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SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE SPECIAL COMMITTEE ON BILL C-78, THE PROPOSED CANADIAN ENVIRONMENTAL ASSESSMENT ACT

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EXECUTIVE SUMMARY

For the past two decades, the Canadian Environmental Law Association (CELA) has advocated the need for effective environmental assessment 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.

The federal government through its endorsement of the Brundtland Commission report and the report of the National Task Force on Environment and Economy has clearly indicated its support for environmental assessment as a tool for integrating environmental and economic decision-making.

Unfortunately, Bill C-78 is a step backwards from the existing regime under the EARP Guidelines Order and does not provide an adequate framework for a meaningful environmental assessment process. CELA contends that Bill C-78 is fundamentally flawed and should be withdrawn in its present form unless substantial amendments are made. Our submission has attempted to identify those major areas of concern where amendments are necessary.

CELA's major recommendations are summarized as follows:

1. Section 5 should be amended to broaden the scope of the Act to include all proposals potentially within federal jurisdiction, including those of Crown Corporations and those proposals that may have an effect on an area of federal responsibility.

2. The exemptions in the definition of federal authority in subsection 2(1) should be deleted.

3. Subsection 55(2)(d) which allows the Cabinet to pass regulations exempting a physical activity from environmental assessment requirements if it is "inappropriate" should be deleted.

4. Subsection 2(1) should be amended to replace the definition of "project" with the broader definition of "proposal" as presently set out in the Guidelines Order.

5. Section 11 should include an assessment of the "need" for a proposal, and "alternatives to" the proposal being assessed, including the alternative of "doing nothing."

6. Sections 25-30 dealing with mediation must be substantially amended to ensure that all interested persons can be involved and to ensure that the process is consensual. Any party should have the right to terminate a mediation process and have the proposal referred to a review panel.

7. The definition of "mitigation" in subsection 2(1) should be amended.

8. The trigger to mediation or a review panel presently found in sections 16, 20, 21 and 24 should be amended to "may result in significant adverse effects." The reference to effects "that cannot be mitigated" should be deleted.

9. Broad discretionary language found in a number of sections should be replaced by mandatory duties based on stated criteria.

10. Section 30 should be amended to provide for the criteria for the appointment of review panel members presently found in section 22 of the Guidelines Order.

11. Section 31 should be amended to provide that any person has standing to appear before a review panel and that the rules of procedural fairness and natural justice apply. This would include the right to conduct cross-examination and call witnesses.

12. The Agency should be given the power to award intervenor funding early on in the process. Criteria for funding and allowable expenditures should be set out in the legislation. Mediators and Review Panels should also be given the power to award both interim and final costs.

13. Section 34 should provide that the Agency or Minister be the final decision-maker in cases where proposals do not go to mediation or a review panel, and that the mediation or review panels decisions be final where they are involved. All decisions should be appealable to the Cabinet. In the alternative, the Minister should make the final decision with a right of appeal to the Cabinet.

14. The final decision regarding an environmental assessment must be enforceable. The following sections should be added:

    (a) no one should be allowed to exercise any power to do anything that would permit the proposal to be carried out in whole or in part until an environmental assessment is complete and a final decision made;

    (b) Injunctive review must be available upon application by any person to enjoin anyone who is in breach of the Act or regulations;

    (c) There must be a provision making a violation of any provision of the Act or regulations an offence punishable by a substantial fine; and

    (d) In the case of joint reviews, a mechanism is required to hold the other jurisdictions accountable to implement the decision regarding the proposal.

15. In situations involving joint review panels, substitution of federal processes and interprovincial environmental effects, the more stringent process should apply. Indicia of stringency should include whether the process examines "need", "alternatives to" and the "no go" option; the nature of the public hearings; whether intervenor funding is provided; and the enforceability of the outcome of the assessment.

SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION ON BILL C-78, THE PROPOSED CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

I. INTRODUCTION

For the past two decades, the Canadian Environmental Law Association (CELA) has advocated the need for effective environmental assessment 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. In 1987, CELA made submissions in response to the Green Paper on Reforming Federal Environmental Assessment.[1] We have most recently been involved in ensuring that applications before the National Energy Board have been thoroughly assessed under the Environmental Assessment and Review Process Guidelines Order (hereinafter Guidelines Order). Finally, CELA is a member of the Environmental Assessment Caucus, coordinated by the Canadian Environmental Network, which has been advocating reform to the federal environmental assessment process for a number of years.

During the past three years since the publication of "Our Common Future"[2] by the

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* CELA acknowledges the excellent brief prepared by Mr. Bill Andrews, Executive Director, West Coast Environmental Law Association, and the work done by the CEN Environmental Assessment Caucus.

1 Steven Shrybman, Submissions of the Canadian Environmental Law Association: Reforming Federal Environmental Assessment (Toronto: CELA, 1987).

2 World Commission on Environment and Development, Our Common Future (Oxford: WCED, 1987).

World Commission on Environment and Development (the Brundtland Commission), the Canadian Government has repeatedly stated its commitment to the principle of sustainable development as espoused by the Brundtland Commission. Environmental assessment is an important tool in implementing this principle.

One of the recurring themes of the Brundtland Report is the need to anticipate and prevent harm to the environment before it occurs. Thus, the report calls upon governments "to ensure that major new policies, projects and technologies contribute to sustainable development." While the Report notes that many countries currently require certain major investments be subject to an environmental impact assessment, the Report recommends that the scope of environmental assessment be considerably broadened to policies, programmes, especially major macroeconomic, finance, and sectoral policies that induce significant impacts on the environment.[3] At the same time, the Report correctly states that there must be greater public participation in decisions that affect the environment, particularly since there is a common public interest in ensuring the long-term sustainability of the environment.

These Brundtland recommendations have been strongly endorsed in Canada by the National Task Force on Environment and Economy. In particular, the Task Force recommended that governments must assume a leadership role in the integration of

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[3] Supra, note 2 at 222.

environment and economy and increased public participation by:

- requiring cabinet documents and major government economic development documents to demonstrate that they are both economically and environmentally sound; and
- taking steps to open environmental, resource and economic development policy-making and planning to greater public input.

The Task Force also recommended the increased use of environmental impact assessment as a tool for environment-economy integration.[4]

In summary, environmental assessment processes are recognized as fundamental in ensuring that we assess and "anticipate" the environmental implications of our policies, programs and projects before they are implemented rather than putting "remedial" measures in place after the harm is done. Therefore, one would have hoped that the Minister of the Environment would have placed a forward-looking Bill before the House of Commons. Instead, what we see is a step backwards from the existing regime established under the EARP Guidelines Order. Bill C-78 is like polishing the surface of a car, while removing the engine!

It is CELA's position that Bill C-78 should be withdrawn in its present form unless

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[4] The National Task Force on Environment and Economy, Report (CCREM, September 1987).

substantial amendments are made. We have focussed our brief and analysis on the major areas of concern where amendments are crucial.

II. DISCUSSION AND PROPOSED AMENDMENTS TO BILL C-78

A. The Scope of the Act

Section 5 of the Act is key as it sets out the situations where an environmental assessment is required. In summary, an assessment is required where:

(a) a federal authority is the proponent;

(b) federal financial assistance is provided;

(c) federal land is involved; or

(d) federal approval is required.

The scope of the Bill has been restricted from the "proposals" currently covered by the EARP Guidelines Order. Section 6 of the guidelines order covers those proposals that:

(a) are undertaken by an initiating department;

(b) that may have an environmental effect on an area of federal responsibility;

(c) involve federal financial commitment;

(d) involve federal land.

