BILL C-69

REVIEW & RECOMMENDATIONS

CANADAWEST FOUNDATION
NATURAL RESOURCES CENTRE

MARCH 2018

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Bill C-69: Review and Recommendations

Executive Summary

The government's proposed legislation to improve the regulatory approval process for major energy projects is necessary to restore both public trust in the system and the confidence of potential investors in the Canadian economy. Shifting to an assessment process that considers both the **positive and negative impacts** of a project – not just the negatives as the current system does – as well as health, social and economic effects is a good step forward. **However, Bill C-69 as currently proposed also retains some of the very same features that are causing problems in the current system.**

Ongoing political debates about climate, energy and Indigenous relations found their way into National Energy Board project hearings for lack of any other venue in which to resolve these issues. But these policy debates are much broader than any one specific project. **A regulatory process cannot and should not be expected to determine economic and environmental policy**. The federal government must address these questions in more appropriate fora ahead of time. Otherwise, the new system will remain bogged down as the regulator attempts to address **issues beyond its scope**. The combination of clear policy established ahead of time and a regulatory process that deals with project specifics, not broad policy debates, is critical to improving the investment climate in Canada.

Another key shortcoming is that the proposed Bill leaves all the **political decision-making** to the end of the regulatory process. This shrouds the entire regulatory process in uncertainty, as participants aren't sure if the regulator's finding will carry the final decision or if it will instead be subject to shifting political priorities. Decisions about what is or is not in the national interest should be made by our elected leaders. That is key to our democracy. However, those **decisions need to be made up front, before the long and costly regulatory process begins.** Bill C-69's proposed planning phase prior to the impact assessment could be an ideal window for this up-front political decision.

In addition, national interest should not be responding to "flavour-of-the-day" political views; this just injures the credibility of the regulatory process for all participants. In order to support all interests and a strong investment climate, there needs to be certainty that during the long process of seeking regulatory approval, **the goal posts won't change** and that a new government will not overturn prior decisions and commitments.

A related problem is that the proposed legislation takes **decision-making authority** away from the new regulator. The NEB recommends to government whether it should approve a project – or not. Bill C-69 does not extend this to the new Impact Assessment Agency. This is a mistake. The government's job is to put in place a framework for the regulatory process. Then it must let the regulator do its job and not just communicate a project's impact, benefits and mitigation but, based on these factors, **recommend whether or not the project should proceed**.

The new regulator will also have to figure out how to deal with increased **volume of participation** in regulatory reviews. While obtaining input from a wide variety of people is a positive step, the government and/or regulator must at the same time determine how to manage a large volume of voices with similar things to say, give appropriate weight to the perspectives of those most directly impacted, and ensure that stakeholders understand that consultation does not mean veto power.

Bill C-69 is a step in the right direction to improving public and investor confidence in our regulatory process for major energy projects. But to truly create a better system, the problems in the current system cannot be allowed to carry over into the new one.

Introduction

Bill C-69 was introduced on February 8, 2018, overhauling the environmental assessment process, creating a new Impact Assessment Agency and replacing the National Energy Board (NEB) with the Canadian Environmental Regulator (CER).

We applaud the Government's commitment to reforming the federal Environmental Assessment system and making an effort to improve Canada's approach to energy regulation. While not exactly broken, the previous system had embedded in it a variety of problems that caused difficulty for proponents, stakeholders and the regulator alike.[1]

We are pleased that the Government has put forward a comprehensive vision for a process that is intended to increase transparency, fairness, and inclusiveness. However, what remains missing is an effort to address the implications of the process on enhancing economic activity and national competitiveness. Proponents and investors are not worried about tough, evidence-based regulation. What discourages investment is decision-making that is vague, uncertain and subject to politically-motivated decisions at the end of a long and expensive process.

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

Critique

A Strong Policy Direction

Creating improvements to the regulatory process is an important step in the right direction. It needs to be remembered, however, that the regulatory process alone is not sufficient to enable Canada to ensure economic and environmental sustainability and to reach its climate change goals.

Regulatory decision-making, both at a small-scale, technical level and at the level of overarching political decisions, needs to be based on clear and decisive policy goals. There needs to be leadership coming from the highest levels to define these goals and to set policy – not just with respect to climate change, but around the full suite of environmental and economic challenges relating to energy, its production, use, transmission and export.

In a democracy such as ours, determining policy goals is a role for elected officials, not the regulator. The regulator's job is to implement those policy goals at the project-specific level.

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 being set up to deal with them effectively.

