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

August 23, 2012 **BY EMAIL**

John McCauley
Director, Legislative and Regulatory Affairs
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, ON
K1A 0H3

Dear Mr. McCauley:

RE: AMENDMENTS TO THE *PROJECTS LIST REGULATIONS* UNDER THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012*

On behalf of the Canadian Environmental Law Association ("CELA"), I am writing to provide CELA's submissions regarding amendments to the *Regulations Designating Physical Activities* (SOR/2012-147), also known as the *Projects List Regulations* ("PLR"), made under the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012").

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 subject to CEAA 2012.

In addition, CELA was involved in the development of the original CEAA and the underlying regulations during the early 1990s, and CELA has participated in previous Parliamentary reviews of the former Act. CELA has also intervened in Supreme Court of Canada appeals, and initiated proceedings in the Federal Court of Canada, regarding federal environmental assessment legislation. Moreover, CELA represents or advises individuals and groups who participate in federal environmental assessment processes.

CELA's main concerns and recommendations regarding the PLR under CEAA 2012 may be summarized as follows:

1. Amending the PLR does not Salvage CEAA 2012

CELA remains strongly opposed to the unjustified enactment of CEAA 2012. Leaving aside the objectionable manner in which CEAA 2012 was passed (i.e. buried in a massive budget bill), it is our view that the new legislation represents an unwarranted and highly retrogressive rollback of the important safeguards that had been built into the previous Act. From a procedural and

substantive perspective, CEAA 2012 is fundamentally flawed and does not create a robust, effective or credible environmental assessment regime at the federal level.[1]

In particular, 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; and (iv) significantly overpoliticize the federal environmental assessment process at all key decision-making stages.

Accordingly, CELA submits that amending the PLR will not remedy these and other deficiencies within CEAA 2012, and will not make the new legislation more palatable to the countless individuals, organizations, communities, and First Nations who have expressed grave concerns about CEAA 2012 and its implementation across Canada.

2. The "Consultation" on the PLR is Inadequate and Unacceptable

Given its inclusion in Bill C-38, CEAA 2012 was enacted with inadequate parliamentary review and insufficient opportunities for input by persons interested in, or potentially affected by, the provisions of the new legislation. This unfortunate trend was continued in the promulgation of the PLR itself, which was drafted and proclaimed into force without any prior public notice/comment opportunities. In our view, this profound lack of consultation on the content of the PLR goes a long way in explaining the shortcomings of, and omissions within, the PLR (see below).

It is highly ironic that one of the key principles within CEAA 2012 is public participation, and yet the Canadian Environmental Assessment Agency ("Agency") is only soliciting stakeholder comments on the PLR after the regulation has already been made. More importantly, the Agency's current efforts regarding the PLR cannot be regarded as meaningful public consultation. For example, due to short notice, CELA was unable to attend the July 25th session hosted by the Agency in Ottawa to discuss the PLR (although we have since reviewed the briefing materials distributed at the meeting). Similarly, the Agency's solicitation of stakeholder comments over the summer vacation season is problematic and unlikely to result in comprehensive public feedback on the PLR.

In summary, *ex post facto* "consultation" on a regulation that has already been made under CEAA 2012 is both ill-timed and unacceptable. We trust that this approach will not be replicated as further regulations are promulgated under CEAA 2012.

3. Public Interest Objectives for the Revised PLR

Although CELA remains concerned about the specific provisions of CEAA 2012, we strongly support the underlying principles of the legislation: sustainable development, environmental

[1] See, for example, letter from CELA to Prime Minister Harper dated June 7, 2012 regarding CEAA 2012. This letter and related briefs are available at www.cela.ca.

protection, public participation, and the precautionary approach.[2] In our view, these principles should be driving the Agency's consideration of the adequacy of the current PLR, and should inform the Agency's analysis of which additional activities should be caught by revisions to the PLR.

In essence, CELA submits that the PLR should be amended to ensure that all environmentally significant activities which engage federal decision-making are immediately listed in the PLR. Where there is uncertainty regarding the nature, extent, mitigability or significance of environmental effects associated with a particular activity, then, in accordance with the precautionary principle, the activity should be prescribed by the PLR.

This prudent and inclusive approach to revising the PLR does not necessarily mean that an environmental assessment must be conducted in every instance where a listed activity is being proposed by a public or private proponent. In the non-energy context, for example, CEAA 2012 merely requires the Agency to conduct a case-by-case screening of specific projects in order to determine if, in fact, an environmental assessment should be conducted.[3] Thus, it is possible that a listed project may not necessarily trigger a federal environmental assessment in appropriate circumstances.

Accordingly, from the public interest perspective, there is no real downside or prejudice to broadening the PLR in order to at least preserve the option of requiring federal environmental assessments where necessary or desirable in the non-energy context. In our view, the upfront inclusion of a broader range of activities in the PLR would provide far greater certainty and predictability to both proponents and the public alike, as opposed to leaving the activities off the list and leaving it to the Minister's discretion to make orders designating specific non-listed projects under section 14 of CEAA 2012.

4. No Deletions from the Current PLR

It is readily apparent that for the most part (and subject to certain changes), the PLR simply duplicates the various projects previously described on the *Comprehensive Study List Regulations* ("CSLR") under the former Act. This is important since the CSLR was a carefully crafted list of the types of major projects which required a higher (or more rigorous) level of environmental assessment (i.e. comprehensive study).

