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Helen Cutts  
Vice President, Policy  
Canadian Environmental Assessment Agency  
160 Elgin Street, 22<sup>nd</sup> Floor  
Ottawa ON

### **Proposed Amendments to the Regulations Designating Physical Activities**

Dear Ms. Cutts,

At the outset, I wish to thank you for the opportunity for Nature Canada to propose amendments to the Regulations Designating Physical Activities ("the Regulations") that have been promulgated pursuant to the *Canadian Environmental Assessment Act 2012* ("CEAA 2012").

As you are aware, CEAA 2012 provides no legal requirement for environmental assessment of physical activities located on federal lands, unless those physical activities are designated as projects in the Regulations. Physical activities occurring on federal lands are treated no differently than other (i.e., non-federal) lands, except that authorities responsible for federal lands are subject to section 67 of CEAA 2012. Section 67 requires that authorities must not carry out a project on federal lands, or exercise any power or perform any duty or function that would permit a project to be carried out, unless the authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects or those effects are justified in the circumstances.

Nature Canada takes the view that the environmental assessment regime applicable to projects in federal protected areas should be stronger than that applicable to other federal lands because the statutory regimes governing federal protected areas require a higher level of environmental protection and biodiversity conservation. Environmental assessment has been a key tool to gather information to support managers of federal protected areas to achieve the higher level of protection and conservation required by these statutory regimes.

Thus, Nature Canada proposes that a number of physical activities that occur in the different categories of federal protected areas be designated in the amended Regulations. This letter highlights key environmental protection provisions of these federal protected area laws, as well as recommendations and key proposed amendments to the Regulations. Physical activities that should be designated as projects in the Regulations are detailed in the Appendix.

The following are the major categories of federal protected areas and their governing statutes:



- National Wildlife Areas (*Canada Wildlife Act*);
- Migratory Bird Sanctuaries (*Migratory Birds Convention Act*);
- National Parks and National Park Reserves (*Canada National Parks Act*);
- National Marine Conservation Areas (*Canada National Marine Conservation Areas Act*);
- Marine Protected Areas (*Oceans Act*); and
- Interim or permanently withdrawn surface and subsurface lands (*Territorial Lands Act*).

National Wildlife Areas (terrestrial and marine) - Under the *Canada Wildlife Act*, the purpose of National Wildlife Areas is to protect wildlife and wildlife habitat for the purposes of conservation, research, and interpretation. The *Wildlife Area Regulations* under the Act prohibit specific activities (such as hunting, fishing, damaging or removing plants, agricultural activity, recreational activity, commercial or industrial activity) unless notices permitting such activities are posted or a person has obtained a permit under the Act. There is currently no provision for the permanent withdrawal of subsurface lands in National Wildlife Areas created pursuant to this Act.

Migratory Bird Sanctuaries - The purpose of the *Migratory Birds Convention Act* is to protect migratory birds and their nests pursuant to the 1917 Migratory Birds Convention. The Convention was amended in 1995 by the Parksville Protocol to include the conservation principle "...to provide for and protect habitat necessary for the conservation of migratory birds". The Act provides authority to make regulations prescribing protected areas for migratory birds and nests, and for the control and management of those areas; the extent of this authority for the control and management of the sanctuaries depends upon the conditions of ownership. There is currently no provision for the permanent withdrawal of subsurface lands in Migratory Bird Sanctuaries created pursuant to this Act.

National Parks and National Park Reserves - Under the *Canada National Parks Act*, National Parks are dedicated to the people of Canada for their benefit, education and enjoyment. National Parks are to be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations. The Act also requires that maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks. Mining, forestry, oil and natural gas exploration and development, and hydro-electric development, as well as commercially extractive activities such as sport hunting are prohibited.

