Recommendations for

REFORMING CANADA'S REGULATORY PROCESS FOR ENERGY PROJECTS

CANADAWEST FOUNDATION | NATURAL RESOURCES CENTRE

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SUMMARY

Bill C-69*, as proposed, would overhaul Canada's energy project assessment process, creating a new Impact Assessment Agency (IAA) and replacing the National Energy Board (NEB) with the Canadian Energy Regulator (CER). The bill introduces some welcome changes, but also retains some of the same features that are causing problems in the current system. It fails to address fundamental issues of trust, economic activity and national competitiveness. Proponents and investors are not worried about tough, evidence-based regulation. But unless these issues are addressed, our regulatory system will remain vague, unreliable and subject to politically motivated decisions at the end of a long and expensive process – all of which discourage investment in the Canadian economy.

If our regulatory system is to become unstuck, we must get it right. Appropriate and sustainable reform benefits everyone – environmentalists, project proponents, the public and the federal government. It is critical that Ottawa takes the time and effort needed to address the systemic issues we describe to ensure it does not hamstring the new regulatory process.

* 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.

AN ENVIRONMENT FOR SUCCESS

The development of a regulatory system that encourages economic development, supports responsible development of our energy resources, and is clear, transparent and fair rests on four essential pillars:

CLEAR POLICY	The regulatory process is not the place to decide and debate government policy. Yet, in the absence of clear direction from the government on economic, environmental and Indigenous rights policy, the regulatory system has become the *de facto* forum for debating these concerns. It is not set up to deal with policy debates, nor should it be. Policy-makers must determine policy up front, based on the priorities of Canadians. This will provide clarity needed for the regulator to better do its job. It will also create a strong and clear signal to investors and the public about how Canada intends to achieve economic prosperity, environmental sustainability and competitiveness.
CLEAR LEGISLATION	A legislative framework should define clear mandates, roles and responsibilities of the regulator, minister(s) and cabinet, so that all stakeholders are confident that decisions are being made using due process by those with the mandate to do so.
AN EMPOWERED & TRUSTED REGULATOR	The government needs to trust the regulator – otherwise how can Canadians be expected to trust it? → Let the regulator decide. The regulator must be empowered to do its job – to make the final decision as to whether the project should be allowed to proceed, based on technical merit, local and regional effects, risk mitigation measures, potential benefits and alignment with policy. → Make the political decision up front. Make the political decision about national interest at the end of the "early planning" phase, before embarking on the full assessment process. This will enhance the legitimacy of the entire process and give stakeholders and investors the greater certainty they need.
APPROPRIATE, BROAD BUT EFFICIENT STAKEHOLDER INPUT	We need appropriate, broad but efficient stakeholder input. (i) Bring back into the bill the concept of "standing," establishing the priority of those groups or entities more directly impacted and consolidating similar messages. (ii) Ensure that the consultation and hearing processes are fair, transparent and inclusive. (iii) Make it clear to participants that being heard does not necessarily mean that the decision will reflect their own preferences. (iv) Create a Public Intervener Office with the responsibility to synthesize the interests and views of various parties who wish to comment on the application or the regulatory process itself, to manage stakeholder input in a way that is both fair and respectful.

THE DETAIL TO MAKE IT WORK

In addition and to fulfill the four main pillars of improvement – clear policy, clear legislation, an empowered and trusted regulator and appropriate, broad but efficient stakeholder input – specific provisions of Bill C-69 need to be amended or to have additional clarity to be efficient, effective and fair.

Ensure transparency and clarity throughout

Ensure that the regulator is able to provide full documentation of the regulatory process and all decisions, and that this information is made available in a way that is easy to access and understand.

Focus on positive as well as negative effects to inform balanced discussion

Consideration of the positive benefits of a project is critical at the local and also regional and national levels. Section 6 of Bill C-69 sets out the purposes of the act. One purpose is to ensure that the impact assessment considers both positive and adverse effects. However, Section 22, *Factors To Be Considered*, does not include specific reference to project benefits. Section 22 must include consideration of positive benefit factors. Positive effects locally, regionally and nationally will better inform a more balanced public discussion of how projects affect environmental, economic and societal goals.

Increase certainty on timeframes

Although the intention of the bill as proposed is to reduce the amount of time the regulatory process takes, the bill as is merely increases uncertainty. The bill must provide additional clarity on milestones to be met; how decisions to stop the clock will occur and why; overall timeframes; and how to ensure that delay is not unreasonable or politically motivated.

Use regional and strategic assessments to account for cumulative effects

Regional and strategic effects are useful tools to identify cumulative effects – if done well. Key issues remain to be worked out, including the triggers to initiate them; how to deal with jurisdictional overlap; and whether results will be informative or prescriptive. Bill C-69 should also clarify that project-level permitting should not be suspended awaiting regional or strategic assessments.

