COMMENTS ON THE *IMPACT ASSESSMENT ACT* AND THE *CANADIAN ENERGY REGULATOR ACT* PROPOSED IN BILL C-69

Équiterre Submission to the Standing Committee on Environment and Sustainable Development

6 April 2018

Introduction

Équiterre appreciates the opportunity to provide this submission to the Standing Committee on Environment and Sustainable Development for its upcoming study on Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts. The present submission presents our comments on select provisions of the *Impact Assessment Act* (IAA) and *Canadian Energy Regulator Act* (CERA) and focuses primarily on how the provisions affect the assessment and regulation of energy pipelines. It is our sincere hope that the Committee's review of the proposed Acts will help ensure that the Acts better accomplish their intended goals, in particular "to create a federal process for impact assessment and the prevention of significant adverse environmental impacts" (s. 1, IAA) and to establish an energy regulatory body that is responsible for ensuring that pipeline and other projects within Parliament's jurisdiction "are constructed, operated and abandoned in a safe and secure manner that protects people, property and the environment" (Preamble, CERA).

About Équiterre

Équiterre, a non-profit, charitable organization with offices in Montréal, Quebec City and Ottawa, has worked for over 20 years to raise awareness and advocate for sound environmental and energy policies in Quebec, Canada and on the international scene as well. Since its creation in 1993, Équiterre's primary mission has been to help build a social movement by encouraging individuals, organizations and governments to make ecological and equitable

choices, in a spirit of solidarity. Our organization includes 20,000 members and more than 150,000 supporters located largely in Eastern Canada, and also manages the world's largest community supported agriculture program, with over 120 organic farms in Quebec. As a leading organization covering the full gamut of environmental and energy issues in Canada, including clean energy, transportation, climate change, ecofiscal policy, water and air quality, family farms, and social justice, Équiterre is well-positioned to offer recommendations on Bill C-69.

Scope of our comments on Bill C-69

Équiterre's comments and recommendations on Bill C-69 are focused mainly on the application of the bill to matters concerning pipelines. Furthermore, in light of the very short time-frame for providing comments on Bill C-69 and in order to respect the page limit, Équiterre's comments and recommendations focus primarily on what we view as shortcomings of the IAA and CERA rather than on praise. We trust the Committee understands our choice of approach.

COMMENTS ON THE PROPOSED *IMPACT ASSESSMENT ACT (PART 1, BILL C-69)*

Before presenting our comments and recommendations, we wish to make several preliminary points for context. First, Équiterre intends to offer additional comments on criteria for the inclusion of designated projects in regulations in the context of the upcoming period for comments on the "Consultation Paper on Approach to Revising the Project List". Second, please note that in the following comments, the word "Agency" refers to the Impact Assessment Agency that would be created under the IAA.

STRENGTHEN ATTENTION TO CLIMATE AND MEETING CANADA'S CLIMATE OBLIGATIONS

Équiterre applauds that climate change and Canada's obligations to meet international agreements related to climate change receive specific mention in the Act, at least in several key provisions. This is a critical development in light of the fact that a recent analysis indicates that Canada's primary policy package for reducing greenhouse gas emissions, *the Pan-Canadian Framework on Clean Growth and Climate Change*, will fall short of achieving Canada's international commitment under the *Paris Climate Accord*.[1] In light of the fact that this shortfall is estimated to be approximately 3.7 times larger than the original 44 MMT gap originally estimated by the government,[2] the need for greater attention to climate change – perhaps the most "adverse environmental impact" of our time – is more urgent than ever before.

Équiterre is pleased that under s. 22(1), Canada's climate change commitments are to be considered in *all* impact assessments, whether by the Agency or by review panel, and that they

[1] Jeffrey Rissman, Robbie Orvis, Brianne Riehl, Benjamin Israël, Bora Plumptre. "Enhancing Canada's Climate Commitments: Building on the Pan-Canadian Framework". March 2018. Available at: http://www.pembina.org/reports/eps-enhancing-canadas-climate-commitments.pdf. (Accessed April 6, 2018).
[2] Ibid.

appear as one of five core factors that must be considered by the Minister, or by Cabinet for review panels, in deciding whether or not a project with adverse impacts should still be approved on the basis of public interest, per s. 63. These kinds of measures flow logically from the language in the Act's Preamble, which states, *inter alia*:

