CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

June 7, 2012 **BY EMAIL**

The Right Hon. Stephen Harper
Prime Minister
House of Commons
Ottawa, ON K1A 0A6

Dear Prime Minister Harper:

RE: BILL C-38: REPEAL OF THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* AND AMENDMENTS TO THE *FISHERIES ACT*

On behalf of the Canadian Environmental Law Association ("CELA"), we are writing to convey CELA's strong objections to Bill C-38's unprecedented and wholly unjustified attack upon federal environmental laws.

We further object to the federal government's inappropriate use of an omnibus budget bill to implement these wide-ranging – and ill-conceived – changes to Canadian environmental legislation.

In particular, Bill C-38 proposes to amend or repeal a number of environmental statutes that have been carefully crafted and previously passed by Parliament in order to protect the environment, conserve natural resources, and safeguard the public interest. These federal statutes include:

- *Canadian Environmental Assessment Act*;
- *Fisheries Act*;
- *Species at Risk Act*;
- *Kyoto Protocol Implementation Act*;
- *National Energy Board Act*;
- *Nuclear Safety and Control Act*;
- *Canadian Oil and Gas Operations Act*;
- *Canadian Environmental Protection Act, 1999*;
- *Parks Canada Agency Act*;
- *Canada National Parks Act*;
- *Canada National Marine Conservation Areas Act*; and
- *National Round Table on the Environment and Economy Act*.

For many years, these statutes have collectively formed an important national framework that entrenches environmental protection, ensures governmental accountability, and facilitates public participation in environmental decision-making at the federal level.

However, Bill C-38 attempts to systematically dismantle these laws in a manner that undermines their intended purposes, substantive content, and overall effectiveness. Accordingly, CELA submits that the various environmental components of Bill C-38 do not reflect sound public policy, and should not be enacted by Parliament under any circumstances.

PART I – CELA'S BACKGROUND

Founded in 1970, CELA is a public interest law group whose mandate is to use and improve laws to protect the environment and public health. CELA lawyers represent citizens, environmental groups and First Nations in the courts and before administrative tribunals, including federal agencies and boards affected by Bill C-38 (i.e. Canadian Nuclear Safety Commission). Similarly, CELA has participated in the implementation or enforcement of several of the federal environmental laws that Bill C-38 proposes to repeal or amend.

For example, CELA was extensively involved in the original development of the CEAA and the underlying regulations during the early 1990s, and CELA has participated in previous Parliamentary reviews of the CEAA. In addition, CELA has intervened in Supreme Court of Canada appeals involving the federal environmental assessment regime, and CELA has initiated legal proceedings in the Federal Court of Canada regarding the interpretation and application of the CEAA. Moreover, CELA represents or advises individuals and groups who participate in environmental assessments under the CEAA, including screenings, comprehensive studies, and review panels.

With respect to the *Fisheries Act*, CELA has assisted or represented informants who have commenced private prosecutions under the Act against polluters. Our casework has also involved instances where *Fisheries Act* authorizations for fish habitat alteration, disruption or destruction have triggered environmental assessment requirements under the CEAA. We also undertake public education and outreach activities in relation to the *Fisheries Act* and other federal environmental laws affected by Bill C-38.

PART II – CELA'S PRIORITY CONCERNS ABOUT BILL C-38

While CELA is concerned about all of the environmental law rollbacks contained within Bill C-38, we are writing at this time to highlight our objections to the proposed repeal of the *Canadian Environmental Assessment Act* ("CEAA") and the proposed amendments to the *Fisheries Act*. In our view, these legislative reforms are arguably the most pervasive and objectionable aspects of Bill C-38 from an environmental perspective, as described below.

(a) Repeal of the CEAA

The current CEAA was originally enacted by Parliament in 1992, and the Act has been periodically amended since that time by successive governments in order to continuously improve the timeliness, efficacy and fairness of the federal environmental assessment process.

In addition, the Standing Committee on Environment and Sustainable Development has previously undertaken detailed public reviews of the CEAA, and has strongly affirmed the importance of having a rigorous federal environmental assessment process for evaluating the environmental risks and impacts of projects which engage federal jurisdiction.