Move the energy information function to increase credibility

Keep the energy information function out of the regulator and house it within Statistics Canada or another autonomous and trusted organization – as is done in the United States and elsewhere – to avoid the perception of conflict of interest and build trust in energy information.

Proponents and investors are not worried about tough, evidence-based regulation. But unless these issues are addressed, our regulatory system will remain vague, unreliable and subject to politically motivated decisions at the end of a long and expensive process – all of which discourage investment in the Canadian economy.

Depoliticize the Project Review Panel appointment process

Review panel members should be appointed from a list developed by an independent committee to avoid bias, or the appearance of bias, in their selection.

Include social impacts, but align with best practice

The bill broadens the impact assessment scope to include not only environmental, but also health, social and economic impacts. Past environmental assessments have often *de facto* addressed these issues; enshrining this in legislation reflects community priorities. However, the new IAA needs to align its approach with international best practice.

Separate the process for information requests from a process for comments

The Information Request (IR) process is overwhelmed, with submitted questions often numbering in the tens of thousands. The new regulatory process should include a parallel mechanism by which comments and opinions can be submitted and heard, but do not need to be answered by proponents. A new Public Intervener Office would help with this.

Make reports comprehensible as well as comprehensive

The size of impact assessment reports has gotten out of hand, often comprising tens of thousands of pages. The new IAA should explore methods through which impact assessment results and the decisions that are made by the regulator, panel or minister can be communicated simply and clearly.

Use community monitoring to help build trust

Indigenous and community monitoring committees can build trust and foster positive relationships as well as provide data to increase understanding of local effects of development. Community monitoring under the new IAA should build on the example of good practice seen elsewhere in Canada, in particular Saskatchewan and British Columbia.

Share data to reduce burden and add transparency

The government should consider using the new open data registry as a clearinghouse to store data gathered by proponents' consultants during the impact assessment process. This would increase transparency. It would also be easier to determine at an early stage what adverse impacts might occur, and would reduce the need for repeated stakeholder consultation.

Reforming

CANADA'S REGULATORY SYSTEM

FOUR ESSENTIAL PILLARS

CLEAR POLICY

Policy-makers must determine economic, environmental and Indigenous rights policy up front. This will provide clarity needed for the regulator to better do its job.

CLEAR LEGISLATION

We need a legislative framework that defines clear mandates, roles and responsibilities so that all stakeholders are confident that decisions are being made using due process by those with the mandate to do so.

AN EMPOWERED & TRUSTED REGULATOR

The government needs to trust the regulator – giving it the power to make the final decision. We must eliminate politically motivated decisions made at the end, after the process is complete.

APPROPRIATE, BROAD BUT EFFICIENT STAKEHOLDER INPUT

Bring back "standing;" make it clear that being heard does not always mean the decision will reflect participant preferences; create a Public Intervener Office.

PROPOSED CHANGES TO BILL C-69

- → Ensure transparency and clarity throughout
- → Focus on positive as well as negative effects to inform balanced discussion
- → Increase certainty on timeframes
- → Use regional and strategic assessments to account for cumulative effects
- → Move the energy information function to increase credibility
- → Depoliticize the Project Review Panel appointment process
- → Include social impacts, but align with best practice
- → Separate the process for information requests from a process for comments
- → Make reports comprehensible as well as comprehensive
- → Use community monitoring to help build trust
- → Share data to reduce burden and add transparency

INTRODUCTION

Bill C-69 was introduced on February 8, 2018 – proposing to overhaul Canada's energy project assessment process, create a new Impact Assessment Agency (IAA) and replace the National Energy Board (NEB) with the Canadian Energy Regulator (CER).

We applaud the government's commitment to reforming the federal Environmental Assessment (EA) system and improving Canada's approach to energy regulation. While not exactly broken, the previous system had a variety of problems that caused difficulty for proponents, stakeholders and the regulator alike.[1]

We also support the effort to develop a process that is intended to increase transparency, fairness and inclusiveness. However, the proposed bill fails to address major implications of the process on trust, economic activity and national competitiveness – the very reasons that drove the need for change. Proponents and investors are not worried about tough, evidence-based regulation or about the need to protect the environment. What discourages investment is a decision-making process that is vague, unreliable and ultimately subject to politically motivated – and therefore uncertain – action at the end of a long and expensive process. And no one, including either proponents or ardent environmentalists, wants a system that relies on political whim – of any kind.

The government has requested input to further improve the process and increase the likelihood that the change will achieve its objectives. With that in mind, the Canada West Foundation describes the problems in the proposed legislation and provides recommendations for improvement.

Our recommendations are framed under two broad headings. The first section, *An environment for success* (page 8), describes how government must create the conditions that will enable the new regulator to succeed and meet Canada's economic and environmental goals. The second section, *The detail to make it work* (page 14), describes the way in which Bill C-69 itself should be amended to provide a clear, workable and fair system for all parties.

We need Canada to be economically competitive *and* socially and environmentally responsible. This is not a trade-off. Building a strong, efficient and trusted regulator is an important part of creating sustainable prosperity. It is critical that Ottawa takes the time and effort needed to address the issues we describe in this report to ensure it does not hamstring the new regulatory process.

