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COMMENTS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION ON TWO DRAFT REGULATIONS UNDER BILL C-13, THE PROPOSED CANADIAN ENVIRONMENTAL ASSESSMENT ACT

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Introduction

The Canadian Environmental Law Association is pleased to make the following submissions with regard to the two draft regulations under the proposed Canadian Environmental Assessment Act.

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest law group dedicated to the enforcement and improvement of environmental law. Funded as a legal aid clinic, CELA also provides a free legal advisory service to the public on matters of environmental law. In addition, CELA lawyers represent citizens and citizens groups in the courts and before statutory tribunals on a wide variety of environmental matters, including environmental assessment.

At the outset we would note that there are fundamental flaws in Bill C-13, and we submit that it is still premature to be commenting on regulations when we believe that the Bill itself needs restructuring, particularly in light of the recent decision by the Supreme Court of Canada in the Oldman River Dam case. Some of these flaws have been addressed in greater detail in the attached brief submitted by CELA to the Legislative Committee on Bill C-13 last October.

This submission will first comment on the overall regulatory process, and will then examine each of the two regulations.

I. Overview of Regulation Process

Your office has informed us that these two draft regulations, the List of Federal Statutes and Regulations (the "Law List"), and the Comprehensive Study List (or CSL), are being discussed prior to the enactment of the legislation because they are essential in setting out the parameters of the proposed Act. As well, we have been advised that these essential matters are being placed in regulation, rather than statutory form, as it will be easier to amend than the statute itself.

Our response to this is twofold. Firstly, we do not support the ad hoc passage of the draft regulations under the Act. The two draft regulations are being presented to us because they are "essential", yet other regulations equally as "essential" for an effective EA process presumably will not be passed until a later date.

Chief among our concerns is the absence of a draft "exclusion" regulation, which we believe should have been provided for comment at the same time as its counterpart, the Comprehensive Study List. Until we are aware of the content of this exclusion list, we cannot confidently evaluate the comprehensiveness of the CSL, as we do not know what will be expressly excluded.

In addition, a satisfactory public consultation process for the regulation process has not yet been confirmed by FEARO officials. We must stress that a well-publicized and well-

organized public consultation process must occur for the exclusion list regulation, as well as the other regulations.

II. Comprehensive Study List

Our comments on the CSL will be divided into three areas:

1) Comments on the criteria, listed on pages 3-4 of the workbook;
2) The projects identified in the CSL and additional projects that, in our opinion, should be added to the CSL; and,
3) General comments and conclusions.

1. The Criteria

We have a number of concerns regarding the criteria purportedly used in drafting the CSL:

i) What is the source of the statement: "The first concern of the public about environmental matters is human health or safety"? (p.3). This statement certainly does not correspond with what CELA hears from the public about environmental matters, in that ecosystem health and sustainability is an overriding concern.

ii) Why are seemingly important terms within the "specific" CSL criteria not defined?

In any legislation (or in this case its guiding principles or the criteria listed on pp. 3 and 4 of the workbook), clear definitions of terms are necessary in order to prevent misinterpretation of the guideline's intent. One serious flaw is the failure to define the word "significant"; which is used in describing 9 of the 13 listed (nos. 1,3,6,7,8,9,10,12, and 13). It is clear to us that, by qualifying many of the criteria in such a fashion, the intent is to limit the size/scale of projects for comprehensive study to some minimum threshold. These thresholds are impossible for us to evaluate without quantitative explanations, in each case, of the word "significant". The term "large-scale" used in the 4th criterion is similarly unsatisfying.

In a memo dated January 9, 1991, from the Chairman of the Canadian Environmental Assessment Act Task Force to its members, this lack of definitions for key terms is acknowledged. Given the ample time between the date of this memo and the release of the draft regulations and accompanying literature, why has Environment Canada not incorporated the definitions of key terms into the draft legislation?

