



Mr. James Rajotte, MP  
Committee Chair, Standing Committee on Finance  
c/o Jean-François Pagé, Clerk of the Committee  
fina@parl.gc.ca

May 4, 2010

Dear Mr. Rajotte:

**Re: Bill C-9 An Act to Implement Certain Provisions of the Budget - amendments to the *Canadian Environmental Assessment Act***

We are writing to express our grave concerns about amendments to the *Canadian Environmental Assessment Act* ("CEAA") contained within Bill C-9. We understand that this legislation is currently being considered by the Standing Committee on Finance. Based on our research, training and experience in the field of environmental assessment and environmental decision-making, **we strongly recommend that members of your Committee vote against the clauses in Part 20 of Bill C-9 (ss. 2152-2171).**

We understand that voting against the clauses in Part 20 of Bill C-9 is permitted at this stage of Committee review. The purpose of Bill C-9 is to implement certain provisions of the budget. As the proposed amendments to the CEAA are unrelated to the budget, voting against the clauses in Part 20 will not interfere with the Bill's true purpose or undermine your mandate from the House of Commons. If there are alternative ways to defer consideration of changes to the CEAA to a more appropriate time and forum, we would likely endorse those actions as well.

**The rest of this submission is divided into two parts:** first, a summary of the reasons the Committee should vote against the clauses in Part 20 of Bill C-9 (s. 2152-2171); second, a summary of our qualifications in the area of environmental decision-making.

## Part 1: Reasons to vote against the amendments to the CEAA.

### **Substantive Reasons to vote against ss.2152 to 2171 of Bill C-9.**

The proposed CEAA amendments are controversial. They do not reflect the best available science, law, or policy in the area of environmental decision-making. They do not reflect the wishes or recommendations of an informed public. If the proposed amendments are passed, the fulfillment of the purposes of the CEAA and the protection of our air and water in the future will be in jeopardy.

**The changes create uncertainty on a matter that the Supreme Court of Canada recently clarified.** As you are likely aware, some of the amendments contained in Bill C-9 change aspects of environmental assessment legislation that the Supreme Court of Canada recently clarified. In its January 2010 decision in *MiningWatch Canada v. Canada (Department of Fisheries and Oceans)*,<sup>1</sup> the Supreme Court ruled that the Minister could not interfere with an environmental assessment by narrowing the scope of an assessment or removing certain aspects of a project from the public consultation process. The Court found that a project as proposed cannot be scoped by the Responsible Authority to result in “project-splitting” in order to circumvent additional assessment obligations. At paragraph 40, the Court found that the CEAA assumes that the proponent will represent the entirety of the proposed project in relation to a physical work.

The changes to Bill C-9, particularly s.2155, create such “project-splitting” powers where none existed before. This has two negative consequences:

First, the changes have the potential to result in significant environmental harm. Those who value clean air and water seek legitimate environmental review because it can help ensure that no unnecessary harm is done to the nation’s natural resources. Under the proposed changes to the CEAA, projects could be divided into sections by the Responsible Authority and evaluated piece by piece. Where the overall project would have required a comprehensive study or a panel review, each small piece may only require a screening report. The projects would not change; the only result would be a lower level of expert review and public scrutiny, leaving more potential for environmental impacts and fewer opportunities to make the project better.

Second, the proposed changes would create tremendous uncertainty in the environmental assessment process. Ministerial interference may allow those individuals or corporations

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<sup>1</sup> *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] S.C.J. No. 2.

with political influence to avoid the kind of review and scrutiny that their peers and competitors experience. Corporate interests frequently decry the “burden” of the environmental assessment process. Allowing political interests to determine which businesses face which kind of review could turn the environmental assessment process into a punitive process for those who do not have political allies. This system would provide *less* clarity and *less* certainty: two things sought by major development interests. Failing to appropriately consider all of the related effects of a project could result in companies facing increasing numbers of lawsuits, legal challenges, and community backlash because of unforeseen damages, impacts, and public controversies.

In addition to the negative consequences of “project-splitting”, the changes to the *CEAA* in Bill C-9 would introduce an “escape clause” to the environmental assessment process for projects undergoing the comprehensive study process. These projects, by definition, are *more likely* to result in environmental effects than other projects. The preamble to the *Comprehensive Study List Regulations* [“*CSL*”] states that projects are included on the list because they are likely to have significant adverse environmental effects. There are three levels of review in the federal environmental assessment process: screening, comprehensive study, and panel review. Comprehensive studies are carried out only when a project is of a type named in the *CSL*. Those projects are so-listed because of their potential to result in environmental effects. They are often complicated, large undertakings that require thorough design, review, and consultation. These are precisely the kinds of projects that should *not* be subject to political interference.

