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West Coast Environmental Law's
Comments on
Smart Regulation for Canada

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INTRODUCTION

This brief contains the comments of West Coast Environmental Law in regard to the *Smart Regulation for Canada*, a consultation document released by the External Advisory Committee on Smart Regulation (EACSR) in July 2004. The EACSR was established in May 2003 to provide the federal government with advice on reforming Canada's approach to regulation.

Since 1974, West Coast Environmental Law (West Coast) has provided environmental law research, representation and education services to promote protection of the environment and public participation in environmental decision-making. West Coast empowers citizens and organizations to protect our environment and advocates for the innovative solutions that will build a just and sustainable world.

In fulfilling our mandate, we have worked closely with provincial and federal governments in developing legislation and regulations in a number of areas. We believe that the law is an effective means of shaping behaviour, while at the same time recognizing the potential for improvements in the Canadian regulatory system.

Some examples of our work include:

- Member of the National Roundtable on Environment and Economy Expert Group on Emissions Trading.
- Member of the National Roundtable on Environment and Economy Expert Group on Ecological Fiscal Reform.
- Member of the Credit for Early Action expert groups (one of 14 issue tables established as part of Canada's consultation to develop climate change policy).
- Member of the Regulatory Advisory Committee of the Canadian Environmental Assessment Agency.
- Member of the Federal Task Force on Pollution Prevention Legislation.
- Former member of the Canadian Environmental Network's toxics caucus.
- Contractor for the Province of British Columbia responsible for development of clean vehicle and fuels policy and regulations.

The External Advisory Committee on Smart Regulation report, *Smart Regulation for Canada*, provides a number of recommendations related to Canada's regulatory system. West Coast supports many of these recommendations including those related to Ecological Fiscal Reform, broadening the range of compliance measures, greater use of strategic environmental assessments, and development of performance measurement plans to evaluate effectiveness of regulations.

Nonetheless, we have significant concerns regarding the recommendations of the EACSR. In particular, we are concerned that recommendation related to risk management and

international standards could have the unintended effect of exerting a downward force on effective environmental regulation, hampering the ability of Canada to adopt regulations that achieve the goals of effective protection and spurring innovation. We are also concerned that the EACSR discussion of voluntary approaches (and to a lesser extent, economic instruments and performance based regulation) does not recognize the limits of these approaches.

Due to competing priorities and the limited time frame for response to the EACSR's consultation document, we have focussed our response on Part I of the Report.

PROMOTING PROTECTION AND INNOVATION

The Committee repeatedly refers to the need for regulation that “protects the health and safety of Canadians **and** promotes an innovative economy” (see page 9) safeguards the public interest **and** “enhances market performance”(page 14). These twin goals need to be clarified:

First, there is a need for greater discussion on the types of regulation that will promote innovation. These may sometimes be regulations that are stringent and fiercely resisted by industry. The Northeast States for Coordinated Air Use Management recently noted that technology innovation follows rather than precedes regulatory requirements. They concluded that “weak standards can prove inefficient by promoting investment in control technologies that ultimately achieve inadequate emission reductions”.¹ According to Michael Porter, Harvard Business School professor and former member of President Reagan's Commission on Industrial Competitiveness, regulations which are more stringent but provide for longer lead times, regulations which anticipate international trends, and use economic incentives have the greatest potential to spur innovation and competitiveness.² Porter provides examples of cost-saving innovations that resulted from regulatory pressure; often this pressure is resisted by industry. Similarly, use of ecological fiscal reform and regulation to reduce greenhouse gases would meet the criteria set by Porter but may not always be recognized as spurring competition and innovativeness. The Committee needs to be clear on how regulation can spur innovation.

Second, the committee needs to acknowledge that these two goals can conflict, and must adopt “protection of health and safety” as the primary goal (at least in the context of environmental protection or public health protection). The expectation of Canadians is that environment, health and safety regulations are primarily aimed at achieving protection. Where the goals of protection and innovation conflict, protection needs to have clear priority.

