

Comments on
Draft
Canada-British Columbia
Agreement for
Environmental Assessment Cooperation

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February 5, 1997

Following are general comments on the draft Agreement, followed by comments on a number of specific provisions on the draft text.

General Comments

Our greatest concern is with section 5 of the *Subsidiary Framework Agreement on Joint Review Panels*. Although the section meets the requirements of CEEA section 41, those are minimal requirements. The *Subsidiary Framework Agreement* should be amended to ensure balanced representation of environmental interests in the joint review panel.

Our concern is that appointment of most members of a panel by the BC Lieutenant Governor in Council makes the appointment of a panel which fully represents environmental values less likely. Although we are unaware of any instances of biased or inappropriate appointments to environmental assessment panels, appointments of environmental decision makers in other fora raise significant concerns. For instance, Canadian Forest Products Limited ("Canfor") recently appealed provisions in its air emissions permit to the BC director of waste management. Canfor requested that its appeal not be heard by a long time public servant with a demonstrated expertise in air issues. The provincial cabinet interfered with the normal process and appointed an official who had previously worked for Canfor. This is not a unique example. Amendment of park use permits has been taken out of the hands of parks officials because they were "too concerned" with protecting park values.

Although, the federal government is not immune from this sort of activity, its broader interest may provide for more neutral appointees. Moreover, the federal Minister of Environment, having as his or her main responsibility protection of the environment, is

more likely to appoint environmentally concerned officials. The federal Minister should appoint or approve at least one half of the individuals serving on a joint review panel.

The *Subsidiary Framework Agreement on Joint Review Panels* could also be improved by adding the following sentence: "All panel members must meet the requirements of section 41(b) of *CEAA*". This will not cure the problem discussed above ("bias" as used in section 41(b) is narrowly defined in administrative law), but it will highlight the importance of appointing environmentally aware, unbiased officials.

Finally, all federal departments with responsibilities in connection with the proposed project should be able to participate on the project committee.

Most of the following comments relate to potential conflicts in the operation of the Agreement and the two environmental assessment regimes. We recognize that an attempt has been made to address problems of incompatibility through the inclusion of general provisions in the Agreement such as section 18, section 22, section 33 and section 36. Despite these general provisions there is a large risk that specific provisions of the Agreement will be interpreted as imperative by federal or provincial authorities and will result in an environmental assessments being contrary to the terms of *Canadian Environmental Assessment Act* ("*CEAA*").

Comments on Specific Provisions

- **Recitals:** The Recitals should include an agreement that each party allocate the resources necessary to carry out an effective environmental assessment according to the spirit and requirements of each Act and to not compromise the quality and rigour of the environmental assessment in an attempt to gain efficiencies when undertaking cooperative environmental assessments.
- **Section 6:** The exact intent of section 6 is unclear as the British Columbia *Environmental Assessment Act* ("*BCEAA*") has not established processes for either screening or comprehensive study.
- An application for a project approval certificate required under section 7(2) of *BCEAA* does not necessarily meet all the requirements of section 16 of *CEAA*. In particular, none of the following information is clearly required by section 7(2) of *BCEAA*: information on cumulative environmental effects (section 16(1)(a) of *CEAA*); information on the purpose of a project and alternative means of carrying it out (section 16(2) of *CEAA*); information on the capacity of natural resources likely to be affected by the project (section 16(2) of *CEAA*); information on the need for the project and alternatives to it and other relevant factors identified by the federal Responsible Authority (section 16(1)(e) of *CEAA*).¹
- To ensure that the factors listed in section 16 of *CEAA* are included in the application for a project approval certificate (potentially avoiding the need for a project being referred to longer processes), a regulation should be passed under section 92(2)(c) of *BCEAA* requiring the proponent to provide information on all the items listed in section 16(1)(a) to (d) of *CEAA*, and, if the project is listed in the *Comprehensive Study List Regulation*, information listed in section 16(2) of *CEAA*. The Agreement should be amended to specifically state that section

7(2)(n) of the *BCEAA* will be interpreted to require consideration of "relevant factors" identified by the federal Responsible Authority.