CELA further notes that during the most recent statutory review of the CEAA, the Standing Committee proposed certain changes to the Act, but did not recommend the wholesale repeal of the Act. Similarly, the recent budget statement from the federal government made no mention of repealing the CEAA. Nevertheless, Bill C-38 proposes to abolish the current CEAA in its entirety, and to replace it with CEAA 2012.

During legislative debate last month on Bill C-38, the Minister of Natural Resources claimed that CEAA 2012 is intended to ensure "a robust environmental review of major projects."[1] However, a close perusal of CEAA 2012 makes it readily apparent that the new Act will not achieve this objective adequately or at all.

To the contrary, CEAA 2012 will: (i) substantially reduce the number, nature and scope of federal environmental assessments; (ii) inappropriately defer environmental planning and decision-making responsibilities to provincial environmental regimes; (iii) greatly increase reliance upon narrowly focused regulatory agencies in the energy sector despite their traditional lack of environmental assessment expertise or experience (aside from occasional joint reviews under the current Act); and (iv) significantly overpoliticize the federal environmental assessment process at all key decision-making stages.

On this latter point, for example, the proposed Act would empower Cabinet to approve projects that will cause significant adverse effects, provided that such effects are "justified in the circumstances" (see sections 52 to 53). However, CEAA 2012 provides no substantive direction or criteria on how such trade-offs are to be determined by Cabinet, or on whether the Cabinet's record of decision will be disclosed to the public.

In essence, CEAA 2012 eliminates the well-established and comprehensive federal environmental assessment requirements found in the current Act, and replaces them with diluted, narrowed and largely discretionary provisions. Moreover, the new Act will likely create more – not less – delay, uncertainty and unpredictability as proponents attempt to navigate controversial projects through the fragmented federal process envisioned by Bill C-38. In this regard, CELA reasonably anticipates that CEAA 2012 will compound – not solve – the root causes of proponents' complaints about the timeliness or efficiency of federal environmental decision-making processes.

CELA's overall conclusion is that the retrogressive provisions in CEAA 2012 will set back environmental assessment law by about four decades and, more importantly, the Act will not achieve the public interest purposes set out in the new Act (see section 4). CELA's specific high-priority concerns about CEAA 2012 may be summarized as follows:

[1] *Hansard* (May 2, 2012) at 1615.

1. The current CEAA automatically applies to projects that are subject to mandatory "triggers" under the Act (i.e. federal lands, financial assistance, or prescribed permits). This inclusive approach promotes regulatory certainty, and the corresponding environmental assessment obligations under the current Act are generally intended to be commensurate with the scale, risk and complexity of the project (i.e. screenings vs. joint review panels). Conversely, under CEAA 2012, it is unknown at the present time which (if any) projects may be subject to the new Act. This is because the federal government has not revealed its list of "designated projects" under CEAA 2012, and has not provided public input opportunities in relation to the forthcoming list.

2. Even if a particular project is "designated" under CEAA 2012, there is no legal guarantee that a federal environmental assessment of the project will actually be conducted under the new Act. For example, for designated non-energy projects, the new Act gives the Canadian Environmental Assessment Agency ("Agency") 45 days to "screen" the project and to determine whether an environmental assessment will be required (see section 10). Under the current CEAA, the Agency does not possess this virtually unfettered discretion to exempt projects, in whole or in part, from federal environmental assessment requirements.

3. CEAA 2012 also contains provisions which purport to allow the federal process to be replaced by provincial environmental assessment processes where the Minister of the Environment opines that the provincial process is an "appropriate substitute" for, or "equivalent" to, the federal process for the project (see sections 32 and 37). Given the diverse, inconsistent and often inadequate nature of provincial environmental assessment regimes across Canada, it is exceedingly difficult to foresee how any of them can be deemed to be an "appropriate substitute" for, or "equivalent" to, the federal process, even under CEAA 2012. In contrast, the current CEAA contains no "substitution" or "equivalency" provisions. Instead, the Act presently contains provisions which are intended to facilitate coordination of, and harmonization between, federal and provincial environmental assessment processes which may be applicable to the same project. In our view, this is the preferable approach for avoiding alleged overlap or duplication between the federal and provincial processes. However, it appears to CELA that these existing provisions have been woefully underutilized to date, and that it is premature to jettison these provisions in favour of ill-defined and untested "substitution" or "equivalency" arrangements under the new Act.

