Monday, April 8, 2019

Bill C-69 Senate Submission and Proposed Amendments
Submitted via email to: ENEV@sen.parl.gc.ca,

Dear Committee Chair Rosa Galvez,

Re: Senate Standing Committee on Energy, the Environment and Natural Resources
TransCanada Submission and Proposed Amendments

TransCanada Corporation (TransCanada) appreciates the opportunity to provide this submission to the Senate Standing Committee on Energy, the Environment and Natural Resources (Committee) regarding proposed Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts (Bill).

With more than 65 years of experience, TransCanada is a leader in the responsible development and reliable operation of North American energy infrastructure, including natural gas and liquids pipelines, power generation and gas storage facilities. TransCanada operates a 91,900 km network of natural gas pipelines across North America, supplying more than 25 per cent of the clean-burning natural gas consumed daily to heat homes, fuel industries and generate power.

TransCanada is not supportive of Bill C-69 and remains deeply concerned with potential negative impacts on future investment in Canadian energy infrastructure. The Bill introduces an expanded and untested review and approval framework that increases both the politicization of the regulatory process and the risk of judicial challenge. As such, the Bill lacks the necessary process clarity and timing certainty required for Canada’s energy sector to remain competitive on the international stage.

As a part of the National Energy Board (NEB) Modernization process, TransCanada advocated for a two-part regulatory process for major projects, where a public interest determination would be made earlier in the process, followed by the technical review of the project. Under such a framework, proponents would have certainty of whether the project is aligned with national economic, energy, and environmental policy before continuing to invest hundreds of millions of dollars to carry out the detailed planning and review of the project.

However, the Bill does not address the fundamental financial risk of lengthy project reviews that are used as venues to debate broad policy issues and are subject to a political “go or no-go” decision at the very end of the process. Under the Bill:

- The Minister and Cabinet retain wide decision-making power at the end of the regulatory process and the Minister and Cabinet are granted increased discretion to change the regulatory process by, for example, extending timelines or designating projects not on the Project List to undergo an assessment under the Impact Assessment Act (IAA)
- New, untested assessment factors relating to broad public policy issues are required to be considered as a part of individual project reviews
- Public participation in hearing processes has no limits, which risks drowning out the voices of those directly affected and unnecessarily increasing the length and cost of hearings
- Review timelines are longer for pipelines regulated by the Canadian Energy Regulator (CER) and there are numerous opportunities for the Minister and Cabinet to extend the timelines
- Two new regulatory bodies are created and the role of the experienced life-cycle regulator for federal pipeline projects is decreased

TransCanada understands the government intends to move forward with Bill C-69. On this basis, working within the framework of the Bill, TransCanada is proposing a package of amendments that, if accepted as a whole, will improve the Bill and help to
reduce its potential negative impacts on future investment in Canada. TransCanada’s specific proposed amendments are provided and explained in Appendix A. In summary, TransCanada is seeking amendments that:

- Allow proponents to request for an early Ministerial notification whether a designated project is inconsistent with government policy
- Reduce uncertainty associated with Ministerial designations of projects not on the Project List
- Allow for the appropriate and early scoping of project assessment factors in a way that requires government to consider broad public policy issues outside of individual project reviews
- Allow for the appropriate scoping of public participation rights to ensure fair, efficient and effective hearing processes
- Reduce timing uncertainty and enhance process clarity
- Safeguard against legal challenges
- Ensure an orderly transition to the new regulatory bodies and the retention of expertise by the Canadian Energy Regulator (CER)

Finally, for industry to fully understand the potential impacts of the Bill, it is necessary to know what projects will be on the Project List and thus be assessed pursuant to the proposed Impact Assessment Act (IAA). To date, no draft Project List has been shared with industry or the public. Under the Bill, all designated projects regulated by the CER would be referred to a review panel. A review panel is the highest level of assessment with the longest timelines and, in turn, requires the greatest utilization of government, private sector and community resources. The IAA process should only apply to major federal pipeline projects, which TransCanada proposes should be defined to involve 500 km or more of new right-of-way. Non-designated federal pipeline projects would continue to be assessed by the CER as the lifecycle regulator. TransCanada provides its rationale for this approach in Appendix B.

A clear, predictable and timely regulatory process is vital to ensuring critical energy infrastructure is proposed, appropriately assessed and ultimately developed in a responsible manner. A clear, predictable and timely process will establish public and investor confidence and support competitive and sustained growth of Canada’s economy. It will allow markets in Canada and around the world to replace higher-carbon fuels with Canada’s clean-burning, abundant natural gas.

TransCanada appreciates the Committee’s consideration of our proposed amendments to Bill C-69.