[1] See the polls reported in CWF's report *Up Front: Modernizing the NEB*

The creation of the Canadian Energy Regulator and Impact Assessment Agency is not a surrogate for establishing clear climate, energy and Indigenous policy. Without clear policy, many of the problems of time, cost and uncertainty will remain.

Recommendation: *Policy-makers must determine policy up front, based on what they believe are the priorities of Canadians. This will provide clarity that will help the regulator better do its job, by providing macro-level objectives and legislative detail that can guide the regulatory process from start to finish. It will also provide guidance to industry, civil society organizations, municipal and regional governments, and others. Finally, it will create a strong and clear signal about how Canada intends to combine economic prosperity and environmental sustainability – and in so doing, provide clarity that is so important to improving the investment climate in Canada.*

Put Political Decisions Up Front

A key concern with the current process is that despite all of the rules and process having been complied with, and despite the regulator's recommendation for approval, a small group of politicians (the federal cabinet) was able to pick and choose which project(s) they would, in the end, approve.

Decisions about what is or is not in the national interest should be made by our elected leaders. That is key to our democracy. However, those decisions need to be made up front; the entirety of the political decision on national interest should not be saved for the end of the regulatory process.

Holding political input to the very end will only perpetuate many of the problems of the current regime. With a cabinet decision at the end, political uncertainty will shroud the entire assessment process – something that should be avoided when encouraging a competitive investment environment.

The introduction in the current Bill of a planning phase before the impact assessment provides a useful window for political decision-making. Bill C-69 proposes a new phase that serves to establish the big picture and lay out the scope and scale of the assessment. This is the perfect time for the government to weigh in on the alignment of the project with the broader policy considerations that have been set (see above) and make an initial determination of national interest of the project. While not providing a green light for the project to proceed, this could act as a 'gate' to help proponents identify early on if there are problems with proceeding, saving time and money for the regulator, the proponent and the public. The project would still be subject to the recommendation of the assessment agency later.

This approach would also help eliminate surprises in the final decision-making stage, as the main issues that could affect the national interest determination, such as climate change and federal-Indigenous relations, would have been previously raised and debated. If there is rigour in this process earlier on, there will be less likelihood of a 'political' reversal at the end.

Recommendation*: Make the political decision about national interest before embarking on the assessment process. This will enhance the legitimacy of the entire process and give potential investors the certainty they need.*

The Regulator's Job

The purpose of the regulator is to ascertain the impacts of the proposed project, to assess the adequacy of planned mitigation measures, to develop additional conditions that would ensure the proposed project minimizes adverse impacts, and to determine the extent to which the project may impact the rights and

titles of Indigenous groups. The regulatory process takes several years, considers multiple viewpoints, weighs the mass of scientific evidence and follows an explicit procedural path.

However, under Bill C-69, and unlike under the NEB, the regulator stops short of providing a recommendation to government on whether or not it approves a project, instead providing only an impact assessment document that puts forward a summary of its analysis of the issues.

This is unacceptable. The regulator needs to be a decision-making body. Deciding up front on the framework for regulation is a job for democratically-elected politicians. However, the job of making decisions on the acceptability of a proposed project under those regulations is the job of the regulator, based on the policy goals, legislation and regulations enacted by the elected politicians. It is harder for politicians to refuse a project for which the regulator has recommended approval—and vice versa.

Five factors are listed in Section 63 of the Bill that will influence the Minister's determination about the designated project. Three of these are ones that we believe should be not just identified, but determined by the regulator:

- *the extent to which direct or indirect effects of the designated project are beneficial or adverse;*
- *the implementation of the mitigation measures;*
- *the impact that the designated project may have on any Indigenous group and any rights of the Indigenous peoples of Canada;*

Recommendation: *The regulator must be empowered to do its job—not just to communicate the impacts, benefits and mitigations, but to make a recommendation as to whether the project should be allowed to proceed, based on technical merit, local effects, risk mitigation measures, potential benefits and alignment with pre-set policy.*

What 'National Interest' Entails

Under the proposed Bill, the Minister of ECCC will make a decision about whether or not to allow the project to proceed, based on a determination of public interest. This is appropriate. However, there needs to be strong guidance on what constitutes national interest; the role of the regulator and the Minister should be separated; and the whole system must not be allowed to be subject to political whim.

As described above, the role of the regulator should be to make a recommendation based on impacts, mitigation adequacy, cumulative effects and alignment with existing policy. It should not be the Minister's role to revisit or distrust the regulator's conclusion. Doing so undermines trust in the regulatory system – and enhancing trust in the regulatory system was the primary reason for the proposed changes.

