Recommendations for Improving the Canadian Energy Regulator Act

Submission to the Senate Committee on Energy, Environment, and Natural Resources on Bill C-69

by Nichole Dusyk, Isabelle Turcotte, and Duncan Kenyon | April 3, 2019

The Pembina Institute is grateful for the opportunity to provide written 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.

This legislation is the culmination of over three years of study and consultation including the important work of two expert review panels: the Expert Panel on NEB Modernization and the Expert Panel on Federal Environmental Assessment Processes. This is truly a once-in-a-generation opportunity to strengthen Canada’s environmental laws and we urge the committee to adopt amendments that strengthen the Bill’s intended purpose of ensuring responsible development while protecting Canada’s environment.

Pembina is a national, non-profit energy think tank working to reduce the environmental impacts of all kinds of energy development. The Pembina Institute was formed 35 years ago by landowners in Drayton Valley, Alberta in direct response to the 1982 Lodgepole sour gas blowout. The Lodgepole blowout killed two people and had significant immediate and longer-term impacts to communities and the environment. For nearly two months it spewed 200 million cubic feet per day of hydrogen sulfide sour gas along with its toxic condensates. In response to the incident, more than 200 local residents joined together to form the Pembina Area Sour Gas Exposures Committee. As a committee, they called for and achieved a full-scale public inquiry into the accident. When the inquiry wrapped up in March 1984, nearly 80 recommendations were adopted by the Energy Resources Conservation Board, various government departments and industry. Core members of that group went on to form the Pembina Institute.

At the Pembina Institute, we have long worked with industry and government to support the responsible development of oil and gas. For over three decades we have been dedicated to ensuring that oil and gas resources are developed safely and responsibly. We are committed to evidence-based decision-making and believe that responsible resource development requires a full understanding of the impacts and benefits of development. This includes both a
development’s impact on our ability to avoid dangerous climate change as well as the physical and financial risks that climate change and decarbonizing global markets pose to that project. The oil and gas sector of the future must innovate and adapt if it is to compete in a low-carbon economy and a lower-carbon industry will better be able to sustain itself in coming decades.

The Pembina Institute is non-partisan. We work with governments of all kinds, industry, civil society, landowners and the public to create solutions-oriented policy change. We provide data and analysis and we convene key players to facilitate discussion and find creative solutions to the pressing environmental problems before us.

It is with this experience and outlook that we have approached the current environmental law reform process. In fall 2016, we conducted 23 interviews with a wide range of experts to gather ideas and understand the challenges facing the National Energy Board. We published a discussion paper¹ in January 2017 and participated in three engagement sessions with the NEB Panel in Saskatoon, Toronto, and Edmonton. In March 2017, with financial support from Natural Resources Canada through the Public Input Funding Program, we published a summary report² detailing the findings of our research and presenting our final recommendations to the NEB Panel. In April 2018, we provided written and oral statements to the House of Commons Standing Committee on Environment and Sustainable Development.³

Our analysis and comments in this submission are focused on the Canadian Energy Regulator Act. We touch on only a few points in the Impact Assessment Act that directly relate to the Canadian Energy Regulator Act or the role of lifecycle regulators in project review. For more detail on our proposed amendments to the Impact Assessment Act, please see our joint submission with West Coast Environmental Law, Ecojustice, Nature Canada, Centre québécois du droit de l’environnement, and Ecology Action Centre.

Overall we applaud the changes proposed to federal energy regulation in the Canadian Energy Regulator Act. We support the inclusion of climate considerations, the revised governance regime, the transfer of authority for impact assessment to the Impact Assessment Agency of Canada, the expanded list of factors that must be considered when issuing a certificate or authorization, the increased transparency regarding decisions, the removal of the standing test


for public participation, and the emphasis on partnering with Indigenous groups and jurisdictions. These are significant improvements that set the stage for more credible project reviews which will benefit industry and all Canadians.

Our primary recommendation is for the committee to pass this legislation in order to improve decision-making for energy projects. The National Energy Board has lost the public’s trust and Canadians are asking for improved decision-making so that they can be confident that projects that proceed are providing a net benefit to their communities. The improvements proposed in Bill C-69 will not eliminate opposition to resource development but, if fully implemented they should lead to more timely and credible review processes—a positive outcome for all Canadians, including industry proponents. Although the bill could be strengthened, in regard to integrating climate change, enhanced public participation, and limiting the discretion of the CER Commission, our proposed amendments are minor adjustments that do not alter the architecture or intent of the bill. Detailed wording for our amendments are included in Annex A.