> Whereas the Government of Canada recognizes that impact assessment contributes to Canada's ability to meet its environmental obligations and its commitments in respect of climate change;

In order, however, to acknowledge that Canada needs to take concrete measures now to avoid its worst impacts in future years – a future which seems increasingly closer with each new scientific report – the Act requires strengthening and modification in a number of areas. Toward this end, Équiterre respectfully submits that the modifications to the legislation presented below would substantially improve the proposed *Impact Assessment Act.*

1. AMEND s. 63 to replace the requirement that decisions "must include a consideration of the following factors" with a requirement that decisions "be based on the following factors." Factor (e) in the list of factors in s. 63 is "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."

   Ideally, the factors language that currently appears in both s. 22(1)(i) and s. 63 (e) of the Act should be more comprehensive and incorporate language to specify that "effects of the designated project" include life cycle, direct, indirect and cumulative affects" and should speak of Canada's ability to meet both national and international agreements, including not only climate change, but environmental and biodiversity agreements as well.

2. AMEND s. 6 of the Act, which sets out the purposes of the legislation, in order to add climate change and meeting Canada's obligations as a Purpose of the Act, preferably using the language suggested in the item above, second paragraph.

3. AMEND s. 16(2) of the Act in order to add the language on the requirement of meeting Canada's climate obligations to the factors the Agency must use in making its screening decision on whether or not a project requires an impact assessment.

4. MODIFY the Act in order to ensure that all projects and strategic undertakings of a climatically-important nature are subject to IA, not simply those "designated projects" that happen to make it to the project list.

5. ADD a provision to the Act that would prohibit approval of those projects that would hinder Canada's ability to meet its climate commitments.

6. AMEND s. 109 of the Act on regulation-making power in order to clarify climate-related requirements to ensure that impact assessments adapt to evolving science, information and

international commitments.

7. AMEND ss. 22(1) and 63(e) of the Act in order to require not just consideration of direct and incidental effects, but also all climate change-related emissions during a project's lifecycle.

8. AMEND s. 109 of the Act in order to add a provision that creates regulation-making power that clarifies climate-related requirements to ensure that impact assessments adapt to evolving science, information and to keep current with international commitments.

REDUCE DISCRETION AND ADD ACCOUNTIBILITY BY SPECIFYING CRITERIA AND GUIDANCE ON HOW FACTORS ARE TO BE TREATED AND WEIGHED IN KEY DECISIONS

In general, the structure of the Act leaves too much discretion to the Minister and Cabinet in exactly how they will weigh, balance and otherwise treat the various factors that "must" be considered in making project determinations. The core of the discretion problem lies with what is *not* currently included in s. 63, the central provision on decision-making power through which the Minister or Cabinet (depending whether the IA is conducted by the Agency or by a review panel) determine whether or not a project evaluated as one likely to have adverse impacts is still to be considered in the public interest. Accordingly, Équiterre offers the following modifications to reduce discretion and better serve the intent of the Act.

9. AMEND s. 63 to include specific language that provides direction, criteria and accountability to both the Minister for reviews of Agency IA recommendations and to Cabinet for reviews of review panel IA recommendations in the determination of when projects with adverse impacts may be said to be within the public interest.

The reasons for this recommendation are threefold. First, there are no specifications about how the public interest factors are supposed to be applied – which leaves the door wide open for discretion. As currently structured, there is no guarantee that things like climate change impacts and Canada's ability to make its climate commitments will be given proper weight. Second, there are no criteria for identifying or evaluating what constitutes "adverse impacts". Third, there is no method set out for determining when adverse impacts are justified and why.

Équiterre strongly suggests that the Act be modified to address these lacunae. While the modifications need not all occur within s. 63, they need to appear explicitly somewhere in the Act and should be referenced accordingly in s. 63.

10. MODIFY the Act to provide impact assessment for a broader range of federally regulated projects that could create adverse impacts. Specifically, the Act needs to address projects that are neither "designated projects" nor non-designated projects on federal lands or projects outside of Canada with a federal proponent or federal funding. Ideally, the Act should include different assessment streams that are suitable to the size and nature of the projects and their potential affects.

