May 6, 2019

BY EMAIL

Standing Senate Committee on Energy, the Environment and Natural Resources
Senate of Canada
Ottawa, Ontario K1A 0A4

Email: enev@sen.parl.gc.ca

Re: Hydro-Québec’s comments on 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

Dear Committee Members:

In response to the invitation from the Standing Senate Committee on Energy, the Environment and Natural Resources, please find enclosed Hydro-Québec’s comments on 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.

Thank you for considering our brief. We are at your disposal for further discussion of our comments.

If you require additional information, please contact Céline Cusson, Manager – Governance and Strategic Issues, at 514-289-2211, ext. 3780.

Sincerely,

Élise Proulx
PRESENTATION TO THE STANDING SENATE COMMITTEE ON ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES (ENEV)

Recommendations on Bill C-69

May 6, 2019
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I – Introduction

Hydro-Québec serves some 4.1 million residential, commercial, institutional and industrial subscribers in Quebec. It manages hundreds of projects at any given time, from simple maintenance work to the construction of major hydro-electric developments such as the Romaine Complex. Those projects ensure the continued operation of Hydro-Québec’s facilities, help meet the growing demand for electricity, and so on.

Hydro-Québec, with its hydro-electric facilities, is playing a central role in the transition to a low-carbon economy and is therefore a leading contributor to meeting the federal greenhouse-gas reduction targets for 2030 and 2050. Hydro-electricity is a key industry in supporting the energy transition, and more than 99% of the electricity produced by Hydro-Québec is from renewable sources. Moreover, as a world leader in hydro-electricity and large power grids, Hydro-Québec exports clean, renewable energy, and its expertise and innovations are valued around the world.

Since the inception of the consultation processes associated with the current federal environmental reform, Hydro-Québec has contributed its expertise through the associations to which it belongs. Today, Hydro-Québec is pleased to submit a brief and is grateful to the Committee for this opportunity to contribute to the study of Bill C-69.

Hydro-Québec recognizes the importance of improving the transparency and certainty of federal impact assessment processes, fine-tuning the mechanisms for consulting and involving all interested parties, and maximizing the validity and reliability of environmental assessments by basing them on scientific evidence. It welcomes the government’s efforts in that regard. However, Hydro-Québec believes that some crucial amendments are still needed in the bill being considered to reduce the significant costs, risks and uncertainty that could arise if the bill is passed in its current form.

This brief addresses the three parts of Bill C-69: the Impact Assessment Act (IAA), the Canadian Navigable Waters Act (CNWA) and the Canadian Energy Regulator Act (CERA).
II – Summary of Recommendations

Impact Assessment Act (IAA)

R.1: The IAA’s scope should be limited to assessing the implications of major projects that are likely to have significant adverse effects on the environment that fall under federal legislative jurisdiction.

R.2: In keeping with “one project, one assessment” principle and for the purpose of harmonizing the IAA with provincial environmental assessment processes, provide a delegation and substitution mechanism so that the Minister can exempt a project from the federal process when it is subject to Quebec’s environmental impact assessment and review process.

R.3: Keep the current application thresholds for hydro-electric projects and power lines.

R.4: Provide a public consultation period before the regulations come into force, so that those affected can comment on the final list of projects subject to the impact assessment process.

R.5: The Impact Assessment Agency of Canada’s authority to reject a project at the stage where a decision is made on the need for an impact assessment should be based exclusively on whether the project has an impact that is unacceptable and incompatible with an area of federal jurisdiction. That authority should not be exercised when the impacts do not fall within federal jurisdiction.

R.6: The IAA administrator’s authority to extend the time limits in the impact assessment process should be restricted with specific rules concerning the grounds and circumstances under which the authority can be used, for each phase of the process.

R.7: The Minister should not have the power to amend the description of a project that has been approved.

R.8: Amend section 76 of the IAA by adding the following after subsection (2):

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

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

**R9:** Completely revise the approval process for international power lines to avoid overlap with the regulatory framework for power transmission and with provincial approval processes.

**R10:** Make the factors to be considered in approving the construction and operation of international power lines clearer and more specific in the Act.

**R11:** To make the approval process simpler and more predictable, amend some provisions of the current Act that remain unchanged in Bill C-69, in particular by eliminating or restricting the option of a referral to the certificate process and specifying the steps and time limits in the process.

