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Standing Senate Committee on Energy, the Environment and Natural Resources
The Senate of Canada
Ottawa, Ontario
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Submission regarding the proposed Impact Assessment Act (Bill C-69)

Husky Energy (Husky) appreciates the opportunity to provide a submission to the Standing Committee regarding the proposed Impact Assessment Act (IAA) contained within Bill C-69.

Summary
In its current form, the proposed IAA would accelerate the erosion of investor confidence in Canada’s ability to assess major projects in a timely and predictable manner. That said, the status quo is not acceptable and, with amendments, the proposed IAA could help deliver an assessment process for major projects at the federal level that attracts investment, keeps Canada competitive and maintains public confidence.

Husky has worked collaboratively with other members of the Canadian Association of Petroleum Producers (CAPP) to develop a package of amendments to improve Bill C-69. We support all of these amendments and recommend that they be accepted by the Standing Committee.

In this submission, Husky will focus on those amendments of greatest direct significance to our company. The amendments would ensure:

- The role, experience and expertise of life-cycle regulators is respected and leveraged in the new impact assessment process. Given Husky’s presence in the Newfoundland and Labrador offshore area, we focus on the participation of the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) in this submission.
- Greater certainty in statutory decision-makers’ discretion to focus project assessments and set procedural aspects of an assessment.
- Assessments remain focused on the project being reviewed and do not stray into debates on broader public policy issues.
- Decisions taken under the proposed IAA are more resilient to legal challenges.
Husky’s approach to Bill C-69

Husky is an integrated oil and gas company, headquartered in Calgary, Alberta, with operations across Canada, as well as in the United States and Asia Pacific region. The company has more than 6,000 employees and contractors, the vast majority of whom work in Canada.

Husky’s approach is to be a constructive partner in the review of Bill C-69. While we have serious concerns with the proposed IAA, we also appreciate its positive features. Notable in this regard are the project planning phase provisions. We believe these provisions can assist in delivering assessments that are more focused, efficient and resilient to judicial review. We also acknowledge the status quo is not working.

We agree with the federal government’s objective for Bill C-69: to provide an assessment process for major projects at the federal level that attracts investment, keeps Canada competitive and maintains public confidence. It is with this objective in mind that we share our concerns and recommendations regarding the proposed IAA. We are hopeful that, through the Standing Committee’s work, Bill C-69 can be significantly improved.

In this submission, Husky focuses on those amendments of greatest direct significance to our company. Prominence is given to amendments relating to oil and gas activities offshore Newfoundland and Labrador. This stems from the importance of this business to Husky, and the long-standing federal participation in offshore assessments compared to our other activities in Canada.

For ease of reference, we have attached CAPP’s table of proposed amendments to this submission. For each recommendation made in this submission, the location of specific amendment language in the CAPP table is noted for the Standing Committee.

The fundamental challenge to be addressed by Bill C-69

For many years, Canada’s reputation was that of a country that could get major projects assessed, approved and built – albeit at a much slower pace than competitor jurisdictions. The inefficiency of assessments was a serious competitive disadvantage for Canada, but it was not a crisis.

More recently, Canada’s reputation has deteriorated sharply due to concerns regarding political involvement and the resiliency of federal environmental assessments to legal challenges. The Federal Court of Appeal’s decision regarding the Trans Mountain Expansion Project was particularly concerning, as the failures identified by the court related to the actions and decisions of the regulator and Government of Canada, not the proponent.

First and foremost, assessment processes should be planning tools that permit good projects to be approved and, ideally, strengthened along the way. The various approaches Canada has taken to assessments have sought to consider and balance key impacts, including environmental and economic impacts. The new challenge that has emerged, and in our opinion is the fundamental challenge to be addressed by Bill C-69, is ensuring project assessments are resilient to legal challenges.
Unfortunately, Canadians are now bearing the costs of a failing federal assessment process:

- Good projects are being frustrated, along with the social and economic benefits they could have delivered.
- New projects are not being advanced, as investors increasingly turn to other jurisdictions that can provide greater regulatory and investment certainty.
- The inability to build export pipelines has led to steep discounts for Canadian oil and reduced benefits for Canadians.
- Once unthinkable public policy decisions are being made as a direct result of Canada’s current dysfunctional federal assessment process. The federal government having to buy Trans Mountain to keep the expansion project alive and the Alberta government’s decision to curtail oil production are recent and obvious examples. They further erode investor confidence in Canada.

Key concerns and recommendations

1. **Offshore exploration wells in the Newfoundland and Labrador offshore area should not be on the Project List.**

   It is difficult to fully consider the implications of the proposed IAA in the absence of a draft Project List setting out the types of projects that would be subject to it. Like many other stakeholders, we encourage the federal government to release a draft Project List so that it may be considered by the Standing Committee during its examination of Bill C-69.