We need Canada to be economically competitive *and* socially and environmentally responsible. This is not a trade-off.

[1] See the polls reported in Canada West Foundation's report *Up Front: Modernizing the National Energy Board.*

An environment for

SUCCESS

Most Canadians share the vision of a prosperous and sustainable Canada. This requires a regulatory system that encourages economic development, supports responsible development of our energy resources, and is clear, transparent and fair.

This goal rests on four essential pillars that lie both inside and outside the bounds of Bill C-69:

- clear policy
- clear legislation
- an empowered & trusted regulator
- appropriate, broad but efficient stakeholder input

CLEAR POLICY

Regulatory decision-making, both at a technical level and at the level of overall project decisions, needs to be based on clear and decisive policy goals. The regulatory process cannot be an *ad hoc* forum in which to decide or debate government policy; policy setting must be done at the beginning so that all participants understand the environment in which they are working.

In recent years, we have had a lack of clear policy on a number of issues that are important to Canadians, including environmental concerns, economic priorities and Indigenous engagement. As a result, the regulatory process has been the *de facto* forum for debating these concerns, without the means to deal with them effectively – in some cases aggravating concerns about trust.

A lack of clear climate policy has encumbered the work of the regulator. For example, expanding the scope of pipeline decisions to include consideration of upstream and downstream greenhouse gas (GHG) emissions[2] goes well beyond a pipeline's control. Emissions from production and consumption of oil and gas should be managed by policies directed to those emissions through carbon prices, emission standards and other regulation. In the same way, we would not use electricity transmission decisions to decide the makeup of electricity generation.

The federal government's commitment to develop, in partnership with Indigenous peoples, a *Recognition and Implementation of Rights Framework*,[3] intended to clarify and ensure full and meaningful implementation of treaties and other agreements, is an important first step. Policy that clarifies Indigenous peoples' rights to participate in decisions about what affects them, and that will enable their participation in the development of resources and infrastructure on their lands, is much broader than the mandate of an energy regulator or an impact assessment agency.

[2] National Energy Board. *Expanded Focus for Energy East Assessment.* August 23, 2017. https://www.canada.ca/en/national-energy-board/news/2017/08/expanded_focus_forenergyeastassessment.html

[3] Prime Minister's Office. *Government of Canada to create Recognition and Implementation of Rights Framework.* February 14, 2018. https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework

The creation of the Canadian Energy Regulator (CER) and Impact Assessment Agency (IAA) is not a surrogate for establishing clear climate, energy and Indigenous policies. Without clear policy, many of the problems of overly long timeframes, high cost and uncertainty will remain.

RECOMMENDATION

Policy-makers must determine policy up front based on the priorities of Canadians. This will provide clarity to help the regulator better do its job. It will also provide guidance to industry, municipal and regional governments and other interested parties. Finally, it will create a strong and clear signal about how Canada intends to achieve economic prosperity and environmental sustainability – and in so doing, provide the clarity that is important to improving Canada's competitiveness and investment climate.

CLEAR LEGISLATION

Beyond clear policy, there needs to be a legislative framework that clearly describes mandates, rules, roles and responsibilities, so that government, regulators and all other parties have clarity on process, timelines and jurisdiction, and confidence that decisions are being made by those appointed to do so.

Clear, well-publicized, wholly transparent mandates and descriptions of scope, describing what the regulator can and cannot do, what the minister can and cannot do, and what cabinet can and cannot do are necessary. This clarity and transparency will benefit all concerned – government, regulator, interested parties and the public.

RECOMMENDATION

Clear legislation must provide the mandates, rules, roles and responsibilities of the various parties involved in the project approval process. Clearer legislation about the process and those in it means less discretion for the regulator and less debate about its mandate during the process.

AN EMPOWERED & TRUSTED REGULATOR

Let the regulator decide

It is the job of our elected leaders to establish legislation and the process that ensures a fair assessment. Having done that, they should empower the regulator to do its job.

The purpose of the regulator is to determine the positive and negative impacts of a proposed project based on clear parameters. It must also assess the adequacy of planned mitigation measures, develop conditions that would ensure the proposed project minimizes adverse impacts, and determine the extent to which the project may impact the rights and titles of Indigenous groups. All of this must be done within the context of established overarching policy. The regulator takes the time to listen to the input of stakeholders, consider multiple viewpoints, weigh the mass of scientific evidence and follow an explicit procedural path.

By the end of this process, the regulator is in the best position to evaluate and weigh the balance of impacts, separate and cumulative effects and the perspectives of different stakeholder groups. Based on this information, the regulator – not the minister or cabinet – should make a decision about whether or not a project should be allowed to proceed.

It should not be the minister's role to revisit the regulator's conclusion. Doing so undermines trust in the regulatory system – and enhancing trust in the regulatory system was a primary reason for the proposed changes. If the regulator has done its job, there should be no reason for the minister to overturn the regulator's decision.

