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CANADIAN ENVIRONMENT  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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REPRESENTATIONS REGARDING THE CANADA PORT AUTHORITY  
ENVIRONMENTAL ASSESSMENT REGULATIONS AS PUBLISHED IN  
THE CANADA GAZETTE PART 1, PUBLISHED JANUARY 2, 1999,  
NOTICE DATED DECEMBER 16, 1998; COMMENTS DUE BY MARCH 3,  
1999

ATTENTION:

Mr. Jim Clarke, Director  
Legislative and Regulatory Affairs,  
Canadian Environmental Assessment Agency,  
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Dear Mr. Clarke:

Thank you for the opportunity to comment on the above noted proposed regulation.

These comments are submitted on behalf of our client, the Citizens' Environment Alliance of Southwestern Ontario, Windsor, Ontario, as well as on behalf of ourselves, the Canadian Environmental Law Association.

**REGARDING THE REGULATORY IMPACT STATEMENT:**

The first set of comments pertain to the narrative contained in the regulatory impact statement as published in the Canada Gazette, January 2, 1999. Additional specific comments arising out of the text of the proposed regulation as published are contained in the second part of these comments below. We have included comments in support of portions of the regulatory impact statement and the proposed text of the regulations, as well as comments expressing concern as to other portions.

1. We support the promulgation of a regulation under section 9 of the *CEAA*, i.e. regulations under 59(k) to set out the manner in which environmental assessments are to be conducted by Port Authorities.
2. We support the requirement that Port Authorities be subject to the *CEAA* and that screening and environmental assessments of their projects be required.
3. We also support the possibility of panel review of Port Authorities' projects being required by the Minister of Environment.
4. Furthermore, we agree that the regulations and requirements that Port Authorities be subject to the *CEAA* should be applied sooner than later.
5. We also agree that the regulation should apply consistently to all of the Port Authorities (rather than developing idiosyncratic and inconsistent regulations from one Port Authority to another).
6. In general, we disagree with the proposal that "the self assessment principles would be extended for comprehensive study assessments for larger port projects such that the ports would control the public consultation and decision making for those reviews" (according to the News Release). We disagree with the statements that the CPA will deal with 99% of the expected EA's under the self-directed screening and comprehensive study levels and be solely responsible for carrying out all aspects of the process, including public consultations and decision-making.
7. We also disagree that the proposal results in a "cost-effective coordination arrangement which minimizes duplication and inefficiency in carrying out assessments" where projects are subject to both the regulation and the *CEAA* itself.
8. With respect to the consideration in the impact statement of alternatives to regulation, we support the comments contained in the impact statement that regulations are the preferred instrument for defining the environmental assessment procedures to be followed in assessing port authority projects. We support the statement that this (regulation) is "the only reliable, consistent and transparent approach" for the prospective CPA's.

9. We also support the statement in the impact statement that in this case, guidelines, voluntary policies and Memoranda of Understanding "would not ensure a clear and consistent approach to environmental assessments of port projects, would not provide the desired public accountability offered by a regulation; nor ensure a uniformly high quality standard of assessment" and would pose difficulties with compliance and enforcement. We agree that these standards are essential to the environmental assessment process.

10. We also agree with the statement in the impact statement, that public participation must be guaranteed and that the process must be transparent.

11. In terms of benefits and costs, we agree that decision-making that more effectively takes into account environmental considerations reduces uncertainty regarding the potential environmental costs of future projects.

12. However, we do not agree that "special competitive federal entities, such as Crown corporations and Harbour Commissions", should be subject to "special procedural regulations rather than the full requirements of the *Canadian Environmental Assessment Act*." On the converse, the port authorities should be subject to the full requirements of the *CEAA*; as for example, would be private proponents, who required federal permits.

13. We do agree with the recommendation by the Commissioner of the Environment and Sustainable Development that regulations be developed to remove gaps for federal entities not covered under *CEAA*, and so support that rationale as stated in the impact statement.