This is not to say that the CSLR was a complete inventory of all major projects that posed environmental risks, but CELA submits that the CSLR provides a workable starting point for the PLR under CEAA 2012. Accordingly, as the Agency receives input from proponents, industrial sectors and provinces on the PLR, the Agency (and the federal government) must strongly resist any calls to delete projects (or classes of projects) that are currently caught by the PLR. In short, there should be no further rollbacks of activities caught by the PLR; instead, the PLR should be expanded, not contracted.

[2] CEAA 2012, section 4.
[3] CEAA 2012, section 10(b).

At the same time, we hasten to add that the CSLR was exactly that – a listing of projects that warranted a comprehensive study under the old Act. In other words, the CSLR was not a listing of all projects that warranted some form of environmental assessment (i.e. screening level assessments). Now that CEAA 2012 utilizes a "designated projects" listing approach rather than the "all-in-unless-excluded" approach under the former Act, it is critically important to ensure that the revised PLR is sufficiently comprehensive to capture all environmentally significant activities, particularly those potentially affecting areas of federal jurisdiction. The listing process under the PLR will undoubtedly prove to be an ongoing challenge in implementing CEAA 2012, as it may be difficult for Cabinet to proactively anticipate and specifically list every conceivable activity that may cause adverse environmental effects (which is why, in our view, the "all-in-unless-excluded" is the preferable approach for environmental assessment purposes).

Nevertheless, there are a number of environmentally significant activities that have been proposed or undertaken in Canada which can be identified as suitable candidates for the PLR, even though they may not have triggered a comprehensive study pursuant to the CSLR. CELA's suggested candidates for listing in the PLR are set out below.

5. Recommended Candidates for Inclusion on the Revised PLR

In CELA's view, there are additional types of activities which should be caught by a revised PLR. These suggestions are based on: (i) the previous regulations under the former CEAA (i.e. CSLR, *Inclusion List Regulations*, etc.); (ii) recommendations made by other environmental organizations to date; and (iii) CELA's experiences in cases involving these activities under the former Act.

We would further recommend that to the maximum extent, these additional activities should be generically described as broadly as possible, and the usage of specific thresholds (i.e. tonnages, production capacity, etc.) should be minimized if not avoided. This approach is intended to prevent the practice of project-splitting or "piecemealing" (i.e. phasing or breaking down a larger project into smaller component parts to avoid triggering an environmental assessment) that periodically occurred under the previous Act. In addition, the size or scale of a particular facility may have little or no bearing on its environmental significance or the risks posed to nearby ecosystems or communities. For example, depending upon its location (i.e. in or near sensitive lands, riparian zones, wetlands or wildlife habitat), a relatively small project may still cause adverse effects upon natural heritage features, functions and values.

Without limiting the generality of the foregoing comments, CELA recommends that the PLR should be amended forthwith to include the following types of environmentally significant activities:

- any proposed refurbishment or life extension of an existing nuclear generating station;[4]

[4] By order, the Minister has already designated the proposed Darlington NGS refurbishment as an activity to which CEAA 2012 applies, but CELA submits that all such projects should be caught by the PLR.

- importing, exporting or transporting low-, intermediate- or high-level radioactive wastes from a Class IA or IB nuclear facility to any other public or private facility for storage, processing, recycling or disposal purposes;

- constructing, operating, modifying, or decommissioning an ethanol fuel production facility;

- constructing, operating, modifying, or decommissioning oil or gas development projects involving the following technologies:

    - hydraulic fracturing (fracking);

    - exploratory drilling or seismic surveys for off-shore oil or gas deposits; and

    - steam-assisted gravity drainage oil sands projects.

- constructing, operating, modifying or decommissioning marine or freshwater aquaculture facilities;

- constructing, operating, modifying, or decommissioning facilities for generating electricity from geothermal power or off-shore wind farms;

- all physical activities prescribed by the previous *Inclusion List Regulations* (SOR/94-637);

- constructing, operating, modifying or decommissioning buildings or infrastructure within protected federal lands[5] (i.e. National Parks, National Park Reserves, National Marine Conservation Areas, National Wildlife Areas, Marine National Wildlife Areas, Marine Protected Areas, Migratory Bird Sanctuaries, etc.), such as:

    - building new roads or rail lines, or widening/extending existing roads or rail lines; or

    - building or expanding golf courses, ski resorts, ski trails, visitor centres or ancillary facilities; and

- constructing, operating, modifying or decommissioning of a diamond mine or chromite mine.

[5] We note that the general duty imposed by section 67 of CEAA 2012 upon "authorities" to self-review environmental impacts of projects on federal lands does not constitute an environmental assessment under the Act. Accordingly, CELA submits that these physical activities, if proposed upon nationally protected lands, should be caught by the PLR and potentially trigger an environmental assessment.

6. Need for the PLR to Capture "Modifications" of Projects

Based upon our review of CEAA 2012, there currently appears to be no equivalent to section 24 of the former Act, which ensured that an environmental assessment would be triggered, *inter alia*, if there was a modification of a previously assessed project. Accordingly, CELA submits that the PLR needs to be amended to ensure that if a proponent proposes to vary, change or otherwise modify the manner in which a previously assessed project is to be carried out, then an environmental assessment shall be conducted in relation to the proposed modification. In our view, if a designated project is duly assessed and approved under CEAA 2012, then it should be mandatory for the proponent to carry out further environmental assessment work if the proponent then proposes to materially change the project prior to or during implementation.

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We trust that CELA's above-noted concerns and recommendations will be taken into account by both the Agency and the federal government as potential amendments to the PLR are being developed. Please contact the undersigned if you have any questions or comments about this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. The Hon. Peter Kent, Minister of the Environment
Helen Cutts, V-P Policy, CEA Agency