RECOMMENDATION #1: PROVIDE CONCISE AND UNAMBIGUOUS DEFINITIONS OF ALL RELEVANT TERMS IN THE CSL AND ACCOMPANYING LITERATURE.

iii) For criterion #2 (p.4), why are only effluents that are "known" to be toxic included? Within the past century, humans have developed thousands of different chemicals,

only a handful of which have been adequately tested for toxicity. The term "known" leaves little, if any room for the presence of suspected toxic chemicals to activate the CSL. A basic tenet of science, the principle of scientific uncertainty, is not considered in this criterion.

RECOMMENDATION #2: CHANGE THE WORDING IN CRITERION #2 TO INCLUDE "EFFLUENTS SUSPECTED AND/OR KNOWN TO BE TOXIC..."

iv) What is the rationale for including criterion #4? Is there any area of Canada where the federal government has the authority to approve timber harvesting activities? Can FEARO predict a project of any type where such a "large-scale" alteration could take place? For example, would the approval of a permit for a pulp and paper mill expansion require comprehensive study (under the proposed Act) due to a planned large-scale alteration of forest area in the guise of timber harvesting for the mill's supply?

As well, do "natural" forest areas (no.4) include previously disturbed, regenerated forests? Human activities in the forests such as harvesting or tree planting can, given the right circumstances, lead to the growth of a subsequent (though often less biologically diverse) generation(s) of forest. In many areas of Canada there is little, if any, undisturbed forest left, yet there may still be vast tracts of previously disturbed, regenerated forest. Would such forests fit the definition of "natural"?

RECOMMENDATION #3: EXPAND THE DEFINITION OF "NATURAL" TO RECOGNIZE THE ECOLOGICAL VALUE OF HUMAN-ALTERED AREAS.

v) For criterion number 5, does "alteration, disruption and elimination" include the introduction of exotic or technologically altered species of organisms? The introduction (whether intentional or unintentional) of exotic species has profoundly changed many North American ecosystems. Currently, across Canada, many species of organisms, from microbes to predacious mammals, are undergoing testing and/or genetic alteration for a variety of purposes. Their introduction into a new environment for any number of so-called "desirable" reasons such as pest reduction/ elimination, increased growth rate, environmental "clean-up", or other purposes could have unforseen effects, and therefore should undergo comprehensive study.

RECOMMENDATION #4: REVISE THIS CRITERION TO SUBJECT PROJECTS WHICH INTENTIONALLY INTRODUCE INTO THE ENVIRONMENT SPECIES ALTERED THROUGH BIOTECHNOLOGY AND EXOTIC SPECIES TO COMPREHENSIVE STUDY. SIMILARLY, ADD SUCH PROJECTS AND FACILITIES FOR RESEARCH WHERE THERE IS ANY CHANCE OF RELEASE TO THE ENVIRONMENT TO THE CSL.

vi) Once again, for criterion #6, what constitutes "natural"? The definition of natural within a highly urbanized centre may be greatly different from that found in a

sparsely populated wilderness setting. Given the phenomenal degree of disturbance found within a city such as Toronto even a small park or ravine may be the only "natural" habitat for many kilometres. Would their proposed development qualify for comprehensive study?

For criterion #6, would the definition of "natural" include human-created areas that have since become (either intentionally or unintentionally) habitat for organisms? Places such as parts of Hamilton Harbour and the entire Leslie Street Spit in Toronto consist of fill placed by humans as a result of development or other activities. They have since become home to unique assemblages of (sometimes rare) species of organisms, which may greatly add to the biological diversity and intrinsic value of an area. Would such areas, if proposed for development, undergo comprehensive study?

RECOMMENDATION #5: EXPAND THE DEFINITION OF "NATURAL" FURTHER TO INCLUDE AREAS WHOLLY OR MAINLY CREATED BY HUMAN ACTIVITY WHICH HAVE SINCE BECOME UNIQUE HABITAT FOR ASSEMBLAGES OF ORGANISMS.

vii) Similarly, what is the definition of "natural" shoreline (#10)?

viii) What constitutes an "important" freshwater or marine waterbody (#10 and #12)?

ix) What constitutes "regionally significant" for #13?

x) Why is there no discernable reflection of the **cultural features component** (p.3) in the "specific" criteria listed on p.4?

