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Canadian Environmental Law Association
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SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION ON THE PROPOSED CEAA REGULATIONS

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SUBMISSIONS ON THE DRAFT CEAA REGULATIONS*

I. INTRODUCTION

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 provides a free legal advisory service to the public on matters of environmental law. In addition, CELA lawyers represent individuals and citizen groups in the courts and before administrative tribunals on a wide variety of environmental matters, including environmental assessment.

Since its inception, CELA has advocated the need for effective environmental legislation in all jurisdictions to ensure that undertakings that might have adverse environmental effects are thoroughly assessed as early as possible in the planning process. CELA made extensive submissions in response to Bill C-78 and Bill C-13 as amended and has commented on draft proposals for regulations under the Canadian Environmental Assessment Act (CEAA).[1]

CELA's position has been and continues to be that Bill C-13 is seriously flawed environmental assessment legislation and represents a step backwards from the current

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* CELA wishes to acknowledge the assistance of Joe Bradford, student-at-law, Queen's University for his analysis of the application of EARP and the CEAA to military activities.

1 See Toby Vigod, Submissions of the Canadian Environmental Law Association to the Special Committee on Bill C-78, the Proposed Canadian Environmental Assessment Act (Toronto: CELA, Nov. 1990); Richard D. Lindgren, Preliminary Response of the Canadian Environmental Law Association to the Legislative Committee on Proposed Amendments to Bill C-13 (Toronto: CELA, October 23, 1991); Craig Boljkovac and Karen Campbell, Comments of the Canadian Environmental Law Association on Two Draft Regulations Under Bill C-13, the Proposed Canadian Environmental Assessment Act (Toronto: CELA, February 1992).

EARP Guidelines Order. It is our position that this government has the opportunity to amend the Act in a number of key areas before it is proclaimed. These areas would include providing mechanisms for enforcement and compliance; requiring an analysis of need and alternatives; creating an independent agency; assessing programs and policies; and providing for the awarding of intervenor/participant funding and costs. As well, we believe that the legislation should be amended to include assessment of all projects and activities unless they are specifically exempted. CELA would be pleased to participate in any process to amend the Act to encompass the needed changes. We are attaching a short paper outlining the rationale and some suggestions for amending the legislation to provide for the awarding of intervenor/participant funding and costs(see attached).

II. COMMENTS ON THE REGULATIONS

The following general comments are made on the proposed regulations. CELA, first of all, supports the amendments to the Comprehensive Study List and the Law List Regulations proposed by Brian Pannell of McTannett Rich, and the amendments to the Exclusion List Regulations and Inclusion List Regulations proposed by Christopher Rolfe of the West Coast Environmental Law Association. We also believe that the problems identified by Mr. Pannell and Mr. Rolfe with regard to the Law List and the Inclusion List point to an essential weakness with the Act itself- the "all out unless regulated in" approach.

CELA's position is that an "all in unless specifically exempted" approach is preferable to

that of trying to list in regulations all of the possible physical activities or statutory provisions requiring federal decision-making that would be necessary to ensure that projects that may have potential adverse environmental effects are assessed.

CELA maintains that the stated goal of CEAA "to ensure that the environmental effects of projects receive careful consideration" (s. 4 of CEAA) will not be met by the Act as presently drafted. The key reason for this is the definition of project (s.2) which makes an artificial distinction between physical works and physical activities. While physical works will be assessed if either a federal authority is the proponent or where they are subject to a government decision identified on the Law List, for an environmental assessment to be required for a physical activity, the physical activity must be listed in the Inclusion List (developed by regulation pursuant to section 59(b) of the Act).

While CEAA makes this distinction between physical works and activities, the environment does not. Many of the activities with potential adverse environmental activities are not necessarily in relation to a physical work. These might include logging, transport of hazardous substances, military exercises, or pesticide spraying. The list is potentially vast, and is by definition a near impossible task. However, the proposed inclusion list includes only those specific activities which can be permitted under sections included on the law list (and not even all of those activities are listed).

The Regulatory Impact Analysis Statement for this list notes:

> The inclusion list regulations under the CEAA has a narrower application than the EARP Guidelines Order which, as interpreted by the courts, applied to a vast array of physical activities... defining the activities that are subject to the Act creates greater certainty than under the EARP process.

While greater "certainty" may be created, we would argue that this has occurred at the expense of protecting the environment and assessing activities that may have an adverse environmental impact. The result is that many major activities currently subject to assessment under EARP will now escape assessment. One must seriously ask why should this government be proclaiming environmental assessment legislation that is a step backwards from the status quo?

A number of examples are illustrative of the absurd situation caused by this approach. For example, a number of physical activities undertaken by federal departments, or on federal lands, or supported by federal funding, would be entirely immune from environmental assessment. Clearly, there are no constitutional impediments to federal environmental assessment legislation applying to physical activities in these circumstances. However, the result is that no assessment would occur and "environmental assessment havens" would be created for activities that have potential adverse impacts on the environment.

Another example is the situation where a company receives millions of dollars in federal funding to support a logging venture; if a facility were to be built an assessment would occur, but if no construction of works were involved, no assessment would be necessary.

Again the environment may suffer.

