Comments on Bill C-69

February 26, 2019
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1. Summary of Main Recommendations

The recommendations summarized below are presented in detail in part 4 “Recommendations.”

**Impact Assessment Act (IAA)**

**R1 Purpose of IAA:** Amend the Purposes section (s. 6(1)) of the Impact Assessment Act to state that one of its purposes is to ensure that only major projects are to be designated, those with the greatest potential to cause effects that are within the legislative authority of Parliament.

**R2 Indigenous Rights:** Clarify in the preamble of the IAA that the Government’s commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples* is based on the Constitution Act, 1982.

**R3 Federal-Provincial Coordination:** Explore all possibilities of making the IAA process easier to coordinate and harmonize with provincial IA mechanisms to avoid duplication. Amend s. 21 of the IAA to state that the Minister must consider either delegating the assessment to the other jurisdiction or substituting its process, if it has one. When the Minister is considering rejecting an application for substitution, the IAA should require the Minister to notify the other jurisdiction in advance and to explain the reasons for the rejection.

**R4 Decision Statements:** Qualify the Minister’s authority to amend a Decision Statement (s. 68) and provide guidance to the Minister by stating that the amendment must not unreasonably affect the technical or economic feasibility of the designated project or its implementation timeline.

**R5 Cost Recovery:** Cost recovery from proponents (s. 76) should be limited to expenses reasonably incurred and connected to the exercise of the powers of the Agency or review panel. Furthermore, the Agency or review panel should provide the proponent with a budget within 30 days of a determination that an assessment will be done.

**R6 Advisory Council and Commission:** Expand the provisions dealing with the Minister’s Advisory Council and the Agency’s Expert Commission to clarify their objectives, size, selection criteria, and responsibilities.

**Canadian Navigable Waters Act (CNWA)**

**R7 Navigable Waters Definition:** Change the definition of navigable waters in Bill C-69 to explicitly exclude canals and bodies of water built for a purpose other than navigation, such as canals constructed to convey water to hydropower plants.

**R8 Navigable Waters Schedule:** Only rivers that are regularly used for transportation (for goods or people) should be on the Schedule of navigable waters. The CNWA should be clearer in stating the importance of this criterion in making decisions about the Schedule.
R9 **Addition to Navigable Waters Schedule:** The addition of navigable waterways to the Schedule should require the approval of the Governor in Council.

R10 **Entry into Force:** The CNWA should come into force only after in-depth consultations on orders related to:

- Major works;
- Minor works;
- Construction, placement, alteration, rebuilding, removal, repair or decommissioning of works (s. 28(2)c).

R11 **Major Works Definition:** The CNWA should define as a "major work" only those structures that completely block navigation in a main channel, thus excluding those that are located on secondary channels.

R12 **Streamlined Approvals for Work on Existing Facilities:** The CNWA should include a simplified process for the approval of alterations or rebuilding of existing structures. Such a process should be less restrictive and time consuming than that for new structures.
2. Introduction

We are the Canadian Hydropower Association (“CHA”). We represent both the producers of hydroelectricity and the service and supply businesses that support the industry. Hydropower is the oldest form of electricity generation in Canada. Our industry has grown up with the creation and development of economic and environmental regulation. We have extensive experience in the impact assessment of large natural resource projects. Our input has been and will continue to be built around the themes of clarity, timeliness, reliability, and efficiency.

The CHA has brought its experience to our response to the government’s consultation on Bills C-68 and C-69 from the beginning of the process. We submitted a brief to the Expert Review Panel, commented on the Environmental and Regulatory Reviews discussion paper, submitted a brief to the House of Commons Committee on the Environment and Sustainable Development (“ENVI”), and provided witnesses to the Committee.

We appreciate the opportunity to contribute to the Senate’s examination of Bill C-69. In this brief, we focus on the Impact Assessment Act (“IAA”) and the Canadian Navigable Waters Act (“CNWA”). The CHA has reviewed Bill C-69 (“the Bill”). We generally understand the Government’s approach and are pleased to note that some of the recommendations in our submission to ENVI appear in the current version of the Bill. However, critical improvements to the IAA and the CNWA are still needed.