Bill C-69 confirms that there is a process for judicial review under the Federal Courts Act. Most jurisdictions within Canada – including B.C., Alberta, Saskatchewan and Manitoba – have some sort of right to judicial appeal to decide on matters of legal compliance. This provision helps ensure that when an error is made, there is an appropriate recourse – but one that stems from a clear mandate and clear rules, not political whim.

> If the regulator has done its job, there should be no reason for the minister to overturn the regulator's decision.

Impartiality will be enhanced by creating appropriate distance between the regulator and those who have jurisdiction over the regulator's mandates. The regulator could report to the House of Commons, possibly via the minister of finance, as happens for the Nova Scotia Utility and Review Board.

RECOMMENDATION

The regulator must be empowered to do its job – to make the decision as to whether the project should be allowed to proceed, based on technical merit, local and regional effects, risk mitigation measures, potential benefits and alignment with policy.

Make the political decision up front

A key concern with the current process is that despite compliance with the process and all of the rules, and despite the regulator's recommendation for approval, the minister or federal cabinet is able to pick and choose which projects they will, in the end, approve or deny. Recent experience has amplified this concern.

In 2012, Prime Minister Stephen Harper brought in provisions that would allow the Governor-in-Council to approve projects notwithstanding the National Energy Board's regulatory rejection[4] – a move that would have pleased project supporters and displeased project opponents. However, in 2016, Prime Minister Justin Trudeau's cabinet cancelled the proposed Northern Gateway pipeline project after regulatory approval had been obtained,[5] stating that "the Great Bear Rainforest is no place for a pipeline."[6]

A decision about what is or is not in the national interest *should* be made by our elected leaders. That is key to our democracy. But it should be made early, *not* at the end of a long and expensive process.

There is a path forward that would allow a national interest determination to be made on a specific project, but would also allow for certainty as the regulatory process moves forward – providing a win for everyone. The introduction in Bill C-69 of an "early planning" phase, before the impact assessment, provides an ideal window for making a determination of national interest. While not all impacts will be known at this point, the major impacts – both positive and negative – relevant to a national interest determination will be clear. For example, proposed pipelines may result in an increase in tanker traffic, but result in higher exports; oil and gas production may result in increased carbon output, but create well-paid jobs; certain proposed projects might take place on sensitive federal lands, but permit important economic opportunities.

[4] National Energy Board. *FAQs – 2012 Changes to the National Energy Board Act*. https://www.neb-modernization.ca/briefing-material

[5] Despite the regulatory approval, the Federal Court of Appeal ruled that the federal government had not fulfilled its duty to consult with Indigenous groups. This could have been remedied through additional consultation.

[6] Prime Minister's Office. *Prime Minister Justin Trudeau's Pipeline Announcement*. November 29, 2016. https://pm.gc.ca/eng/news/2016/11/29/prime-minister-justin-trudeaus-pipeline-announcement

Withholding political decisions to the very end of the process will only perpetuate many of the current problems.

While not providing a green light for the project to proceed, a national interest determination at this stage would act as a "gate" to identify the political acceptability of a project early on. This would save time and money for the regulator, the proponent and the public and help to eliminate surprises in the final decision-making stage. A project deemed to be broadly in the national interest would still be subject to detailed examination and the decision of the regulator following its review. But a "no" determination would save the time and expense of pursuing a lost cause.

Withholding political decisions to the end of the process will only perpetuate many of the current problems. An ongoing parallel political process alongside the regulatory assessment means that interests do not need to fully participate or collaborate in the regulatory process because they can turn their efforts to the political decision process instead. In addition, having the final outcome decided by politicians, rather than a full and transparent regulatory process, could open the system to possible corruption, allegations of corruption or other improper influencing of politicians – where, in the future, it could be cheaper to "buy" politicians or political processes than to invest in a long and expensive regulatory process.

The decision should not depend on which party is in power; it should be the result of a clear, strong and fair regulatory system, based on well-developed and clear policy. Leaving a decision to political discretion at the end of the decision-making process can only benefit a particular interest temporarily; a time will come when the government changes and the next minister of the environment or the next federal cabinet may not be as sympathetic to the same causes. Such extraordinary discretion should worry everyone, regardless of position.

RECOMMENDATION

Make the political decision about national interest at the end of the "early planning" phase, before embarking on the full assessment process. This will enhance the legitimacy of the entire process and give stakeholders and investors the greater certainty they need.

APPROPRIATE, BROAD BUT EFFICIENT STAKEHOLDER INPUT

The new legislation proposes to relax the standards for who is able to participate in hearings by removing the principle of "standing" – ostensibly to encourage input from more people. This is of serious concern. There is great value in an effective and diverse consultation process, but it will be a challenge for the new IAA to efficiently and effectively handle the additional volume of fact and opinion headed its way.

