Bill C-69: Submission to the Committee on the Environment and Sustainable Development

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1. The Object of the Act

Compared to CEAA, the IAA has a much more explicit focus on achieving *sustainability*, including the environmental, economic, health, social and Indigenous aspects. This focus is reflected not just in the Purpose section, but also in the Factors considered in the assessment, and in the new Decision criteria.

This explicit and broadened focus on sustainability is commendable – that *should* be the ultimate purpose of development. Development that meets this test is more likely to be beneficial to Canada, and socially acceptable. The challenge will be to accomplish this broadened assessment mandate in an efficient, effective manner, so it does not add time and cost to the assessment process. This result will be driven mainly by how the Act is administered by the Agency.

Also, it is surprising that the Act's stated purposes (s. 6) do not include helping Canada to meet its international environmental and climate commitments – since this is an important factor in assessments and approval decisions

Recommendation: Add a new Purpose in s. 6, saying: "to support the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change"

2. The Scope of the Act: what is covered?

An assessment law, no matter how good, is only effective for those projects and activities that it covers.

a) Strategic and Regional Assessments

This may be the <u>most important part</u> of this new Act. The main shortcoming of the EA process to date in Canada is that it has been focused almost exclusively at the project level. The ability to positively influence sustainability is much greater at level of regional and strategic assessments. Because these occur earlier in the planning process and at a much broader scale, they can achieve much better environmental, economic and social outcomes. By the time it gets to a project level decision, there are far fewer options and much less flexibility.

Far too often, in the past, decisions that really are regional and strategic ones (e.g. what should Canada's limits on GHG emissions be? how do we conserve woodland caribou?) have been shoved into project level assessments – for lack of an appropriate regional or strategic-level forum for making these larger-scale decisions. This is unfair to both the developer (whose project gets hijacked into a forum to discuss broader issues) and the pubic (which must debate these larger issues in a process not meant for that).

By analogy, this would be like a situation where someone seeking a municipal permit to build a new house first had to have a regional planning process for the whole neighbourhood. That is why municipal decision-making starts with regional planning, and then conducts specific development approvals with that broader frame. Industrial develop approvals should do the same, for the same reasons.

It is laudable that the IAA has explicit provisions for Strategic and Regional assessments. The main weakness is that there is no requirement that such assessments occur, or even a mechanism to encourage that. History suggests that the Department and Agency are likely to prioritize project-level assessments, since they are legally required. With limited resources, strategic and regional assessments could easily get short shrift. *The urgent (and legally required) trumps the important.*[1]

While it may not be feasible to legally require a certain number of regional and strategic assessments each year, it is feasible to *tilt the scales* in favour of this happening.

Recommendation: Add powers that build accountability, and create momentum, for carrying out regional and strategic assessments. This could include

- Requiring that the Minister (or Agency) create and regularly update a priority list, identifying priorities for strategic and regional assessments over the next 4-5 years (like CEPA's priority substances list) [new section]
- Explicitly requiring that the advisory council make recommendations on priorities for strategic and regional assessments, and the Minister respond to these (s. 118)
- Directing the Agency to establish a fund, within its budget envelope, dedicated to strategic and regional assessments

In addition, s. 23 should be revised to also apply to regional and strategic assessments:

> "Every federal authority that is in possession of specialist or expert information or knowledge with respect to a designated project that is subject to an impact assessment, or with respect to a regional or strategic assessment, must, on request, make that information or knowledge available…"

(b) Ensuring that all high impact types of projects are covered

The primary gateway into the Act, for projects, is to be a "designated project" (s. 2). Section 109(2) states that the GiC may "designat[e] a physical activity or class of physical activities" for purposes of s. 2. Considering the fundamental importance of this provision, it is surprising that the Act gives no guidance as to what types of projects should be 'designated'.

Recommendation: the Act should for provide guidance as to what types of activities should be listed as 'designated projects'

[1] The current government has committed to initiate several regional and strategic assessment in the near future. The bigger concern is what happens after this initial stage passes; how to build into the Act ongoing momentum for future governments to carry out these broader assessments, when they are not required?

