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***Memorandum
Regarding the Five-Year Review of the Canadian
Environmental Assessment Act (CEAA)***

***Submitted to the
Canadian Environmental Assessment Agency***

by MiningWatch Canada

31 March, 2000

Summary:

This paper makes a series of recommendations regarding improvements to the Canadian Environmental Assessment Act (CEAA) and its implementation, based on MiningWatch Canada's analysis. The recommendations are aimed at strengthening the application of environmental assessment (EA) in Canada, increasing public accountability, and improving the consistency of EA practice. Reference is made to the Discussion Paper distributed by the Canadian Environmental Assessment Agency ("the Agency"), though in some cases our proposals go beyond the options laid out in that document.

Key recommendations include:

- Mandate the use of CEAA for assessment of federal policies and programs, to turn the current Cabinet Directive into a useful and accessible public policy tool by applying the public involvement features of CEAA
- Allow the use of CEAA for regional and strategic EA, as well as the integration of REA/SEA into project assessments to provide the necessary context or "bigger picture"
- Set out information or filing requirements for common regulatory ("Law List") triggers so as to allow them to be identified earlier in the planning process
- Require public notification of projects at the filing stage, and provide mechanisms for public involvement in scoping of major projects
- Disposition of projects (assessment/no assessment, scoping) must be tracked and the information publicly available
- Mandate the Canadian Environmental Assessment Agency ("the Agency") to monitor application and compliance with CEAA across federal departments
- Exclusion List and Class Screenings must be revisited to make them easier and more efficient for regulators to use
- Improve training for "Responsible Authorities" (RAs)
- Ensure accountability and transparency in the application of assessment decisions through a compliance-monitoring program administered by the Agency and mandated under the Act
- Make consideration of need for a follow-up program mandatory
- Make federal agencies, boards and Crown Corporations subject to CEAA by reversing current exemptions, i.e. allow regulations to vary/exclude CEAA provisions
- Provide adequate resources for federal agencies responsible for implementing EA, to allow them to properly discharge their obligations
- Explicitly recognise aboriginal peoples' Constitutionally protected rights on traditional territories and Crown land
- Provide greater flexibility for the use of traditional knowledge in the EA process
- Modify the "land trigger" to include all projects on federal land, including subsequent projects on leased land but not limited to leased land.
- Explicitly recognise aboriginal peoples' Constitutionally protected rights on traditional territories and Crown land as per Delgamuukw decision.
- Make the Federal Environmental Assessment Index (FEAI) functional

- Participant funding must be provided wherever public participation is provided for
- Provide opportunities for public participation in comprehensive studies, class screenings, and follow-up and monitoring programs
- CEAA must apply to projects outside Canada
- Mechanisms must be identified to allow appropriate public notification and participation

We hope these recommendations will assist in the five-year review process, and help in the amendment of the Act and its attendant regulations and administrative guidelines and procedures.

Introduction:

Environmental assessment (EA) is a key element in any comprehensive view of environmental protection and sustainable development. It should complement other planning and environmental protection measures, allowing proposed development activities to be assessed according to their potential environmental and socio-economic effects and providing the opportunity for inappropriate development to be reconsidered, re-thought, or shelved. The current federal EA regime (CEAA) is flawed, but valuable. We consider the five-year review of CEAA to be an important opportunity to make much-needed adjustments in the Act and its attendant regulations and administration to make them more useful in achieving sustainable development.

Our recommendations are for the most part general in nature; we leave the technical drafting of legislation to the legislators, although we have some specific recommendations regarding whether legislative, regulatory, or administrative means are most appropriate to implement the necessary changes. To allow the reader to make the correspondence between this document and the Agency's Discussion Paper, we will generally follow the organisation of the Discussion Paper. It should be noted that there are many issues that cut across the categories set out in that document. We will identify these linkages where they arise in order to give them the appropriate emphasis.

Efficiency ("Making the Process More Predictable, Consistent and Timely")

Key issues in this area include making the application of the Act more consistent, including identifying triggers earlier in the planning process, and reducing the need for legal action to ensure that the Act is applied properly. As it stands, projects are often not identified as requiring assessment until they are into the final design stage, various federal departments seem to be applying the Act in different ways, and many federal employees seem to be unaware of important aspects of the Act and its regulations.

The nature of the Act also impedes its use as a planning tool, as it sets out a project-driven process, and the definition of "project" as excluding policies, plans, and programs — unless brought in as "physical activities" under the Exclusion List. Thus regional planning or EA

processes, and policy-level assessments are neither mandated nor linked to (in the event they are being carried out anyway). The ability to assess cumulative impacts is therefore severely disadvantaged.

We see the recognition of Strategic EA (SEA) and Regional EA (REA) as central to any serious consideration of EA as a planning tool, and the Act as a mechanism for sustainable development. The rôle of the Agency as “guardian of EA” must be strengthened to provide for mandatory transparency measures and improved decision-making throughout the federal “family.”