Sheer numbers and volume of comment do not mean better input, particularly if many voices are saying the same thing. It will require management. We recommend, first, the return of the concept of "standing." If this return occurs, but all the more importantly if it does not, there are four points that are important:

It will be important for the government, in this bill or its regulations, to clarify that consultation does not mean veto power.

(i) First, the consultation process should not be a weapon to be used by any special interest. Consultations are not a plebiscite – greater numbers or louder voices do not necessarily imply general public consensus. Nor are they an opportunity to shout down those with whom one disagrees or to shut down the process.

(ii) Second, some voices have more relevance. It is vital that a wide range of opinions are heard, but does everyone get to speak? Without the concept of "standing," there is no guidance on weighting the perspectives of those people and organizations who are more directly impacted. It must be clear ahead of time who can be heard, under what circumstances and why. Access is also important. Do the people and organizations with legitimate reasons to be heard have realistic access? Are there ways to use technology or outreach to make the process more accessible?

(iii) Finally, it will be important for the government, in this bill or its regulations, to clarify that consultation does not mean veto power. It is essential that concerns are taken seriously, but participants need to clearly understand that the regulatory agency will be balancing disparate interests and importantly, weighing objective scientific and economic analyses. In other words, people need to understand that the regulator will not always agree with them.

(iv) We recommend the use of a Public Intervener Office, as recommended by the Expert Panel on NEB Modernization.[7] As suggested by the Pembina Institute in its submission to the House of Commons Standing Committee on Environment and Sustainable Development,[8] the office could be tasked with reviewing and synthesizing written public comments and ensuring that key public concerns are represented in the public hearings. This could be a way to tame and triage the influx of public and stakeholder comments that are put forward at various points in the regulatory process.

RECOMMENDATION

(i) Bring back into the bill the concept of "standing," establishing the priority of those groups or entities more directly impacted and consolidating similar messages. (ii) Ensure that the consultation and hearing processes are fair, transparent and inclusive. (iii) Ensure that stakeholders understand that consultation does not mean veto power or that any decision will reflect their own preferences. (iv) Create a Public Intervener Office with the responsibility to synthesize the interests and views of various parties who wish to comment on the application or the regulatory process itself.

[8] Lauzon, Helene; Merasty, Gary; Besner, David; John, Wendy; and Brenda Kenny. *Forward Together: Enabling Canada's Clean, Safe, and Secure Energy Future. Report of the Expert Panel on the Modernization of the National Energy Board.* 2017. Page 73.

[8] Dusyk, Nichole. *Strengthening the Canadian Energy Regulator Act Submission to the Standing Committee on Environment and Sustainable Development on Bill C-69.* Pembina Institute, April 6, 2018.

A decision about what is or is not in the national interest should be made by our elected leaders. That is key to our democracy. But it should be made early, not at the end of a long and expensive process.

The detail to

MAKE IT WORK

With respect to Bill C-69, we have a number of specific recommendations:

Ensure transparency and clarity throughout

Full transparency gives confidence to all stakeholders that the process is fair, and in doing so, enhances the credibility of the regulatory decision.

Transparency extends to both data and decisions. It requires not just making information available, but also making it easy to find and easy to understand.

Many important documents related to the application process are available online. There is no reason that that the entire application process should not be public (except for material that is competitively or culturally sensitive) – including the data that supports the environmental assessment, video coverage and digital transcripts of hearings, and supporting reports. The evidence in any proceeding must also be easy to find and readily and conveniently accessible. Knowledgeable staff should be available to help guide the public to the information they are looking to find.

RECOMMENDATION

Ensure that the regulator is able to provide full documentation of the regulatory process and all decisions, and that this information is made available in a way that is easy to access and understand.

Focus on positive as well as negative effects to inform balanced discussion

In Section 6(1)(c), the bill specifies that impact assessments take into account both the positive and negative effects of a project. This is an important start. However, this is not mentioned again. In Section 22(1), which lists the various factors to be considered in the assessment, there is no factor that refers to benefits or other positive results. This must be amended to include positive as well as adverse effects as factors.

Up to now, the overall process has focused on the negative aspects of development, and federal environmental assessments were directed to assess only potential adverse impacts. While the impact assessment usually includes the purpose of and need for the designated project, as in Section 22(1)(d) of Bill C-69, the potential benefits are not brought out – and are particularly easily overlooked in light of the volume of information on adverse impacts. For example, the Trans Mountain Expansion Project application has more than 8,800 pages describing local community impacts, primarily through a lens of potential harm. But there are just two pages on the project's economic, fiscal and energy benefits buried in the project description.[9]

For communities to benefit from projects and to inform a balanced discussion of the project's merits, not only do negative impacts need to be mitigated, but positive effects also need to be identified, understood and enhanced.

