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BY EMAIL

November 28, 2011

Marie-France Renaud
Clerk, Standing Committee on Environment and Sustainable Development
House of Commons
Ottawa, Ontario K1A 0A2

Dear Members of the Committee,

Re: Seven Year Statutory Review of the *Canadian Environmental Assessment Act*

West Coast Environmental Law Association ("West Coast") is a non-profit group of environmental law strategists and analysts dedicated to safeguarding the environment through law. Since its founding in 1974, West Coast has been involved with various aspects of, including the precursors to, provincial, federal and joint environmental assessment ("EA"). West Coast was also involved in the development of the *Canadian Environmental Assessment Act* ("CEAA") and is active with the Environmental Planning and Assessment Caucus of the Canadian Environmental Network. We have a long history of serving on the federal government's Regulatory Advisory Committee ("RAC") and have provided environmental legal aid to citizens and organizations involved in EA for over twenty years.

We note that we are preparing this brief on an expedited timeline and in response to the Standing Committee's motion passed Thursday November 24 that announced written submissions must be submitted within two business days. We also note that West Coast has received an invitation to present to the Committee as a witness but has yet to receive a date confirming when or if we will be presenting (we postponed the initially offered timeslot, impossible for us to attend, on the written assurance that we would be rescheduled). Our concerns with the process that has been followed by the Committee in this review of CEAA and our disappointment with the cursory nature of the review and its lack of openness and transparency are detailed in our letter of November 18, attached for your reference.

Summary

We have categorized our submissions and recommendations in response to the subjects we understand the Committee will be focusing its upcoming report on. A common theme to our recommendations is the need for the federal government to rebuild and affirm a strong role in environmental protection and environmental assessment in particular that honours federal constitutional responsibilities while still establishing efficient and cooperative relationships with provincial EA regimes.[i]

In the past several years the federal government appears to have been retreating from its responsibility over environmental protection and assessment. The result is that the federal EA process bears less and less relation to its stated goals and purposes, which include achieving sustainable development, providing an effective means of integrating environmental factors into planning and decision making processes in a manner that promotes sustainable development, and facilitating public participation in the EA of projects. In particular, the federal EA scheme currently does not live up to the stated goal of exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality while ensuring compatible and sustainable economic development.

We understand that the government is contemplating changes to CEAA that, in our opinion, will further erode EA, limit public participation, fail to meaningfully and appropriately involve Aboriginal groups as decision-makers, and implement a re-weighting of economic, environmental and social considerations. The likely result of such a retreat from responsible environmental protection, assessment and management will include increased delays due to conflict and lawsuits (especially where constitutional rights and public concerns are not adequately addressed), species extinctions, loss of natural life support systems, and other ecosystem failures.

Done correctly, EA can be an effective long term planning tool to assist the government in making decisions that recognize environmental and societal values, identify alternatives for human uses of and development of resources, prioritize how resources are used within ecological limits and advance the kind of Canada in which the majority of Canadians want to live. As a central part of environmental decision-making, EA can and should be a process that helps to positively reshape the relationship between the Crown and Aboriginal peoples, and recognize the rights of Aboriginal groups to make decisions about what takes place in their traditional lands. Strategic investments in EA now will result in greater efficiencies in project EA and greater long-term certainty for proponents, Aboriginal governments and peoples, and the public alike; erosion of environmental protection and CEAA in particular will only result in costly delays and greater uncertainty for all Canadians.

This submission attempts to follow the list of topics identified by the Committee in its instructions of November 24, 2011. This does not denote West Coast's agreement to the headings identified by the Committee.