The courts have interpreted clause (b) quite broadly, and in the Oldman River dam case found that the alteration, disruption or destruction of fish habitat by the project

fell within an area of federal responsibility and was an initiative within the sense of the term "proposal" as defined in section 2 of the Guidelines Order.[5]

Bill C-78 would be a step backwards and would restrict the scope of environmental assessment. CELA submits that the CEAA should apply to all proposals potentially within federal jurisdiction, including those proposals:

- initiated or regulated by federal departments, agencies, regulatory boards, Cabinet, and Crown corporations;
- that may have an environmental effect on an area of federal responsibility;
- for which federal funds are committed including all foreign aid and private sector projects;
- for activities on lands or waters under federal jurisdiction, including those affecting native land claims;
- initiated and funded under federal-provincial development agreements;
- related to international or interprovincial trade; and
- having international or interprovincial impacts.

The definition of "federal authority" as defined by Bill C-78 is also troubling. Subsection 2(1) specifically excludes a variety of crown corporations and other bodies

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[5] Friends of the Old Man River Society v. Minister of Transport (13 March 1990), Ottawa A-395-89 (F.C.A.). Leave to Appeal to the Supreme Court of Canada granted September 13, 1990.

such as harbour commissions, and port corporations from the main environmental assessment requirements of the Bill. However, paragraph 55(1)(j) of the Bill authorizes the cabinet to make regulations requiring some of these bodies to conduct environmental assessment. Since these regulations are not before the public, it is impossible to know whether projects initiated by these bodies will be adequately assessed. We wish to comment specifically on the exemption of the Harbour Commissions from the definition of federal authority. We have had experience, on behalf of various clients, and through the Remedial Action Plan (RAP) process, with the environmentally damaging activities undertaken by the Toronto and the Hamilton Harbour Commissions. These include:

- the construction of the Leslie Street Spit by the Toronto Harbour Commission without an environmental assessment has lead to a number of adverse environmental impacts. Recent testing has shown that over 60% of that land mass is made up of soils exceeding open water disposal guidelines in heavy metals, oils and greases. There have been other impacts of these lakefilling activities on coastal processes;

- both the Hamilton and Toronto Harbour Commissions have built marinas for pleasure craft with inadequate environmental assessment;

- the Crombie Commission on the Future of Toronto's Waterfront has identified many of the adverse environmental consequences of the THC's activities and is recommending that the THC revert to a Port Authority and be stripped of all its development rights. The Hamilton Harbour Commission's development activities are also now under scrutiny due to allegations involving its former Chairman.

Clearly the environment does not distinguish between projects initiated by federal departments and the bodies exempted by the definition of "federal authority." CELA

submits that the exemptions set out in clause (d) of the definition of federal authority should be deleted.

Subsection 55(2) also provides that Cabinet, on the recommendation of the Minister, may make regulations prescribing projects that are physical activities and for which an environmental assessment is not required where cabinet is of the opinion that an environmental assessment of such projects would be "inappropriate." This language is so broad, that the Cabinet could exempt almost any project for whatever reason it wanted. Surely, the need for an environmental assessment must be linked to potential environmental impacts. CELA would recommend that subsection 55(2) be deleted.

The final issue to be addressed under the "scope" of the proposed Act is the definition of "project" set out in subsection 2(1). "Project" is limited to "physical work" or "physical activity." This definition again is a step backwards and a narrowing of the existing Guidelines Order which uses the term "proposal" as a triggering mechanism. "Proposal" is defined as including any initiative, undertaking or activity for which the Government of Canada has a decision-making responsibility. CELA submits that Bill C-78 be amended to replace the definition of "project" in subsection 2(1) with the definition of "proposal" as presently set out in the Guidelines Order.

B. Factors to be Assessed in the Environmental Assessment Process

Section 11 sets out those factors which are to be assessed in the screening, mandatory

study, mediation and assessment by a review panel stages. These include: the environmental effects, including cumulative effects; the significance or seriousness of these effects; public comments; and mitigative measures. A second tier of factors is added where a mandatory study, mediation or assessment by a review panel takes place. These additional factors include: the purpose of the project; alternative means of carrying out the project; the need for and requirements of any follow up program; capability for regeneration of renewable resources; and additional matters required by the responsible authority or the Minister.

