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BRIEFING NOTE:

Weakening Canada's Environmental Protection Laws¹

1. INTRODUCTION: LEGAL PROTECTIONS FOR CANADA'S ENVIRONMENT WILL SOON BE LOST, UNLESS WE TAKE SWIFT ACTION.

A major policy shift is in the works federally and there is reason to be alarmed: new regulatory changes are planned that will put the goals and practices of sustainable development into peril. By removing environmental protections in the name of short-term economic recovery, we are placing Canada at risk of long-term economic and health impacts.

Just as disturbing, the federal government is developing these radical legal and policy changes extremely quickly and behind closed doors. Even the Minister's own Regulatory Advisory Committee² (RAC) which has been meeting twice per year since the inception of the *Canadian Environmental Assessment Act* some 14 years ago, has had no input into what is being developed by government. A RAC meeting that was supposed to discuss the government's proposal for changes was cancelled in February without explanation and RAC members have no idea whether RAC will be consulted or not.

It is up to Canadians to speak up and to ensure that what we value is not taken away. *Canadians deserve a transparent, careful policy discussion of this important sustainability issue.*

We need a public discourse on strategies for advancing *both* economic development and environmental and social sustainability. The idea that in difficult economic times we "cannot afford" processes that will protect the environment – and should try to eliminate them - is an idea predicated on a false dichotomy. *History has proven that a healthy environment and healthy economy go hand in hand.* We must not abandon our commitment to sustainable development. If we do, we risk not just the Canada we love, but our prosperity as well.

2. FEDERAL ENVIRONMENTAL ASSESSMENT PROVIDES CRITICAL INFORMATION, AND SOMETIMES THE ONLY ASSESSMENT REVIEW, ON PROJECT PROPOSALS IN CANADA. BOTH THE ENVIRONMENT AND OUR ECONOMY NEED A STRONG FEDERAL PRESENCE.

In Canada, we have instituted federal environmental assessment (EA) legislation to protect the environment from harmful development projects. The *Canadian Environmental Assessment Act*

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² The Regulatory Advisory Committee to the Minister on Environmental Assessment is a multi-stakeholder committee established to provide advice to the Minister on issues of environmental assessment law and practice. It has been meeting regularly since at least 1995.

(CEAA) establishes an EA process that is designed to ensure projects³ are scrutinized before being permitted to proceed to the regulatory approval stage. Strong federal EA alerts project proponents and regulators to the potential environmental, social, economic and cultural impacts. It gives parties the information needed to change project parameters - thereby avoiding or mitigating impacts and ensuring sustainability - before irreversible decisions are made.

Put simply, EA protects Canadian interests by ensuring projects receive precautionary scientific scrutiny, and by giving the public opportunities to provide decision-makers with input on development proposals. EA practice is consistent with the value Canadians place on sustainable development. Canadians do not support development at any cost.

Under the Canadian Constitution, regulatory decision-making power is divided between the federal and provincial governments. While development activity occurs within one of the provinces or territories, some decisions to be made are solely federal.⁴ In making such decisions, it is critical for federal regulators to have the information they need to be informed about potential negative effects, and to be aware of alternative means of carrying out the project.

Similarly, if the federal government removes its protections for these areas of federal jurisdiction, Canadians should know that provincial governments do not possess the jurisdiction to themselves directly pass laws to re-institute protections which have been removed.⁵ This makes a public and First Nations consultation and accommodation on any proposed changes to EA legislation all the more critical.⁶

While it may come as a surprise, the federal government sometimes carries out the only EA on environmentally-significant projects. For example, in BC, hydroelectric projects are not reviewable under provincial EA legislation unless they have a capacity of at least 50MW. Similarly, controversial extensive gravel extraction projects of 100,000+ cubic metres are being undertaken on the Fraser River without any provincial EA. Because fish habitat is being impacted, however, a federal *Fisheries Act* authorization is required and so federal EA reviews have been triggered. For these projects, the only EA safeguard is federal.

