www.cn.ca/aboriginalvision

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February 8, 2019

Standing Senate Committee on Energy,
The Environment and Natural Resources
The Senate of Canada
Ottawa, Ontario
K1A 0A4

SUBJECT: CN's Comments on Bill C-69

Dear Madame Chair and honourable Members of the Standing Senate Committee,

Canadian National Railway Company (CN) welcomes the opportunity to provide input to the federal government's proposed *Impact Assessment Act* (IAA) and other legislative amendments. CN has actively participated in the ongoing review of environmental and regulatory processes, including making oral and written submissions to the Expert Panel in December 2016 and written submissions to Government in May and August 2017, as well as in April and May 2018.

CN has specific legal obligations under the *Canada Transportation Act* to provide adequate and suitable accommodation for the receiving and loading of all traffic offered by shippers, and for its carriage, unloading, and delivery. We strive to do so in an environmentally and socially responsible manner, while respecting applicable laws. Our comments on the proposed legislation are made in light of these obligations and our commitment to delivering responsibly.[1].

In particular, it is worth reiterating the importance of rail to the Canadian economy. Canada's railways move more than 75 million people and approximately $280 billion worth of goods each year, while relieving road congestion and helping to reduce greenhouse gas emissions. CN alone operates over 31,500 kilometres of track connecting six ports, ten main yards, 17 automotive compounds, 21 intermodal terminals, 58 transload centres, and 200 interchange locations. CN re-invests approximately 20% of its revenues every year towards maintaining the safety and integrity of our network, and to support customer demand – over $12 billion in the last five years and a record $3.5 billion planned for 2018. Rail transportation is approximately four times more fuel efficient than truck, translating into a 75 per cent reduction in greenhouse gas emissions for an equivalent volume of freight. We facilitate the efficient and cost-effective movement of over 300 million tonnes of cargo every year, including consumer goods imported into Canada and the export of Canadian resources and manufactured goods. Our projects, including the construction of railway lines and related infrastructure to serve customers, are potentially subject to federal impact assessment and regulatory processes and are time-sensitive and critical to the success of the Canadian economy.

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[1] https://www.cn.ca/en/delivering-responsibly

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We agree there is a need to improve federal impact assessment (IA) and regulatory processes in a manner that will enhance participation by government, Aboriginal groups, and the public, protect the environment, and enable economic prosperity. These objectives are well aligned with our vision of moving goods safely and efficiently, being environmentally responsible, developing respectful and mutually beneficial relationships with Aboriginal people[2], attracting and developing the best railroaders, helping build safer, stronger communities, and adhering to the highest ethical standards.

To fulfil our obligations and responsibility efficiently, we need clear, stable, predictable, and timely IA and regulatory processes. Clarity and predictability are also paramount to increasing investors' trust and confidence in Canada's IA and regulatory processes, ensuring that Canada remains competitive in the context of a global marketplace and continues to provide a bright future for generations to come. CN is pleased to see these principles reflected in the draft *Impact Assessment Act* (IAA) and supporting documentation. It appears that many of the proposed changes have the potential to contribute to enhanced predictability and transparency, both of which need to be strengthened.

Comments in our submission focus on the draft IAA and proposed amendments to the *Navigation Protection Act* in Bill C-69.

Comments on the Proposed *Impact Assessment Act*

Overall Timelines

The *Better Rules for Major Project Reviews* Handbook issued by the Government states that, under the draft IAA, "legislated timelines are maintained but reduced from 365 to a maximum of 300 days for assessments led by the Agency, and from 720 to a maximum of 600 days for assessments led by a review panel." In fact, the overall timelines under the draft IAA would be longer than under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). As shown below, timelines for an IA by the Agency would increase by at least **3.5 months**, while timelines for an IA by a review panel could increase by **8.5 months** or more. In particular:

- The proposed planning phase would add **6 months** of process time at the beginning of an IA, as it is unlikely that proponents would have the necessary project description information to formally start the process any earlier than they currently do under CEAA 2012.
- The draft IAA includes no time limit for information gathering by the Agency (a step that takes about **5 months** of process time for an assessment by a review panel under CEAA 2012).
- The days of process time proposed in the draft IAA are measured from different start and end points, instead of from the time of Notice of Commencement (NoC) of an IA to the time of the Minister's decision (the start and end points of the mandatory timeline under the current legislation), thus *excluding* many months of actual process time from the mandatory timeline and giving the *appearance* of a timeline reduction, which would in reality not occur if the Bill is adopted as proposed.

