

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

PRELIMINARY RESPONSE OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE LEGISLATIVE COMMITTEE ON PROPOSED AMENDMENTS TO BILL C-13 (THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT)

Publication #199
ISBN# 978-1-77189-531-6

Prepared by:
Richard D. Lindgren
Counsel

October 23, 1991

BOOKSHELVES: ENVIRONMENTAL ASSESSMENT AND MANAGEMENT - BILL C-13. CANADIAN ENVIRONMENTAL LAW CELA BRIEF NO.199; Prel...RN8051

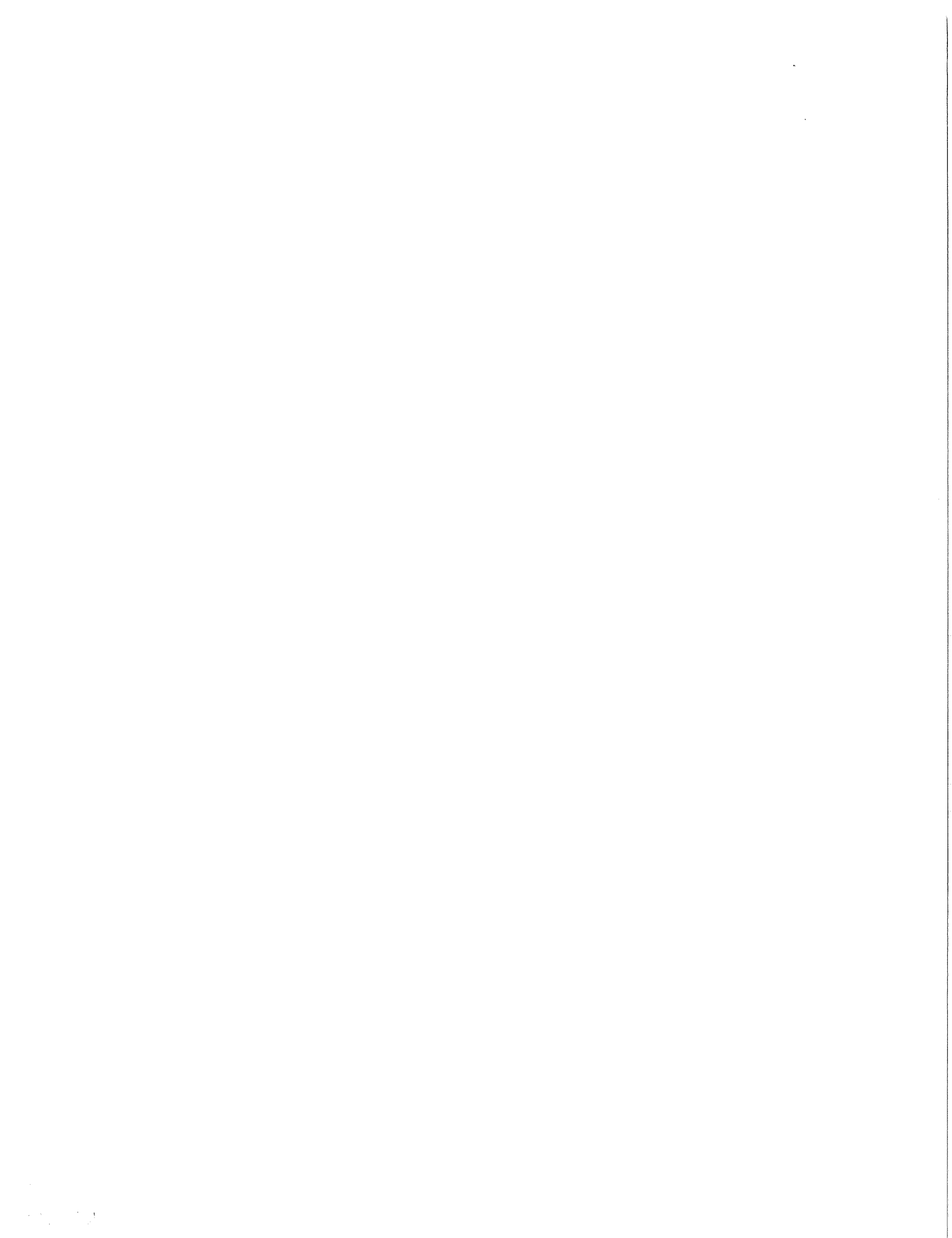
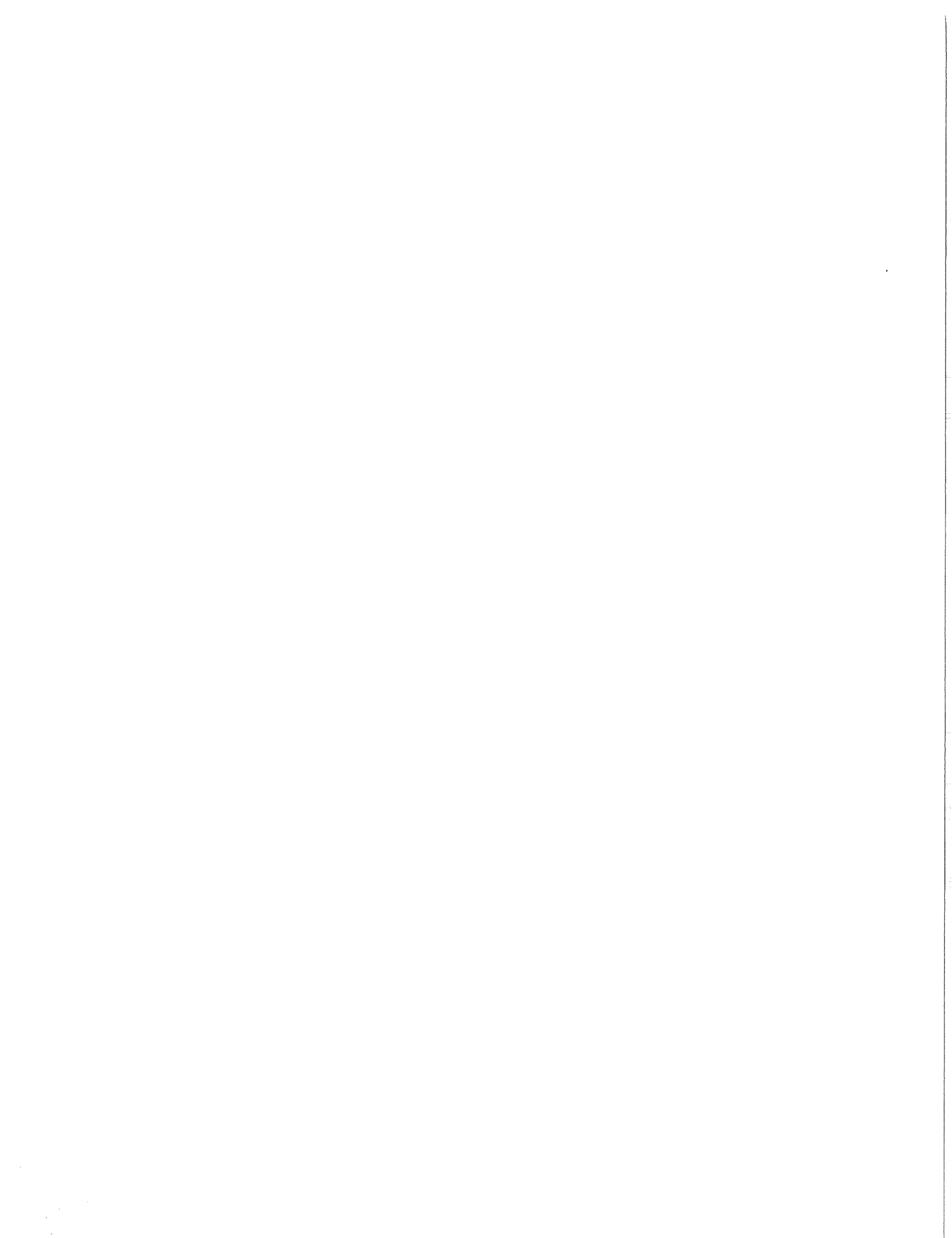


TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	i
INTRODUCTION.....	1
PART I - ESSENTIAL ELEMENTS OF ENVIRONMENTAL ASSESSMENT.	3
PART II - CRITIQUE OF THE PROPOSED AMENDMENTS.....	5
A. Preamble.....	5
B. Definition.....	8
C. Purposes of the Act.....	10
D. Projects to be Assessed - Excluded: ss.5-6.....	12
E. Participation by Federal Authorities: s.8(3)....	17
F. Factors to be Considered: s.11.....	17
G. Screening: s.13.....	19
H. Class Screening: s.14.....	20
I. Post-screening Decision-making: s.16.....	21
J. Comprehensive Study List: s.17.....	23
K. Minister's Decision: s.20.....	23
L. Referral by Minister: s.24.....	24
M. Referral to Mediation: s.25.....	24
N. The Review Panel: ss.30-33.....	25
O. Decision of the Responsible Authority: s.34.....	26
P. Joint Review Panels: ss.37-39.....	27
Q. Transboundary and International Effects: ss.43-45.....	28
R. Injunctions: s.48.....	29
S. Minister's Powers: s.54.....	30
SUMMARY AND RECOMMENDATIONS.....	31



EXECUTIVE SUMMARY

The Canadian Environmental Law Association (CELA) cannot support Bill C-13 as amended because the Act is seriously flawed and represents a significant step backwards from the current EARP Guidelines. Accordingly, CELA submits that the Bill must be withdrawn and substantially amended in accordance with the following recommendations:

RECOMMENDATION #1 - THE PREAMBLE OF BILL C-13 SHOULD BE AMENDED TO REFLECT THE CONSTITUTIONAL AUTHORITY OF THE ACT.

RECOMMENDATION #2 - THE PREAMBLE OF BILL C-13 SHOULD BE AMENDED TO ENSURE THE PROTECTION AND SUSTAINABILITY OF THE ENVIRONMENT BY PERMITTING ONLY ECOLOGICALLY SOUND AND EQUITABLE DEVELOPMENT.

RECOMMENDATION #3 - THE DEFINITION OF "ENVIRONMENT" SHOULD BE AMENDED TO INCLUDE THE HUMAN ENVIRONMENT.

RECOMMENDATION #4 - THE DEFINITION OF "ENVIRONMENTAL EFFECT" SHOULD BE AMENDED TO EXPRESSLY INCLUDE DIRECT, INDIRECT, AND CUMULATIVE ENVIRONMENTAL IMPACTS.

RECOMMENDATION #5 - THE DEFINITION OF "FEDERAL AUTHORITY" SHOULD BE AMENDED TO ENSURE THAT ALL AGENCIES AND AUTHORITIES PRESENTLY SUBJECT TO THE EARP GUIDELINES ARE NOT EXCLUDED FROM BILL C-13.

RECOMMENDATION #6 - THE PURPOSE OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT ALL FEDERAL AUTHORITIES ARE REQUIRED TO PROMOTE SUSTAINABLE DEVELOPMENT.

RECOMMENDATION #7 - THE PURPOSE OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT MEANINGFUL PUBLIC PARTICIPATION IS FACILITATED EARLY AND OFTEN THROUGHOUT THE ENVIRONMENTAL ASSESSMENT PROCESS, AND CONSIDERATION SHOULD BE GIVEN TO DEFINING "PUBLIC PARTICIPATION" WITHIN THE ACT.

RECOMMENDATION #8 - SECTION 5 OF BILL C-13 SHOULD BE SUBSTANTIALLY AMENDED TO ENSURE THAT THE ACT APPLIES TO ALL PROPOSALS, UNDERTAKINGS, OR ACTIVITIES WHICH:

- MAY HAVE AN EFFECT ON AN AREA OF FEDERAL RESPONSIBILITY;
- WOULD BE INITIATED BY A FEDERAL AUTHORITY;
- WOULD BE FUNDED BY A FEDERAL AUTHORITY; OR
- WOULD BE CARRIED OUT ON FEDERAL LANDS OR WATERS.

RECOMMENDATION #9 - SECTION 6(1)(C) OF BILL C-13 SHOULD BE DELETED, OR IN THE ALTERNATIVE, SHOULD BE AMENDED TO PERMIT THE MINISTER OF THE ENVIRONMENT TO MODIFY OR VARY THE TIMING OF THE ENVIRONMENTAL ASSESSMENT PROCESS IN EMERGENCY CASES.

RECOMMENDATION #10 - SECTION 6(2) OF BILL C-13 SHOULD BE AMENDED TO NARROW THE SCOPE OF EXCLUSIONS IN RESPECT OF FEDERAL FUNDING ARRANGEMENTS.

RECOMMENDATION #11 - SECTION 8(3) SHOULD BE AMENDED BY ADDING A NEW SUBSECTION (C) WHICH PROVIDES THAT SPECIALIST OR EXPERT INFORMATION IN THE POSSESSION OF FEDERAL AUTHORITIES SHOULD BE MADE AVAILABLE TO THE PUBLIC UPON REQUEST.