For those who, like us, value of the rule of law, the speed with which Parliament is seeking to re-write rules clarified by the Supreme Court is shocking. In a sense, Parliament is refusing to respect the common law, opting instead to rewrite legislation in the name of political expediency. In our view, this is a cynical and un-admirable approach to governance.

### **The changes eliminate an important step in the decision-making process.**

Under the existing *CEAA*, the Minister must decide whether a project that falls into a category on the comprehensive study list should be reviewed through the study process or if it should instead be reviewed more rigorously by a panel. While *CEAA* grants the Minister the discretion to choose, it does require that a choice be made. This decision has been eliminated in the amendments in Bill C-9 (s.2156).

There are generally two reasons why a project would be “bumped up” to mediation or a review panel: when the project is likely to cause significant adverse environmental effects and/or when public concern warrants increased scrutiny. The Minister’s obligation to consider whether these processes would be more appropriate than the comprehensive

study process was both a precaution against environmental effects and an accountability mechanism. Removing this obligation to consider the appropriate level of review essentially devolves responsibility for environmental decisions to un-elected, usually un-named government staff. In our view, this is an inappropriate devolution of powers and cannot possibly fulfill the purposes of the *CEAA*.

**The changes encourage manipulation of the scope of projects - a crucial step.**

To “scope” a project is to enumerate the different parts of a project. All of the buildings, infrastructure, emissions, and so forth that are part of any major development are identified as part of scoping. Determining the scope of a project is the most important part of the environmental assessment process. Do it right, and science and scrutiny will lead you to the most protective way to carry out a project. Do it wrong, and the best science and scrutiny in the world will not lead you to a good decision. If a project is approved, but has been too narrowly scoped, it will have all kinds of unforeseen, unreviewed, and unlicensed impacts on resources, air, water, and communities.

In our experience, scoping is the part of any project that warrants the most public review. This is the only way to ensure that the groundwork has been laid for a legitimate environmental assessment. Unfortunately, Bill C-9 eliminates public consultation requirements that used to ensure accurate, accepted project scopes.

There are three negative consequences of this change. First, substituting a politicized scope for a rational, science-based scope will mean that environmental impacts occur even when a project has been vetted via the environmental assessment process. This renders the process illegitimate and threatens to waste resources invested by proponents in projects that still fail to comply with legal or community expectations.

Second, eliminating or weakening public consultation on scope will mean that valuable community knowledge is never factored into an environmental assessment. There are likely to be environmental impacts unforeseen by government, but fully anticipated by the individuals and communities directly affected by the project. In many cases, when the scope is unsatisfactory to a community, the environmental assessment process is controversial, overly time-consuming, and subject to frequent delays.

Third, the ability to re-scope a project would allow proponents and staff to change the way a project is presented in such a way that it could, for example, never undergo the kind of environmental assessment it is supposed to undergo. This means that projects explicitly listed as being potentially damaging to the environment will never be subjected to the kind of review that Parliament and subsequent regulators intended.

**The changes would permanently exempt many projects from the environmental assessment process.** The only part of the *CEAA* amendments contained in Bill C-9 that have a relation, albeit a loose relation, to “jobs” or “economic growth” are those in s.2153 that exempt certain projects from the environmental assessment process altogether. These exemptions are essentially the legislative equivalent of a regulation passed in 2009 purportedly intended to speed up the delivery of stimulus funds to certain development projects.

That regulation will still be in effect for one more year. It could, if necessary and appropriate, be replaced by a similar regulation. To change the legislation permanently is likely to lead to unintended consequences, both for proponents (i.e., uncertainty) and for the environment.

### **Procedural Reasons to vote against ss. 2152 to 2171 of Bill C-9.**

**A review of the *CEAA* is required later this year.** We recognize that certain interests will wholeheartedly endorse the proposed amendments. We recognize that environmental assessments are regarded by many as “red tape” and a hindrance to progress. With respect, we would urge those who support any weakening of environmental assessment rules to reconsider their position. There is a time and a place for this conversation, and that time and place is during the scheduled Five-Year Review. This year, 2010, triggers the five-year comprehensive review that the *CEAA* requires from the Minister. There is no legitimate reasons for making significant amendments to the legislation now, without a full, transparent discourse on the best way to proceed.

### **Public consultation rights are being eliminated, without notice or consultation.**

The mentality that allows decision-makers to amend the *CEAA* without consulting those who may be directly affected is the mentality that allows decision-makers to review and approve industrial developments without consultation. This approach to decision-making is directly at odds with the kind of consultative, informed, and rational process mandated by the *CEAA*.

### **The changes mark a dramatic transfer of responsibility to the Canadian Environmental Assessment Agency.**

If Bill C-9 is passed in its current form, the Canadian Environmental Assessment Agency will assume responsibility for overseeing most environmental assessments. Whether or not you agree that the Agency should have this role, it is clear that shifting this responsibility from one department to another agency is a significant undertaking. It would seem that there is a more appropriate forum for discussing and debating the potential impacts of this restructuring than in this particular committee, under the heading of this particular bill.