[2] https://www.cn.ca/aboriginalvision

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Timeline Comparison for IA by Agency			
Step	**CEAA 2012**	**Proposed IAA**	**Recommended**
NoC	45 days after Project Description posted	180 days (6 months) after initial Project Description posted	90 days (3 months) after initial Project Description posted
EIS deemed complete	365 days (12 months) (from NoC to Minister's decision) (pre GIC referral)	No time limit (+ *months*)	300 days (10 months)
Agency submits IA report to Minister		300 days (10 months) (from notice EIS is complete to IA report submission to Minister)	
Minister makes decision		30 days (1 month) (or 90 days (3 months) if referred to GIC) (after posting of IA report)	30 days (1 month) (or 90 days (3 months) if referred to GIC) (after posting of IA report)
TOTAL	**13.5 months**	**17+ months**	**14 months** (or 16 months if referred to GIC)

Timeline Comparison for IA by Review Panel			
Step	**CEAA 2012**	**Proposed IAA**	**Recommended**
NoC	45 days after Project Description posted	180 days (6 months) after initial Project Description posted	90 days (3 months) after initial Project Description posted
EIS conformity review (by Agency)	*Typically 5 months (included in 24 months below)*	No time limit (*assume 5+ months*)	510 days (17 months)
Review panel established	24 months (from NoC to Minister's decision)	600 days (20 months) (from establishment of review panel to submission of review panel report)	
EIS sufficiency review (by review panel)			
Review panel report submitted to Minister			
Additional information requested by Minister			
Minister issues decision statement		90 days (3 months)	90 days (3 months)
TOTAL	**25.5 months**	**34 + months**	**23 months**

Proposed amendments to the draft IAA to achieve the government's stated goal of reducing the mandatory timelines for IA are provided in Appendix 1. If these amendments were to be implemented, the reduced timelines could be achieved as indicated in the right-most column in the timeline comparisons above.

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Effective Project Veto and Decision Statement Amendment without Due Process

The draft IAA even after being amended by the House of Common would give the Minister an effective veto over a designated project without due process of review. Under subsection 17(1), the Minister could effectively veto a designated project based on the "opinion" that it is "clear" a designated project would cause "unacceptable" environmental effects, without having undertaken any assessment to inform that opinion. The potential effects of a designated project are rarely "clear" before a comprehensive assessment has been undertaken. Further, the draft IAA does not specify any objective threshold beyond which effects would be considered "unacceptable" nor to whom they would have to be "unacceptable" for this power to apply. This provision precludes due process of actually considering the facts of a project through a comprehensive process of assessment and places projects at serious risk of arbitrary decision-making. Finally, there is no recourse under the draft IAA for proponents to appeal a decision made under this provision.

In our opinion, there is no circumstance in which a designated project should be rejected by the Minister before its positive and negative effects have been fully considered in a comprehensive IA process. The IA process allows ample opportunity for effects to be evaluated, mitigation opportunities explored, and informed decisions made, based on a complete record of evidence. As the IA process will function on a cost-recovery basis, the risk of rejection after a fair process of IA will be borne largely by the proponent.

A related concern pertains to subsection 68(1) of the draft IAA that would allow the Minister to amend or modify a Decision Statement, which could materially alter project feasibility, without any prior engagement with the proponent. While CN agrees that it may be necessary and appropriate to amend a Decision Statement, it must be understood that any such amendment could materially affect the technical or economic feasibility of a project that has already been determined to be in the public interest. Therefore, the legislation must ensure there is due process and limitations on this power to avoid such unintended consequences.

Proposed amendments to the draft IAA to address these concerns are provided in Appendix 1.

Public Participation

While the goal of enhanced Aboriginal and public participation in federal IA and regulatory processes to improve the quality of assessment and build trust in assessment outcomes and decision-making is laudable, the steps intended to open participation opportunities could in fact *undermine* meaningful participation by drowning out local interests. Participation that is extended too broadly, without due regard to the source of the issues raised and the strength of the interest, risks detracting attention away from the issues of greatest concern to those most affected. No limit on who can participate in a public hearing will likely increase the duration and cost of public hearings, as well as the level of effort required by all participants to review and consider written evidence and oral testimony provided by parties who are not directly affected by the designated project. The broader public will still have numerous and broad opportunities to participate in an IA by a review panel, including participating in the proposed mandatory planning phase of a project, providing comments on the initial Project Description, providing comments on the tailored Impact Statement Guidelines, providing comments on the completeness and sufficiency of the proponent's Impact Statement, providing comments on the proponent's responses to information requests issued by the review panel, and providing

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comments on the draft conditions. The hearing itself should continue to be focused on those parties that are directly affected and/or who have relevant information and expertise, as it is under the current process. This will ensure local interests who have the most at stake with respect to a designated project will be clearly heard and given due weight in the review panel's deliberations during and after the public hearing.

