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Lynn Gordon November 20, 2012
Clerk
Standing Senate Committee on Energy, the Environment and Natural Resources
1053 Édifice Chambers Building, 40 rue Elgin Street
Ottawa, Ontario K1A OA4

Dear Members of the Committee,

Re: Study of Bill C-45, Divisions 4, 18 and 21

Thank you for the opportunity to submit our comments to the Committee's study.

About West Coast

West Coast Environmental Law Association ("West Coast") is a British Columbia-based non-profit organization of environmental lawyers and analysts dedicated to safeguarding the environment through law. One of Canada's oldest environmental law organizations, West Coast has provided legal support to British Columbians to ensure their voices are heard on important environmental issues and worked to secure strong environmental laws for almost 40 years. Through our environmental legal aid services, citizens and community groups who could not otherwise afford it are able to participate meaningfully and democratically in decisions about resource development that have the potential to profoundly affect their lives.

Since its founding, West Coast has been involved with various aspects of, including the precursors to, provincial, federal and joint environmental assessment ("EA") and also has a long standing involvement in fisheries issues both federally and provincially. West Coast was involved in the development of the *Canadian Environmental Assessment Act* SC 1992, c.37 ("CEAA") and is active with the Environmental Planning and Assessment Caucus of the Canadian Environmental Network. We have a long history of serving on the federal government's Regulatory Advisory Committee ("RAC") and provide environmental legal aid to citizens and organizations involved in EA and other regulatory processes. We also made submissions to the Standing Committee on Environment and Sustainable Development's Seven Year Review of CEAA in autumn

2011[1] and to the Finance Subcommittee[2] and Senate Standing Committee on Energy, the Environment and Natural Resources[3] in Spring 2012 in relation to Part 3 of the omnibus Budget Bill C-38.

General Comments on Bill C-45 and the Legislative Process

The government's "*Responsible Resource Development Plan"* has the overall goal of "unleashing Canada's natural resource potential"[4]. The plan states that this will be accomplished by streamlining reviews of major projects by ensuring more predictable and timely reviews, reducing duplication, strengthening environmental protection, and enhancing consultations with Aboriginal peoples.

We continue to disagree that the current direction of changes to many of Canada's key federal natural resource laws is or will accomplish these stated objectives of the government.

Both omnibus Bills C-38 and C-45 have contained very significant legislative and regulatory changes under the auspices of the Responsible Resource Development Plan. West Coast is consistently on the record as not being in favour of almost all environmental law changes proposed in both Bills. However, even if we agreed with the direction of these changes, we would still not support the speed with which the changes are being made and the lack of thorough study and amendment that they have received, which we believe are contributing to poor quality policy and law making and therefore reducing predictability, efficiency and clarity and diminishing consultations with Aboriginal peoples, counter to the government's stated objectives.

For instance, Bill C-45 provides some examples where the changes from C-38 are being corrected to provide clarity and making the new regulatory processes less uncertain. This demonstrates that further careful thought could have gone into C-38's provisions before it was enacted. Bill C-45 also proposes dramatic changes to the current *Navigable Waters Protection Act* (NWPA) that have not gone through a consultation process (indeed, Transport Canada states that it did not consult on the proposed *Navigation Protection Act* or its Schedule of protected waterways but that it had "rich

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1 See West Coast's submissions to the Environment and Sustainable Development Committee on problems with its process and the insufficiency of the study conducted: http://wcel.org/resources/publication/letter-standing-committee-process-seven-year-review-canadian-environmental-ass
And our substantive submissions on CEAA: http://wcel.org/resources/publication/west-coasts-submission-seven-year-statutory-review-canadian-environmental-asse

2 West Coast Submission to House of Commons Finance Subcommittee on Part 3 of Budget Bill C-38: http://wcel.org/resources/publication/west-coast-submission-house-commons-finance-subcommittee-part-3-budget-bill-c- s

3 West Coast Submission to the Standing Senate Committee on Energy, the Environment and Natural Resources regarding Budget Bill C-38: http://wcel.org/resources/publication/west-coast-submission-standing-senate-committee-energy-environment-and-natural

4 http://actionplan.gc.ca/en/page/r2d-dr2/overview

discussions with provinces", per witness testimony at the November 1, 2012 meeting of this Committee).