Marine Protected Areas - Under the *Oceans Act*, Marine Protected Areas are designated for the conservation and protection of: commercial and non-commercial fishery resources, including marine mammals, and their habitats; endangered or threatened marine species, and their habitats; unique habitats; marine areas of high biodiversity or biological productivity; and any other marine resource or habitat as is necessary to fulfill the mandate of the Minister of Fisheries and Oceans. The Act provides authority to prohibit classes of activities in Marine Protected Areas.

Interim or permanently withdrawn surface and subsurface lands (*Territorial Lands Act*) - The Governor in Council is authorized under the *Territorial Lands Act* to withdraw by order any tract of federal Crown land in Northwest Territories, Nunavut or Yukon from disposal under the Act. The stated purposes of such orders are often to provide interim protection against resource development projects (typically mining) for the withdrawn lands preparatory to the establishment of a National Wildlife Area or National



Park. Projects proposed for lands withdrawn from disposal under the Act should be subject to CEAA 2012 environmental assessment.

*Nature Canada concludes that the higher level of environmental protection and biodiversity conservation required by law for federal protected areas – and the threats against which some areas are not legally protected – means that there ought to be more careful, legally binding, scrutiny of developments proposed for federal protected areas that may have adverse environmental effects.*

Thus, Nature Canada wishes to make the following recommendations in relation to amendment of the Regulations Designating Physical Activities in order to achieve the objectives of the statutory regimes governing federal protected areas, and observe the principles of ecology necessary to sustainably manage these areas and their ecological integrity:

- 1. Designated physical activities specific to Wildlife Areas and Migratory Bird Sanctuaries should apply to all federal protected areas.** The Regulations already recognize that some federal protected areas deserve special consideration with respect to designation of projects for environmental assessment. Sections 1, 33 and 39 of the Schedule to the Regulations designate certain physical activities specific to Wildlife Areas and Migratory Bird Sanctuaries for environmental assessment that are not so designated for other federal or non-federal lands. For example, the construction of an oil and gas facility or oil and gas pipeline is a designated project under the Regulations in a Wildlife Area or Migratory Bird Sanctuary but not in other federal protected areas. Oil and gas facilities and oil and pipelines should be designated projects in all federal protected areas. Note as well that the term “Wildlife Areas” is not defined in the Regulations but the term “Migratory Bird Sanctuaries” is defined. While the term “Wildlife Areas” is likely meant to refer to National Wildlife Areas established pursuant to the *Canada Wildlife Act*, this interpretation is not without doubt.

*Nature Canada recommends that Sections 1, 33 and 39 of the Schedule to the Regulations be amended to apply to all federal protected areas including National Wildlife Areas, Migratory Bird Sanctuaries, National Parks and National Park Reserves, National Marine Conservation Areas, Marine Protected Areas and any surface or subsurface lands withdrawn under the Territorial Lands Act. Nature Canada further recommends that “federal protected area” be defined in the Regulation as “federal lands designated pursuant to the National Wildlife Act, Migratory Birds Convention Act, Canada National Parks Act, Canada National Marine Conservation Areas Act or the Oceans Act and lands withdrawn from disposal by order pursuant to the Territorial Lands Act in relation to protected areas.”*

- 2. Physical activities involving expansions of developments in federal protected areas should be designated as projects.** Sections 1, 33 and 39 of the Schedule to the Regulations are currently limited to the physical activities of construction, operation, decommissioning and abandonment. Nature Canada takes the informed view that expansions of developments such as dams, mines, railway lines or roads in federal protected areas should also be designated as projects in the



Regulations given that such expansions could well have adverse environmental effects in the specific ecological context of federal protected areas. The twinning of the TransCanada Highway in Banff National Park would not be subject to a CEAA 2012 environmental assessment under the current Regulations; clearly this highway expansion has had adverse environmental effects that have been at least partially mitigated by Parks Canada Agency at great effort. The proposed expansion of an existing shallow gas well-field at CFB Suffield National Wildlife Area is another example of an undertaking with significant adverse environmental effects that would not be subject to assessment under CEAA 2012. The term “expansion” should be explicitly defined in the Regulations to distinguish it from mere modifications to existing developments.