Équiterre has serious concerns about the Project List approach, but given time and space constraints, we reserve our comments on this key issue for our upcoming submission on the "Consultation Paper on Approach to Revising the Project List".

11. AMEND s. 22(2), which currently lets the Agency or review panel (whichever is tasked with the impact assessment of a particular project) determine the SCOPE of all the factors listed in s. 22. There is too much discretion left to the Agency and the Minister on this. The public must have input on the scope of these factors, as it often has had under past environmental assessment regimes, because the scope of a factor can shape the weight and treatment of that factor in important ways.

MODIFY REVIEW PANEL PROVISIONS TO CURB REGULATOR INFLUENCE AND ENSURE FAIRNESS ON PROVINCIAL PARTICIPATION

12. AMEND s. 47(3) on the composition of review panels, which currently requires that for energy projects (those regulated by CER), the Minister must establish the terms of reference *and* appoint a chairperson *and* at least two other members, one of whom must be someone recommended by the lead commissioner of the regulator. The requirement to choose "at least" one person the regulator recommends should be eliminated.

As currently drafted, the Act allows for situations in which regulators may be chairs of review panels or regulators may even comprise the majority of members on a panel. This is a critical problem and the provision must be amended to redress it.

13. STRIKE s. 39(2), which expressly prohibits collaboration with the provinces when dealing with projects falling under the CER, which of course includes pipeline projects. This provision is objectionable and must be eliminated in order to protect the constitutional right of provinces to evaluate projects with environmental impacts within their borders.

IMPROVE PUBLIC PARTICIPATION WITH ADDITIONAL PUBLIC HEARINGS

Équiterre is pleased to see that during what the Act refers to as the "Planning Phase", the period during which the Agency first examines a project to see whether or not an IA is even needed, the public *must* be invited to make comments (s. 11). While allowing public comments may suffice as a method of obtaining public input at this early stage, it does not suffice for certain subsequent stages in the process. In fact, *only* for designated projects that are referred to a Review Panel must there be a public hearing (s. 51(1)(c)). Accordingly, Équiterre makes recommendations below concerning public hearings.

14. AMEND s. 27 of the ACT on public participations in IAs conducted by the Agency in order to include an obligation to hold public hearings for these IAs (i.e., IAs that have not been

referred to a Review Panel). As currently drafted, the Act allows for public input by way of written comments only.

15. AMEND s. 31 on substitution of IAs to other jurisdictions in order to add an obligation to hold public hearings. As currently drafted, the Act affords the public the opportunity to provide comments on a draft report of the assessment, but not a public hearing.

16. AMEND s. 53(3) concerning public hearings for designated projects referred to review panels, in order to ensure that only those aspects of evidence for which a witness, or the environment, may be harmed by disclosure of the evidence are suppressed during a public hearing. To clarify, it must not be allowed that entire public hearings can be avoided in situations where a witness has made the case that he or she, or the environment, may be harmed by disclosure of the evidence, then a public hearing is not required.

IMPROVE PARTICIPANT FUNDING PROVISIONS

Équiterre applauds the fact that the Agency "must" (s. 75) establish a Participant Funding Program (PFP) in four (4) areas under the IAA:

- For public participation in the Planning Phase ("the Agency's preparations for possible impact assessment") (s. 75(1)(a));
- For public participation in an IA carried out by the Agency (s. 75(1)(a));
- For public participation in an IA carried out by a Review Panel (s. 75(1)(b)); and
- For public participation in Regional or Strategic Impact Assessments (s. 75(1)(c)).

That said, there are several improvements that should be made in relation to the participant funding program aspect of the Act, in order to ensure the credibility of the process, build public trust and ensure the effectiveness of IAs. To this end, Équiterre offers these recommendations:

17. AMEND s. 75(2) in order to add an obligation of the Agency to establish a PFP for public participation in Impact Assessments carried out by other jurisdictions when the Minister has authorized substitution of another jurisdiction for federal jurisdiction.

18. STRIKE s. 75(2). Currently, the Act mandates that for IAs carried out by the Agency and not a Review Panel, there will be a list (created via regulations) that will determine exactly which kinds of projects will receive participant funding. This approach is overly and unreasonably restrictive and should be eliminated.

