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Dear Mr. McCauley,

Re: Recommended Amendments to the Regulations Designating Physical Activities

Please consider this letter our submission on recommended amendments to the current *Regulations Designating Physical Activities* (RDPA) under the *Canadian Environmental Assessment Act 2012* (CEAA 2012).

We look forward to continuing to participate in the amendment process for the RDPA as the Canadian Environmental Assessment Agency (Agency) and the Minister of the Environment review submissions and provide subsequent drafts of the RDPA for additional public comment.

About West Coast

West Coast Environmental Law Association ("West Coast") is a British Columbia-based non-profit organization of environmental lawyers and analysts dedicated to safeguarding the environment through law. One of Canada's oldest environmental law organizations, West Coast has provided legal support to British Columbians to ensure their voices are heard on important environmental issues and worked to secure strong environmental laws for almost 40 years.

Since its founding, West Coast has been involved with various aspects of, including the precursors to, provincial, federal and joint environmental assessment. West Coast was also involved in the development of the *Canadian Environmental Assessment Act* SC 1992, c.37 ("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 provide environmental legal aid to citizens and organizations involved in EA processes. We made submissions to the Environment and Sustainable Development Committee's Seven Year Review of CEAA in autumn 2011[i] and to the Finance Subcommittee and Senate Standing Committee on Energy, the Environment and Natural Resources in Spring 2012 in relation to Part 3 of the omnibus Budget Bill C-38.

Lack of Consultation on the RDPA

Although we appreciate the opportunity to comment on the RDPA, our participation in this 'consultation' process is in no way an endorsement of CEAA 2012; our previously expressed concerns and objections with respect to CEAA 2012 and the process its enactment followed stand.[1] Amending the RDPA will not remedy the retrogressive rollback of environmental protection and public participation that is embodied within CEAA 2012, and it will not make the new legislation and the process it advocates acceptable to individuals, organizations, communities, and First Nations who have repetitively expressed serious concerns about CEAA 2012 and the detrimental effects those people feel it will have across Canada.

The RDPA was 'drafted' (or copied from the previous *Comprehensive Study List Regulations*) and proclaimed into force without any prior public notice or any public comment opportunities. The approach of enacting a law, making and continuing to make a number of important decisions under that law, and *then* soliciting public comments on how the Minister *might* decide to amend the RDPA is an objectionable and unacceptable process. Moreover, given the Act and the Regulations are already in force and operational, one questions whether or to what degree there are legitimate intentions of making any substantive amendments to the RDPA. While we do hope the Minister does and do encourage the Minister to make some significant changes to the RDPA, based on the process followed to date we do have some hesitations as to whether this consultation will produce any meaningful changes.

Failure to Meet Government's Own Standards for Statutory Drafting

The RDPA is a critical component of the new CEAA 2012 federal environmental assessment regime but we do not believe it has been drafted with sufficient scientific or technical input to give the Act the credibility it needs to function predictably or withstand a court challenge. By importing the previous *Comprehensive Study List Regulation* as the RDPA, the CEAA 2012 scheme is now dependent upon a regulation

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[1] See West Coast's submissions to the Environment and Sustainable Development Committee on problems with its process and the insufficiency of the study conducted: http://wcel.org/resources/publication/letter-standing-committee-process-seven-year-review-canadian-environmental-ass
And our substantive submissions on CEAA: http://wcel.org/resources/publication/west-coasts-submission-seven-year-statutory-review-canadian-environmental-asse

that was meant to operate with an entirely different act (the previous CEAA) that had multiple regulations and worked on a contrary presumption (of projects being included unless they were excluded versus CEAA 2012 only including those projects specifically listed). We believe that this could be found to run contrary to the principles of drafting statutory instruments where regulations are meant to support and work in concert with the act they inform and the stated purposes of that Act (per section 4 of CEAA 2012).

