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Commission on Environmental Cooperation
393 St-Jacques Street West
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Montreal (Quebec) H2Y 1N9 *** BY EMAIL AT JPAC@CEC.ORG AND MAIL***

Attn. Joint Public Advisory Committee

To the Commission on Environmental Cooperation:

**Re: Public input on NAAEC successes and failures
NAAEC's failure to address Canada's gutting of environmental laws**

We write to you regarding the North American Agreement on Environmental Cooperation (NAAEC) and its failure to address Canada's recent actions in gutting a wide range of environmental laws, apparently at the request of industry. This failure raises broader questions about NAAEC effectiveness and the CEC's mandate, relevant to your current public consultations.

In this letter, we suggest ways to strengthen the NAAEC and the CEC to help ensure that Parties' uphold their commitment to conserve, protect and enhance the environment. We trust our feedback and suggestions will be helpful in achieving the important objective of improving Canada's environmental laws, regulations, procedures, policies and practices.

Removing high levels of environmental protection

Canada committed in the NAAEC to "ensure that its laws and regulations provide for high levels of environmental protection" and to "strive to continue to improve those laws and regulations."¹ Although the commitment does recognize that each country may modify its laws and choose how it ensures a high level of environmental protection, recent changes to Canada's major environmental statutes, initiated after pressure from the oil and gas industry,² do not credibly maintain current Canada's previous environmental standards.

¹ North American Agreement on Environmental Cooperation, Article 3 (NAAEC).

² Galloway, G. "Controversial changes to Fisheries Act guided by industry demands" in *The Globe and Mail* (5 August 2013), available at <http://www.theglobeandmail.com/news/politics/fisheries-act-change-guided-by-industry/article13606358/>, last accessed 9 August 2013. See also Letter dated 12 December 2011 from Energy Framework Initiative to Peter Kent, Canada's Minister of Environment, available at http://www.greenpeace.org/canada/Global/canada/pr/2013/01/ATIP_Industry_letter_on_enviro_regs_to_Oliver_and_Kent.pdf, last accessed 9 August 2013; and Gage, A. The Smoking Gun: Who was the real author of the 2012 omnibus bills? (11 January 2013), available at <http://wcel.org/resources/environmental-law-alert/smoking-gun-who-was-real-author-2012-omnibus-bills>, last accessed 8 August 2013.

With its enactment of the *Canadian Environmental Assessment Act, 2012*, Canada eliminated thousands of environmental assessments of activities and projects, including projects which can have major environmental impacts³ and (especially in the assessment of oil and gas pipelines) severely reduced public participation.⁴ These changes weaken environmental protection and public involvement, despite Canada's commitment in NAAEC to the appropriate assessment of environmental impacts.⁵

Canada's only law setting targets for the reduction of greenhouse gases and requiring the Canadian government to plan how to achieve its targets, the *Kyoto Protocol Implementation Act*, has been repealed, and has not been replaced with any equivalent legislation. This means that, unlike Mexico or the U.S., Canada has no "flagship legislation" guiding its response to climate change.⁶

³ *CEAA, 2012* established a much higher threshold for which projects would receive environmental assessments. Under the Act, only projects that are designated in regulations will be assessed, and when Canada enacted the regulations designating projects as requiring environmental assessments, only the largest projects were listed. Moreover, the government retains a broad discretion not to require an environmental assessment. As a result, nearly 3,000 screening-level environmental assessments were cancelled in the month following the enactment of *CEAA, 2012*, and a wide range of mid- to large-sized and environmentally significant projects will no longer receive an assessment by any level of government. See Canadian Environmental Assessment Agency, Screenings Cancelled in July 2012, webpage available at <https://etc-cte.ec.gc.ca/010/type1abandon-eng.cfm?yyyy=2012&m=7>. See also P. Duck, J. Sinclair, and G. Assessing the smaller projects: an essential step towards sustainability. (March 2012), available at https://d3n8a8pro7vhm.cloudfront.net/envirolawsmatter/pages/38/attachments/original/1332998632/Assessing_the_Smaller_Projects_08-03-2012.pdf?1332998632, last accessed 8 August 2013.

⁴ *CEAA, 2012*, S.C. 2012, s. 19(1)(a), indicates that while in most assessments comments from the general public must be considered, for environmental assessments of pipelines, conducted by the National Energy Board, only the comments of "interested parties" must be considered. "Interested parties" is defined as a party that is "directly affected" by the project, or parties which, in the view of the NEB, has relevant expertise (s. 1(2)). In relation to assessments conducted by review panels (for most larger projects), the comments of the public must be considered, but only "interested parties" have a right to participate in the assessment (s. 43(1)(c)). See Gage, A. Who is silenced under Canada's new environmental assessment act? (27 April 2012), available at <http://wcel.org/resources/environmental-law-alert/who-silenced-under-canada%E2%80%99s-new-environmental-assessment-act>, last accessed 8 August 2013.