No assessment regime is acceptable without public support. We commend the Government’s efforts to ensure that, all interested parties can participate, the process is transparent and understandable, assessments are evidence-based, the responsibility to respect Indigenous rights and Indigenous participation is made explicit, and proponents can better predict how and at what pace the process will unfold. We are pleased to see that a project’s impact on Canada’s ability to meet its climate change commitments will now be part of the assessment. This is especially important for hydropower, as Canada’s largest low-emission, renewable energy source.

Hydropower supplies over 60% of Canada’s electricity. It is our largest generation source by far. The industry is essential to keeping Canada’s electricity system one of the cleanest, most renewable, and reliable in the world. Hydropower generation produces virtually no greenhouse gas (“GHG”) emissions. It can and must play a central role in achieving Canada’s climate change targets.

Studies indicate that to meet our 2030 and 2050 commitments we need to electrify the economy and further reduce GHG emissions in the electricity industry, amongst other measures. This means doubling, or even tripling, electricity generation by 2050 through a major expansion of hydropower, in concert with wind, solar, tidal power, and geothermal. The hydropower industry is up to the challenge. Canada has vast amounts of hydroelectric resources still to be developed. For this to happen, our industry needs a predictable and timely impact review process that engages all stakeholders and Indigenous peoples and has the confidence of the public. Bill C-69 could bring us closer to that objective.
The IAA and CNWA are particularly important to the hydropower industry. We develop, operate and maintain facilities that include both mega-projects and small-scale installations. Proponents and operators take great care to minimize impacts on the environment and maximize socio-economic benefits. An effective impact assessment regime can play an important role in optimizing hydropower projects. But a poorly crafted regime, no matter how thorough it may be, could paralyze hydropower projects and hinder the growth of clean electricity. Impact assessments are especially challenging for our industry because of Canada’s federal system and the multiple regulatory regimes to which we are subject. Similarly, federal navigation regulation acutely affects the way in which hydropower interacts with other water users and other water management authorities.

The new IAA process, with its broader objectives, new early planning phase, and increased public, as well as Indigenous, participation, is complex and time consuming, especially for small or medium-sized projects. We are particularly concerned that small-scale proposals might be discouraged by the lengthy and complicated IAA process. For developers of such projects, the IAA will require an upfront commitment of considerable time as well as human and financial resources to assess what are likely to be minimal impacts. Such large commitments are out of proportion with the budget and timelines of small and medium-sized projects. And, in many cases, lifecycle regulators or other federal and provincial regulations will have already dealt with the potential effects of such projects. It is reasonable to expect that the commercial viability of many of those projects would be undermined by the IAA’s requirements, if they had to go through the process. We do not believe the Government intended that outcome.

Bill C-69, as currently drafted, does not distinguish between mega-projects and small-scale developments. The legislation should state clearly that the purpose of the IAA is to assess the impacts of major projects and projects on federal land. Such an amendment would make the Act conform with the statement made by the Minister of the Environment in the House of Commons standing committee (see Item 4.1, below). The Act should state this explicitly in order to guide the development of the project list regulations.

For major projects, the thoroughness of the IAA’s procedure is understandable and may at first sight appear to be appropriate. Large projects can have extensive, wide-ranging impacts. If the new assessment regime better assures the public that those impacts have been identified and that measures will be taken to eliminate, minimize, and mitigate them, then project proponents can proceed with confidence. However, even for large-scale projects, the heavy process of the IAA may cause substantial delays that, from a proponent’s standpoint, may not compare favorably with the present-day CEAA process. For example, the IAA process – unlike that of CEAA 2012 – puts the Minister under no obligation to consider substitution, despite the fact it appears to be an effective solution to the risk of duplicate IAs.

The assessment process in the IAA extends beyond purely environmental concerns to encompass aspects of health, as well as social and economic well-being. Proponents and regulators will have to draw on areas of expertise that have not been central to the federal review process in the past. The new process will require significantly
increased resources to administer. This will be critical not only to ensure that it functions smoothly but also to support industry’s ability to develop good projects in a timely way. When Parliament reviews future budget bills, it should ensure that adequate resources are regularly provided to the Impact Assessment Agency and to all associated federal authorities.