³ As well as certain activities: see the Inclusion List Regulation under CEAA.

⁴ For example, (amongst other things) fisheries, inter-provincial pipelines, and navigation and shipping are matters of exclusive federal jurisdiction: see sections 91 and 92 of the Constitution Act, 1867.

⁵ For a discussion of this issue, see Arlene Kwasniak, "Reviewing the Canadian Environmental Assessment Act: A Citizen's Backgrounder" (February 2009), at p. 5

⁶ *Ibid.*

3. THE GOVERNMENT'S AGENDA: TO GET OUT OF THE EA BUSINESS

The federal government appears intent on drastically reducing EA protections

On February 14, 2009, John Baird, federal Minister of Transport, Infrastructure and Communities, was quoted in the Canadian Press as stating:

"We are going to be coming in the next 14 days with regulatory changes...that should eliminate about 90 per cent of federal [environmental assessments]."

While the exact legal mechanism with which the federal government will virtually eliminate the incidence of federal EA is not yet clear, a leaked internal government document⁷ confirms Minister Baird's statement regarding the government's intended direction to eliminate all but a tiny fraction of environmental assessments. The Budget Speech on January 27, 2009 referred to the possibility of "administrative changes" which would "streamline application of the *Fisheries Act*"⁸ and also noted the government would be pursuing other "regulatory efficiencies" for projects subject to CEAA. A document leaked to the media in January 2009⁹ suggested the government may be considering instituting a \$10 million EA threshold – an arbitrary basis for exempting projects from EA that would have no rational connection to potential environmental effects. In short, the government appears to be considering a variety of strategies for reducing the number and extent of EAs.

An internal government document¹⁰ reveals that there would be no legal guarantee that an EA will be conducted on any project

A government presentation indicates the government intends to eliminate the current system of enforceable, legal "triggers" for conducting an EA. Instead, the entry point for federal EA will be a "project list" system. However, even for projects on the list, an EA will not be guaranteed. Instead, the document suggests that what is contemplated is that projects will first be subject to a *discretionary* decision by a government official as to whether the project will be required to undergo an EA.

Under this system, government officials would be required to make discretionary pre-judgments on the very issue that logically flows only after being informed by the results of an EA - a determination of whether the project is likely to result in significant adverse environmental effects.

At its worst, this system provides no protection at all from political interference with project review.

⁷ A leaked Canadian Environmental Assessment Agency PowerPoint presentation from January 21, 2009 states the government anticipates conducting only 200-300 EAs per year under its new regime. This can be contrasted with more than 4000 per year being conducted currently – meaning an enormous decrease in the scale of environmental oversight in Canada.

⁸ Currently the *Fisheries Act* is a significant "trigger" for an EA to be conducted under CEAA.

⁹ On January 14, 2009, *Le Devoir* newspaper reported that it had seen documents indicating the government was contemplating a regulation that would exempt from CEAA all projects of less than \$10 million.

¹⁰ *Ibid.*

For those few EAs it will retain, the government plans to weaken its scrutiny.

While “what makes good EA” can be a lengthy discussion, it is no secret that when the rules of a game are fundamentally changed, the substance of what happens also changes fundamentally. So it is with EA. Over time, some tests and practices have proven their merit as hallmarks of good EA practice. If you discard these, you lose the beneficial content and outcome of EA.