Option A:

- The Minister shall recommend to the GiC, for inclusion in the list of 'designated projects' in s. 109(b), all types of activities that s/he determines are *likely to cause significant adverse effects*
- If the GiC's regulated list in s. 109(b) excludes some of those recommended types of activities, the Minister shall publish reasons for such exclusion

Option B:

- The Minister shall develop and publish *criteria* for determining which activities are likely to cause significant adverse effects, and therefore should be recommended to the GiC for inclusion as 'designated projects' in s. 109(b) (draft list subject to public comment)[2]
- If the GiC's regulated list in s. 109(b) excludes some of those recommended types of activities, the Minister shall publish reasons for such exclusion

(c) Requiring assessment of major projects

Prior to 2012, CEAA listed the types of major projects that must undergo a comprehensive assessment (the 'comprehensive study list'). CEAA 2012 removed this requirement; it gave *discretion* about whether or not to go forward with an assessment of any project listed on the 'project list' [true?]

It is surprising that the Act would not identify certain types and sizes of major projects that should *always* undergo assessment, because of their inherent potential for significant adverse effects (e.g. a large nuclear plant, mine, or hydro dam). Leaving this decision to the Agency's unfettered discretion creates the possibility that in the future certain high impact projects may be excluded for political reasons; it also invites lobbying of the Agency to exclude assessment of particular listed projects.

Recommendation: Either identify certain types and sizes of major projects that *must* undergo assessment, or create a *presumption* that all projects on the project list will undergo an assessment, unless there are exceptional reasons to not do so.

Option A: Create *mandatory* list

- Revise section 16(1): "the Agency must, subject to section 17, unless the project is one described in a regulation under s 109(b.1), decide whether an impact assessment of the designated project is required.
- Add s. 109(b.1): "for purposes of section 16 and the definition *designated project* in section 2, designate a physical activity or class of physical activities for which an impact assessment *must* be carried out."

Option B: Create *presumption* that all listed projects will undergo assessment

- Revise section 16(1): "All designated projects must, subject to section 17, undergo an impact assessment unless the Agency decides there are exceptional reasons not to do so."

d) Additional factor in decision to require an IA or Panel: environmental & climate commitments

[2] The Minister has published such criteria for developing the initial list. This is commendable. Making such criteria a requirement of the Act will ensure that future revisions continue to be based on such reasonable criteria.

S. 16(2) of the Act sets out the factors to consider in deciding whether a project requires an IA. It is strange that those factors do not include the effects on meeting Canada's international and climate obligations – given that this is an important factor in IAs and project approvals. The same is true for section 36(2), the decision to have a review panel.

Recommendation: Add a new factor in ss. 16(2) and 36(2): "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change"

3. Ensuring high quality assessments – what must be considered?

a) Assessing *all related components* of a project (avoiding project splitting)

A fairly common practice – one that has undermined the purpose of EA laws – has been *'project splitting'*. That is when an assessment looks only at one component of the full scope of activities that will result from approving its project. Examples of this (which have been struck down by courts) include:

- assessing only the movement of electrons along a power line, and excluding the new hydro-electric dams required to generate that power (Quebec v. Canada (National Energy Board), [1994] 1 S.C.R. 159)
- assessing only a new bridge, and excluding the new logging road that the bridge is part of, and the logging and milling activities that will occur from the new bridge and road (*Friends of the West Country Assn. v. Canada*, [2000] 2 F.C. 263)
- assessing only a mine's tailings facility, but excluding the mine and mill (*MiningWatch Canada v. Canada*, 2010 SCC 2, [2010] 1 S.C.R. 6)

Such project-splitting can undermine the purposes of an assessment in two ways

- by approving a project without assessing the full scope of activities (and impacts) that will necessarily flow from the approval
- by approving one part of a project for construction, it tilts the scales towards then approving subsequent, related parts.