WEST COAST's RECOMMENDATION 1:

The committee should reference research showing that regulation can stimulate innovation by imposing standards that necessitate new technologies.

¹ Page 5-2, NESCAUM, (October 2003). *Mercury Emissions from Coal-Fired Plants: the case for regulatory action.*

² Michael Porter and Claas van der Linde. “Toward a New Conception of the Environment-Competitiveness Relationship”. *The Journal of Economic Perspectives* 9, no. 4 (Fall 1995).

WEST COAST's RECOMMENDATION 2:

The committee should recognize that protection of health and safety and promotion of an innovative economy can conflict in individual cases, and that protection of health and safety is the primary goal.

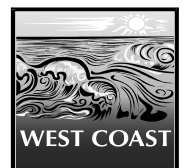
INTERNATIONAL REGULATORY COOPERATION — SECTION 3.1

West Coast agrees with the committee's assessment that there is a need to look outside the domestic toolkit to meet domestic policy objectives; however, we are concerned that elements of the Committee's proposals may conflict with the vision and principles enunciated by the Committee.

By way of background, West Coast has been intimately involved in several processes where Canadian jurisdictions adopted international standards (West Coast was contracted by government to assist in the development of a clean vehicle and fuel regulatory agenda that involved adoption of California and subsequently US federal motor vehicle emission standards, and adoption of certain elements of US clean gasoline regulations). In these cases, West Coast supported full adoption of standards from other jurisdictions because they were environmentally effective, avoided duplication of effort and minimized barriers to trade and were environmentally effective. West Coast has supported the use of World Health Organization (WHO) standards for ambient air quality; the WHO standards are higher than the "Canada Wide Standards" (which represent a lowest common denominator acceptable to all provinces and the federal government).

However, we have major concerns regarding recommendations 2, 3, 5 and 6:

- *Pressure to align with international standards has tended to exert a downward force on environmental and health safety regulations.* Provisions related to non-tariff barriers in trade agreements have been used to lower environmental standards to an international lowest common denominator, thwarting regulatory innovation. Also, in regulatory consultations in Canada, it is predictable that industry will call for international approaches when international standards are lower, harmonization with the US, when US standards are lower, and a "made in Canada" approach when international standards are more stringent. Put simply, we have grave concerns that the recommendations proposed by the EACSR will simply increase the extent to harmonize/use international approaches whenever it entails a diminishment of standards, without yielding a corresponding benefit in terms of increased regulatory effectiveness.
- *A policy of alignment with international standards will conflict with transparency, accountability, timeliness and potentially effectiveness.* Adoption of international standards can and will often conflict with many of the principles of the Committee:
 - Effectiveness. International standards can be less effective.
 - Timeliness. Development and adaptation of international standards (e.g., Codex Alimentarius) can be extremely slow, even by Ottawa standards. Timeliness is not usually a word associated with international institutions.



- Transparency. It is hard to see how adoption of standards developed in Washington, Geneva or Brussels will increase the accessibility or transparency of the Canadian regulatory system.
- Accountability and performance. International standards bodies or foreign governments are almost by definition less accountable to Canadians for their results (and may be less accountable to anyone).
- *Creation of Trade Barriers.* Adoption of international standards can lead to creation of trade barriers. Where international standards are lower than standards of the US, US states, or other trade partners, adoption of the international standard may create trade barriers.
- *The definition of International/North American Standards need to clearly include national and sub-national standards of foreign jurisdictions.* The Committee needs more clarity regarding the terms “international approaches” and “international standards”. Typically, international standards connotes standards developed by international organizations such as the ISO. These often represent a lowest common denominator. Many of the goals expressed by the Committee could be better served by adopting, in appropriate circumstances, standards of foreign jurisdictions, including sub-national jurisdictions such as US states. For instance, to ensure free entry of Canadian goods into foreign jurisdictions the best approach may be for Canada to adopt the most stringent approaches from our trade partners’ national and sub-national jurisdictions.
- *Committee approach may constrain regulators for no valid policy reason.* We are concerned that references to adopting “international approaches wherever possible”, and references to specific Canadian regulatory requirements being appropriate when there are no “international or North American standards”, could push government in a direction where the public good is not served. Instead, international approaches should be seen as one part of the regulator’s toolkit, with choices informed by variables that include environmental effectiveness and accountability.