CELA makes the following submissions in regard to this section:

1. All the factors listed above should be considered at the screening stage as well as in the mandatory study, mediation or review panel stages. To do otherwise would result in the perverse situation where a project might advance through the process because the additional factors were not assessed.

2. Section 11 is fundamentally flawed in that it does not require an assessment of the "need" for a project nor does it require an examination of "alternatives to" the project. One of the major purposes of environmental assessment is to assess whether a project is needed as early in the planning process as possible. If it is not needed, then questions about mitigation become unnecessary. As well, "alternatives to" the project are fundamental including the alternative of "doing nothing." For example, if the 3Rs are shown to adequately deal with a waste problem, or if water conservation

can deal with a water quantity problem, then perhaps a landfill, with its possible adverse environmental impacts need not be built or an expansion to a water treatment plant may not be necessary. It is shocking that in 1990 a proposed environmental assessment law does not include these requirements for proponents to assess.

CELA submits that section 11 of Bill C-78 be amended to require proponents to assess (a) the need for the proposal and (b) alternatives to the proposal being assessed, including the alternative of "doing nothing."

C. Referral to Mediation or the Review Panel

There are four avenues by which a project may end up at mediation or a review panel. The first is found in section 16 (1)(b) which provides that where, "in the opinion of the responsible authority, the project is likely to cause significant adverse environmental effects that may not be mitigable" or where "public concerns respecting the environmental effects warrant it" the responsible authority shall refer the project to the Minister who then decides whether it goes to mediation or a review panel. Where a project, in the opinion of the responsible authority is not likely to cause significant adverse environmental effects, or such effects can be mitigated the project can go ahead. Only if the responsible authority believes that the project is likely to cause significant adverse environmental effects that cannot be mitigated, does the project not proceed.

The second trigger for mediation or a review panel is found in section 20 which provides that after taking into consideration the mandatory study report the Minister of Environment shall refer the project to mediation or a review panel if the tests outlined in section 16(1) above are not met. Third, pursuant to section 21, a responsible authority may, at any time, refer a project that meets the tests set out above to the Minister for referral to mediation or a review panel. Finally, the Minister of Environment may at any time, after consultation with the responsible authority, or the appropriate federal authority, refer the project to mediation or a review panel if the above-noted tests are met.

The fundamental problem here is the linking of a trigger for mediation or review with the phrase "that may not be mitigable." "Mitigation" is defined in subsection 2(1) and means "the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means." First of all, this term has been too broadly defined. According to this wording, projects that might cause significant adverse environmental effects would not be subjected to mediation or a review panel if in the subjective opinion of the responsible authority or the Minister, those effects could be reduced or controlled or compensated.

This is again a step backwards from the existing Guidelines Order which provides in section 12 that where potentially adverse environmental effects are significant the

proposal shall be referred to the Minister for public review or where they are unknown further study or a referral for public review shall take place. Only where the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology can a proposal proceed. The tests outlined in Bill C-78 containing the use of such language as "likely to cause" and the broad definition of "mitigation" plus the fact that these are subjective tests "in the opinion" of the responsible authority or the Minister, will ensure that very few projects get to the mediation or review panel stage.

CELA submits that Bill C-78 be amended to provide:

(a) for the trigger to mediation or a review panel presently found in sections 16, 20, 21 and 24 to be changed to where a "project may result in significant adverse environmental effects" rather than the present clause "likely to cause significant adverse environmental effects that may not be mitigable.

(b) for amendment to the definition of the term "mitigation" to "the substantial elimination of the adverse environmental effects of the project and includes restitution through replacement or restoration."

In addition, it should be up to the mediation process or the review panel to determine whether the adverse environmental effects can be mitigated. In this regard, it should be noted that the Ontario Environmental Assessment Act, while requiring that

proponents describe in their environmental assessments actions which may be necessary to mitigate the effects upon the environment, the existence of mitigative measures does not preclude a hearing.

