Environmental Defence Canada

Fixing Canada's Broken Energy Regulator and Making Bill C-69 Climate-Safe

Comments on Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts

Submitted to:

Standing Committee on Environment and Sustainable Development

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About Environmental Defence Canada

Environmental Defence Canada (EDC) is Canada's leading environmental action organization, working to defend clean water, a safe climate and healthy communities. EDC challenges and inspires change in government, business and people to ensure a healthier and prosperous life for all.

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Thank you for this opportunity to submit written comments on Bill C-69. Environmental Defence Canada (EDC) has participated in the environmental law reform process, particularly regarding the modernization of the National Energy Board (NEB) and the creation of the proposed Canadian Energy Regulator (CER), since consultations began in 2016. We have also focused on the aspects of the process related to climate change, particularly on ensuring that the review process and impact assessment regime for energy and industrial projects are aligned with Canada's climate commitments—or that Bill C-69 is designed to be "climate-safe".

For this reason, EDC's submission will focus on the *Canadian Energy Regulator Act* (CERA). It will also focus on sections of the *Impact Assessment Act* (IAA) and the CERA, as well as associated regulatory and policy processes related to climate change, that can help ensure that the federal government's environmental laws are climate-safe. For other sections of Bill C-69, EDC would like to voice its support for the submissions of its colleagues from the West Coast Environmental Law Association, Ecojustice, the Pembina Institute, Nature Canada, and the Canadian Freshwater Alliance.

Comments and Recommended Amendments to the Canadian Energy Regulator Act

Overall, EDC welcomes the changes proposed in the CERA. This includes support for the revised governance regime, the transfer of authority for impact assessment from the NEB to the Impact Assessment Agency of Canada (IAAC), the expanded list of factors that must be considered when issuing a certificate of authorization, the removal of the "standing test" for public participation in project review processes, and the emphasis on partnering with Indigenous groups and jurisdictions. These improvements will help make project reviews more credible and contribute to restoring public trust in the project review process.

However, the CERA must be amended in several key areas for the government to achieve its objectives of restoring credibility to federal energy regulation and the project review process.

Alignment with Canada's climate targets

Unlike the IAA, the CERA makes no mention of Canada's international and domestic commitments to climate change, including policies, targets and obligations. The CERA also lacks an explicit mandate to report or advise on Canada's and the world's transition to a low-carbon economy. Please see below, 'Recommended "climate-safe" amendments to the CERA', for a list of amendments to the CERA needed to ensure climate considerations are integrated into both the purpose of the Act and the factors to consider when issuing a certificate of authorization.

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Composition of Project Review Panels

EDC strongly supports transferring the responsibility for all impact assessments to the IAAC and accepts that lifecycle regulators, including the CER, have a seat on project review panels in order to provide specific technical expertise. However, EDC submits that it is unacceptable for review panels to be made up of a majority or entirety of members from the lifecycle regulators. The IAA must be amended to remove this possibility and ensure that review panels have balanced representation and expertise, including representation from relevant regions, provinces and Indigenous jurisdictions.

- Amend Section 47(3) of the IAA to read "One of the persons appointed under paragraph (1) must be appointed from a roster established under paragraph 50(c), on the recommendation of the Lead Commissioner of the Canadian Energy Regulator and in consultation with the member of the Queen's Privy Council for Canada that is designated by the Governor in Council as the Minister for the purposes of the Canadian Energy Regulator Act."

Ensuring meaningful public participation

EDC strongly supports the removal of the "standing test" for public participation (e.g. the requirement that participants be "directly affected" by the proposed project) that was introduced in 2012. However, several amendments must be made to the CERA to enable meaningful public participation. As recommended by the Expert Panel on NEB Modernization in its 2017 report, Bill C-69 should create a Public Intervenor Office, ensure participants in review processes have access to independent research and expertise and project-related information, and make the participant funding program mandatory and extend it beyond public hearings.