For example, at page 69, the EACSR refers to differences in labelling of trans fat on nutritional labels, noting that the US approach allows foods to be labelled as trans fat free, they contain 150% more trans fats than allowed in Canadian foods labelled trans fat free. It is not clear how the criteria in EACSR Proposed Recommendation #3 would be applied. Following the EACSR criteria, Canada would be obligated to follow the US lead if reducing trans fatty acids was not an important national priority and the US FDA was considered a trustworthy organization. This would be true even if the health benefits of stringent labelling outweighed any costs to manufacturers to divergent labelling standards. (It should be noted that manufacturers could avoid such costs by applying Canadian standards in the US). Even the best regulatory institutions are subject to political constraints and manipulation: should Canada be obligated to follow the US lead where effective lobbying has blocked necessary health or environmental protection action.

WEST COAST’S RECOMMENDATION 3:

The EACSR should revise EACSR Recommendations 2 and 3 (in Part 1) and EACSR Recommendation 6 in Part 2 along the following lines:

When developing or reviewing regulatory frameworks, the Canadian government should consider adoption of international standards and standards or approaches used by trade partners based on their ability to provide equal or better protection; spur innovations in technology; avoid duplication of government efforts; reduce trade barriers and ensure a regulatory process that is transparent and accountable.

EACSR Proposed Recommendations 5 and 7 should be reworded to express a positive agenda of moving to the highest North American standards, ensuring the “eliminating the tyranny of small differences and reduce regulatory impediments” does not translate as “harmonization to the lowest common denominator”. We would wholeheartedly support recommendations that clearly recognized the value of consistently adopting the highest regulatory standards.

The EACSR should recognize that moving to North American integrated regulatory processes means a practical diminishment in the accountability, transparency and responsiveness of regulations to Canadian priorities. Canadian priorities are unlikely to have a significant influence on decisions of the US EPA or congress.

PERFORMANCE BASED REGULATION — LIMITS NEED TO BE RECOGNIZED

West Coast recognizes the value of performance-based approaches and accountability structures. We also agree with EACSR Proposed Recommendation 19 which calls for an acceleration in efforts to make the regulatory community aware of the suitability of various instruments. However, we have several concerns with regard to recommendation 4 and the discussion around section 3.4.1.

The promotion of performance-based approaches needs to be caveated. West Coast agrees that performance-based approaches have an advantage in spurring innovation. However, performance-based regulation can also be inappropriate in many circumstances.

First, performance based regulation may be difficult to monitor and enforce. There may be a conflict between EACSR Proposed Regulation 27 (early attention to compliance) and EACSR Recommendation 4. Government will often lack the capacity to develop, monitor and enforce performance-based regulations. For example, a requirement to not log within 30 meters of a stream bank is an effective prescriptive approach to protecting fish habitat from logging. A performance-based approach might require no increase in siltation or stream temperature above natural bounds. While the prescriptive approach requires a measuring tape to monitor, the performance-based approach requires historic baseline data that is often lacking, and continuous monitoring (since damaging incidents are likely to be episodic). Causation is also likely to be a difficult issue to prove in the context of some performance based regulations (did logging cause siltation or was it just a natural event).

Similarly, a command and control requirement that mandates a particular emission reduction technology can be easily enforced (inspector checks presence of technology); a performance-based regulation that specifies maximum emission rates is very expensive in the absence of very expensive tamper-proof continuous emissions monitoring systems.



Second, performance-based regulations may not allow timely interventions. Returning to the riparian set back example: the environmental consequences of logging near a stream bank may not be apparent for years or even decades.