2. Projects listed under the draft CSL, and suggested additional projects

i) National Parks

In reference to part (b), we are concerned with the figure of 10% or more of the total area of a park being a minimum amount for comprehensive study. Canada's national parks contain a great diversity of habitats, often within a single park. Loss of an area substantially less than 10% of total area could translate into the loss of unique or rare habitat without the benefit of comprehensive study. The arbitrariness of the 10% figure is even more apparent when one notes the great range in size of Canada's National Parks. A one or two percent loss of area in one of the larger parks could be greater than the entire area of others. For example, Canada's largest National Park, Wood Buffalo, comprises 44,807 square kilometres; Canada's smallest, St.Lawrence Islands, is 3 square kilometres in area (Filion, 1987). 10% of the area of Wood Buffalo National Park could contain almost 1,500 parks the size of St.Lawrence Islands!

We are also concerned with the potential this draft regulation has for the piecemeal loss of multiple areas of less than 10% over a period of time due to development or

other pressures from outside a park. This government's commitment to the proper maintenance of a National Park system for future generations could be jeopardized by this oversight.

Activities occurring outside of, but in close proximity to a park's border's or within a watershed including part or all of a park could have detrimental environmental effects to organisms permanently or temporarily resident in the park. These activities should be subject to comprehensive study. Such activities could include mining, forestry, or oil and gas extraction, agriculture, and the draining of wetlands.

RECOMMENDATION #6: THAT PART 1(B) BE CHANGED TO INCLUDE ANY MODIFICATION TO NATIONAL PARK BOUNDARIES.

RECOMMENDATION #7: THAT ANY ENVIRONMENTALLY DISRUPTIVE ACTIVITY OUTSIDE A PARK BORDER THAT INCURS UPON NATURAL PROCESSES OCCURRING INSIDE A PARK BE SUBJECT TO COMPREHENSIVE STUDY.

ii) Water Management

Once again, we are concerned with the lack of rationale for the numbers used in all the projects listed in this section. For a project which modifies more than thirty continuous kilometres of shoreline (part (c)), we feel that the piecemeal approach may again be taken (see section (i) above) by modifying large areas of shoreline over

a longer period of time through a number of projects smaller than the stated threshold level.

Water is currently priced in such a way in Canada that it is seriously undervalued. Where the federal government has jurisdiction over public works, it should endeavour to supply communities with water at the full-cost price. Such pricing could be better determined through the comprehensive study of water supply for each facility under consideration.

RECOMMENDATION #8: THAT ANY PROJECT WHICH MODIFIES SHORELINE IN SUCH A WAY THAT ENVIRONMENTAL DISRUPTION OCCURS SHOULD BE SUBJECT TO COMPREHENSIVE STUDY.

RECOMMENDATION #9: MAKE THE COMPREHENSIVE STUDY OF ALL WATER SUPPLY FACILITIES MANDATORY, WITH AN ASSESSMENT OF THE FULL COST PRICE OF THE WATER SUPPLY.

iii) Oil and Gas

As well, there is no explanation of the numbers listed in parts b,c,e,f,g, and h. The environmental impacts of a spill or other accident may differ greatly depending upon the location of facilities such as those listed in this section. The apparent arbitrariness of these numbers shows no discernable sensitivity to the great variety of

habitats which may be situated near a facility.

Also, there is no definition in part (d) for the term "commercial-scale".

iv) Minerals and Mineral Processing

How was the minimum capacity listed in part (a) arrived at?

RECOMMENDATION #10: EXPAND THE OIL AND GAS AND MINERAL SECTIONS TO INCLUDE EXPLORATION AS WELL AS DEVELOPMENT.

RECOMMENDATION #11: PREPARE A MANDATORY ENVIRONMENTAL IMPACT STATEMENT FOR ALL PROPOSED ASBESTOS MINES.

v) Nuclear and Related Facilities

CELA has a discovered a number of inconsistencies and changes in this section. Firstly, we believe that the use of nuclear power is a costly and unnecessary risk to the environment. All stages of the nuclear process involve the production of radioactive products and byproducts which can have severe mutagenic consequences to the genetic material of any organism. The mutation of even a single, strategic bond within a DNA molecule could lead to birth defects in future generations or cellular malfunction in the mutated generation. Thus the placement of minimum threshold levels of radioactive substances in the CSL is, in our opinion, not valid.