The government has a key policy regarding regulation in Canada: the Cabinet Directive on Streamlining Regulation (CDSR), which came into effect on April 1, 2007. The CDSR and the *Statutory Instruments Act* RSC 1985, c.S-22 (SIA) (together with other policies and guidance documents, as appropriate) make up the regulatory process that is mandatory for all regulations (and other instruments) that are made or approved by the Governor in Council or by a Minister.[2] The CDSR states that the government, when regulating, is committed to following a number of principles, including:[3]

- protecting and advancing the public interest in health, safety and security, the quality of the environment, and the social and economic well-being of Canadians, as expressed by Parliament in legislation;...

- making decisions based on evidence and the best available knowledge and science in Canada and worldwide, while recognizing that the application of precaution may be necessary when there is an absence of full scientific certainty and a risk of serious or irreversible harm;...

- creating accessible, understandable, and responsive regulation through inclusiveness, transparency, accountability, and public scrutiny;... and

- requiring timeliness, policy coherence, and minimal duplication throughout the regulatory process by consulting, coordinating, and cooperating across the federal government, with other governments in Canada and abroad, and with businesses and Canadians.

The SIA also has provisions to ensure regularity and fairness of practice in regulation drafting. For example:

> **3.** (1) Subject to any regulations made pursuant to paragraph 20(*a*), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.
>
> (2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

[2] http://www.tbs-sct.gc.ca/ri-qr/processguideprocessus-eng.asp
[3] http://www.tbs-sct.gc.ca/ri-qr/directive/directive01-eng.asp

(*a*) it is authorized by the statute pursuant to which it is to be made;

(*b*) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards.

Ms. Cutts has recently stated, in response to a July 19, 2012 letter from the Canadian Environmental Network Environmental Planning and Assessment Caucus, that: "Amending regulations in an effective way depends on drawing on the relevant expertise of all stakeholders." We are not aware how such expertise was gathered or utilized in enacting the existing RDPA, nor are we confident that any stakeholder would be able to provide comprehensive and thoughtful expertise in the short, summertime window provided for comment on the already in force RDPA.

By simply attaching a previous regulation to the new CEAA 2012, we believe a disservice is being done that will impair the functionality of the Act and we are not aware of how the process to date has met or could meet the objectives and principles set out in the CDSR and the SIA.

Therefore, we believe it is of the utmost importance, and is necessary in order for the credibility of the regulatory process, for the Agency to recommend to the Minister that substantive amendments be made to the RDPA and for the Minister to seriously consider and propose those amendments, which would then be subject to the usual Gazette publication and comment periods.

A Project List Approach is Not Best Practice

CEAA 2012 utilizes a designated projects listing approach rather than the all-in-unless-excluded approach employed under the previous Act. We do not support a project list approach as it has been demonstrated that, as compared to the previous legal triggering approach that CEAA used to employ, it creates a number of legislative gaps and creates additional ways that proponents can structure project proposals so that an environmental assessment is not required. A project list approach is also focused on individual projects as opposed to potential environmental impacts or potential cumulative impacts of several projects. It also makes it impossible to anticipate new types of projects that, while they may be proposed and carried out, would not be identified in the project list and therefore there would be limited ways to ensure the impacts of new technologies or projects are assessed. The British Columbia environmental assessment process uses a project list approach and some of the

challenges and shortcomings of that scheme are clear when compared with the previous federal CEAA.[4]

We support re-working the RDPA entirely so that designated physical activities are identified based on legal triggers and environmental impacts (in a similar way to the previous CEAA), not simply because that specific project at its particular threshold is listed.

We also feel that using such an approach would better achieve the government's stated aim of capturing projects of national significance, an indicator likely better measured by adverse environmental effects and relation to other significant laws rather than individually listed projects of seemingly arbitrary size.

