed circumstances". We do not support this amendment as this section originally envisioned the passage of a regulation to govern public participation in screenings. Screenings are the dominant mechanism for federal EA, and the Minister has recognized the need to make public participation in EA more meaningful in his Report to Parliament.[5] Reducing this commitment to pass a regulation to a Ministerial Guideline, as is currently intended, has the potential to diminish the important contributions that the public can make in the EA process.

We recommend that the draft Ministerial Guideline for Public Participation in Screenings currently being developed by a RAC Subcommittee be converted into a regulation, as was the original intent of section 18(3). As per the existing draft, this regulation should specify that consideration of the need for public participation should occur in every circumstance, elaborate on some criteria, and ensure that the responsible authority provides reasons when a decision is made to not undertake public participation. If there are particular types of screenings where the government believes public involvement is not needed, then these should be specifically identified as exceptions in the regulation. At a minimum, this Committee should have an opportunity to review this regulation before concluding its deliberations on Bill C-19.

Recommendation 9: That new section 18(3) be deleted, or amended to require that the responsible authority provide opportunities for public participation in screenings in regulation. In this regard, the draft Ministerial Guideline being developed for this purpose should be converted to a regulation.

New section 18(3) also removes the notice provision that previously existed. However it is important that the public be provided with notice, as well as an opportunity to comment on a screening report. Indeed, consideration should be given to including specific notice periods with respect to screenings.

Recommendation 10: Retain the words "notice and" before "an opportunity to examine" in new section 18(3).

REPLACEMENT SCREENINGS (CLAUSE 11)

Clause 11 proposes significant changes to the class screening provisions. CEAA currently provides that screening reports for a previous EA could be used as a model for future screenings at the request of the responsible authority. Currently, the responsible authority is required to ensure that local circumstances and cumulative environmental effects are accounted for, and that adjustments are made to the report to consider these factors (section 19(5)).

New sections 19(2) and 19(5) provide an additional power, enabling the Agency to make a declaration that a class screening report may be used as a *replacement* for a screening where the responsible authority is of the view that the project is not likely to cause significant adverse environmental effects when design standards and mitigation measures are applied. These proposed changes essentially enable additional exemptions from the Act beyond the Exclusion List Regulation, because in such circumstances, no environmental assessment

[5] Strengthening Environmental Assessment for Canadians, goal 3 for a renewed process.

whatsoever would be conducted once the responsible authority has made its determination about adverse environmental effects. In addition, clause 19(5) eliminates the requirement that local circumstances and cumulative environmental effects be considered, as is the case with the model class screening provisions under clause 19(6).

Recommendation 11: That all provisions creating and dealing with replacement class screenings in clause 11 be deleted, including new section 19(2)(a), 19(5), and the reference to "replacement" screenings in new section 19(8).

In the alternative, if this provision remains in Bill C-19, there should be a positive obligation on the responsible authority to take into account local circumstances and cumulative environmental effects, to ensure that local conditions have been considered. We do not understand how the responsible authority can ensure that design standards and mitigation measures be implemented if there has been no consideration of local circumstances.

Recommendation 12: If the replacement class screening provisions are not deleted, then new section 19(5) should include after the word applies, "and once it has ensured that any adjustments are made to the report that are necessary to take into account local circumstances and any cumulative environmental effects that may result from the project in combination with other projects or activities that have been or will be carried out, then …"

IRREVOCABLE TRACK DETERMINATION: COMPREHENSIVE STUDY OR PANEL (CLAUSE 13)

Clause 13 proposes significant amendments to section 21 of CEAA with respect to the conduct of comprehensive studies. Perhaps the most significant change is the addition of an irrevocable track determination, whereby once a project has commenced in the comprehensive study track, it cannot subsequently be referred to a mediator or review panel.

Our comments on this provision are broken down in two areas: the establishment of an irrevocable track determination and the need for expanded opportunities for public input with respect to the scope determination for the comprehensive study, should this irrevocable track determination remain intact.

Irrevocable Track Determination (new section 21.1)

Comprehensive studies account for less than 1% of EAs. Projects that are subject to a comprehensive study, by their nature, have a likelihood of significant adverse environmental effects, which is why the Act intended that they be subjected to this level of assessment instead of screening. Since the Act was passed in 1995, only 37 comprehensive studies have been completed, and 25 are underway, for a total of 62 to date.