Sincerely,

Patrick Keys
Senior Vice-President, Legal

Cc: Committee Chair Rosa Galvez, the Senate Standing Committee on Energy, the Environment, and Natural Resources. Submitted via e-mail to Rosa.Galvez@sen.parl.gc.ca

Committee Clerk Maxime Fortin, the Senate Standing Committee on Energy, the Environment, and Natural Resources. Maxime.Fortin@sen.parl.gc.ca
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<th>ISSUE AND SECTIONS OF BILL C-69</th>
<th>EXPLANATION</th>
<th>RECOMMENDED AMENDMENTS</th>
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<tr>
<td>Early Ministerial Notification</td>
<td>Under Bill C-69, proponents continue to face significant financial risk of a political “go or no-go” decision at the very end of the process. To provide more clarity for proponents prior to further capital investment, proponents should be able to seek an early notification during the Early Planning Phase if the Ministers of Finance, Natural Resources Canada and Environment and Climate Change are of the opinion that the project is inconsistent with formal Government policy or if a federal authority advises the Minister that it will not be exercising a power required for the carrying out of the designated project. The proposed amendments to section 17 are intended to allow proponents to obtain an earlier notification of whether a project triggers a political “yellow flag” based on national economic,</td>
<td>Ministers’ ‘s obligation</td>
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<td>- Section 17 of the Impact Assessment Act (IAA)</td>
<td></td>
<td>17 (1) If the proponent of a designated project may request that, before the Agency provide the proponent of a designated project with a notice of the commencement of the impact assessment of the designated project under subsection 18(1), the Ministers of Finance, Natural Resources Canada and Environment and Climate Change Canada provide a written notice if, in their opinions, the designated project is inconsistent with formal Government of Canada policy or 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 federal jurisdiction. 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 of the Ministers.</td>
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<td>(2) A proponent’s request under subsection 17(1) must be made at least 30 days before the date the Agency is required to provide the proponent of a designated project with a notice of the commencement of the impact assessment of the designated project under subsection 18(1).</td>
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<td>(3) The written notice of the Ministers under subsection (1) must be provided to the proponent prior to the Agency providing a notice of commencement of the impact assessment of the designated project under subsection 18(1). For greater certainty, the provision of a written notice to a proponent of a designated project under subsection 17(1) does not automatically suspend or terminate the impact assessment of the designated project.</td>
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<td>(4) The Agency must post a copy of the notice on the Internet site.</td>
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### Ministerial Designations

**Section 9 of the IAA**

The Minister’s discretion to designate a project that is not on the Project List is virtually unlimited, which creates considerable uncertainty for proponents. The current criteria of “public concerns” should not warrant the Ministerial designation of projects that may have already invested time and money in a regulatory process before the CER or a provincial regulator. This could be used by parties to delay and frustrate projects.

The Project List, once released, will have undergone consultation and should reflect those major projects to which the new IAA process was intended to apply. A Ministerial designation for projects not on the Project List should only be made in exceptional circumstances and based on prescribed and objective criteria.

Further, the Minister’s power should be time-limited to avoid designations from being

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### Minister’s power to designate

**9(1)** 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 either the carrying out of that physical activity may cause significant adverse effects within federal jurisdiction or adverse direct or incidental effects or public concerns related to those effects warrant the designation and:

- **(a)** the project effects within federal jurisdiction are complex and may require a complex set of mitigation measures; or
- **(b)** the project is novel and the severity of effects within federal jurisdiction, or mitigations are unknown.

...  

### Minister’s response – time limit

**(4)** The Minister must respond, with reasons, to a request referred to in subsection (1) within 30 90 days after the day on which it is received. The Minister must ensure that his or her response is posted on the Internet site.

...  

### Limitation

**(7)** The Minister must not make the designation referred to in subsection (1) if

- **(a)** more than 60 days have passed since the day on which the proponent filed an application with a federal or provincial regulatory agency to seek approval for a physical activity;
- **(b)** if the carrying out of the physical activity has substantially begun; or
- if a federal or provincial authority has exercised a power or performed a duty or function conferred on it under any Act of Parliament other than this Act or under an Act of a Legislature that could permit the physical activity to be carried out, in whole or in part.
made once a project application has already been submitted to the CER or provincial regulatory process.

Finally, the 90-day time period for the Minister to make a determination after a request adds additional time to the assessment process. This timeline should be shortened to 30 days which is consistent with the 30 days that the Minister is granted to issue a decision statement on an IA report.

### Scoping of Assessment and Decision-making factors

- Sections 18, 22, 33, 42, 49 and 63 of the IAA
- Sections 183, 262 and 298 of the *Canadian Energy Regulator Act* (CERA)

The proposed lists of factors that must be considered for impact assessments and decision-making are expansive and include broad public policy issues that are not appropriately considered within the scope of a project-specific review.

Public policy issues relating to sustainability, climate change and the intersection of sex and gender with other identity factors should be debated and defined as a part of strategic assessments or policy frameworks, outside of IAA.

### 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 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
   (i) the scope of the designated project that the Agency has determined will be subject to the impact assessment;
   (ii) the factors under subsection 22(1) that will be considered in the impact assessment of the designated project and the scope of such factors as determined by the Agency or Minister in accordance with subsection 22(2);
individual project reviews. This will provide proponents and other stakeholders with an understanding of how these undefined and untested concepts will be applied before investing time and money in the regulatory review process.