Proposed amendments to the draft IAA to address these concerns are provided in Appendix 1.

Public Engagement during the Proposed Mandatory Planning Phase

It is unclear whether and how the Agency would itself undertake public engagement during the proposed mandatory planning phase or if this will be (entirely) delegated to the proponent. Section 11 of the draft IAA indicates the Agency "must ensure that the public is provided with an opportunity to participate…, including by inviting the public to provide comments within the period that it specifies." However, the *Guide on the proposed system*, states that "during this step, the proponent would engage potentially affected communities…", but that the Agency "would provide feedback to the proponent based on the results of consultations." Duplicate or overlapping public engagement (*i.e.*, by the Agency and the proponent) on the same topic at the same time often leads to confusion on the part of the public, as well as engagement "fatigue"; this could undermine the goal of increasing early public participation in the IA process.

Proposed amendments to the draft IAA to address these concerns in part are provided in Appendix 1. CN will provide additional relevant comments on this issue through the ongoing consultation on the draft regulations pursuant to the draft IAA.

Deciding Whether an IA of a Designated Project is Required

The draft IAA includes screening provisions similar to those in the current legislation, which give the Agency the discretion to decide whether an IA of a designated project is required. The retention of screening provisions implies an understanding on the part of Parliament that there may be circumstances in which a project, despite being designated, would not warrant IA. Subsection 16(2) of the draft IAA lists factors that must be taken into account by the Agency when deciding whether an IA of a designated project is required. The availability of effective measures to mitigate adverse effects and a mechanism to ensure those measures will be implemented are also important factors to consider, which may not be limited to the information provided by the proponent pursuant to proposed subsection 16(2)(a). It would also be helpful if the draft IAA provided greater clarity regarding the criteria that would have to be met in order for a designated project to be exempt from IA. This could be done by adding a subsection (*e.g.*, 16(2.1)) that explicitly specifies exemption criteria.

Proposed amendments to the draft IAA to address these concerns are provided in Appendix 1.

Information Gathering

Several provisions in the draft IAA pertain to the gathering of information by the Agency to support an IA. Additional information about how these provisions may work in practice is provided in the Government's consultation paper regarding the draft regulations.

Notice of Commencement vs. Guidelines

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The draft IAA contemplates the issuance of a NoC of an IA, which is consistent with current practice under CEAA 2012. Subsection 18(1)(a) of the draft IAA indicates the NoC would set out the information or studies that the Agency considers necessary for it to conduct the impact assessment. However, the consultation paper indicates that "tailored Impact Statement Guidelines" outlining the information required from the proponent in the Impact Statement would be issued at the same time as the NoC, as one of the documents referred to under subsection 18(1)(b), and, further, that the Guidelines would then be made available for public comment. This suggests that the tailored Impact Statement Guidelines could be revised to take public comment into account some time *after* the NoC has been issued. This creates the potential for conflicting information requirements. The information required from the proponent in the Impact Statement, including any information or studies the Agency considers necessary, should be specified in only one regulatory instrument, preferably the tailored Impact Statement Guidelines, which are expected to be more detailed than the NoC.

Additional Information after Extension of Time Limit

The draft IAA anticipates that a proponent may request an extension of the proposed three-year time limit for providing the Impact Statement for a designated project (after the NoC) and provides the Agency with discretion to require additional information or studies the Agency considers necessary for it to conduct the impact assessment following any such extension. Conceptually, this provision is reasonable, as it acknowledges that ongoing project planning over the three-year-plus time period since the NoC of an IA might lead to material changes in the designated project, about which additional information may be necessary for the IA. However, the scope of the additional information or studies that may be required under this provision should be limited to information or studies related to any material changes in the designated project after the NoC or in how the proponent intends to address issues raised by the public, any jurisdiction, or Aboriginal group. It would be inappropriate to re-open the scope of assessment about aspects of the designated project or the proponent's approach that have not changed, as that scope, set out in the tailored Impact Statement Guidelines (and/or the NoC, as discussed above), will have been the subject of extensive Aboriginal consultation and public engagement and the proponent will likely already have expended considerable effort in preparing the specified information. To re-open the established scope of assessment when there has been no material change proposed by the proponent would be procedurally unfair to the proponent and unnecessarily burdensome to Aboriginal and public participants in the process.