Thresholds Should be Avoided

We recommend that to the extent possible, activities should be described as broadly as possible, and the usage of specific thresholds (tonnages, production capacity, length, etcetera) should be avoided entirely or at least minimized. This approach is intended to prevent the practice of project-splitting that has previously occurred on occasion. The size or scale of a particular facility or activity is not necessarily an indication of its environmental significance or the risks posed to nearby ecosystems or communities. For example, depending upon its location and how it interacts with the land and water, a relatively small project may still cause adverse effects upon natural heritage features, functions and values, and the cumulative impact of several smaller projects in a region may also be significant.

If and where thresholds are used, additional research is required to fine tune these numbers. As discussed above, there has not been sufficient scientific, technical or local consultation to determine appropriate thresholds that allow significant projects to be assessed, include expansion of projects, and allow for a better study and understanding of environmental, cultural, social and economic impacts of projects that should be of concern to the Canadian government.

A thoroughly researched approached to thresholds would also provide a better mechanism to establish national standards for environmental assessment of not only projects of national significance but also projects that take place in a number of areas that will necessarily have ripple effects elsewhere or the model for which will be implemented nationally, an area where the current CEAA 2012 and regulations is absent, perhaps deliberately.

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[4] See for example: Haddock, Mark, 2010. Environmental Assessment in BC. University of Victoria, Environmental Law Centre. Available at: http://www.elc.uvic.ca/publications/documents/ELC_EA-IN-BC_Nov2010.pdf and our Environmental Law Alert post on the Friends of Davie Bay case: http://wcel.org/resources/environmental-law-alert/size-counts-when-it-comes-environmental-assessments

Finally, additional threshold research is needed to ensure that a mechanism is established to capture cumulative impacts of multiple projects of any size taking place within one region. There is provision in CEAA 2012 for some regional studies, which could be combined with a regional environmental capacity for existing and proposed projects. In some cases, we believe it would be useful and prudent to carry out a regional study taking into account smaller projects that would not otherwise meet a threshold but due to their location, timing or interaction do require an assessment.

Mechanism for a Citizen-Requested Environmental Assessment

The amount and breadth of ministerial and Cabinet discretion that is built into CEAA 2012 has been an area of concern for many environmental, civil society and First Nations groups. It may also be a concern to some industries, as it has the potential to lead to increased uncertainty in many cases.

If the Agency and the Minister are not willing to amend the Act to remove some of the discretionary powers, then we recommend that the RDPA be amended to include a section that allows for a citizen to request a particular project (or group of projects that pose significant cumulative impacts) be assessed. This would allow for a way to capture exceptional projects that have particular local environmental, social, cultural or economic impacts that are not or cannot be factored into the limitations of the pre-existing listed projects. A citizen, group, or business could make a submission to the Agency, following certain informational criteria, that makes a case for the need for the proposed project or physical activities to be assessed and then the Agency can request a submission from the proponent as well and evaluate the request in a similar manner to the 'screening' undertaken of a proponent's project description.

Recommended Specific Amendments

If the RDPA is to remain a project list and the opportunity for amendment is limited to adding project types or removing/changing thresholds, then West Coast recommends that the RDPA be amended to include the following types of environmentally significant activities:

- constructing, operating, modifying or decommissioning marine or freshwater aquaculture facilities;

- any proposed refurbishment or life extension of an existing nuclear generating station;

- importing, exporting or transporting low-, intermediate- or high-level radioactive wastes from a Class IA or IB nuclear facility to any other public or private facility for storage, processing, recycling or disposal purposes;

- constructing, operating, modifying, or decommissioning an ethanol fuel production facility;

- constructing, operating, modifying, or decommissioning oil or gas development projects involving the following technologies:

    - hydraulic fracturing (fracking);
    - exploratory drilling or seismic surveys for off-shore oil or gas deposits; and
    - steam assisted gravity drainage oil sands projects;

- constructing, operating, modifying, or decommissioning facilities for generating electricity from geothermal power or off-shore wind farms;