*Nature Canada recommends that Sections 1, 33 and 39 of the Schedule to the Regulations be amended to designate expansions of existing developments as projects. There should be an explicit definition of “expansion” to ensure that physical activities that add production capacity to existing projects above a threshold level are designated under the Regulations, but that mere modifications of existing projects that do not increase the footprint of such projects are not designated.*

- 3. Designate additional categories of developments as projects.** Section 1 of the Schedule to the Regulations currently designates a number of categories of developments (e.g., oil and gas facility, electrical generating station) in Wildlife Areas and Migratory Bird Sanctuaries as projects. Nature Canada proposes that a number of other categories of developments also be designated based on historical experience of adverse environmental effects. For example, the construction and expansion of ski resorts and golf courses in National Parks have had demonstrable adverse effects on wildlife populations and should therefore be designated as projects in the Regulations. The construction of any road (not just a public highway) in a federal protected area also is likely to have demonstrable adverse effects by fragmenting habitat of federally protected species-at-risk such as boreal woodland caribou and Greater Sage Grouse.

*Nature Canada recommends that Sections 1 and 39 of the Schedule to the Regulations be amended to designate additional physical activities as projects as detailed in the Appendix.*

- 4. Designate physical activities that are not related to a physical work.** The former *Canadian Environmental Assessment Act* required that certain physical activities not related to a physical work be assessed by virtue of their designation in the so-called Inclusion List Regulations. Nature Canada proposes that some such physical activities not related to physical works in federal protected areas be designated as projects under the Regulations Designating Physical Activities. Many of these designated projects would relate to marine and freshwater protected areas, and would include naval exercises, testing of military weapons, seismic testing and surveying, offshore exploratory drilling, dredging, and fishing not authorized in a management plan. Other



of these recommendations include physical activities in terrestrial protected areas such as cutting of trees not authorized in a management plan, culling of wildlife populations, and agricultural activities not authorized in a management plan. Based on Nature Canada's experience, all of these proposed designations could have adverse environmental effects in federal protected areas and thus should be subject to a CEEA 2012 environmental assessment.

*Nature Canada recommends that Sections 1, 33 and 39 of the Schedule to the Regulations be amended to designate additional physical activities not relating to physical works as projects as detailed in the Appendix.*

I would be very pleased to discuss Nature Canada's recommendations with yourself or a member of your staff to clarify any issues or address any questions that you may have.

Sincerely

Ian Davidson  
Executive Director



## APPENDIX

### PROPOSED AMENDMENTS TO CEAA 2012 REGULATIONS DESIGNATING PHYSICAL ACTIVITIES IN FEDERAL PROTECTED AREAS

1. Delete the definition of “migratory bird sanctuary” in section 1 of the Regulations, and include the following definition of “federal protected area” as “federal lands that are designated pursuant to the *National Wildlife Act, Migratory Birds Convention Act, Canada National Parks Act, Canada National Marine Conservation Areas Act, or the Oceans Act* or that are withdrawn by order pursuant to the *Territorial Lands Act*.”

#### **2. Amend section 1 of the Schedule of Physical Activities applicable to the Canadian Environmental Assessment Agency as follows:**

1. The construction, expansion, operation, decommissioning and abandonment, in a federal protected area of:

(a) an electrical generating station or facility or transmission line;

(b) a dam, dyke, reservoir or other structure for the diversion of water;

(c) an oil, gas or bitumen facility or oil, gas, or bitumen pipeline;

(d) a mine or mill, and associated effluent and solid waste containment or disposal areas;

(e) an industrial facility;

(f) a canal or lock;

(g) a marine terminal;

(h) a railway line, road or bridge ~~public highway~~;