RECOMMENDATION #12 - SECTION 11(1) AND (2) MUST BE SUBSTANTIALLY AMENDED TO ENSURE THAT EVERY SCREENING, COMPREHENSIVE STUDY, MEDIATION, AND REVIEW PANEL ASSESSMENT INCLUDES CONSIDERATION OF:

- THE PURPOSE OF AND NEED FOR THE PROJECT;
- THE "ALTERNATIVES TO" THE PROJECT;
- THE ALTERNATIVE MEANS OF CARRYING OUT THE PROJECT;
- THE ENVIRONMENTAL EFFECTS OF THE PROJECT AND THE ALTERNATIVES;
- THE MITIGATION MEASURES NECESSARY TO ADDRESS ADVERSE ENVIRONMENTAL EFFECTS;
- THE MONITORING AND OTHER FOLLOW-UP PROGRAMS NECESSARY TO ADDRESS ADVERSE ENVIRONMENTAL EFFECTS;
AND
- THE PUBLIC COMMENTS CONCERNING EACH OF THE ABOVE-NOTED FACTORS.

RECOMMENDATION #13 - SECTION 11(3) OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE MINISTER DETERMINES THE SCOPE OF THE FACTORS TO BE CONSIDERED, AND THAT ADEQUATE PUBLIC NOTICE AND COMMENT PROVISIONS ARE INCLUDED IN THIS SUBSECTION.

RECOMMENDATION #14 - SECTION 13(3) OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THERE ARE ADEQUATE OPPORTUNITIES FOR PUBLIC NOTICE AND COMMENT WITHIN THE SCREENING EXERCISE.

RECOMMENDATION #15 - SECTION 14 OF BILL C-13 SHOULD BE AMENDED TO PROVIDE THE MINISTER WITH AUTHORITY WITH RESPECT TO ISSUES CONCERNING THE APPLICABILITY OR IMPLEMENTATION OF CLASS SCREENING REPORTS.

RECOMMENDATION #16 - SECTION 16 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT A PROJECT SHALL BE REFERRED TO A PUBLIC REVIEW OR MEDIATION WHERE THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS. THE SECTION SHOULD ALSO BE AMENDED TO ENSURE THAT THERE ARE OPPORTUNITIES FOR PUBLIC COMMENT REGARDING A RESPONSIBLE AUTHORITY'S DECISION TO PROCEED WITHOUT A PUBLIC REVIEW OR MEDIATION, AND THAT THE DECISION BE MADE IN WRITING WITH REASONS, AND BE APPEALABLE TO THE MINISTER.

RECOMMENDATION #17 - SECTION 20 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT A PROJECT ASSESSED IN A COMPREHENSIVE STUDY SHALL BE REFERRED TO A PUBLIC REVIEW OR MEDIATION IF THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS.

RECOMMENDATION #18 - SECTION 24(A) OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE MINISTER SHALL REFER A PROJECT TO PUBLIC REVIEW

OR MEDIATION IF THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS.

RECOMMENDATION #19 - SECTION 25 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT ALL PARTIES INTERESTED IN OR AFFECTED BY A PROJECT ARE PERMITTED TO PARTICIPATE IN MEDIATION, AND THAT ALL PARTIES HAVE ACCESS TO INFORMATION AND PARTICIPANT FUNDING TO ENSURE FAIR AND EFFECTIVE MEDIATION.

RECOMMENDATION #20 - SECTION 30 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT PANEL MEMBERS "ARE FREE OF POLITICAL INFLUENCE".

RECOMMENDATION #21 - SECTION 31 OF BILL C-13 SHOULD BE AMENDED TO REFLECT THE PRINCIPLES OF NATURAL JUSTICE AND RULES OF FAIRNESS.

RECOMMENDATION #22 - SECTION 37 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE MORE STRINGENT ENVIRONMENTAL ASSESSMENT PROCESS SHALL APPLY WHERE THE MINISTER INTENDS TO ESTABLISH A JOINT REVIEW PANEL WITH ANOTHER JURISDICTION.

RECOMMENDATION #23 - SECTION 34 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE FINAL DECISION TO PROCEED OR NOT PROCEED WITH A PROJECT SHALL BE MADE BY A REVIEW PANEL OR MEDIATOR, WITH OR WITHOUT TERMS AND CONDITIONS, SUBJECT TO AN APPEAL TO CABINET. FOR MATTERS NOT INVOLVING A PUBLIC REVIEW OR MEDIATION, THE FINAL

DECISION SHALL BE MADE BY THE MINISTER OR AGENCY, SUBJECT TO AN APPEAL TO CABINET.

RECOMMENDATION #24 - SECTIONS 43-45 OF BILL C-13 SHOULD BE AMENDED TO REQUIRE REFERRAL OF A PROJECT TO A REVIEW PANEL OR MEDIATOR WHERE THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS. SECTION 43(2) SHOULD BE DELETED.

RECOMMENDATION #25 - SECTIONS 43-45 SHOULD BE AMENDED TO PERMIT ANY INTERESTED OR AFFECTED PARTY TO PETITION THE MINISTER WITH RESPECT TO TRANSBOUNDARY OR INTERNATIONAL ENVIRONMENTAL EFFECTS, OR WITH RESPECT TO EFFECTS ON FEDERAL LANDS.

RECOMMENDATION #26 - SECTION 48 OF BILL C-13 SHOULD BE AMENDED TO PERMIT THE ATTORNEY GENERAL OR ANY PERSON TO APPLY FOR AN INJUNCTION RESPECTING BREACHES OF THE ACT OR REGULATIONS. AN OFFENCE SECTION MUST BE INCORPORATED WITHIN THE ACT. THE ACT MUST PROVIDE THAT NO PROJECT SHALL BE COMMENCED OR UNDERTAKEN UNTIL AN ENVIRONMENTAL ASSESSMENT HAS BEEN COMPLETED AND A FINAL DECISION HAS BEEN MADE RESPECTING THE PROJECT.

RECOMMENDATION #27 - SECTION 54 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT PARTICIPANT FUNDING IS MANDATORY IN PANEL REVIEWS AND MEDIATIONS.

PRELIMINARY RESPONSE OF THE CANADIAN ENVIRONMENTAL LAW
ASSOCIATION TO THE LEGISLATIVE COMMITTEE ON PROPOSED
AMENDMENTS TO BILL C-13 (THE CANADIAN ENVIRONMENTAL
ASSESSMENT ACT)

INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest law group dedicated to the enforcement and improvement of environmental law. Funded as a legal aid clinic, CELA also provides a free legal advisory service to the public on matters of environmental law. In addition, CELA lawyers represent citizens and citizens groups in the courts and before statutory tribunals on a wide variety of environmental matters, including environmental assessment.