Impact Statement Sufficiency

The draft IAA provides the Agency with discretionary power to require the proponent to collect additional information or undertake additional study if, in the opinion of the Agency, the information available to it (*e.g.*, in the Impact Statement) is not sufficient. This is consistent with the current practice of the Agency (and/or the review panel) to issue additional information requests to the proponent to ensure the Impact Statement is complete and sufficient. The Government's *Guide to the proposed new system* explains that the outcome of the proposed early planning step, manifest in proposed tailored Impact Statement Guidelines, would result in "a more efficient and streamlined impact assessment, fewer additional information requests and a more timely decision." However, this intention is not adequately reflected in the draft IAA. For example, there is currently no limit to the scope of the discretionary power to require additional information in the draft IAA. Moreover, as highlighted previously, there is no time limit for this activity proposed in the draft IAA. Under the current legislation, considerable time (*i.e.*, many months to years, in some cases) is spent in a repeating cycle of information requests from the

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Agency (and/or the review panel), responses from the proponent, and follow-up information requests. As proposed in the draft IAA and supporting documents, the NoC and/or tailored Impact Statement Guidelines would include detailed specification of information and study requirements, including methods to be used. It would not be appropriate or fair to later expand or change those information and study requirements or methods, which will have been established following extensive Aboriginal consultation and public engagement during the proposed early planning step. The establishment of a mandatory early planning step, which will add up to six months of additional process time, as currently proposed, must therefore be balanced with a practical limit to the later step of requiring additional information. This would provide procedural fairness to the proponent and make it more likely that the goal of achieving "a more efficient and streamlined impact assessment, fewer additional information requests and a more timely decision" could in fact be realized.

Proposed amendments to the draft IAA to address these concerns are provided in Appendix 1.

Factors to be Considered in IA and Decision-Making

Subsection 22(1) of the draft IAA lists factors that must be taken into account in the IA of a designated project. Section 63 of the draft IAA lists the factors that must be considered when determining whether the adverse effects of a designated project are in the public interest. Some of these factors require clarification in terms of scope and definition, as well as with respect to how they will be considered and weighed in practice.

Clarity of Scope and Definition
Key terms used in these provisions should be more clearly defined in the legislation and explained in supporting guidance. Provisions of concern in this regard include subsections 22(1)(g), 22(1)(l), 22(1)(q) and 22(1)(r). With respect to several factors listed in subsection 22(1), we note the term "indigenous peoples of Canada" is defined in section 2 of the draft IAA, but the term "indigenous" alone is not. This leads to some potential confusion about the scope of the term "indigenous" compared to the term "indigenous peoples of Canada" and we recommend the latter term be used consistently throughout the legislation when referring to Aboriginal matters. The term "substantially begin," used in subsection 70(1) of the draft IAA, should also be clearly defined.

Contribution to Sustainability
Subsections 22(1)(h) and 63(a) of the draft IAA contemplate the consideration of the "extent to which the designated project contributes to sustainability." "Sustainability" is defined in section 2 of the draft IAA as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations." This definition of sustainability includes four distinct 'pillars' of sustainability (*i.e.*, environmental protection, social well-being, economic well-being, and health preservation). It is unclear how the "contribution to sustainability" would be evaluated across these 'pillars'. For example, how will the "contribution to sustainability" be measured and weighted when there are adverse effects on one or more pillars and positive effects on other pillars? The definition of sustainability in the draft IAA also implies that a designated project must affect these pillars "in a manner that benefits present and future generations"; however, some designated projects that are in the public interest may have unavoidable adverse effects on one or more pillars. The current legislation anticipates this circumstance by requiring a determination of whether significant adverse environmental effects are "justified." The current

definition of sustainability in the draft IAA appears to potentially preclude the possibility that such trade-offs may in fact be necessary and in the public interest. An alternative definition of sustainability (*e.g.*, the Brundtland definition)[3], which refers to meeting the needs of present and future generations (rather than "benefits") may be appropriate to resolve this conflict. Guidance regarding the evaluation of sustainability must also be provided to support implementation of the IAA.

