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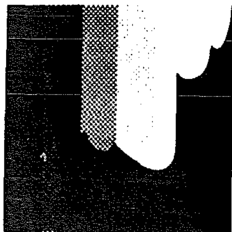

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SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION:

REFORMING FEDERAL ENVIRONMENTAL ASSESSMENT

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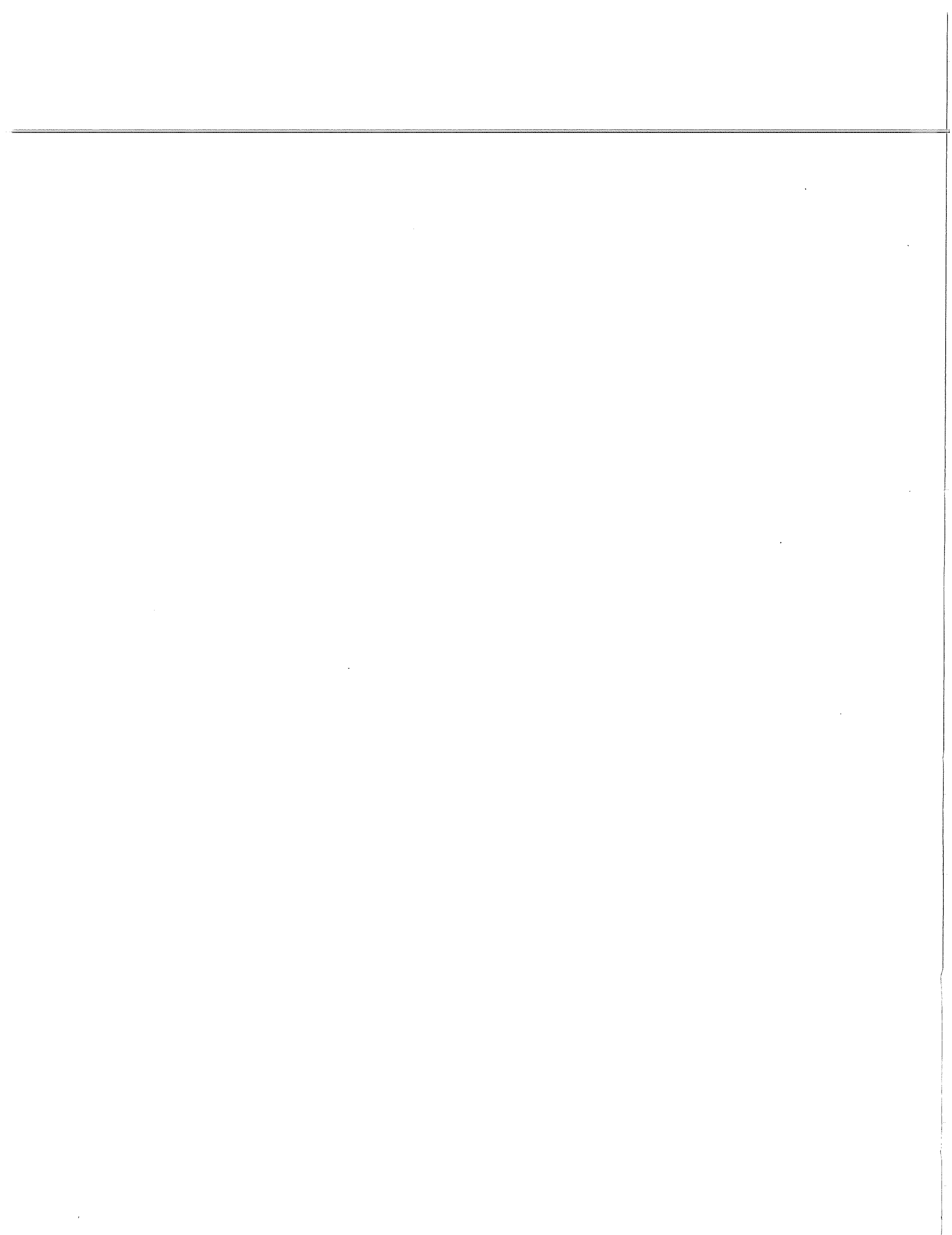

REFORMING FEDERAL ENVIRONMENTAL ASSESSMENT

The need to reform the Federal Environmental Assessment and Review Process (EARP) has been widely recognized for some time now. Indeed in a discussion paper prepared during 1983 by the Department of the Environment the EARP process was described in the following manner.

> "The deficiencies of the present system ... cover a number of fronts and collectively have brought the efficiency and credibility of EARP into question both within and outside the federal government."