The role of lifecycle regulators

Lifecycle regulators play a critical role and possess invaluable expertise. However, the close relationship between regulators and the industry they regulate has led to an erosion of public trust due to a perceived lack of independence. This has resulted in what the NEB Expert Panel referred to as a “crisis of confidence”.4 The expert panel on environmental assessment also spoke to this issue highlighting the erosion of public trust and the differences between regulation and assessment.5 The danger of conflating environmental assessment and regulatory processes is that project review loses its planning and information gathering functions and becomes more of an extended permitting process. The recommendation put forward by the Expert Panel on environmental assessment to ensure adequate assessment processes and restore public trust was a single responsible agency for conducting impact assessments, as is proposed in Bill C-69.

While we recognize the technical expertise of the lifecycle regulators and the need for a commissioner from the Canadian Energy Regulator to be at the table during a project review, the public interest is best served by a review panel with diverse expertise including but not limited to the expertise of the lifecycle regulators. A single responsible authority also helps

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ensure the Impact Assessment Act will be applied consistently for all sectors so that the same standards and procedures apply regardless of whether it is a pipeline, a hydroelectric facility, a nuclear facility, or an offshore oil platform under review.

We strongly supported the House of Commons’ decision to limit the role of the Canadian Energy Regulator and Canadian Nuclear Safety Commission so that neither can form a majority, nor chair review panels. The two offshore petroleum boards (Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board) were limited from forming a majority on review panels but did not receive the same limitation on chairing review panels.

Recommendation: Make the treatment of all lifecycle regulators consistent by prohibiting the offshore petroleum boards from chairing review boards.

**Integration of climate change**

In the 21st century, energy policy is climate policy and a modern energy regulator must integrate climate change into all of its activities and functions. As initially tabled, the *Canadian Energy Regulator Act* did not even mention the word climate. We fully support the amendment passed in the House of Commons adding climate change to the *Canadian Energy Regulator Act* as a factor to consider in issuing a certificate or authorization. This amendment is consistent with the *Impact Assessment Act*.

Ideally the Canadian Energy Regulator would have climate considerations included in its mandate, not just as a factor in project reviews, to ensure climate change is integrated into all of its regulatory decision-making, data and analytical responsibilities, and its advisory functions. However, the current wording in conjunction with a robust strategic assessment of climate change, and a greenhouse gas threshold for adding projects to the project list is an acceptable compromise. We note however, that absent a robust, independent strategic assessment of climate change, it will be difficult to implement the current provisions in both the *Impact Assessment Act* and the *Canadian Energy Regulator Act*. Similarly, without assuring that all high carbon projects are federally assessed, the federal government’s ability to evaluate and mitigate greenhouse gas emissions will be significantly hindered.

**Public Participation**

The Pembina Institute has 35 years experience advocating for responsible resource development in Alberta. That experience tells us that responsible resource development, by necessity, requires open and inclusive project reviews.
As an organization we produce the Landowner’s Guide to Oil and Gas Development as a resource to help Alberta landowners understand and navigate the regulator landscape\(^6\). This is a landscape that, in general, discourages public participation even for those whose rights and livelihoods are directly impacted. Provincial assessments are far less likely to involve public hearings and even when public hearings are held, the Alberta Energy Regulator’s standing test has historically made it difficult to access reviews and ensure that all relevant evidence is heard.

Since 1993, the Pembina Institute has intervened as an expert witness in eighteen project reviews at the provincial and federal level to ensure that the environmental impact of oil and gas projects are understood and appropriately mitigated. We add value to the processes that we participate in. Generally panels commend us for our input and incorporate our suggestions and perspectives into recommendations. As an intervener, we have also been able to negotiate with proponents prior to hearings to improve environmental protections. Yet even as Canada’s leading public interest expert on oil and gas, we have often been denied access to provincial processes where we have legitimate expertise on issues such as greenhouse gas emissions and species at risk. We have even had to go to court to ensure that our expertise was heard.\(^7\)

There is no evidence to suggest that a standing test is necessary to limit frivolous participation nor that a standing test amplifies the voices of those that are most impacted. Instead we have seen firsthand how a standing test is used to limit and minimize the input of those who might be construed as “opponents” regardless of the relevance of the evidence they might bring. In our view, ensuring that those directly impacted are heard requires supporting and funding engagement and providing multiple opportunities and formats for participation throughout project lifecycles. We recommend additional support for those who are most directly impacted rather than introducing a standing test.