The Extent to Which Adverse Effects are Adverse
Subsection 63(b) of the draft IAA requires the consideration of "the extent to which the adverse effects … are adverse." The draft IAA provides no indication of how the extent of adversity would in fact be measured. CEAA 2012 currently requires the determination of whether adverse effects are significant. The significance test was established through decades of practice and case law that served to clarify the relevant and appropriate measure of adversity of effects. In particular, it is well understood that a clearly defined threshold is necessary to make a meaningful determination of the degree of adversity of effects. The significance test replaced unsatisfactory and ineffective approaches to evaluating adversity that relied on a vaguely defined spectrum of terms, such as "low", "minor", "moderate", "major", and "high", terms that were inconsistently applied and finally deemed through case law[4] to be inappropriate for the purpose of federal decision-making. To that effect, the proposed language in the draft IAA must be clarified. The significance test has proven an effective threshold for decision-making and should be continued.

Proposed amendments to the draft IAA to address this concern are provided in Appendix 1.

Comments on the Proposed Navigation Protection Act Amendments

Uncertainty

While CN appreciates and supports the intention to restore protections lost in the 2012 legislative changes, the proposed definition of "navigable water" in the amended *Canadian Navigable Waters Act* (CNWA) is exceedingly broad and creates tremendous uncertainty for proponents as it could include virtually every body of water in Canada. The proposed amendments would define "navigable water" as "…a body of water … that is used ***or where there is a reasonable likelihood that it will be used*** by vessels, ***in full or in part, for any part of the year*** as a means of transport or travel…" [emphasis added]. This definition extends, for example, to extremely shallow watercourses that swell once per year allowing for a single day of possible recreational use, such as drainage ditches alongside roadway or railway rights-of-way, small unconnected ponds or wetlands, or small depressions that occur immediately adjacent to or on private property. This creates uncertainty for proponents whose works may affect watercourses or waterbodies that are of very limited or impractical use.

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[3] The World Commission on Environment and Development (WCED) (commonly referred to as the Brundtland Commission) defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." WCED 1987. *Our Common Future*. Oxford University Press. 400pp.

[4] *Canadian Wildlife Federation Inc.* v. *Canada (Minister of Environment)* (1989), [1990] 31 F.T.R. 1, Muldoon J. (T.D.) Rafferty No. 3. Decision rendered December 28 1989.

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Amendments to the draft CNWA are necessary to narrow the definition of "navigable waters" to avoid requiring proponents to speculate on whether a waterbody is "likely to be used," as this creates vagueness and uncertainty in the legislation and therefore limits a proponent's ability to know whether compliance has been achieved. Proposed amendments to the draft CNWA to address this concern are provided in Appendix 2.

Predictability

As with the definition for "navigable waters," certain proposed amendments to the CNWA refer to *future* navigation. For example, proposed subsections 7(7)(c) and 29(1(e) refer to "***anticipated*** navigation" and proposed subsection 29(1)(f) refers to whether indigenous peoples "navigate, have navigated or ***will likely*** navigate" [emphasis added]. Without specific information, it would be difficult, if not impossible, to predict future usage of a waterway. These provisions should be qualified to focus on future navigation that is certain or can reasonably be foreseen, such as where a dredging project is underway or proposed that would make anticipated or future navigation likely. Proposed amendments to the draft CNWA to address this concern are provided in Appendix 2.

Works in Navigable Waters not Listed in Schedule

CN recognizes and appreciates that section 10 of the CNWA would provide a proponent with two options for compliance with the Act when a proponent's activity affects a works in, on, over, under, through, or across navigable waters: (a) application and approval by the Minister or b) public notification and responses to concerns. Unfortunately, both processes set out in section 10 rely heavily on details to be "specified by the Minister." There is a lack of transparency, consultation, and predictability when requirements for a process are left to future "specification" – neither spelled out in the Act itself, nor subject to the public consultation process required by regulations or other statutory instruments.

In an effort to minimize discrimination between types of projects or applicants and to provide both transparency and predictability to the process, while still giving the Minister the necessary flexibility to determine pertinent details of the process, CN respectfully submits that, at a minimum, the Minister should be required to "specify" such details in guidelines that are published and therefore publicly available to all proponents of works associated with navigable waters not listed in the Schedule.