Over recent years, we believe that a growing consensus has emerged as to those aspects of the EARP process in need of reform. While various notions have been advanced for affecting those reforms, there is substantial agreement among environmentalists and public interest groups that reforms must enhance the rigour of environmental impact analysis; the accountability of project proponents and regulatory officials, and; the accessibility to the decision-making process.

We welcome then, the Minister's commitment to improve the process and trust that his undertaking will be made manifest in the near future.

However it is not without some ambivalence that we respond to the Green Paper released by the federal Minister of the Environment in September of 1987. While we support some of the suggestions

for reform that are very generally described by the Green Paper, we find the range of options advanced for the purposes of discussion, disappointingly limited. It is unfortunate that the discussion paper did not engender a more candid assessment of the process's shortcomings and a more ambitious articulation of possible reforms.

Of course for those with first hand experience with EARP no such prompting is necessary. For those less familiar with the process however, a more candid appraisal of the process's shortcomings might have elicited some interesting ideas for reform.

As you may be aware, CELA has since it inception in 1971 been avowedly committed to a rational planning process that fully assessses environmental impacts and that does so in a public and accountable manner. A comprehensive assessment of environmental impacts, before commitments are made to proceed with a project, is fundamental to such a process.

While environmental assessment has its detractors, their criticisms are not at all unlike those made of most public welfare statutes, particularly in the first years following their enactment. However, none would now seriously dispute the need for a host of legislative and regulatory initiatives in the area of resource management, conservation or public health and environmental protection.

It is becoming increasingly apparent to even the most committed sceptics that in an evergrowing number of jurisdictions and to an ever increasing extent, environmental assessment is a necessary precondition for project approval. To require otherwise is to allow projects with potentially enormous and even irreversible environmental consequences to proceed without the benefit of a thoroughly rational and comprehensive planning process.

We trust however that it is not necessary here for us to restate first principles.

Rather we take this opportunity to comment upon the particular characteristics of such an Environmental assessment process which in our view should entail the following basic principles:

1. The environmental assessment process must have a statutory foundation and compliance must be required as a matter of law.

2. The rules which delineate the environmental assessment process should be precise and of general application.

3. The definition of "environment" should be expansive and engender social and economic considerations.

4. The environmental assessment process should be iterative and consider alternatives for meeting the proponent's objectives that include the "no go" option.

5. The environmental assessment process should be equitable and democratic, with public hearings being the essential element of the decision-making process.

6. Intervenor funding must be provided to facilitate the participation of those without the resources to otherwise do so.

The FEARO Process Should be Engendered in Legislation that Mandates Compliance for Projects and Undertakings Within Federal Jurisdiction

We live in a nation committed to the rule of law. Fundamental to this notion in a democratic society is the requirement that the rules by which we are to govern ourselves be generally applied and fairly enforced.

It would be preposterous to suggest that compliance with the civil or criminal laws of this land be a matter of discretion for the individual to determine. Yet with respect to a project or endeavour of potentially enormous environmental consequence we do not at present require the observance of the rules established to protect our collective and public interest. If one is to measure the desirability of compliance by the potential costs of non-observance, then compliance with the rules of environmental assessment must be given very high priority indeed.

In a society strongly committed to the respect and enforcement of private rights and no one would contemplate the abridgement of those rights the full observance of legal and due process. Unfortunately however when it comes to the protection of our public or collective interests, we have been much less vigilent to ensure that the same measure of due process or accountability.

As the scale of human enterprise has grown enormously, and as our ability to assess the environmental consequences of our activities has become refined, we have ever-increasingly recognized the limits of conceiving of our ecosystem as some agglomeration of private rights. We have accordingly replaced the common law regimes of tort law, established primarily to preserve and protect individual and proprietary interests from the risks of pollution and nuisance, with environmental laws and regulations intended to protect and preserve our collective interests in a clean environment and viable ecosystem.

It is not at all rational, in our view, to relax our expectations of compliance because the stakes are higher. Indeed as the consequence of our activities become more profound and far-reaching, the need for compliance becomes even more acute.

There is nothing that has more fundamentally undermined the credibility of the EARP process than the failure to insist, as a matter of law, that those to whom it applies comply with its

requirements. We therefore strongly urge the enactment of a Federal Environmental Assessment Act which mandates compliance and provides for enforcement as the first and most important reform of the present process.

The Requirements of the Environmental Assessment Process Must be Clearly Defined, Consistently Applied.

While procedures must be implemented that are suitable to a diverse array of undertakings, the process itself cannot be ad hoc or subject to redefinition by each proponent and with respect to each project. Often advanced under the rubric of flexibility, we believe that such an approach actually operates as an impediment to more universal application because it is inherently unpredictable.