14. We also agree with the impact statement that costs expected to occur from environmental assessment should be "expected to be outweighed by the increase in benefits to the environment." This is an important principle of sustainable development.

15. We do not agree with the proposal in that the proposed regulations are based on the "principle of self assessment" as the impact statement states. Rather, we would submit that Transport Canada or another Department of the federal government should be the responsible authority.

16. If the proposal continues with the port authority as the responsible authority,

then we agree that there is a necessity for Transport Canada to monitor and report on the implementation of the CPA's environmental assessments under the regulation. However, clear goals and expectations must be stated so that there is a method to determine whether the CPA's are meeting the requirements and so that there would be a basis upon which to make adjustments to the regulation in the future.

17. With respect to the impact statement that the Canadian Environmental Assessment Agency intends to submit necessary comments back to the CPA regarding inadequacies of comprehensive study reports, we would submit firstly that the same should be done for screening reports, and secondly, that there should be an enforceability mechanism in case the CPAs fail to address shortcomings. However, this should be done in the context of a responsible authority other than the CPA's, such as Transport Canada.

Further comments on the specific text of the regulation follow, which supplement the foregoing comments.

**ADDITIONAL COMMENTS SPECIFIC TO THE PROPOSED TEXT OF THE REGULATION:**

1. All section numbers in these comments refer to the section numbers of the proposed regulation as published in the Canada Gazette January 2, 1999, unless specifically identified as section numbers of the *Canadian Environmental Assessment Act*.
2. We agree with the requirement in section 3, that the CPA shall conduct environmental assessments "as early as is practicable in the planning stages of the project and before irrevocable decisions are made". However, we would submit that a sanction should be provided in case of breach of this provision, such as a provision that the port authority shall not proceed with a project, and that Transport Canada or the Minister may so order.
3. As to section 4, we would suggest moving the words "where applicable" to subsection (c) so as to clarify the section and remove ambiguity, since that is the only subsection where those words are needed. We would also recommend that section 4(d) should always be required. Principles of ecosystem planning as well

as the recently developed adaptive environmental management require that all plans have goals and objectives; that these be monitored; that there be assessment of the performance of the plan against those goals and objectives; and that in case of performance deviation from those goals and objectives, that the plan be modified or redrawn, or appropriate contingency or mitigative measures be employed. The port authorities should be required to consider this full feedback loop in all environmental assessments.

4. We disagree with section 5(a) - the scope of the project should not be determined by the port authority, but by Transport Canada or the Minister of Environment. Furthermore, section 5(b) should have the addition of a requirement for consultation with the public before determining the scope of the project.

5. We agree with section 6 of the regulation which prohibits any power, duty or function conferred by or under any Act of Parliament or any regulation to be exercised to permit the project to be carried out in whole or in part unless an environmental assessment of the project has been completed and a course of action has been taken in accordance with the Regulations.

6. We agree with section 7(1) of the regulation with the caveat that the responsible authority, as submitted above should be Transport Canada or a Minister of a Department. However, we vigorously disagree with section 7(3) of the regulation which provides that where there are two or more responsible authorities for a project and one of them is the port authority, that the responsible authority shall be the CPA. This is a highly inappropriate provision.

7. With respect to section 8 of the regulation, the CPA should not further delegate. However, as we recommend that the CPA should not be the responsible authority in the first place, we would suggest that the proper responsible authority (Transport Canada or a Minister of a Department) could be empowered to delegate parts of the screening or comprehensive study or design and implementation of a follow-up program to the port authority in appropriate cases. We also agree with the principle of non-delegation of the responsible authority's duty to take a course of action as provided in the latter portion of section 8.

8. Section 9(1) should be modified by substitution of the appropriate responsible authority for the CPA as above submitted.

9. Section 9(2) should be modified by adding the words "by the port authority or any other person" to the end of subparagraph (a). Subsection (e) thereof should be further modified by breaking that subparagraph into two subparagraphs; the first , subparagraph (e) ending after "any other matter relevant to the screening" and the second, a new subparagraph (f) reading "the need for the project and alternatives to the project". These amendments are required to clarify the ambiguities inherent in the proposed wording.