**R12:** It is essential to keep the principle of fair market access for Canadians in the Act.

**R13:** Restrict the discretionary power concerning the conditions that the Commission can impose.

**R14:** The Commission’s power to vary a permit or licence after it is issued should be removed.

**Canadian Navigable Waters Act (CNWA)**

**R15:** Keep works for which the right to opt out was exercised exempt from approval requirements under the *Navigation Protection Act*.

**R16:** There should be a public consultation period regarding the regulatory instruments arising from the Act.

**R17:** The Act should provide for a simplified regime for operations to modify, repair and rebuild existing works, since they have less impact on navigation and need to be carried out promptly for the safety of navigation and the public.

**R18:** Exclude from the definition of major works dams and regulation structures that do not completely block navigation, specifically

a. dams on the perimeter of reservoirs that do not impede the main watercourse, such as closure dikes in secondary valleys that are supported on the surrounding land, and

b. water regulation structures that are not on the main watercourse.
III – Comments and Recommendations

Hydro-Québec welcomes and supports the fact that a project’s implications for Canada’s ability to fulfil its climate change commitments will now be included in the impact assessment process.

A – Impact Assessment Act (IAA)

Purposes of the Act: Assessment of the impacts of major projects

The purposes and mandate of the IAA, spelled out in subsections 6(1) and (2) respectively, give the environmental assessment process unprecedented scope. In its current form, Bill C-69 makes no distinction between megaprojects and small development projects.

The proposed process is complex and time-consuming. It is not suited to small or medium-sized projects. If such projects are subject to the assessment process, the proponents will be forced to make a substantial investment in human and financial resources, an investment that is not commensurate with the minor impacts that their projects are likely to have. Small and medium-sized projects should be dealt with by other provincial or federal bodies (e.g., Fisheries and Oceans Canada) or sectoral regulatory agencies (e.g., the Energy Board in Quebec). In Hydro-Québec’s view, the purposes of the IAA need to be clarified to guide the government in developing regulations on designating projects subject to the impact assessment process.

Moreover, Hydro-Québec maintains that the federal environmental assessment regime should apply only to projects on Canada lands and major projects that involve a high risk of adverse effects in areas of federal jurisdiction. The suggested amendment would also reflect the vision described by the environment minister in her testimony to the House of Commons standing committee on March 22, 2018: “The legislation […] aims to restore public trust in how the federal government makes decisions about such major projects as mines, pipelines, and hydro dams.” (our emphasis)

Recommendation 1

The IAA’s scope should be limited to assessing the implications of major projects that are likely to have significant adverse effects on the environment that fall under federal legislative jurisdiction.

Application of the “one project, one assessment” principle

In Hydro-Québec’s view, it is paramount to ensure that the IAA does not result in both the provincial and federal assessment processes applying to the same project. However, in contrast to the process specified in the CEAA 2012, the IAA does not require the Minister to consider using the substitution mechanism in cases where another jurisdiction has an environmental assessment process.

Consideration should be given to harmonizing the provincial and federal frameworks. Quebec’s Environment Quality Act establishes rigorous environmental impact assessment and review processes, which were enhanced in 2018 with the passage of
the Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund. The new process allows greater participation by the public.

Recommendation 2

In keeping with “one project, one assessment” principle and for the purpose of harmonizing the IAA with provincial environmental assessment processes, provide a delegation and substitution mechanism so that the Minister can exempt a project from the federal process when it is subject to Quebec's environmental impact assessment and review process.

Application to the hydro-electricity industry and power lines

For energy projects, the IAA establishes a process of joint approval by the Canadian Energy Regulator and the Impact Assessment Agency of Canada (IAAC or the Agency), under the aegis of a joint review panel. The panel has six hundred (600) days to submit its impact assessment report, which lengthens the project approval process by two to three years. For Hydro-Québec, this means a significant change in project planning, possibly even jeopardizing a project's commercial viability. Such a lengthy process for designated projects is incompatible with the timelines for completing international power lines.