Since its inception, CELA has strongly advocated the need for effective environmental assessment legislation in all jurisdictions to ensure that undertakings which might have adverse environmental impacts are thoroughly assessed as early as possible in the planning process. At the federal level, for example, CELA made submissions in response to the "Green Paper on Reforming Federal Environmental Assessment". CELA has also commented on matters involving the Environmental Assessment and Review Process Guidelines Order (hereinafter "the EARP Guidelines"), and CELA intervened in the recent appeal to the Supreme Court of Canada respecting the Oldman Dam. CELA is also a member of the Environmental Assessment Caucus coordinated by the Canadian Environmental Network, which has frequently advocated reform to the federal environmental assessment process.

After Bill C-78 (the Canadian Environmental Assessment Act) was introduced in June, 1990, CELA made a submission to the Legislative Committee that, inter alia, concluded that the Bill was fundamentally flawed and recommended that the Bill be withdrawn unless substantial amendments were enacted. This view was shared by a number of other public interest groups that made submissions on Bill C-78. In May, 1991, Bill C-78 was reintroduced as Bill C-13 by the Minister of the Environment, who outlined some of the possible amendments under consideration by the federal government. On October 10, 1991, the Minister released the government's proposed Bill C-13 amendments which, according to the Minister, "have all been put forth in the spirit of strengthening the legislation".

CELA has had a brief opportunity to review these proposed amendments, and our preliminary response is that the amendments fall far short of "strengthening" the legislation. While we welcome certain amendments, CELA submits that the overall amendment package does not transform Bill C-13 into effective and enforceable environmental assessment legislation. Accordingly, it remains our position that Bill C-13 represents a significant step backward from the EARP Guidelines, and that Bill C-13 must be withdrawn until such time as it is substantially overhauled to address the serious deficiencies outlined in this brief.

This submission is divided into two main parts: firstly, the brief will identify the essential elements of sound environmental assessment; and secondly, the brief will provide a critique of the government's proposed amendments.

PART I - ESSENTIAL ELEMENTS OF ENVIRONMENTAL ASSESSMENT

In its submission on Bill C-78, the Environmental Assessment Caucus of the Canadian Environmental Network identified eight essential elements of a strong environmental assessment process. Briefly stated, these principles are as follows:

1. Legislation must be utilized to establish a mandatory environmental assessment process which is reviewed by an independent agency, and which results in a final and binding decision.
2. The legislation must contain a broad definition of "environment", and the environmental assessment process must apply universally to a variety of initiatives, including governmental policy-making.
3. The legislation must minimize the amount of discretionary decision-making within the environmental assessment process, and must establish clear criteria to guide the planning and review of proposals in order to ensure accountability of decision-makers.

4. The legislation must ensure that proponents justify proposed undertakings by demonstrating:

- that the purpose of the undertaking is legitimate;
- that there is an environmentally acceptable need for the undertaking; and
- that the preferred undertaking is the best of the "alternatives to" and "alternative means" considered by the proponent.

5. The legislation must provide for a significant public role early and often in the planning process, and thus must contain provisions relating to public notice and comment, access to information, participant funding, and related procedural matters.

6. The legislation must establish an environmental assessment process which results in a decision that is implementable, enforceable, and subject to terms and conditions where necessary.

7. The legislation must specifically address monitoring and other post-approval activities, and must ensure that the environmental impacts of abandoning or discontinuing the undertaking in the future are considered as part of the environmental assessment process.

8. The legislation must establish an efficient environmental assessment process, and must provide for joint federal-provincial reviews where necessary.

CELA endorses the above-noted principles and submits that they should be used as criteria to evaluate the adequacy of the proposed amendments to Bill C-13. In our view, such an evaluation clearly indicates that the amendment package does not result in a fair, efficient and effective environmental assessment process.

PART II - CRITIQUE OF THE PROPOSED AMENDMENTS

The government's proposed amendments to Bill C-13 include substantive changes as well as minor alterations that are essentially semantic or grammatical in nature. It is beyond the scope of this preliminary response to comment upon each and every amendment proposed by the government. Accordingly, this brief will identify and analyze the more problematic amendments submitted by the government.

A. Preamble

Several public interest groups have argued that the Preamble to Bill C-78 should be amended to set out the federal government's constitutional authority for the Act, notably the "peace, order, and good government" (POGG) power. Accordingly, it has been submitted that the Preamble could be modelled on the Preamble to the Canadian Environmental Protection Act, and that it should recognize that environmental degradation is a matter of national concern; that there are transboundary aspects to environmental

degradation; and that Canada must fulfil its international obligations with respect to the environment.

However, the proposed amendments to the Bill C-13 Preamble still do not reflect the constitutional authority for a federal environmental assessment process. In CELA's view, this omission is unfortunate and will invite continuing provincial challenges to the constitutionality of the federal environmental assessment process, at least insofar as the process may affect matters of concurrent provincial jurisdiction. It is recognized that far-ranging constitutional reforms have been recently proposed by the federal government, and it is acknowledged that the outcome of these constitutional discussions is uncertain at this time. Nevertheless, CELA submits that there must be a strong federal role in environmental protection and environmental assessment, and the Preamble's deliberate failure to recite the constitutionality of Bill C-13 causes us to question the government's professed commitment to "achieving a new and meaningful environmental assessment program for Canada".

RECOMMENDATION #1 - THE PREAMBLE OF BILL C-13 SHOULD BE AMENDED TO REFLECT THE CONSTITUTIONAL AUTHORITY OF THE ACT.

The amendment package submitted by the government contains two main changes to the Bill C-13 Preamble. The first amendment relates to the Canadian Government's desire to "further the concept of

sustainable development" by preserving and enhancing environmental quality and, and the same time, encouraging and promoting economic development. To the extent that the s.2 definition of "sustainable development" is derived from the Brundtland Report, we are generally supportive of the definition. However, while the amended Preamble provides a better statement of the need to integrate environmental and economic decision-making, we are concerned about the Preamble's lack of precision about the kind of "economic development" that the Government of Canada seeks to encourage and support. In particular, the Preamble must clearly state that only ecologically sound and equitable development will be permitted in order to ensure the long-term protection and sustainability of the environment.

RECOMMENDATION #2 - THE PREAMBLE OF BILL C-13 SHOULD BE AMENDED TO ENSURE THE PROTECTION AND SUSTAINABILITY OF THE ENVIRONMENT BY PERMITTING ONLY ECOLOGICALLY SOUND AND EQUITABLE DEVELOPMENT.

The second amendment proposed by the government in relation to the Preamble states that the Canadian Government is committed to "facilitating" public participation in the environmental assessment process. While this represents an improvement over the wording of the original Preamble, it is our submission that the public participation regime within Bill C-13 must be strengthened if the government is truly committed to this statement of principle.