**This committee has been asked to review a policy issue unrelated to its mandate.**

The combination of the *CEAA* amendments with financial matters in Bill C-9 has created an unenviable task for this committee. In the midst of financial issues, the committee must also review nuances of environmental decision-making that have nothing whatsoever to do with economics, jobs, or the economy. With due respect to the members of this committee, there is a more appropriate and more transparent forum for reviewing these matters. Voting against these clauses would allow environmental assessment amendments to be brought up later, in separate legislation or via the mandatory five-year review period. That would, in our view, be a more appropriate use of the committee's expertise and time.

The one issue somewhat related to this committee's mandate - the regulation exempting stimulus projects from environmental assessment exemptions - is still in effect for one more year. Thus, there is no urgency to vote in favour of these amendments immediately.

**Part 2: Our qualifications and experience.**

**Lake Ontario Waterkeeper**

LOW's president and Waterkeeper, Mark Mattson, is an environmental lawyer with nearly two-decades experience. He has acted as counsel for environmental and public interest groups at over fifty hearings, including the Walkerton Inquiry. Mark has also appeared on behalf of clients in front of the International Water Tribunal in Amsterdam, and serves as the Canadian representative to Waterkeeper Alliance's Board of Directors. Mark has been investigator and/or co-counsel on nearly every *Fisheries Act* private prosecution in Canada.

LOW is a charitable organization dedicated to restoring and protecting a "swimmable, drinkable, fishable" watershed for everyone who lives or visits Lake Ontario. Founded in 2001, LOW has participated in numerous federal environmental assessments, including screenings, comprehensive studies, and review panels. We have worked with proponents and government to review projects in a variety of areas, including nuclear waste management, nuclear fuel manufacturing, wind turbine development, bridge construction, contaminated sediments management.

**Ottawa Riverkeeper**

Formed in 2001, Ottawa Riverkeeper is a citizen-based action group that brings people together to protect and promote the ecological health and diversity of the Ottawa River and its tributaries. Ottawa Riverkeeper is a registered Canadian charity and a licensed member of Waterkeeper Alliance, an international advocacy organization, founded by Robert F. Kennedy Jr. For more information, please visit: [www.ottawariverkeeper.ca](http://www.ottawariverkeeper.ca).

### **Petitcodiac Riverkeeper**

Tim Van Hinte is the Petitcodiac Riverkeeper and holds a Master's degree in resource and environmental management from Simon Fraser University. He has both written environmental impact assessments and participated in their public consultation processes, in addition to co-authoring two major reports on the environmental impacts of oil and gas development in Canada.

The mission of Petitcodiac Riverkeeper is to lead in the protection, preservation and promotion of the Petitcodiac River watershed, located in southeastern New Brunswick. As Canada's first chapter of the Waterkeeper Alliance in 1999, Petitcodiac Riverkeeper was an intervenor in the assessment process for the modifications to the Petitcodiac River causeway, one of New Brunswick's most comprehensive environmental assessments ever undertaken.

### **Fraser Riverkeeper**

Fraser Riverkeeper (FRK), located in Vancouver, BC, was founded in 2004 under the leadership of full time Riverkeeper, Doug Chapman. Doug is a revered prosecutor of polluters and has been one of the Canada's most significant environmental fixtures during the last 30 years. Doug began defending criminal cases in 1964 as a lawyer in Ontario. In 1986 he was employed by the Minister of the Attorney General in Ontario and assigned to the Ministry of the Environment as a government environmental prosecutor. In 1993, Doug commenced his association with the Sierra Legal Defense Fund (now Ecojustice), working in Vancouver and in Toronto as an environmental investigator and private prosecutor. He has since directed the gathering of evidence and the preparation of the prosecution briefs in 14 private environmental prosecutions in B.C. and in Ontario.

FRK is a registered Canadian charitable organization committed to protecting the public's right to clean water and a healthy watershed through citizen involvement and community action. FRK participates in the legal processes that are part of Canada's environmental protection system and helps members of the public understand how these systems work. FRK takes on an enforcement and action role in the watershed to more efficiently and effectively evaluate, prevent, and mitigate pollution problems, with the goal of providing long-term solutions through participatory methods.

### **Georgian Baykeeper**

Mary Muter, the Georgian Baykeeper, is a public health nurse with over a decade in water quality assessment experience. She has brought hot spots of toxic blue-green algae to the attention of the government. Mary is a member of the Great Lakes Charter Annex

Advisory Panel and a member of the International Joint Commission's Upper Great Lakes Study Public Interest Advisory Group.

## **Conclusion**

We are unable to present this information to the Committee personally, however we trust that you will consider our written brief. Please feel free to contact us at any time to request more information, clarification, documentation or anything else that would be helpful to you in this matter.

Yours truly,

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