

Strengthening the *Canadian Energy Regulator Act*

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

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The Pembina Institute is grateful for the opportunity to provide written comments 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*. This legislation is the culmination of two years of study and consultation including the important work of two expert review panels: the Expert Panel on NEB Modernization and the Expert Panel on Federal Environmental Assessment Processes. This is truly a once-in-a-generation opportunity to strengthen Canada's environmental laws and we urge the committee to carefully consider the amendments that are needed to strengthen and improve the legislation.

Throughout the environmental law reform process, the Pembina Institute has been an active participant, with our efforts focused on reforming the National Energy Board (NEB). In fall 2016, we conducted 23 interviews with a wide range of experts to gather ideas and understand the challenges presented by NEB modernization. We published a discussion paper¹ in January 2017 and participated in three engagement sessions with the NEB Panel in Saskatoon, Toronto, and Edmonton. In March 2017, with financial support from Natural Resources Canada through the Public Input Funding Program, we published a summary report² detailing the findings of our research and presenting our final recommendations to the NEB Panel. Finally, in May and June of 2017, we submitted comments to the government on the recommendation reports put forward by the EA Panel³ and NEB Panel.⁴

Due to the length limitations of this submission, our comments are focused on the *Canadian Energy Regulator Act*. We touch on only a few points in the *Impact Assessment Act* that directly relate to the Canadian Energy Regulator (CER). We do have concerns regarding the level of ministerial discretion contained in the *Impact Assessment Act* and the continued use of the

¹ Erin Flanagan and Lindsay Wiginton, *Good governance in the era of low carbon: A vision for a modernized National Energy Board* (Pembina Institute, 2017). <https://www.pembina.org/reports/vision-for-neb-modernization-final.pdf>

² Ibid.

³ Pembina Institute, letter to Environment and Climate Change Canada, May 5, 2017. <https://www.pembina.org/pub/ea-panel-report-comments>

⁴ Pembina Institute, letter to NEB Modernization Secretariat, June 14, 2017. <https://www.pembina.org/pub/expert-panel-report-on-neb-modernization>

designated project list to determine projects that may be subject to federal assessment. For more detail on these and other concerns in Parts 1 and 3 of Bill C-69, we direct your attention to the submissions of our colleagues from West Coast Environmental Law, Ecojustice, Environmental Defence Canada, Nature Canada, and Canadian Freshwater Alliance.

Overall we applaud the changes proposed to federal energy regulation in the *Canadian Energy Regulator Act*. We support the revised governance regime, the transfer of authority for impact assessment to the Impact Assessment Agency of Canada, the expanded list of factors that must be considered when issuing a certificate or authorization, the removal of the “standing test” for public participation, and the emphasis on partnering with Indigenous groups and jurisdictions. These are significant improvements that set the stage for more credible project reviews.

Nevertheless, there are several significant omissions that must be addressed for the Act to fulfill its intended purposes. In particular, we are concerned about the lack of consideration of climate policy and obligations. A 21st-century energy regulator must integrate climate change considerations throughout its functions and activities. In addition, we make recommendations to ensure that CER Commissioners are not a majority on project review panels, support public participation, improve the transparency and accountability of decisions, further expand the diversity and competencies of the CER Commissioners and Board of Directors, and improve the state of energy data in Canada.

Alignment with climate policy and commitments

A modernized energy regulator must, as an explicit part of its mandate, ensure that decisions on energy infrastructure are aligned with domestic climate policies and are taken in light of global energy transitions. This is necessary to ensure that we meet our commitments under the Paris Agreement and is imperative to protect Canada’s long-term interests in a decarbonizing world. It is also essential for restoring public trust in the federal energy regulator.

The *Canadian Energy Regulator Act* makes no mention of climate policies, targets or obligations. Nor does the Canadian Energy Regulator have an explicit mandate to report or advise on Canada’s transition to a low-carbon economy. This is a major oversight. We recommend that climate considerations be integrated into both the purpose of the Act and the factors to consider when issuing a certificate or authorization, as well as into the reporting and advising responsibilities of the regulator.

The Purpose of the Act:

- Add the following clause to section 6, the purposes section, of the *Canadian Energy Regulator Act*: “to contribute to maintaining a healthy and stable climate for future generations.”

The factors to consider when issuing a certificate or authorization under the Act:

- Amend section 183(2) of the *Canadian Energy Regulator Act* to replace “(j) environmental agreements entered into by the Government of Canada” with “(j) 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 international and domestic commitments in respect of climate change.”
- Amend section 262(2) of the *Canadian Energy Regulator Act* to replace “(f) environmental agreements entered into by the Government of Canada” with “(f) 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 international and domestic commitments in respect of climate change.”
- Amend section 298(3) of the *Canadian Energy Regulator Act* to replace “(f) environmental agreements entered into by the Government of Canada” with “(j) 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 international and domestic commitments in respect of climate change.”