Recommendations:

1. Stipulate meaningful participation throughout project lifecycles by removing “when public hearings are held under section 52 or subsection 241(3)” from sections 74 and 75.
2. Extend to power lines and offshore renewables the participation provision included, for pipelines, in section 183(3).

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**Time limits**

Section 37.1 of the *Impact Assessment Act* reduces the default time limit for panel reviews under the Canadian Energy Regulator, setting it at 300 days, the same time required for shorter pipelines that are not designated under the *Impact Assessment Act*. This timeline would also apply to projects reviewed by the Canadian Nuclear Safety Commission and the offshore petroleum boards. The section does allow for an extension to the time limits for these projects up to the 600 day limit for other panel reviews under the *Impact Assessment Act* however, at the outset, the goal would be to complete the review in 300 days.

The 300 day time limit for designated projects under the purview of the federal energy regulator is unworkable for linear projects like pipelines and transmission lines. While we recognize the need for efficient and timely reviews, timelines that are too short are counter-productive leading to increased uncertainty. If there is insufficient time, discretionary powers to extend time limits will have to be deployed to manage the process. The result is less certainty about the actual timelines for the assessment. Moreover, reviews that do not allow adequate time for reviewing information and engaging stakeholders and Indigenous Peoples will not be viewed as credible and thus will likely delay projects with even more time-consuming litigation. Again, the end result will be less certainty rather than more.

*The Impact Assessment Act* allows shorter timelines to be set during the project scoping. Thus, when appropriate, the time limit for projects should be reduced rather than beginning with a default time limit that will be too short for many projects.

Recommendation: Delete section 37.1 of the *Impact Assessment Act* setting the default timeline for all panel reviews at 600 days.

**Discretion of the Commission**

Section 214 of the *Canadian Energy Regulator Act* provides the Commission broad discretion to allow for the construction, operation, or decommissioning of some pipelines or related infrastructure without a Certificate of Public Convenience and Necessity or even a complete project plan. While this discretion to exempt projects from these requirements may be appropriate in some instances, the broad discretionary powers allowed to the Commission must be bound with established conditions and exercised in a transparent fashion. This will help ensure that any exemptions are fully and publicly justified.

Recommendation: Amend section 214 (1) of the *Canadian Energy Regulator Act* to ensure that all the factors considered when issuing a certificate (as set out in 183(2)(a) to (l)) are applied and that reasons are provided for an exemption order issued under this section.
Conclusion

We fully support the additional emphasis on Indigenous rights and engagement included in Bill C-69 and, in general, using impact assessment processes as a means to advance reconciliation. To this end, we urge the committee to ensure that it is hearing from Indigenous Peoples across the country on how this legislation could be strengthened to protect their constitutional and treaty rights.

In conclusion, we recommend the committee move forward with Bill C-69 without compromising its intended purposes. The legislation is not without its flaws but it represents a measureable and much-needed improvement on the status quo. This will benefit both industrial proponents and all Canadians. After more than three years of consultation and debate, it is time to begin the process of rebuilding public trust, providing the environmental and health protections that Canadians expect, and ensuring the Canadian Energy Regulator is equipped to respond to the pressing challenges of the 21st century. We look forward to appearing before the committee to further discuss the legislation and our recommendations.