[9] The full application for the Trans Mountain Expansion Project can be viewed at https://www.transmountain.com/neb-application

Lack of explicit consideration of national or macro-level effects remains a critical problem. The bill does not bring into the discussion the consideration of the benefits of a project for the region and the country as a whole. To what extent does a project benefit other industries? How does it support a province, territory or the federal government in reaching its goals for economic success? How does the project facilitate the transportation of goods or access to regions in a way that will benefit the country as a whole?

Overlooking potential macro-level benefits creates an information imbalance biased against projects – even good projects. It also creates a lopsided conversation, both within regulatory hearings and in the general public discourse.

Bill C-69 needs to include a mechanism within the regulatory hearing process that ensures informed discussion of the macro-level benefits that the proposed project would generate. These discussions need to go beyond consideration of the economics of the project and should also describe the potential benefits for other industries, government objectives and sustainability of the country.

RECOMMENDATION

Consideration of the positive benefits of a project is critical at the local and also regional and national levels. Section 6 of Bill C-69 sets out the purposes of the act. One purpose is to ensure that the impact assessment considers both positive and adverse effects. However, Section 22, *Factors To Be Considered*, does not include specific reference to project benefits. Section 22 must include consideration of positive benefit factors. Positive effects locally, regionally and nationally will better inform a more balanced public discussion of how projects affect environmental, economic and societal goals.

Increase certainty on timeframes

It needs to be clear when a decision will be made.

Although the stated intention of the proposed bill is to reduce the amount of time the regulatory process takes, the bill as is merely increases uncertainty. The minister can repeatedly add time extensions or stop the clock with suspensions during multiple parts of the process: the early planning phase, the review panel phase and the timeline for the Governor-in-Council to make a decision, for example.

It is unavoidable that delay will occur in some situations, and it is in no one's interest to rush a decision if it means the process will fall apart later. Nevertheless, the bill needs to increase, not decrease, certainty on the process, milestones to be met and timelines.

RECOMMENDATION

Increase certainty on timeframes for decision-making by providing clarity on milestones to be met; how decisions to stop the clock will occur and why; overall timeframes; and how to ensure that delay is not unreasonable or politically motivated.

Use regional and strategic assessments to account for cumulative effects

Strategic and regional assessments are vastly underused. We are pleased to see their prominence rise in this bill.

Strategic and regional assessments do not look at a specific project; they look at the potential for impacts from all development within a particular area, even before a specific project application is submitted. This enables a high-level perspective to inform project-level decision-making. It is a sensible way to approach the thorny issues of cumulative effects and sustainability thresholds and enable multiple project applications to be based on a common understanding.

There is, however, little detail in the bill or the accompanying materials on strategic and regional assessments. Although the ambition and intention is important, the ultimate success of this approach will rest on the implementation details.[10] Because they have not been extensively used in Canada, there is little precedent from which to work.

In particular, the government needs to identify whether the purpose of undertaking a regional assessment or strategic assessment is informative or prescriptive. The assessment could be informative to provide useful background information on the local context and sensitivities and analysis of the interests of residents and other stakeholders. Or, it could be prescriptive and identify conditions that future projects must meet, thresholds for reviewable projects that are specific to that area, or thresholds that should be used in project-specific impact assessments to identify unacceptable adverse impact. It should also be made clear that project-level permitting should not be suspended while a regional or strategic assessment is being planned or undertaken.

RECOMMENDATION

Sufficient detail is needed about the triggers to initiate regional and strategic assessments; how to deal with the jurisdictional overlap between federal and non-federal lands in an affected region; what purpose (informative or prescriptive) they are intended to serve. Bill C-69 should also clarify that project-level permitting should not be suspended awaiting regional or strategic assessments.

Move the energy information function to increase credibility

The energy information function currently housed within the National Energy Board (NEB) should be moved away from the regulator to a trusted federal body such as Statistics Canada, or an arm thereof.[11] This is currently the approach used in other jurisdictions – such as the U.S. Energy Information Administration (EIA) and the International Energy Agency (IEA) – where the agency's independence avoids the perception of conflict of interest and builds trust in energy information.

The Expert Panel on the Modernization of the NEB also supported this position, recommending *"A new, independent Canadian Energy Information Agency, separate from both policy and regulatory functions, accountable for providing decision-makers and the public with critical energy data, information, and analysis."*[12]

Bill C-69 does not in its current form address this issue – but it should. It is important for the credible and efficient functioning of the project approval system and should be addressed clearly within the bill.

RECOMMENDATION

Keep the energy information function out of the regulator and house it within Statistics Canada or another autonomous and trusted organization – as is done in the United States and elsewhere – to avoid the perception of conflict of interest and build trust in energy information.

[10] For a discussion of the way in which implementation has influenced effectiveness in a Canadian context, see Acharibasam, John B., and Bram F. Noble. "Assessing the impact of strategic environmental assessment." *Impact Assessment and Project Appraisal* 32(3), 2014: 177-187.

[11] Recent surveys in Canada have found that many of the key actors in the energy debate suffer from a significant credibility deficit and that a single, independent source for energy data could help build trust. Eisner, Dale. "Energy literacy in Canada: a summary." *University of Calgary School of Public Policy SPP Research Papers* 9(1), 2016.