The Agency, review panel, Commission, Minister or Governor in Council would then consider a project’s consistency with such strategic assessments or policy frameworks, provided, however, that project reviews should not be held up while these are completed.

In addition, “alternatives to a project” should be removed as an assessment factor and should not be debated in the assessment process. The economic and feasible alternative means of carrying out a project that still address the project’s need and purpose is already a factor to consider. Assessing entirely theoretical alternative projects the proponent has no intention of investing in will

(iii) the information or studies that the Agency considers necessary for it to conduct the impact assessment;

...(1.1) The Agency must take into account the factors set out in subsection 22(1) in determining what information or which studies it considers necessary for it to conduct the impact assessment.

Factors – impact assessment
22(1) In the impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must subject to subsection (2) take in account consider the following factors:

(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including
  (i) the effects of malfunctions or accidents that may occur in connection with the designated project,
  (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
  (iii) the result of any interaction between those effects;
(b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;
(c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;
(d) the purpose of and need for the designated project;
(e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;
(f) Indigenous knowledge provided with respect to the designated project;
consume the time for assessment of the proposed project and the resources of all parties.

Further, the power of the Agency or the Minister (if the matter is referred to a review panel) to determine the relevance of the various assessment factors and their scope as applicable to a specific project should be clarified. This will reduce the risk that an approval is later invalidated by the Court due to a perceived failure to address certain factors. In addition, the Agency or Minister should be required to provide its scoping determination at the outset, along with the notice of commencement, so that the proponent and other stakeholders will understand the scope of the assessment at the outset.

Finally, the list of factors the Minister or the Governor in Council may consider in making a final decision on a project should expressly include the economic and

(g) the environmental, health, social and economic effects of the designated project and their consistency with relevant published policy on the extent to which the designated project contributes to sustainability framework that is developed by the Agency under paragraph 155(h) and that is identified in the tailored guidelines provided to a proponent of a designated project under paragraph 18(1)(b);
(h) consistency with any relevant assessment referred to in section 92, 93 or 95 regarding the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change, as enacted in federal legislation applicable to the designated project where such assessment has been completed prior to the notice of commencement of the impact assessment of the designated project under subsection 18(1);
(i) any change to the designated project that may be caused by the environment;
(j) the requirements of the follow-up program in respect of the designated project;
(k) considerations related to Indigenous cultures raised with respect to the designated project;
(l) community knowledge provided with respect to the designated project;
(m) comments received from the public and any response of the proponent;
(n) comments from a jurisdiction that are received in the course of consultations conducted under section 21;
(o) consistency with any relevant assessment referred to in section 92, 93 or 95 that is not related to a factor noted in paragraph 22(1)(h), where such assessment has been completed prior to the notice of commencement of the impact assessment of the designated project under subsection 18(1);
(p) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;
(q) any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project;
social effects of the project along with other factors. This will ensure that the decision-maker weighs all effects of the project.

(1)(r) consistency with any relevant published policy on the intersection of sex and gender with other identity factors that is developed by the Agency under paragraph 155(h) and that is identified in the tailored guidelines provided to a proponent of a designated project under paragraph 18(1)(b); and

(1)(s) any other matter relevant to the impact assessment that the Agency or — if the impact assessment is referred to a review panel — the Minister requires to be taken into account.

(2) The Agency, or the Minister if the impact assessment is referred to a review panel, may determine: The scope of the factors to be taken into account under paragraphs (1)(a) to (f), (h) to (l) and (s) and (t) is determined by

(a) the Agency; or

(b) the Minister, if the impact assessment is referred to a review panel.

(a) that one or more of the factors listed in subsection (1), with the exception of paragraphs 1(f) and (l) to (q), do not need to be considered in the impact assessment of a designated project; and

(b) the scope of those factors to be taken into account under paragraphs (1)(a) to (e), (g) to (k) and (r) and (s) in the impact assessment of a designated project.

(3) For clarity, notwithstanding paragraphs 22(1)(g), (h), (o) or (r), the Agency or review panel shall not adjourn or defer the impact assessment of a project because an assessment referred to in sections 92, 93 or 95 or a policy or referred to in paragraphs 22(1)(h) or (r) has not been completed at the time of the notice of commencement of the impact assessment of the designated project pursuant to subsection 18(1).

(4) In considering an assessment referred to in section 92, 93 or 95, the Agency or review panel shall, in its discretion, consider the weight to be given to an assessment, having regard to both the relevance of the assessment and the strength of evidence supporting the assessment’s conclusions.