This Committee has heard from some witnesses from the relevant government agencies who are bringing in the changes proposed by C-45. The agencies responsible for the *Fisheries Act* and for CEAA 2012 have openly stated that many of the changes in C-45 are intended to clarify or correct some of the changes made through C-38. We would submit that if the changes to these pieces of legislation underwent an adequate consultation process, were amended when Bill C-38 went through the legislative process, or were separated from that Bill and more thoroughly studied, then we would not need to be in the position of amending these acts only three-four months since the changes were enacted.

In Bill C-45 there are already uncertainties apparent that warrant clarification and further exploration of their implications before they are enacted. This is especially true in relation to the proposed *Navigable Waters Protection Act* changes and their implementation across the country. Although it has stated it has wanted these changes for some time, Transport Canada to our knowledge has not given reasons why these proposed changes are so urgent they must be included in an omnibus budget bill. **We recommend, therefore, that at the very least the proposed changes to the NWPA in Division 18 of Bill C-45 be separated from the omnibus bill, undergo further consultation with stakeholders and especially with Aboriginal groups, and then be studied as a stand alone piece of legislation by both the Senate and the House of Commons.**

Comments and Proposed Amendments on Divisions 4, 18 and 21

Based on our experience and analysis, as set out below, West Coast recommends that the Standing Senate Committee on Energy, the Environment and Natural Resources make the following recommendations in its report to the Senate and the Senate's National Finance Committee.

Division 4 of Bill C-45 (*Fisheries Act)*

This Division concerns amendments to the *Fisheries Act*. Some of these amendments are further amendments to sections introduced in Bill C-38 but that are not yet in force yet. As confirmed by testimony from government agencies given at this Committee on November 1, 2012, these amendments are to clarify sections that were enacted (but not necessarily brought into force) three-four months ago. We point to this as evidence that rushed major changes that are brought in through omnibus bills do not necessarily produce the most internally consistent or clear legislation. We also note that Fisheries and Oceans Canada is still undergoing consultations on the upcoming proposed amendments and regulations to the *Fisheries Act* that were originally part of Bill C-38

and that this process appears to be a difficult one where additional inconsistencies and difficulties with the proposed changes to the act are arising.

We have two substantive concerns with the amendments proposed in Bill C-45 to the *Fisheries Act*. The first is in relation to the provisions on the Environmental Damages Fund. While we support fines and penalties being directed back to environmental restoration or protection, we note that enforcement under the revised *Fisheries Act* may be more difficult due to new, more subjective terms being used in the act, and, more importantly, because there have been massive cuts to DFO staff (especially habitat and environmental assessment staff). This means that there will be a reduced ability to enforce the act and bring charges. As an example, in 2000 in the Pacific Region, there were 1,800 habitat-related investigations, leading to 49 convictions; by 2010 the number of investigations was at 300 and the convictions under the habitat provisions was at one.[5] Therefore, what looks like a positive legislative change may not in fact result in additional funds collected or improved conditions for fish or fish habitat.

The second is in relation to the transitional sections. Transitional section 177(2) of Bill C-45 allows the Minister to cancel or amend *Fisheries Act* section 32 and/or section 35(2) authorizations that were issued prior to the introduction of Bill C-38. Transitional section 177(3) makes the offence provisions of section 40(3) inapplicable for 90 days after the coming into force of subsection 142(2) of the *Jobs, Growth and Long-term Prosperity Act* regardless of whether an exemption is to be granted for the authorization.

These changes could mean that in certain situations where a section 35(2) authorization required the permittee to construct (potentially expensive) compensation works for lost or damaged habitat or monitor such works for effectiveness, those works might not ever be carried out; or, where project proponents were required to construct fishways to allow for passage of fish, those fishways may not ever be constructed. Further, a permittee would otherwise be contravening section 40(3) would receive a 90 day exemption from that offence. **We recommend removing sections 177(2) and 177(3) entirely to address these two issues.**

The proposed section 177(1)-(3) in Bill C-45 currently reads:

Transitional Provisions
Ministerial authorizations
177. (1) An authorization issued by the Minister under section 32 or subsection 35(2) of the *Fisheries Act* as it existed before June 29, 2012, or under paragraph 32(2)(*c*) or paragraph 35(2)(*b*) of the *Fisheries Act* as it existed before the coming into force of subsection 142(2) of the *Jobs, Growth and Long-term Prosperity Act*, and that is still valid on the day on which that subsection 142(2) comes into force, is deemed to be an authorization issued by the Minister under paragraph 35(2)(*b*) of the *Fisheries Act* after that coming into force.
Amendment

[5] Figures compiled by the Atlantic Salmon Foundation, November 2012

(2) On the request of the holder of an authorization referred to in subsection (1) that is made within 90 days after the day on which subsection 142(2) of the *Jobs, Growth and Long-term Prosperity Act* comes into force, the Minister must examine the authorization, and the Minister may, within 210 days after the day on which that subsection 142(2) comes into force, confirm or amend the authorization or, if the Minister is of the opinion that the holder no longer needs an authorization, cancel it.
Conditions of authorizations
(3) Paragraph 40(3)(*a*) of the *Fisheries Act* does not apply to the holder of an authorization referred to in subsection (1) until 90 days after the day on which subsection 142(2) of the *Jobs, Growth and Long-term Prosperity Act* comes into force. However, if the holder makes a request under subsection (2), then that paragraph does not apply to that holder until the day on which that holder receives notice of the Minister's decision to confirm, amend or cancel the authorization or until 210 days after the day on which that subsection 142(2) comes into force, whichever is earlier.

Division 18 of Bill C-45 (*Navigable Waters Protection Act)*

As stated above, our priority recommendation in relation to the proposed NWPA changes is that **this Division be separated from the omnibus bill, undergo further consultation with stakeholders and especially with Aboriginal groups, and then be studied as a stand alone piece of legislation by both the Senate and the House of Commons.**

We do not support the overall direction of the proposed changes to the NWPA and we feel that – much in the same way some government Ministers would like to avoid regulation for the sake of regulation – the proposed amendments are deregulation for the sake of deregulation in that they go too far, creating the very real potential for increased *in*efficiencies in regulating waterways.

We support the submissions of our colleagues Will Amos of Ecojustice Canada and Tony Maas of World Wildlife Fund on the proposed NWPA changes.

In addition, we would like to add the following comments and recommendations:

If our main recommendation to remove Division 18 from the Bill is not supported by the Committee, we propose some changes within the existing framework of Bill C-45.

- In relation to the opt in provisions in proposed section 4(3) (section 318 of Bill C-45), **we recommend that criteria be set** so that, when the Minister is deciding whether to accept an 'opt in' request of an owner. These criteria could easily mirror those set out in proposed section 5(4) that set out how to determine if the proposed work will 'substantially interfere with navigation'.
    - **We recommend that section 4 include an obligation on the Minister to provide written reasons for her/his decision.**

- Also in relation to that section, **we recommend that once an opt in authorization has been granted for a work on an unlisted waterway, that that waterway henceforth be automatically included on the schedule to the act so as to increase efficiency and reduce duplication of owners' efforts in the future**.

- In relation to decisions made under section 5, including determinations made by the Minister as to whether a work is likely to substantially interfere with navigation (5(6)) and assessment results (5(8)), and in relation to section 6 approvals and transfers of approvals, **we recommend that to increase transparency, additional terms be added to require written reasons for such decisions be made publicly available on a registry and that any approval or transfer thereof be made publicly available on a registry.**

We would also like to comment on the interaction of the proposed *Navigation Protection Act (*NPA) and the new CEAA 2012. There has been discussion related to the changes proposed to the NWPA and the previous 'triggers' for an environmental assessment (EA) under CEAA 1992. Some commentators have stated that because CEAA 2012 has removed the triggering approach to EA, that the NWPA / NPA is no longer directly related to EA and thus does not relate to environmental protection. There are many ways that the NWPA relates and should remain related to environmental protection, but we also believe that there is still a relevant linkage between NWPA / NPA and CEAA 2012. Section 5 of CEAA 2012 sets out the environmental effects that are to be taken into account in relation to a designated project or a project. These effects are quite a narrow list but are made more broad when they are in relation to Aboriginal peoples (section 5(1)(c)) *or* if they are in relation to "a federal authority's exercise of a power or performance of a duty or function conferred on it under any Act of Parliament other than [CEAA 2012]" (section 5(2)). This means that where there is an authorization, for example, under the NWPA, the scope of environmental effects that must be taken into account in an EA are much broader (IF an EA is required in those circumstances).