3. Background

Bill C-69 contains improvements to Canada’s impact assessment regime. It also brings additional complexity. The House of Commons strengthened the bill through its review. The CHA, drawing on the extensive practical experience of its members, has examined Bill C-69 to determine whether it can be further improved to provide clear, timely, reliable, and efficient assessments. Does the IAA set clear expectations of industry behaviour? Does it provide a process with timing that allows a thorough review but also respects the constraints that proponents must deal with in preparing major projects? Can a Government Decision Statement be relied upon not to be challenged in court? And finally, does the IAA focus scarce public resources on addressing the effects of major projects with potential impacts in areas of federal jurisdiction?

When legislative requirements are ambiguous, industry cannot prepare projects with confidence. Equivocal and undefined terms produce uncertainty and confusion. If the legislation leaves key concepts open to interpretation, their meaning will be likely be determined in the courts. That is an outcome that can be wasteful and time-consuming.

Large-scale hydropower projects require long planning and construction times, substantial financial commitments, and they have extended operating and economic lives. Companies must make far-reaching investment decisions and commit substantial resources long before any revenue is generated. An assessment process that is not subject to timing discipline — or is disrupted by court challenges — can paralyze needed hydro development.

Any project will have effects on its environment. The federal assessment regime should focus on proposals of national significance. No one process is suitable for all circumstances. The IAA needs to recognize that small-scale proposals may be dealt with by other jurisdictions or by lifecycle or sector specific regulators (for example, the Canadian Energy Regulator or Fisheries and Oceans Canada). The IAA should contain a provision indicating clearly that the federal IA process is intended to deal with major projects and not designed to review smaller projects. This will ensure that the legislation includes sufficient guidance for the development of the Regulations designating Physical Activities (project list). The government should consult potential participants as soon as a draft of the Schedule is released.

We are deeply concerned by the additional burden on proponents that will result from the implementation of the changes to the Navigation Protection Act (i.e. the Canadian Navigable Waters Act) and by the risk that it will cause delays in urgent maintenance or rebuilding work that is essential for public safety and a reliable electricity supply. It is critical that the government ensure that hydropower (and other) facilities located on navigable waters can continue to be maintained, repaired, rebuilt or altered without
undue delays or excessive burden on the proponent. This can be accomplished by amendments to the Bill and by judicious development of regulations under the Act.

On basis of the above considerations we have developed recommendations to improve the clarity and certainty of the IAA process and the Canadian Navigable Waters Act. These recommendations are presented in Section 4.

4. Detailed Recommendations & Rationale

4.1 IAA

R1 The IAA should apply only to major projects with the highest risk of adverse effects in areas within the legislative authority of Parliament, as well as to projects on federal land. The IAA’s process is too long and complex for small projects. Minister McKenna was clear when she spoke to ENVI on March 22, 2018 and said: The legislation we introduced earlier this year aims to restore public trust in how the federal Government makes decisions about such major projects as mines, pipelines, and hydro dams.” (emphasis added). The IAA should state clearly that its purpose is to assess the impacts of major projects and projects on federal land.

We propose the addition of a subsection 6(1)(a.1), with the words,

\[ \text{to ensure that only major projects with the greatest potential to cause significant adverse environmental effects that are within the legislative authority of Parliament are designated.} \]

Projects with less potential for adverse effects or that only have effects that are already managed through other legislation or fall outside of federal jurisdiction should not be subject to the IAA. They should continue to be assessed and regulated by lifecycle regulators and, when applicable, sector specific legislation (e.g., Fisheries Act, Migratory Birds Convention Act, Species at Risk Act) or provincial legislation.

For example, after careful consideration of the IAA, we believe that applying the process to hydropower projects of less than 200 MW could prove to be impossible. The time and effort required could result in proponents abandoning their projects early in their development, before submitting an application.

The Minister’s authority to designate an activity that is not prescribed by regulations under subsection 9(1) should be clear and consistent with our recommended purpose statement.

We recommend modifying sub-section 9(1), so that it reads:

\[ \text{The Minister may, on request or on his or her own initiative, by order, designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in his or her opinion the carrying out of that physical activity may cause adverse effects within federal jurisdiction and,} \]
There is potential for such effects to be significant; or

Potential effects within federal jurisdiction are complex and may require a complex set of mitigation measures; or

The project type is novel and the severity of effects within federal jurisdiction or the extent to which these effects can be mitigated is unknown.