33(1) The Minister may only approve a substitution if he or she is satisfied that
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| (a) the process to be substituted will include a consideration of the factors set out in subsection 22(1) that the Minister has determined are relevant to the designated project; |
| ... |

**Provisions of Agreement**

42 When there is an agreement or arrangement to jointly establish a review panel under subsection 39(1) or (3), or when there is a document jointly establishing a review panel under subsection 40(2), the agreement, arrangement or document must provide that the impact assessment of the designated project includes a consideration of the factors set out in the notice of commencement provided to a proponent pursuant to subsection 18(1) and is conducted in accordance with any additional requirements and procedures set out in it and provide that ...

**Summary and information**

49 In establishing or approving a panel’s terms of reference, the Minister must consider, among other things, the summary of issues and the information or knowledge referred to in section 14 and the content of the notice of commencement for the designated project provided to the proponent pursuant to subsection 18(1).

**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:

(a) the environmental, health, social and economic effects of the designated project and their consistency with relevant published policy on the extent to which the designated project contributes to sustainability framework that is developed by the Agency under paragraph 155(h) and that is identified in the documents provided to a proponent of a designated project under paragraph 18(1)(b);
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| (b) the extent to which 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;  
(c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;  
(d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and  
(e) consistency with any relevant assessment referred to in section 92, 93 or 94 regarding the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change, as enacted in federal legislation applicable to the designated project, where such assessment has been completed prior to the notice of the commencement of for the designated project under subsection 18(1). |

| (3) For clarity, notwithstanding paragraph 63 (a) and (e), the Minister or Governor in Council shall not adjourn or defer a determination because an assessment referred to in sections 92, 93 or 95 or a policy developed under paragraph 155(h) has not been completed at the time of the notice of commencement of the impact assessment of the designated project under to subsection 18(1). |

### CERA Report – Factors to consider

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| 183(2) The Commission must make its recommendation taking into account — in light of, among other things, any Indigenous knowledge that has been provided to the Commission and scientific information and data — all considerations that appear to it to be relevant and directly related to the pipeline, including which may include  
(a) the environmental effects, including any cumulative environmental effects; |
(b) the safety and security of persons and the protection of property and the environment;
(c) the health, social and economic effects, including consistency with any order made under section 13 providing the Regulator with direction on policy matters regarding with respect to the intersection of sex and gender with other identity factors;
(d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
(e) the effects of the project on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982 and on their current use of lands and resources for traditional purposes;
(f) the availability of oil, gas or any other commodity to the pipeline;
(g) the existence of actual or potential markets;
(h) the economic feasibility of the pipeline;
(i) the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline;
(j) consistency with any relevant assessment referred to in section 92, 93 or 95 of the Impact Assessment Act regarding the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change as enacted in applicable federal legislation where the assessment has been completed prior to the date on which the application for a certificate was filed;
(k) consistency with any relevant assessment referred to in section 92, 93 or 95 of the Impact Assessment Act that is not related to a factor noted in paragraph 183(2)(j), where the assessment has been completed prior to the date on which the application for a certificate was filed; and
(l) any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.

(3) For clarity, notwithstanding paragraphs 183(j) and (k), the Commission shall not adjourn or defer the review of a project because an assessment referred to in
Bill C-69 removes the standing test for participation in hearing processes and contains no express provisions that allow the Agency, review panel or Commission to scope participation rights. There are also repeated references to “meaningful” public participation, which is an undefined term.

Without appropriate scoping of participation rights, the voices of directly affected parties risk being drowned out and the length and cost of hearings will likely be increased.

To ensure fair, efficient and effective hearing processes, the Agency, review panels and the Commission should expressly be granted discretion to scope the manner in which members of the public will be permitted to participate based on certain

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- Section 11, 25, 27, 33, and 51 of the IAA
- Section 74 and 183 of the CERA

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<th>IAA</th>
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Public Participation

11 The Agency must ensure that the public is provided with an opportunity to participate meaningfully, as set out in the Act, 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.

Agency’s obligations

25 The Agency must ensure that

(a) an impact assessment of the designated project is conducted;
(b) a report is prepared with respect to that impact assessment; and
(c) subject to 27.1, processes are established that the Agency considers appropriate to engage meaningfully with the public – and, in particular, the Indigenous peoples of Canada and Indigenous organizations – when conducting an impact assessment by the Agency.

Public Participation

27 The Agency must ensure that the public is provided with an opportunity to participate meaningfully, as set out in the Act, within the time period specified by the Agency, in the impact assessment of a designated project and that the proponent has an opportunity to respond to public comments.

27.1 (1) The Agency has discretion to determine the manner in which a member of the public may participate in an impact assessment of a designated project conducted by the Agency taking into account:

(a) the degree to which the member of the public is directly affected by the designated project; or
criteria, namely the degree to which the member of the public is directly affected and their relevant expertise or information. Decisions on the extent of participatory rights should be considered final to reduce litigation risk.

Further, it should be reinforced that the framework set out in the Act meets the standard of “meaningful” public participation.

Finally, a provision requiring that the Agency set out processes for public participation should be included, which is analogous to section 74 of the CERA.

(b) whether, in the opinion of the Agency, the member of the public has relevant information or expertise regarding the matters to be decided.