A leaked government document¹¹ reveals some of the hallmarks of a meaningful EA will be eliminated and replaced by weaker concepts:

- a) It appears the government is planning to retreat from the standard EA practice of considering project purposes as well as alternative means of carrying out the project. The document states that the “project to be assessed will be the development proposal.” This clearly signals there will be no consideration of alternatives or purposes of the project; instead, the project must be assessed as proposed. Consideration of alternatives and purposes has evolved over time to be one of the hallmarks of a good EA process. If the federal government decides to abandon consideration of these factors in its EA process, this will set back Canadian EA practice by decades.
- b) Government appears poised to restrict its view and assessment of project impacts to a notional “federal” environment: government documents intimate that the current test of “no significant adverse environmental effects” will be supplanted by a test of “no significant adverse environmental effects *on areas of federal jurisdiction*” (emphasis added). This change signals a retreat from EA taking a holistic look at the total environmental impacts of a project and planning for all known impacts. With this new direction, if significant impacts are deemed not to be “federal jurisdiction” impacts, it would seem federal approvals will be permitted *regardless* of whether the province has a system in place for avoiding or mitigating negative impacts.
- c) The government document also states that regional or strategic EA¹² may substitute for project EA. While EA experts have been fighting for years to institute regional and strategic EA in Canada, these processes were never meant to become project EA substitutes. Instead, the role of these broader reviews is to complement and set a sustainability context for project EA.
- d) The government document suggests provincial EA will be accepted as a substitute for federal EA.¹³ When one considers that regulatory jurisdiction cannot be delegated, it is hard to imagine how this might be practically and efficiently achieved. Provincial governments cannot fulfill duties for which the federal government will ultimately be responsible in the

¹¹ *Supra* note 7.

¹² Regional EA is a planning and assessment process that considers regional scale impacts and planning. Strategic EA is a planning and assessment process that considers the impacts of programs, plans and policies.

¹³ Both the Budget Speech and the leaked government powerpoint presentation confirm this intention.

event of a failure.¹⁴ In addition, the public must be concerned that the quality, scope and accessibility of EAs varies greatly from province to province.

- e) Government appears ready to accept a *regulatory* decision-making process in the place of an EA planning and assessment process (which is distinct and properly precedes the regulatory decision). The change will impact some large-scale projects of great public concern, including those currently subject to National Energy Board and Canadian Nuclear Safety Commission regulatory approvals.
- f) The government is making decisions about public participation and participant funding in the absence of meaningful public consultation.

4. CAN WE IMPROVE FEDERAL EA? OF COURSE! SHOULD WE THROW IT OUT? NO!

The federal government is developing its plans for EA away from public scrutiny. Legislative amendments to important environmental legislation that will substantially weaken environmental protection, public rights to navigation and EA processes were buried within the omnibus *Budget Implementation Act, 2009*¹⁵ In effect, the government is both limiting and devaluing the public discourse about environmental sustainability and its connection to economic growth.

Some EA issues that have been challenging for government include:

- a) “Late triggering”: In some cases, federal departments have failed to declare in a timely way that a project will be subject to the EA process. Delaying the start of EA until after the project is well into its planning stages undermines the purpose of EA, which is supposed to inform project planning before irreversible decisions are made. Example: “Late triggering” has happened in the context of *Fisheries Act* approvals. As a matter of operational policy, the federal department, Fisheries and Oceans Canada, attempts,¹⁶ through the suggestion of mitigation measures, to shape proponents’ projects so as to try to “avoid the need” for a legal *Fisheries Act* approval, which is a “trigger” for an EA under CEAA. However, in the instances where the department ultimately decides the project cannot avoid a *Fisheries Act* approval, the project may already be well into the planning stages. If instead the need for a *Fisheries Act* approval and the CEAA “trigger” were both declared at project inception,

¹⁴ Arlene Kwasniak, “*Reviewing the Canadian Environmental Assessment Act: A Citizens Background*” (draft, February 2009), at p. 5. See also Arlene Kwasniak, “Harmonization in Environmental Assessment in Canada: The Good, the Bad and the Ugly”, available online at the www.cen-rce.org website.

¹⁵ For an analysis of proposed amendments to the *Navigable Waters Protection Act* (NWPA) that are buried within the *Budget Implementation Act, 2009*, see Will Amos, “Proposed amendments to the Navigable Waters Protection Act and the erosion of public navigation rights on Canadian waterways” (Ottawa: uOttawa-Ecojustice Environmental Law Clinic, 2009). Note the NWPA changes will also mean fewer EAs will be “triggered” under CEAA.