To avoid such project-splitting, the Act should *require that all integrally-related parts of a project be covered in assessment*. This is a well-precedented approach. The US developed a test for deciding what are *"connected actions"* and has been applying it for more than 30 years. The NEPA regulations require "connected actions" to be considered together in a single EA. See 40 C.F.R. § 1508.25(a)(1) (1984).

> (1) "Connected actions" means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

Recommendation: Revise the definition of "designated project" (s. 2) to read: "… It includes any physical activity that is incidental or integrally connected to those physical activities."

b) Factors to consider in conducting an IA

Section 22 sets out the factors to consider in conducting an IA. I would recommend two changes

i. Cumulative effects: 22(a)(ii) requires consideration of "any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out". "*Will be* carried" is a very difficult test to meet, unless construction on a project has actually begun. Saying "are *likely to be* carried out" would be much more consistent with the purposes of cumulative effects assessment. Similar words ("reasonably foreseeable") have been used by the US under NEPA for more than 30 years, and it has worked well. (40 C.F.R. § 1508.7)

ii Promoting innovation: S. 22 requires consideration of "alternative means of carrying out the designated project that are technically and economically feasible, including through the use of *best available technologies*…". If the aim is to encourage innovative practices (which is laudable), here are two suggestions for improvement

- Change to say "best available technologies or practices". Many of the best practices to reduce impacts are not "technologies" – e.g. forest practices that buffer streams or avoid important nesting trees.
- If it is *not* feasible for a project to use best available technologies and practices, that are commonly used elsewhere, there should be a justification. Canada should think carefully before approving projects that do not use the best technologies and practices that are used elsewhere – and there should be a good reason

Recommendation. Revise s. 22(1) as follows

- Change (a)(ii) to say "have been or are likely to be carried out".
- Change (e) to say "best available technologies or practices"
- Add new section (e.1) to say: "If it is not feasible to use best available technologies or practices that are commonly used elsewhere, the justification for that situation."

4. Approval Decisions: making informed, sustainable choices

a) Ensuring IA reports have the right information

The Act's requirements are *surprisingly thin* for what must be in a final report from the Agency or a panel (ss 28(3), 59(2)). Basically, they only must address 'adverse effects'. There is *no requirement that the report address the other matters that must be part of the assessment*, under s.22. For example, there is no requirement that it address s. 22 factors such as:

- will the project hinder or contribute to meeting Canada's environmental and climate obligations

- alternative means that could reduce impacts
- the use of best available technologies and practices
- mitigation measures to reduce impacts

That omission is very strange. The purpose of a report is to inform a final decision by the Minister or GiC. Addressing all the factors that were considered under s. 22, at a minimum, seems to be essential to ensure an informed decision. In particular, the 'public interest' test under s. 63 requires that the Minister/GiC consider more than just the adverse effects, so that information must be in a report.

Of course there is nothing preventing the report from including such items if it wants. It just seems odd to require that they be considered in the IA (s. 22) but not also require that they be addressed in the report.

Recommendation: Expand the list of factors that must be addressed in a final report (ss 28(3), 59(2)) **to more closely match the factors that must considered in an IA** (s. 22) **and a final decision** (s. 63).

b) Promoting transparency and sustainability in project approval decisions

Section 63 sets out a list of factors that must guide a final approval decision by the Minister or GiC. Having this additional guidance will help to provide more predictability for proponents and more consistency for decisions (compared to a mere 'public interest' test with no guidance).

The overall goal is to promote approval of projects that advance *sustainability*. However, "sustainability", by its nature, is a broad term that includes environmental, social and economic dimensions. Project approvals normally involve a trade-off -- typically involving economic and other benefits, and environmental and other impacts.[3] (IAs seek to maximize the former and minimize the latter.) The ultimate question is why do the project's benefits justify the adverse impacts – why is the net result beneficial for Canada, and sustainable, in the longer-run?