[12] Lauzon, Helene; Merasty, Gary; Besner, David; John, Wendy; and Brenda Kenny. *Forward Together: Enabling Canada's Clean, Safe, and Secure Energy Future. Report of the Expert Panel on the Modernization of the National Energy Board*. 2017. Page 4.

Depoliticize the Project Review Panel appointment process

The appointment of members to a Project Review Panel should be independent of either real or perceived political selection.

Section 41(1) of the bill states that panel members must be "unbiased and free from any conflict of interest relative to the designated project." This is important. But to insulate the panel from such bias, or the appearance of bias, panel members should be appointed based on selection from a list of candidates formulated by an independent committee – in the way that provincial court judges or federal senators are appointed now.

RECOMMENDATION

Review panel members should be appointed from a list developed by an independent committee to avoid bias, or the appearance of bias, in their selection.

Include social impacts, but align with best practice

We support the bill's formalizing that the scope of impact assessment is to include not only environmental, but also health, social and economic impacts.

Doing so aligns impact assessment with the concerns that are most prominent among stakeholders. Research conducted by the Canada West Foundation and others finds that communities in areas affected by natural resource development are strongly concerned about issues that include not only impacts on the environment, but changes to social well-being, economics, local services and infrastructure, health outcomes and other non-environmental factors.[13]

We do not believe this expanded scope will significantly increase the work required by project proponents to prepare impact assessments. Many past environmental assessments have *de facto* addressed many of these issues and have included sections on health, social, economic, heritage and/or cultural effects alongside aspects of the biophysical environment such as air, water and wildlife. The only real difference is the new inclusion of a gender lens.

The change, therefore, is not one of an increased burden, but a recognition of what has been happening – a move away from the terminology of "environmental assessment" to the more inclusive term "impact assessment," which recognizes the primacy of people's concerns on health, well-being and society in addition to the environment.

However, whether this change is meaningful will depend on the way that the new agency approaches health and social topics in the proposed project's Terms of Reference. Previous guidance from the Canadian Environmental Assessment Agency (CEAA) and the NEB was not sufficiently specific for proponents regarding both the range of topics that were to be included and the way in which they were organized. It also did not align with international best-practice for assessment in these topic areas.[14]

RECOMMENDATION

Ensure that the Impact Assessment Agency (IAA) develops its Terms of Reference guidelines in close consultation with subject-matter experts from the fields of health impact assessment and socio-economic impact assessment, and align with international best practices.

[13] See: *A Matter of Trust: The role of communities in energy decision-making*. 2016. Canada West Foundation.

[14] See, for example: International Finance Corporation. *Introduction to Health Impact Assessment*. 2009. Washington, D.C.: IFC. http://www.ifc.org/wps/wcm/connect/a0f1120048855a5a85dcd76a6515bb18/HealthImpact.pdf International Council on Mining and Metals (ICMM). *Good Practice Guidance on Health Impact Assessment*. 2010. London, UK: ICMM. https://www.icmm.com/website/publications/pdfs/health-and-safety/792.pdf Vanclay, F., Esteves, A.M., Aucamp, I. and Franks, D. *Social Impact Assessment: Guidance for Assessing and Managing the Social Impacts of Projects*. 2015. Fargo ND: International Association for Impact Assessment. http://iaia.org/uploads/pdf/SIA_Guidance_Document_IAIA.pdf

Separate the process for information requests from a process for comments

In its current form, the Information Request (IR) process is seen by many as a last opportunity to have their voices heard by decision-makers. The number of IRs submitted often number in the thousands or tens of thousands. However, much of the time, the question submitted is not really a question – the writer has a comment or an objection, but must formulate it in the manner of a question (which must then be responded to by the proponent) for it to become part of the process.

We need another approach. Legitimate questions should be asked and answered. We recommend a parallel opportunity for people to submit comments or opinions. This would shorten timelines and reduce the burden on all participants.

A Public Intervener Office would be able to assist with this function.

RECOMMENDATION

Develop a parallel mechanism by which comments and opinions can be submitted, but do not need to be answered as part of the Information Request process. A new Public Intervener Office would help with this.

Make reports comprehensible as well as comprehensive

The size of impact assessment reports has gotten out of hand, often comprising tens of thousands of pages. This is hardly digestible by someone at the regulator, never mind an interested stakeholder. Materials need to be produced that can simply and clearly – but also accurately – convey the essence of the report.

In addition, developing plain-language summaries of decisions is important, especially for complex decisions. The plain-language summary needs to focus on communicating the substance of, and the rationale for, the decision in a way that can easily be understood. A legal challenge would be based on the full text of the decision, meaning that the summary can be focused on clarity rather than legal accuracy.

RECOMMENDATION

The new Impact Assessment Agency (IAA) should explore additional methods through which impact assessment results and the decisions that are made by the regulator, panel or minister can be communicated simply and clearly.