In part (a), we do not agree with the first exemption. Additional ore bodies within an existing facility may be significantly richer than those currently exploited. The equipment used to extract an ore body of higher radioactivity may have to be modified; the safety requirements for workers may have to be more stringent; and the resultant waste products such as tailings may be significantly more radioactive. The exemption under part (a) does not adequately foresee this possibility.

Part (b) lacks definitions for "refining" and "conversion".
The minimum threshold of one hundred megagrams allows for the construction of numerous smaller facilities without the benefit of comprehensive study.

The limit stated in part (c) is totally unacceptable. The newest generation of proposed Candu reactors (known as Slowpoke IIIs) range from 2-20 megawatts in size (Hilborn and Glen, 1981). While these reactors still have the same problems from cradle to grave as their larger counterparts, they would be exempt from comprehensive study. The potential environmental effects of small reactors are far too great to permit exemption.

Part (e) lists a facility for the "processing of irradiated nuclear fuel designed for an input of more than one hundred megagrams...". This level is absurd. One hundred megagrams equals one hundred metric tonnes of fuel rods. One freshly spent

CANDU fuel bundle (weighing slightly less than 20 kg - or 0.02 megagrams) would deliver a lethal dose of ionizing radiation to a person standing one metre away in less than fifteen seconds. Any release of this material to the environment would have disastrous consequences.

Part (f) describes an irradiated fuel storage facility "where the design inventory exceeds five hundred megagrams of irradiated nuclear fuel..." as qualifying for comprehensive study. The chronic absence of explanation for these numbers is continued in this entire section. The possibility of a nuclear fuel storage facility being constructed to hold slightly less than five hundred tonnes of irradiated nuclear fuel without the benefit of at least a comprehensive study is, in our opinion, astoundingly absurd.

RECOMMENDATION #12: REQUIRE AT LEAST COMPREHENSIVE STUDY FOR: ALL NEW REACTORS, HIGH-LEVEL AND LOW-LEVEL NUCLEAR WASTE STORAGE, TRANSPORTATION AND PROCESSING, FUEL PROCESSING, FUEL REFINING, THE DECOMMISSIONING OF ALL NUCLEAR FACILITIES IRREGARDLESS OF CAPACITY/SIZE, AND THE CONSTRUCTION, OPERATION AND DECOMMISSIONING OF ALL RESEARCH FACILITIES WHERE THERE IS ANY DANGER OF ESCAPE OF RADIOACTIVE MATERIALS TO THE OUTSIDE ENVIRONMENT.

vi) Industrial Facilities

"Industrial Facilities" are not defined in the legislation or the accompanying literature. There is no explanation of why this list is limited to just pulp and paper mills, primary steel mills, and non-ferrous metals smelters and refineries. Similarly, there is no explanation of why there is a limitation to only greenfield projects, when the expansion or retrofitting of an existing facility would have equally as harmful environmental impacts.

RECOMMENDATION #13: EXPAND THIS SECTION TO INCLUDE ALL EXPANSIONS AND RETROFITTINGS OF INDUSTRIAL FACILITIES.

RECOMMENDATION #14: ENSURE THAT THE DEFINITION OF "INDUSTRIAL FACILITIES" ENCOMPASSES ALL SECTORS THAT NEGATIVELY IMPACT THE ENVIRONMENT, AND THAT THIS SECTION OF THE CSL BE EXPANDED ACCORDINGLY.

vii) Defence

Part (b) may be interpreted to mean a permanent structure such as a building covering more than 100 square kilometres. A clarification of the intent of this section would be helpful. These items do not adequately reflect the multitude of potential projects that DOD could carry out that could affect the environment, such as flight corridors, and weapons development and testing.

RECOMMENDATION #15: REVISE THE WORDING OF 7(B) FROM "PERMANENT AREA" TO "DEVELOPMENT", AND PROVIDE A CLEAR DEFINITION OF DEVELOPMENT THAT INCLUDES AREAS IN WHICH THERE MAY BE ENVIRONMENTAL IMPACTS, BUT NOT NECESSARILY PERMANENT STRUCTURES.