We understand that the purpose of this irrevocable track determination is to increase the certainty available to proponents in terms of project approvals. However, this proposal effectively invites the responsible authority, in making the track determination, to evaluate the significance of the environmental effects of the project and evaluate whether these effects can be justified in the circumstances *prior to the conduct of the EA*. Given that there are, on average, less than 10 comprehensive studies initiated per year, we believe that the same degree of certainty can be achieved if the comprehensive study track was eliminated

completely, and these same projects were subjected to a panel review, which, by its nature, provides for greater public participation with respect to a proposed project.

Such a change would be consistent with the proponents desire for increased certainty, and may possibly be more cost effective.[6]

Recommendation 13: Delete new section 21.1; eliminate the comprehensive study track altogether and designate all comprehensive studies as panel reviews.

Public Comment on the Scope of the Comprehensive Study (new section 21)

If the irrevocable track determination is not eliminated, the corollary implication is that even fewer panel reviews are likely to be conducted than is currently the case. The CEAA website indicates that 2 panel reviews are currently underway, and 9 have been completed to date. Therefore, opportunities for public participation early in the process must be considerably strengthened. In this regard, we commend the proposal in clause 29 of Bill C-19 to establish a participant funding program for comprehensive studies.

However, as experience with CEAA has proven, many of the concerns with respect to the conduct of EAs have resulted from how a project has been scoped. In order for EA to be effective, it must be conducted early in the planning process for a project, and before irrevocable decisions are made. This core principle is enshrined in CEAA's purpose section 4(a)). As the authors of the Annotated Guide to CEAA have noted:

> the primary purpose of the legislation is to discipline federal authorities to ensure that an EA is carried out at the earliest possible opportunity and before they make any irrevocable decisions about the project. This, in turn, will preserve and improve the environment.[7]

The irrevocable track determination is, in a sense, an irrevocable decision with respect to the project, and therefore, the public should have ample opportunity to comment on the scope of the project. Proposed section 21(a) provides that the responsible authority will report to the Minister on the project scope and project description (including factors in the assessment, and the potential to cause adverse environmental effects) and make a recommendation as to the irrevocable track determination concurrently with its report on public concerns in relation to the project.

While this proposed section includes a requirement that the responsible authority provide an "opportunity for public participation" before it reports to the Minister, this provision lacks essential detail. If the irrevocable track determination is not eliminated, the public must have an opportunity to comment on the scope of the project and factors to be considered in the assessment *before* the recommendation under new section 21(b) regarding the irrevocable track determination is made. The responsible authority and the

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[6] See Figure 3-2, in the *Canadian Environmental Assessment Agency's Performance Report for the period ending March 31, 1999*, which indicates that the costs of a review panel amount to only 1.1% of a project's capital costs, whereas the cost of a comprehensive study amounts to 2. 4% of project capital costs; page 23.

[7] Beverly Hobby, Daniel Ricard, Marie Bourry, Joseph de Pencier, *Canadian Environmental Assessment Act: An Annotated Guide* (Canada Law Book, 2000), p. I-6.

Minister should have the benefit of public comment on the scope of the project before this irrevocable determination is made. This would require an additional stage of public consultation prior to the report to the Minister under new section 21(a). Such a change would also be consistent with the recommendations of the RAC.[8] Such an opportunity would provide an opportunity for the public to voice any concerns about the scope of the project, and allow the responsible authority to respond to these concerns prior to determining the scope of the project.

Recommendation 14: That new section 21 be amended to require that there be an additional opportunity for public participation specifically with respect to the scope of the project and the factors to be considered in the assessment. Only once public comment has been received on these matters should the responsible authority report to the Minister on the items in section 21(a)(i)–(iv). Consequential amendments should be made to the Registry provisions in new section 55(2) accordingly.

An additional constraint on the conduct of public participation with respect to comprehensive studies is found in clause 21.2 which makes public participation subject to a decision of the federal environmental assessment coordinator. This is also problematic because new section 12.3, setting out the powers of the federal environmental assessment coordinator, is permissive, not mandatory.