On top of this, there is the issue of changes in thresholds. In the past, hydro-electric stations under 200 MW and export power lines under 345 kV were not subject to the Canadian Environmental Assessment Act (CEAA). Any change in these thresholds could bring more projects under the federal process and the associated timelines. Under the current system, the National Energy Board is a stakeholder even when the CEAA does not apply. Hydro-Québec's concern is that after revision of the list of designated projects, dozens of additional projects will be subject to the new IAA. One of Hydro-Québec’s strategies is to develop external markets by building power lines so that it can export its renewable energy to other provinces or other countries. Those power lines, which are under 345 kV and are intended to export electricity, are not subject to the CEAA at this time. The threshold issue is critical for Hydro-Québec, as those export power lines have very little environmental impact on areas of exclusive federal jurisdiction.

Recommendation 3

Keep the current application thresholds for hydro-electric projects and power lines.

Recommendation 4

Provide a public consultation period before the regulations come into force, so that those affected can comment on the final list of projects subject to the impact assessment process.

Planning phase
The IAA establishes a new “planning” phase. This consultation phase gives the public, Indigenous communities and the IAAC an opportunity to request additional information and determine whether an impact assessment should or should not be done for a designated project. From this phase on, the Minister may reverse the Agency's decision to conduct a project impact assessment or not, and notify the project proponent in writing. That decision, made solely on the basis of information obtained in the planning phase, would effectively block the project. Under subsection 17(1), the Minister can justifiably make that decision if

- a federal authority advises the Minister that it will not be exercising a power that is conferred on it under another Act of Parliament and 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 impact assessment would not start until this mandatory planning phase is complete.

**Recommendation 5**

The Impact Assessment Agency of Canada’s authority to reject a project at the stage where a decision is made on the need for an impact assessment should be based exclusively on whether the project has an impact that is unacceptable and incompatible with an area of federal jurisdiction. That authority should not be exercised when the impacts do not fall within federal jurisdiction.

**Time limits**

With regard to the length of time allowed for the various phases of the impact assessment process, prescribing time limits is a worthwhile idea per se, in that it provides some degree of predictability for proponents.

However, the predictability benefits are negated by the many situations in which the time limits can be suspended or extended. The deadlines can be extended as the administrator of the IAA sees fit, and considerable discretion is permitted at a number of stages. It would therefore be a good idea to specify the grounds or circumstances under which the administrator can extend or suspend the time limits.

**Recommendation 6**

The IAA administrator’s authority to extend the time limits in the impact assessment process should be restricted with specific rules concerning the grounds and circumstances under which the authority can be used, for each phase of the process.

**Minister’s power to amend the decision statement**

The decision by the Minister or the Governor in Council may contain conditions that cover all aspects of the effects that fall within an area of federal jurisdiction and the direct
and incidental effects. The Minister’s subsequent statement contains a description of the project as approved in that decision. However, subsequent modification by the Minister of the project described in the decision statement undermines the “one project, one assessment” principle, since the Minister can unilaterally amend the description of a project approved by the Governor in Council, even when the project has been assessed through the substitution mechanism.

Recommendation 7

The Minister should not have the power to amend the description of a project that has been approved.

Cost recovery from proponents

The IAA’s provisions on cost recovery from proponents are imprecise and should be amended to put limits on the payable costs. Recovery should be limited to expenses reasonably incurred and connected to the exercise of the IAAC’s or review panel’s powers. In the interests of predictability and transparency, the IAA should require those bodies to provide the proponent with a statement of estimated costs when the actual impact assessment begins. On this point, we are reproducing the recommendation made by WaterPower Canada (until recently the Canadian Hydropower Association).

Recommendation 8

Amend section 76 of the IAA by adding the following after subsection (2):

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

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

B – Canadian Energy Regulator Act (CERA)

B-1 Comments on the approval process for the construction and operation of international power lines

Complete overhaul of the approval process to align it with the industry’s current reality

It would have been beneficial to make more substantial changes to reflect developments in the power transmission industry, which has evolved appreciably since the last significant amendments were made in the legislation in 1990.
Since the National Energy Board was established, the provinces have adopted rigorous approval processes for power line projects. In Quebec specifically, the transmission provider’s activities are regulated by various North American regulatory agencies\(^1\) and the Quebec Energy Board. Multiple approvals, including environmental approvals, are needed from provincial authorities.

