May 3, 2019 via email

The Standing Senate Committee on Energy, the Environment and Natural Resources
Le Comité Sénatorial Permanent de l’énergie, de l’environnement et des Ressources Naturelles

Re: Comments on Bill C-69

Honourable Senators,

Thank you for inviting the Conservation Council of New Brunswick to speak to the Standing Senate Committee on Energy, the Environment and Natural Resources that is reviewing 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, at the Committee’s hearing in Saint John, New Brunswick on April 25, 2019. As noted in Saint John we would like to reiterate that the Conservation Council of New Brunswick supports the passage of Bill C-69.

After listening to the questions and concerns of the Senators at the hearing, as well the presentations from other witnesses, we wanted to provide the Committee with some further comments on Bill C-69, which you will find below.

1. The focus of impact assessment should be participation, planning and decision-making

We continue to be concerned that there seems to be a fundamental misunderstanding of the purpose of impact assessment. At its core, impact assessment is about determining whether a project, program, policy, etc., contributes to sustainability, the definition of which that we have adopted as being, “Will this proposal relative to other reasonable options make the best net contribution to lasting environmental, social and economic well-being without demanding trade-offs that entail significant adverse effects?”

During the hearing in Saint John, it became clear that people and organizations opposed to Bill C-69 view impact assessment as a tool simply for project approval. Essentially, what these parties are asking for is a check-box process; i.e. a proponent checks certain boxes or complete certain steps and a project will be guaranteed approval. Again, this is not how proper impact assessment works. We know that opponents of Bill C-69 don’t want to hear this, but under a robust impact assessment regime, not all projects will be allowed to proceed (although
a review of the history of federal environmental/impact assessment in Canada will show that well over 95% of projects have been approved).

Recommendation #1: As the Senate deliberates upon Bill C-69, it keeps the core purpose of impact assessment in mind.

2. The need for strategic impact assessments

We agree with those who have pointed out that recent assessments of some large projects have become embroiled in public debate surrounding climate change and Canada’s efforts to its greenhouse gas emissions. Ideally, Canada’s climate change policy, and other pan-Canadian policies, should be subject to a strategic impact assessment through a lens of sustainability. Removing this policy debate from the assessment of individual projects would make the entire process more manageable.

Recommendation #2: That s. 95 of Bill C-69 be amended to require the Minister to pass a regulation requiring in turn the strategic assessment of various policies, first of which is Canada’s response to climate change.

3. Addressing climate change

Perhaps our biggest disappointment with the debate regarding Bill C-69 is the general failure to acknowledge the importance of climate change and Canada’s need and international commitment to reduce its greenhouse gas emissions. Suppose for many reasons a project, such as a pipeline, is desirable but will contribute 50 megatonnes/year of CO₂ equivalent to Canada’s greenhouse gas emissions. Simply put, this does not meet the test of sustainability. What is needed is a project proposal that indicates how a project’s greenhouse gas emissions will be offset. If project A adds 50 megatonnes, where will the 50 megatonnes from Canada’s carbon budget be taken away from? To be relevant and meaningful, any opposition to Bill C-69 first needs to address this fundamental truth.

We are not suggesting all of this accounting fall on the shoulders of the proponent. Assessments of large projects should not be oppositional, they should be about working together; proponent, stakeholders, governments, etc., to come up with the best decision for a project.

Recommendation #3: That Bill C-69 be amended to include a provision that requires the assessment of any project, proposal, policy, etc., that will contribute more than a determined quantity per year of CO₂ equivalent to Canada’s greenhouse gas emissions to include proposals for how these emissions will be offset.
4. Protecting jobs and the economy

Returning to the purpose of impact assessment, it needs to be understood that proper impact assessment protects jobs and the economy. As we discussed during our presentation, it was estimated that if built, Energy East would have only created 121 direct jobs in New Brunswick during its 40 years of operation.\(^1\) In comparison, in 2008 the New Brunswick portion of the Bay of Fundy, through various sectors such as fishing and tourism, supported over 9,000 full-time equivalent direct jobs and contributed over $475 million yearly in direct GDP to the New Brunswick economy.\(^2\) A proper impact assessment would have allowed New Brunswick, among other things, to question and answer whether we are willing to put those jobs and economy at risk from a possible catastrophic oil spill in the Bay of Fundy or how to significantly protect against such a risk.

5. Addressing some revisionist history of the Energy East Project

During the review of Bill C-69, it has been stated that the Energy East pipeline would have been the main source of product for eastern Canadian refineries. To be clear, the Energy East pipeline was first and foremost a pipeline for export purposes. The Conservation Council asked TransCanada on several occasions how much product the Irving refinery in Saint John would be taking from the pipeline. TransCanada was unable or unwilling to answer. We would also like to point out that during his presentation to the Committee on April 25\(^{th}\) in Saint John, the Irving representative did not say how much product of the 1.1 million barrels per day from the pipeline Irving would use or that the Irving refinery only produces 320,000 barrels of finished product per day.\(^3\)

Also during the presentations in Saint John, it was intimated that the length of time of the NEB’s review of the Energy East project was the result of the Canadian Environmental Assessment Act, 2012 process. The delays in the review had nothing to do with the process. They were the result of the panel’s failure to observe one of the basic principles of administrative law; namely to avoid perceptions of bias. It was the panel’s failure to do so that required the entire process to start again, not the assessment process or CEAA 2012 itself.