RECOMMENDATION #16: PLACE ALL NEW WEAPONS DEVELOPMENT AND TESTING, INCLUDING BIOLOGICAL AND CHEMICAL WEAPONS, ON THE CSL.

viii) Marine Transportation

Item (a) is, in our view, inadequate. Practically by definition, the construction of a navigable waterway inevitably causes a myriad of detrimental environmental impacts.

RECOMMENDATION #17: SUBJECT PROJECTS UNDER THIS SECTION TO MANDATORY ENVIRONMENTAL IMPACT ASSESSMENT.

ix) Rail Transportation

There is no rationale for the two quantities mentioned in this section. A rail corridor of any length could impact ecologically sensitive areas. Similarly, no account is taken of the effects of twinning track in this section.

RECOMMENDATION #18: SUBJECT ANY RAIL DEVELOPMENT OR EXPANSION (INCLUDING TWINNING) TO COMPREHENSIVE STUDY, REGARDLESS OF LENGTH, IF IT IMPACTS ANY ECOLOGICALLY SENSITIVE AREA, AS DEFINED BY ACCEPTABLE CRITERIA.

x) Waste Management (excluding nuclear waste)

What is FEARO's definition of a "permanent facility", and of "hazardous waste"?

Why are landfill sites, sewage treatment plants, and incinerators excluded from comprehensive study?

Why is nuclear waste excluded? Where is there any accounting of low-level nuclear waste storage or disposal? (See recommendation #12)

RECOMMENDATION #19: EXPAND THIS SECTION TO INCLUDE BOTH PERMANENT AND MOBILE HAZARDOUS AND SOLID WASTE FACILITIES; AND SEWAGE TREATMENT PLANTS.

In concluding our comments on the CSL, we find that:

a) There does not appear to be any internal consistency between the 13 criteria and the contents of the CSL. The criteria seem to have played no role in the contents of the CSL;

b) The description of projects in the CSL is for the most part so vague that it severely limits our analysis, and the efficiency and predictability of the CSL;

c) The use of quantitative limits or thresholds in the CSL appears to have, in all cases, no sound ecological basis;

d) There are significant weaknesses and omissions in the CSL.

In conclusion, we have grave doubts that this draft regulation would be at all effective without substantial revisions and additions.

III. Law List

i) CELA is also concerned about the process by which the law list was created. In our view, the list in its present form will unduly limit the scope of the legislation before it is even proclaimed. We would like to know the rationale which dictated the inclusion and exclusion of particular provisions on the law list.

Unfortunately, a section by section review of all federal legislation to determine whether it is applicable to the EA process is beyond our resources at the present time. However, we support the principle of "all in unless specifically exempted" and would therefore urge FEARO to consider this option. Currently, if a project is not

caught under ss. 5(1)(a)-(c) or by the law list enacted pursuant to s. 5(1)(d) then it will not be subjected to an EA. Although steps can then be taken to have the relevant section of the statute or regulation added to the law list, this process will be very time consuming and may be too late for a particular undertaking. The limited scope of the present law list seriously jeopardizes the possibility that any environmental review will be done on a project not already on the list.

ii) In keeping with the goal of ensuring that the environmental effects of projects receive careful consideration before actions are taken in connection with them (s. 4(a)), we submit that a much wider net be cast for inclusion into the law list. This scope could gradually be narrowed with implementation of the legislation and the informed realization that some projects will not require an environmental assessment. The screening process could be well utilized in this regard.

This change would then place the burden of stating that an environmental assessment is not necessary on the federal, provincial or private authority requesting Ministerial permission, rather than placing the burden on citizens, community groups or individuals, to try to establish that an EA of the project should be done. This latter group almost always has fewer resources and no profit-oriented financial interest in the undertaking.

RECOMMENDATION #20: ENSURE THAT THE LAW LIST BE AS COMPREHENSIVE AS POSSIBLE, IN THE RECOGNITION THAT IN THE COURSE OF ITS REFINEMENT SOME SECTIONS MAY BE FOUND UNNECESSARY.