**Recommendation 9**

**Completely revise the approval process for international power lines to avoid overlap with the regulatory framework for power transmission and with provincial approval processes.**

**Factors to be considered in the project approval process**

These factors should relate to the proposed Canadian Energy Regulator's area of jurisdiction to avoid overlap with provincial approval processes. They should also be the same for a permit and a certificate, since both involve approval of the construction and operation of an international power line.

The factors to be considered in issuing a certificate set out in subsection 262(2) of Bill C-69 should not intersect with the factors in the Impact Assessment Act.

**Recommendation 10**

**Make the factors to be considered in approving the construction and operation of international power lines clearer and more specific in the Act.**

**Predictability of the approval process**

The option of a referral to the certificate process should be eliminated, or at least subjected to tighter restrictions, including a requirement that the referral be made within a limited time after the permit application is submitted. Allowing up to 45 days for referral after a permit is issued is a significant risk factor that creates uncertainty in the approval timelines for international power line construction projects, which generally require considerable coordination with the provincial and U.S. approval processes.

The CERA should also specify the steps and time limits associated with the permit process, for greater predictability. This change would also benefit the public, by providing a clearer understanding of the various steps in the project approval process.

**Recommendation 11**

**To make the approval process simpler and more predictable, amend some provisions of the current Act that remain unchanged in Bill C-69, in particular by eliminating or restricting the option of a referral to the certificate process and specifying the steps and time limits in the process.**

B-2 Comments on the export approval process

Fair market access

Currently, an applicant for an electricity export permit must provide satisfactory proof of fair market access for Canadian buyers. Under paragraph 359(2)(b), it is not clear that an exporter must offer Canadian buyers (power distribution companies) the opportunity to purchase electricity for consumption in Canada on terms as favourable as those established for exportation. The impact of this change in the fair market access principle is difficult to assess at this time, because we do not know what the government’s intention is in this regard.

Recommendation 12

It is essential to keep the principle of fair market access for Canadians in the Act.

Discretionary power of the Commission of the Canadian Energy Regulator

Bill C-69 also gives the Commission greater discretionary power to make any permit subject to conditions respecting matters prescribed by regulation that the Commission “considers necessary or in the public interest.” (our emphasis) In the current National Energy Board Act, the Board may make a permit subject to such terms and conditions as it “considers necessary or desirable in the public interest.” (our emphasis) Hence, if this bill is passed, the Commission could impose conditions that it considers necessary without taking the public interest into account. In other words, this discretionary power will be broader than it is now.

Although the regulations specifying the matters regarding which conditions may be imposed are not yet available and it is difficult to determine what the impact of this provision will be, this discretionary power is still very troubling.

Recommendation 13

Restrict the discretionary power concerning the conditions that the Commission can impose.

Variation of a permit or licence after it is issued

Allowing variation of the conditions of an electricity export permit after it is issued would violate the principle of the sanctity of contracts.

Subsection 365(1) could jeopardize the stability of export contracts, as it states that the Commission may, “on application or its own initiative, vary a permit or licence issued in respect of the exportation of electricity.” (our emphasis) This provision gives the Commission great discretionary power to amend an existing permit, or act on an application made by a third party against an existing permit, with no apparent grounds or
rules for the use of the discretionary power.

This new power could have a major impact on electricity export contracts for which a permit has been duly obtained. What will the consequences of a change in the export conditions be and what will the implications for the parties be if the conditions in an export permit can be amended at any time by the Commission on its own initiative or on application by a third party? Permit variations could result in a situation where an exporter such as Hydro-Québec can no longer honour the terms of an export contract entered into after the export permit was issued. This discretionary power is too broad and could undermine the stability of export contracts.

Recommendation 14

The Commission’s power to vary a permit or licence after it is issued should be removed.

C – Canadian Navigable Waters Act (CNWA)

Hydro-Québec owns numerous works located in, on, under or across navigable waters, including the following:

- 63 hydro-electric stations,
- 99 regulating structures,
- 686 dams, and
- 381 bridges and culverts.

Hydro-Québec understands that Parliament wishes to establish rules to promote greater transparency, reconciliation with Indigenous peoples, and public participation. However, it is concerned that the proposed amendments to the Navigation Protection Act will considerably increase the applicable requirements with no substantive improvement in navigation. For Hydro-Québec, this is a big step backward.