R2  The House amended C-69 to state in the Preamble that the Government is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP" or "the Declaration"). CHA supports the Government’s efforts, through the IAA and elsewhere, to protect Indigenous rights and promote reconciliation. However, the reference in the preamble to UNDRIP could be incorrectly interpreted to suggest the Declaration in some way changes the nature of the Government’s obligation. Our interpretation of the Government’s statement adopting UNDRIP and of the terms of the Declaration itself, makes it clear that Indigenous rights are safeguarded by the Constitution Act, 1982 and not UNDRIP. This needs to be made clear.

We suggest Parliament modify the Preamble to state:

Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples in accordance with the Canadian constitution

R3  Explore all possibilities of making the IAA process easier to coordinate and harmonize with provincial IA mechanisms to avoid duplication. Amend s.21 of the IAA to state that the delegation of the impact assessment to another jurisdiction that has IA legislation in place and the substitution of the IA of the other jurisdiction for the federal IA are mechanisms that must be considered when consulting other jurisdictions. If the Minister decides to reject an application for substitution, he or she should be required to notify the other jurisdiction in advance and to explain the reasons for the decision.

R4  Proponents that receive a positive Decision Statement must have confidence that they can proceed with reasonable certainty about the conditions that they must meet and the costs of compliance. Subsection 68(1) introduces a power for the Minister to amend a decision statement, on the condition specified in 68(2) that this not make the effects of the project more adverse. This provision has the potential to be an effective tool to enable appropriate adaptive management. However, there is no economic constraint on the use of this power. It would effectively introduce an unquantifiable contingent liability to be borne by the proponent. We recommend amending 68(2) as follows:

The Minister may add, remove or amend a condition only if he or she is of the opinion that both of the following conditions are true:

a) the action of the Minister will not increase the extent to which the effects that are indicated in the report with respect to the impact assessment of the designated project are adverse, or
b) the action of the Minister will not unreasonably affect the technical or economic feasibility of the designated project or the timeline of implementation of the designated project.

R5 The cost recovery provisions of the IAA, as written, are open-ended and not aligned with similar provisions in other federal legislation (e.g., Fisheries Act). Regulations on cost recovery will not be sufficient to address our concerns. Cost discipline is essential in regulatory processes. The text of the IAA should clearly state the principles by which reasonable limits on reimbursable costs will be established. The IAA should require the Agency or review panel to provide the proponent with a budget of estimated costs. This is essential for process predictability, transparency, and financial discipline. The budget should be provided within 30 days of establishing a review panel or the issuance of a notice of commencement by the Agency, as the case may be. The proponent should be responsible only for costs that are reasonably incurred and clearly connected to the performance of the duties and functions of either the Agency or the review panel.

We recommend the following additions after subsection 76(2):

76(2.1) Costs and expenses incurred pursuant to subsection (1) and subsection (2) shall only be recoverable to the extent they can be established to have been reasonably incurred in the circumstances of, and directly connected to, the exercise of the powers or the performance of the duties or functions of the Agency or the review panel, as the case may be; and

76(3) The Agency or the review panel will provide the proponent of a designated project with an estimated budget for costs that they may incur under subsection (1) and subsection (2), in the case of the Agency, within 30 days of a notice being provided pursuant to subsection 18(1), and in the case of a review panel, within 30 days of the establishment of the review panel by the Minister.

R6 Bill C-69 states that the Minister must establish an Advisory Council (s. 117) and the Agency must establish an Expert Committee (s. 157) to advise on the administration of the IAA and regional and strategic assessments. The IAA does not explain the terms of reference or a purpose for each body, except in general terms. It does not explain how the bodies are intended to work with each other, let alone with the officials of the Impact Assessment Agency and Environment and Climate Change Canada. In addition, the only aspect of the composition of the bodies that is specified is that each will have at least three Indigenous members. A minimum of one representative from the First Nations, Métis, and Inuit communities will be on each body. There is no indication what criteria the Government will use to select the rest of the Council and the Committee.

We recommend that ENEV request that the Government provide witnesses to explain the objectives, size, selection criteria, and responsibilities that it intends for these bodies. With that information, we recommend that ENEV amend the IAA to make those terms
explicit and to ensure a fair representation of the different categories of stakeholders, including industry.