Reporting and advising:

- Amend section 11(e) of the *Canadian Energy Regulator Act*, pertaining to CER’s mandate, to “advising and reporting on energy matters including renewable energy, energy efficiency, climate impacts related to the production, distribution, and use of energy, the impacts of a changing climate on the production, distribution, and use of energy, and Canada’s transition to a low carbon economy.”
- Amend section 80 of the *Canadian Energy Regulator Act*, pertaining to issues the Regulator must study and keep under review, to add “(c) climate impacts related to the production, distribution, and use of energy, and the impacts of a changing climate on the production, distribution, and use of energy. (d) Canada’s transition to a low carbon economy.”

Composition of project review panels

We strongly support transferring the responsibility for impact assessment to the Impact Assessment Agency of Canada. Having a single agency responsible for conducting all assessments under the *Impact Assessment Act* will help ensure consistent application of the law for all sectors and projects. The specific expertise of the life cycle regulators is a necessary component of project review and it is acceptable for the CER and other life cycle regulators to have a seat on review panels. It is not acceptable that they comprise the majority or the entirety of an impact assessment review panel. The existing wording of the *Impact Assessment Act* allows for this possibility and must be amended to ensure that project review panels have

balanced representation and expertise, including representation from relevant regions or jurisdictions.

Limit the number of CER Commissioners on an impact assessment panel to one of three:

- Amend Section 47(3) of the *Impact Assessment Act* to read “One of the persons appointed under paragraph (1) must be appointed from a roster established under paragraph 50(c), on the recommendation of the Lead Commissioner of the Canadian Energy Regulator and in consultation with the member of the Queen’s Privy Council for Canada that is designated by the Governor in Council as the Minister for the purposes of the Canadian Energy Regulator Act.”

Ensuring meaningful public participation

We are pleased to see the removal of the “standing test” for public participation (i.e. the requirement that participants be “directly affected” by the project) that was introduced in 2012. However, removing barriers to participation does not create “early engagement and inclusive participation” that are referred to in the preamble of the Act. Several related factors enable meaningful public participation:

- Access to financial resources that are commensurate with the level of engagement
- Clear mechanisms to include public input in decision-making
- Timely access to data, research, and independent expertise
- Access to legal advice and representation
- Requirements that information provided by the proponent and the regulator be well-organized and searchable
- Engagement opportunities throughout the project life cycle including in early planning, the design of public engagement activities, project assessments and hearings, monitoring and compliance, and decommissioning
- Appropriate information on the process and requirements of engagement activities.

Clear direction on how to enact meaningful participation and an entity with an explicit mandate to do so, is the best way to ensure that citizens have a voice in energy decision-making. An appropriately resourced Public Intervenor Office, as recommended by the Expert Panel on NEB Modernization⁵, should be created as a voluntary resource and conduit for public access to the Regulator and its processes, including public hearings conducted under the *Impact Assessment Act*. In addition, the Public Intervenor Office should be responsible for managing the participant funding program and advising the CER on the design and timing of engagement activities. It may also coordinate technical and scientific studies that are commissioned to

⁵ Expert Panel on the Modernization of the National Energy Board, *Forward Together: Enabling Canada’s Clean, Safe and Secure Energy Future* (2017). <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>

support its activities and create voluntary classes for representation in public hearings. It may also be appropriate to task the Public Intervenor Office with reviewing and synthesizing written public comments and ensuring that key public concerns are represented in the public hearings.

In addition, the legislation should require, not just allow, the creation of a participant funding program and stipulate that the funding be commensurate with the level of engagement.

Create a Public Intervenor Office:

- Amend section 74 of the *Canadian Energy Regulator Act* to read “(1) The Regulator must establish a Public Intervenor Office to manage the participant funding program, advise the Regulator on the appropriate mechanisms and timing of engagement activities, and, on a voluntary basis, represent the interests and views of parties, the public—and, if appropriate, the Indigenous peoples of Canada and Indigenous organizations—on matters within the Regulator’s mandate.”
- Amend section 74 of the *Canadian Energy Regulator Act* to add “(2) The Regulator or the Public Intervenor Office may establish processes to engage with the public—and, in particular, the Indigenous peoples of Canada and Indigenous organizations—on matters within the Regulator’s mandate.”

Ensure access to independent research and expertise:

- Amend section 74 the *Canadian Energy Regulator Act* to add “(3) The Public Intervenor may coordinate scientific and technical studies to the extent possible and may develop pools of independent experts that are available to the public to provide third-party independent advice during project reviews.”

Ensure access to project related information:

- Amend section 74 the *Canadian Energy Regulator Act* to add “(4) The Regulator must ensure that information provided by proponents, the Regulator, and the Public Intervenor Office is searchable, transparent, well-organized, and not subject to change during the course of a project review, so as to facilitate public access.”

Make the participant funding program mandatory and extend it beyond public hearings:

- Amend section 75 of the *Canadian Energy Regulator Act* to read “For the purposes of this Act, the Regulator must establish a participant funding program to facilitate the participation of the public — and, in particular, the Indigenous peoples of Canada and Indigenous organizations — in public hearings under section 52 or subsection 241(3), any steps leading to those hearings, and throughout the project lifecycle.”