The greatly reduced number of 'exercises' of power, duties or functions under the proposed NPA will likely result in a reduced scope of environmental effects being considered in some EAs, if and when an EA is required in relation to that project. This necessarily impacts environmental protection.

For ease of reference, section 5 of CEAA 2012 reads as follows:

> Environmental effects
> 5. (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are
>
> > (*a*) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:

(i) fish as defined in section 2 of the *Fisheries Act* and fish habitat as defined in subsection 34(1) of that Act,
(ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,
(iii) migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and
(iv) any other component of the environment that is set out in Schedule 2;

(*b*) a change that may be caused to the environment that would occur
(i) on federal lands,
(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or
(iii) outside Canada; and

(*c*) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on
(i) health and socio-economic conditions,
(ii) physical and cultural heritage,
(iii) the current use of lands and resources for traditional purposes, or
(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Exercise of power or performance of duty or function by federal authority
(2) However, if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(*a*) a change, other than those referred to in paragraphs (1)(*a*) and (*b*), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

(*b*) an effect, other than those referred to in paragraph (1)(*c*), of any change referred to in paragraph (*a*) on
(i) health and socio-economic conditions,
(ii) physical and cultural heritage, or
(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Schedule 2
(3) The Governor in Council may, by order, amend Schedule 2 to add or remove a component of the environment.

Division 21 of Bill C-45 (*Canadian Environmental Assessment Act 2012)*

Division 21 sets out amendments to the recently enacted *Canadian Environmental Assessment Act 2012* (CEAA 2012). As demonstrated by our previous submissions on the subject, including to this Committee, we do have many ongoing and outstanding concerns in relation to CEAA 2012. However, we appreciate that the Standing Committee's work is focused on the amendments proposed in Bill C-45 and thus we will limit our comments to those clauses and to the issue of regulations to CEAA 2012, one of which is currently before the Minister to consider amendments to.

We are pleased to support some of the amendments to CEAA 2012 proposed in Bill C-45. However, as detailed in our previous submissions (to this Committee, Finance Subcommittee, Canadian Environmental Assessment Agency, and to the Standing Committee on Environment and Sustainable Development, as listed above), we do not support the approach that the new CEAA 2012 and its Regulations take in relation to environmental protection, public participation, Aboriginal consultation, and sustainable development.

We do appreciate that some of the amendments in Bill C-45 appear to address some errors in drafting that occurred in hastily enacting CEAA 2012. As such we do not have any significant objections to the amendments proposed in sections 425 through 431 of Bill C-45, although we do think that the fact these 'housekeeping' changes are already being made is evidence that rushed major changes that are brought in through omnibus bills do not necessarily produce the most internally consistent or clear legislation.

Section 432 of C-45 proposes to amend section 128 of CEAA 2012 by adding two new subsections (1.1) and (1.2). We do not object to the addition of subsection (1.1) and we believe it has a positive effect of ensuring that the legislation can adapt to and address projects that require or come to require federal approvals, or the exercise of another federal power, duty or function. We believe that this will assist in ensuring projects receive an environmental assessment and do not 'fall through the cracks'.

It is for that reason that we do not support the addition of subsection (1.2), as we do not believe that this inclusion of projects in the requirements of an environmental assessment in certain prescribed and limited circumstances should expire on what seems to be an arbitrary date of January 1, 2014.

By recommending the omission of the addition of section 128(1.2) to CEAA 2012, the Committee would ensure that the reasons listed in sections 128(1)(b), 128(1.1) and section 5(1) of the former Act to not grant an exemption from environmental assessment requirements of CEAA 2012 are maintained after January 1, 2014.

For ease of reference, section 128 with Bill C-45's proposed amendments and our proposed deletion of subsection (1.2) reads as follows:

> **Non-application of this Act**
> **128.** (1) This Act does not apply to a project, as defined in the former Act, that is a designated project as defined in this Act, if one of the following conditions applies:
>
> (*a*) the proponent of the project has, before the day on which this Act comes into force, initiated the construction of the project;
> (*b*) it was determined by the Agency or a federal authority under the former Act that an environmental assessment of the project was likely not required;
> (*c*) the responsible authority has taken a course of action under paragraph 20(1)(*a*)

or (*b*) or subsection 37(1) of the former Act in relation to the project; or
(*d*) an order issued under subsection (2) applies to the project.