   We are encouraged by statements of senior federal officials to the Standing Committee that the Project List is intended to capture major projects. Our view is that well-understood projects, with established mitigation options, and which are assessed by experienced and expert life-cycle regulators, should not be on the Project List. In addition to having these characteristics, exploration wells in the Newfoundland and Labrador offshore area are short duration activities and cannot be characterized as major projects.

   **Recommendation:** Exploration wells in the Newfoundland and Labrador offshore area should not be on the Project List.

2. **A panel review should not be mandatory for designated offshore oil and gas activities.**

   As currently drafted, the proposed IAA mandates that all designated offshore oil and gas activities be subject to a panel review and blocks other assessment options (Agency review, substitution and joint panel reviews). The scale of an assessment should be aligned with the scope, scale and complexity of the project being assessed. The mandatory panel review requirement runs contrary to this principle. There appears to be no justification as to why a designated oil and gas activity on land should have this flexibility while those offshore would not.
**Recommendation:** The mandatory panel review requirement for all designated offshore oil and gas activities be removed.¹

3. **Life-cycle regulators have experience, expertise and credibility and should be leveraged in panel reviews.**

In cases of a review panel involving a life-cycle regulator (here we use the example of the C-NLOPB), the proposed IAA states that persons selected from the C-NLOPB’s roster cannot constitute a majority of members of a review panel.

**Recommendation:** This limitation be removed so that the experience and expertise of life-cycle regulators can be leveraged in panel reviews.²

4. **Provide express discretion to statutory decision-makers to enable focused assessments and procedural guidance that is resilient to legal challenge.**

The issuance of a notice of commencement under subsection 18(1) of the proposed IAA provides an opportunity to enhance certainty regarding the process for an impact assessment, factors to be considered, the process for engaging with Indigenous peoples, as well as that for public participation.

Our concern is that this certainty could be undermined by section 22 which states that an impact assessment “must” take into account all of the factors listed. It is very likely that one or more of the listed factors will not be relevant to a given project’s assessment. However, if the Agency or review panel does not expressly address one of these irrelevant factors, it could later be challenged.

**Recommendation:** Provide express discretion to statutory decision-makers to focus project assessments and provide procedural guidance that is resilient to legal challenge.³

5. **Project assessments should be about the project being reviewed, not a forum for broader public policy debates.**

The list of factors in subsection 22(1) contains a number of public policy issues – climate change, sustainability and the intersection of sex and gender with other identity factors - for which little definition or guidance is provided. In the absence of any greater definition, a project assessment could become a forum for debate of these broader public policy issues, adding uncertainty for proponents and distracting from the true purpose of a project assessment.

¹ See CAPP proposed amendments to section 21 (pp. 15-17), as well as to section 43, subsection 31(1), and paragraphs 32(b), 39(2)(a.1) and (c) (p. 17).

² See CAPP proposed amendments to sections 48.1, 46.1, 44, and 47 (p. 15).

³ See CAPP proposed amendments to subsections 18(1) and 22(1) (pp. 1-2), as well as to paragraph 33(1)(a), and sections 42 and 49 (pp.6-7).
The proposed IAA provides government with the ability to undertake strategic and regional assessments and provide policy guidance. These tools should be utilized to provide: (a) an appropriate forum for such policy debates; and (b) frameworks to assess whether a given project is consistent with such policy objectives.

**Recommendation:** Amend the proposed IAA to ensure an individual project assessment does not become a forum to debate broad public policy issues.4

6. **Include a privative clause so decisions of statutory decision-makers are treated with appropriate deference by the courts.**

The proposed IAA has many decision points where a court could substitute its opinion for that of the decision-maker under the Act. CAPP has proposed a privative clause in its proposed amendments that would limit court challenges to matters of law and jurisdiction and ensure any challenges are brought forward in a timely manner.

**Recommendation:** Include a privative clause in the proposed IAA.5

7. **The Agency and review panels require express discretion to establish the nature and scope of public participation in an impact assessment.**

Without express discretion being provided to the Agency or review panels as to the scope and nature of public participation in an impact assessment, a decision by the Agency or a review panel in this regard could be vulnerable to legal challenge.

**Recommendation:** The Agency or review panel be provided with clear discretion to define the scope and nature of public participation in an impact assessment.6

**Conclusion**

Husky is hopeful this submission will be of benefit to the Standing Committee as it examines Bill C-69. We are available to members and staff of the Standing Committee to answer questions and would welcome the opportunity to appear before the Standing Committee.

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4 See CAPP proposed amendments to section 22 (pp. 2-5), and new sections 94.1 and 95.1 (pp. 5-6).
5 See CAPP proposed amendment to include a privative clause (p. 7).
6 See CAPP proposed amendments providing new section 27.1, and new subsection 51(4) (p.8), as well as amendments to sections 11, 27, paragraphs 31(1)(e) and (f), paragraph 51(c), section 99 and subsection 181(4.1) (p.8).