Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

May 13, 2013 **BY EMAIL**

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

Dear Mr. McCauley:

RE: PROPOSED AMENDMENTS TO THE *REGULATIONS DESIGNATING PHYSICAL ACTIVITIES* UNDER THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012*

On behalf of the Canadian Environmental Law Association ("CELA"), I am writing to provide our comments on the recently proposed amendments to the *Regulations Designating Physical Activities* under the Canadian Environmental Assessment Act, 2012 ("CEAA 2012").

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 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 ("EA") legislation. Moreover, CELA represents or advises individuals and groups who participate in the former and current federal EA processes.

CELA'S GENERAL CONCERNS ABOUT THE PROPOSED REGULATIONS

We have carefully reviewed the proposed text of the draft regulatory amendments, and we have considered the Regulatory Impact Analysis Statement ("RIAS") which accompanied the draft amendments. We have also compared the draft amendments to the list of projects that CELA

previously recommended for inclusion under CEAA 2012 when the CEA Agency first solicited *ex post facto* public input after the current listing regulation went into force last year.[1]

CELA's general comments and concerns about the current regulatory proposals may be summarized as follows:

1. The potential for adverse environmental impacts should have been the paramount consideration in determining which types of projects are – or are not – designated by the regulations under CEAA 2012. If properly and consistently applied in this case, then this criterion should have resulted in more – not fewer – projects being included on the list. The fact that the draft amendments attempt to delete (or de-list) numerous projects from the current regulations without an adequate environmental justification suggests to CELA that the proposed list was largely driven by partisan political factors, misplaced economic priorities (i.e. so-called "Responsible Resource Development"), or an unfortunate ideological distrust of EA.

2. We are aware that the RIAS claims – without further elaboration – that the proposed amendments are intended to focus on "major projects" that have the "greatest potential" to cause "significant adverse environmental effects." However, nothing in the RIAS actually explains or analyzes how a large number of projects on the current regulatory list are no longer "major" or environmentally significant enough to remain on the list. In the absence of such an explanation, CELA concludes that these sweeping regulatory changes have not been developed or justified in a rational, traceable, or accountable manner. We would further add that the RIAS's focus on "major projects" overlooks the fact that medium- and small-sized projects (or groups of smaller projects in the same geographic area) can also create direct, indirect and cumulative environmental effects which are both adverse and significant.

3. These RIAS claims also appear to implicitly suggest that while developing the draft amendments, the federal government has carefully assessed the significance of project impacts within various sectors, and has determined *a priori* which types of activities have potential to create "significant adverse environmental effects." Assuming that such an exhaustive analysis has, in fact, been undertaken by the CEA Agency, it does not appear anywhere within the RIAS, nor, to our knowledge, has it been provided to stakeholders for review and comment. Unless and until such an analysis is disclosed by the CEA Agency, there is no credibility in the Agency's implicit assertions that non-listed (or de-listed) projects have little or no potential to create significant adverse environmental effects.

4. More importantly, CELA submits that the current regulatory initiative has been fundamentally marred by fixating upon "significant environmental environment effects". As a matter of proper environmental planning, and for the purposes of identifying which projects warrant EA scrutiny, the focus should be on projects' potential to cause adverse environmental effects. If it is possible that a particular type of activity may produce such

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[1] Letter to CEA Agency from R. Lindgren (CELA) dated August 23, 2012.

effects (or where there is uncertainty about such effects), then, in accordance with the precautionary principle entrenched in CEAA 2012, that type of project should be listed in the regulations. Thereafter, if a proponent proposes to undertake that particular project at a specific location and timeframe, then the EA process will be triggered so as to identify and evaluate the nature, frequency, duration, magnitude, and mitigability of such effects (i.e. significance) on a site-specific basis. In our view, the determination of "significance" should await the completion of a project-specific EA process, and the federal government's subjective views (or wishful thinking) about "significance" should not be used as the threshold factor in deciding which projects should – or should not be – designated by regulations under CEAA 2012.

5. CELA notes that the current regulations largely adopted the projects list from the *Comprehensive Study List Regulations* under the former Act. This original list was carefully crafted after extensive stakeholder consultations, and was intended to capture large-scale industrial projects which warranted a higher level of EA scrutiny (i.e. comprehensive study) under the former Act. In other words, the Comprehensive Study List was not intended to be an exhaustive list of all projects warranting an EA under federal law; instead, it prescribed more rigorous requirements for certain types of projects, but other projects (although smaller in scale) still required an EA (i.e. screenings). Accordingly, CELA submits that it is unacceptable to further narrow the range of projects triggering EA under CEAA 2012 to a sub-set of projects that were originally set out in the Comprehensive Study List.

