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Environmental Defence Canada
Making Bill C-69 Climate-Safe

Submission to the Standing Senate
Committee on Energy, the Environment and
Natural Resources
on
Bill C-69: Impact Assessment Act and the
Canadian Energy Regulator Act, to amend
the Navigation Protection Act and to make
consequential amendments to other Acts

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About Environmental Defence Canada

Environmental Defence is a leading Canadian advocacy organization that works with government, industry and individuals to defend clean water, a safe climate and healthy communities.



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.

At the outset, we would like to note that while we support Bill C-69, it falls far short of what is needed to ensure environmental decision-making truly fosters sustainability by safeguarding ecosystem integrity and Canadians' health, upholding Indigenous rights and authority or fostering long-term and equitably distributed economic wellbeing.

Regardless, Bill C-69 is a significant step towards a modern and effective federal impact assessment process. It is also a marked improvement on the Canadian Environmental Assessment Act, 2012 (CEAA 2012), which is not working for the environment, the public, Indigenous peoples or project proponents. In C-69, the government has struck a compromise among the priorities of various interests, resulting in a balance that will bring greater transparency, accountability and credibility to environmental decision-making. But that balance is delicate, and calls from the petroleum industry and opponents of the bill to amend it threaten to undermine that balance. We are dismayed by the amount of misinformation that some Bill C-69 opponents have spread after the legislation was referred to the Senate.

Our focus is on ensuring that the Canadian Energy Regulator Act (CERA) and the Impact Assessment Act (IAA) are aligned with Canada's climate commitments; in other words, that Bill C-69 is designed to be "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.*

Earlier this month, Environment and Climate Change Canada released the Canada's Changing Climate Report¹ which sounded the alarm that Canada is warming up twice as fast as the rest of the world, causing irreversible changes to our climate. Last fall, the U.N.'s Intergovernmental Panel on Climate Change (IPCC)² unveiled a report stating that if we are to have a chance of not exceeding 1.5 degrees of warming – and thus avoid the most catastrophic impacts of climate change – we have 12 years to significantly transition towards a low-carbon society. Furthermore, the Government of Canada has ratified the Paris Agreement under the United Nations Framework Convention on Climate Change. Canada has committed to the

¹ Bush, E. and Lemmen, D.S., editors (2019): Canada's Changing Climate Report; Government of Canada, Ottawa, ON. 444 p. Available: <https://changingclimate.ca>

² IPCC, 2018: Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty. Available: <https://www.ipcc.ch/sr15/>



aim of holding global average temperature to well below 2°C above pre-industrial levels and to pursuing efforts to limit the increase to 1.5°C.

Bill C-69 makes some real improvements over the 2012 Canadian Environmental Assessment Act (CEAA 2012) on climate change, namely the requirement that impact assessments consider whether an energy or industrial project hinders or contributes to Canada's climate commitments. This is a much-needed step in the right direction. But the proposed legislation still allows the government to approve environmentally-destructive projects that put Canada's climate targets out of reach. 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. 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.

Comments and Recommended Amendments to the *Canadian Energy Regulator Act*

Overall, EDC supports:

- 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 or 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. A modernized energy regulator must, as an explicit part of its mandate, ensure that decisions on energy infrastructure are aligned with domestic climate policies and are taken in light of global energy transitions. This is necessary to ensure that we meet our commitments under the Paris Agreement and is imperative to protect Canada's long-term interests in a decarbonizing world. It is also essential for restoring public trust in the federal energy regulator.

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. We are proposing several 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 or authorization:

- Add the following clause to Section 6(e) of the CERA, the purposes section: “to contribute to maintaining a healthy and stable climate for future generations”
- Amend Section 11(e) of the CERA to: “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 by adding “(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 Section 186(1) of the 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 Impact Assessment Act”
- Amend the reasons for decision in Section 186(2) of the CERA to require reasons *based on* the factors in Section 186(1)(c) as proposed above for Section 63 of the IAA.
- Amend Section 183(2)(j) of the CERA to include “the extent to which the pipeline, *including lifecycle and lifespan direct, indirect and cumulative effects*, hinder or contribute to the Government of Canada’s ability to meet its international and national environmental, climate change and biodiversity obligations and commitments”

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.