10. Section 9(3) should be modified to simply provide that the responsible authority shall ensure that studies and information necessary to take a course of action under section 14(1) is available, obtained or collected.

11. Section 9(4) should be modified to provide that the responsible authority (as above described); NOT the port authority shall determine the scope of the factors to be considered under paragraph 9(2).

12. Section 10 (1) should be modified to eliminate the words "If public participation in the screening of a project is appropriate or is required by an Act or regulation" and the section should read "The responsible authority shall give the public notice of the assessment and shall give the public an opportunity to participate in the assessment." The same amendment should be made to section 10(2) so as to remove the words " if public comment on the screening report is appropriate or is required by any Act or regulation" and to begin with the words "the responsible authority shall give the public notice..." The effect of these modifications are to make public notice mandatory in all screenings and to make it mandatory to give an opportunity for public comments as to all screening reports.

13. Section 12 of the proposed regulation should be modified to require publication in two national newspapers and publication in one or more local daily newspapers publishing in the geographic locale of the relevant port authority. It should further provide a minimum sixty day comment period, and the regulation should provide that the place where copies of the Report may be obtained shall include a publicly accessible location in the geographic locale of the relevant port authority. The section should also require publication of the request by the CEAA on its public electronic registry sixty days before the expiry of the comment period. The notice requirements here suggested and the comment period here suggested are mandated because, by definition, such a Model Class Screening

Report, once adopted, may apply to more than one project, including projects in the future that are not yet identified or proposed. It is therefore essential to ensure that such Model Class Screening Reports meet the requirements of the Act, the Regulation and the needs of the public.

14. We agree with the provisions of section 13(2). Subsection 13(3) should be modified by including a requirement for publication of such a declaration by the Agency on its public electronic registry.

15. Section 14(1) of the regulation should be modified so as to delete "CPA" and replace it with "the responsible authority" as the case may be.

16. Section 14(2) (a) of the regulation should be modified by adding a sanction for the breach of this section; i.e. in case of the failure to take the required mitigative measures, while section 14(2)(b) should be modified by deleting the words "if appropriate".

17. Section 15(1) should be amended by the replacement of the words "CPA" with the words "responsible authority".

18. Section 16(a) should be modified by replacing "CPA" with "responsible authority" (as above described); and both subsections 16(a) and (b) should be modified by the addition of a requirement for consultation with the public prior to determining the scope of the factors to be taken into consideration.

19. Section 17 (1) and (2) should be modified by substituting "responsible authority" for "CPA".

20. Section 19 should be similarly modified by substituting "responsible authority" for "CPA".

21. We agree with the provisions of section 20. We would suggest the addition of a provision for public consultation to this section.

22. Section 21 should be deleted and replaced with a reference to or incorporation of the provisions of section 12 (4) and (5) of the Act.

23. Section 27 should be modified by adding "or responsible authority" following


the word "Agency".

Thank you once again for the opportunity to provide these comments. Please feel free to contact us for clarification or further discussion with respect to any of the foregoing. If there is any further opportunity for input or consultation, we would be pleased to participate. If a revised regulation is prepared based on comments received, we would appreciate your advice to that effect so that we may review same with our client, and provide any additional comments on behalf of our client, Citizens' Environmental Alliance, and on behalf of ourselves, the Canadian Environmental Law Association.

All of which is respectfully submitted,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Per

  
Theresa A. McClenaghan  
Counsel

cc Rick Coronado, Citizens' Environmental Alliance  
cc Prof. Marcia Valiante, University of Windsor  
cc Hon. Christine Stewart, Minister of Environment  
cc Hon. David Collenette, Minister of Transport  
cc Hon. Herb Gray, M.P. Windsor West  
cc Michael D. Hurst, Mayor, City of Windsor