Committee heading 1: The inefficiencies of current practices and the need for improving processes

a) **Standardized nationwide processes for strong EA would reduce inefficiencies.** We understand there is concern with the economic costs of the EA process in relation to the resulting environmental benefits and protections. There are currently unnecessary differences in EA process design between the federal and the various provincial EA regimes. We propose the solution to this is a national EA standard, agreed to by the federal government, provinces and territories, and Aboriginal governments. This would ensure the process is standardized and applied by provinces in a similar fashion and that proponents have a single set of requirements that responds to the issues under federal, provincial, and Aboriginal jurisdiction, to comply with for the conduct of EA. We are collaborating with other organizations and academics on this issue and are researching and creating models of standardized federal and provincial EA laws that could be adopted or, where necessary, adapted by provinces, thereby enabling a streamlined process and affording process predictability to proponents, governments, the public and Aboriginal rights-holders alike, without compromising on the quality of EA or the ability to protect valued ecosystems. In the interim, we believe that entering into general harmonization agreements with a greater number of provinces – in serious consultation with Aboriginal governments – would assist in increasing efficiencies in coordination and improving the process.

b) **A duty on proponents to submit ALL viable options for consideration would avoid inefficiencies.** Another major source of inefficiency arises where proponents do not put forward for assessment all of the possible options for a proposed project. We submit that proponents should have a statutory duty to disclose all the best possible options for a project, based on social, environmental, cultural and economic considerations. Proponents should not be permitted to exclude viable options based on potential variances in the resulting profit. This creates opportunities to "game" the system by putting forward cheaper, environmentally-inferior options to see if they will be approved, when an alternative viable (though less cheap) and environmentally-superior alternative may exist. Significant delay and ineffective use of government and public resources result when a proponent can, without limitation, re-submit a proposal for assessment simply by making minor adjustments that were earlier

represented as not being viable for economic or other reasons. Similarly, where alternative options have previously been considered to have significant environmental impacts that cannot be mitigated, they should not be reconsidered later without a demonstrated substantive and material change in the proposed alternative (a change in the actual proposed project, not just the financial viability). Such a situation has recently arisen with the New Prosperity proposal in BC where minor variances in a previously rejected project alternative have been made based on changing commodity prices, but the previously identified substantive problems with the project in general, and the "new" alternative specifically, have not been comprehensively addressed. Having such a project go through a second EA is a regrettable waste of time and resources. The law should ensure that such projects are not accepted for subsequent consideration unless substantive and material change in relation to the anticipated significant adverse environmental effects can be demonstrated.

c) **Regional strategic cumulative effects assessment is a streamlining tool.** There is a wide consensus among EA practitioners, the public, proponents and government agencies that cumulative effects assessment ("CEA") is not currently working well – not only because of information gaps or that methodological problems in the practice of CEA is poor, but also because the current institutional framework does a poor job of linking CEA to actual decision-making. This was examined by the federal Auditor General in its Autumn 2009 report to the House of Commons on Applying CEAA, and its October 2011 report on assessing cumulative effects of oil sands projects (the Canadian Environmental Assessment Agency ("Agency") agreed with the recommendations in both of these audits).[ii] The difficulties relate to a range of structural and regulatory issues that render cumulative effects assessments – as they are currently practiced – fairly ineffectual in the actual *management* of cumulative effects. There is a need to create a mechanism so that comprehensive, regional cumulative effects assessments are conducted based on the need to manage for sustainability (as described below). The methods of CEA would be most effectively deployed and most effective at managing for sustainability through such a mechanism. It is our submission that it should be a priority for the federal government to work with the provinces and Aboriginal governments to enable regional cumulative effects assessment legal frameworks that can efficiently manage provincial and federal responsibilities, in a way that respects Aboriginal and treaty rights, without duplicating efforts. Once established, such frameworks will create efficiencies in addressing long term sustainability and responsible land use and resource management, and provide a great deal of information that would assist in individual project assessments. This would allow proponents to start further along the road because much of the required information needed to assess individual project's effects would already be available.

d) **Public participation improves process.** (The comments immediately below relate principally to the broader public. While these comments may apply in a general way to Indigenous groups as well, the constitutionally-protected rights and title of Aboriginal peoples may have implications for involvement in the EA process that go significantly beyond these general comments on public participation.) Public participation is a cornerstone of EA because environmental decisions tend to be better and more acceptable to the public if they are undertaken with citizen input. One of the express purposes of the current CEAA is: to ensure opportunities for "timely and meaningful" public participation "throughout" the EA process (section 4(1)(d)). This choice of wording was deliberate and was brought about by a long period of advocacy by community groups wishing to ensure the best possible process to meet the needs of Canadian communities. We emphasize that a robust commitment to timely and meaningful public participation must remain part of the foundation of the government's exercise of its responsibilities for environmental decision-making.