It has often been common ground among environmentalists and industry that environmental regulation should be certain and consistently applied. Unfettered bureaucratic discretion inhibits planning and introduces into the regulatory process the expectation that regulation will be "politically" determined in response to the influence of the project proponent. There are two casualities of such an approach. The first being any prospect of industry support for a regime that may not be applied fairly to one's competitors; the second, public confidence in a system that may appear to primarily depend upon temporal political expedience.

Environmental legislation must clearly delineate the essential elements of the assessment and review process. The Ontario Environmental Assessment Act offers an excellent illustration of such an approach.

Environmental Impacts Must be Defined in Such a Manner as to Engender All of the Consequences of a Particular Project, Including its Social and Economic Impacts

It is absolutely essential, in our view, to engender in the environmental assessment process a full consideration of the social and economic context within which a particular undertaking or its alternative may proceed. There are any number of examples that we might offer to illustrate the need for such an approach.

The Mackenzie Valley Pipeline Inquiry conducted by then Mr. Justice Thomas Berger, is commonly accepted as a seminal illustration of the conduct of a public enquiry and offers an excellent illustration of the fundamental importance of joining the assessment of physical impacts, with that of potential economic and social implications. For those familiar with the impacts of energy development in the north, it would be unthinkable to consider an environmental assessment process that did not take fully into account the impacts of such development upon native people.

When attempts have been made to disassociate the physical impacts of a project from its broader implications, the first casualty is the credibility of the process itself. When EARP panels have operated with mandates that restrict the ambit of the enquiry in this manner, frustration and dissatisfaction with the process has been apparent. In such a circumstance other avenues are explored by those who feel deprived of an opportunity to participate in a meaningful examination of the project or proposal.

A Rational Planning Process Requires a Consideration of Alternatives for Meeting the Objective or Purpose of the Proposal or Endeavour

An assessment of the options available to achieve a particular objective is the fundamental characteristic of virtually all decision-making processes, from the mundane to the sophisticated and complex. A typical corporate planning process will iterate various options for meeting an objective, assess respective costs and benefits (usually restricted to economic and technical considerations) and choose accordingly. Typically such planning has not included, at the incipient stage, any consideration of the environmental costs and benefits of the options under consideration. It is the interjection of this additional planning criterion that is the essence of the environmental assessment and review process.

An EA process that mandates examination of alternatives, requires little more than a documentation of the planning process that the corporation has actually undertaken. When a project may have

significant impacts upon the environment, we are entitled to ensure that assessment of those impacts be made before commitments to proceed with the project are undertaken. Whatever the regional differences in perspective, most Canadians are no longer content to have projects, with significant environmental implications, planned without consideration of their environmental consequences.

One of the strongest features of such an environmental assessment process is that it provides a practical way to address the difficult moral and ethical issues that often arise in trying to weigh project costs and benefits. To illustrate: We know that virtually all activity engenders risk. Within the context of environmental assessment, those risks may entail damage to a unique natural habitat, threats to the stability or the social integrity of certain communities or an increase in mortality due to exposure to toxic substances. Choosing the appropriate balance of the costs and benefits often entails difficult judgments about the value of a clean environment or even human life.

One important strength then, of an approval process that requires the consideration of alternatives is that it allows one to identify the alternative that poses the least risk and yet achieves the project's ultimate objective. For example, we all recognize the need to establish facilities to dispose of toxic and hazardous waste. Given the very real risks associated with

this endeavour, including the increased incidence of cancer that results from exposure to a variety of toxic substances, what more rational way is there to address those risks than to compare the various options available for meeting the objective.

Conversely, why should a community that must bear those risks accept them unless the proponent can demonstrate that its preferred alternative represents a rational choice among the options available after a full account of the adverse impacts that the community will be asked to accept. The choices among economic, technical and environmental aspects are thus made explicit and may be justified in a public and accountable manner.

The Public Hearing Process is the Most Effective Way to Guarantee the Participatory Rights of Those Affected by or Interested in a Particular Project or Endeavour

We believe the need for a public hearing process is commonly recognized with respect to the environmental assessment review process. There is considerable debate however, about the appropriate degree of formality in such proceedings.

A very substantial proportion of our work at CELA involves the representation of individuals and groups in various administrative and judicial proceedings. We believe that we are keenly 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.

Formality, whether procedural, or in the demeanor of the decision-maker, or even in the trappings or physical setting of the court or tribunal can often inhibit full and effective public access to the process.

For this reason we strongly endorse the adoption of procedures and protocols that will invite participation in the process rather than discourage it. 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 cause of public participation.