(1.1) Paragraph (1)(b) does not apply if the carrying out of the project in whole or in part requires that a federal authority exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act and that power, duty or function was a power, duty or function referred to in subsection 5(1) of the former Act.

~~(1.2) Subsection (1.1) ceases to have effect on January 1, 2014.~~

Minister's powers
(2) On the day on which this Act comes into force, the Minister may, by order, exclude from the application of this Act a project, as defined in the former Act, that is a designated project under this Act, if the Minister is of the opinion that the project was not subject to the former Act and that another jurisdiction that has powers, duties or functions in relation to the assessment of the environmental effects of the project has commenced that assessment.

Posting of notice of order on Internet site
(3) The Agency must post a notice of any order made under subsection (2) on the Internet site.

CEAA 2012's *Regulations Designating Physical Activities* (RDPA)

We are including comment on the RDPA because these regulations (also known as the "Project List") are a pivotal instrument to the scope and implementation of CEAA 2012, and they are currently under review by the Agency and the Minister of Environment.

CEAA 2012 was abruptly brought into force on July 6, 2012 and the Agency was tasked with providing a regulation that would function as the Project List but was not given any time to do so in a thorough manner. Therefore, with minor amendments, the previous *Comprehensive Study List Regulation* (that was enacted under the former Act) was attached to CEAA 2012. In August the Agency carried out a circumscribed 'pre-consultation' on the already-in force RDPA with industry, provinces and territories, environmental organizations and First Nations. It was termed a pre-consultation presumably because a revised draft of the RDPA is expected this autumn/winter, and there will be further consultations on it before the RDPA are finalized.

The recommendations for amending the RDPA put forward by the 44 stakeholder groups involved in the pre-consultation were compiled by the Agency in a high level summary document ("Stakeholder Pre-Consultations Summary of Issues Raised") circulated by Ms. Helen Cutts on September 13, 2012). It is before the Minister of Environment to decide whether and how to amend the RDPA, taking into account the issues and concerns of the stakeholder groups consulted.

Our submission to the Agency setting out our recommendations for amendments to the RDPA/Project List are **attached**.

In light of the widespread concerns raised by all stakeholders and the fact that the Agency had an extremely short timeframe within which to 'draft' regulations (and hence there were none drafted, they were simply copied from previous legislation), **we encourage the Committee to include in its recommendations that, while CEAA 2012 is being 'tidied up' through amendments in Bill C-45, the Minister also carefully consider amendments to the RDPA and publish those proposed amendments in the Canada Gazette for further consultation and comment from the public.**

To achieve the stated aim certainty and predictability that the government is seeking, it behooves them to respond to outstanding concerns raised by all parties in relation to these pivotal and influential regulations and to work cooperatively toward finalizing them in the coming several months.

Yours truly,

WEST COAST ENVIRONMENTAL LAW ASSOCIATION

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August 24, 2012

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22nd Floor, Place Bell
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Dear Mr. McCauley,

Re: Recommended Amendments to the Regulations Designating Physical Activities

Please consider this letter our submission on recommended amendments to the current *Regulations Designating Physical Activities* (RDPA) under the *Canadian Environmental Assessment Act 2012* (CEAA 2012).

We look forward to continuing to participate in the amendment process for the RDPA as the Canadian Environmental Assessment Agency (Agency) and the Minister of the Environment review submissions and provide subsequent drafts of the RDPA for additional public comment.

About West Coast

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1992, c.37 (“CEAA”) and is active with the Environmental Planning and Assessment Caucus of the Canadian Environmental Network. We have a long history of serving on the federal government's Regulatory Advisory Committee (“RAC”) and provide environmental legal aid to citizens and organizations involved in EA processes. We made submissions to the Environment and Sustainable Development Committee's Seven Year Review of CEAA in autumn 2011 and to the Finance Subcommittee and Senate Standing Committee on Energy, the Environment and Natural Resources in Spring 2012 in relation to Part 3 of the omnibus Budget Bill C-38.

