Bill C-69 – Canada's Proposed New *Impact Assessment Act*

Submission of the Environmental Planning and Assessment Caucus,
Réseau Canadian Environmental Network

to the

Standing Committee on Environment and Sustainable Development

April 6, 2018

We are pleased to submit these recommendations on the proposed new *Impact Assessment Act* (IAA) on behalf of the Environmental Planning and Assessment Caucus (the Caucus) of the Réseau Canadian Environmental Network. The Caucus represents approximately 60 national, provincial, regional and local conservation, environmental and community groups, academics and environmental assessment (EA) experts from across Canada. As a caucus and as individual organizations, its members have a long history of work on, and involvement with, EA in Canada, many dating back to the first federal guidelines order that introduced EA in the federal regulatory framework.

These recommendations are based in part on the outcomes of a 2½ day meeting supported by the Canadian Environmental Assessment Agency. Attended by 21 delegates, the meeting focused on amendments needed to better align the IA Act with the Caucus' vision for next generation EA[1] that we shared with the Expert Panel appointed to review federal EA processes prior to the development of the Act.

Our resulting recommendations fall into the following theme areas:

1. Sustainability, transparency and accountability (including climate considerations and decision-making)
2. Regional and strategic assessment and cumulative effects
3. Meaningful public participation
4. What gets assessed, and how
5. Panel integrity/role of the regulators
6. Post-assessment
7. Learning-oriented impact assessment

In order to comply with the suggested 10-page maximum for submissions, this document presents the overview text for each topic, and it is complemented by a separate table of recommended amendments as an Appendix document.

[1] Environmental Planning and Assessment Caucus, Achieving a Next Generation of Environmental Assessment; Submission to the Expert Review of Federal Environmental Assessment Processes (December 2015): http://rcen.ca/sites/default/files/epa_caucus_submission_to_expert_panel_2016-12-14.pdf.

1. Sustainability, transparency and accountability

The Act as proposed clearly intends to ensure that assessed undertakings deliver positive contributions to sustainability, rather than merely aim to mitigate adverse environmental effects. The key decision making sections (60-65) establish a public interest test in which "contribution to sustainability" plays the central role for decision makers in considering whether a project with adverse effects may be nonetheless in the public interest. However, because "sustainability" is a much-abused term and because application of a sustainability-based public interest test will be new to many participants, the test must be specified as clearly as possible, recognizing the need accommodate learning through experience. As such, we offer suggestions A-F:

A. Decision-making

Recommendation: Require decisions to *be based on* consideration of the factors listed in section 63.

Rationale: To facilitate reasonable predictability and consistency of decisions.

B. Regulation-making power

Recommendation: Include a specific regulation-making power under section 109 to set out the core criteria for determining net contributions to sustainability and for evaluating trade-offs.

Rationale: To provide guidance for ensuring that decisions contribute to sustainability and uphold the purposes of the Act.

C. Providing sufficient information and analysis to decision-makers

Recommendation: Incorporate requirements under sections 28(3) and 51(1) to ensure that Agency and panel reports provide the analyses and recommendations needed by the Minister and Governor in Council to make informed decisions applying the sustainability-based public interest test – especially comparison of the project and alternatives, assessment of the implications of effects on the section 63 factors for decision, and conclusions (with reasons) on overall net contributions to sustainability and the justifiability of trade-offs.

Rationale: To ensure that decision-makers have adequate information for selecting the best option from among the alternatives for fostering sustainability and determining the public interest.

D. Reasons for decision

Recommendation: Require in section 65(1) that the decision statement include detailed reasons, with justification for any trade-offs.

Rationale: Explicit justification of the public interest determination and any trade-offs made in the decision is essential to achieving public trust in decisions, and contributes to better decisions.

E. Regional and strategic assessment decisions

Recommendation: Apply the decision-making provisions (60-65) to regional and strategic assessments conducted under sections 92, 93 and 95.

Rationale: To provide for and guide credible and authoritative decisions on assessments of regional and strategic undertakings.

F. Enhance positive effects

Recommendation: Incorporate enhancement of positive effects as well as mitigation of adverse effects, and incorporate explicit attention to interactive and intergenerational effects, into assessments and decision-making.

Rationale: Sustainability means going beyond simply avoiding and mitigating adverse effects; it requires enhancing net environmental, social, health, gendered and economic benefits that are equitably distributed and lasting.

2. Regional and strategic assessment and cumulative effects

Both the practice and decision-making within impact assessment processes in Canada consistently fail to consider the broader regional environmental change and the cumulative effects on social and ecological systems in which a project is embedded. Scientific reviews of 40 years of cumulative effects assessment (CEA) practice in Canada have consistently shown that rigorous, useful, and tractable CEA remains elusive. Other benefits of RIA and SIA include addressing broad alternatives beyond the usually feasible range of project assessments (e.g., alternative infrastructure options for the Ring of Fire), and major policy issues (e.g., whether it is ever acceptable to write off a waterbody to house mine waste (tailings) in perpetuity).