In addition, as drafted, the proposed section 10 could create a repeating cycle of public notice and comment with respect to works in non-listed navigable waters. Proposed subsection 10(3) provides for a 30-day comment period following publication of a public notice of a proposed work, and proposed subsection 10.1(1) provides for an additional 45-day period to resolve concerns that may be raised in relation to the proposed work. Proposed subsection 10.1(2) would then require publication of a *new* public notice, initiating another 30-day public comment period, following any "material change" to the proposed work that results from an attempt to resolve the concern. The term "material change" is not defined, creating uncertainty for proponents. Moreover, new concerns could be raised following each public notice, which could lead to a repeating cycle of notification, public comment, expression of concern, resolution of concern, back to notification and further public comment. In certain circumstances, a concerted effort to maintain this cycle could be perpetuated by individuals against the proposed work in order to create delay. This adds to procedural uncertainty and increases the likelihood of delays

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and inefficiencies. Proposed amendments to the draft CNWA to address these concerns are provided in Appendix 2.

Minister's Power to Sell

As drafted, proposed subsection 17(1) would give the Minister the power to sell an obstruction or potential obstruction without any consultation with the owner or person in charge of the obstruction or potential obstruction and without reference to whether the owner or person in charge is compliant with a relevant order. This should be a power of last resort, and therefore must be linked to the non-compliance referenced in proposed subsections 15(4), 15.1(2), and 16(2). Proposed amendments to the draft CNWA to address this concern are provided in Appendix 2.

We welcome the opportunity to respond to any questions the Committee may have.

Yours truly,

Mélanie Allaire
Senior Counsel
Environmental and Aboriginal Affairs

cc.: Louis-Alexandre Lanthier (CN Governmental Affairs)

Appendix 1

Please find all amendments CN is proposing to make to the proposed *Impact Assessment Act*

Overall Timelines

Proposed Language	Rationale
Notice of commencement 18 (1) If the Agency decides that an impact assessment of a designated project is required — and the Minister does not approve the substitution of a process under section 31 in respect of the designated project — the Agency must, within ~~180~~ 90 days after the day on which it posts a copy of the description of the designated project under 20 subsection 10(2), provide the proponent of that project with …	This amendment would allow the time available for early Aboriginal[5] and public participation in an IA to more than double, while also providing the Agency 3 months to undertake consultation and planning with other jurisdictions.
Final report submitted to Minister 28 (2) After taking into account any comments received from the public, the Agency must, subject to subsection (5), finalize the report with respect to the impact assessment of the designated project and submit it to the Minister no later than 300 days after the day on which the notice referred to in subsection ~~19(4)~~ 18(1) is posted on the Internet site.	This amendment would help to achieve the stated goal of reducing the mandatory timeline for IA by the Agency, as the total process time measured from the same start and end points (NoC to Minister's decision) would be 330 days, instead of the current 365 days (excluding the new early planning step).
Time limit 37 (1) If the Minister refers the impact assessment of a designated project to a review panel, the review panel must, subject to subsection (2), submit a report with respect to that impact assessment to the Minister no later than ~~600~~ 510 days after the day on which ~~he or she appoints to the panel the minimum number of members required~~ the notice of the commencement of the impact assessment of the designated project is posted on the Internet site under subsection 18(2).	These amendments would achieve the stated goal of reducing the mandatory timeline for IA by a review panel, as the total process time measured from the same start and end points (NoC to Minister's decision) would be 600 days (510 days specified in this subsection plus the 90 days for decision-making specified in subsection 65(4)), instead of the current 720 days (excluding the new early planning step).

Effective Project Veto and Decision Statement Amendment without Due Process

Proposed Language	Rationale
Minister's power 17 (1) If, before the Agency provides the proponent of a designated project with a notice of the commencement of the impact assessment of the designated project under subsection 18(1), a federal authority advises the Minister that it will not be exercising a power conferred on it under an Act of Parliament other than this Act that must be exercised for the project to be carried out in whole or in part, ~~or the Minister is of the opinion that it is clear that the designated project would cause unacceptable environmental effects within~~	This amendment would ensure the positive and negative effects of a designated project are fully considered before a decision in respect of the designated project is rendered.

[5] CN uses the term "Aboriginal" to refer to First Nations, Métis, and Inuit peoples of Canada. See our recommendation regarding the need for clarity of terms in our submission.