D. Excessive Discretion

Bill C-78 leaves too much discretion up to the responsible authority to determine whether a project is described in an exclusion list or mandatory list or falls somewhere in between to trigger screening; it also leaves too much discretion to the responsible authority and Minister to determine whether mediation or a review panel will be necessary. CELA submits that there is a need to remove broad discretionary language in a number of areas and to replace it with either mandatory duties or discretion based on stated criteria.

For example, sections 6, 13 and 17 provide for a subjective test: "where a responsible authority is of the opinion..." to determine whether a project is on the mandatory or exclusion list. CELA would submit that this subjective test should be changed to an objective test. Further, sections 16 and 20 that may provide for a referral to mediation or a review panel are based on "the opinion of the responsible authority or Minister." CELA would recommend that sections 16 and 20 be changed to an objective test.

E. The Review Panel

Sections 30-33 deal with the establishment and duties of a review panel. Section 30 requires that members of the panel be made up of persons,"who, in the opinion of the Minister, possess the required knowledge or experience." This is again a step backwards from the requirements presently outlined in the Guidelines Order. CELA recommends that section 30 be amended to provide that panel members:

(a) are unbiased and free of any potential conflict of interest relative to the proposal under review;

(b) are free of any political influence; and

(c) have special knowledge and experience relevant to the anticipated technical, environmental and social effects of the proposal under review.

This amendment would reflect the present criteria set out in section 22 of the Guidelines Order.

Section 31 provides that a review panel shall "hold hearings in a manner that offers the public an opportunity to participate in the assessment." CELA submits that this section is too vague and does not set out the minimum requirements of fairness that should apply to such a hearing panel. First of all, Bill-C-78 should be amended to provide clearly that any person has standing to appear before a review panel and that the rules of procedural fairness and natural justice apply.

As was stated in our 1987 brief[6], a substantial portion of CELA's work over the past 20 years has involved the representation of individuals and groups in various administrative and judicial proceedings. We are very aware of the need to facilitate public participation in a manner that will allow every interested party a meaningful opportunity to participate in the decision-making process. Unfortunately, the desire to avoid the negative effects of formalistic legal procedures has often prompted an over-reaction that can, in our view, even more substantially impede the case of public participation.

It is unacceptable, in the era of the Canadian Charter of Rights, to establish procedures that deny or inhibit participatory rights. The fundamental principles of fairness and natural justice defined by a long and respected common-law tradition include:

(a) the right to notice;

(b) the right to representation by counsel;

(c) the right to call evidence through witnesses; and

(d) the right to conduct cross-examination.

To deny these rights to participants in the environmental regulatory process under the guise of devising "informal" procedures is to fundamentally undermine the

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[6]See discussion, supra note 1, at 10-14.

participatory rights the government says it is seeking to ensure. For example, to deny a participant in a hearing the right to cross examine the proponent's evidence, will often effectively prevent an intervenor from effectively testing the merits of the proponent's case, especially where the intervenor has limited resources to retain its own expert witnesses. CELA would urge that Bill C-78 be amended to ensure that the essential elements of "due process" are incorporated.

It is also unacceptable that an environmental statute in 1990 involving public hearings does not contain provisions for the granting of intervenor funding. While the preamble to Bill C-78 states the commitment of the government to "promoting public participation in the environmental assessment of projects"; public participation becomes meaningless unless adequately funded. While the Minister of the Environment has announced that a funding program will be put in place, he intends to do so outside the ambit of legislation. CELA recommends that BIll C-78 be amended to include a section on intervenor funding. We would suggest that the Agency be given the initial power to grant funds to participants early on in the process. Criteria should be outlined in the statute as well as the allowable expenditures. The criteria could be based on the Ontario Intervenor Funding Project Act which has codified criteria used by various Commissions and ad hoc processes over the past 15 years. Allowable expenditures should cover legal expenses, consultants, transcripts and disbursements. Funding should be available for mediation as well as the review panel process. CELA would also suggest that the mediator and review panel also be given

to award both interim costs and costs at the end of their respective processes. This presently occurs in respect to environmental assessment hearings in Ontario, and allows intervenors to recover additional costs that may have been incurred during the hearing.