Hydro-Québec is therefore asking the Senate to re-examine the proposed CNWA and adopt the recommendations below so that the administrative burden will be commensurate with the impacts on navigation.

Loss of the benefits of opting out

In 2017, Hydro-Québec exercised its right under the Navigation Protection Act to opt out for all works situated in non-listed waters, which meant hundreds of works in more than 200 watercourses. This process entailed a huge volume of work over more than two years within the organization; on top of that, Transport Canada requested an equally long validation period. However, under the CNWA, any future operations on those works may have to be approved through the new process, which will ultimately negate the benefits of opting out.

Recommendation 15

Keep works for which the right to opt out was exercised exempt from approval requirements under the Navigation Protection Act.
Importance of regulatory predictability

With the introduction of a complex approval process that varies depending on the nature of the operation or the status of the watercourse concerned, and with the potential addition of watercourses to the *Navigation Protection Act* schedule at any time, it seems hard to predict which situations will require approval. In our view, this approach also seems at odds with the principles of the federal government’s *Policy on Limiting Regulatory Burden on Business*.

Moreover, the fragmented, step-by-step consultation approach makes it impossible to determine the new regime’s global impacts, since we do not know the combined content of all the orders that will establish its scope: (1) the Major Works Order, (2) the Minor Works Order, and (3) the Order on the Construction, Placement, Alteration, Rebuilding, Removal, Decommissioning, Repair, Maintenance, Operation, Use and Safety of Works. All regulatory instruments should be published before the Act comes into force.

In general, Hydro-Québec feels that imposing new requirements results not only in an additional procedural and administrative burden that seems unreasonable, but also in legal risks in the ongoing operation of its existing works.

**Recommendation 16**

Publish the following regulatory instruments before the Act is enacted:

1. Major Works Order,
2. Minor Works Order, and

Need for a separate, simplified regime for operations on existing works

As manager of numerous dams and water regulation structures across Quebec, Hydro-Québec has to be able to promptly carry out maintenance, repair, replacement or rebuilding operations on its existing works as required. These operations need to be performed with as few regulatory and administrative constraints as possible, so that Hydro-Québec can provide conditions conducive to maintaining the safety of navigation and the public and carrying out its mission, which is to generate, transmit and distribute electricity. Such operations have little or no impact on navigation.

Many hydro-electric developments have been placed at falls or major rapids to take advantage of the hydraulic head to generate electricity. In other words, navigation was impossible at those locations when the facilities were built. Hydro-Québec cannot understand why operations to repair, alter or rebuild those works, which already prevent navigation, would require the Department’s approval, since the operations have no effect on navigation, which is already impossible.

The formalities for operations to alter, repair and rebuild existing works should remain
simple and minimal. It would be useful to document how these operations are carried out, so that the Department’s approval would be required only for the placement, removal or decommissioning of such works. That way, maintenance operations would be subject to a separate, simplified regime.

Recommendation 17

Document how maintenance operations on existing hydro-electric developments are carried out, and establish a separate, simplified regime for approving such operations.

Proposed major works

Hydro-Québec requests that the proposed major works concept apply only to dams that span the main stream of a navigable watercourse from one shore to the other. Dams on the perimeter of reservoirs which are supported on the surrounding land and water regulation structures that are not located on the main watercourse should not be treated as major works, since navigation is still possible in the main navigable channel. A structure should be characterized as a major work only in cases where navigation would be completely blocked and impracticable.

Recommendation 18

Exclude from the definition of major works dams and regulation structures that do not completely block navigation, specifically

(a) dams on the perimeter of reservoirs that do not impede the main watercourse, such as closure dikes in secondary valleys that are supported on the surrounding land, and

(b) water regulation structures that are not on the main watercourse.

IV – Conclusion

Hydro-Québec thanks the Committee for the opportunity to contribute to the study of Bill C-69. We recognize the importance of the reform process and the underlying objectives. However, we believe that essential amendments are still needed in Bill C-69. In the current energy transition, it seems contrary to the public interest to needlessly limit the development of means of generating clean hydro-electric energy. It is from this perspective that we present our concerns and recommendations regarding Bill C-69.