4. Even in those rare cases where a "designated" project may remain subject to federal environmental assessment requirements, CEAA 2012 unduly narrows the scope and content of the environmental assessment. For example, the definition of "environmental effects" under the new Act does not capture the full range of adverse biophysical, socio-economic and cultural effects (or their interactions) that may be caused by a project. Instead, the definition is limited by section 5 to a narrow subset of issues (i.e. fish, aquatic species at risk, migratory birds, etc.). Similarly, section 19 of the new Act excludes key environmental assessment considerations – such as the alleged "need" for the project, the comparison of "alternatives to" the project, or the effects upon the capacity of renewable resources – which are expressly mentioned in the current CEAA.

Moreover, the application of CEAA 2012 would occur too late in the proponent's planning process, long after key threshold decisions about the purpose, design, operation, and location of the proposed project have been made by the proponent (usually in the absence of meaningful public input).

5. In addition to creating or compounding problems within the federal environmental assessment process, CEAA 2012 fails to make any headway on the real issues requiring legislative action by Parliament. For example, CEAA 2012 fails to include any provisions aimed at: (i) strengthening environmental sustainability considerations; (ii) entrenching strategic environmental assessment of governmental policies, programs or plans on a firm legislative basis; (iii) addressing the various shortcomings in public participation opportunities and participant funding programs under the Act; (iv) ensuring procedural fairness and greater rigour in review panel proceedings; or (v) establishing mechanisms for assessing the cumulative effects of the numerous "small" projects that will no longer require environmental assessments under CEAA 2012.

For these and other reasons (i.e. arbitrary time limits, restrictive definition of "interested parties" in public hearings, etc.), CELA calls upon the House of Commons and the Senate to not enact CEAA 2012 contained within Bill C-38.

(b) Amendments to the *Fisheries Act*

The *Constitution Act, 1867* gave the federal government exclusive jurisdiction over seacoast and inland fisheries, primarily because management of these valuable natural resources was considered to be a matter of national importance. The earliest version of the federal *Fisheries Act* was originally enacted by Parliament in 1868, and the current fish habitat protection provision was put in place in 1986.

The protective prohibitions in the current Act (section 35(1) and 36(3)) apply to Canadian waters frequented by "fish", which are broadly defined as: (i) parts of fish; (ii) shellfish, crustaceans, marine animals and any parts thereof; and (iii) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals. "Fish habitat" is also broadly defined under the Act as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

However, Bill C-38 proposes several sweeping changes to the existing *Fisheries Act*, particularly in relation to the application of the Act and its current prohibition against the harmful alteration, disruption or destruction of fish habitat. If enacted, these amendments will seriously weaken the Act and its ability to effectively protect fish and fish habitat across Canada. Like the above-noted repeal of CEAA, the recent federal budget statement made no mention of re-writing the habitat provision of the *Fisheries Act* or restricting its application to certain types of fisheries or so-called "major" waterways.

CELA's specific high-priority concerns about the proposed *Fisheries Act* amendments may be summarized as follows:

1. Section 35(1) of the current *Fisheries Act* properly prohibits all forms of harmful alteration or disruption of fish habitat, regardless of whether the harm is short- or long-term in nature. This will no longer be the case under the Bill C-38 amendments to the Act. Among other things, the proposed new prohibition only applies to "serious harm" to fish that "are part of a commercial, recreational or Aboriginal fishery, or fish that support such a fishery." "Serious harm" is defined as including only the "death of fish" (not injury or displacement), and only the "permanent" alteration to, or destruction of, fish habitat. Thus, the scope and content of existing fish habitat protection will be significantly narrowed under the Bill C-38 amendments, particularly since the focus of the revised prohibition is upon fish species with utilitarian value.