- 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.”



Comments and Recommended Amendments to the *Impact Assessment Act*

Recommended “climate-safe” amendments:

- Add the following clause to Section 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 Section 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.”
- In Section 22(1)(i) of the IAA, 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” 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, climate change and biodiversity obligations and commitments”
- In Section 63(e) of the IAA, 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” 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, climate change and biodiversity obligations and commitments”
- Amend Section 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.”
- Add a Section 63(1) prohibiting the Minister or Cabinet from determining that a project is in the public interest if it: will result in significant adverse effects or the crossing of an ecological threshold; is likely to significantly hinder Canada’s environmental, climate change and biodiversity obligations; is inconsistent with an assessment conducted under sections 92, 93 or 95; would be likely to result in infringements of Aboriginal or treaty rights, or Indigenous human rights as set out in UNDRIP in the absence of consent from affected Indigenous groups.
- Amend Section 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”



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. Regulators have important expertise to bring to the Review Panel process. At the same time, it is clear that the central role some regulators have played in EA's under CEAA 2012 has seriously undermined the public credibility of the federal EA process. Therefore, EDC strongly supports the current language in the IAA which limits the role of the Canadian Energy Regulator and Canadian Nuclear Safety Commission so that neither can form a majority, nor chair review panels.

Some witnesses at the Standing Senate Committee would like to see this section amended. For the purposes of restoring public trust, EDC supports the inclusion of regulators as panel members, but submits that they should not form the majority on the panel, nor should they serve as the Chairperson of the panel. This is the only way to ensure that review panels have balanced representation and expertise, including representation from relevant regions, provinces and Indigenous jurisdictions.

- Subsections 44(4) and 47(4) of the IAA should continue to provide that members of the CNSC, or Commissioners of the Canadian Energy Regulator, cannot constitute the majority of the members of review panels and that these appointees cannot serve as Chairpersons of the review panels.

The IAA gives greater authority to the offshore boards in impact assessment than they currently have, and environmental and fishing groups on the East Coast are seriously concerned that the greater role of the offshore boards in IA will undermine the integrity and independence of assessments. In order to bring the requirements respecting panel composition of assessments of projects regulated by the offshore boards into alignment with those of projects regulated by the CER and CNSC, the following amendments should be made. These amendments will help ensure the credibility of and public trust in assessments of these projects, as well as consistency in IAs under the Act in general:

- Amend Sections 46.1(4) and 48.1(4) by replacing "The persons appointed from the roster must not constitute a majority of the members of the panel" with "The chairperson must not be appointed from the roster and the persons appointed from the roster must not constitute a majority of the members of the panel."

Ensuring Meaningful Participation

Bill C-69, as it currently stands, makes real improvements to ensure meaningful public participation. EDC strongly supports the removal of the "standing clause" for public participation (e.g. the requirement that participants be "directly affected" by the proposed project) that was introduced in 2012.



This is a critical change that recognizes the thousands of projects that have been successfully approved without such standing rules each year between 1992 and 2012 under both NEB and CEAA processes. When introduced such rules forced the public to find ways to have their views heard through protests, the courts and other action outside the assessment process.

There have been proposed amendments made to the Senate to keep the standing clause in place. This would go against the very spirit of the bill, which is to rebuild public trust in federal assessments. It would also ensure that we continue to see projects tied up due to court challenges and protests, a situation which benefits no one.

In order to strengthen and further clarify this aspect of the bill, EDC suggests:

- Amending Section 2 of the IAA to include the following definition of meaningful public participation. The term “meaningful public participation” should then be used throughout the Act in place of “public participation”. Meaningful public participation establishes the needs, values, and concerns of the public, provides a genuine opportunity to influence decisions, and uses multiple and customized methods of engagement that promote and sustain fair and open two-way dialogue.

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.

If you have any questions or comments about the contents of this submission, please do not hesitate to contact me at jlevin@environmentaldefence.ca.