It is recommended that the Act do all that it can to make this balancing explicit and transparent, and ensure projects provide substantial overall benefits. There are several potential ways to do this. After discussions with a number of people, we recommend the following:

Recommendation: Revise s. 63(b) to require that a project approval decision must also consider "whether the project's benefits <u>substantially outweigh</u> the adverse effects referred to in (b)."[4]

c) Encouraging innovation

It is desirable to use the IA process as a way to promote innovation in Canada, and encourage Canadian businesses to adopt world-leading clean performance technologies and practices. (It is widely agreed

[3] Of course all projects vary; some might even involve net environmental benefits.

[4] Alternatively, wording such as this could be inserted in ss. 60 and 62 (as part of the 'pubic interest' test) or in s. 65(2) (the reasons for the decision).

that this will be a growing economic advantage to firms in global markets.) At present, the Act references this in the list of factors to consider in an IA (s. 22) but not in the *approval* considerations.

Referencing innovative technologies and practices as a factor in the approval decision (building on their consideration in IAs) would encourage their adoption in projects.

Recommendation: Add a new clause to s. 63 saying: "the extent to which the project uses best available technologies or practices, or more innovative ones[5] to reduce adverse effects and promote sustainability."

It is also important to encourage innovative technologies and practices in mitigation measures. There is growing agreement that a significant impediment to such innovative practices is overly rigid compliance rules that discourage experimentation and risk-taking (which are at the heart of innovation).

Recommendation: Add a clause 64(5), to encourage innovation in mitigation measures, saying:

> (5) If any such conditions or mitigation measures include innovative technologies or practices to reduce adverse effects, the Minister may consider the need for a compliance and follow-up approach that fosters experimentation, learning and adaptation, while ensuring that overall environmental objectives are met.

5. Other 'Federal' Projects (s. 81+)

The following are recommendations to improve this part of the Act:

s. 81: revise the definition of "environmental effects" as follows: "changes to the environment and the impacts of these changes, including on the Indigenous peoples of Canada, and on health, social or economic conditions.

- current wording could be interpreted to mean only consider impacts on Indigenous Peoples

s. 82(b): revise to say… "the authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides, under subsection 90(3), that those effects are justified in the circumstances and the project will contribute to sustainability.

- The 'sustainability' test is used for most project approval under s. 63; why not make use it for 'federal' projects as well?

s. 83(b): same revision as s. 82(b)

s. 84: The list of factors to consider is very thin. Why not include more of the factors from s 22, such as:

- the environmental effects of the project [at the *very least*]
- cumulative effects
- alternative means

[5] Adding "more innovative" is aimed at giving credit to projects that attempt to use innovative technologies or practices that go beyond what is normally considered best practices – i.e. to encourage innovation.

- the impacts on Canada’s ability to meet its environmental and climate commitments

6. The perils of attempting to define "federal jurisdiction" in the Act

Bill C-69 defines "federal jurisdiction", in order to circumscribe the factors that may be considered in a decision to trigger an IA or to approve a project. The federal government, of course, must act within its jurisdiction. However, to attempt to define that jurisdiction in the Act is unnecessary, and is almost certain to lead to an overly narrow scoping and application of federal jurisdiction in the IA process.

It is automatically implied in any Act that the federal government must act within its jurisdiction. Federal statutes need not spell that out – and very rarely (if ever) do. Not just because it is unnecessary, but because attempting to list every element of federal jurisdiction is a hugely complex task – think of all the areas touched by federal legislation (e.g. all the 'toxic' substances listed in CEPA, all the products listed in the Hazardous Products Act, all navigable waters, all pesticides, all species listed under SARA, to name just a few). Any attempt to list all these areas, in addition to being a massive time sink, will almost certainly end up being overly narrow, because of the near-impossibility of identifying all specific areas of federal jurisdiction.

The current approach -- of seeking to define federal jurisdiction for purposes of IA -- was first inserted by the previous government in CEAA 2012. The prior version of CEAA (1992), which was in place for nearly 20 years, did not define federal jurisdiction – and there was (to my knowledge) no case in which a federal assessment decision was struck down by the courts for acting outside its jurisdiction.[6] The previous approach was not broken, so why fix it? This is a solution in search of a problem.

