Strengthening the *Impact Assessment Act*

Joint Submission to the Standing Senate Committee on Energy, the Environment and Natural Resources on Part 1 of Bill C-69

March 27, 2019

Honourable Senators:

We represent six of Canada's leading environmental organizations on federal environmental (impact) assessment. Our groups have been working closely on the federal environmental assessment review since it commenced in 2016, and collectively hold over a century of experience with environmental assessment in Canada. Two of our members sit on the Multi-Interest Advisory Committee appointed by Minister McKenna to advise on this review, various among us were members of the Regulatory Advisory Committee under the original *Canadian Environmental Assessment Act*, and West Coast Environmental Law co-chairs the Environmental Planning and Assessment Caucus of the Canadian Environmental Network, which is comprised of approximately 60 environmental assessment experts and groups across the country.

We are writing to voice our shared support for Bill C-69, and to recommend five priority amendments to strengthen the *Impact Assessment Act* and correct matters that we believe will bar robust and effective assessments that adhere to the purposes of the Act. In our view, all five amendments are within the policy intention of the Bill, and all will contribute to more rigorous assessments that better enable decision-makers to select options that maximize sustainability gains without imposing undue burdens or risk on proponents or authorities.

As this submission contains joint shared recommendations, our individual groups may share additional evidence and recommendations to you on C-69.

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' heath, upholding Indigenous rights and authority or fostering long-term and equitably distributed economic wellbeing. Like many others, we urged the federal government to adopt a next-generation model that would, among other things, not just promote sustainability, but require it; that would not only recognize Indigenous authority and rights but uphold them; and that would apply not only to a dozen or so of Canada's most environmental harmful projects per year, but to any proposal with the potential to affect sustainability.[1]

While Bill C-69 falls short on each of these fronts, it is still 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.

---

[1] See, e.g., Nature Canada *et al.*, Letter to the Honourable Catherine McKenna, Minister of Environment and Climate Change re "Reforming Federal Environmental Assessment Law" (30 August 2017), online: https://www.wcel.org/sites/default/files/publications/ltr_engos_to_mckenna_and_carr_re_ea_bottom_line_17-08-30.pdf.

Bill C-69, if passed, would fulfill important election promises made by this government. In order to do so it must be capable of achieving the goals of restoring robust oversight and credibility, ensuring decisions are based on evidence and knowledge, and respecting Indigenous rights and authority.

The below amendments would further those goals without introducing onerous burdens or overreaching the purposes or intention of the Bill. Many other changes being called for in the media and submissions to your committee would not.

As experts on Bill C-69 and federal environmental assessment generally, we welcome ongoing opportunities to discuss these amendments with Senators during your consideration of Bill C-69.

Sincerely,

Anna Johnston

Staff Lawyer
West Coast Environmental Law

Josh Ginsberg

Barrister & Solicitor
Ecojustice Canada

Stephen Hazell

Director of Policy and General Counsel
Nature Canada

Nichole Dusyk

Senior Analyst, Federal Policy
Pembina Institute

Karine Peloffy

Centre québécois du droit de l'environnement

Mark Butler

Policy Director
Ecology Action Centre

Recommended Amendments to Part 1 of Bill C-69, the *Impact Assessment Act*

Section	Current provision	Proposed amendment	Rationale
22(1)	22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors: … (f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;	22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors: … (f) any alternatives to the designated project that are technically and economically feasible ~~and are directly related to the designated project~~;	Assessment of alternatives is foundational to the concept of impact assessment as a planning tool, and was permitted under CEAA '92 for nearly two decades. Section 22(2) of the IAA permits the Agency or Minister, as the case may be, to determine the scope of factors to be considered in section 22(1), including the scope of alternatives (i.e., which alternatives should be considered). The words "directly related to the designated project" is new language without precedence in Canadian EA and introduce ambiguity – and therefore invite future disputes – as to what they mean. They serve as a qualifier, but to what degree? The longstanding principle of statutory interpretation 'presumption against tautology' presumes the legislative drafters to not have introduced redundancy into a statute, meaning that "alternatives to the designated project that are… directly related to the designated project" must mean something different than "alternative means of carrying out the designated project." But what does "directly related to the designated project" mean beyond alternative means? At a minimum, the 'no' alternative should always be on the table, and with certain projects (such as public sector), other reasonable alternatives may exist that are technologically and economically feasible, but potentially not "directly related to the project," such as demand-side management. Moreover, the Agency and Minister's scoping power under section 22(2) authorize them to only scope in reasonable alternatives, making this qualifier unnecessary, in addition to ambiguous and open to challenge. Assessment of alternatives has been a cornerstone of environmental assessment and planning for decades, and that should not change now.