(2) A decision of the Agency under subsection (1) is final and conclusive.

Conditions

33 (1) The Minister may only approve a substitution if he or she is satisfied that...

(e) the public will be given an opportunity to participate meaningfully, as set out in the Act, in the assessment and to provide comments on a draft report;

(f) the public will have access to records in relation to the assessment to enable its meaningful participation, as set out in the Act;

Review panel’s duties

51(1) A review panel must, in accordance with its terms of reference,

(a) conduct an impact assessment of the designated project;

(b) ensure that the information that it uses when conducting the impact assessment is made available to the public;

(c) hold hearings in a manner that offers the public an opportunity to participate meaningfully, as set out in the Act and within the time period specified by the review panel, in the impact assessment;

(2) In conducting a public hearing under paragraph 51(1)(c), a review panel has discretion to determine the manner in which a member of the public may participate in public hearings taking into account:

(a) the degree to which the member of the public is directly affected by the designated project; or

(b) whether, in the opinion of the review panel, the member of the public has relevant information or expertise regarding the matters to be decided.

(3) A decision of the review panel under subsection (2) is final and conclusive.

CERA
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Public engagement

74(1) Subject to subsection (2), the Regulator must establish processes that the Regulator considers appropriate to engage meaningfully with the public — and, in particular, the Indigenous peoples of Canada and Indigenous organizations — when public hearings are held under section 52 or subsection 241(3).

(2) In conducting a public hearing under section 52 or subsection 241(3), the Commission has discretion to determine the manner in which a member of the public may participate in a public hearing taking into account:

(a) the degree to which the member of the public is directly affected by the project; or

(b) whether, in the opinion of the Commission, the member of the public has relevant information or expertise regarding the matters to be decided

(3) A decision of the Commission under subsection (2) is final and conclusive.

Representations by the public

183(3) Any member of the public may, in a manner specified by the Commission and subject to subsection 74(2), make representations with respect to an application for a certificate.

Timelines and Extensions

The legislated timelines for review under the new IAA process are lengthy. For designated pipeline projects, the timelines would range from 615 days to 915 days, plus the time it takes the proponent to produce the Impact Statement (up to three years).

In addition to the IAA and CERA legislated time limits for various process steps, there

IAA

Posting notice on the Internet site

18(5) The Agency must post on the Internet site a notice of any extension granted under subsection (3), including the Minister’s reasons for granting that extension, and a notice of any extension granted under subsection (4), including the Governor in Council’s reasons for granting that extension.

Note: Similar revisions are also required for subsections 28(8), 37(5) and 95(7).

Limit on Extensions

62.1(1) Notwithstanding subsections 28(5), 28(6), 28(7), 28(9), 36(3), 37(3), 37(4), 37(6), 37.1(2), 37.1(4), 65(5) and 65(6), and subject to subsection (2), a decision pursuant to paragraph 60(1)(a) or the determination pursuant to section...
| 186(3) and 189(2) of the CERA | are numerous references to the power of the Minister or Governor in Council to extend or suspend such time limits. Such an unpredictable process creates substantial risk for investors.  

To provide timing certainty, an overall maximum time limit is required, thereby limiting the number and length of extensions that could be granted. This overall time limit would commence once a proponent submitted a complete Impact Statement or application. It should also be subject to being extended on a proponent’s request, if, for example, the proponent was to make a significant change in the project scope.  

Further, changes should be made to ensure that the Governor in Council’s reasons for granting an extension to any time limit are provided, similar to the existing provisions regarding Ministerial extensions under the IAA. |
|---|---|
| 62 must be made no later than 730 days after the date on which the notice referred to in subsection 19(4) is posted on the Internet site.  

(2) On the proponent’s request, the Minister or Governor in Council may extend the time limit in subsection (1) by any period requested by the proponent. The Agency must post a notice of any extension pursuant to this subsection (2) that sets out the reasons for doing so must be posted on the Internet site.  

CERA  

186(7) Notwithstanding subsections 183(5), 183(6), 186(3) and 189(2), and subject to subsection (8), the time limits referred to in subsections (4) and (9) cannot be extended by the Minister or Governor in Council beyond 600 days after the day on which the applicant has, in the Commission’s opinion, provided a complete application.  

(8) On the proponent’s request, the Minister or Governor in Council may extend the time limit referred to in subsection (7). |
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<tr>
<td>- Section 70 of the CERA</td>
<td>Except as provided for in this Act, every decision or order of the Agency, Minister or Governor in Council is final and conclusive.</td>
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<tr>
<td>- No proposed provision in the IAA</td>
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</table>

In light of the expertise of the Agency and review panels, decisions made under the Act should be afforded a level of deference in order to protect an expert process and provide a level of certainty to parties that participate in that process. Judicial challenges should be narrowly focused on matters of law and jurisdiction and not create an opportunity to re-litigate matters of fact and the judgement reasonably applied by the Agency, a review panel, the Minister, or the Governor in Council.