6. In light of the foregoing chronology, CELA submits that the new proposed list is baffling, inconsistent, and contrary to the public interest. In particular, the draft amendments propose to delete a number of environmentally significant activities (or increase the triggering thresholds) that are now prescribed on the current regulatory list (i.e. groundwater extraction facilities; pipelines and electrical transmission lines not regulated by the National Energy Board; potash mines and industrial mineral mines; heavy oil/oilsands processing facilities; and a large number of other industrial facilities such as pulp and paper mills, metal smelters, textile mills and chemical manufacturing factories). At the same time, the draft amendments fail or refuse to list a number of other environmentally significant activities that CELA and other stakeholders had identified for inclusion on the projects list (i.e. radioactive waste shipments, ethanol refineries, refurbishment or life extension of nuclear power generating stations, etc.). While the RIAS briefly refers to the various listing proposals submitted by the public at large, the RIAS does not adequately explain why such proposals are not being adopted by the federal government or reflected in the draft amendments. In CELA's view, these significant omissions are not mitigated or offset by the proposed listing of a small handful of new projects not expressly caught by the current regulations (i.e. diamond mines, apatite mines, certain bridges/tunnels, some offshore exploratory wells, etc).

7. From the public interest perspective, CELA submits that there is no downside to taking an over-inclusive and precautionary approach to listing projects within the regulations. Even if a particular type of project has been listed in the regulations (i.e. Items 1 to 30 in the regulatory Schedule), CEAA 2012 confers residual discretion in some circumstances

to not proceed with an EA for certain designated projects on a case-by-case basis. Thus, where the CEA Agency is notionally responsible for conducting an EA, the mere fact that a project appears on the regulatory list does not guarantee that an EA will actually be conducted by the Agency under CEAA 2012. If this discretion was intended to serve as a "safety valve" to relieve against federal EA obligations in certain cases, then CELA is unclear why it is necessary to further constrain or limit the types of projects designated by the regulations under CEAA 2012.

8. If a particular type of project remains un-listed in the regulations, then it is open to the federal Environment Minister, on a case-by-case basis, to order that the project shall be subject to CEAA 2012. However, given the recent rollbacks in the nature, scope and applicability of the federal EA regime (and related "reforms" in other federal environmental statutes), CELA takes no comfort in the existence of the Minister's largely unfettered authority to designate un-listed projects, and we do not anticipate that this statutory authority will be exercised frequently or at all. Thus, CELA submits that the Minister's project-by-project designation powers are not an acceptable substitute (or "back-stop") for a comprehensive listing of all project types which warrant EA scrutiny under CEAA 2012. In our view, the upfront inclusion of a broader range of activities in the projects list would provide far greater certainty and predictability to both proponents and the public alike, as opposed to wholly omitting the activities from the list and leaving it to the Minister's discretion to make orders designating specific non-listed projects under section 14 of CEAA 2012.

9. CELA further observes that it cannot be assumed that provincial EA regimes will automatically apply to projects which will no longer be prescribed by regulations under the CEAA 2012. From both a procedural and substantive perspective, provincial EA regimes vary considerably across Canada, and they may not necessarily apply to projects which formerly triggered federal EA obligations. In Ontario, for example, the provincial *Environmental Assessment Act* does not generally apply to private sector activities, and it is extremely rare for the Ontario government to designate private sector undertakings as being subject to individual EA requirements under the Act. Thus, if the federal government persists in its proposal to omit numerous projects from the regulations under CEAA 2012, then there is no guarantee that provincial EA regimes will fill this significant gap in EA coverage. In effect, this means that non-listed projects may escape any serious EA scrutiny at either level of government, even if such projects may impact areas of federal interest or jurisdiction (i.e. First Nations, fisheries, migratory birds, etc.). In our view, this scenario represents a fundamental abdication of the federal government's constitutional responsibilities, and runs contrary to the goal of ensuring sustainable development, as entrenched within CEAA 2012.

SPECIFIC RECOMMENDATIONS FOR AMENDING THE REGULATIONS

For the foregoing reasons, CELA makes the following recommendations for expanding and improving the project list regulations under CEAA 2012:

1. There should be no de-listing or elimination of projects that are currently caught by the regulations now in force. Thus, all proposed deletions from the current regulatory list should be withdrawn and abandoned by the federal government. In short, the current list should be used as the starting point, and henceforth projects should only be added to (not subtracted from) the current list.

2. The proposed list should be reviewed and revised to ensure that the following activities are fully caught by the regulations:

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

- 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:

  (i) hydraulic fracturing (fracking);

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

  (iii) 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[2] (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:

  (i) building new roads or rail lines, or widening/extending existing roads or rail lines; or

[2] 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.

(ii) building or expanding golf courses, ski resorts, ski trails, visitor centres or ancillary facilities;.

3. 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 EA would be triggered, *inter alia*, if there was a modification of a previously assessed project. Accordingly, CELA submits that the proposed regulation should clarify 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 EA shall be conducted in relation to the proposed modification. In our view, if a designated project has been duly assessed and approved under CEAA 2012, then it should be mandatory for the proponent to carry out further EA work if the proponent then proposes to materially change the project prior to or during implementation.

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We trust that the foregoing comments will be taken into account as the federal government finalizes amendments to the projects list regulations under CEAA 2012. Please feel free to contact the undersigned if you have any questions or comments about this submission.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. The Hon. Peter Kent, Minister of the Environment