B. Definitions

During the public comment on Bill C-78, it was submitted that the definition of "environment" failed to include the "human" or "built" environment. As the government's proposed amendments do not change the definition of "environment", CELA submits that the definition should be amended to include the human environment.

RECOMMENDATION #3 - THE DEFINITION OF "ENVIRONMENT" SHOULD BE AMENDED TO INCLUDE THE HUMAN ENVIRONMENT.

The government has proposed to broaden the definition of "environmental effect", and CELA is generally supportive of the proposed definition. However, it is not clear from the wording of the definition that cumulative or synergistic environmental effects are caught by the proposed definition. Accordingly, CELA submits that the definition should be amended to expressly include "any direct, indirect, or cumulative change that the project may cause in the environment."

RECOMMENDATION #4 - THE DEFINITION OF "ENVIRONMENTAL EFFECT" SHOULD BE AMENDED TO EXPRESSLY INCLUDE DIRECT, INDIRECT, AND CUMULATIVE ENVIRONMENTAL IMPACTS.

The government has proposed a reworded definition of "federal authority" in Bill C-13. However, the new definition still

purports to exclude a number of federal agencies and authorities presently subject to the EARP Guidelines. In our view, this represents a transparent attempt to significantly restrict the ambit of Bill C-13, and it is inconsistent with the principle that environmental assessment should be mandatory and universal in application. Moreover, it is clear that the environment makes no distinction between projects initiated by federal departments and those bodies purportedly exempted by the definition of "federal authority". Accordingly, there are no compelling environmental reasons for the exemption of bodies such as harbour commissions from the scope of Bill C-13.

In fact, as described in CELA's previous submission on Bill C-78, there has been widespread public concern over the environmentally damaging activities undertaken by bodies such as harbour commissions. Frequently, these activities have been undertaken without environmental assessments and have resulted in significant adverse environmental impacts. Thus, it remains CELA's position that these bodies must be universally subject to environmental assessment.

CELA recognizes that s.55(j) to (j.2) of Bill C-13 permits the passage of regulations "respecting the manner of conducting assessments of the environmental effects of projects" by bodies excluded by the definition of "federal authority". In our view, this provides no assurance for two main reasons: firstly, the

passage of such a regulation is by no means mandatory under this section; and secondly, even assuming such a regulation is passed, there is no guarantee that the resulting process will incorporate the essential elements of sound environmental assessment as described in Part I, supra. Our concern about this section is heightened by the fact that no such draft regulations have been circulated for public review and comment.

For the foregoing reasons, CELA therefore recommends that the definition of "federal authority" be significantly amended to ensure that all agencies and authorities currently caught by the EARP Guidelines are not excluded from the application of Bill C-13.

RECOMMENDATION #5 - THE DEFINITION OF "FEDERAL AUTHORITY" SHOULD BE AMENDED TO ENSURE THAT ALL AGENCIES AND AUTHORITIES PRESENTLY SUBJECT TO THE EARP GUIDELINES ARE NOT EXCLUDED FROM BILL C-13.

C. Purposes of the Act

The government's proposed amendment to s.4(b) introduces the concept of "sustainable development", as defined by the Act, to clarify the relationship between environmental and economic decision-making. In CELA's view, this subsection should be reworded to ensure that federal authorities are required to act in accordance with the principles of sustainability. The government's proposed amendment would "encourage" only "responsible authorities"

(i.e. those required to conduct environmental assessments pursuant to s.7) to promote sustainable development. In our submission, the Act should impose a positive duty on all federal authorities to promote sustainable development, regardless of whether they are initiating or reviewing proposed initiatives.

RECOMMENDATION #6 - THE PURPOSE OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT ALL FEDERAL AUTHORITIES ARE REQUIRED TO PROMOTE SUSTAINABLE DEVELOPMENT.

The proposed amendment package adds a new s.4(d) to recognize that the Act is also intended to "facilitate public participation in the environmental assessment process". CELA supports this amendment, but submits that the wording can be improved in two ways. Firstly, this subsection should be amended to read that the purpose of the Act is to "facilitate meaningful public participation early and often throughout the environmental assessment process." In our view, such an amendment will help ensure that public participation programs will be fair, effective, and efficient, and that unsatisfactory or "token" public participation programs will not be countenanced. Secondly, we note that there is no definition of "public participation" in the Act, which may result in uncertainty as to what constitutes adequate "public participation". Accordingly, CELA submits that the following definition should be considered for possible inclusion within the Act:

"public participation" means a systematic, interactive process in which the responsible authority and affected or interested parties exchange information, discuss issues of concern, identify alternative solutions, and attempt to resolve any areas of disagreement.

RECOMMENDATION #7 - THE PURPOSE OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT MEANINGFUL PUBLIC PARTICIPATION IS FACILITATED EARLY AND OFTEN THROUGHOUT THE ENVIRONMENTAL ASSESSMENT PROCESS, AND CONSIDERATION SHOULD BE GIVEN TO DEFINING "PUBLIC PARTICIPATION" WITHIN THE ACT.

D. Projects to be Assessed - Excluded: ss.5-6

Section 5 is perhaps the most significant provision of Bill C-13 since it identifies the circumstances where an environmental assessment is required under the Act. In short, an environmental 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 under certain statutes or regulations.

In our view, s.5(1)(d) represents a significant step backward from the EARP Guidelines, which provide, inter alia, that an environmental assessment is required in respect of "proposals" that "may have an environmental effect on an area of federal jurisdiction". In recent EARP litigation, the courts have confirmed that this provision is to be interpreted broadly, and that it includes projects by non-federal proponents that may alter fish habitat or affect other areas of federal jurisdiction. In the result, s.5 of Bill C-13 would restrict the scope of environmental assessment now available in law, and would not establish an environmental assessment process that is universal in application.

It is beyond the scope of this brief to comment in detail upon the government's draft list of federal statutes and regulations that may be designated under s.55(g) for the purposes of s.5(1)(d). It is also CELA's understanding that the draft list will be subject to a separate round of public consultation. However, it is CELA's view that the list represents a rather byzantine attempt to evade the universality of the EARP Guidelines and the recent court decisions thereunder. Moreover, we are unclear why certain statutory provisions are on the list and why others have been omitted. In our view, Bill C-13 should apply to all proposals within federal jurisdiction, including those proposals:

- that are 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;
- that involve federal funds, including all foreign aid and private sector projects;
- that involve activities on lands or waters under federal jurisdiction, including those affecting native land claims;
- that are initiated and/or funded under federal-provincial development agreements;
- that are related to interprovincial or international trade;
or
- that have interprovincial or international environmental effects.