The proposed privative clause is analogous sections 70 and 72 of the CERA, but consequential modifications to s. 72 should be made to align these proposed changes, including the addition of a clause that specifies the filing of a notice of appeal does not suspend the operation of a decision under the CER Act.

<table>
<thead>
<tr>
<th>Review Panel’s Report</th>
<th>Review panel’s duties</th>
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<tbody>
<tr>
<td>- Sections 51 and 64 of the IAA</td>
<td>51(1) A review panel must, in accordance with its terms of reference, ...</td>
</tr>
</tbody>
</table>

Decisions final
Except as provided for in this Act, every decision or order of the Agency, Minister or Governor in Council is final and conclusive.

Appeal to Federal Court of Appeal
An appeal from a decision or order of the Agency, Minister or Governor in Council on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.

Application for leave to appeal
Leave to appeal must be applied for within 30 days after the date of the decision or order appealed from or within any additional time that a judge of the Court grants in exceptional circumstances.

Time limit for appeal
An appeal must be brought within 60 days after the day on which leave to appeal is granted.

Report not decision or order
For greater certainty, a report submitted by the Agency under subsections 28(2) or 59(1) or by a review panel under 51(1)(e) is not a decision or order for the purposes of this section and neither is any part of the report.

Notice of Appeal
The filing of a notice of appeal under subsection(3) does not suspend the operation of a decision made under this Act.

Note: Consequential amendments should be made to s. 72 of the CER Act.
the panel’s expertise. The review panel should be required to provide a recommendation as to whether the project should be approved, as well as recommendations on any conditions or mitigation measures that the review panel determines should be applicable.

As a matter of fairness, it should also be clarified that the review panel’s report not only reflect comments received from the public, but also the proponent’s response to such comments.

Finally, the ultimate decision-maker should be required to take into consideration the recommendations made by the expert tribunal.

<table>
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<tr>
<th><strong>Appendix A – TransCanada Proposed Bill C-69 Amendments</strong></th>
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<tbody>
<tr>
<td><strong>(d)</strong> prepare a report with respect to the impact assessment that <strong>(i)</strong> sets out the effects that, in the opinion of the review panel, are likely to be caused by the carrying out of the designated project, <strong>(ii)</strong> 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, <strong>(ii.1)</strong> subject to section 119, sets out how the review panel, in determining the effects that are likely to be caused by the carrying out of the designated project, took into account and used any Indigenous knowledge provided with respect to the designated project, <strong>(iii)</strong> sets out a summary of any comments received from the public and any response received from the proponent <strong>(iv)</strong> sets out the review panel’s rationale, conclusions and recommendations, including conclusions and recommendations as to whether or not the designated project should be approved, together with recommendations regarding conditions in relation to the adverse effects within federal jurisdiction, including with respect to any mitigation measures and follow-up program, if deemed appropriate.</td>
</tr>
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</table>

**Conditions – effects within federal jurisdiction**

64(1) If the Minister determines under paragraph 60(1)(a), or the Governor in Council determines under section 62, that the effects that are indicated in the report that the Minister or the Governor in Council, as the case may be, takes into account are in the public interest, the Minister must, taking into consideration the recommendations made in the report with respect to the impact assessment, establish any condition that he or she considers appropriate in relation to the adverse effects within federal jurisdiction with which the proponent of the designated project must comply.

**Conditions – direct or incidental effects**

(2) If the Minister determines under paragraph 60(1)(a), or the Governor in Council determines under section 62, that the effects that are indicated in the report that the Minister or the Governor in Council, as the case may be, takes into account are in the public interest, the Minister must, taking into consideration the
**Mitigation measures and follow-up program**

(4) The conditions referred to in subsections (1) and (2) may include:

(a) the implementation of the mitigation measures that the Minister takes into account in making a determination under paragraph 60(1)(a), or that the Governor in Council takes into account in making a determination under section 62, other than those the implementation of which the Minister is satisfied will be ensured by another person or by a jurisdiction; and

(b) the implementation of a follow-up program.

**Transition and CER expertise**

- Section 196 of Bill C-69
- Sections 47(4), 68(1) and 181 of the IAA
- Transitional sections (including sections 12(1), 13(1) and 36 of Bill C-69)

Time is required to consult upon and draft the necessary regulations required to implement Bill C-69 and for the regulatory agencies, proponents and other stakeholders to understand the new processes. The transition to a new regulatory regime will create potential delays in the processing of existing and new applications.

**Bill C-69**

**Appointments terminated**

12(1) Each permanent member of the National Energy Board appointed under subsection 3(2) of the National Energy Board Act, as it read immediately before the commencement day, who holds office immediately before the commencement day ceases to hold office on that day unless appointed a commissioner by the Governor in Council.

**Appointments terminated**

13(1) Each temporary member of the National Energy Board appointed under subsection 4(1) of the National Energy Board Act, as it read immediately before the commencement day, who holds office immediately before the...
Further, expertise that exists within the NEB’s current roster of Board members will be lost, particularly with respect to complex tolling matters.

