

Submissions on Criteria for Substitution pursuant to Section 43 of the *Canadian Environmental Assessment Act*

Thank you for the opportunity to comment on the draft Criteria for Substitution. We have had an opportunity to review the draft Criteria for Substitution set out in your memo of July 30, 1997, and have the following comments.

We understand that the proposed guidelines have been prepared with the intention of making clear the minimum conditions upon which the Minister would be willing to consider the exercise of her discretion under Section 43 of the *Canadian Environmental Assessment Act*. Those decisions would be made on a case-by-case basis, and the guidelines have not been developed in contemplation of being applied to more than one, or a class of, projects.

In principle we have no objection to providing greater certainty with respect to the factors that will guide the Minister in the exercise of her discretion. However, in our view it should be made explicit that the draft guidelines only establish the threshold requirements for consideration by the Minister of a request for approval under Section 43, and are not intended to represent an exhaustive list of those matters that it may be appropriate for the Minister to consider in any given instance.

Safeguarding the Integrity of the Environmental Assessment Process

In our view, it would also be important for the criteria to include a preamble that would address the overarching constraints that should apply with respect to Section 43 approvals. In our opinion, the most important of these would be that such approvals be granted only when the Minister is satisfied that the proposed process, that would substitute for that of a review panel, will be no less rigorous, participatory, or thorough. In particular a substituted process would have to meet or exceed the conditions of assessment under a review panel in the following key areas:

- the qualifications and competence of those presiding over the process with respect to the anticipated environmental effects of the project;
- the participatory rights of those seeking intervention in the review process, and the fairness of the review process; and,
- the extent and character of the environmental assessment that would be carried out under any substituted review process.

In other words, it is not appropriate in our view for the Minister to consider the substitution of other processes that would in any way derogate from, or represent some diminishment of, the processes of review by a Panel convened by *CEAA*.

Stating the Rationale For Substitution

In light of the established expertise and specialized competence of the Agency, we believe that it should be incumbent on an institution seeking approval under Section 43 to set out the rationale for substitution. In our view, substitution under this provision of the *Act* should be permitted only when there are persuasive reasons for doing so.

Opportunity to Comment on Requests for Substitution

In light of the clear emphasis that Parliament has placed on the importance of public participation in the assessment process, we believe that it is important for the Minister to consider submissions from the public with respect to requests for approval under Section 43. There may be several options for allowing such comment; however, the provision of effective notice and sufficient time for response would be essential. One appropriate option would be for notice of an application under Section 43 to be published in the *Canada Gazette* and for a 60 day period for public comment to follow.

Panel Composition and Appointment

Under Section 33 of *CEAA*, persons nominated to the review panel must have knowledge or experience relevant to the anticipated environmental effects of the project. This provision underscores the importance that Parliament assigned to ensuring that all Panel members be competent to assess the environmental effects of the projects that are subject to review.

In rather sharp contrast to Section 33, the draft criteria contemplates the establishment of a Panel that might have only one member with knowledge or experience relevant to the anticipated environmental effects of the project.

In our view, such an outcome would represent an unjustifiable departure from the clear intent of the *Act* to ensure the highest degree of specialized competence for those presiding over the review process. In our view, all Panel members should have strong environmental qualifications.

While one might argue that it would be sufficient to ensure that a majority of Panel members bring environmental qualifications to their task, even this outcome will in some cases represent too great a compromise of the integrity of the assessment process.

For example, there is nothing in Section 43 which would limit its potential application to projects that may, in both scale and complexity, be every bit as challenging as any to have been subject to a panel review. It is precisely because of the often varied and complex environmental implications of such projects that members have been chosen to equip review panels with the breadth of expertise needed to assess the diversity of project impacts. Therefore to require less, by way of environmental expertise of Panel members in this context, is to risk compromising the capacity the review process to fully assess project impacts.

Finally on this point, we should note a process established in accordance with a Section 43 approval, would likely operate without the same benefit of institutional support by

the Canadian Environmental Assessment Agency. The need for highly qualified Panel members seems even more compelling in this circumstance.

The Substitute Process

Section 16 of the *Act* describes the factors that must be included, *inter alia*, as part of any assessment by a review panel. Pursuant to Section 44 of the *Act* no order may be made under Section 43 unless the Minister is satisfied that

(a) the process to be substituted will include a consideration of the factors required to be considered under subsections 16(1) and (2);

The draft criteria include under heading 5.2 (b) the following proviso:

iii) an opportunity to scope the factors to be assessed;

In our view this provision introduces some ambiguity as to the need to ensure that any substitute assessment address all of the "factors" set out under Section 16(1) and (2) of *CEAA*. This ambiguity could easily be resolved by including in the criteria a clear stipulation these statutory requirements represent the minimum conditions for project review.

Review Process Established under Land Claims Agreement

We understand that your office is in receipt of several detailed responses to the applicability of the draft guidelines in this context. Unfortunately, we are not conversant enough with this area of law to know what jurisdictional or cultural constraints might operate in the context of a land claims agreement. We would be pleased to consider any submissions that First Nations groups have made in response to your request for comments, and respond in a timely manner to them.

Submitted on behalf of West Coast Environmental Law Association.

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