Third, performance-based approaches can be inappropriate where there is a high value in prevention. To use an admittedly extreme example, most people would favour a prescriptive, preventative approach to regulating the nuclear industry rather than a performance standard saying that “allowing or causing a meltdown is an offence”. My experience is that performance based approaches are usually used by regulators unless there is a good reason to the contrary.

WEST COAST’S RECOMMENDATION 4:

EACSR Proposed Recommendation #4 and associated discussion should reference pros and cons of performance-based regulation, noting the value of certainty/ease of implementation associated with prescriptive standard (already referenced at page 40), ease of monitoring and enforcement associated with prescriptive standards, and preventative values of prescriptive standards.

VOLUNTARY APPROACHES — QUESTIONABLE VALUE FOR MONEY

EACSR Recommendation 4 seems to imply that voluntary measures are not routinely considered by government and that more attention should be applied to voluntary approaches. Our experience is that voluntary approaches, while having value in limited circumstances, have too often been used by Canadian governments as an ineffective substitute for real action. For instance,

- A huge amount of governmental effort has gone into Canada’s voluntary approach to greenhouse gas reduction, centering on the Voluntary Challenge and Registry Program for Greenhouse Gases. These programs have had no discernable impact on Canadian greenhouse gas emissions.
- A 2003 study analyzed data that was initially interpreted as suggesting the effectiveness of voluntary approaches; it found that regulations, not information strategies was responsible for the bulk of reductions of industrial toxins reported under the National Pollutant Release Inventory.³
- KPMG’s 1996 study of Canada’s largest companies, hospitals, universities and school boards asked what were the “top factors influencing their organization to take action on environmental issues,” the respondents reported that the chief incentive was compliance with regulations. Other motivating factors included Board of Director liability, employees, cost savings, interest groups and insurer requirements (KPMG Management Consultants, 1996). Factors considered by respondents to be least influential with respect to compliance, in ascending order, were trade considerations, environmental interest groups and voluntary programs.

³ Kathryn Harrison and Werner Antweiler. “Incentives for Pollution Abatement: Regulation Regulatory Threats and Non-Governmental Pressures” in *Journal of Policy Analysis and Management* vol 22, no. 3, 361-382 (2003).

- According to one Environment Canada report based on 3 case studies, “sole reliance on voluntary compliance was considered ineffective...in achieving even a marginally acceptable level of compliance or benefit to the environment.”⁴
- The experience with fuel economy standards should be seen as testament to the ineffectiveness of voluntary approaches in all but limited circumstances. Fuel efficiency in North America has paralleled US regulatory standards. Fuel efficiency improved at the same time as US regulations required improvement and plateaued when US regulatory standards plateaued. Car manufacturers in Canada have complied (albeit inconsistently) with the Canadian voluntary standard because of a unique set of circumstances: an integrated North American market Canada benefits from US fuel economy standards and Legislation is in place as a backstop. Voluntary agreements in the mid 1990s between vehicle manufacturers and the federal government have been ineffective in realizing an improvement in fuel efficiency beyond that achieved due to US regulatory standards.
- West Coast is aware of a situation where a major Vancouver emission source voluntarily agreed to install emission reduction technology, leading to the belief that this emission source was controlled. It only emerged (in the context of government-industry discussions) that the technology was not being used.

As a result of these studies and experience, West Coast is extremely sceptical of voluntary measures. While we understand that voluntary measures may be less costly to implement some of the time, we are not convinced that they are cost effective. Our experience is that on a cost per tonne of reduction basis regulatory measures are more cost effective.

WEST COAST'S RECOMMENDATION 5:

EACSR Proposed Recommendation 4 should eliminate references to voluntary and information based strategies. Recommendation 19 should be revised to include study to determine the circumstances where voluntary initiatives and information strategies have proven to be effective and ineffective alternatives to regulation.

APPLYING COMMON SENSE TO PRECAUTION

The EACSR suggests that “ ‘Precaution’ is applied in instances where there is a risk of serious or irreversible harm and the regulator cannot count on full scientific certainty to make the decision...”. Precaution is an option where “potential risks are so high or severe that normal decision-making processes should not apply”.