1. **The Criteria** (as modified by the "ERRATA" sheet distributed at the Toronto workshop)

iii) With regard to the third criterion, we submit that the EA process should not be limited by a requirement that it be invoked early in the planning stages and before final decisions are taken. This leaves open the possibility that proponents will avoid applying for Ministerial permission until late in the planning or construction stage. As well, the Supreme Court of Canada has discussed the value of any environmental assessment, even if it is not done until a late stage in the process. In the recent Oldman Dam decision, La Forest J. noted that an application of the EARP Guidelines to the dam at this late stage in the proceeding may have

> some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.

RECOMMENDATION #21: CELA RECOMMENDS THAT THE THIRD CRITERIA BE AMENDED TO ENSURE THAT EA MAY ALSO BE REQUIRED AT LATER PLANNING STAGES WHERE APPROPRIATE.

iv) In our view, there are definitional problems inherent in the fourth criteria as the wording used is not consistent with that used elsewhere in the Act and the CSL. Why is the term "not negligible" used instead of the word "significant", which is used repeatedly throughout the Act and CSL?

RECOMMENDATION #22: CELA RECOMMENDS THAT CRITERION #4 BE ALTERED IN ORDER TO ACHIEVE CONSISTENCY WITH LANGUAGE ELSEWHERE IN THE ACT AND DRAFT REGULATIONS; OR BE PROPERLY DEFINED; OR DELETED ALTOGETHER.

v) Regarding criteria #8 and #9, considerations such as trading licences or deviations from prescribed standards would be adequately addressed in the screening process outlined in s. 13.

RECOMMENDATION #23: THAT CRITERIA 8 AND 9 BE FACTORED INTO A SCREENING PROCESS AND NOT LEFT IN CRITERIA FORM.

vi) Regarding criterion #10, in keeping with the goal of preventing significant adverse environmental effects, emergency situations should not be exempt altogether from the EA process. Rather, the timing of the screening process should be streamlined in such situations.

RECOMMENDATION #24: DELETE CRITERION #10 AND REWORK IT INTO A SCREENING PROVISION.

2. Specific Provisions on the Law List

vii) CELA is concerned about the misunderstanding that has arisen with regard to s. 35(2) of the Fisheries Act. In our view, this provision must remain on the Law List as the subsection requires Ministerial authorization before a proponent can carry on a work or undertaking that results in the harmful alteration of fish habitat (s. 35(1)). Approvals granted under this section generally have the effect of making a decision as to whether a project will proceed.

RECOMMENDATION #25: THAT S. 35(2) OF THE FISHERIES ACT REMAIN ON THE LAW LIST.

viii) We would like to point out that both s. 37(2) of the Fisheries Act and s. 61(1) of the Canadian Environmental Protection Act respectively give the Minister of Fisheries the power to modify an undertaking if he/she is of the opinion that an offence is being or likely to be committed; or permit the Minister of the Environment to make recommendations for regulations to abate pollution if he/she suspects it may be occurring. Both of these provisions are designed to protect the environment. To include them in the Law List is absurd as it has the effect of requiring an

environmental assessment of actions taken to protect the environment.

RECOMMENDATION #26: DELETE S. 37(2) OF THE FISHERIES ACT AND S.61(1) OF THE CANADIAN ENVIRONMENTAL PROTECTION ACT FROM THE LAW LIST.

ix) CELA would like to reiterate that our comments on specific contents of the Law List are few as we unfortunately do not have the resources at the present time to study all relevant statutes and regulations. Once again, we stress that the "all in unless specifically exempted" approach is highly preferable.

IV. Conclusions

In conclusion, we feel that these two draft regulations simply reinforce our position that this legislation is fundamentally flawed, and should be either wholly overhauled or scrapped. To present to us two highly flawed draft regulations "critical" for the implementation of Bill C-13 so close to Third Reading in the House is inexcusable. We trust that the public consultation process for future regulations, if this Bill goes forth, will allow us more time and resources for a more comprehensive analysis.

V. Bibliography

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