The perils of this approach are illustrated by CEAA 2012. Like Bill C-69, that Act identified only three areas of 'federal environmental jurisdiction' (fish and aquatic species, migratory birds, and extra-provincial impacts). It said that all other areas of federal jurisdiction would be identified in subsequent regulations. *No such regulations were passed in 6 years*. The result: federal assessments and approvals have applied a far-too-narrow definition of 'federal jurisdiction' for all that time.

Even if the current government does better, and attempts to flesh out the list of areas within federal jurisdiction by regulation, that list will almost-certainly be too narrow, because of the near impossibility of identifying all the specific areas of federal jurisdiction (see above).

Recommendations:

a) **The parts of the Act which seek to define and delimit 'federal jurisdiction' and 'direct or incidental effects' should be removed.** This includes, among others, ss. 2, 7, 9, 16, 51 and 60-64. Instead, the approach used (successfully) in CEAA from 1992-2012 – and in almost all other federal environmental laws -- should be followed: counting on officials to act within their jurisdiction when applying the Act.

b) Alternatively, if the above approach is not followed, the federal government should put forward a proposed list of the areas of 'federal jurisdiction' for inclusion in Schedule 3, in the same way as it has developed a proposed 'project list' under the Act.

[6] There were a few cases in which the courts *referenced* the need for the federal government to act within its jurisdiction in exercising its regulatory powers under CEAA (e.g. Friends of the West Country, Friends of the Oldman River), but the court did not find that the government had acted beyond its powers.

7. Approval conditions – fixing an apparent drafting error

Section 64 sets out the power to impose conditions on approvals. It limits conditions to those with "federal jurisdiction" (1) or those that are related to "adverse direct or incidental effects" (2). Those limitations are unnecessary, for the reasons given above, and should be removed.

However, if those limitations *are* retained, at the very least section 64(2) should be revised to fix what appears to be poor drafting. Explaining that apparent error is not simple, because it is a wordy section that draws on a wordy definition. The section states:

> 64(2) If the Minister determines under paragraph 60(1)(a)… that the effects that are indicated in the report that the Minister … takes into account are in the public interest, the Minister must establish any condition that he or she considers appropriate — that is directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority that would permit a designated project to be carried out, in whole or in part, or to the provision of financial assistance by a federal authority to a person for the purpose of enabling the carrying out, in whole or in part, of that designated project — in relation to the adverse **direct or incidental effects** with which the proponent of the designated project must comply.

The highlighted words essentially duplicate the definition of the term "direct or incidental effects", which is already in section 64(2). See below to compare the words of that definition with the highlighted words in 64(2). They are identical, except for the re-ordering of a few words.

> ***"direct or incidental effects***" means effects that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project, or to a federal authority's provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part.

Because the words of the defined term "direct or incidental effects" are already incorporated by reference into 64(2), repeating those words in the section is not only unnecessary, it makes the section confusing to interpret. (A judge will ask – "why would Parliament repeat words that are already part of the defined term?" – and seek to attribute some meaning to the added, duplicative words, as a matter of statutory interpretation.).

To understand why it is unnecessary and confusing to add these words, look at s. 64(1) (below). It uses *exactly the same wording formula* as 64(2), except that it applies to effects within "*federal jurisdiction*". That is also a defined term, and yet s. 64(1) does not repeat all the words of that definition – because it is unnecessary to do so. For exactly the same reason, it is unnecessary (and confusing) for s. 64(2) to repeat the words of the definition of "direct or incidental effects".

> 64 (1) If the Minister determines under paragraph 60(1)(a)… that the effects that are indicated in the report that the Minister… takes into account are in the public interest, the Minister must establish any condition that he or she considers appropriate [60(2) inserts the extra words here] in relation to the adverse effects within **federal jurisdiction** with which the proponent of the designated project must comply