In addition, national interest should **not** be responding to "flavour-of-the-day" political views. This is what we have seen recently in Canada and particularly within British Columbia, and it has injured the credibility of the regulatory process. While approval based on political whim may be acceptable to activists confident in the current government, this approach gives less protection in the event of government that is not supportive of environmental sustainability.

In order to support all interests and for there to be a strong investment climate, there needs to be certainty that during the long process of seeking regulatory approval, the goal posts won't change and that a new government will not overturn prior decisions and commitments.

Recommendation: *The Minister should make an early determination of whether a project in theory would be in the national interest, using clear criteria. Such criteria would include Canada's trade commitments, the environment and Indigenous rights, but also economic benefits and jobs, and maintaining a competitive investment climate. To the extent possible, this determination should come during the early phases of the approvals process, and not be reserved for the end.*

Regional and Strategic Assessments

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

Strategic and regional assessments don't look at a specific project – they look at the potential for impacts from development in general within a particular area, before a specific project application is submitted. This enables a high-level perspective to inform project-level decision-making, and is a sensible way to approach the thorny issue of cumulative effects and sustainability thresholds.

There is, however, little specificity in the Bill or the accompanying materials on strategic and regional assessments – and although the ambition/intention is important, the ultimate success of this approach will rest on the implementation details. And because they have not been extensively used in Canada before, there is little precedent to work from.

In particular, the government needs to identify whether the purpose of undertaking REA / SEA is informative or prescriptive. An REA / SEA could be merely informative, and provide useful background information on the local context and sensitivities, and an analysis of the interests of residents and other stakeholders. Or, an REA / SEA could be prescriptive, and identify conditions that future projects must meet, thresholds for reviewable projects that are specific to that area, or significance thresholds that should be used in project-specific EAs to identify unacceptable adverse impact.

Recommendation: *Sufficient detail will need to be provided around issues such as what the triggers are for SEA or REA to be undertaken; how to deal with the jurisdictional overlap between federal and non-federal lands in an affected region; who will undertake them; what the funding mechanism will be, and most importantly, what purpose (informative or prescriptive) they are intended to serve.*

Indigenous Consultation and Engagement

The Bill introduces a number of new measures that are intended to increase the meaningful participation of Indigenous peoples within the impact assessment process, including the creation of an advisory committee on the interests and concerns of Indigenous peoples, the requirement to consult with Indigenous groups during the early planning phase, and the inclusion of traditional knowledge as a stream of information in the assessment.

Because proposed projects reviewable at the federal level are often located on or adjacent to Aboriginal communities and asserted territories, strengthening the meaningful involvement of Indigenous groups in the regulatory process, as well as ensuring that their rights are respected, is important.

It is critical, however, to ensure that clear policy on Aboriginal rights and title is set at the federal government level. This would provide the regulator and proponents with appropriate guidance to follow, rather than making the regulatory process or the courts the forum in which these debates take place.

The federal government announced on February 14, 2018 that it will develop in partnership with First Nations, Inuit and Métis Peoples, a "Recognition and Implementation of Rights Framework" that is intended to clarify and ensure full and meaningful implementation of treaties and other agreements.

This development has important implications for both the new IAA / CER and for the investment climate around new projects. We hope that this framework and any associated mechanisms or fora will provide the needed clarity to allow good projects to move ahead without being mired in issues that are outside their remit to resolve.

Recommendation: *Ensure that the new federal framework provides clarity around issues on rights and title that should appropriately be addressed on a nation-to-nation basis, and that does not make the regulatory process the forum in which these discussions take place.*

The Positives Alongside the Negatives

The Bill specifies that impact assessments will have to consider both the positive and negative impacts of a project (Section 6 (1)(c)).

This is a very important development. Up to now, the overall process has focused on the negative side of development, and federal EAs were directed to assess only potential adverse impacts.

We hope that this shift in focus will help balance the conversation by laying out—in one place—the likely economic and social benefits as well as the societal and environmental costs of the project.

No recommendation made.

A Meaningful Range of Social Issues

The Bill's wording specifies that the impact assessment will need to look at not only environmental, but also health, social and economic impacts.

This, too, is a positive step forward. It aligns the impact assessment with the concerns that are most prominent among stakeholders. As shown in research conducted by the Canada West Foundation and others, communities in areas affected by natural resource development are strongly concerned about issues that include not only impacts to the environment, but changes to social well-being, economics, local services and infrastructure, health outcomes, and other non-environmental factors.[2]

Some people have raised concerns about this 'expanded' scope, with the assumption that it will increase the work required by the project proponent to prepare the impact assessment.