Proposed projects should only go forward on the basis that they have a proven ability to make a net positive contribution to each of the social, economic, cultural and environmental aspects of sustainability. This can only be ascertained and achieved with transparent, fair and meaningful engagement in the EA process. Interested members of the public can play direct roles in the full cycle of decision-making from monitoring existing conditions, through objective setting and planning for new initiatives, to monitoring results and follow-up. The benefits are many – including that government decision-makers get much better information than by simple reliance on top-down expert models of

assessment, leading to decisions that are well founded and more locally acceptable. This has been recognized by the government of Canada in Agency reports and guidance materials.

Often members of the public have equal or better first hand knowledge of the area of a proposed project than the government agencies or proponent and can add value to the knowledge base for the assessment. The public includes not just lay people who are resistant to any change (the "not-in-my-back-yard" profile) but very often individuals who are experts in their own right – in fisheries, wildlife, hydrology, mining, forestry, energy, economics to name just a few. There are other benefits like local capacity building, the development of local stewardship and local capability for citizen-based follow up on environmental outcomes. In short, the public needs to be treated as valuable resources – and incorporated into project design and the design of the EA process from an early stage.

By involving the public in identifying issues and alternatives, and by both heading off problems and conflict and providing a forum for their satisfactory resolution in many cases, effective EA participation processes can actually result in reduced project costs and reduced social, environmental and health costs; conversely, a failure to incorporate public consultation can lead to increased costs and unsatisfactory outcomes.[iii] An earned social license to proceed with a project gives better long term certainty than conflict and potential court challenges.

To be effective in improving the EA process, however, current public participation requires reform in relaxing unrealistic timelines, increasing capacity funding, and increasing its meaningfulness. Sufficient notice and preparation time must be allocated, with a view to the fact that many participants such as non governmental organizations, local community groups and civil society organizations consist of unpaid volunteers who work on a part time basis with few resources, while nearly all Aboriginal rights-holder groups are also dramatically under-resourced for effective engagement in these processes. Both public participation and Aboriginal consultation must be initiated early in the process and with due care to cultural differences, so as to not preclude appropriate issue definition or dismissal or options before there has been a valid opportunity to consider them.

Public participation funding should not be so prescriptive that it limits effective public participation or presupposes what could or could not be useful for either a panel or the Agency to hear or receive information about. For example, the cap on funding and the unrealistically low prescribed categories of funding, neither of which have been publicly announced or explained, in relation to Site C Clean Energy Project and more recently New Prosperity is a dramatic regression in public participation in review panel processes.

We believe funding should be used effectively by participants. However, we believe that limiting participation to *only* commenting on particular proponent or government generated documents at certain junctures in the process circumscribes participants' ability to meaningfully engage with the project, with the communities affected, or with experts that may be required to fully comprehend the subject matter of a project.

The RAC has previously advised the Minister of the Environment as to what constitutes meaningful public participation during CEAA's Five Year Review. The RAC achieved nearly complete consensus that meaningful public consultation:

- should be based on full access to relevant and required information;
- must include the opportunity to critically review and comment on the information in a two-way exchange;[iv]
- must be done early enough to allow participants to have an influence on the planning of the project;
- must allow sufficient time to review and respond;
- must require a consultation plan to be developed and shared with the public;
- must be efforts to relate public comment to process or project decisions;

- must include notification, information out and information discussion and exchange; and
- must be timely.

While in need of improvement in this regard, the existing CEAA has the ability to achieve meaningful public participation and is much better designed to do so than, for example, the British Columbia process. Any 'substitution' of public participation through the BC EA process would be wholly inadequate because public participation is largely discretionary and thus the public in BC relies upon the maintenance and improvement of a strong federal role in EA in order to be able to engage at all in major developments that also trigger a federal EA.