Recommendation 15: That the proviso in new section 21.2 that public participation be "subject to a decision with respect to the timing of the participation made by the environmental assessment coordinator under paragraph 12.3(c)" be deleted.

THE MEDIATION DEAD END (CLAUSE 15)

This clause changes section 29(4) which states that if mediation of an issue is unsuccessful, the mediation can be referred to a review panel. It is problematic for 2 reasons. First, it eliminates the Minister's ability to refer a mediation to a review panel, and does not propose any alternatives, thereby creating a procedural dead end. Second, it removes the phrase "any issue" from the existing section, thus if mediation on one particular issue fails, then the entire mediation could potentially be concluded. We do not understand why any of these changes are being proposed because the mediation provisions of the Act have never been used.

Recommendation 16: Clause 15 should be deleted altogether; the original section 29(4) should remain intact, and the original intention should be utilized and evaluated before any changes are proposed.

THE PUBLIC REGISTRY (CLAUSE 26)

This clause replaces the existing section 55. We are pleased to see that Bill C-19 establishes a Canadian Environmental Assessment Registry, which we are confident will be an improvement over the previous registry provisions in section 55. We have the following comments on this provision.

[8] RAC Report to the Minister, May 8, 2000, Recommendation on Issue 23, to allow interested individuals to input into the responsible authority's determination of the scope of project/scope of assessment.

While an electronically accessible registry will be adequate for most individuals who are interested in EA, there are still many Canadians who do not have access to the internet, or who for whatever reason will not be able to work effectively off a computer based system. This is a particular concern with respect to notices of commencement of EAs, which may be the only means by which the public may become aware of an EA in their community. In this regard, consideration should be given to requiring that non-electronic notice be made available in the community where the project is proposed.

Recommendation 17: That the word "electronic" be deleted from clause 55(1). In the alternative, clause 55 should require that hard copies of all material that would otherwise be available on line be provided to any individual upon request.

Proposed section 55(2), setting out the contents of the Registry, is somewhat narrower in scope than the existing section 55(3). We endorse the specific recommendations of our colleagues, contained in the briefs from the Canadian Environmental Law Association and the Environmental Law Centre. We also recommend that the inclusive wording in existing section 55(3) be reinserted in new section 55(2), to confirm that the documentation available on the registry should be comprehensive, including public comments and any other relevant information, subject to third party information limitations.

Recommendation 18: That new section 55(2) be amended to confirm that the Registry shall contain "all records produced, collected, or submitted with respect to the environmental assessment of the project, including"; before the list of specific Registry items.

REGULATIONS EXCLUDING APPLICATION OF CEAA (CLAUSE 30)

The current section 59(c) states that an EA will not be required where the Governor in Council "is satisfied that" an EA of a project would be inappropriate for reasons of national security, if it will have insignificant environmental effects, or the contribution of the responsible authority is minimal (section 59(c)(i) and (ii)).

New section 59(c) broadens Cabinet's discretion in making such regulations as it states that regulations exempting projects or classes of projects can be passed if it is "the opinion of" the Governor in Council. This denotes a lesser test, as it merely requires that Cabinet be of the opinion that an exclusion is warranted, not that Cabinet be satisfied, or somehow convinced through some other process, that an exclusion is warranted.

Recommendation 19: That the phrase "where the Governor in Council is satisfied that" be reinserted in clause 59(2)(c).

We are also concerned about the inclusion of a new section 59(c)(iii), exempting projects or classes of projects which have a total cost below a prescribed amount, and meet prescribed environmental conditions. There is not necessarily a connection between cost of a project and the potential for environmental effects, nor are we provided with any criteria or indication as to what the prescribed environmental conditions. Proposed clause 59(c.1)(iii) allows for a similar exemption for projects undertaken by the Canadian International Development Agency, projects outside Canada or projects on federal lands that would otherwise be captured by section 8 or 10.1. We do not support this change for similar reasons.

Recommendation 20: That new section 59(2)(c)(iii) and 59(2)(c.1)(iii) be deleted. Alternatively if these sections remain, then the Act should specify both the cost, and the environmental conditions for such exemptions.