A final example to illustrate the absurdity of the approach of trying to list all the possible physical activities that should be assessed, is in relation to military activities, an area shrouded in some mystery. For the past few years, the Canadian Army apparently has been concerned with the environmental impact of large scale "field exercises" on the environment within and outside training bases. An example is "Exercise Rendezvous 92" in Wainwright Alberta. The exercise did not involve the construction of buildings or "sites," but consisted of 15,000 Canadian, American and NATO troops with over a thousand vehicles(trucks, Armoured Personal Carriers and main battle tanks) manoeuvring on defensive and offensive operations over hundreds of acres of land in Northern Alberta. Presently, the Department of National Defence's Environmental Policy Directives, Environmental Screening Procedures, Environmental Protection Management Systems, Land Force Environmental Action Plan and Force Standing Operational Procedures are based heavily on the assessment guidelines found in EARP.

Military activities that will be subject to an environmental assessment are noted in paragraphs 37 and 38 of the regulations:

> 37. the testing of military weapons in an area not designated for testing military weapons under section 17 of the National Defence Act

38. the low level flying of military fixed wing jet aircraft as part of training programmes at an altitude below 330 m above ground level on routes or in areas that are not designated by or under the authority of the Minister of National Defence as low-level flying training routes or area.

The result here is that an environmental assessment is required only in the unusual testing of military weapons off designated ranges or low flying in undesignated areas. Only paragraph 38 of the Inclusion Regulations has any real effect on military field exercises and that effect is limited to fixed wing jet aircraft.

If CEAA is proclaimed with the regulations as presently drafted, since no military field exercises qualify as a "physical activity" under the CEAA regulations, there is no requirement for the Department of National Defence to conduct an environment assessment of proposed field exercises which may have adverse environmental impacts. The replacement of the EARP Guidelines Order with CEAA will have an impact and could seriously hamper the Department of National Defence's and Canadian Force's efforts to develop environmentally sound procedures. The military has adopted a general "Code of Environmental Stewardship" (NDHQ Policy Directive P5/92: Canadian Forces and the National Defence Policy on the Environment). One of the major objectives of the code is,

> to meet or exceed the letter and spirit of all applicable federal environmental laws and, where appropriate, to be compatible with provincial and international environmental standards.

The Canadian Environmental Protection Act and the EARP Guidelines Order together provided the federal environmental laws on which this objective was based. More specifically, Canadian Forces Administrative Order 36-50 Environmental Protection Management's stated purpose is to

> detail the policy and responsibilities for environmental protection management and the Environmental Assessment and Review Process as it concerns the Canadian Forces and the Department of National Defence.

The administrative order outlines in exhaustive detail the method of environment assessment required by the department. The recently published Lead Forces Environmental Action Plan (LEAP) notes that an EARP assessment is required for all exercises above the unit level (unit is approximately 500 persons) and for all exercises below unit level if the following qualifications apply:

a. new areas;
b. seasonal changes;
c. sensitive environments;
d. new activities or equipment;
e. negative impact upon fish or fish habitat;
f. the use of hazardous materials such as noxious gases; and
g. public concern

The replacement of EARP with the CEAA will remove the foundation upon which the military has based all of its environmental assessment policy. Presently, the CEAA and its regulations provide no base upon which the military can establish environmental assessment policies.

In order to ensure that major field exercises are assessed for their impact on the environment and to provide a foundation for present military environmental assessment

procedures, the following paragraph is recommended to be included in the Inclusion List Regulations:

37.1 All military exercises above the unit (defined in the National Defence Act) level and exercises if the following qualifications apply:

a. new areas;
b. seasonal changes;
c. sensitive environments;
d. new activities or equipment;
e. negative impact upon fish or fish habitat;
f. the use of hazardous materials such as noxious gases; and
g. public concern

This is but one example of the shortcomings of the approach of trying to forecast all the environmentally significant activities which the federal government will carry out, fund, provide land for or permit. Instead the Act should require listing of activities which are not subject to environmental assessment, or use the approach applied under the current EARP Guidelines Order of subjecting all potentially significant activities to assessment.

CELA is also concerned that the proposed Law List and Inclusion List regulations, as presently drafted, will not cover activities such as:

- Fishing by large draggers and other technologies that destroy the marine ecosystem;
- export of electricity or natural resources;
- exports and imports of hazardous substances and waste;
- use of pesticides;
- large scale military exercises (discussed above);

- activities relating to management of wildlife;
- navigation of oil tankers in the Arctic;
- cutting timber in National Parks.

The failure to require environmental assessment of federal decisions to allow exports of Canada's natural resources, such as oil, gas and hydro-electric power is especially troubling in light of the recent passage of the North American Free Trade Agreement (NAFTA). Under the Canada- U.S. Free Trade Agreement and NAFTA, Canada may be locked into long term exports of natural resources to the United States. Any restrictions on export necessary for conservation must apply equally to domestic consumption as well as foreign consumption even in times of shortage. These trade agreements may result in the development of projects that increase the exploitation of these resources. Before entering into export arrangements with the United States or Mexico, an environmental assessment should take place. We would urge that these federal decisions be added to the Law List.

In conclusion, CELA would urge this government to seriously consider amending this flawed piece of legislation before proclamation. Tinkering with the regulations will not sufficiently rectify the shortcomings of the Act itself. The Law List and Inclusion List approach will inevitably leave gaps in the environmental assessment regime. The amendments to the Act discussed herein are necessary to provide for legislation that will indeed ensure that the environmental effects of projects are assessed before a decision is made to proceed.