Regional and strategic assessments offer opportunities to improve the efficiency, effectiveness and fairness of assessment processes and resulting decision-making. These types of assessment are at the appropriate scale for cumulative effects assessment and can inform and complement project-level assessments as well as set a preferred direction and strategy for achieving sustainability in a region through the assessment of alternative scenarios, including under different climate change futures. RIAs and SIAs could allow assessments at the project level to be streamlined and improve clarity on what types of projects are most appropriate, and attract better projects as a consequence.

In spite of its tremendous promise, and wide endorsement by many different sectors, there have been few examples of RIA/SIA implementation in Canada. While Bill C-69 places a higher emphasis on RIA and SIA than CEAA 2012, this emphasis is still tentative at best. Few provisions in the draft legislation will compel, promote, or incentivize the use of these essential tools; as a result, we anticipate that they are unlikely to result in any regional or strategic assessments actually being conducted.

Apart from the assessment of federal policies, plans, and programs, strategic and regional assessments will clearly be stronger and more useful if they are carried out with the cooperation of other jurisdictions. Accordingly, we stress the importance of providing strong financial incentives for jurisdictions to conduct cooperative RIAs and SIAs with the federal government. We are, however, aware that jurisdictions may still be resistant, even where there is a critical need for an RIA or SIA to be conducted in order to be able to make good decisions under section 63 of the proposed IAA. While the Constitution may limit the ability of the federal government to make certain decisions about programs, plans or projects following RIAs and SIAs in the absence of provincial engagement, *no such limits* exist with respect to gathering and assessing information, and engaging the public, or with respect to assessing federal strategic initiatives. This means that RIAs and SIAs undertaken under this legislation fall squarely within federal legislative authority, and do not necessarily require the cooperation, however desirable, of other jurisdictions. The primary intention of RIAs and SIAs is to provide appropriate background, context, and direction for valid federal policy-making – and for project assessments and project decision-making.

Given the federal government's oft-stated commitment to use RIA and SIA for addressing cumulative effects at appropriate scales, the key areas of reform that will be required to best ensure use of these instruments in the new impact assessment regime include:

1) Define the terms "regional impact assessment" and "strategic impact assessment" both to clarify the difference between the intended process and the CEAA 2012's reference to "regional studies," and to ensure that SIAs are not limited to those that are "relevant to conducting impact assessments" (s. 2);
2) Ensure that factors that determine public interest include outcomes from any RIA or SIA, so that these are explicitly linked to regulatory decision-making (e.g., at the project level) and do not become stranded as relatively inconsequential advice (s. 63). Ensure that the planning phase screens out any projects that are inconsistent with the outcomes of an RIA or SIA, or that the planning phase triggers an RIA or SIA, where appropriate (s. 17).
3) Create a schedule under the IAA identifying regions for which regional assessments must be initiated by the Minister within one year of the Act coming into force, and a second schedule identifying the subjects for which strategic assessments must be carried out by the Minister within a period of one year (Schedules 5 and 6). A related set of amendments would authorize the Expert Committee to recommend regions and subjects to be included on the respective schedules (s. 97).
4) Amend the statute to indicate that the appointed committees (or the Agency when it does a strategic assessment) will make recommendations and provide a means by which these could be turned into an authoritative decision along with a requirement for the Minister to respond with reasons (s. 102/3).
5) Require the Minister to establish a funding program to facilitate the conduct of regional and strategic assessments and the participation of federal departments and provincial, territorial, municipal and Indigenous governments in these assessments (s. 96).
6) Require that the Minister be required to develop regulations relating to the conduct of regional and strategic amendments, and to amend the schedules, to clarify the process and expectations of use of these instruments (s. 109, 112).

3. Meaningful public participation

Meaningful public participation has been a goal of environmental assessment (EA) processes for a long time. The implementation of this goal has, however, been mixed, and the federal environmental assessment process is no exception. While jurisdictions have struggled to reform their EA processes over time to improve public participation, the role of the public in EA has evolved significantly. As the focus of EA has shifted from a technical exercise of predicting biophysical impacts of proposed undertakings to a consideration of a full range of social, economic, health and cultural impacts of proposals, the need for effective and meaningful public engagement has become more and more pressing. The Multi-Interest Advisory Committee (MIAC), established by the Minister of Environment and Climate Change to advise her on the federal law reform effort, developed ten principles for meaningful participation that need to be reflected in Bill C-69.