~~federal jurisdiction~~, the Minister must provide the proponent with a written notice that he or she has been so advised or is of that opinion. The written notice must set out the reasons why the federal authority will not exercise its power ~~or the basis for the Minister's opinion~~.	
Minister's power — decision statement 68 (1) The Minister may amend a decision statement, including to add or remove a condition, to amend any condition or to modify the designated project's description. However, the Minister is not permitted to amend the decision statement to change the decision included in it.	While no amendment is proposed to the basic power established in section 68(1), the proposed amendments would appropriately limit that power and provide for due process of engagement with the proponent to ensure any Decision Statement amendment would not render infeasible a project that has been determined through IA to be the public interest.
Limitation – feasibility (4.1) The Minister may add or amend a condition or modify the designated project's description only if, in the Minister's opinion, following consultation with the proponent under section 72(1), the new or amended condition or modification of the designated project's description would not render the project technically or economically infeasible.	
Amending decision statement — information 72 (1) The Minister may, before amending a decision statement, require the proponent of the designated project described in the decision statement to provide the Minister with any information that he or she considers necessary for the purpose of amending the decision statement and must consult with the proponent regarding the technical and economic feasibility of the amendments.	

Public Participation

Proposed Language	Rationale
Review panel's duties 51 (1) A review panel must, in accordance with its terms of reference, … (c) hold hearings in a manner that offers ~~the public~~ any interested party an opportunity to participate in the impact assessment; …	While the public will still have numerous and broad opportunities to participate in an IA by a review panel, the hearing itself should be focused on those parties that are directly affected and/or who have relevant information and expertise. This will ensure local interests who have the most at stake with respect to a designated project will be clearly heard and given due weight in the review panel's deliberations during and after the public hearing.
Definitions 2 The following definitions apply in this Act. … ***interested party***, with respect to a designated project, means any person who, in the opinion of the review panel, is directly affected by the carrying out of the designated project or has relevant information or expertise.	

Public Engagement during the Proposed Mandatory Planning Phase

Proposed Language	Rationale
Public participation 11 (1) The Agency must ensure that the public is provided with an opportunity to participate meaningfully in its preparations for a possible impact assessment of a designated project, including by inviting the public to provide comments within the period that it specifies. (2) If the Agency delegates to the proponent any aspect of the public participation under subsection 11(1), the Agency must consult with the proponent to coordinate public participation opportunities.	This amendment would provide for coordination of public participation activities by the Agency and the proponent to avoid over-burdening the public and promote effective and meaningful public participation.

Deciding Whether an IA of a Designated Project is Required

Proposed Language	Rationale
Factors 16 (2) In making its decision, the Agency must take into account the following factors: … (f) any study that is conducted or plan that is pre-pared by a jurisdiction — in respect of a region that is related to the designated project — and that has been provided to the Agency; ~~and~~ (g) effective measures are available to mitigate the adverse effects of the designated project and the Agency is satisfied that the implementation of those measures will be ensured by a federal authority or another person or jurisdiction; and ~~(g)~~(h) any other factor that the Agency considers relevant.	This amendment would clarify relevant factors for consideration when deciding whether an IA of a designated project is required.

Information Gathering

Proposed Language	Rationale
Notice of commencement 18 (1) If the Agency decides that an impact assessment of a designated project is required — and the Minister does not make an order under section 17 or approve the substitution of a process under section 31 in respect of the designated project — the Agency must, within ~~180~~ 90 days after the day on which it posts a copy of the description of the designated project under subsection 10(2), provide the proponent of that project with (a) a notice of the commencement of the impact assessment of the project ~~that sets out the information or studies that the Agency considers necessary for it to conduct the impact assessment~~; and (b) any documents that are prescribed by regulations made under paragraph 112(a), including tailored guidelines regarding the information or studies referred to in paragraph	This amendment would remove the potential conflict between information requirements specified in the NoC and information requirements specified in the tailored Impact Statement Guidelines that are intended to be one of the documents provided under subsection 18(1)(b) (as described in the Government's consultation paper regarding the draft information requirements regulations).