RECOMMENDATION #8 - SECTION 5 OF BILL C-13 SHOULD BE SUBSTANTIALLY AMENDED TO ENSURE THAT THE ACT APPLIES TO ALL PROPOSALS, UNDERTAKINGS, OR ACTIVITIES WHICH:

- MAY HAVE AN EFFECT ON AN AREA OF FEDERAL RESPONSIBILITY;
- WOULD BE INITIATED BY A FEDERAL AUTHORITY;
- WOULD BE FUNDED BY A FEDERAL AUTHORITY; OR
- WOULD BE CARRIED OUT ON FEDERAL LANDS OR WATERS.

CELA notes that proposed s.5(2) would require an environmental assessment of certain matters requiring the approval of the Governor-in-Council. While this represents an improvement over Bill C-78, it must be pointed out that this section, like s.5(1)(d), is only applicable to those matters listed by regulation pursuant to s.55(g.1). Accordingly, our concerns described above are applicable, and it is doubtful whether s.5(2) will catch all environmentally significant policy-making carried out by Cabinet.

The government's proposed amendments do not significantly change s.6 respecting projects to be excluded from the requirements of environmental assessment. However, CELA is concerned about the rewording of s.6(1)(c), which no longer links the exclusion to an emergency. In particular, the proposed wording of s.6(1)(c) is extremely broad and, notwithstanding the deletion of the phrase "in the opinion of", the subsection still confers considerable discretion to the responsible authority. In effect, a proponent that is a "responsible authority" can elect to exclude its project on these very broad and highly subjective grounds. In our view,

s.6(1)(c) is unnecessary and should be deleted, or alternatively, should be amended to permit the Minister of the Environment to streamline the timing of the environmental assessment process in emergency cases, rather than permit the wholesale exclusion of environmental assessment.

RECOMMENDATION #9 - SECTION 6(1)(C) OF BILL C-13 SHOULD BE DELETED, OR IN THE ALTERNATIVE, SHOULD BE AMENDED TO PERMIT THE MINISTER OF THE ENVIRONMENT TO MODIFY OR VARY THE TIMING OF THE ENVIRONMENTAL ASSESSMENT PROCESS IN EMERGENCY CASES.

Similarly, CELA is concerned about the proposed rewording of s.6(2), which would permit federal authorities to avoid environmental assessments for funding arrangements where "the essential details of the project are not specified before or at the time the power is exercised." CELA submits that this subsection provides a large loophole through which federal funding activities could evade environmental assessment requirements. In addition, it is unclear who makes the determination respecting the lack of "essential details", or what criteria might apply to such a determination. It is also unclear how this subsection relates to s.50, which generally requires an environmental assessment of federal funding agreements.

RECOMMENDATION #10 - SECTION 6(2) OF BILL C-13 SHOULD BE AMENDED TO NARROW THE SCOPE OF EXCLUSIONS IN RESPECT OF FEDERAL FUNDING ARRANGEMENTS.

E. Participation by Federal Authorities: s.8(3)

Proposed s.8(3) provides that federal authorities possessing specialist or expert information respecting a project should make such information available to the responsible authority or the Minister. CELA submits that in order to facilitate informed public participation in the environmental assessment process, such information should also be made available to the public upon request.

RECOMMENDATION #11 - SECTION 8(3) SHOULD BE AMENDED BY ADDING A NEW SUBSECTION (C) WHICH PROVIDES THAT SPECIALIST OR EXPERT INFORMATION IN THE POSSESSION OF FEDERAL AUTHORITIES SHOULD BE MADE AVAILABLE TO THE PUBLIC UPON REQUEST.

F. Factors to be Considered: s.11

Proposed s.11(1) sets out a list of factors to be included within every screening, comprehensive study, mediation, and review panel assessment. Incredibly, this list does not require a description of the "purpose" of the project, nor does it require an assessment of the "need" for the project or the "alternatives to" the project.

In CELA's view, these matters represent critically important components of environmental assessment, and without these requirements, s.11(1) is seriously flawed and must be amended accordingly.

CELA recognizes that s.11(2) contains requirements relating to the consideration of "purpose" and "alternative means", and that the consideration of "need" or "alternatives to" may be required under s.11(2)(d). However, it must be noted that none of these requirements apply to the screening stage, and that the consideration of "need" or "alternatives to" is not mandatory under subsection (d). In our submission, the consideration of "need" and "alternatives to" (including the "null alternative") should never optional, and must be required at the earliest stage of the environmental assessment process.

RECOMMENDATION #12 - SECTION 11(1) AND (2) MUST BE SUBSTANTIALLY AMENDED TO ENSURE THAT EVERY SCREENING, COMPREHENSIVE STUDY, MEDIATION, AND REVIEW PANEL ASSESSMENT INCLUDES CONSIDERATION OF:

- THE PURPOSE OF AND NEED FOR THE PROJECT;
- THE "ALTERNATIVES TO" THE PROJECT;
- THE ALTERNATIVE MEANS OF CARRYING OUT THE PROJECT;
- THE ENVIRONMENTAL EFFECTS OF THE PROJECT AND THE ALTERNATIVES;
- THE MITIGATION MEASURES NECESSARY TO ADDRESS ADVERSE ENVIRONMENTAL EFFECTS;

- THE MONITORING AND OTHER FOLLOW-UP PROGRAMS NECESSARY TO ADDRESS ADVERSE ENVIRONMENTAL EFFECTS; AND
- THE PUBLIC COMMENTS CONCERNING EACH OF THE ABOVE-NOTED FACTORS.

Proposed s.11(3) would permit the scope of factors set out in subsections (2) and (3) to be determined by the responsible authority or, in certain cases, by the Minister. In our view, the scope of factors should ultimately be decided by the Minister rather than the responsible authority so as to avoid self-assessments that circumvent key environmental considerations. In addition, to facilitate consensus-building and public participation in the decision-making process, there should be an opportunity for the public to review and comment upon the scope of factors to be considered and upon the terms of reference for a mediation or a review panel.

RECOMMENDATION #13 - SECTION 11(3) OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE MINISTER DETERMINES THE SCOPE OF THE FACTORS TO BE CONSIDERED, AND THAT ADEQUATE PUBLIC NOTICE AND COMMENT PROVISIONS ARE INCLUDED IN THIS SUBSECTION.

G. Screening: s.13

Section 13(3) provides that the responsible authority may permit public participation in the screening exercise if, in the opinion

of the responsible authority, public participation is "appropriate". We note that that this subsection contains no criteria to assess when public participation is "appropriate". In CELA's view, public participation is an integral part of the environmental assessment process, and it should never be optional or left to the discretion of the proponent. While it may be necessary to tailor varying levels of public participation for different types of projects, there must be a requirement for public notice and comment in all screening exercises.