Recommendations:

1. Mandate the use of CEAA for assessment of federal policies and programs, to turn the current Cabinet Directive into a useful and accessible public policy tool by applying the public involvement features of CEAA
2. Allow the use of CEAA for regional and strategic EA, as well as the integration of REA/SEA into project assessments to provide the necessary context or “bigger picture”
3. Set out information or filing requirements for common regulatory (“Law List”) triggers so as to allow them to be identified earlier in the planning process
4. Require public notification of projects at the filing stage, and provide mechanisms for public involvement in scoping of major projects
5. Disposition of projects (assessment/no assessment, scoping) must be tracked and the information publicly available
6. Mandate the Canadian Environmental Assessment Agency (“the Agency”) to monitor application and compliance with CEAA across federal departments
7. Exclusion List and Class Screenings must be revisited to make them easier and more efficient for regulators to use
8. Improve training for “Responsible Authorities” (RAs)

Quality (“Improving the Quality of Environmental Assessments”)

The EA process suffers from a lack of credibility with the public, partially because of its uneven application (excluding Crown Corporations, different interpretations by different departments or different personnel in the same department) but also on account of the discretion exercised throughout the process with little transparency or accountability. At the screening level, the reasons for decisions or determinations are rarely made public, and even at the panel review level, the panels’ recommendations are subject to political decisions. A variety of measures are needed to improve this situation.

Recommendations:

1. Ensure accountability and transparency in the application of assessment decisions through a compliance-monitoring program administered by the Agency and mandated under the Act

2. Make consideration of need for a follow-up program mandatory, and tie follow-up results to monitoring program to identify opportunities to improve mitigation and monitoring measures
3. Make federal agencies, boards and Crown Corporations subject to CEAA by reversing current exemptions, i.e. allow regulations to vary/exclude CEAA provisions (to provide, for example, appropriate consideration of competitive status of Crown Corporations where this may be relevant)
4. Provide adequate resources for federal agencies responsible for implementing EA, to allow them to properly discharge their obligations
5. Explicitly recognise aboriginal peoples' Constitutionally protected rights on traditional territories and Crown land
6. Provide greater flexibility for the use of traditional knowledge in the EA process
7. Modify the "land trigger" to include all projects on federal land, including subsequent projects on leased land but not limited to leased land.
8. Explicitly recognise aboriginal peoples' Constitutionally protected rights on traditional territories and Crown land as per Delgamuukw decision.

Openness ("Strengthening Opportunities for Public Participation")

It is axiomatic that effective public participation is necessary for good decision-making, to ensure the social acceptability of a plan or project, but also to ensure the best possible standard of scrutiny is adhered to with respect to ecological integrity and protecting existing and future economic and social realities. Access to accurate and up-to-date information is crucial, but so is the capacity to respond comprehensively and thoroughly when appropriate. To this end, we recommend opening up several areas of the process to public participation, with participant funding wherever the public rôle is more than cursory. This could include the early notification and scoping of assessments (see recommendations 4 & 5 under *Efficiency*), various stages of the comprehensive study process, the establishment and periodic review of class screenings, and projects outside Canada (see next section).

Recommendations:

1. Make the Federal Environmental Assessment Index (FEAI) functional
2. Participant funding must be provided wherever public participation is provided for
3. Provide for public participation in comprehensive studies, in the pre-scoping, scoping, report preparation, and final decision (comment on Comprehensive Study Report) phases
4. Provide for public participation in class screenings
5. Provide for public participation in follow-up and monitoring programs

Projects Outside Canada

It is bizarre that Canada has not acted to bring projects outside Canada, carried out with federal funds, under the purview of CEAA. One immediate measure to rectify this would be the inclusion of Crown Corporations, with the appropriate variances contained in regulation.

(see recommendation 3 in the *Quality* section, above.) This would have the effect of providing some motivation to develop such regulations within a specified time frame if there is a real (as opposed to rhetorical) question of competitive advantage or corporate secrecy. Beyond this, it is clear that the principles of CEAA need to be applied in the international context with some sensitivity to local realities, with the proviso that (a) transparency towards the Canadian public is not compromised, and (b) under some circumstances, the refusal of host countries to release information or permit public consultation may comprise adequate reason to cancel a project. It is unbecoming a country of Canada's reputation to get involved in "donor competition" simply to ensure that Canadian companies benefit from such projects. Requirements for public notice and participation (see above) must be maintained to the greatest extent practicable within Canada and in the recipient country.

Recommendations:

1. CEAA must apply to projects outside Canada
2. A mechanism must be identified to allow appropriate public notification and participation without violating either the proposed CEAA requirements or the Official Languages Act and without imposing undue cost on the RAs or proponents, for example through off-site links from the RAs or FEAI to information in the language of the recipient country and the official language used by the RA's project staff.

Conclusion:

This is an important opportunity to build on a flawed but useful piece of legislation, and the revisions and improvements that are to be made to CEAA and its administration must respect and build upon the experience and insight of the public, Aboriginal organisations, non-governmental organisations, interested academics, federal departmental personnel, and last but not least, Agency staff and Panel members who have struggled with the implementation of the existing Act. Canada — the land and the people — deserve a strong and fully-functional environmental assessment process.