- Amend section 74 of the CERA to read "(1) The Regulator must establish a Public Intervenor Office to manage the participant funding program, advise the Regulator on the appropriate mechanisms and timing of engagement activities, and, on a voluntary basis, represent the interests and views of parties, the public—and, if appropriate, the Indigenous peoples of Canada and Indigenous organizations—on matters within the Regulator's mandate."

- Amend section 74 of the CERA to add "(2) The Regulator or the Public Intervenor Office may establish processes to engage the public—and, in particular, the Indigenous peoples of Canada and Indigenous organizations—on matters within the Regulator's mandate."

- Amend section 74 the CERA to add "(3) The Public Intervenor Office may coordinate scientific and technical studies to the extent possible and may develop pools of independent experts that are available to the public to provide third-party independent advice during project reviews."

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- Amend section 74 of the CERA to add "(4) The Regulator must ensure that information provided by proponents, the Regulator, and the Public Intervenor Office is searchable, transparent, well-organized, and not subject to change during the course of a project review, so as to facilitate public access."

- Amend section 75 of the CERA to read "For the purposes of this Act, the Regulator must establish a participant funding program to facilitate the participation of the public — and, in particular, the Indigenous peoples of Canada and Indigenous organizations — in public hearings under section 52 or subsection 241(3), any steps leading to those hearings, and throughout the project lifecycle."

Governance

EDC supports the proposed governance changes to the NEB/CER in Bill C-69, including the separation of the Commissioners from the Board and CEO, the intent of the conflict of interest provisions, and the requirement for Indigenous representation on both the Board and Commission. We encourage the committee and the federal government to make additional amendments to solidify the Minister of Natural Resource's mandate.

- Remove the clause "*while they are exercising their powers and fulfilling the duties and functions"* from sections 16, 22, and 29 of the CERA.

- Amend section 14(1) of the CERA to add "(a) Directors will be appointed to reflect, to a reasonable extent, the diversity of Canadian society and ensure the Board maintains a range of competencies including in Indigenous traditional knowledge and worldview, public consultation, community development, renewable energy, and climate science.

- Amend section 26(1) of the CERA to add "(a) Commissioners will be appointed to reflect, to a reasonable extent, the diversity of Canadian society and ensure the Commission maintains a range of competencies including in Indigenous traditional knowledge and worldview, public consultation, community development, renewable energy, and climate science.

Creation of an independent energy information agency

EDC is disappointed to see no specific provisions in the CERA to improve the condition of energy information in Canada or to ensure that federal energy regulation is based on high-quality, independent data and analysis. EDC recommends amendments to CERA that would enable and fund the creation of a new Canadian energy information agency and expanded data collection at Statistics Canada. Please see the submission from the Pembina Institute for details on the creation of the energy information agency.

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Making Bill C-69 climate-safe

Bill C-69 makes some real improvements over the 2012 *Canadian Environmental Assessment Act* (CEAA 2012) on climate change. But this is a low bar to clear, as CEAA 2012 does not even mention climate change. Bill C-69 requires that impact assessments consider whether an energy or industrial project hinders or contributes to Canada's climate commitments. And as part of the proposed reforms to the nation's environmental assessment laws, the government has committed to lay out how climate change is integrated in the project review process through a strategic assessment of climate change.

These are welcome steps forward. But in the twenty-first century, Canada needs environmental laws that ensure the federal government only approves energy and industrial projects that will contribute to a climate-safe future. While it's good that Bill C-69 proposes that the government *consider* climate change in impact assessments, the proposed legislation allows the government to approve environmentally-destructive projects that put Canada's climate targets out of reach.

Bill C-69's language needs to be tightened in several places to ensure project approvals *are based on*, not just *consider*, their ability to hinder or contribute to Canada's climate targets. These amendments must apply to projects assessed by the new IAAC, as well as by review panels that include Canada's energy regulators and offshore petroleum boards. Climate targets must include Canada's domestic plans, such as the Pan-Canadian Framework on Clean Growth and Climate Change and the Mid-Century Long-Term Low Greenhouse Gas Development Strategy, and its international obligations under the Paris Agreement.