Section	Current provision	Proposed amendment	Rationale
37.1	**Time limit — 300 days** 37.1 (1) Despite section 37, if the review panel is to conduct an impact assessment of a designated project that includes physical activities that are regulated under any of the Acts referred to in section 43, it must, subject to subsection (2), submit a report with respect to that impact assessment to the Minister no later than 300 days after the day on which he or she appoints to the panel the minimum number of members required. **Minister's power** (2) The Minister may, at any time before the Agency posts a copy of the notice of commencement of the impact assessment on the Internet site, by order, establish a time limit that is longer than the time limit referred to in subsection (1) but is no more than 600 days. The order must include the Minister's reasons for making it.	**Option 1 (preferred): Delete section 37.1** ~~**Time limit — 300 days**~~ ~~37.1 (1) Despite section 37, if the review panel is to conduct an impact assessment of a designated project that includes physical activities that are regulated under any of the Acts referred to in section 43, it must, subject to subsection (2), submit a report with respect to that impact assessment to the Minister no later than 300 days after the day on which he or she appoints to the panel the minimum number of members required.~~ ~~**Minister's power**~~ ~~(2) The Minister may, at any time before the Agency posts a copy of the notice of commencement of the impact assessment on the Internet site, by order, establish a time limit that is longer than the time limit referred to in subsection (1) but is no more than 600 days. The order must include the Minister's reasons for making it.~~ ~~**Factors to consider**~~ ~~(3) The Minister must take into consideration the factors set out in subsection 36(2) in establishing a time limit under subsection (2).~~ ~~**Application**~~	A default 300-day limit on review panel assessments of projects regulated by the CNSC, CERA and offshore boards is arbitrary and too short to ensure that assessments are rigorous, public participation meaningful, and Indigenous rights and authority upheld. It is possible that this amendment was made in order to accommodate an expanded project list that contains smaller projects regulated by the lifecycle regulators. We support the expansion of the project list, but without assurance that the list will contain more projects regulated by these entities, especially in light of intense lobbying from the oil and gas and nuclear industries, we worry that this provision may actually result in shorter assessments of projects of the same magnitude as those captured by the current project list, such as inter-provincial pipelines and oil sands mines. Moreover, we note that in the case of NEB-regulated projects, section 37.1 would actually reduce the current timelines by eight months as a default for review panels. We do not believe that this drastic reduction of timelines that are already unmanageable for many assessments is a reasonable trade-off for the mere possibility of a few additional projects being captured by the Act. Therefore, we recommend that this section be deleted, returning the default timeline to 600 days. Discretion to shorten the timeline for assessment of a given project during the planning phase would remain. Alternatively (and less preferably), the default timeline could be set at 18 months – the current timeline for NEB-regulated project EAs under CEAA 2012/NEBA.

Section	Current provision	Proposed amendment	Rationale
		~~(4) Subsections 37(3) to (7) apply, with any modifications that the circumstances require, with respect to a time limit established under this section.~~	

Section	Current provision	Proposed amendment	Rationale
		Option 2: Amend section 37.1 to make the default timeline 18 months **Time limit — ~~300 days~~ 18 months** 37.1 (1) Despite section 37, if the review panel is to conduct an impact assessment of a designated project that includes physical activities that are regulated under any of the Acts referred to in section 43, it must, subject to subsection (2), submit a report with respect to that impact assessment to the Minister no later than ~~300 days~~ 18 months after the day on which he or she appoints to the panel the minimum number of members required. **Minister's power** (2) The Minister may, at any time before the Agency posts a copy of the notice of commencement of the impact assessment on the Internet site, by order, establish a time limit that is longer than the time limit referred to in subsection (1) but is no more than 600 days. The order must include the Minister's reasons for making it. **Factors to consider** (3) The Minister must take into consideration the factors set out in subsection 36(2) in establishing a time limit under subsection (2).	

Section	Current provision	Proposed amendment	Rationale
		Application (4) Subsections 37(3) to (7) apply, with any modifications that the circumstances require, with respect to a time limit established under this section.	
28(3), 33(2) and 51(1)(d)(ii)	**Effects set out in report** 28(3) The report must set out the effects that, in the Agency's opinion, are likely to be caused by the carrying out of the designated project. It must also indicate, from among the effects set out in the report, those that are adverse effects within federal	**Effects set out in report** 28(3) The report must set out the effects that, in the Agency's opinion, are likely to be caused by the carrying out of the designated project. It must also indicate, from among the effects set out in the report, those that are adverse effects within federal jurisdiction and those that are adverse direct or incidental effects,	While the shift to a sustainability purpose and intent in the IAA is promising, the Act as currently set out lacks a clear, measurable standard by which to judge a project's adverse effects and its contribution to sustainability. While in our view sustainability means that the wellbeing of each "pillar" (social, economic, health and environmental) must be safeguarded and advanced, the traditional 'balancing approach' often taken in Canada permits economic gains (including short-term) to 'counter balance' environmental degradation. As a result, environmental decision-making in Canada overwhelmingly favours projects that advance economic