Use community monitoring to help build trust

The handbook that accompanies the bill – although not the bill itself – raises for the first time the idea of using Indigenous and community monitoring committees. We support this idea. Indigenous and community monitoring committees can build trust and foster positive relationships between host communities and development project proponents, as well as provide ongoing data to inform understanding of the actual effects of resource development across the country.

There are a number of examples of good practice in Indigenous and community monitoring that have been extremely effective in helping build trust between communities (including Indigenous communities), government and industry on the actual impacts of contentious development, and thereby creating a better environment for future development. These include the Northern Saskatchewan Environmental Quality Committee (NSEQC),[15] the Eastern Athabasca Regional Monitoring Program (EARMP)[16] in Saskatchewan and the Indigenous Guardians Program[17] in B.C.

RECOMMENDATION

Community monitoring under the new Impact Assessment Agency (IAA) should build on the example of good practice seen elsewhere in Canada, including Saskatchewan and B.C., and the concept should be included in the bill.

Share data to reduce burden and add transparency

The bill states that the government will create a publicly accessible registry to house scientific and other information used in an impact assessment. This opens the opportunity to address a significant gap in the science and methodology that underlies impact assessment.

Currently, the raw environmental and social data that is gathered to support any given project assessment remains in the hands of the consultants who gathered the data. As a result, this information is not available for use by others; and when there is a new proposed project in the same area, data collection must begin again. Not only is this time consuming, expensive and wasteful, it also represents an enormous burden to stakeholders and local community representatives, who are often the source of the original information.

A mechanism or clearinghouse is needed that can house and allow retrieval of this data for the benefit of all.

Project proponents would win – data gathering would become cheaper, and it would be easier to figure out at an earlier stage what adverse impacts might occur. Government would win – the quality of assessments should improve as a result. The public would win – data could be viewed by anyone interested and stakeholder burnout from repetitive consultation would be lessened.

RECOMMENDATION

The government should consider using the new open data registry as a clearinghouse to store information and raw data gathered by proponents' consultants during the impact assessment process. The information that should be housed should include not only quantitative data, but also qualitative information that has been gathered.

[15] See: https://www.saskatchewan.ca/residents/first-nations-citizens/saskatchewan-first-nations-metis-and-northern-initiatives/northern-saskatchewan-environmental-quality-committee

[16] See: http://earmp.com/about.html

[17] See: https://www.ilinationhood.ca/our-work/guardians/ and https://www.indigenousguardianstoolkit.ca

CONCLUSION

Canada's regulatory system has become fraught with delays, lack of clarity and distrust. Regulators, project proponents and even environmental critics have become mired in a process that does not satisfy anyone.

The introduction of Bill C-69 – to overhaul Canada's energy project assessment process, create a new Impact Assessment Agency (IAA) and replace the National Energy Board (NEB) with the Canadian Energy Regulator (CER) – is an opportunity to move forward.

But if our regulatory system is to become unstuck, we must get it right.

While Bill C-69 introduces some welcome changes, it still does not address key issues of trust, economic activity and national competitiveness that plague the regulatory system. Developing a regulatory system that encourages economic development, supports responsible development of our energy resources, and is clear, transparent and fair rests on four pillars:

Together, these changes can help Canada develop a regulatory environment that allows us to be both economically competitive and socially and environmentally responsible.

AN ENVIRONMENT FOR SUCCESS

CLEAR POLICY

Policy-makers must determine economic, environmental and Indigenous rights policy up front. This will provide clarity needed for the regulator to better do its job.

CLEAR LEGISLATION

We need a legislative framework that defines clear mandates, roles and responsibilities, so that all stakeholders are confident that decisions are being made using due process by those with the mandate to do so.

AN EMPOWERED & TRUSTED REGULATOR

The government needs to trust the regulator – giving it the power to make the final decision. Otherwise, how can Canadians be expected to trust it? We must eliminate politically motivated decisions made at the end, after the process is complete.

APPROPRIATE, BROAD BUT EFFICIENT STAKEHOLDER INPUT

Bring back “standing;” make it clear that being heard does not always mean the decision will reflect participant preferences; create a Public Intervener Office.

THE DETAIL TO MAKE IT WORK

To fulfill key pillars of our recommendations, specific provisions of Bill C-69 need to be amended or to have additional clarity in order to be efficient, effective and fair:

- Ensure transparency and clarity throughout
- Focus on positive as well as negative effects to inform balanced discussion
- Increase certainty on timeframes
- Use regional and strategic assessments to account for cumulative effects
- Move the energy information function to increase credibility
- Depoliticize the Project Review Panel appointment process
- Include social impacts, but align with best practice
- Separate the process for information requests from a process for comments
- Make reports comprehensible as well as comprehensive
- Use community monitoring to help build trust
- Share data to reduce burden and add transparency

Together, these changes can help Canada develop a regulatory environment that allows us to be both economically competitive and socially and environmentally responsible.

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