Recommended "climate-safe" amendments to the IAA

- Add the following clause to s.6, the purposes section, of the IAA: "to contribute to maintaining a healthy and stable climate for future generations."

- Add to the list of effects prohibited prior to approval of a designated project in s.7(1) of the IAA: "a change that would hinder the Government of Canada's ability to meet its international and domestic environmental obligations or its international and domestic commitments in respect of climate change."

- Amend the phrase "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change" in s.22(1)(i) and s.63(e) to read "the extent to which the designated project, *including lifecycle, direct, indirect and cumulative effects*, hinders or contributes to the Government of Canada's ability to meet its *international and domestic* environmental obligations and its *international and domestic* commitments in respect of climate change."

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- Amend s.63 of the IAA, concerning the decisions of the Minister and the Governor in Council on proposed projects, to replace the requirement that the decisions "include a consideration of the following factors" with requirement that the decisions "be based on consideration of the following factors." Those factors include s.63(e) on whether the project will hinder of contribute to meeting the Government of Canada's climate change commitments.

- Amend s.109 of the IAA to add a provision to make regulations "specifying criteria and methods for determining whether and the extent to which the designated project, *including lifecycle, direct, indirect and cumulative effects,* hinders or contributes to the Government of Canada's ability to meet its *international and domestic* environmental obligations and its *international and domestic* commitments in respect of climate change."

Recommended "climate-safe" amendments to the CERA

- Add the following clause to s.6(b), the purposes section, of the CERA: "to contribute to maintaining a healthy and stable climate for future generations."

- Amend section 11(e) of the CERA, pertaining to the regulator's mandate: "advising and reporting on energy matters, *including renewable energy, energy efficiency, climate impacts related to the production, distribution, and use of energy, the impacts of a changing climate on the production, distribution and use of energy, and Canada's transition to a low carbon economy*."

- Amend section 80 of the CERA, pertaining to issues the Regulator must study and keep under review, to add "(c) climate impacts related to the production, distribution, and use of energy, and the impacts of a changing climate on the production, distribution, and use of energy", and "(d) Canada's transition to a low carbon economy."

- Amend s.186(1) of CERA by adding a new s.186(1)(c) requiring that decisions by the Governor in Council be *based on* a set of factors identical to those in s.63 of the IAA, and amend the reasons for decision in s.186(2) of the CERA to require reasons *based on* the factors in s.186(1)(c) as proposed above for s.63 of the IAA.

- Amend s.183(2)(j) of the CERA to include "(x) the extent to which the project in comparison with reasonable alternatives would contribute to sustainability"; and to replace "(j) environmental agreements entered into by the Government of Canada" with "(j) the extent to which the

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designated project, *including lifecycle, direct, indirect and cumulative effects*, hinders or contributes to the Government of Canada's ability to meet its international and domestic environmental obligations and its international and domestic commitments in respect of climate change."

- Amend s.262(1) of the CERA by adding a new s.262(1b) requiring (i) that decisions by the Commission be *based on* a set of factors identical to those in s.63 of the IAA and (ii) that the reasons for decision based on these factors be set out and posted publicly. Accordingly, amend s.262(2) to list related factors for consideration to inform decision making *based on* the factors above.
    - Alternatively, amend s.262(2) of the CERA to include "the extent to which the project in comparison with reasonable alternatives would contribute to sustainability;" and to replace "(f) environmental agreements entered into by the Government of Canada" with "(f) the extent to which the designated project, *including lifecycle, direct, indirect and cumulative effects*, hinders or contributes to the Government of Canada's ability to meet *its international and domestic* environmental obligations and its *international and domestic* commitments in respect of climate change."