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<th>Section</th>
<th>Current provision</th>
<th>Proposed Amendment</th>
<th>Rationale</th>
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<tr>
<td>CERA 74</td>
<td>Public engagement</td>
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<td>There is no need to limit opportunities for engagement and consultation activities to public hearings. As noted by the NEB Expert Review panel, engagement opportunities, particularly with Indigenous Peoples, should exist throughout a project’s lifecycle. Removal of the public hearings specification allows but does not compel the regulator to create or fund engagement opportunities outside of public hearings.</td>
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| CERA 262, 298 | **Representations by the public**  
**183(3)** Any member of the public may, in a manner specified by the Commission, make representations with respect to an application for a certificate. | **Add to sections 262, 298**  
**Representations by the public**  
Any member of the public may, in a manner specified by the Commission, make representations with respect to an application for a certificate. | Section 183(3) stipulates that the public may make representations with respect to the application for a pipeline certificate. For consistency, this should be extended to applications for power lines and offshore renewables. |
| --- | --- | --- | --- |
| **Orders**  
**214 (1)** The Commission may, by order, exempt from the application of any or all of the provisions of section 179, subsection 180(1) and sections 182, 198, 199 and 213  
(a) pipelines or branches of or extensions to pipelines, of not more than 40 kilometres in length;  
(b) pipelines that have already been constructed; and  
(c) any tanks, reservoirs, storage or loading facilities, pumps, racks, compressors, interstation communication systems, real or | **Orders**  
**214 (1)** The Commission may, by order, after considering the factors set out in paragraphs 183(2)(a) to (l), exempt from the application of any or all of the provisions of section 179, subsection 180(1) and sections 182, 198, 199 and 213  
(a) pipelines or branches of or extensions to pipelines, of not more than 40 kilometres in length;  
(b) pipelines that have already been constructed; and  
(c) any tanks, reservoirs, storage or loading facilities, pumps, racks, | Section 214 allows the commission to proceed with the construction, operation, or abandonment of some pipelines and related infrastructure without a Certificate of Public Convenience and Necessity or even a complete project plan. While this may be appropriate for some incremental improvements to existing projects, this provision needs to be amended to ensure that such exemptions are justified, transparent, and do not proceed without due consideration of the factors set out in section 183(2)(a) to (l) (i.e. the factors that must be considered in issuing a certificate for a pipeline). |
| IAA 37.1 | **Time limit — 300 days**  
37.1 (1) Despite section 37, if the review panel is to conduct an impact assessment of a designated project that includes physical activities that are regulated under any of the Acts referred to in section 43, it must, subject to subsection (2), submit a report with respect to that impact assessment to the Minister no later than 300 days after the day on which he or she appoints to the panel the minimum number of members required.  
**Minister’s power** | **Option 1 (preferred): Delete section 37.1**  
**Time limit — 300 days**  
37.1 (1) Despite section 37, if the review panel is to conduct an impact assessment of a designated project that includes physical activities that are regulated under any of the Acts referred to in section 43, it must, subject to subsection (2), submit a report with respect to that impact assessment to the Minister no later than 300 days after the day on which he or she appoints to the panel the minimum number of members required.  
**A default 300-day limit on review panel assessments of projects regulated by the CNSC, CERA and offshore boards is arbitrary and too short to ensure that assessments are rigorous, public participation meaningful, and Indigenous rights and authority upheld.**  
It is possible that this amendment was made in order to accommodate an expanded project list that contains smaller projects regulated by the lifecycle regulators. We support the expansion of the project list, but without assurance that the list will contain more projects regulated by... |
(2) The Minister may, at any time before the Agency posts a copy of the notice of commencement of the impact assessment on the Internet site, by order, establish a time limit that is longer than the time limit referred to in subsection (1) but is no more than 600 days. The order must include the Minister’s reasons for making it.

**Minister’s power**

(2) The Minister may, at any time before the Agency posts a copy of the notice of commencement of the impact assessment on the Internet site, by order, establish a time limit that is longer than the time limit referred to in subsection (1) but is no more than 600 days. The order must include the Minister’s reasons for making it.

**Factors to consider**

(3) The Minister must take into consideration the factors set out in subsection 36(2) in establishing a time limit under subsection (2).

**Application**

(4) Subsections 37(3) to (7) apply, with any modifications that the circumstances require, with respect to a time limit established under this section.

Moreover, we note that in the case of NEB-regulated projects, section 37.1 would actually reduce the current timelines by eight months as a default for review panels. We do not believe that this drastic reduction of timelines that are already unmanageable for many assessments is a reasonable trade-off for the mere possibility of a few additional projects being captured by the Act.

Therefore, we recommend that this section be deleted, returning the default timeline to 600 days. Discretion to shorten the timeline for assessment of a given project during the planning phase would remain.

Alternatively (and less preferably), the default timeline could be set at 18 months – the current timeline for NEB-regulated project EAs under CEAA 2012/NEBA.
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<td>(4) The persons appointed from the roster must not constitute a majority of the members of the panel.</td>
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<td>(4) The chairperson must not be appointed from the roster and the persons appointed from the roster must not constitute a majority of the members of the panel.</td>
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These amendments bring the requirements respecting panel composition of assessments of projects regulated by the offshore boards into alignment with those of projects regulated by the CER and CNSC.

These amendments will help ensure the credibility of and public trust in assessments of these projects, as well as consistency in IAs under the Act in general.