6. Our support for Bill C-69

It is because the Conservation Council supports strong impact assessments that we also support Bill C-69. The Bill will give decisions-makers better information about environmental,

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\(^2\) Department of Fisheries and Oceans and Govt. of New Brunswick. 2010. Economic Impact of the New Brunswick Ocean Sector: 2003-2008.

social, health, and economic risks and it represents an improvement over the current *Canadian Environmental Assessment Act, 2012*. Areas of Bill C-69 that we are in favour of include:

- Its recognition of the respect owed to the rights of Indigenous peoples (e.g., s. 6(1), 6(2)).
- The inclusion of a planning phase into the assessment process.
- The list of factors set out in s. 22 that are required to be taken into account during an assessment and in particular the factors that require an assessment of: 1) a project’s impacts on Indigenous rights, 2) a project’s contribution to sustainability, 3) a project’s impacts on Canada’s climate change commitments, and 4) a project’s differential gender impacts.
- The removal of project assessment responsibilities from the Canadian Nuclear Safety Commission and the National Energy Board/Canadian Energy Regulator (s. 43).
- That the Minister or Cabinet must provide written reasons why they consider a project to be or not be in the public interest (s. 63, s. 65).
- Removal of the “directly affected” standing test for determining participation in impact assessments.

7. **Suggested amendments to Bill C-69**

Ways in which Bill C-69 could be improved include:

- Removing the discretion of decision-makers to approve unsustainable projects. (That a determination of a project’s contribution to sustainability needs to first be made before the remainder of the “public interest” determination is made.)
- That “meaningful” public participation is defined and that such definition incorporates public participation best practices.
- A provision for guaranteed participant funding for each reviewed project.
- A requirement that an impact assessment will not conclude before consultation with Indigenous communities is completed (see #9 below).
- A provision that all projects that require some form of government licence or permit, e.g., the former Law List under the *Canadian Environmental Assessment Act, 1992*, must be included in a central registry and geo-referenced webpage.
  - These projects do not require assessments, but this central database would allow all parties, including proponents having to conduct cumulative impact assessments, to understand what is taking place on the landscape.

8. **Addressing some specific opposition to Bill C-69**

We would like to address four specific points (in *italics*) of opposition to Bill C-69.

- **There should be discretion to screen out s. 22 factors:** All of the factors listed in s. 22 are important and they need to be considered in some form during the assessment of a
project. Also, s. 22(2) provides for the scope of the review of each factor to be determined by the Agency or a review panel. As such, we are not in favour of a provision that would allow for an \textit{a priori} removal of s. 22 factors from an assessment.

- \textit{Bill C-69 should be amended to provide for only limited rights of judicial review}: This amendment is unnecessary. We know of no substantive decision to allow or not allow a project to proceed that has been overturned by a Canadian court. Canadian courts only quash impact assessment decisions when the process, i.e., the law, has not been followed correctly. There should be no limits placed on ensuring that the rule of law has been complied with.

- \textit{That assessment powers be returned to the NEB/CER and CNSC}: Parties that are asking for this are confusing regulation with assessment. While the NEB and CNSC may be expert regulators, they are not expert assessors. As discussed in #1 above, impact assessment is about making a determination of a project’s contribution to sustainability, not simply project approval.

- \textbf{Maximum time limit for an impact assessment}: The Canadian Association of Petroleum Producers has proposed that Bill C-69 be amended to include a maximum time limit of 730 days for an assessment, including for when extensions are required under s. 28(9) and correspondingly regulations under s. 112(c). Such an amendment should not be entertained as it would provide incentive to proponents to provide incomplete environmental impact statements/reports (EIS) and then delay in addressing the inadequacies of an EIS.

  o As an example, the comprehensive assessment of the Sisson tungsten and molybdenum mine was suspended 6 times for approximately 6 years because the proponent had not provided adequate information to the Canadian Environmental Assessment Agency. If there had been a maximum time limit placed on this assessment, the proponent may never have provided the requested information.

9. \textbf{Reconciliation with Indigenous peoples}

In the 2004 \textit{Taku River} case,\textsuperscript{4} the Supreme Court of Canada stated that consultations with Indigenous communities regarding the accommodation of their rights can take place during environmental assessments. It is clear such consultations cannot be done in haste; that there is no time limit on the length of these negotiations. Shortening the time for the assessment of large projects from what is proposed in Bill C-69 will likely result in situations where an impact assessment is completed well before consultations and negotiations with Indigenous communities are. It is our concern that in these cases, it is these consultations that will become the target of blame for purported delays in the development of projects. Obviously, such a result would not advance reconciliation with Indigenous peoples.

\textsuperscript{4} Tlingit First Nation v. British Columbia (Project Assessment Director) (SCC, 2004).
To conclude, impact assessment is a participatory process aimed at improving planning and decision-making. It is about understanding the present and future impacts of the positives and negatives of projects and other activities. Strong impact assessment processes, among other things, further fairness in the sharing of the costs and benefits of projects. Thank you for your giving your consideration to our comments.

Respectively,

Lois Corbett
Executive Director