In a study of public participation in review panels,[v] Rutherford and Campbell identified numerous impediments to ensuring effective public participation in CEAA review panels. Limits on participant funding, poorly developed processes with short timelines, and narrow project scope are some of the factors that cause challenges for the public. Although the panel review process may appear to be more expensive than other processes, the short- and long-term savings in relation to an investment in conducting an effective panel review – such as public acceptance, identification of issues and reduction of project and social costs – must also be considered. Campbell and Rutherford found that public input has resulted in sometimes significant improvements in the process of consultation and in the planning and implementation of the proposed projects.

e) **Sustainability assessment would assist in improving process.** We recommend that EA legislation should be directed, at its core, to achieving – while maintaining respect for Aboriginal rights and rights-holders – particular sustainability goals and leaving a positive environmental and socio-economic legacy. EA is not just a process but a mechanism for evaluating options to achieve societally valuable goals and recognizing and working toward meeting international commitments on the environment and on Indigenous peoples' rights.

One key principle of sustainability assessment is the precautionary principle, which entails respecting uncertainty, avoiding even poorly understood risks of serious or irreversible damage to the foundations for sustainability, and designing and managing for adaptation. Assessing based on sustainability and the precautionary principle also means giving greater recognition to the possibility of not just identifying mitigating measures – which EA is generally geared towards and in which it has had some success – but also seriously considering saying no to proposed projects that do not and cannot achieve stated long term societally valuable goals and international commitments.

Following the March 2011 submissions, "Towards Sustainability", of Ecojustice Canada,[vi] informed by the work of Professor R. Gibson,[vii] we recommend that CEAA be amended to require assessment of the environmental and socio-economic sustainability of projects and not just their adverse environmental effects, possibly using the model of the *Yukon Environmental and Socio-economic Assessment Act*.

We emphasize that in both designing and conducting sustainability assessment, government must include Aboriginal rights-holders in a meaningful and substantive way, to ensure that Aboriginal peoples' values and priorities for their traditional territories are reflected and respected in the decision-making process, and that their governance rights (under both Treaty and title, depending on the circumstance) are respected.

Committee heading 2: Duplication of environmental assessment activities that cause unnecessary delays in the overall process

Under the *Constitution Act 1867*, the federal and provincial governments share responsibility for protecting the environment. We are in agreement with Ms. Kwasniak's submissions to the Committee: it is important to separate duplication of process from the importance of each level of government

fulfilling its constitutional role (which may require what Kwasniak terms overlap[viii]) and its responsibility to ensure that it has appropriate information about the social, economic and environmental implications of decisions before it makes decisions about new project proposals. In line with our recommendation for a standardized provincial process nation- wide and a regional cumulative effects assessment mechanism that is coordinated among federal, provincial and Aboriginal governments, we suggest that the best way to ensure that constitutional responsibilities are met while minimizing or eliminating delays due to duplication (but not necessarily overlap) is to have a standardized process, reflecting the highest environmental standards, that is largely overseen by an independent agency (logically an expanded role for the Agency). A standardized process can ensure comprehensive consideration of all relevant factors and make the best, well-informed decisions on whether and under what conditions to approve proposed projects.

Committee heading 3: Ambiguities that exist in the current CEAA legislation

a) **We support clarification of decision points and conditions in CEAA that enhance the process.** We agree in principle that ambiguity should be clarified, so long as it enhances the effectiveness and fairness of the EA process. We note here three specific areas we recommend be clarified. First, we think there should be a formalized process to determine when and by what public notification process decisions are taken in relation to project scoping. This should be a formalized process in the legislation to give greater certainty to proponents and to others involved in the process, and to allow for a defined decision point to be appealed or reviewed as necessary. Second, we think that the sections in CEAA that allow a responsible authority to recommend a project be referred to a review panel should be clarified to make it explicit that such a recommendation can be made on the basis of significant adverse environmental impact *or* the degree of public concern. Finally, we recommend that CEAA be amended so that EA includes mandatory consideration of and accounting for climate change impacts, mitigation and adaptation as part of its analysis. Climate change is perhaps the most significant environmental challenge facing Canada for the foreseeable future, yet climate considerations are not generally well-integrated into EA at any level of government, and concerned community groups and Aboriginal groups are left trying to argue for climate considerations to be included. Including such considerations in every EA would provide certainty to industry, Aboriginal groups, and the community that a project's relationship to climate change mitigation and adaptation will not be ignored.