West Coast is concerned that this approach to precautionary approaches is inappropriately narrow. As the EACSR notes, “regulators can never count on full scientific certainty before making decisions”. Human understanding of ecological processes and health impacts of pollutants are generally poor. Even where the scientific community has achieved broad consensus, industry will often question science and a few scientists will challenge the broad

⁴ P 25. Krahn, Peter K. (n.d.). “Enforcement Versus Voluntary Compliance: An Examination of the Strategic Enforcement Initiatives Implemented by the Pacific and Yukon Regional Office of Environment Canada 1983 to 1998.” *Acting Head, Inspections Division, Environment Canada Pacific and Yukon Region.*



consensus. The EACSR's definition of the precautionary approach suggests that action in the absence of "full scientific certainty" is inappropriate unless the potential risks are "so high or severe.

Regulatory action in the absence of full scientific certainty should not be seen as an exceptional action. Instead, the precautionary approach should be seen as applying in a complex world where there are varying levels of risk and certainty. As both seriousness of negative environmental consequences and scientific certainty increase so does the case for aggressive regulatory action; however, less aggressive action may be warranted where either the consequences of non-regulation or level of scientific certainty are lower.

This is simply common sense: when driving, we take precautionary actions to avoid situations where there is a reason to believe a fender bender may ensue, we take more aggressive action as the certainty of an accident and the seriousness of the accident increase. We don't reserve the brakes for times when there is scientific consensus that a fatal accident will in ensue in the absence of precautionary action.

WEST COAST'S RECOMMENDATION 6:

The EACSR should re-frame the discussion of the precautionary approach so that it clearly applies in the context of varying levels of risk and certainty. As seriousness of consequences and scientific certainty increase so does the case for aggressive regulatory action; however, less aggressive action may be warranted where either the consequences of non-regulation or level of scientific certainty are lower.

RISK MANAGEMENT FRAMEWORK: COMMON SENSE OR "ANALYSIS PARALYSIS"

The report calls for a risk management framework for Canada, noting that dealing with risks is inherent in regulation, and that absolute safety is unobtainable.

While we agree that regulatory decision-making inherently involves a process of prioritizing risks, references to risk management be interpreted as supporting an approach to regulation that is problematic. Risk management is often associated with a cumbersome exercise of risk assessment and a pseudo scientific exercise of quantitatively assessing risks in the absence of good scientific understanding. We recommend that the Committee review some of the literature critical of risk management and risk assessment. For instance, a UK Royal Commission Report notes the slowness and cumbersome nature of risk assessment, and calls for a more precautionary approach that rejects the pseudo-science of risk assessment.⁵

Risk management also connotes an evaluation of costs of compliance against benefits of compliance. This process is inevitable in public decision-making, but enshrining it may create an unlevel playing field, where industry can exaggerate the costs of compliance (with government often having limited ability to challenge government estimates) while belittling environmental/public health costs because of uncertainty. One can only think of the

⁵ UK Royal Commission on Environmental Pollution (2003) *Chemicals in Products – Safeguarding the Environment and Human Health*. Available at <http://www.rcep.org.uk/chemicals>. See Chapter 6. See also Pollution Probe and Canadian Environmental law Association, *Toxic Substances – Focus on Children*.

experience of lead in gas, where for 60 years, industry argued that the cost of removing lead was too high and that impacts on child brain development were questionable. Similar issues continue to be alive today, with industry and environmentalists arguing over the costs of dealing with mercury and polybrominated diphenyl ethers (PBDEs — flame retardants similar to PCBs used extensively in furniture, fabrics, and plastics and found in mothers milk). While weighing risks and prioritizing risks may often be inevitable, basing regulation on the goal of safety and environmental protection may ultimately lead to decisions that are more timely and reduce costs of inaction.

WEST COAST'S RECOMMENDATION 7:

The EACSR should review literature critiquing risk assessment/risk management and clarify that the intent of their Recommendation 12 is not to support a risk assessment process that has proven to be cumbersome and ineffective. The EACSR should affirm environmental protection and public safety as the goal of regulation, with risk management frameworks used simply as methods for prioritizing most urgent issues.