ADD REVIEW AND APPEAL PROVISIONS – ABSENCE OF THESE PROVISIONS IS UNACCEPTABLE

The only provisions in the IAA relating to review and appeal apply only to orders made under the Act where an enforcement officer believes there may be a contravention of the Act (ss. 138-139). Consequently, there are no review or appeal provisions concerning impact assessment decisions by the Minister or Cabinet. This should be rectified. A possible model for this language is found in the CERA, which unlike the IAA, the CERA has an entire section of the Act on review and appeals (ss. 69 – 72), including rules that:

- The Commission itself may review, vary or rescind any decision or order (s. 69);
- A party may appeal to the Commission to appeal its decision or order (s. 71); and
- "An appeal from a decision or order of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court." (s. 72).

In light of the above, Équiterre makes the following recommendation:

19. ADD provisions to the Act that provide for review of decisions and a right of appeal for decisions made either by the Agency, Minister and Cabinet in relation to IAs, with internal review and appeal available for Agency decisions and appeal to the Federal Court of Appeal, with leave of that court, for decisions made by the Minister or Cabinet.

FIX INCONSISTENCIES BETWEEN FRENCH AND ENGLISH VERSIONS of the IAA

A key example of inconsistency occurs under s. 22(1) on factors to be considered in an impact assessment, the English version is stricter than the French. To wit:

ENG: "The impact of a designated project must take into account the following factors"
FR: "L'évaluation d'impact d'un projet désigné prend en compte les éléments suivants"
(emphasis by underlining is ours).

This is a very substantial difference, with potentially serious consequences. It must be rectified and should be done in a way that more closely mirrors the English version, although we prefer the "must be based on" language recommended above. Other examples of problems include s. 53, the provision relating to the power of Review Panels to execute summonses and orders. In light of these examples, Équiterre strongly recommends the following:

20. ENSURE that proper, accurate and complete translations occur so that both the English and French versions of the Act are identical within the limits of linguistic translation.

ENSURE THAT IMPACT ASSESSMENTS REMAINS PUBLICLY AVAILABLE, PERMANENTLY

In order to ensure credibility, accountability and transparency of the process, Équiterre recommends the following:

21. AMEND s. 105(2)(e) in order to require that all information used in impact assessments remains publicly available on a permanent basis.

COMMENTS ON THE PROPOSED *CANADIAN ENERGY REGULATOR ACT (CERA) (PART 2, BILL C-69)*

Équiterre is highly concerned that neither "climate" nor Canada's international obligations on climate change are mentioned anywhere in the CERA as currently drafted. While ss. 183(2)(j) and 262(2)(f) require the regulator to consider "environmental agreements entered into by the Government of Canada", we urge that in light of the importance of climate change to our energy future, specific reference should be made in the Act to "climate change" agreements. With this in mind, and the reminder that our comments and recommendations on the CERA cover only those aspects of the Act that touch on energy infrastructure such as pipelines, Équiterre offers the following recommendations:

22. AMEND s. 6(b) on purposes of the Act in order to specify that one of the purposes is "to ensure a healthy and stable climate for current and future generations.

23. AMEND s. 183(2) on "Factors to Consider" when the Canadian Energy Regulator (CER) makes its recommendations and report on granting a certificate (e.g., of operation), and AMEND s. 186(1) on subsequent Cabinet decisions, in order to harmonize them with the climate obligations language in ss. s. 22(1) and 63(e) of the IAA. Harmonization of the CERA and the IAA on climate change is essential for reasons discussed above.

24. AMEND s. 11 of the Act in order to add language on renewables, energy efficiency, and the climate impacts of energy choices to the part of the regulator's mandate concerning advice to government on energy matters. Currently, the mandate includes only "advising and reporting on energy matters" and should be expanded as suggested.

25. AMEND s. 80 of the Act to ensure that "energy and sources of energy in and outside Canada" includes renewable energy and efficiency in the provision about the regulator giving advice to government on energy matter.

26. AMEND s. 52 of the Act to make public hearings mandatory on pipeline matters within the restrained jurisdiction of the CERA. As currently drafted, the provision does not actually create an obligation of the regulator to hold hearings with respect to certificates on pipeline projects. Rather, it requires any hearings held to be public. An unambiguous obligation to hold public hearings is preferable and may help build public trust.