Lack of Consultation on the RDPA

Although we appreciate the opportunity to comment on the RDPA, our participation in this 'consultation' process is in no way an endorsement of CEAA 2012; our previously expressed concerns and objections with respect to CEAA 2012 and the process its enactment followed stand. Amending the RDPA will not remedy the retrogressive rollback of environmental protection and public participation that is embodied within CEAA 2012, and it will not make the new legislation and the process it advocates acceptable to individuals, organizations, communities, and First Nations who have repetitively expressed serious concerns about CEAA 2012 and the detrimental effects those people feel it will have across Canada.

The RDPA was ‘drafted’ (or copied from the previous *Comprehensive Study List Regulations*) and proclaimed into force without any prior public notice or any public comment opportunities. The approach of enacting a law, making and continuing to make a number of important decisions under that law, and *then* soliciting public comments on how the Minister *might* decide to amend the RDPA is an objectionable and unacceptable process. Moreover, given the Act and the Regulations are already in force and operational, one questions whether or to what degree the Minister has legitimate intentions of making any substantive amendments to the RDPA. While we do hope the Minister does and do encourage the Minister to make some significant changes to the RDPA, based on the process followed to date we do have some hesitations as to whether this consultation will produce any meaningful changes.

Failure to Meet Government’s Own Standards for Statutory Drafting

The RDPA is a critical component of the new CEAA 2012 federal environmental assessment regime but we do not believe it has been drafted with sufficient scientific or technical input to give the Act the credibility it needs to function predictably or withstand a court challenge. By importing the previous *Comprehensive Study List Regulation* as the RDPA, the CEAA 2012 scheme is now dependent upon a regulation that was meant to operate with an entirely different act (the previous CEAA) that had multiple regulations and worked on a contrary presumption (of projects being included unless they were excluded versus CEAA 2012 only including those projects specifically listed). We believe that this could be found to run contrary to the principles of drafting

statutory instruments where regulations are meant to support and work in concert with the act they inform and the stated purposes of that Act (per section 4 of CEAA 2012).

The government has a key policy regarding regulation in Canada: the Cabinet Directive on Streamlining Regulation (CDSR), which came into effect on April 1, 2007. The CDSR and the *Statutory Instruments Act* RSC 1985, c.S-22 (SIA) (together with other policies and guidance documents, as appropriate) make up the regulatory process that is mandatory for all regulations (and other instruments) that are made or approved by the Governor in Council or by a Minister.[6] The CDSR states that the government, when regulating, is committed to following a number of principles, including:[7]

- protecting and advancing the public interest in health, safety and security, the quality of the environment, and the social and economic well-being of Canadians, as expressed by Parliament in legislation;...
- making decisions based on evidence and the best available knowledge and science in Canada and worldwide, while recognizing that the application of precaution may be necessary when there is an absence of full scientific certainty and a risk of serious or irreversible harm;...
- creating accessible, understandable, and responsive regulation through inclusiveness, transparency, accountability, and public scrutiny;... and
- requiring timeliness, policy coherence, and minimal duplication throughout the regulatory process by consulting, coordinating, and cooperating across the federal government, with other governments in Canada and abroad, and with businesses and Canadians.

The SIA also has provisions to ensure regularity and fairness of practice in regulation drafting. For example:

> **3.** (1) Subject to any regulations made pursuant to paragraph 20(*a*), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.
>
> (2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that
>
> (*a*) it is authorized by the statute pursuant to which it is to be made;
>
> (*b*) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

[6] http://www.tbs-sct.gc.ca/ri-qr/processguideprocessus-eng.asp
[7] http://www.tbs-sct.gc.ca/ri-qr/directive/directive01-eng.asp

(*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards.

Ms. Cutts has recently stated, in response to a July 19, 2012 letter from the Canadian Environmental Network Environmental Planning and Assessment Caucus, that: "Amending regulations in an effective way depends on drawing on the relevant expertise of all stakeholders." We are not aware how such expertise was gathered or utilized in enacting the existing RDPA, nor are we confident that any stakeholder would be able to provide comprehensive and thoughtful expertise in the short, summertime window provided for comment on the already in force RDPA.

By simply attaching a previous regulation to the new CEAA 2012, we believe a disservice is being done that will impair the functionality of the Act and we are not aware of how the process to date has met or could meet the objectives and principles set out in the CDSR and the SIA.