INCREASING THE PROFILE AND USE OF ECONOMIC INSTRUMENTS

The EACSR recommends expanding the appropriate use of economic instruments in Canada, including examination of ecological fiscal reform and tax shifting and use of pollution taxes. West Coast strongly supports the recommendations of the committee in this regard. The discussion of EACSR should however note some of the problems that have plagued use of economic instruments in Canada and limitations of economic instruments.

First, implementation of economic instruments that are efficient, effective and administratively workable has tended to be stymied by political resistance. The design of an emissions trading system for greenhouse gases has been politically driven, being largely designed to minimize impact on Canada's largest emitters. The result is a emission trading model that National Roundtable's expert group on emissions trading identified as being most administratively cumbersome, least economically efficient, and least environmentally effective.⁶ Similarly, BC's experience with waste discharge fees (the *Waste Management Permit Fees Regulation*) has been that permit fees are likely too low to significantly impact behaviour. (The rate on nitrogen oxides is approximately one thousandth of the rate under the Swedish revenue neutral program.)

Second, there may be practical implementation barriers to designs of economic instruments which theoretically allow for the greatest flexibility (and thus cost savings). Economic instruments are best applied in situations where emissions/emission reductions can be measured with certainty. For instance, British Columbia's volume base pollution permit fee does not provide an incentive for reductions in day-to-day emissions (as opposed to maximum permitted levels) because few emitters have necessary emissions monitoring.

Similarly, West Coast was a partner in the Greenhouse Gas Emission Reduction Trading Pilot project. Our experience led us to be deeply sceptical of emissions reduction trading programs where reductions were measured from counterfactual baselines. While reductions could be expressed with misleading precision, they were often measured from baselines that were

⁶ National Roundtable on the Environment and the Economy, *Canada's Options for a Domestic Greenhouse Gas Emissions Trading Program*, (Ottawa: NRTEE/Renouf Publishing, 1999).



“castles in the air”, elaborate scenarios that sometimes had a questionable connection to what would have otherwise occurred.

WEST COAST’S RECOMMENDATION 8:

The EACSR should revise the discussion at pages 42 to 43, noting that effective implementation of economic instruments in Canada has been stymied by lack of political will to implement effective programs, and noting that there may be practical implementation barriers related to monitoring and measurement that may limit the choice of or applicability of economic instruments.

CONSULTATION — FROM POSITIONAL GAME PLAYING TO EFFECTIVE SOLUTION FINDING

West Coast agrees with the EACSR’s recommendations in regard to consultation, but suggests that the discussion would benefit from more analysis of the current problems with consultation. First, often stakeholders approach consultation in an adversarial manner, being less than honest with other parties and looking to win, not solve problems. This must inform governments approach; government cannot be naïve to the games being played by stakeholders and must be assertive in moving toward a more collaborative approach. Second, there is frustration with consultation processes because the rationale for rejecting proposals is never made clear. Third, there is frustration with when multistakeholder consultation occurs but stakeholders subsequently negotiate with government/lobby in closed-door processes. West Coast is aware of one provincial multistakeholder process where a parallel secret industry government process occurred behind close doors.

WEST COAST’S RECOMMENDATION 9:

The EACSR recommendations and discussion regarding consultation should be expanded to include references to the problems with game playing and lack of honest openness that bedevil current consultations.

FIRST NATIONS ECONOMIC DEVELOPMENT — BALANCING DEVELOPMENT WITH ABORIGINAL RIGHTS

While West Coast recognizes that promoting opportunities for economic development in aboriginal communities and on reserves, this goal cannot be considered in isolation from the myriad of other issues facing First Nations and aboriginal communities in Canada. Any consideration of First Nations and aboriginal issues must be considered in the context of section 35(1) of the Constitution, which states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” These rights have been confirmed and interpreted by Canadian Courts, and rulings for landmark cases regarding the extent of the government’s duty to consult and accommodate First Nations aboriginal rights are currently expected to be handed down from the Supreme Court of Canada in Fall 2004 (see *Haida Nation v. B.C. and Weyerhaeuser* (2002) 99 B.C.L.R. (3d) 209 (C.A.); *Haida Nation v. B.C. and Weyerhaeuser* (2002) 5 B.C.L.R. (4th) 33 (C.A.); *Taku River Tlingit First Nation v. Ringstad et al.* (2002) B.C.L.R. (3d) 16 (C.A.)).