27. AMEND Part 5 of the Act to include public hearings on offshore renewable projects. Currently, other parts of Bill C-69 allow for public hearings on pipeline matters within the jurisdiction of the CER, but there are no hearings provided for offshore renewable projects.

28. AMEND s. 75 of the Act in order to make participant funding mandatory for hearings held within the jurisdiction of the CER. As currently drafted, the regulator "may" set up a participant funding program.

29. AMEND s. 97 of the Act in order to reduce wide discretion that can otherwise be exercised by the Commission in exempting projects from regulations that the Commission make under s. 96, on matters such as design, construction, operation of pipelines, monitoring, etc. As currently drafted, s. 97 lets the Commission can simply exempt any projects from its regulations “as appropriate”.

30. AMEND s. 32(2) of the Act to make inquiries by the regulator apply to pipeline incidents -- not just accidents.

    This is a serious lacuna. As currently drafted, the inquiries provision in s. 32(2) applies only to accidents (e.g., injury to a person or property), not incidents, such as spills, exposed pipe segments, and other related safety failures that arise from non-accidental causes such as insufficient management and safety practices.

31. AMEND the conflict of interest provisions for CER Board of Directors (s. 16), Chief Operating Officer (s. 22) and Commissioners (s. 29) in order to ensure credibility, integrity and build public trust.

    Currently, the first paragraph in each of the provisions on conflict or interest for these positions (ss. 16, 22, and 29), states that the various prohibitions mentioned (holding shares, working for energy companies, etc.) apply “while exercising the powers or performing the duties and functions”. Instead, conflict of interest prohibitions should apply not only while they are " exercising the powers or performing the duties and functions of" their position, but from the moment they are appointed until the moment they leave the position or are terminated. As currently drafted, the prohibition does not appear to cover these persons during those moments, hours, days, etc., when they are not actually "exercising the powers or performing the duties and functions of their position", such as weekends and evenings for those with full-time positions. The risks are even greater for the part-time positions held by Directors and some Commissioners.

32. ADD a provision on “removal of Directors for Cause”. While the Act includes a provision for removing a Commissioner for cause (s. 28(3)), there is no parallel provision for removing a

Director for cause. Both Directors and Commissioners are appointed by Cabinet, and as such, it seems reasonable to create the parallel provision just described.

A comment on the Energy Information Agency not covered in the CERA. We understand that the government intends to create a separate and independent agency for the purpose of gathering and disseminating energy information. We support the separation of this work into a separate agency and look forward to seeing new legislation proposed on this matter.

CONCLUSION AND KEY RECOMMENDATIONS

The proposed *Impact Assessment Act* and *Canadian Energy Regulator Act*, as presented in Bill C-69, represent some useful progress in the goal of reforming Canada's environmental review processes for energy projects, but as currently drafted, both Acts are in need of modification in order to ensure that Canadians are effectively protected from the adverse impacts of energy projects. Our top line recommendations may be summarized as follows:

- Amend the IAA to ensure that energy projects do not hinder Canada's ability to meet its international climate obligations and amend the CERA to incorporate attention to climate considerations and harmonize it with the IAA in this respect.

- Reduce discretion and increase accountability for decisions relating to impact assessments by amending the IAA to ensure that decisions by the Agency, Minister and Cabinet are made according to clear directions, guidance, and specific criteria.

- Ensure that review panel assessments in the IAA are not dominated by regulatory personnel and that collaboration with provinces is allowed in establishing review panels.

- Improve public participation by expanding opportunities for public hearings under both the IAA and the CERA and improve the structure of participant funding under IAA.

- Ensure that energy sources, as discussed in the CERA, includes renewable energy and efficiency and that the climate change implications of energy choices are recognized.

- Make conflict of interest provisions under the CERA are fool-proof by ensuring that they cover the entire period of time that Directors, the Chief Operating Officer and Commissioner serve during their appointments to the CER.

- Ensure that investigations and inquiries by the CER include not only accidents on pipelines but incidents as well.

- Add a right of appeal to Federal Court in the IAA similar to that provided under the CERA.

- Fix inconsistencies between French and English versions of the IAA.