In assessing whether the Act achieves the goal of meaningful participation, much attention has been directed to the removal of the "standing clause" introduced in CEAA 2012. Bill C-69 restores the right of any interested member of the public to participate in the assessment process, but does not in any way guarantee that any participative opportunity that is provided will be meaningful.

One of the bill's purposes in 6.1(h) is ensuring "that opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment." This assurance was also provided in the purposes of the Canadian Environmental Assessment Act 2012: "[t]o ensure that opportunities are provided for meaningful public participation during an EA," and as the Expert Panel noted, "the former [pre-2012] Act specifically stated that 'there be opportunities for timely and meaningful public participation throughout the EA process.'"[2] Unfortunately, this outcome has rarely if ever been achieved, as many participants to the EA reform consultation concluded. Meaningful participation in assessment processes is essential to creating a strong foundation for mutual learning and to enhancing the democratic legitimacy of outcomes. To achieve meaningful participation in all types of assessment and to ensure learning outcomes through assessment, **amendments are needed in at least eight areas** of the proposed Bill C-69, as outlined in the Appendix.

In addition, section 29 proposes delegation to any jurisdiction of the carrying out of any part of the impact assessment of a designated project. Provisions must be added to this section to invite public comment on any proposed delegation and to require the posting of notice of such delegation and provision of input to it, as well as requiring the posting of any decision regarding the delegation and the reasons for that decision.

Cooperation with other jurisdictions is promoted in the bill, including through substitution. For transparency, provision needs to be made in the bill for the timely public participation in any cooperation or substitution agreement and public reporting via the Canadian Impact Assessment Registry. As well, while registries can certainly be kept by other jurisdictions, they need to be permanent (or transfer their information to the federal registry), they need to be linked to the federal registry (so that the information is readily accessible through the federal registry), and they need to otherwise meet the requirements of the federal registry.

The bill should recognize and strongly encourage informal opportunities for participation that involve two-way dialogue and discussion, including the undertaking of mediation and other forms of alternative dispute resolution (ADR) in all types of assessment and as part of both Agency-led and review panel-led project IA. Formal dispute resolution will help participants work together to achieve mutually acceptable and collaborative solutions when participants need assistance to come to consensus. Strong provisions are needed in legislation so that the full array of ADR's benefits can be realized. This is in fact recognized in section 73 of the proposed Canadian Energy Regulator Act.

4. What gets assessed, and how

A. Federal triggers

a) Disposition of federal lands

Recommendation: Include disposition of federal lands as trigger for lesser assessment under sections 81-90 provisions.

Rationale: Disposition of federal lands should be clearly within the required screening and EA process (it is currently discretionary to include projects that are not physical works or not designated projects under section 87).

b) Federal proponent or federal-funded projects within Canada

[2] *Building Common Ground*, at 38 [emphasis added by Expert Panel].

Recommendation: Include projects with federal funds or a federal proponent that are within Canada but outside federal lands as a trigger for a lesser assessment under sections 81-90. Note that classes of projects not likely to result in significant adverse effects can be excluded.

Rationale: To "get the federal house in order" (i.e., ensure federal projects receive some degree of assessment.

c) Make the Agency the authority for federal screenings

Recommendation: Amend sections 81-90 dealing with lesser assessments of federal projects to make the Agency, not federal authority, the responsible authority for the assessment.

Rationale: To bring greater credibility, oversight, independence and transparency into the lesser assessment processes.

d) Enhance public participation requirements for federal screenings

Recommendation: Extend the 15-day public comment period to 30 day minimum comment periods, and add public comment periods on draft determinations under the sections 81-90 assessments.

Rationale: To ensure transparency, credibility and rigour through public participation in lesser assessments of federal projects.

e) Limit exemption power to Ministerial regulation

Recommendation: Amend section 88(1) so that only the Minister by regulation, not federal authorities, can exempt classes of projects from these provisions.

Rationale: Greater transparency and credibility, and to ensure that projects that should receive assessments are not exempt.

B. Screen-Out

Recommendation: Amend section 16 to limit the Agency's ability to determine whether an assessment is required to only being able to determine that no assessment is required if there is no jurisdiction. Also, establish a requirement that the Agency produce an assessment plan as an outcome of the planning phase.

Rationale: To ensure assessments are conducted of designated projects where there is federal jurisdiction, and to ensure that the planning phase is not used merely as a process for screening-out projects, but rather results in an assessment plan established collaboratively with other relevant jurisdictions and interests.

5. Panel integrity/role of the regulators

A. Panel role in planning, scoping and information gathering

Recommendation: That Panels be appointed earlier than currently anticipated under Bill C-69 and be actively involved in the scoping and information gathering stages of the process.