2. The Bill C-38 amendments unjustifiably expand the authority of the federal government to pass regulations authorizing harm to fish and fish habitat. For example, Bill C-38 proposes that works, undertakings and activities prescribed by regulation would be automatically exempted from the revised prohibition, and that certain prescribed waterbodies in Canada would also be automatically exempted from the prohibition. These regulations have not been disclosed to date, but once promulgated, the regulations will mean that federal staff are no longer to be notified about, or closely review, exempted projects or exempted waterbodies. Moreover, it will no longer be an offence under the Act for exempted projects to kill fish or destroy habitat, provided that the conditions in the regulation (if any) are met. This approach will effectively deprive countless lakes, rivers and streams – and the fish and fish habitat therein – from the legal protection currently conferred under the *Fisheries Act* at the present time.

3. The Bill C-38 amendments are also intended to facilitate the delegation (or devolution) of fisheries management and regulation to the provinces. For example, aside from generally empowering the Minister to enter into administrative agreements with the provinces on various matters, the amendments further stipulate that if there is a provincial provision that is "equivalent in effect" to regulations under the *Fisheries Act*, the Cabinet may order that the Act or regulations do not apply in the province. No such equivalency provisions exist in the current *Fisheries Act*, and no compelling reasons have been offered by the federal government to explain its attempted delegation (or abdication) of its fisheries responsibilities to the provinces. Moreover, as a matter of constitutional law, the provinces do not possess the jurisdictional authority to enact and enforce their own fisheries legislation. Therefore, it remains unclear how any existing provincial provisions can be deemed to be "equivalent" under the Bill C-38 amendments.

For these and other reasons, CELA calls upon the House of Commons and the Senate to <u>not</u> enact the *Fisheries Act* amendments contained within Bill C-38.

<u>PART III - CONCLUSIONS</u>

In summary, CELA submits that the uncertain, inefficient and excessively discretionary process created by CEAA 2012 cannot be regarded as a legitimate or *bona fide* environmental assessment process. To the contrary, the process under the new Act is best characterized as a

rushed, highly constrained and wholly unacceptable information-gathering exercise intended to "greenwash" environmentally significant projects across Canada.
Similarly, CELA submits that the proposed amendments to the *Fisheries Act* appear to have little to do with protecting fisheries or aquatic ecosystems. Instead, the amendments are primarily aimed at removing potential regulatory roadblocks for major projects that otherwise would run afoul of current habitat protection provisions within the Act.

Taken together, these and other legislative changes in Bill C-38 will most assuredly not result in "responsible resource development", as claimed by the federal government. Instead, the environmental law changes (coupled with announced job cuts, funding reductions and facility closures within federal departments across Canada) will undoubtedly lead to rampant, poorly scrutinized, and potentially harmful resource development, particularly in the energy context (i.e. pipelines, oilsands, etc.).

Accordingly, CELA respectfully requests that:

1. All proposed environmental law changes (especially those in Part 3 of the bill) must be severed and withdrawn from Bill C-38 forthwith; and

2. If the federal government still intends to proceed with such changes, then they should be reframed as individual, stand-alone bills, and should be made subject to meaningful public and Parliamentary review, including hearings by the Standing Committee on Environment and Sustainable Development.

We look forward to your timely response to these requested actions. Please contact the undersigned if you have any questions or comments about this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Theresa A. McClenaghan
Executive Director

Richard D. Lindgren
Counsel

cc. The Hon. Peter Kent, Minister of the Environment
The Hon. Keith Ashfield, Minister of Fisheries and Oceans
James Rajotte, Chair, Standing Committee on Finance
Mark Warawa, Chair, Standing Committee and Environment and Sustainable Development
Leon Benoit, Chair, Standing Committee on Natural Resources
W. David Angus, Chair, Senate Committee on Energy, the Environment and Natural Resources
Thomas Mulcair, Leader of the Official Opposition
Bob Rae, Liberal Leader

Elizabeth May, Green Party Leader
Daniel Paille, BQ Leader