RECOMMENDATION #14 - SECTION 13(3) OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THERE ARE ADEQUATE OPPORTUNITIES FOR PUBLIC NOTICE AND COMMENT WITHIN THE SCREENING EXERCISE.

H. Class Screening: s.14

The proposed "class screening" procedure proposed in s.14 could provide an efficient means to assess certain classes of projects. We support proposed s.14(2) with respect to the need for public consultation prior to the declaration. However, we would suggest that the Minister should be empowered to provide directions as to whether a particular project is within or without the class, and to generally oversee the use of and "necessary adjustments" to the class report.

RECOMMENDATION #15 - SECTION 14 OF BILL C-13 SHOULD BE AMENDED TO PROVIDE THE MINISTER WITH AUTHORITY WITH RESPECT TO ISSUES CONCERNING THE APPLICABILITY OR IMPLEMENTATION OF CLASS SCREENING REPORTS.

I. Post-screening Decision-making: s.16

In response to criticism that Bill C-78 conferred too much discretion upon responsible authorities and other decision-makers, the government has generally attempted to remove the phrase "in the opinion of" where it appeared in the Act. However, in proposed s.16, that phrase has been replaced by the phrase "finds that", which, in our view, confers the same level of subjective decision-making. With this continued discretion, and in the absence of criteria to guide the responsible authority and other decision-makers, CELA submits that the environment assessment process set out in Bill C-13 cannot be described as mandatory, accountable or independent.

In our view, the threshold test as to whether further environmental review is necessary after screening must focus on whether the project may have significant adverse environmental effects. This approach is consistent with s.12(d) and (e) of the EARP Guidelines, which provide that a proposal shall be referred for public review where the potentially adverse environmental effects of the proposal are significant or unknown. Clearly, the link to a review or

mediation should not focus on whether the environmental effects are mitigable, particularly in light of the Act's overly broad definition of "mitigation". In our submission, it should surely be left to the review panel or the mediator, after full public participation has occurred, to determine whether the impacts, in fact, can be adequately mitigated. On this point, it is noteworthy that under Ontario's Environmental Assessment Act, the proponent is required to describe potential mitigative measures in its environmental assessment document; however, the mere fact that mitigation may be possible does not preclude a public hearing under the Ontario legislation.

We are unclear as to why former s.16(3), which required the responsible authority to consider public comments, has been deleted from the current draft. We would recommend that public input be required prior to a responsible authority's decision to proceed without a review or mediation, and that the decision be made in writing with reasons and be explicitly appealable to the Minister.

RECOMMENDATION #16 - SECTION 16 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT A PROJECT SHALL BE REFERRED TO A PUBLIC REVIEW OR MEDIATION WHERE THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS. THE SECTION SHOULD ALSO BE AMENDED TO ENSURE THAT THERE ARE OPPORTUNITIES FOR PUBLIC COMMENT REGARDING A RESPONSIBLE AUTHORITY'S DECISION TO PROCEED WITHOUT A PUBLIC REVIEW

OR MEDIATION, AND THAT THE DECISION BE MADE IN WRITING WITH REASONS, AND BE APPEALABLE TO THE MINISTER.

J. Comprehensive Study List: s.17

It is our understanding that the government intends to undertake a separate consultation with respect to the draft list of projects on the "comprehensive study list". Accordingly, CELA will not comment on the list at this time, except to say that the list appears to be excessively narrow and it appears to exclude environmentally significant projects.

K. Minister's Decision: s.20

Proposed s.20, like s.16, relies upon the test of "mitigation" to determine whether a project assessed in a "comprehensive study" should be referred to a public review or mediation. As described above, this is the wrong test, and it should be replaced by a test which looks at whether the project may cause a significant adverse environmental effect.

RECOMMENDATION #17 - SECTION 20 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT A PROJECT ASSESSED IN A COMPREHENSIVE STUDY SHALL BE REFERRED TO A PUBLIC REVIEW OR MEDIATION IF THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS.

L. Referral by Minister: s.24

Proposed s.24(a), like s.16, includes reference to "mitigation" in the test as to whether the Minister should refer a project to a public review or mediation. Again, CELA submits the proper test is whether the project may cause significant adverse environmental effects.

RECOMMENDATION #18 - SECTION 24(A) OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE MINISTER SHALL REFER A PROJECT TO PUBLIC REVIEW OR MEDIATION IF THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS.

M. Referral to Mediation: s.25

Proposed s.25 would provide for a referral to a mediator if the Minister is satisfied that "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 process. In our view, the "interest test" has been cast in excessively narrow terms, and would seem to require parties to demonstrate that they have a personal, proprietary or pecuniary interest in the project before they can participate in mediation. CELA submits that any party who considers that he or she is interested in or affected by the project should be permitted to participate in the mediation, regardless of whether that party can demonstrate potential personal

harm or property damage. In this way, public interest intervenors will be able to participate in situations where there are no persons "directly" affected by the project, or where such persons are willing accept compensation even though the environment may be adversely affected.

It will also be necessary to ensure that parties to mediation have access to information, and that participant funding be available to ensure fair and effective mediation.

RECOMMENDATION #19 - SECTION 25 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT ALL PARTIES INTERESTED IN OR AFFECTED BY A PROJECT ARE PERMITTED TO PARTICIPATE IN MEDIATION, AND THAT ALL PARTIES HAVE ACCESS TO INFORMATION AND PARTICIPANT FUNDING TO ENSURE FAIR AND EFFECTIVE MEDIATION.

N. The Review Panel: ss.30-33

Proposed s.30(1)(a) essentially reiterates s.22 of the EARP Guidelines respecting panel member qualifications except for one curious omission: s.30 does not require that the members be "free of any political influence". We are unclear why the government would balk at inserting such a requirement, particularly since the provision could serve to emphasize the independence of the panel.

RECOMMENDATION #20 - SECTION 30 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT PANEL MEMBERS "ARE FREE OF POLITICAL INFLUENCE".

In our brief on Bill C-78, CELA was extremely critical of s.31's failure to entrench (or even refer to) the rules of natural justice or fairness. The new version of s.31 still fails to make any provisions relating to standing, notice, intervenor funding, the right to be represented by counsel, the right to present and cross-examine evidence, and other related procedural matters. We appreciate that the public reviews should not be transformed into full-blown adversarial trials; however, the lack of formality in the review process can substantially undermine public participatory rights. Accordingly, we submit that the Act must be amended to ensure that the essential elements of "due process" are applicable to public reviews.