There should also be the power for the Minister to establish rules for regulating the proceedings of review panels including criteria to be considered by the panels in directing interim or final costs to be paid.

Finally, section 31 provides that the review panel prepare a report setting out the conclusions and recommendations of the panel relating to the environmental effects of the project and any mitigation measures or follow up program. CELA submits that section 31 should be amended to clarify that the review panel can make recommendations that a project be turned down.

F. Mediation

Pursuant to section 25, the Minister has the discretion to refer the project to mediation rather than a review panel. In order for a referral to take place, the Minister must be satisfied that:

(a) The parties who are directly affected by or have a direct interest in the project have been identified and are willing to participate in the mediation through a representative, and

unacceptable. It must be open to a participant in the process to terminate the mediation and to send the proposal to a review panel for consideration at this point. This safety valve must be present in order for the mediation process to be legitimate. This will also ensure that a decision is reached in regard to the proposal. Finally, it must be assured that the participants in a mediation process have full access to all data, and that they be adequately funded.

CELA recommends that sections 25-30 be substantially amended to reflect these principles.

G. Decision Making Authority

Subsection 34(1) sets out the criteria that a responsible authority is to take action following receipt of a mediator or review panel's report. This section is too broad and would allow the responsible authority to take whatever action it wants, and to ignore the reports of the mediator or review panel. Subsection 34(1)(a)(ii) allows the responsible authority to proceed if any significant adverse environmental effects "can be mitigated or justified in the circumstances." The reference to "mitigation" has already been identified as problematic due to the overly broad definition. The use of the term "justified in the circumstances" is even broader and would basically give the responsible authority carte blanche to proceed with a project.

It is also inappropriate for the responsible authority to be the ultimate decision-maker

(b) The mediation is likely to produce a result that is satisfactory to all of the parties.

Our first concern is the restriction of mediation to parties directly affected or who have a direct interest. This is an extremely narrow view of who should be parties in an environmental case. In many instances, it may very well be a body of water, the air, wildlife or wetlands that may be affected by a proposal. An individual or group may not have a "direct" interest in the manner but may be concerned with the impact on the environment and may represent a "public interest." Further, a person living in the neighbourhood may be willing to accept compensation even though the environment may be adversely affected. Surely, both those more directly affected as well as those who have a broader interest in the environmental impacts of a proposal should be able to participate, whether it be in mediation or before a review panel. CELA recommends that the qualification that a person have a direct interest or be directly affected by a proposal be deleted.

Our second concern is the role of the Minister in the mediation process. The Minister, in consultation only with the responsible authority, appoints the mediator, fixes the term of reference, determines the parties and terminates the mediation. This is in contrast to the generally accepted principles of mediation which include consent and equal participation of all parties in the mediation process. Third, CELA is concerned that only the Minister may decide whether to terminate the mediation. This is

decision-makers need to have the power to issue permits and licences with appropriate terms and conditions in order that their decisions can be enforced. In addition, to ensure that the process is meaningful and that the proposal is carried out in accordance with the terms of any approval, Bill C-78 should include the following sections:

(a) No one should be allowed to exercise any power or do anything that would permit the proposal to be carried out in whole or in part until an environmental assessment is complete and a final decision made;

(b) Injunctive review must be available upon application by any person to enjoin anyone who is in breach of the Act or regulations;

(c) There must be a provision making a violation of any provision of the Act or regulations an offence punishable by a substantial fine; and

(d) In the case of joint reviews, a mechanism is required to hold the other jurisdictions accountable to implement the decision regarding the proposal.