Section	Current provision	Proposed amendment	Rationale
	jurisdiction and those that are adverse direct or incidental effects, and specify the extent to which those effects are adverse. **Effects set out in report** 33(2) The Minister must be satisfied that the report that will be submitted to him or her will set out the effects that, in the opinion of the jurisdiction that is following the process to be substituted, are likely to be caused by the carrying out of the designated project. The Minister must also be satisfied that the report will indicate, from among the effects set out in it, those that are adverse effects within federal jurisdiction and those that are adverse direct or incidental effects, and specify the extent to which those effects are adverse. **Review panel's duties** 51(1)(d)(ii) 51 (1) A review panel must, in accordance with its terms of reference…	and specify the extent to which those effects are adverse <u>and whether any effects are significant</u>.[2] **Effects set out in report** 33(2) The Minister must be satisfied that the report that will be submitted to him or her will set out the effects that, in the opinion of the jurisdiction that is following the process to be substituted, are likely to be caused by the carrying out of the designated project. The Minister must also be satisfied that the report will indicate, from among the effects set out in it, those that are adverse effects within federal jurisdiction and those that are adverse direct or incidental effects, and specify the extent to which those effects are adverse <u>and whether any effects are significant</u>. **Review panel's duties** 51(1)(d)(ii) 51 (1) A review panel must, in accordance with its terms of reference … (d) prepare a report with respect to the impact assessment that …	gains (even when those gains themselves are not sustainable) over options that safeguard or benefit the environment and community well-being. To help guide decisions towards more truly sustainable outcomes and provide direction for addressing more serious trade-offs, environmental groups have advocated for sustainability criteria and trade-off rules in the legislation. We are aware that the government has decided not to take this approach, and that such criteria and rules are not currently on the table. As a result, contrary to legislative intent the Act as currently written may permit even less sustainable decisions than occurred under the former "significance and justification" test set out in CEAA '92 and CEAA 2012. Without a significance determination, the IAA lacks a clear measurable standard to which projects can be held, and by which decision-makers can be held to account. The standards in the IAA – namely, the extent to which adverse effects are adverse, the extent to which a project contributes to sustainability, and the extent to which a project helps or hinders Canada's ability to achieve its environmental commitments and goals – are nebulous and can be manipulated to fit the decision-maker's goals. In our view, it is unlikely that a reviewing court would find a determination on any of these matters to be unreasonable. These amendments restore a measurable standard into the Act that is well established both in impact assessment and science more broadly. Through these insertions, we believe decision-makers will have a clearer and stronger standard by which to determine a project's contribution to sustainability, and thereby make more sustainable decisions.

[2] There is some ambiguity as to whether "those effects" in the final clause refers to all the effects mentioned in this section, or only those effects that are adverse direct or incidental effects. Our intention with this amendment is to have the significance determination apply to whatever adverse effects are intended to be reported on.

Section	Current provision	Proposed amendment	Rationale
	(d) prepare a report with respect to the impact assessment that … (ii) indicates which of the effects referred to in subparagraph (i) are adverse effects within federal jurisdiction and which are adverse direct or incidental effects, and specifies the extent to which those effects are adverse, …	(ii) indicates which of the effects referred to in subparagraph (i) are adverse effects within federal jurisdiction and which are adverse direct or incidental effects, and specifies the extent to which those effects are adverse <u>and whether any effects are significant, …</u>	
46.1 and 48.1	**Not majority** (4) The persons appointed from the roster must not constitute a majority of the members of the panel.	**Not majority** (4) The <u>chairperson must not be appointed from the roster and the</u> persons appointed from the roster must not constitute a majority of the members of the panel.	These amendments 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 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. 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.
50	**Establishment of roster** The Minister must establish the following rosters: (a) a roster of persons who may be appointed as members of a review panel established under any of the following: (i) section 41, (ii) subsection 44(1),	**Establishment of roster** The Minister must establish the following rosters: (a) a roster of persons who<u>, upon recommendation of the expert committee established under s. 157,</u> may be appointed as members of a review panel established under any of the following: (i) section 41,	A key issue in Bill C-69 is the lack of assurance that review panels will be shielded from political or other improper influence. Requiring appointments to the roster of potential review panel members to be made on the advice of the expert committee would better ensure the credibility of review panel assessment reports, and therefore of assessment outcomes. This model is taken from the recent modernization of Québec's *Environmental Quality Act*, under which the list of people eligible to become members of the office of public hearings on the environment (BAPE) is proposed by a selection committee.

Section	Current provision	Proposed amendment	Rationale
	(iii) subsection 47(1), (iv) an agreement, arrangement or document referred to in section 42; …	(ii) subsection 44(1), (iii) subsection 47(1), (iv) an agreement, arrangement or document referred to in section 42; …	