RECOMMENDATION #21 - SECTION 31 OF BILL C-13 SHOULD BE AMENDED TO REFLECT THE PRINCIPLES OF NATURAL JUSTICE AND RULES OF FAIRNESS.

O. Decision of the Responsible Authority: s.34

Proposed s.34 does not require the responsible authority, in making the final decision on a project, to accept or act upon the recommendations of the review panel or mediator. Indeed, the responsible authority is not even under a duty to advise the public why such recommendations have not been accepted. In CELA's view,

this represents a fundamental shortcoming of the environmental assessment process set out in Bill C-13. Proponents have a clear and direct self-interest in seeing that projects proceed, and the issue of final approval cannot be left to the proponent if the government intends to establish a credible, mandatory and independent process. Accordingly, we submit that the review panel should be empowered to make a binding and enforceable decision, with or without terms and conditions, and with the possibility of an appeal to the Minister or Cabinet. Where matters have not gone to a public review or mediation, final decision-making authority should be exercised by the Minister or Agency, with a possible appeal to Cabinet.

RECOMMENDATION #22 - SECTION 34 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE FINAL DECISION TO PROCEED OR NOT PROCEED WITH A PROJECT SHALL BE MADE BY A REVIEW PANEL OR MEDIATOR, WITH OR WITHOUT TERMS AND CONDITIONS, SUBJECT TO AN APPEAL TO CABINET. FOR MATTERS NOT INVOLVING A PUBLIC REVIEW OR MEDIATION, THE FINAL DECISION SHALL BE MADE BY THE MINISTER OR AGENCY, SUBJECT TO AN APPEAL TO CABINET.

P. Joint Review Panels: ss.37-39

Proposed ss.37-38 would permit the Minister to establish joint review panels with other jurisdictions, but these sections are silent as to the nature and extent of the environmental assessment

process to be applied. In our view, joint reviews should not be used to establish weak or "lowest common denominator" review processes; instead, the more stringent assessment process of the respective jurisdictions should be applied. As we indicated in our previous brief, indicia of stringency include: the scope of the assessment (i.e. need, alternatives to, null option); the nature of public hearings; enforceability of decision; and related matters.

RECOMMENDATION #23 - SECTION 37 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT THE MORE STRINGENT ENVIRONMENTAL ASSESSMENT PROCESS SHALL APPLY WHERE THE MINISTER INTENDS TO ESTABLISH A JOINT REVIEW PANEL WITH ANOTHER JURISDICTION.

Q. Transboundary and International Effects: ss.43-45

Proposed ss.43-45 provides that where a project "is likely to cause" significant impacts, the Minister "may" refer the matter to a review panel or mediator. In our view, such a referral should be mandatory where the project may cause significant adverse environmental effects. Proposed s.43(2) provides an inappropriate mechanism to allow the Minister and the provinces to opt out of a joint environmental assessment, and thus should be deleted.

RECOMMENDATION #24 - SECTIONS 43-45 OF BILL C-13 SHOULD BE AMENDED TO REQUIRE REFERRAL OF A PROJECT TO A REVIEW PANEL OR MEDIATOR WHERE THE PROJECT MAY CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS. SECTION 43(2) SHOULD BE DELETED.

Significantly, s.43(3) would permit a "directly" interested person to petition the Minister with respect to a panel review or mediation. Again, CELA disagrees with the need for a "direct" interest, and we submit that all interested or affected parties should be permitted to initiate a petition. In addition, we see no reason why this opportunity should not be extended with respect to international environmental effects pursuant to s.44, or with respect to federal lands pursuant to s.45.

RECOMMENDATION #25 - SECTIONS 43-45 SHOULD BE AMENDED TO PERMIT ANY INTERESTED OR AFFECTED PARTY TO PETITION THE MINISTER WITH RESPECT TO TRANSBOUNDARY OR INTERNATIONAL ENVIRONMENTAL EFFECTS, OR WITH RESPECT TO EFFECTS ON FEDERAL LANDS.

R. Injunctions: s.48

Proposed s.48 would entitle the Attorney General to apply for a injunction to ensure compliance with a Ministerial "stop order" made under s.47. CELA submits that this relief should be available upon application by any person, not just the Attorney General. Moreover, we submit that injunctive relief should be generally

available for any contravention of the Act or the regulations. The Act must specifically provide that no federal authority and no person shall exercise any power or do anything that would permit a project to proceed until the environmental assessment has been completed and a final decision has been made. Similarly, CELA submits that an offence section (with substantial fines or jail terms upon conviction) must be built into the Act to further ensure compliance with the Act and the regulations. Ideally, each of these matters would be set out within a separate "Enforcement" part of the Act.

RECOMMENDATION #26 - SECTION 48 OF BILL C-13 SHOULD BE AMENDED TO PERMIT THE ATTORNEY GENERAL OR ANY PERSON TO APPLY FOR AN INJUNCTION RESPECTING BREACHES OF THE ACT OR REGULATIONS. AN OFFENCE SECTION MUST BE INCORPORATED WITHIN THE ACT. THE ACT MUST PROVIDE THAT NO PROJECT SHALL BE COMMENCED OR UNDERTAKEN UNTIL AN ENVIRONMENTAL ASSESSMENT HAS BEEN COMPLETED AND A FINAL DECISION HAS BEEN MADE RESPECTING THE PROJECT.

S. Minister's Powers: s.54

Proposed s.54(1)(h) provides that the Minister "may" establish a participant funding program. In our view, participant funding should not be optional and should be provided to all eligible participants in panel reviews and mediations.

RECOMMENDATION #27 - SECTION 54 OF BILL C-13 SHOULD BE AMENDED TO ENSURE THAT PARTICIPANT FUNDING IS MANDATORY IN PANEL REVIEWS AND MEDIATIONS.

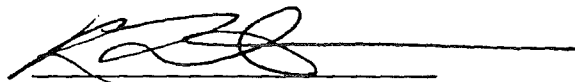
SUMMARY AND RECOMMENDATIONS

The federal government has endorsed the Brundtland Report and the Report of the National Task Force on Environment and Economy, and thus has endorsed the need for fair, effective, and efficient environmental assessment in order to integrate environmental and economic decision-making. However, despite the government's proposed amendments, Bill C-13 still represents a significant step backwards from the the existing process under the EARP Guidelines.

Accordingly, CELA cannot support Bill C-13 as amended, and we recommend that the Bill be withdrawn unless it is substantially amended. In this preliminary analysis, CELA has attempted to identify the major deficiencies that must be addressed forthwith.

All of which is respectfully submitted.

October 23, 1991



Richard D. Lindgren
Counsel

