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

July 6, 2010 **BY EMAIL**

Senator Joseph A. Day, Chair
Senate Committee on National Finance
Senate of Canada
Ottawa, Ontario
K1A 0A4

Dear Senator Day:

RE: BILL C-9: PROPOSED CHANGES TO THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

On behalf of the Canadian Environmental Law Association ("CELA"), I am writing to the Senate Committee on National Finance to strongly object to Bill C-9's proposed amendments to the *Canadian Environmental Assessment Act* ("CEAA").

In our opinion, there are a number of fundamental deficiencies within the CEAA "reform" package contained in Part 20 of Bill C-9. If implemented, the Bill C-9 proposals, among other things, would:

- permanently exempt many types of undertakings from CEAA coverage;
- facilitate "project-splitting" by the Minister (or Responsible Authorities) during the project/EA scoping process so that environmentally significant components of contentious projects may escape federal EA scrutiny;
- result in overreliance on regulatory or licencing proceedings (which tend to focus on technical matters) instead of EA processes (which are aimed at ensuring sustainable development);
- diminish or undermine public participation rights under CEAA; and
- erode accountability for EA processes and outcomes under CEAA.

In our opinion, there is no public interest justification for these sweeping changes to CEAA, nor has the federal government provided any compelling reasons for such changes.

130 SPADINA AVE • SUITE 301 • TORONTO • ON. • M5V 2L4
TEL: 416/960-2284 • FAX: 416/960-9392 • WEB SITE: www.cela.ca

We are particularly perplexed by the unmeritorious and oft-repeated claim that the Bill C-9 changes are necessary to address inefficient "overlap and duplication" between federal and provincial EA processes.

In our view, such claims have long been discredited by the Standing Committee on Environment and Sustainable Development,[1] independent commentators,[2] and the Supreme Court of Canada in its 2010 decisions in *MiningWatch Canada v. Canada*[3] and *Quebec v. Moses.*[4] Accordingly, we are unclear why such arguments are still being invoked as the apparent rationale for the CEAA changes being proposed within Bill C-9.

Arguably, however, the most objectionable CEAA amendment is Bill C-9's proposal to create a new section 15.1 in CEAA.

If enacted, section 15.1 would empower the Minister to limit the scope of the project to be assessed by restricting the EA to only certain components of the overall project. More alarmingly, section 15.1 further proposes that the Minister should be able to delegate this unprecedented (and unjustified) project-scoping power to responsible authorities under CEAA.

In our view, section 15.1 immediately opens the door to the very type of project-splitting under CEAA that was recently – and correctly – rejected by the Supreme Court of Canada in the *MiningWatch* case.

For example, even if the Red Chris Mine Project initially started out on the "comprehensive study" track under CEAA, section 15.1 would permit the Minister to subsequently "scope" out the mine and mill from the CEAA process, thereby resulting in a comprehensive study of certain ancillary facilities (i.e., access road, infrastructure, etc.) instead of the core elements of the project as proposed by the proponent. In our view, this is a ludicrous and unacceptable result, yet this is exactly what would be permissible under section 15.1, if enacted.

CELA submits that if section 15.1 is being proposed to address situations where the same project may trigger both federal and provincial EA requirements, then, as discussed above, section 15.1 is clearly unnecessary since CEAA already contains provisions to facilitate coordinated (or harmonized) federal/provincial EA reviews, as was noted by the Supreme Court of Canada in the *MiningWatch* and *Moses* decisions.

In addition, CELA points out that project-splitting (or "segmentation") has long been prohibited under the U.S. *National Environmental Policy Act* (NEPA), and there is a long line of NEPA jurisprudence where American courts have rejected attempts to circumvent federal EA requirements by breaking projects down into smaller components.

Given that Canada's largest trading partner has a federal EA regime that expressly prohibits project-splitting, we are unclear on the economic (or environmental) rationale for now expressly allowing project-splitting under Canada's federal EA regime via section 15.1.

Moreover, it strikes us as highly ironic that the proposed CEAA changes are unlikely to resolve the specific EA issues that Bill C-9 purports to address (i.e., delay, inefficiency, uncertainty, cost, etc.).

To the contrary, to the extent that the proposed CEAA amendments further weaken the existing law, CELA anticipates that the amendments will likely cause or contribute to more – not less – delay, inefficiency, uncertainty and cost, particularly as proponents, stakeholders and federal officials debate the proper scope of the project, the timing and type of EA process to be undertaken, and the factors to be considered during the assessment.

In addition, CELA notes that the Bill C-9 proposals do not actually address the actual issues which need to be tackled in order to improve and strengthen CEAA. These issues include:

- creation of a rules-based regime which requires undertakings subject to CEAA to provide for sustainable societal benefits, rather than merely focusing upon impact mitigation;

- greater emphasis upon identifying and evaluating the direct, indirect, and cumulative effects of undertakings upon ecological, social, cultural, and economic environments (and their interrelationships), rather than generally limiting EAs to biophysical impacts (or related effects);

- establishment of a robust legislative framework for strategic level EA of governmental plans, policies and programs, rather than focusing EA on individual physical works or activities;

- enhancing opportunities for public participation in the planning of undertakings subject to CEAA, particularly during the upfront determination of the purpose of the undertaking and consideration of reasonable alternatives; and

- development of clear decision-making criteria under CEAA, and the creation of enforceable approval/rejection decisions under CEAA (with or without terms and conditions).

In closing, CELA submits that there are compelling procedural and substantive reasons why the Bill C-9's proposed changes to CEAA should <u>not</u> be given Royal Assent or proclaimed into force.

We further submit that it is both premature and inappropriate for these changes to be buried in a voluminous budget bill, and introduced shortly before the mandatory Parliamentary review of CEAA is scheduled to commence.

We therefore call upon the Senate Committee on National Finance to take all necessary steps to delete, defer or defeat Bill C-9's proposals to amend CEAA.

Please feel free to contact the undersigned if you or other Committee members have further questions or comments about these submissions.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

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[1] Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment* (December 1997), wherein the Committee rejected "unsubstantiated claims of overlap and duplication" within Canada's environmental management regime.

[2] Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2009), JELP 20:2, pp.1-35.

[3] 2010 SCC 2, para.24-25, 41.

[4] 2010 SCC 17, para.13, 29, 37, 46, 48.