- constructing, operating, modifying or decommissioning buildings or infrastructure within protected federal lands (i.e. National Parks, National Park Reserves, National Marine Conservation Areas, National Wildlife Areas, Marine National Wildlife Areas, Marine Protected Areas, Migratory Bird Sanctuaries, etc.), such as:
    - building new roads or rail lines, or widening/extending existing roads or rail lines; or
    - building or expanding golf courses, ski resorts, ski trails, visitor centres or ancillary facilities; and
    - constructing, operating, modifying or decommissioning of a diamond mine or chromite mine;

- any material modifications of a project (proposed, under construction or in operation or decommissioning stage);

- any federal lands and to include the disposal of nuclear waste regardless of the proposed location for disposal (requires an amendment to section 33 of the Schedule to the RDPA); and

- all physical activities that would be assessed through their inclusion in the previous *Inclusion List Regulations* (SOR/94-637);

We do not support the removal of any activity or project currently listed in the RDPA.

We recommend that the limitations on and exemptions related to expansions of existing projects and projects that are proposed to take place in existing right of ways be re-examined with the aim of requiring environmental assessments for those projects that are likely to cause adverse environmental effects despite the pre-existing activity or right of way. With respect to right of ways, in particular we recommend that the requirement for an environmental assessment apply to electrical transmission lines, oil and gas pipelines, railway lines, and highways.

West Coast supports the RCEN EPA Caucus's submission that the government adopt a *broad and inclusive* approach to adding projects to the Regulations. We propose a broad and inclusive approach in order to ensure that all projects that may have significant environmental effects are at least subject to mandatory screenings, the process for which is set out in sections 8 to 10 of CEAA 2012. Screenings are subject to tight time frames (e.g., the 45-day Agency review period for the project description) and so are minimally inconvenient to project proponents. Under s. 10(b) the Agency has broad discretion to decide that an environmental assessment is not required for a designated project. Although we do not agree with the breadth of this discretion, if that approach is continued then there is minimal risk to the proponent that a designated project with insignificant adverse environmental effects would be subjected to a federal environmental assessment.

West Coast supports MiningWatch Canada's recommendation that *no thresholds* be applied with respect to mining projects for determining whether or not such projects are designated under the RDPA. All proposed mines should be considered for CEAA 2012 environmental assessment regardless of the size and production capacity of the mine. Mine size and production capacity is at best a crude indicator for predicting the significance of adverse environmental effects. Small mines can have significant environmental effects (e.g., acid mine drainage from mine workings or wastes, or a gold mine that releases arsenic). If all mines are subject to screening by virtue of their inclusion on the RDPA regardless of the quantum of expected mineral production, then the decision to conduct an environmental assessment can focus on environmentally relevant factors such as siting, environmental sensitivity, and cumulative effects. As noted above, the history under CEAA 1992 is that thresholds have provided loopholes for project splitting.

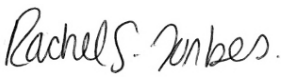
West Coast supports other environmental groups' recommendation that the RDPA include *additional projects located in federal protected areas* (e.g., National Parks) because the statutory regimes governing these protected areas (e.g., *Canada National Parks Act*) require a higher level of environmental protection, and environmental assessment has been a key tool in support of this higher level of protection. Subsection 8(2) of the *Canada National Parks Act*, for example, provides that: "Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks."

CEAA 2012 provides no legal requirement for environmental assessment of projects located on federal lands *unless* those projects are listed under the RDPA. Additional projects should be considered for inclusion on the Regulations for the following categories of protected areas: National Parks, National Park Reserves, National Marine Conservation Areas, National Wildlife Areas, Marine National Wildlife Areas, Migratory Bird Sanctuaries, and Marine Protected Areas. For example, the following categories of projects located in National Parks have been subject to legally binding CEAA assessments, but would not be subject to assessment under CEAA 2012 unless they are included on the RDPA: construction or expansion of golf courses; construction or

expansion of ski resorts; construction of new roads; widening or existing roads; expansion of rail lines; construction or expansion of visitor centres and facilities; and construction or expansion of buildings outside townsites.

Yours truly,

WEST COAST ENVIRONMENTAL LAW ASSOCIATION



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