4.2 Canadian Navigable Waters Act ("CNWA")

The CHA understands the need to improve navigation regulation, to ensure greater transparency and Indigenous participation. However, our industry is concerned by some of the unintended consequences that Bill C-69 might have in this area.

Bill C-69 could create a very complex, needlessly restrictive regime for the management of existing and future hydropower facilities. The additional burden on the hydropower industry will be considerable. The number of approvals required will greatly increase and become unpredictable. The benefits of the opt-out mechanism of the current regime will be lost. This Bill in its current form seems out of step with the principles of the Policy on Limitation of the Regulatory Burden on Business.

It could become difficult or impossible to maintain, repair\(^1\), or rebuild structures in a timely manner. This could have consequences for public safety, other water users, and electricity supply reliability. Often seasonal constraints leave only a brief window between the time when damage to a structure is observed and the time it must be fixed. The consequences will be serious unless Parliament modifies Bill C-69 and officials take great care to consult industry and other stakeholders in developing regulations (including Ministerial orders) under the CNWA.

The current definition of navigable waters, and some other related elements of the CNWA, including the new and broader definition of works, could result in a heavy and unjustified burden on owners of dams and other hydraulic structures. In extreme cases the provisions could delay critical work, including certain maintenance activities, alteration and rebuilding essential to electricity generation or necessary to ensure public safety

We urgently ask the Senate to re-examine and adopt the recommendations below. The future regime must ensure a match between the administrative burden and the anticipated impacts of the intervention on navigation.

**R7** We recommend that the definition of navigable waters be amended to explicitly exclude canals and bodies of water that have been built for a purpose other than navigation, such as canals constructed to convey water to hydropower plants.

**R8** Only rivers that are regularly used for transportation (for goods or people) should be on the Schedule of navigable waters. We suggest, in this regard, that in paragraph (e) of s. 29 of the CNWA be moved up to first position. This would emphasize that the first criterion to be considered is the existing use of the water body for navigation.

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\(^1\) Although repairs will not in themselves require the owner to submit an application for approval, repair work on hydraulic structures located on navigable waters will often require the owner to make such an application because such repairs often require “work” that is subject to the prohibition of Section 3.
R9 The addition of a water body to the Schedule should require the approval of the Governor in Council, just as the removal of a waterway from the Schedule requires GIC approval.

R10 The amendments contained in the CNWA should not come into force until officials have consulted extensively with affected parties on the following:

- Major works order,
- Minor works order,
- Order on construction, placement, alteration, rebuilding, removal, repair or decommissioning of works (s. 28(2)c).

R11 We recommend that the definition of “major works” include only those that completely block navigation in a main channel and exclude those located on secondary channels. True obstructions to navigation should be distinguished from works located on a secondary channel and thus easily by-passed. A structure’s size or purpose should not be the only factors in the designation major works.

R12 The CNWA should contain a separate, streamlined regime for the approval of work to be done on an existing structure. Repair, maintenance, alteration, and rebuilding work typically have very limited incremental impacts on navigation and often need to be undertaken quickly. These interventions must be able to be undertaken with as few administrative constraints as possible so as to ensure conditions conducive to the maintenance of public safety and navigation. The streamlined process that would accommodate such work could be based on a set of agreed upon standards or procedures so that the formalities of approval are kept to a minimum. The streamlined process would not apply to the removal or decommissioning of a facility which would remain subject to the provisions of the Bill in its current form.

5. Conclusion
The installation of a new assessment regime is a significant challenge for government and industry. The hydropower industry has grown in a highly regulated environment. We have considerable knowledge and experience in this area. CHA appreciates the Committee’s openness to having our industry share its views on Bill C-69. We understand that the impact assessment process must address the requirements and concerns of many competing interests and entities. We formulated our recommendations with that in mind. We believe that Bill C-69 can, and should, be improved and that the proposals in this submission can help achieve that.

It will be essential, in finalizing the IAA and in implementing its provisions, to keep in mind that the assessment regime of the IAA is too long and too complex to be suitable for small and medium-sized projects. It is especially not suitable for modest-sized projects that – like hydropower proposals – must compete with other types of electricity generation, or with projects not subject to an Impact Assessment under the IAA. In an economy trying to eliminate carbon emissions, needlessly curtailing hydropower development is not in the public interest.