In our view, any steps to modernize regulatory regimes for First Nations communities or reducing the regulatory and administrative burden must first ensure that individual First Nations have an ability to determine how it is that they would like to see their lands and

resources utilized. We have found in our work with First Nations that “full economic growth” is often at odds with traditional land uses, and with the exercise of aboriginal and treaty rights. The government’s obligation to recognize aboriginal and treaty rights implies that efforts to promote economic development must be balanced with a corresponding obligation to ensure meaningful opportunities for First Nations to exercise these constitutionally guaranteed rights.

WEST COAST’s RECOMMENDATION 10:

The EACSR should reframe its First Nations economic development section to include an express reference to the constitutional recognition of First Nations aboriginal and treaty rights. This recognition should include a recognition that in some cases, economic development on First Nations and aboriginal lands and territories may need to be balanced with individual needs to exercise aboriginal and treaty rights, and that the efforts to maintain this balance should be part of any regulatory regime for First Nations.

ENVIRONMENTAL ASSESSMENT — MAKING THE MOST OF A PLANNING TOOL

West Coast was pleased to participate in the 5-year review of the *Canadian Environmental Assessment Act*, and welcomes the changes that will ensure greater federal coordination, participant funding for comprehensive studies, and regional environmental effects assessments. We also agree that there are a number of further adjustments that would be desirable to improve and strengthen the federal environmental assessment process, and are particularly supportive of the Committee’s recommendations 16, 21, and 22.

While the environmental assessment process is often perceived of as complex, it should be kept in mind that many of the projects and activities for which environmental assessments are required are complex themselves, often with the potential for multiple impacts on air, water, lands and/or wildlife. Planning for complex economic activity in a manner that does not adversely impact environmental quality or sustainability may require more process than a proponent would ideally envision. Effective smart regulation must balance a desire for process efficiency while ensuring that environmental quality standards are not diminished.

WEST COAST’s RECOMMENDATION 11:

The EACSR should include a desired result pertaining to environmental protection and maintaining environmental quality to its list of desired results in section 1.4.2. Key process characteristics must also recognize the purpose of the act to promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy.

We are somewhat confused by the references to substitution in the section around Proposed Recommendation 18. Since the context for this section is that environmental assessment is a planning tool, not a project approval process, we believe that any changes that would allow “substitution” where an environmental assessment by a review panel and other project approval processes are both required, would obviate the distinction between an environmental assessment and a project approval process. Further, where substitution is contemplated, we have concerns about the loss of independence of a review panel that would occur should another board, such as the National Energy Board occur.



WEST COAST's RECOMMENDATION 12:

The EACSR should clarify that substitution would only be envisioned where another board would be conducting a hearing with respect to a parallel planning process (such as a provincial environmental assessment process).

West Coast agrees that the need for post-environmental assessment monitoring is important, and is pleased that the recent amendments to CEAA provide for follow up programs. Given that environmental assessment is a planning exercise, and not a project approval exercise, we have concerns about framing a recommendation for monitoring in a "results-based" context, as being potentially too narrow. It may well be that the effects of a project could result in unanticipated results, that cannot be identified at the outset in a results-based approach. In our experience, results-based often means that anticipated results be identified in advance, and then monitored for. We are concerned that a results-based approach may be too narrow, and not allow for the identification of unintended, or unforeseen results. Further, a monitoring process can only be as strong and as effective as the resources that are put into ensuring that a meaningful monitoring program is implemented. If there is a shift toward a single agency, this agency would be well positioned to conduct monitoring programs.