In a society increasingly committed to the principles of due process, of which the Canadian Charter of Rights and Freedoms is an unprecedented commitment, it is absolutely unacceptable to establish procedures that deny or inhibit participatory rights, as those rights have been defined by a long and respected common-law tradition.

The essential elements of our common law approach to due process are engendered by the Rules of Natural Justice. Rules developed by our courts to ensure the fairness of a wide variety of decision-making processes. In Ontario these common law

principles are enshrined in the Statutory Powers Procedure Act, and include:

1. The right to notice
2. The right to representation by counsel
3. The right to call evidence and witnesses
4. The right to conduct cross-examination

To deny theses rights, to participants in the environmental regulatory process under the guise of devising "informal" procedures is to fundamentally undermine the very participatory rights one is seeking to ensure. While it is appropriate to encourage participation by those who may not be represented, it is prejudicial and unnecessary to deny a party the right to be represented by an agent or counsel. Further, to deny a participant in a proceeding the right to cross-examine the proponent's evidence, will often be to effectively prevent an intervenor, without resources to retain his or her own consultants, any opportunity to effectively test the merits of the proponent's case.

In our view, the fundamental rules of natural justice offer the most important protection of the rights of those with modest resources or little political influence. They represent the very tools with which intervenors may seek to balance the equation that greatly favours the party with the greatest resources.

Proponents inevitably have the benefit of legal advice when they require it even though they may not actually be represented by counsel in the hearing itself. A public or private corporation will have little difficulty in finding a project manager (who is not a lawyer) with sophisticated advocacy skills to represent its interests in an environmental assessment review process. Thus a proscription on being represented by counsel will have little if any impact upon a project proponent. For a citizen or public interest group however the result is far different. Without the right to counsel, and appropriate funding or costs provisions, intervenors will invariably have no access to legal advice whatsoever. Neither will it be possible for many intervenors to enlist the effective advocacy skills necessary to advance their case in what will often be complex and protracted proceedings.

Rather than counter the inequities then, denying all the right to counsel can actually shift the balance even further in favour of the project's proponent. Similarly, no dearth of expert resources will impede a proponent from making its case as thoroughly and completely as it chooses to do so. Neither need a proponent directly assail the evidence of its opposition, it can through the simple expedience of retaining consultants, have its experts do so.

Even where intervenor funding is available, resources often fall substantially short of the mark. This is particularly true where large projects raise a diverse array of complex and technical issues. It will often not be possible then, for intervenors to retain the expert assistance necessary to advance their own case and thoroughly review and report upon any deficiencies in the proponent's evidence. Here the opportunity to question under oath, those who have prepared the work upon which the project is justified, may present the only opportunity to identify weaknesses or shortcomings associated with the project. Again, by denying the right of cross-examination to all, intervenors are put at a particular disadvantage relative to the proponent who can simply resort to another method to challenge evidence adverse to its cause.

As we believe, the examples illustrate, when proceedings become so informal that the basic rules of procedural fairness are ignored or abandoned, those who loose are those who the "informality" is ostensibly intended to protect. We urge then that the essential elements of "due process" be recognized and incorporated in any regulatory or legislative initiative to strengthen the federal environmental assessment and review process.

Intervenor Funding

The need to establish funding or costs mechanisms to facilitate public participation in the environmental regulatory process has been extensively commented on and is ever more frequently being recognized. While reservations remain, there is now extensive imperical evidence to substantiate the claim that such funding yields returns far in excess of the amounts committed.

Experience has also demonstrated the effectiveness of the criteria for allocating funds or costs that have, in very similar forms, been adopted by several tribunals, at both the federal and provincial level. In addition, these costs criteria have the general support and confidence of both proponents and intervenors and allay any concern that such funding will open the floodgate of funding applications.

Rather than repeat the arguments that have been made so often elsewhere, we would simply refer you to the extensive bibliography of material on the issue of intervenor funding. We also attach our most recent submissions concerning the issue of cost before administrative tribunals, being our submissions to the Ontario Municipal Board which engenders a general discussion about the need for financially assisting public intervention.

Conclusion

There are many specific issues upon which we have not commented, including such matters as the timing and extent of public notice, the composition and authority of EARP panels and the ambit of EARP application. Each of these issues, and of course many others, have been the subject of critical comment elsewhere and we trust that you will consider those analyses as fully as the ones offered specifically in response to the government's green paper. One such work with which this Association was associated was a joint effort by Ms. Grace Patterson, then Director of CELA, and Dr. Bob Gibson. We attach a copy for your consideration.

We look forward with anticipation to the day when we will have a comprehensive and effective environmental assessment process in place in Canada and trust that your endeavours will hasten its arrival.