b) **We recommend clarification of how CEAA ensures First Nation's constitutionally-protected rights are honourably addressed in the EA process.** Canada has recently endorsed the United Nations Declaration on the Rights of Indigenous Peoples.[ix] It is our position that Canada should respect this Declaration and ensure that its process for environmental decision-making respects the commitment contained in the Declaration to obtain the free, prior and informed consent of affected Indigenous peoples before approving resource development activities on their traditional territories and in their waters. This should be reflected in Canada's EA legislation.

The environmental assessment process needs to be reformed dramatically to allow for a more participatory and fair process such that First Nations and Indigenous peoples have the ability to exercise authority flowing from their governance rights within the decision-making process. First Nations across Canada, and certainly in BC, have been clear over and over that their decision-making authority over their own unceded lands, and their laws, must be respected and recognized by the Crown. By its very nature this cannot be a static, one one-size size-fits-all approach, but rather should be able to dynamically accommodate different interests, treaty rights, governance rights, and different rights-holders in relation to different scales of projects and types of EA being conducted.

At the most basic level, we urge the federal government to re-examine its current consultation and accommodation processes in relation to EA and also the level of capacity funding it is allocating to First Nations who are being constantly inundated with multiple project proposals. The timing and meaningfulness of consultation undertaken by the federal Crown is not consistently applied across the

country or in different types of EA process; this is evidenced by a number of recent court actions challenging Crown decisions to proceed without properly discharging its constitutional duties. Failure to deal honourably with title and rights through the EA process is resulting and will continue to result in high levels of conflict and uncertainty for proponents and the public, all of which has short and long term economic and legal implications.

We support the Assembly of First Nations' call for the establishment of a "Crown-First Nations process to reform CEAA". Within such a process, we recommend that creative forms of the right of First Nations involvement to be meaningfully involved in decision-making be explored and the requirement to respect the title-based or treaty-based governance rights of First Nations (and other Indigenous peoples where applicable) should be explicit. This could include mechanisms for First Nations review processes that run parallel to or in tandem with Crown processes, shared decision-making, and where appropriate other forms of partial or optional exercise of authority in relation to projects that impact various types of rights and interests – according to the needs of individual Nations.

We suggest the First Nations Energy & Mining Council's paper on proposals for reforming the EA process in relation to First Nations in BC as a good resource to further thinking on these ideas.[x]

We note in addition that we understand that relatively few Aboriginal groups have had the opportunity to present evidence to the Committee, and that the Committee has made a fairly limited effort to reach out to Aboriginal peoples who are so directly affected by EA and government environmental decision-making across Canada. We find this to be terribly unfortunate, as it is in the interest of all Canadians – and frankly it is in the interest of industry stakeholders – that Indigenous peoples play a central role in EA, and that should begin with being permitted to play a serious role in the review of this legislation.

Committee heading 4: Other timeline issues

We reiterate the concerns of many participants in the EA process that the recently imposed timelines for comprehensive studies are unreasonable and can have a prejudicial affect. We believe there should be some flexibility to accommodate extenuating circumstances and special issues in projects. Unreasonably short prescribed timelines can be especially difficult for First Nations communities to meet due to capacity issues, necessary internal decision-making processes and structures, and lack of full participatory funding allocated by the Agency.

Timelines is another area where 'substitution' by the provinces is especially inappropriate. Rigid provincial approaches to timelines should not be replicated federally as they have the effect of penalizing the public and First Nations, particularly if there are endemic capacity and funding issues, and such timelines can only hurt the ability to make wise, informed and balanced decisions.