⁵ NAAEC, Article 2(1)(e). Appropriate is not, of course, defined, but direction may be taken from the Rio Declaration on the Environment and Economy, at Principle 17, which all three NAAEC signatories had signed shortly before, which states that environmental assessments should assess "proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." To our knowledge, there is no scientific or other basis for maintaining that projects not captured by *CEAA, 2012* pose no risk of a significant adverse effect on the environment.

⁶ Globe International. *GLOBE Climate Legislation Study (3rd Edition)* (2013), available at <http://www.globeinternational.org/index.php/legislation-studies/publications/climate-legislation-study-3rd-edition>, last accessed 8 August 2013. Of the 33 nations reviewed by Globe International, only Canada and Mozambique lack such legislation, and only Canada had such legislation and repealed it.

Amendments to the *Fisheries Act* have been passed that will, if brought into force, severely curtail the protection of all fish habitat⁷ and eliminate protection for fish that are not part of, or otherwise support, a commercial, recreational or aboriginal fishery.⁸

Similarly, one of its oldest laws, Canada's *Navigable Waters Protection Act*, has provided protection for both navigation and the environment on tens of thousands of streams and lakes since 1882. However, amendments to that Act have been passed that would, if brought into force, limit its legal protection to a relatively small number of listed water bodies.⁹

In each case these changes were made with little or no meaningful public consultation. Indeed, all of the legislative changes were buried within two omnibus "budget" bills that ran into the hundreds of pages.¹⁰ As noted above, oil and gas industry lobbyists asked for many of these changes just months before they were introduced into Parliament.¹¹

The government has also promised sweeping changes to the country's *Species at Risk Act*, which the oil and gas industry has also requested, although these have not yet been unveiled.

What is more, the NAAEC also commits Canada to "further scientific research and technology development in respect of environmental matters."¹² Despite this commitment, in recent years the Canadian government has stopped funding a range of crucial scientific research into environmental matters,¹³ as well as forbidden its environmental scientists from talking publicly about their work without vetting by public relations officials.¹⁴

What this means for NAAEC

The NAAEC allows members of the public to request an investigation of non-enforcement of environmental laws. While the commitment to enforce environmental laws is indeed a crucial piece of the NAAEC, the Agreement does not contain any remedy for members of the public when a government violates the many other commitments found in it – commitments to maintain strong environmental laws, to promote science, to ensure public process. Instead, the Canadian government has ignored these provisions with apparent impunity.

We ask you to notify the Canadian government that bringing into force its recent amendments to the *Fisheries Act* and the *Navigable Waters Protection Act* may be inconsistent with the NAAEC.

⁷ Gage, A. Limiting fish protection to "Serious harm" is a serious problem. (1 May 2012), available at <http://wcel.org/resources/environmental-law-alert/limiting-fish-protection-%E2%80%9Cserious-harm%E2%80%9D-serious-problem>, last accessed 8 August 2013.

⁸ Section 35 of the *Fisheries Act* as modified by 2012, c. 19, ss. 142(2) to (4).

⁹ Bill C-45, 2012, ss. 316-339, especially at 316, 318 and 331.

¹⁰ Bill C-38, 2012; Bill C-45, 2012.

¹¹ Above, note 2.

¹² NAAEC, above, note 1, Article 2(1)(d).

¹³ The Death of Evidence, webpage available at <http://www.deathofevidence.ca/why>, last accessed 9 August 2013.

¹⁴ Greenwood, C.. Muzzling Civil Servants: A Threat to Democracy. (Victoria: Environmental Law Centre, February 2013), available at http://www.elc.uvic.ca/press/documents/2012-03-04-Democracy-Watch_OIPLtr_Feb20.13-with-attachment.pdf, last accessed 8 August 2013.

In addition, we suggest the following measures to ensure that the objectives and commitments in the NAAEC and NAFTA should be adopted:

- The NAAEC should be amended to include specific commitments related to its objective to “promote transparency and public participation in the development of environmental laws, regulations and policies.”¹⁵ Laws cannot be based on meetings with industry lobbyists behind closed doors.
- The CEC needs to have a stronger role in evaluating changes to environmental laws and notifying the public of weakened environmental laws;
- The NAAEC should include specific commitments related to procedural and substantive rights to participate in decision-making (for example, through environmental assessments);
- There needs to be economic consequences for intentionally weakening environmental laws in order to give industry a competitive advantage; and
- While the NAAEC allows the public to complain about a failure to enforce environmental laws, the role of the public, and the CEC, in evaluating changes to the law that weaken environmental protection should be strengthened.

Congratulations on your upcoming 20th anniversary, and thank you for the opportunity to give input into how to better protect North America’s natural environment under the NAAEC.

Sincerely,



Anna Johnston
Staff Lawyer



Andrew Gage
Staff Lawyer

cc. Prime Minister’s Office

¹⁵ NAAEC, above, note 1, Article 1.