¹⁶ The Department of Fisheries and Oceans Canada’s “no trigger” policy is controversial and its legality has been questioned. See e.g. Arlene Kwasniak, “Slow on the Trigger, The Department of Fisheries and Ocean, the Fisheries Act and the Canadian Environmental Assessment Act,” *Dalhousie Law Journal*, V. 27, No.2 (2004), pp. 349-377 and also see the case of *Cassiar Watch v. Minister of Fisheries and Oceans and Shell Canada Energy*, commenced in 2007 and currently before the Federal Court.

mitigation measures could be planned and assessed under CEAA instead of in advance of, and outside of, the CEAA process. This would avoid late triggering and allow everyone to get on with a transparent assessment of project plans and mitigation measures, without delay.

- b) “Narrow or inconsistent scoping”: In some cases, federal departments have scoped projects either narrowly or inconsistently, when compared to other similar projects, and this has created uncertainty in both proponent and stakeholder understanding of how a project will be assessed. Project assessment that considers only components of a project rather than the project in its entirety also lacks credibility, as such scoping excludes significant project components and their effects. Example: An example of narrow scoping would be the “down-scoping” of an “oil sands” project application so that the “project” scoped for the purposes of the EA is reduced to only one or a few component(s) of the overall project, e.g. reduced to a “stream destruction” (harm to fish habitat) project.¹⁷ An example of inconsistent scoping is when similar projects are scoped in different ways. Such scoping problems, as well as late triggering, result from a lack of political leadership or appropriate regulations to ensure consistent action by departments.
- c) “Inconsistent tracking”: Sometimes two similar-scale projects receive vastly different assessment tracks, or comprehensiveness; e.g., one may receive a screening, and another a panel review. Example: Liquefied natural gas (LNG) projects have been tracked in some cases as screenings and in others as panel reviews. Inconsistent tracking makes it difficult for all parties and the public to know what sort of assessment to expect.
- d) “Cumulative impacts”: EAs in Canada have often given cumulative impacts only cursory treatment. EAs need to more rigorously consider cumulative impacts issues. Example: while a potato processing plant may have impacts which can be mitigated, EA has not adequately protected us against the cumulative impacts which are related to building such a plant – e.g. the plant’s doubling of potato acreage, increases in soil erosion, addition of pesticides into the system and ultimately, fish kills.
- e) “Inadequate follow-up”: this includes a failure to ensure mitigation measures are instituted. We simply have not devoted the resources needed to re-visiting projects to be sure that mitigation measures that were ordered have been put in place, or are working.
- f) EAs rely too heavily on a “minimize harm” paradigm, as opposed to one premised on “advancing sustainable development.” Example: “How can this oil sand project do less harm?” is a very different question from, “Does this oil sands project advance Canada’s sustainable development goals, and how?” However, related to this problem there is a need to have not just strategic EA of policies, plans and programs (e.g. “Does our policy of supporting oil sands development advance Canada’s sustainable development goals?”) but also regional EA (e.g. “What development in this region would be sustainable, and where?”) so that project EA is not burdened (as it is now) with housing the full scope of these broad policy questions.

¹⁷ This kind of down-scoping of an oil sands project occurred in the case of *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* (2006 FCA 129).

With all of these issues, it is important to look at the underlying causes, and the possibility for changes to address these. Solutions can be found without rejecting the system outright.

5. SOLUTIONS: THOUGHTFUL IMPROVEMENTS BACKED BY EXPERIENCE

The federal government should not retreat from conducting EA. Yes, the EA process can be made more effective and efficient. But we do not need to eliminate project EAs to achieve that outcome.

What are the solutions we need to advocate for?