Therefore, we believe it is of the utmost importance, and is necessary in order for the credibility of the regulatory process, for the Agency to recommend to the Minister that substantive amendments be made to the RDPA and for the Minister to seriously consider and propose those amendments, which would then be subject to the usual Gazette publication and comment periods.

A Project List Approach is Not Best Practice

CEAA 2012 utilizes a designated projects listing approach rather than the all-in-unless-excluded approach employed under the previous Act. We do not support a project list approach as it has been demonstrated that, as compared to the previous legal triggering approach that CEAA used to employ, it creates a number of legislative gaps and creates additional ways that proponents can structure project proposals so that an environmental assessment is not required. A project list approach is also focused on individual projects as opposed to potential environmental impacts or potential cumulative impacts of several projects. It also makes it impossible to anticipate new types of projects that, while they may be proposed and carried out, would not be identified in the project list and therefore there would be limited ways to ensure the impacts of new technologies or projects are assessed. The British Columbia environmental assessment process uses a project list approach and some of the challenges and shortcomings of that scheme are clear when compared with the previous federal CEAA.[8]

[8] See for example: Haddock, Mark, 2010. Environmental Assessment in BC. University of Victoria, Environmental Law Centre. Available at: http://www.elc.uvic.ca/publications/documents/ELC_EA-IN-BC_Nov2010.pdf and our Environmental Law Alert post on the Friends of Davie Bay case:

We support re-working the RDPA entirely so that designated physical activities are identified based on legal triggers and environmental impacts (in a similar way to the previous CEAA), not simply because that specific project at its particular threshold is listed.

We also feel that using such an approach would better achieve the government's stated aim of capturing projects of national significance, an indicator likely better measured by adverse environmental effects and relation to other significant laws rather than individually listed projects of seemingly arbitrary size.

Thresholds Should be Avoided

We recommend that to the extent possible, activities should be described as broadly as possible, and the usage of specific thresholds (tonnages, production capacity, length, etcetera) should be avoided entirely or at least minimized. This approach is intended to prevent the practice of project-splitting that has previously occurred on occasion. The size or scale of a particular facility or activity is not necessarily an indication of its environmental significance or the risks posed to nearby ecosystems or communities. For example, depending upon its location and how it interacts with the land and water, a relatively small project may still cause adverse effects upon natural heritage features, functions and values, and the cumulative impact of several smaller projects in a region may also be significant.

If and where thresholds are used, additional research is required to fine tune these numbers. As discussed above, there has not been sufficient scientific, technical or local consultation to determine appropriate thresholds that allow significant projects to be assessed, include expansion of projects, and allow for a better study and understanding of environmental, cultural, social and economic impacts of projects that should be of concern to the Canadian government.

A thoroughly researched approached to thresholds would also provide a better mechanism to establish national standards for environmental assessment of not only projects of national significance but also projects that take place in a number of areas that will necessarily have ripple effects elsewhere or the model for which will be implemented nationally, an area where the current CEAA 2012 and regulations is absent, perhaps deliberately.

Finally, additional threshold research is needed to ensure that a mechanism is established to capture cumulative impacts of multiple projects of any size taking place within one region. There is provision in CEAA 2012 for some regional studies, which could be combined with a regional environmental capacity for existing and proposed projects. In some cases, we believe it would be useful and prudent to carry out a regional

http://wcel.org/resources/environmental-law-alert/size-counts-when-it-comes-environmental-assessments

study taking into account smaller projects that would not otherwise meet a threshold but due to their location, timing or interaction do require an assessment.

Mechanism for a Citizen-Requested Environmental Assessment

The amount and breadth of ministerial and Cabinet discretion that is built into CEAA 2012 has been an area of concern for many environmental, civil society and First Nations groups. It may also be a concern to some industries, as it has the potential to lead to increased uncertainty in many cases.

If the Agency and the Minister are not willing to amend the Act to remove some of the discretionary powers, then we recommend that the RDPA be amended to include a section that allows for a citizen to request a particular project (or group of projects that pose significant cumulative impacts) be assessed. This would allow for a way to capture exceptional projects that have particular local environmental, social, cultural or economic impacts that are not or cannot be factored into the limitations of the pre-existing listed projects. A citizen, group, or business could make a submission to the Agency, following certain informational criteria, that makes a case for the need for the proposed project or physical activities to be assessed and then the Agency can request a submission from the proponent as well and evaluate the request in a similar manner to the 'screening' undertaken of a proponent's project description.