We do not share those concerns. Past environmental assessments have *de facto* addressed almost all 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 one of emphasis or focus – getting away from the terminology of Environmental Assessment to the more inclusive term *Impact Assessment,* which

[2] See: *A Matter of Trust: The Role of Communities in Energy Decision-Making*. 2016. Canada West Foundation.

recognizes the primacy of people's concerns on health, well-being and society in addition to the environment.

The change from "Environmental Assessment" to "Impact Assessment" in the Agency's name is an important one, and reflects this broader focus, which we support.

No recommendation made.

More Voices

The new legislation relaxes the standards for who is able to participate in hearings, which will encourage input from more people. Wider input should help inform the end result—which is good. It will be a challenge, however, for the new Agency to figure out how to handle the additional volume of fact and opinion headed their way.

There are three points that we feel are important.

First, numbers / volume should not be more important than what people wish to say. As many people will want to say the same things, there should be some way to avoid the process being dragged out by many individuals requiring a hearing if their message is the same.

Second, not all voices should be given equal weight. Even though the concept of 'standing' has been eliminated, those people and organizations who are more directly impacted should count for more in terms of the weight given to their perspectives.

Finally, it will be important for the Agency to clarify that consultation does not mean veto power. It is vital that a wide range of opinions are heard, and that concerns are taken seriously; but participants need to clearly understand that the Agency will be balancing disparate interests and will take a decision in what it perceives to be society's best interests. In other words, people need to understand that the regulator won't always agree with them.

***Recommendation**: Ensure that the consultation and hearing process are fair, transparent and inclusive; determine a way to establish groups of people with similar messages; determine the priority of those groups of entities more directly impacted; and ensure that stakeholders understand that consultation does not mean veto power.*

Fix the Information Request process

This revamping of the legislation provides an opportunity to fix a broken process: the Information Request (IR) process.

In its current form, the 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 isn't 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) in order for it to become part of the process.

We need another approach. Legitimate questions should be asked and answered. We highly recommend another parallel opportunity for people to submit comments or opinions that will be taken into consideration as-is, but which do not masquerade as questions. This would shorten timelines as well as burden on all participants.

***Recommendation**: Develop a mechanism by which comments and opinions can be submitted but do not need to be answered as part of the Information Request process.*

Community Monitoring

The Handbook that accompanies the Bill—although not the Bill itself—raises for the first time the idea of monitoring using Indigenous and community monitoring committees. This is an excellent idea, and one that we support. 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 around the actual impacts of contentious development, and thus creating a better environment for future development. These include the Northern Saskatchewan Environmental Quality Committee (NSEQC), the Eastern Athabasca Regional Monitoring Program (EARMP) in Saskatchewan and the Indigenous Guardians Program in BC.

No recommendation made.

Appropriate Subject-Area Guidance

The explicit focus on health, social and economic effects is, as stated above, an improvement. However, whether or not this is meaningful will depend on the way that the new Agency approaches these topics in the proposed project's Terms of Reference. Previous guidance from CEAA and the NEB was insufficiently specific in their guidance to proponents both the range of topics that were to be included and the way in which they were organized. It was also not aligned with international best-practice guidance for assessment in these topic areas.[3]

***Recommendation:** Ensure that the Impact Assessment Agency develops its generic Terms of Reference guidelines in close consultation with subject matter experts from the fields of health impact assessment and socio-economic impact assessment.*

Comprehensive but also Comprehensible

The size of impact assessment reports has clearly gotten out of hand, often comprising tens of thousands of pages. There is clearly a need for materials to be produced that can simply and clearly—but also accurately—convey the essence of the report.

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[3] See, for example:

International Finance Corporation. (2009). Introduction to Health Impact Assessment. Washington, D.C. Available at: http://www.ifc.org/wps/wcm/connect/a0f1120048855a5a85dcd76a6515bb18/HealthImpact.pdf?