Committee heading 5: How to address small projects

We believe screenings play an important and valuable role within the federal EA process. We would not support the elimination of screenings, but we are open to exploring ways to refine screenings or to develop 'template' screenings for projects that meet specified criteria which would reduce the number of studies and steps that would have to be conducted for each proposed project. We also recommend that screening level assessments be placed on a simple online registry (or that the existing Registry be expanded to accommodate them) to allow for greater transparency, knowledge sharing and public awareness of development activity.

If an effective regional cumulative effects EA regime were adopted and implemented, efficiencies could be created for screening level projects as much of the baseline data and contextual study would be done as part of the region and small screening project EAs would have a limited amount to do prior to approving a project.

Committee heading 6: CEAA triggering mechanisms

We support maintaining the existing triggering mechanism as a preferred approach, although as stated below we recommend that section 7.1 be repealed so that additional projects are not excluded from the triggering process. Moving to a listing approach would risk missing important new projects (e.g. liquid natural gas, hydraulic fracturing, instream tidal are 'new' and would not have been put on a list several years ago). A project list approach would also cause difficulty for meeting constitutional responsibilities as most areas of federal authority are not in relation to projects themselves but certain aspects of projects that are triggered for different departments.

Committee heading 7: Concerns brought forward by project proponents and stakeholders

a) Regarding concerns brought forward within the EA process itself:
All concerns should be carefully assessed from the perspective of whether addressing them enhances the efficiency, effectiveness and fairness of the process. Improvements to one that compromise the other two should be avoided. We feel that there is a need for a mechanism to demonstrate how proponents' and stakeholders' concerns were heard and how they will be incorporated into deliberations and decision-making.

b) Regarding concerns brought forward by proponents and stakeholders *about* the EA process, we have particular concern with the following issues:

i) Lack of monitoring and follow-up procedures
Existing EA is reasonably good at identifying mitigation measures; unfortunately it is not good at following up on whether and to what degree they are implemented or how they meet their intended goals. CEAA is in dire need of direct enforcement mechanisms where the Agency can play a coordinating role of oversight and follow up for projects.

Follow-up and monitoring is vital to determining if the predictions made in an EA were in fact accurate, and if the specified mitigation measures are being carried out, and are having the predicted effect. It is at this stage that the real opportunities exist to ensure that the project is developed consistent with the final recommendations.

We recommend that follow-up and monitoring steps be added to the Registry and to the Major Projects Management Office, where applicable, to increase transparency and accountability. We also recommend that CEAA be amended to allow for issuance of EA permits according to specific criteria and that penalties be imposed for any proponent or federal department should they proceed with any aspect of a project without a permit or in breach of a permit.

Monitoring and enforcement is yet another area where delegation to or substitution to the provinces would be woefully inadequate. BC's Auditor General recently published a report[xi] on the widespread inadequacies of this in the BC Environmental Assessment Office, both in terms of law and policy and in terms of lack of resources.

ii) Statutory appeal mechanisms
The ability of the public or a proponent to challenge certain decisions made throughout or at the conclusion of the EA process is very limited and, where available, a judicial review typically does not provide an effective outcome for any party involved; it will often only create delay and uncertainty. We suggest that CEAA be amended to include a right of appeal, or that a less discretionary and therefore more reviewable decision of an official or the Minister at certain decision-making junctures in the EA process. Some junctures would include when a decision is made, based on a recommendation by a responsible authority or by the Minister, to continue with a comprehensive study or move to a review panel or mediation; when and for what reasons a scoping is made; EIS guidelines are finalized; funding

eligibility or amount decisions are made. Further research is required, but a potential model for this type of process is the *Administrative Procedure Act* 5 USC §551 et seq. (1946) (APA) that governs the process by which US federal agencies develop and issue regulations. Among other things, it provides opportunities for the public to comment on notices of proposed rule making and it provides standards for judicial review if a person has been adversely affected or aggrieved by an agency action.[xii] Some agencies that fall under the APA such as the Bureau of Land Management and the Forest Service also have an administrative appeals process.