Recommended Specific Amendments

If the RDPA is to remain a project list and the opportunity for amendment is limited to adding project types or removing/changing thresholds, then West Coast recommends that the RDPA be amended to include the following types of environmentally significant activities:

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

    - 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 facilities for generating electricity from geothermal power or off-shore wind farms;

- constructing, operating, modifying or decommissioning buildings or infrastructure within protected federal lands (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;

- any material modifications of a project (proposed, under construction or in operation or decommissioning stage);

- any federal lands and to include the disposal of nuclear waste regardless of the proposed location for disposal (requires an amendment to section 33 of the Schedule to the RDPA); and

- all physical activities that would be assessed through their inclusion in the previous *Inclusion List Regulations* (SOR/94-637);

We do not support the removal of any activity or project currently listed in the RDPA.

We recommend that the limitations on and exemptions related to expansions of existing projects and projects that are proposed to take place in existing right of ways be re-examined with the aim of requiring environmental assessments for those projects that are likely to cause adverse environmental effects despite the pre-existing activity or right of way. With respect to right of ways, in particular we recommend that the requirement for an environmental assessment apply to electrical transmission lines, oil and gas pipelines, railway lines, and highways.

West Coast supports the RCEN EPA Caucus's submission that the government adopt a *broad and inclusive* approach to adding projects to the Regulations. We propose a broad and inclusive approach in order to ensure that all projects that may have significant environmental effects are at least subject to mandatory screenings, the process for which is set out in sections 8 to 10 of CEAA 2012. Screenings are subject to tight time frames (e.g., the 45-day Agency review period for the project description) and

so are minimally inconvenient to project proponents. Under s. 10(b) the Agency has broad discretion to decide that an environmental assessment is not required for a designated project. Although we do not agree with the breadth of this discretion, if that approach is continued then there is minimal risk to the proponent that a designated project with insignificant adverse environmental effects would be subjected to a federal environmental assessment.

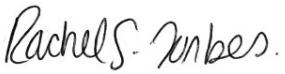
West Coast supports MiningWatch Canada's recommendation that *no thresholds* be applied with respect to mining projects for determining whether or not such projects are designated under the RDPA. All proposed mines should be considered for CEAA 2012 environmental assessment regardless of the size and production capacity of the mine. Mine size and production capacity is at best a crude indicator for predicting the significance of adverse environmental effects. Small mines can have significant environmental effects (e.g., acid mine drainage from mine workings or wastes, or a gold mine that releases arsenic). If all mines are subject to screening by virtue of their inclusion on the RDPA regardless of the quantum of expected mineral production, then the decision to conduct an environmental assessment can focus on environmentally relevant factors such as siting, environmental sensitivity, and cumulative effects. As noted above, the history under CEAA 1992 is that thresholds have provided loopholes for project splitting.

West Coast supports other environmental groups' recommendation that the RDPA include *additional projects located in federal protected areas* (e.g., National Parks) because the statutory regimes governing these protected areas (e.g., *Canada National Parks Act*) require a higher level of environmental protection, and environmental assessment has been a key tool in support of this higher level of protection. Subsection 8(2) of the *Canada National Parks Act*, for example, provides that: "Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks."

CEAA 2012 provides no legal requirement for environmental assessment of projects located on federal lands *unless* those projects are listed under the RDPA. Additional projects should be considered for inclusion on the Regulations for the following categories of protected areas: National Parks, National Park Reserves, National Marine Conservation Areas, National Wildlife Areas, Marine National Wildlife Areas, Migratory Bird Sanctuaries, and Marine Protected Areas. For example, the following categories of projects located in National Parks have been subject to legally binding CEAA assessments, but would not be subject to assessment under CEAA 2012 unless they are included on the RDPA: construction or expansion of golf courses; construction or expansion of ski resorts; construction of new roads; widening or existing roads; expansion of rail lines; construction or expansion of visitor centres and facilities; and construction or expansion of buildings outside townsites.

Yours truly,

WEST COAST ENVIRONMENTAL LAW ASSOCIATION



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