International Council on Mining and Metals (ICMM). (2010). Good Practice Guidance on Health Impact Assessment. London, UK: ICMM. Available at: https://www.icmm.com/publications/pdfs/792.pdf

Vanclay, F., Esteves, A.M., Aucamp, I. and Franks, D. 2015. *Social Impact Assessment: Guidance for Assessing and Managing the Social Impacts of Projects*. Fargo ND: International Association for Impact Assessment. Available at: http://iaia.org/uploads/pdf/SIA_Guidance_Document_IAIA.pdf

The new Impact Assessment Agency should explore additional methods through which IA results can be communicated simply and clearly. The Government did a very good job of summarizing the 412-page Bill C-69 in a 15-page handbook. Not only were the plain-language words important in conveying the message, but so were the graphics and layout. Emerging technologies should also be explored for this purpose, as significant advances have been made in data visualization techniques, virtual reality and other methods of communicating complex information.

Recommendation: *The Impact Assessment Agency should explore and promote a variety of approaches that can be used to help the general public and other audiences to clearly understand the proposed project, the positive and negative impacts and the proposed mitigations.*

Data Sharing – Reducing the Burden for Everyone

Currently, the 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 early 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 creating a clearinghouse to store information and raw data gathered by the proponent's 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.*

Prior Recommendations

In our 2017 report *Up Front: Modernizing the National Energy Sector*, we included the following recommendations:

- NEB panel members should not engage with communities; they should remain objective and above the fray. We recommend that the role for panel members be modelled on the role of case management judges in the Canadian legal system. NEB panel members should also avoid turning into competing experts.
- The NEB's energy information function should be housed elsewhere. This function should be moved into a respected, trusted federal body such as Statistics Canada, or an arm thereof – as is the case in other jurisdictions. Separating the energy information function from the NEB will avoid the perception of conflict of interest and build trust in both energy information and the NEB.

Bill C-69 does not in its current form address these issues—but it should. These issues remain important to the credible and efficient functioning of the project approval system, and they should be addressed clearly by way of regulation.

Summary of Recommendations

The recommendations that are put forward in this report are as follows:

- Policy-makers must determine policy up front, based on what they believe are the priorities of Canadians. This will provide clarity that will help the regulator better do its job, by providing macro-level objectives that can guide the regulatory process from start to finish. It will also provide guidance to industry, civil society organizations, municipal and regional governments, and others. Finally, it will create a strong and clear signal about how Canada intends to combine economic prosperity and environmental sustainability – and in so doing, provide clairty that is so important to improving the investment climate in Canada.

- Make the political decision about national interest before embarking on the assessment process. This will enhance the legitimacy of the entire process and give potential investors the certainty they need.

- The regulator must be empowered to do its job—not just to communicate the impacts, benefits and mitigations, but to make a recommendation as to whether the project should be allowed to proceed, based on technical merit, local effects, risk mitigation measures, potential benefits and alignment with pre-set policy.

- The Minister should make an early determination of whether a project in theory would be in the national interest, using clear criteria. Such criteria would include Canada's trade commitments, the environment and Indigenous rights, but also economic benefits and jobs, and maintaining a competitive investment climate. To the extent possible, this determination should come during the early phases of the approvals process, and not be reserved for the end.

- Sufficient detail will need to be provided around issues such as what the triggers are for SEA or REA to be undertaken; how to deal with the jurisdictional overlap between federal and non-federal lands in an affected region; who will undertake them; what the funding mechanism will be, and most importantly, what purpose (informative or prescriptive) they are intended to serve.

- Ensure that the new federal framework provides clarity around issues on rights and title that should appropriately be addressed on a government-to-government basis, and that does not make the regulatory process the forum in which these discussions take place.

- Ensure that the consultation and hearing process are fair, transparent and inclusive; determine a way to establish groups of people with similar messages; determine the priority of those groups of entities more directly impacted; and ensure that stakeholders understand that consultation does not mean veto power.

- Develop a mechanism by which comments and opinions can be submitted but do not need to be answered as part of the Information Request process.

- Ensure that the Impact Assessment Agency develops its generic Terms of Reference guidelines in close consultation with subject matter experts from the fields of health impact assessment and socio-economic impact assessment.

- The Impact Assessment Agency should explore and promote a variety of approaches that can be used to help the general public and other audiences to clearly understand the proposed project, the positive and negative impacts and the proposed mitigations.

- The government should consider creating a clearinghouse to store information and raw data gathered by the proponent's 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.

- Panel members should not engage with communities; they should remain objective and above the fray. We recommend that the role for panel members be modelled on the role of case management judges in the Canadian legal system. Panel members should also avoid turning into competing experts.

- The NEB's energy information function should be housed elsewhere. This function should be moved into a respected, trusted federal body such as Statistics Canada, or an arm thereof – as is the case in other jurisdictions. Separating the energy information function from the energy regulator will avoid the perception of conflict of interest and build trust in both energy information and the CER.