Therefore, in addition to clarifying the current transition provisions, the effective date of the IAA and CERA should be delayed for one-year following royal assent of Bill C-69. Existing applications, as well as new facility and tolling applications made during the one-year transition period would continue to be considered under the NEB Act Part III and CEAA 2012 legislation for facilities and NEB Act Part IV for tolling matters.

In addition, the Bill should permit existing NEB Board members with the requisite expertise to be appointed as Commission members. Also, in appointing new Commissioners of the CER, it is imperative to choose a roster with the requisite expertise to consider tolls and tariff matters in addition to project applications.

commencement day ceases to hold office on that day unless appointed a commissioner by the Governor in Council.

Pending applications
36 Applications pending before filed with the National Energy Board immediately before the commencement day are to be taken up before the Commission of the Regulator and continued in accordance with the National Energy Board Act as it read immediately before the commencement day.

Order in Council
196(1) The provisions of this Act, other than sections 2 to 8, subsection 47(4), sections 55 and 60, subsection 61(5) and sections 62, 74 and 189 to 195, come into force on a day to be fixed by order of the Governor in Council, which is to be no earlier than 1 year following royal assent.

IAA

Net majority
47(4) The chairperson may not be appointed from the roster and the persons appointed from the roster must not constitute a majority of the members of the panel.

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 and is not permitted to remove, add or amend conditions of a decision statement referred to in subsections 67(1), (2) or (3).

CERA

Reappointment
<table>
<thead>
<tr>
<th>Purposes Clause</th>
<th>28(2) A commissioner may be reappointed for one or more terms of up to six years each. However, a commissioner is to serve no more than 10 years in office in total.</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Section 6 of the IAA</td>
<td>As an expert life-cycle regulator with specialized knowledge, Commission members should be permitted to chair a review panel and should constitute a majority on such panels. Finally, in order to avoid potential inconsistencies, it should be clarified that the Minister may not remove, add or amend conditions made as part of pipeline certificate under subsection 67(2) of the IAA, after the fact. This would also mitigate the risk of the Minister making an amendment or change to a decision statement that may inadvertently impact pipeline safety.</td>
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<tr>
<td>6 (1) The purposes of this Act are</td>
<td>In her address to the House Committee on Bill C-69, the Minister for Environment and Climate Change Canada stated that the provisions of the proposed legislation “are designed to protect our environment while improving investor confidence, strengthening our economy, and creating good middle-</td>
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<tr>
<td></td>
<td>(o) to improve investor confidence, strengthen the Canadian economy, encourage prosperity and improve the competitiveness of the Canadian energy and resource sectors;</td>
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</table>
class jobs. They will also make the Canadian energy and resource sectors more competitive.” The “purposes” clause of the IA Act should be amended to reflect this intent and recognize the need to balance of economic factors with environmental aims.

<table>
<thead>
<tr>
<th>Delegation of carrying out an impact assessment</th>
<th>Delegation</th>
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<tbody>
<tr>
<td>• Section 29 of the IAA</td>
<td>29 (1) Subject to subsection (2), the Agency may delegate to any person, body or jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction in section 2 the carrying out of any part of the impact assessment of the designated project and the preparation of the report with respect to the impact assessment of the designated project.</td>
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<tr>
<td></td>
<td>(2) The Agency may only make the delegation in subsection (1) if the Minister determines that:</td>
</tr>
<tr>
<td></td>
<td>(a) the person, body or jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction has the expertise and an appropriate process to carry out the delegated duties;</td>
</tr>
<tr>
<td></td>
<td>(b) that the Agency has an appropriate process to manage delegations made to multiple persons, bodies or jurisdictions referred to in paragraphs (a) to (g) of the definition of jurisdictions.</td>
</tr>
</tbody>
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<tr>
<th>Preparation of Detailed Project Description</th>
<th>Proponent’s obligation — notice</th>
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<tbody>
<tr>
<td>• Section 15 of the IAA</td>
<td>15 (1) The proponent must provide the Agency with a notice that sets out, in accordance with the regulations, how it intends to address the issues referred to in section 14 and a detailed description of the designated project that includes the information prescribed by regulations made under paragraph 112(a).</td>
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<td></td>
<td>Additional information</td>
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</table>
address the issues raised during the Early Planning Phase prior to the notice of commencement being issued, a detailed response and further project description is more appropriately addressed as a part of the impact assessment itself.

(2) If, after receiving the notice from the proponent, the Agency is of the opinion that a decision cannot be made under subsection 16(1) because the description or the prescribed information set out in the notice is incomplete or does not contain sufficient details, the Agency may require the proponent to provide an amended notice that includes the information or details that the Agency specifies.