- a) We need an open and transparent review of the Act and potential improvements to federal EA. A Parliamentary Review is already legislated to commence in 2010, and many have been planning for this. A broad review is appropriate for legislation that has such fundamental importance to sustainable development and to Canadians' right to participate.
- b) Government can better coordinate EAs with provincial authorities. Currently the federal government has reached harmonization agreements with only seven provinces and territories; we need these agreements for all jurisdictions.
- c) The federal government needs to make a priority of getting its internal EA house in order, rather than getting rid of that house. Government can address several of the current issue areas by:
 - a. Passing regulations to make the office of federal environmental assessment coordinator¹⁸ more effective;
 - b. Providing clear requirements for departments to be more consistent and timely with decisions such as triggering, scoping and tracking;¹⁹ and/or
 - c. Centralizing the oversight and responsibility for EA into one federal agency, instead of continuing the current system which places responsibility for the EA with the various federal departments ("self-assessment").
- d) Public participation must continue to have access and funding. The value of public participation in environmental decision-making has been internationally recognized.²⁰ Transparency ensures wide scrutiny, learning and improvements as well as the legitimacy of difficult decisions.
- e) For smaller and more "routine" projects, the responsible solution is not to eliminate EAs but rather to pass appropriate regulations such as "Class Screening", "Replacement Class

¹⁸ CEAA, section 12.1

¹⁹ Information gathered under the Agency's Quality Assurance Program can contribute to this improvement.

²⁰ See e.g. Thomas Dietz and Paul C. Stern, Editors, *Panel on Public Participation in Environmental Assessment and Decision-Making* (Washington: National Research Council, 2008) which concludes that when public participation in EA is conducted properly, it improves the quality of the decisions, as well as increases the legitimacy of the decisions in the eyes of those affected by them, thereby increasing the chances of an effective decision implementation.

Screening” and “Model Class Screening” regulations to ensure the EA process for these projects is predictable and consistent. The information and benefit that is yielded from the EA planning process is needed not just for large, expensive projects, but also for many smaller/less expensive projects. Experience has demonstrated that projects do not need to be large or expensive to cause significant adverse environmental effects.

- f) The federal government cannot simply rely on provincial EA to do the federal government’s job. The federal government has its own priorities and information needs to make its regulatory decisions (which cannot be delegated) and in addition, often the province may not even be conducting an EA of the project. In addition, Canadians need to be guaranteed the same access to EA processes across the country, and currently, provincial standards and processes are not the same as federal standards.²¹ To maximize efficiency and effectiveness, EAs should be coordinated, joint federal-provincial processes that meet the needs and priorities of both jurisdictions.
- g) We need regulations that will ensure more effective enforcement of follow-up and mitigation.
- h) We need to more clearly seek out the application of a test that asks, “Does this project advance Canada’s sustainable development goals, and how?” rather than merely trying to reduce harm.
- i) We need to ensure that EA is used as a tool to meet Canada’s international environmental commitments (e.g. the Kyoto Protocol, Biodiversity Convention). As discussed above, instituting legal, enforceable and transparent regional and strategic EA of policies, plans and programs *to complement* project EA would assist in this regard.
- j) The federal government also needs to work collaboratively with First Nations to ensure that clearer procedures are in place to ensure that the Crown meets its legal duties to consult and accommodate First Nations with respect to projects that will potentially impact their constitutionally protected rights.

In short, the current Act provides many of the tools needed for the federal government to perform its important job of EA more effectively and more efficiently. In other cases, regulatory reforms and improvements may be needed to advance goals, e.g. to institute transparent and legally enforceable strategic EA of policies, plans and programs or regional EA. What is clear is that for sustainable development to occur, the answer is not to eliminate EA but rather to strengthen it.

²¹ For example, in some provinces only those citizens who are “directly affected” may provide input to EAs. This is a much smaller group than any member of the public. For a further discussion of this point, see Arlene Kwasniak, *supra*. note 5, at p. 6.