I. Joint Review Panels, Substitution of Federal Processes and Interprovincial Environmental Effects

Section 37 allows the Minister to establish review panels jointly with other jurisdictions including, the provinces and governments or agencies of foreign countries. Section 38 sets out the conditions, under which the Minister may establish a joint panel. Unfortunately, these conditions do not state that the joint panels meet any minimum requirements for environmental assessment.

It is our submission that the more stringent of the jurisdictions' requirements should apply. Indicia of "stringency" should include the scope of the assessment, i.e. are the

in this process. CELA would support the proposal that the Agency or the Minister be the final decision-maker in cases of proposals that do not go to mediation or a review panel, and that the mediation or review panel's decision be final where they are invoked. All decisions should be appealable to the Cabinet. In the alternative, the Minister should make the final decision with a right of appeal to the Cabinet.

In the event that the mediation or review panel is not the ultimate decision maker, the responsible authority and/or the Minister should be required to consider the recommendations of the mediation, review panel or mandatory study. The decision-maker should also be required to provide a written decision with reasons. The decision must also be enforceable, as discussed below.

H. Implementation of a Decision

Another fundamental flaw in Bill C-78 is the fact that there is no clear link between the environmental assessment process and any legally binding mechanism, such as a license or permit, for imposing conditions to the assessed proposal. In other words, a decision by the responsible authority to proceed with a project following a mediation or review panel report is unenforceable.

As recommended above, the Agency or the Minister should be the final decision-maker in cases of proposals that do not go to mediation or a review panel, and the mediation or review panel's decision should be final where they are invoked. These

need, alternatives to and the "no go" option assessed; the nature of the public hearings, i.e. are full participatory rights allowed; funding of intervenors; i.e. is it ad hoc or statutory; enforceability of the outcome of the assessment. Depending on the fate of Bill C-78, it may be the case that some provincial jurisdictions environmental assessment processes should apply to joint review panels rather than the federal rules. In respect to other provinces, or foreign countries, it may be the case that the Federal Act should apply. The fundamental underlying principle is that the more stringent process should apply.

Section 39 provides that a review panel established jointly with another jurisdiction shall "be deemed to satisfy any requirements of this Act and the regulations." This approach is unacceptable and will create a regime where a less thorough environmental assessment and public process may proceed in relation to projects where federal authorities are involved. CELA recommends that section 39 by amended by striking out the words, "be deemed to".

Finally section 40(1) authorizes the Minister to approve the substitution of another federal process for an environmental assessment by a review panel. At the present time we are not aware of any other federal processes for environmental assessment. However, should there be any in the future, then the principle of the more stringent process should apply. This section should not be used as a mechanism to allow second-class assessments of projects involving federal authorities.

Section 43 allows the Minister to establish a review panel to conduct an assessment of the interprovincial effects of a project where a project (for which an environmental assessment is not required under section 5) "is likely to cause serious adverse environmental effects in another province." CELA submits that the trigger is too stringent. We would recommend that the words "likely to" be replaced with "may". Further, once the criteria are met, it should be mandatory for a review panel to be established. We would recommend changing "may establish" in subsections 43(1) and 43(3) to "shall establish." Subsection 43(2) provides that the Minister shall not establish a review panel where the Minister and the provincial governments have agreed on "another manner of conducting an assessment." This alternative is extremely open-ended and would not even require a joint federal-provincial assessment as provided for under sections 37 and 38. We recommend that subsection 43(2) be deleted.

CELA would also recommend that sections 37, 38, 40, 43 and 44 be amended to allow for mediation as well as hearings before a review panel where appropriate.

III. CONCLUSIONS

The federal government through its endorsement of the Brundtland Commission report and the report of the National Task Force on Environment and Economy has clearly

indicated their support for environmental assessment as a tool for ensuring that environmental concerns are thoroughly assessed as early as possible in the planning process. Unfortunately, Bill C-78 is a step backwards from the existing regime under the EARP Guidelines Order. CELA contends that the Bill should be withdrawn in its present form unless substantial amendments are made. Our submission has attempted to identify those major areas of concern where amendments are necessary.