<table>
<thead>
<tr>
<th>Responsible Minister for the CERA</th>
<th>The NEB currently falls under NRCan responsibilities, where the expertise sits. Like the IAA, the CERA should explicitly define the responsible Minister.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agency Rules</td>
<td>Developing guidance about the regulatory process on a project-by-project basis, at the end of the early engagement phase, does not provide the certainty of process required for proponents and other stakeholders. Proponents and their investors need to know the processes and timeframes up front in order to plan and propose a project. The lack of certainty regarding information requirements and processes has potential to significantly delay projects. The Agency should have the</td>
</tr>
<tr>
<td>Rules</td>
<td>137 The Agency may make rules respecting (a) the sittings of the Agency and joint review panels; (b) the procedure for making applications, representations and complaints to the Agency and joint review panels and the conduct of hearings before the Agency and joint review panels; and (c) governing the practice and procedure for the review of orders; (d) generally, respecting the work of review officers; and (e) for preventing trade secrets and information described in section 20 of the Access to Information Act from being disclosed or made public as a result of their being used as evidence before a review officer.</td>
</tr>
</tbody>
</table>

Copy posted on Internet site
(3) When the Agency is satisfied that the notice includes all of the information or details that it specified, it must post a copy of the notice on the Internet site.
Appendix A – TransCanada Proposed Bill C-69 Amendments

| Authority to develop filing guidance for different types of designated projects (like pipelines). This could be accomplished through rules of practice, standard terms of reference, process flow chart and/or a Filing Manual (similar to what the NEB currently has in place). |
Appendix B – Project List Threshold for Federal Pipeline Projects

The *Impact Assessment Act* (IAA), as currently outlined in Bill C-69, requires designated pipeline projects regulated by the CER to be reviewed by joint review panels. A joint review panel is the highest level of review with the longest timelines and requires the greatest utilization of government, private sector and community resources. TransCanada submits that only the most major federal pipeline projects involving 500km or more of new right-of-way should be subjected to this level of review. All other non-designated federal pipeline projects will continue to be reviewed and assessed by the new proposed Canadian Energy Regulator (CER).

Canada’s pipeline network is 840,000km long. Transmission pipelines routinely add additional capacity to account for changes in supply volumes, source locations or end-use markets. These routine facility additions are essential to a safe, vibrant and competitive energy sector. In many cases, these are simply additions to existing facilities in previously disturbed areas. In other cases, the projects are small in scale, providing for safe and reliable operation and maintenance of the infrastructure using proven technology, construction and mitigation practices.

The process for regulatory review of such projects is well established under the National Energy Board (NEB) and tested in the courts. Subjecting routine but essential projects to a joint review panel with the scope of review process and decision-making proposed in the IAA would be crippling to the pipeline industry and to Canada’s energy sector. The importance of these routine projects on existing infrastructure, including enhancements to reliability and safety, requires that they remain under the sole jurisdiction of the NEB/CER.

A length-based metric has been the precedent used not only in Canada but globally as well. Using a length-based metric retains simplicity, objectivity and certainty, so that proponents can know, in advance, what regulatory process will apply to their projects. Under the current NEB Act, projects are split into Section 58 applications (under 40 km in length) or Section 52 applications (greater than 40 km in length). Each type of project has the same information requirements but the review process is scaled to match the level of assessment required under a regulatory framework where the NEB retains life-cycle jurisdiction over all federal pipeline projects. Bill C-69 keeps both of these categories in the proposed *Canadian Energy Regulator Act* (CERA), but adds a third category that would go to a joint review panel. This supports a new threshold for the Project List that captures only large-scale federal pipeline projects.

Further, utilizing a threshold determined by length of new right of way as opposed to pipeline length better reflects the mature nature of Canada’s existing pipeline network and the overall disturbance and potential environmental impacts of the project. Existing rights-of-way have already been disturbed, studied, and permitted. Most of the Section 52 projects submitted over the past few years were expansions and extensions of existing systems, many of which used existing rights of way or were adjacent to other linear disturbances. Some of these are up to 300 km long but are still only extensions of the existing systems typically within a province and in previously disturbed areas.

The 500 km of new right-of-way threshold would allow joint review panels to dedicate resources to reviewing projects that are truly of a national scale and touch on broad national policy issues. This threshold would capture projects that cross provincial boundaries such as Energy East and Northern Gateway.

Importantly, this does not mean that non-designated projects will not be rigorously assessed. For federally regulated pipelines, projects excluded from the Project List would continue to be assessed by the CER under Bill C-69. The NEB currently conducts environmental assessments for all such pipeline projects and the CER would continue to assess those that are not included on the Project List.

Finally, intra-provincial pipeline projects that are not regulated by the CER should not be on the Project List, even if they have the potential for adverse effects in areas of federal jurisdiction related to the environment. These projects will undergo provincial environmental assessments as well as federal permitting processes which should
Appendix B – Project List Threshold for Federal Pipeline Projects

be sufficient to address potential adverse environmental effects on areas of federal jurisdiction. Returning to a trigger regime such as that which existed before the Project List would run contrary to the goals of predictability and certainty and would not align with the ‘one project, one assessment’ concept.