Committee heading 8: Substitution and equivalency as options for EA

We strongly oppose any attempt to characterize the majority of provincial EA regimes, and BC's in particular, as equivalent or a substitute for the regime under CEAA. BC's EA legislation is completely inadequate and does not have the ability to substitute for the federal process. Generally provincial regimes, unless drastically reformed and implemented in concert with federal departments or the Agency, do not have the ability to meet the federal government's constitutional responsibilities, including in relation to honourably meeting and discharging the honour of the Crown per section 35. The federal government would be ill-advised to attempt to substitute by way of delegation to provinces, and we anticipate doing such would only set up both levels of government for increased conflict and legal action.

The drastic inadequacies of the BC EA process are thoroughly described and demonstrated in the reports and case studies on First Nations' involvement in BC EA,[xiii] and on the provincial versus federal assessment processes and outcomes for the Prosperity mine proposal.[xiv]

If at all, substitution should only be permitted to agencies who that are engaged in planning processes, and that are independent of the industry being reviewed and of the regulatory process. Gary Schneider of the Canadian Environmental Network's Environmental Planning and Assessment Caucus has made this point well.[xv] In addition to the differences in mandate, Schneider points out that the individuals who serve on the National Energy Board ("NEB") are less independent from the federal government and more likely to have previous ties to the energy industry. An evaluation by CEAA noted the limits of the NEB's process in meeting the federal government's constitutional obligations to consult Aboriginal groups: "The National Energy Board does not engage in separate Aboriginal consultation during the hearing process, nor can the NEB be deemed to represent the Crown with respect to the duty to consult Aboriginal groups."

Committee heading 9: Simplifying the process when and where possible

WCEL has always supported[xvi] a streamlined and harmonized process that avoids duplication if and only if the process is strong, protecting the environment and recognizing that both the federal and provincial governments need to work together. Developing and implementing the common set of standards would go a long way towards this and the concern regarding simplification.

We note, however, that simplification in and of itself is not a valuable goal if it glosses over the complexity that is inherent in making environmental decisions. For example, our scientific understanding has grown as to how projects' cumulative impacts are all interconnected across landscapes, we now understand more and more about climate change, public awareness of environmental issues is higher than in the past, and Indigenous traditional ecological knowledge has been recognized as a critical basis for understanding and making decisions. In light of all of these developments and many more, while the EA process could be made "simpler", it must be recognized that the information required to make the best environmental decisions in the public interest is necessarily complex and detailed. This is a complex area of government regulation and needs to be recognized and dealt with appropriately.

Committee heading 10: Improving predictability and consistency in processes

We are not opposed to simplification, improving predictability or consistency of the process as long as it also improves the effectiveness and fairness and the ecological, cultural, social and heritage aspects of an assessment, and the sustainability goals of EA are still met.

We suggest that predictability and certainty would be improved by repealing section 15.1 of CEAA. As it stands currently, the Minister has discretion to scope a project according to any conditions that he or she develops; both the potential arbitrary nature of the conditions and when the Minister will chose to use this discretion create a high degree of uncertainty and unpredictability. Repealing this section will also function to reduce the possibility of political interference with outcomes, which we believe is a key component to a credible EA process.

Further, we believe consistency can be improved by repealing section 7.1 of CEAA, which was originally intended to introduce exemptions from EA for economic stimulus projects; this exemption should now be removed as many of the relevant funding programs are now complete, or have been distributed already, and in any case the policy rationale that originally was used to justify these exemptions is no longer supportable.

We are in favour of encouraging predictability and consistency of the process, but outcomes should be variable depending on a project's merits. While proponents and the public may complain about unpredictable process, the statistics prove that outcomes for project approval in the current CEAA system are practically certain – over 99.9% approval in screenings, comprehensives and review panels.