COMPLIANCE WITH THE ACT (CLAUSES 7, 19, 32)

One of the long term concerns about the application of CEAA has been the fact that the Act includes virtually no mechanisms to ensure compliance. Bill C-19 proposes a number of changes that will strengthen the government's ability to ensure compliance with the Act. We have the following comments on these provisions.

Ministerial Orders (Clause 7)

Clause 7 establishes a new power to issue ministerial orders in situations where a proponent may commence work on a project prior to the completion of the EA. While we are pleased to see the inclusion of this power, its wording is problematic for a number of reasons. First, it limits the issuance of orders to situations where a proponent commences work on a project prior to issuance of an approval only where this course of action "would alter the environment". In our view, this is an unnecessary restriction; no part of the project should be permitted to proceed while the EA is underway.

Recommendation 21: Delete the phrase "that would alter the environment" at the end of new section 11.1.

Second, the Minister's power is significantly constrained by the fact that once issued, an order is only valid for two weeks and any extension must be approved by Cabinet. We do not understand why Cabinet must approve the continuance of such an order. An order should remain in effect as long as necessary to ensure that the proponent does not do any action prior to the completion of the EA.

Recommendation 22: Delete new section 11.1(3) altogether.

Third, new section 11.1(5) implies that if an order has been issued, and has expired (as per new section 11.1(3)), the Minister cannot issue a similar order for the same violative activity, regardless of whether that activity has actually stopped. Given that the entire operation of this section is discretionary, and given that it is one of the few restraining provisions whereby the Minister can exercise authority to ensure that the conditions of the Act are adhered to, we do not understand why it is being prescribed so narrowly.

Recommendation 23: Delete clause 11.1(5) altogether.

Follow-Up Programs (Clause 19)

At present, CEAA provides that the need for and requirements of follow-up programs be considered in comprehensive studies or panel reviews; but not in screenings (section 16(2)(c)). Section 38 envisions that a regulation will be passed to govern the design and implementation of follow-up programs once action has been taken pursuant to section 20(1)(a) or 37(1)(a). Clause 19 amends this provision to require that follow-up programs be mandatory upon completion of a comprehensive study, provided that regulations are in place; and discretionary for screenings, provided that regulations are in place. It also clarifies

that responsible authorities are not limited to their own departmental legislation in designing a follow up program.

Follow-up and monitoring is vital to determining if the predictions made in an EA were in fact accurate, and if the specified mitigation measures are being carried out, and are having the predicted effect. We believe this provision could be strengthened in a number of ways. First, the ability of these sections to become operative remains subject to whether regulations have been enacted.

Recommendation 24: Delete the phrase "in accordance with any regulations made under paragraph 59(h.1) in clause 38(1) and 38(2). Alternatively, regulations to give effect to these provisions should be developed immediately.

Second, given that over 99% of EAS are conducted by way of screenings, the circumstances under which a follow up program may be appropriate for screenings should be elaborated upon. There may well be many instances where the need for a follow-up program will be clear. The Government could affirm its commitment to implementing meaningful follow-up programs by identifying criteria or listing particular circumstances or projects where a follow-up program would be appropriate. We do not believe that follow-up programs for screenings should be required in all circumstances, but we do believe that the public should have a clearer indication of when follow-up programs are anticipated for screenings.

Recommendation 25: Amend new section 38(1) to include a list of considerations that the responsible authority must consider in determining whether to design a follow up program for screenings.

Quality Assurance (Clause 32)

In terms of overall compliance, we are pleased to see the addition of a mandatory quality assurance program in Clause 32. However, we have been given little indication of how this program will be implemented. In order to ensure that quality assurance consists of more than reporting on the completion of assessments under the Act, we recommend that the Act impose a mandatory duty on the part of the Agency to ensure compliance with CEAA by responsible authorities. This positive duty should be accompanied by a penalty section authorizing the imposition of fines for non-compliance with the Act.

Recommendation 26: That clause 32 be amended to include a mandatory duty on the part of the Agency to ensure compliance with CEAA by responsible authorities. This mandatory duty should be accompanied by a penalty section authorizing the imposition of fines for non-compliance with the Act.

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