(i) an aerodrome or runway; or

(j) a waste management facility

(k) a ski resort or facility

(l) a golf course or driving range

(m) a permanent building with a footprint larger than 50 square metres

(n) a permanent tourism facility or center



- (o) an aquaculture facility
- (p) a facility for the extraction, treatment and/or storage of ground water
- (q) a military base or station
- (r) a facility for the manufacture of pulp or wood or paper products

3. Designate the following additional physical activities in the Regulations:

- 1.1 Testing of military weapons in a federal protected area other than those training areas, ranges and test establishments established under the authority of the Minister of National Defence for the testing of weapons prior to October 7, 1994.
- 1.2 Naval exercises in a federal protected area involving more than 15 vessels, including auxiliary and foreign vessels.
- 1.3 Military field exercises and military field training in a federal protected area involving more than 275 persons and 40 vehicles in an area other than a training area or range established by or under the authority of the Minister of National Defence.
- 1.4 Cutting of trees in a federal protected area other than as authorized pursuant to an approved management plan and the permitting policy of the responsible authority.
- 1.5 Agricultural activities in a federal protected area other than as authorized pursuant to an approved management plan and the permitting policy of the responsible authority.
- 1.6 Marine or freshwater seismic testing or surveying in a federal protected area in relation to the production of oil and gas during which the air pressure measured at a distance of one meter from the seismic energy source is greater than 275.79 kPa (40 psi).
- 1.7 Land-based seismic surveying in a federal protected area.
- 1.8 Offshore exploratory drilling in a federal protected area in relation to the production of oil or gas, or extraction of bitumen or coal bed methane
- 1.9 Proposed commercial or large-scale recreational fishing in a federal protected area other than as authorized pursuant to an approved management plan and the permitting policy of the responsible authority.
- 1.10 The deposit of a substance that is harmful to migratory birds in a federal protected area that would be contrary to the *Migratory Birds Convention Act*.



1.12 Physical activities relating to the construction, expansion or modification of a golf course, driving range or ski hill in a federal protected area.

1.13 The culling or destruction of a population of a wildlife species in a federal protected area

1.14 The dumping of any substance in a federal protected area for which a permit is required under Division 3 of Part 7 of the *Canadian Environmental Protection Act, 1999*.

1.15 The removal or destruction of a wreck in marine or fresh water of a federal protected area.

1.16 The removal of any vessel that is wrecked, sunk, partially sunk, lying ashore or grounded in marine or fresh water of a federal protected area.

1.17 Dredging of the seabed or subsoil of a federal protected area other than as authorized pursuant to an approved management plan and the permitting policy of the responsible authority.

1.18 Drilling for, or extraction of natural gas or oil in a federal protected area using hydraulic fracturing technology (fracking)

**3. Amend section 33 of the Schedule of Physical Activities applicable to the Canadian Nuclear Safety Commission as follows:**

33. The construction, expansion, operation, decommissioning and abandonment, in a federal protected area ~~wildlife area or migratory bird sanctuary~~, of

(a) a mine or mill, and associated effluent and solid waste containment or disposal areas;

(b) a nuclear facility; or

(c) a waste management facility.

33.1 The abandonment, disposal or other release of a nuclear substance in a federal protected area

**4. Amend section 39 of the Schedule of Physical Activities applicable to the National Energy Board as follows:**

39. The construction, expansion, operation, decommissioning and abandonment, in a federal protected area, of

(a) an electrical transmission line; or

(b) an oil, gas or bitumen facility or an oil, gas, or bitumen pipeline.





39.1 Marine or freshwater seismic testing or surveying in a federal protected area in relation to the production of oil and gas during which the air pressure measured at a distance of one meter from the seismic energy source is greater than 275.79 kPa (40 psi).

39.2 Land-based seismic surveying in a federal protected area

39.3 Offshore exploratory drilling in a federal protected area in relation to the production of oil or gas, or the extraction of bitumen or coal bed methane.