- Section 6 should also be amended to recognize that instances may arise where use of the provincial environmental assessment processes is incompatible with the *Canadian Environmental Assessment Act*. It should be clarified that in such cases only portions of assessments will be conducted through a cooperative environmental assessment. There may be cases where this approach can be anticipated and the parties can come to agreements to cooperate to the extent possible in the circumstances. (This seems to be the intent of section 18 of the Agreement, but could be made clearer through a statement to that effect in section 6.)
- **Section 7.** One of the difficulties in completing federal environmental assessments using the process established by *BCEAA* is that there may be a long delay between when the federal environmental assessment would occur and the completion of a project report phase under the provincial assessment process. Under section 11(1) of *CEAA*, a federal environmental assessment is to be conducted as early as is practicable in the planning stages of the project. Section 7 should state that cooperative environmental assessment should not be used where it would delay the federal environmental assessment.
- **Section 8.** We note that the federal Responsible Authority must determine whether or not a comprehensive study report meets requirements of *CEAA*. We recommend that the first sentence in section 8 be amended to state, "Canada will use the project report prepared and submitted by the project proponent as its comprehensive study report providing the project report, in the opinion of the Responsible Authority, meets the requirements ..."
- **Section 10.** Under sections 15(1) and 16(3) of *CEAA*, the scope of the project and scope of factors are to be determined by the Responsible Authority or the Minister. This function is distinct from conducting the actual screening or comprehensive study of a project. Therefore, it cannot be delegated under section 17(1) of *CEAA*. To ensure that cooperative environmental assessments meet the requirements of *CEAA*, we recommend adding the following to section 10 of the Agreement:
 - "Where the parties are unable to agree to the scope of the project and the factors and scope of the factors to be considered, the scope of the project shall include all aspects of the project which both parties recommend including in the scope of the project, and the factors and scope of the factors to be considered shall include all factors and scope of factors which either party recommends consideration of."

The addition of this sentence will ensure that section 10 of the Agreement does not act as a fetter on the discretion of the Responsible Authority and ensure that where agreement as to scope and factors cannot be achieved, a cooperative assessment process can continue.

- **Section 11.** Despite that last sentence in section 11 of the Agreement, there is potential for conflict in the requirements for time limits established by the British Columbia *Environmental Assessment Project Time Limits Regulation* and the requirements of *CEAA*. We also note that the *Time Limits Regulation* is

incorrectly cited. In particular, we are concerned that the time frames included in *BCEAA* may not permit the Minister under the *CEAA* to come to necessary conclusions under sections 20, 23, 25 or 37 of *CEAA*. Secondly, the time frames in the *Time Limits Regulation* section 6 may fetter the Canadian Environmental Assessment Agency's discretion to "in any manner it considers appropriate" set the deadline for filing comments under section 22 of *CEAA*. A similar discretion is given to the Responsible Authority in section 18(3) of *CEAA*. The federal government should not commit to matters affecting any time frames in the Agreement until time frames have been addressed and agreed upon at the federal level. If the commitment to federal time frames continues to be included in the Agreement, section 11 should be amended to say, "in the case of cooperative environmental assessments, Canada will endeavour to follow the time limits for completing each stage of the assessment process". The last sentence should be amended to read, "Notwithstanding the foregoing, Canada is not bound by the time limits in the British Columbia *Environmental Assessment Prescribed Time Limits Regulation* for project decisions under sections 20, 23, 25 and 37 of *CEAA*."

- **Section 20.** This section should be amended to clarify that in cases where only one party is required to conduct an assessment or where separate assessments have been used, the other party should agree that it will not take any action to allow projects to proceed while the environmental assessment is being conducted.
- **Section 37.** The Agreement should include a provision for public review of its operation either at the time the Agreement expires (for the purposes of developing a better agreement in the next round) or after two years (for the purposes of improving the current Agreement for the remainder of its life).

We appreciate the opportunity to comment on the draft Agreement.

1. Please note that section 17 does not allow delegation of the ability to require considerations of "other matters" that the Responsible Authority or the Minister consider appropriate.