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Mouvement
Au courant

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September 10, 2010

Dear Mme. Génier,

Re: Proposed “Establishing Timelines for Comprehensive Study Regulations” – Canada Gazette, Part I: Notices and Proposed Regulations, August 14, 2010

We have reviewed the Proposed Regulatory Text and Regulatory Impact Analysis Statement for the draft “Establishing Timelines for Comprehensive Study Regulations”, published August 14, 2010, in the Canada Gazette, Part I: Notices and Proposed Regulations, Vol. 114, No. 33.

Our eight organizations regard environmental assessment as a fundamental legal tool for ensuring that environmental impacts are considered in the planning and decision-making process. In 2003, Parliament amended the *Canadian Environmental*

Assessment Act (the “*Act*”) to require a comprehensive review of the *Act*’s provisions and operation *by a Parliamentary committee* (not by *the Minister* as was required for the previous review) in 2010. This review provides an excellent opportunity to develop legislative proposals to reform the *Act* to ensure ongoing effectiveness in addressing priorities such as greenhouse gas reduction. We are concerned that introduction of these regulations, so soon before this review is expected to take place, circumvents and hampers the effectiveness of the seven-year review. The goals of improving the environmental assessment process would be better addressed comprehensively in a thorough review of the effectiveness of the *Act* during the seven-year review process, than they would be in these regulations which seek to address a problem piecemeal without the broader context. We are also concerned that these fundamental changes are being introduced by way of regulation; if they are to be proposed by the government at all, they ought properly to be laid before Parliament as potential amendments to the *Act* itself. For this reason, we suggest that these changes be postponed and that they be brought into the Seven-Year Review for consideration.

We take this opportunity, in spite of our suggestion above, to raise a number of specific questions and concerns with the proposed regulations:

- Section 5 of the proposed regulations provides that if a comprehensive study is conducted, the Agency must publish a notice under s. 22 of CEAA (which provides that the public may comment on the completed comprehensive study report) within 365 days. The apparent intention of the proposed provision is apparently to require that the time between announcing that a comprehensive study will be required and the completion of the comprehensive study report will not exceed one year. Such a time limit is arbitrary, and does not appear to consider the potential variations in the time required to review and provide a decision on the completed comprehensive study report. Introducing such arbitrary limits is not the right way to conduct comprehensive assessments of the environmental and social effects of very complex projects, an exercise that is naturally subject to a degree of variation according to the complexity, nature of, and interests involved in different projects.
- Section 6 of the proposed regulations provides that the Agency must include an annual report on the implementation of these Regulations – what will likely amount to a performance standard report on the speed of comprehensive studies. We are concerned that CEAA, which is already under-resourced, will be challenged in its new responsibility to conduct comprehensive studies across a diverse array of projects and the time limitation will only serve to compromise the quality of assessments. Moreover, while accountability is important, we are

concerned that this reporting requirement may cause personnel to privilege speed over quality of assessment, which must be the Agency's primary concern.

- The imposed 365-day time constraint has the potential to seriously erode the time available for effective public consultation. Time spent establishing an appropriate terms of reference – during which the 365 day time limit runs – will reduce the time available for public consultation. While the government may endeavour to prepare terms of reference within the 90 day period, such that none of the 365 day period is required for this purpose, the regulation does not require it. Moreover, on a complex project and especially those where multiple Indigenous groups may be involved, there may be reasons why public and Aboriginal consultation should properly take longer than the time limit will allow – even where terms of reference are produced quickly. An important aspect of public consultation is ensuring that the consultation occurs at a suitable time. If Agency officials exercising their discretion over the timing of consultation must prioritize completion within a specific 365 day period, there is less flexibility to delay public consultation until, for example, after summer or winter holidays, time periods during which public turn-out is likely to be lower than it would otherwise be. Further, there is an increased likelihood that communications delays in the process of Aboriginal consultation could result in inadequate consultation. Thus, the 365 day limit presents a significant concern, and the regulation does not provide for an extension or suspension of the time limit in order to ensure that there has been sufficient consultation (although it provides for such suspensions in other circumstances).
- We are concerned with s. 5(2)(a) of the proposed regulation which indicates that the 365-day period is to be suspended “while the proponent collects any information necessary to complete the requirements of the terms of reference, unless the Agency has sufficient information allowing it to continue the comprehensive study during this period.” We acknowledge that there might be circumstances under which the Agency had virtually all of the information needed to carry on, up to a certain point, with its comprehensive study while certain information requirements on the proponent under the terms of reference had yet to be satisfied. However, as long as the proponent has not provided all of the information required under the terms of reference, the ability of the public and Indigenous groups to properly review and comment on the information provided, and to identify deficiencies in the information (both in terms of substance, and in terms of missing information) is likely to be hampered. For this reason, the 365 day time period should not be running as long as the proponent has not fulfilled its requirements, since it also limits the time for comment and consultation based on that information. In addition, given the comprehensive

nature of the study, we question the wisdom of going ahead while the “comprehensive” array of information is not yet complete. This could result in erroneous conclusions forming in the study process that would have been avoided had a full picture been available. We further question the ability of Agency officials to properly assess whether or not they have “sufficient information” to continue the study. This is a wide discretion, added on to the significant discretion already available to officials in determining the terms of reference. Taken together with the restrictive 365 day timeline and perhaps inappropriately prioritized desire to meet that timeline due to the new reporting that is being introduced, we are concerned that this will lead to decisions being taken about the “sufficiency” of information that promote haste at the expense of thoroughness and rigour in conducting the study.

- The recently added s. 11.01(1) provides that Agency will conduct comprehensive studies of certain projects and will exercise the powers and perform the duties of the responsible authority in relation to those projects. Section 4 of these proposed regulations states that the Agency will provide the proponent with the terms of reference for those studies. The Agency, which by its nature lacks subject matter expertise in many of the domains relevant to an environmental assessment, should be required to consult with other expert agencies within the government when making scoping decisions during the 90-day period, and determining the terms of reference.
- How will the timelines imposed by these regulations affect the involvement of the Major Projects Management Office in comprehensive study reviews?

We strongly believe that the upcoming seven-year review is the best possible forum to discuss ways to improve the *Canadian Environmental Assessment Act*. We are frankly puzzled by the desire evinced by the government to undertake substantive and significant changes to the *Act* itself, and the regulations, prior to the root-and-branch review of the *Act* that Parliament has legally required. Moreover, we are concerned that these fundamental changes to the conduct of comprehensive studies are being made through regulation, rather than through an amendment to the statute. This is properly a matter for Parliament to consider, and these changes should be submitted to that review for consideration. We look forward to the opportunity to participate in that review.

Should the government not postpone these regulations as we have suggested, we look forward to its answer to our concerns above.

Sincerely,



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