- Amend section 298(3) of the CERA to replace "(f) environmental agreements entered into by the Government of Canada" with "(j) the extent to which the designated project, *including lifecycle, direct, indirect and cumulative effects*, hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its international and domestic commitments in respect of climate change."

Ensuring the proposed strategic assessment of climate change is aligned with impact assessments for individual projects

The government's proposed strategic assessment of climate change must provide real guidance for individual energy and industrial projects. As announced in the Consultation Paper on Approach to revising the Project List, the strategic assessment is intended to lay out how climate change considerations would be integrated in the impact assessment process and in determining whether a project is in the public interest. As such, the strategic assessment should help determine which new projects make sense for Canada in a world moving away from fossil fuels.

While the government's commitment to undertake this strategic assessment is welcome, as it stands now, the outcome will simply be a report to the Minister of Environment and Climate Change. There are no specifics on how the public will be able to participate or how Indigenous groups will be consulted, and no further requirements for implementation. Bill C-69 must be amended to require a response

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from the Minister that identifies how strategic assessments are to provide guidance for individual project assessments.

To ensure the proposed strategic assessment of climate change effectively aligns impact assessments for individual projects with the Government of Canada's international and domestic environmental obligations and its international and domestic commitments in respect of climate change, EDC recommends the following amendments:

- Amend s.109 of the IAA to provide for a regulation to designate the potential to hinder or contribute to meeting the Government of Canada's international and domestic environmental and climate change commitments as a category of strategic undertaking that is automatically subject to law-based assessments, and to establish sustainability-centred criteria and public processes for identifying and defining the strategic assessment.

- Add a new section to the law to establish a formal designation process for strategic and regional undertakings not captured in the designated strategic undertakings list regulation. The process should be parallel to that in s.9(1) of the IAA for projects (physical activities) and would provide a credible foundation for a ministerial decision to appoint a regional or strategic assessments committee.

- Amend s.109 of the IAA to provide for a regulation establishing criteria for decision making on public requests for regional and strategic assessments, and requiring responses from the Minister or Governor in Council, with reasons based on the criteria.

- Amend s.102 of the IAA to require the regional or strategic assessment committee's report to present the committee's findings and recommendations; and
    - to provide justification for the recommendations on the evidence and knowledge made available to the committee, and attention to the purposes of the IAA in section 6, the considerations in s.22, and the decision factors in s.63;
    - to identify implications for proposed policies, plans and programs, for further strategic actions, and for project level assessments.

- Amend s.102 and 103 of the IAA to require the Minister or the Governor in Council to:
    - respond to the report of a regional or strategic assessment committee, specifying a decision on what actions are to be taken in light of the report;
    - establish that the actions may include new policy, plan or program initiatives, requirements or guidance for project level assessments

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    based on the committee's report, and determination of the authority of the requirements or guidance in project level decision making;
  - set out the reasons for the decision, based on the factors set out in s.63; and
  - ensure that both the decision and the reasons for decision are posted on a publicly accessible internet site.

- Add to s.109 provisions for regulations to specify
  - the matters to be considered by regional and strategic assessments; and
  - the means of ensuring meaningful public participation in regional and strategic assessments.

- Add to s.109 a provision for regulations to clarify how cumulative effects, broad alternatives and big policy issues are to be addressed, including by government authorities where proponent capacities and authority are insufficient, in project level assessments in the absence of completed and up-to-date regional or strategic assessments.

Recommended changes to make the Project List climate-safe

While the federal government is undertaking a separate consultation on revising the Project List, the Project List is of critical importance to the utility of the IAA as proposed in Bill C-69. The Consultation Paper indicates that the Project List would "focus federal impact assessment on projects that would have the most potential for adverse environmental effects in areas of federal jurisdiction". In essence, the Consultation Paper is saying that only the worst of the worst projects will be included on the Project List for possible federal impact assessment. This means even environmentally-destructive projects with serious adverse impacts in areas of federal jurisdiction may not be listed so long as there are projects that are worse. The approach taken in the Consultation Paper is not reflected in the text of Bill C-69.