Sincerely,

WEST COAST ENVIRONMENTAL LAW ASSOCIATION

Rachel S. Forbes
Staff Lawyer

Josh Paterson
Staff Lawyer

encl. Letter dated November 18, 2011 to Members of the Standing Committee

[i] We refer the Committee and its Analysts to two repositories of studies and information on EA law reform: EA publications by West Coast http://wcel.org/our-work/environmental-assessment and a list of EA resources compiled by the EPA Caucus: http://rcen.ca/caucus/environmental-planning-and-assessment/resources

[ii] Report of the Commissioner of the Environment and Sustainable Development, Chapter 1: Applying the *Canadian Environmental Assessment Act*. Fall 2009: http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_200911_01_e.pdf; Report of the Commissioner of the Environment and Sustainable Development, Chapter 2: Assessing Cumulative Environmental Effects of Oil Sands Projects. October 2011: http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201110_02_e_35761.html

[iii] Karen Campbell. 2001. "Environmental Assessment and the Export Development Corporation: The Shock of the Possible". NGO Working Group on the Export Development Corporation – A working group of the Halifax Initiative Coalition, pp. 5-6.

[iv] "... education becomes both a precondition for, and an outcome of, fair and effective consultation of stakeholders." See Patricia Fitzpatrick and John Sinclair, "Learning Through Public Involvement in Environmental Assessment Hearings", *Journal of Environmental Management*, Volume 67 (2003), 161-174, p. 165.

[v] Karen Campbell and Susan Rutherford. 2004. Time Well Spent? A Survey of Public Participation in Federal Environmental Assessment Panels. Vancouver: West Coast Environmental Law: http://wcel.org/resources/publication/time-well-spent-survey-public-participation-federal-environmental-assessment-p

[vi] Available at www.ecojustice.ca/media-centre/media.../ceaa-review-submission, in particular pages 5-6.

[vii] Robert Gibson et al. 2005. *Sustainability Assessment: Criteria and Processes*, Earthscan.

[viii] Arlene Kwasniak. 2009. "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward," 20(1) *Journal of Environmental Law and Practice* I-35.

[ix] Since endorsing it in November 2010, the federal government has taken the position that the Declaration is only a guidance document and that there is no obligation to review laws and policies to bring them into compliance with the standards set out in the Declaration. This position ignores that Canada is already bound to obtain the consent of Indigenous peoples in International law by other agreements to which Canada is a party such as the *American Declaration on the Rights and Duties of Man* and legal decisions interpreting them. See page 2 of West Coast, "Legal Comment on Coastal First Nations Declaration", at http://wcel.org/sites/default/files/publications/Legal%20Comment%20on%20Coastal%20First%20Nations%20No%20Tankers%20Declaration_0.pdf

[x] Tony Pearse, First Nations Energy & Mining Council. 2009. *Environmental Assessment and First Nations in BC: Proposals for Reform*: http://fnbc.info/environmental-assessment-and-first-nations-bc-proposals-reform

[xi] An Audit of the Environmental Assessment Office's Oversight of Certified Projects. 2011: http://www.bcauditor.com/pubs/2011/report4/audit-bc-environmental-assessment-office-EAO

[xii] http://www.archives.gov/federal-register/laws/administrative-procedure/

[xiii] Tony Pearse, First Nations Energy & Mining Council. 2009. *Environmental Assessment and First Nations in BC: Proposals for Reform*: http://fnbc.info/environmental-assessment-and-first-nations-bc-proposals-reform

[xiv] Mark Haddock. 2011. *Comparison of the British Columbia and Federal. Environmental Assessments for the Prosperity Mine.* Northwest Institute: northwestinstitute.ca/downloads/NWI_EAreport_July2011.pdf

[xv] http://www.cen-rce.org/eng/caucuses/assessment/docs/Final Substitution Paper March29.pdf

[xvi] For example, "BC's Throne Speech chooses one process over good process" February 2010. http://wcel.org/resources/environmental-law-alert/bc%E2%80%99s-throne-speech-chooses-%E2%80%9Cone-process%E2%80%9D-over-%E2%80%9Cgood-process%E2%80%9D