WEST COAST's RECOMMENDATION 13:

References to results-based approaches be deleted from EACSR Proposed Recommendation 20 regarding monitoring and evaluation. Further, recognition of the importance of providing appropriate resources to ensure implementation should be added to this recommendation.

With respect to risk management, West Coast is of the view that the recent review of the Exclusion List Regulations addresses any issues in this regard, and that a review of the Comprehensive Study List is unwarranted. The Committee recognizes that the recent review, and the new use of class screening reports is already expected to reduce the number of environmental assessments by one third.

One of the express changes in the 2003 amendments is to section 4(a), the purpose section: "that projects are considered in a careful *and precautionary manner* before federal authorities take action in connection with them." Reviewing the Comprehensive Study List with a view to modifying the list or altering thresholds could diminish the ability to consider unique site-specific conditions that could affect the local environment and ensure that projects are considered in a precautionary manner.

Currently, over 99% of projects that undergo an environmental assessment receive an approval, indicating that the project is not expected to cause any significant adverse effects that cannot be justified. A review of the Comprehensive Study List along the lines proposed could result in future projects being removed from the list on the basis that previous assessments concluded that there were no adverse environmental effects, yet these projects were designated on the list in the first place because of this potential for adverse effects. If CEAA is to be able to ensure sustainable development, and ensure that projects are considered in a precautionary manner, then the ability to conduct a comprehensive study for these listed projects must remain intact unless there is compelling evidence to the contrary. The conclusion of a prior comprehensive study on a similar project would not be adequate. The work of the Regulatory Advisory Committee on Offshore Oil and Gas with regard to the inclusion of exploratory wells on the Comprehensive Study List provides some insight into the complexity of these considerations (see also West Coast's Recommendation 16).

WEST COAST's RECOMMENDATION 14:

The EACSR should remove Proposed Recommendation 23 from its report.

OFFSHORE OIL AND GAS — RESPECTING MULTISTAKEHOLDER UNDERTAKINGS

West Coast is acutely aware of the increased interest in offshore oil and gas development in Canada. There are many issues to consider in relation to increases in this activity, including the potential for spills, risks to the marine environment, and the extent to which this activity will increase Canada's greenhouse gas emissions and influence Canada's ability to meet its commitments under the *Kyoto Protocol*.

We are seeing an increasing emphasis on results-based, or performance-based regulation, and in many respects, we feel that this approach to regulation is not appropriate for fragile and complex environments such as found in Canada's marine offshore. First, performance-based approaches to regulation are not precautionary. Problems with a performance-based regime will not come to light until there has been some failure in the system – we won't know if the regulations have met their goal unless and until we have evaluated the result, and if environmental damage is done, it may be too late to remedy it. Second, performance-based approaches will not guarantee against irreparable harm. As noted above, problems may not be identified until the damage is done, at which point it is often too late.

For example, should a spill occur in the marine environment, the damage from hydrocarbons can travel hundreds of kilometres or more, and, as experience with the Exxon Valdez spill in 1989 has proven, the deleterious effects of a hydrocarbon spill can still be found in the coastal marine environment in Prince William Sound today. Remedying such damage will be extremely difficult, if not impossible, to rectify. This is certainly one area where a more prescriptive approach to regulation is warranted.

WEST COAST's RECOMMENDATION 15:

The EACSR should remove Proposed Recommendation 32 from its report.

With respect to Proposed Recommendation 33, which considers modifying the rationale for requiring comprehensive study assessments of exploratory wells, West Coast would like to emphasize that this issue has been the primary discussion point of a subcommittee of the Federal Environment Minister's Regulatory Advisory Committee to CEAA since 2002, and as such, the EACSR should refrain from making recommendations on this issue as it is being addressed through a detailed review at the subcommittee level.

WEST COAST's RECOMMENDATION 16:

The EACSR should remove Proposed Recommendation 33 from its report, and defer to the work of the Regulatory Advisory Committee Subcommittee on Offshore Oil and Gas that has been expressly examining this issue in detail for well over a year.