EDC urges the federal government to direct that this "only the worst of the worst" approach to the Project List be abandoned, and replaced by an approach that lists projects based on a test of likelihood of having significant adverse environmental effects in areas of federal jurisdiction. **In particular, this includes projects that may hinder or contribute to Canada's ability to meet its international and domestic environmental obligations and its international and domestic commitments in respect of climate change, individually or cumulatively.**

To make Bill C-69 climate-safe, the following should be added to the proposed Project List:

- Construction or expansion of a facility that is expected to release more than 50,000 tonnes of greenhouse gas (GHG) emissions per year;

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- Construction or expansion of a hydraulic fracturing (fracking) project to extract shale gas, coal methane or shale oil;
- Construction or expansion of a steam-assisted gravity drainage (in situ) oil sands project;
- Construction of an oil, gas, or commodity pipeline or electrical transmission line longer than 50 km; and
- Exploratory offshore oil and gas seismic activities.

Not only do the activities listed above pose a series of significant risks to aquatic and terrestrial ecosystems that justify federal impact assessment, they emit massive amounts of greenhouse gas emissions that could hinder the Government of Canada's ability to meet its international and domestic environmental obligations and its international and domestic commitments in respect of climate change, individually or cumulatively.

For in situ oil sands projects, the federal government is proposing to exempt in situ tar sands projects from the Project List. The Minister of Environment and Climate Change reasoned that future oil sands projects don't need a federal assessment because their emissions are already covered by Alberta's 100 megatonne cap on oil sands emissions.

But a provincial cap is not an adequate reason to exempt in situ oil sands projects. And the Alberta cap is a particularly good example of why granting provincial exemptions is problematic. The cap excludes emissions-intensive activities like electricity cogeneration and new upgrading; it may not be implemented before the next Alberta election; and it allows Canada's largest and fastest-growing source of emissions to grow by nearly 40 per cent—at the same time that every other economic sector is expected to cut emissions.

Canada is heading in the wrong direction in meeting its target to reduce emissions by 30 per cent below 2005 levels by 2030. And it's largely because of the oil and gas industry. Canada has an obligation to decarbonize its economy by mid-century. The impact assessment process can be an essential tool in the carbon reduction toolkit, but only if given the teeth to help move the country towards a zero-carbon future.

Canada has a crucial opportunity to align its environmental laws and project review process with its climate targets. Exempting high-carbon projects, like fracking and in situ oil sands, from the Project List would be an abdication of the federal government's responsibility.

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Conclusion

After participating for nearly two years in the federal government's mandated environmental law reform process, EDC submits that Bill C-69 falls short of ensuring that the review process and impact assessment regime for energy and industrial projects are aligned with Canada's climate commitments—or that Bill C-69 is "climate-safe". We also submit that the CERA makes significant changes to the *National Energy Board Act* and makes good progress to restore public trust in the decision-making process for energy and industrial projects. However, key amendments must be made, as well as government action taken in addition to legislative amendments, to create a modern energy regulator for the 21st century. We strongly encourage the committee to consider the improvements outlined by EDC in this submission.

In addition to the recommended amendments in this submission, EDC also notes that Bill C-69 falls far short when measured up against the essential elements of next-generation environmental assessment. EDC strongly supports the submissions of its colleagues from the West Coast Environmental Law Association, Ecojustice, the Pembina Institute, Nature Canada, and the Canadian Freshwater Alliance in addressing the shortcomings and deficiencies of Bill C-69.

EDC looks forward to continuing to work with the federal government on the reform of Canada's environmental laws. If you have any questions or comments about the contents of this submission, please do not hesitate to contact me at 416-323-9521 ext. 248 or pderochie@environmentaldefence.ca. I would also ask for the opportunity to present my views on Bill C-69 and recommendations in person before the committee.

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