Proposed Language	Rationale
(a) and plans for cooperation with other jurisdictions, for engagement and partnership with the Indigenous peoples of Canada, for public participation and for the issuance of permits.	
Additional information or studies 19 (3) If the Agency extends the time limit, it may require the proponent to provide it with any additional information or studies related to any material change in the notice or detailed description of the designated project provided by the proponent under subsection 15(1) that the Agency considers necessary for it to conduct the impact assessment.	This amendment would ensure the additional information or studies that may be required by the Agency following a time limit extension would be focused on any material changes proposed by the proponent. This would provide procedural fairness and limit unnecessary burden on assessment participants.
Studies and collection of information 26 (2) However, if the Agency is of the opinion that there is not sufficient information available to it for the purpose of conducting the impact assessment or preparing the report with respect to the impact assessment, it may require the collection of any information or the undertaking of any study that, in the Agency's opinion, is necessary for that purpose, including requiring the proponent to collect that information or undertake that study, subject to subsection 26(3). (3) The additional information or studies required under subsection 26(2) must be consistent with the scope of assessment specified in the notice of commencement and documents provided to the proponent under subsection 18(1).	These amendments would ensure the additional information or studies that may be required by the Agency and/or the review panel would be focused on the scope of assessment previously determined by the Agency following the extensive Aboriginal consultation and public engagement in the proposed early planning step. This would provide procedural fairness and promote the achievement of the Government's stated goals of a more efficient and streamlined process with fewer additional information requests.
Similar amendments would also be required to sections 38 and 52 (2) of the draft IAA.	

Factors to be Considered in IA and Decision-Making

Proposed Language	Rationale
Factors – public interest 63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors: … (b) ~~the extent to which~~ whether the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are ~~adverse~~ significant; …	These amendments would continue the well-established and appropriate significance test for measuring the adversity of effects. This would keep the IAA consistent with Canadian case law and with well-established assessment practice in Canada and internationally.
All other references in the draft IAA to "the extent to which the effects are adverse" should be amended to refer instead to "whether the adverse effects are significant." *See subsections 28(3), 33(2), 36(2)(a), 51(1)(d)(ii), 59(2),*	

Proposed Language	Rationale
and 68(2).	

Appendix 2

Please find all amendments CN is proposing to make to the proposed *Navigation Protection Act Amendments*

Uncertainty

Proposed Amendment	Rationale
navigable water means a body of water, including a canal or any other body of water created or altered as a result of the construction of any work, that is used ~~or where there is a reasonable likelihood that it will be used~~ by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and (a) there is public access, by land or by water; (b) there is no such public access but there are two or more riparian owners; or (c) Her Majesty in right of Canada or a province is the only riparian owner. (*eaux navigables*)	Removing the reference to "likelihood" of use allows the definition of "navigable waters" to encompass seasonal uses, and partial uses, but limits them to *actual* use instead of *possible* use.

Predicability

Proposed Amendment	Rationale
Assessment — factors 7 (7) In determining whether to issue the approval, the Minister must consider the following: ... (c) the current ~~or anticipated~~ navigation in that navigable water; **Addition to schedule** 29 (1) The Minister may, by order, amend the schedule by adding to it a reference to a navigable water after considering the following factors: ... (e) the past, or current ~~or anticipated~~ navigation in the navigable water; (f) whether there are Indigenous peoples of Canada who navigate, or have navigated ~~or will likely navigate~~ the navigable water in order to exercise rights recognized and affirmed by section 35 of the Constitution Act, 1982; and	Limiting the factors to current or known navigation provides transparency and predictability to proponents.

Works in Navigable Waters not Listed in Schedule

Proposed Amendment	Rationale
Minister's powers 10(1.1) The Minister shall issue and publish guidelines specifying the form, manner, information and place referred to in subsection (1) 10(1.2) The guidelines referred to in subsection (1.1) are not statutory instruments within the meaning of the *Statutory Instruments Act*.	Requiring the specifications to be in a published guideline provides transparency and predictability to proponents. Specifying that the guideline is not subject to the *Statutory Instruments Act* provides flexibility for the Minister.

Proposed Amendment	Rationale
Change 10.2 (3) For greater certainty, if, at any time, an owner referred to in subsection (1) makes a material change to the work or to the method of its construction, placement, alteration, rebuilding, removal or decommissioning, that has the possibility of having a negative effect on navigation, the owner must either make an application under paragraph 10(1)(a) or deposit new information and publish a new notice in accordance with paragraph 10(1)(b).	The "material change" referred to in 10.2(3) that would require the proponent to engage in a follow-up application or notification under 10(1)(a) or (b) should be limited to a "material change" that has the possibility of having a negative effect on navigation. If the material change improves navigation, or does not affect navigation, the requirement to reinitiate process under 10(1) should not be binding.