Rationale: Panels should be appointed during the planning phase, at least for projects for which it is clear that a Review Panel is the appropriate assessment process. At the latest, Panels should be appointed at the conclusion of the planning phase, as the proponent starts to gather the information it is required to provide under section 19. The Panel should have a legislative right to conduct scoping hearings, and have input into the scope of the assessment and the information needed to complete its assessment. This can be done

without any delay to the overall timelines if Panels are appointed early and scoping sessions are held in parallel with the proponent's information gathering.

B. Panel role in project decision-making

Recommendation: That review panels be required, in their reports, to conclude whether a project is in the public interest based on the criteria set out in section 63.

Rationale: Panels will spend two years or more immersed with the assessment of the full range of predicted impacts and benefits, with the risks and uncertainties associated with proposed projects, and with alternatives and alternative means of carrying out the project. No one else involved in the process, and certainly not the Minister or Cabinet, will have the unique combination of having carried out a detailed analysis of the proposed project's impacts and benefits and the big picture perspective on its contribution to the public interest. This is particularly true now that the scope has been broadened to include all benefits and impacts of a proposed project. Therefore, panels should inform Ministerial or Cabinet decision-making by concluding whether, in their opinion, projects are in the public interest.

C. Role of energy regulators in the review panel process

Recommendation: That the Act limit the role of the Canadian Energy Regulator (CER), Canadian Nuclear Safety Commission (CNSC) and offshore boards on review panels to maximum one member, who cannot be the chair.

Rationale: Regulators have important expertise to bring to the review panel process. At the same time, it is clear that the central role some regulators have played in EA's under CEAA 2012 has undermined the public credibility of the federal EA process. More fundamentally, the merging of EA and regulatory processes ignores the fundamental differences, and the sequential nature of planning and regulating. The work of assessing and approving a project must occur separate from and before the regulatory processes. This was the case under the original CEAA, but was changed under CEAA 2012 for projects regulated by the CNSC and NEB. Appointing the regulators as responsible authorities clearly did not work.

Bill C-69 is an improvement over CEAA 2012 in that it has the potential to ensure proper assessment approval before regulatory considerations and may focus the role of energy regulators in the assessment process to their appropriate role as a source of technical expertise about the proposed project. It does not, however, as currently drafted, adequately protect the integrity and independence of the assessment process. The IAA needs to limit the role of energy regulators to ensure the assessment process will take an impartial independent look at the proposed project, and fairly and impartially considers issues such as need and alternatives.

D. Other Recommendations to Improve the Review Panel Process

In addition to the three broad areas of reform we have covered above, there are a number of specific issues related to review panels that warrant attention. Some deal with the timelines for review panels. Others are more technical in nature, but are, in our view, equally important to the effectiveness of the review panel process. They include ensuring that panels are able to hire experts and facilitators to assist with their work, have access to secretariat services provided by the new Agency, and have access through the Agency to competent analysis covering the broad range of issues to be assessed. Panels should include members with knowledge of the local context, and with expertise relevant to the specific assessment.

6. Post-assessment

We are concerned that the provisions respecting follow-up and monitoring fail to ensure that follow-up information is easily accessible, includes the ability to adjust all IA decisions post-assessment, and will inform future assessments. These are detailed as proposed amendments in the appendix.

7. Learning-oriented impact assessment

In contrast to treating assessment as hoops for proponents to jump through in order to gain project approval, it is now more commonly held that impact assessment should be centred on learning. To achieve this, the potential for learning by all participants must be recognized throughout the assessment process from the earliest pre-planning phases through to the monitoring of effects and outcomes. We contend that the problems we are dealing with in federal EA in Canada were caused in part by the lack of integration of learning into EA. This suggests that the potential benefits of learning need to be recognized throughout all of the typical stages of a strategic, regional or project assessment.

In support of this, the Expert Panel also recognized the need to "foster a culture of learning so that assessments become more effective and efficient over time"[3]. The Panel noted further that "mutual learning and inclusive dialogue"[4] are essential ingredients of this culture of learning. The Panel also recognized that impact assessment must place a heavy reliance on knowledge/evidence inputs of various kinds throughout almost all stages of the process. Such inputs are critical to learning and understanding the veracity of the outcome decisions of any impact assessment process.

Learning is not mentioned in Bill C-69. As such, an additional purpose paragraph needs to be added to section 6 related to learning. Learning outcomes are also inextricably linked with participation, follow-up and regime evolution in impact assessment. We strongly feel that the current crisis faced in Federal impact assessment in Canada is a result of the lack of attention to learning and these interrelated impact assessment components. As such, we have recommended in this submission a number of amendments related to participation, follow-up and regime evolution that need to be implemented to action learning oriented assessment.

[3] Building Common Ground, at 14.

[4] Building Common Ground, at 37.