Transparent and accountable decision-making

Accountable decision-making requires clear explanations of how decisions were made including the factors that were considered and how evidence was weighed. We support the

steps taken in the *Impact Assessment Act* to ensure more transparent decision statements and endorse the recommendations put forth by West Coast Environmental Law, Ecojustice, and Nature Canada to further improve on the transparency and accountability of those provisions.

To ensure accountability and public confidence in decisions made by the Canadian Energy Regulator, parallel measures are required in the *Canadian Energy Regulator Act*. Specifically, we suggest amendments that require public decision statements to explicitly reference how the following three factors were considered and weighed:

- a. the impacts to Indigenous groups or to the rights of the Indigenous peoples of Canada
- b. the extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its domestic and international commitments in respect of climate change
- c. public input on the project and its effects.

Create an independent energy information agency

Quality decisions begin with quality data and analysis. We are disappointed to see no specific provisions in the *Canadian Energy Regulator Act* to improve the state of energy information in Canada or to ensure that federal energy regulation is based on high-quality, independent data and analysis. The fact that the responsibility for energy data and modelling is housed within the regulator leads to perceptions of bias among some stakeholders. The Expert Panel on NEB Modernization stated, “we feel that the [new] Canadian Energy Information Agency needs to have the mandate and ability to tell it like it is on energy matters, and inform the development of energy policy and strategy, without being involved in the determination of energy policy, or administering energy infrastructure regulation. This will help to assure that information is seen as neutral and credible.”⁶ We agree and recommend amendments that would enable and fund the creation of a new Canadian energy information agency and expanded energy data collection at Statistics Canada.

We envision the Canadian energy information agency relying on Statistics Canada for the collection and harmonization of energy data. This is consistent with the mandate of Statistics Canada and makes use of its already existing data collection capacity, expertise, and relationships with provincial governments. Statistics Canada should be given additional resources and any necessary authority in order to:

⁶ Expert Panel on the Modernization of the National Energy Board, *Forward Together: Enabling Canada's Clean, Safe and Secure Energy Future* (2017). <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>

- Collect energy-related data on oil and gas, renewables, electricity generation, energy efficiency, and associated GHG emissions from all relevant agencies, government departments and industry; perform quality assurance; and resolve inconsistencies.
- Work with departments and agencies who continue to collect energy data to ensure that the data is produced with consistent units and timeframes so that it can be usefully aggregated.
 - The CER should retain the responsibility for collecting pipeline safety and monitoring data, as it will continue to hold the mandate on pipeline safety and engineering.
 - ECCC should retain the responsibility for collecting GHG data as well as information pertaining to the release of other pollutants associated with energy activities (e.g., criteria air contaminants, heavy metals).

The new energy information agency should be housed within Natural Resources Canada and report to the Minister of Natural Resources. The independence of the agency should be established by specifying, in legislation, that the agency does not require review or approval of its statistics or forecasting by any government entity. The mandate of the agency should include:

- Managing a coordinated interface/one-stop-shop platform to collect and disseminate all energy data and analysis
- Producing annual scenarios for energy supply and demand, including a Reference Case that considers domestic and international action on climate change (with possible interim updates when needed, such as at the implementation of a new regulation)
- Reporting quarterly on energy supply, demand, sources and downstream consumption, including international and interprovincial energy import and export
- Producing an annual report on Canada’s progress toward fulfilling its commitments to addressing climate change and conducting international benchmarking (with possible interim updates when needed, such as at the implementation of a new regulation)
- Making all data supporting the above reports available to the public at no cost in easy-to-use formats (such as spreadsheets)
- Participating in project hearings as expert witnesses with respect to energy and GHG emissions modelling
- Conducting proactive energy education for a public, non-technical audience
- Advising government ministries and agencies on energy matters upon request.

Create a new energy information agency:

- Amend the *Canadian Energy Regulator Act* to create and fund the Canadian energy information agency, ensure the independence of its data and analysis, and, with the

exception of responsibilities related to safety and monitoring, transfer the reporting and advising responsibilities of the Canadian Energy Regulator to the new agency.

Governance

The proposed *Canadian Energy Regulator Act* makes great strides toward the objective set out in Minister Carr’s mandate letter of “[m]oderniz[ing] the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.” We support the proposed governance changes including the separation of the Commissioners from the Board and CEO, the intent of the conflict of interest provisions, and the requirement for Indigenous representation on both the Board and Commission. We encourage the committee to take the remaining steps to ensure this mandate is met completely. This includes tightening up the conflict of interest provisions and expanding the required competencies of the Board and the Commissioners to include such factors as Indigenous traditional knowledge and worldview, and expertise in climate science, renewable energy, and public consultation.

Amend the conflict of interest provisions to remove the clause “while they are exercising their powers and fulfilling the duties and functions”:

- Amend section 16 of the *Canadian Energy Regulator Act* to “For the purposes of the *Conflict of Interest Act*, the circumstances in which a director is in a conflict of interest include”
- Amend section 22 of the *Canadian Energy Regulator Act* to “For the purposes of the *Conflict of Interest Act*, the circumstances in which the Chief Executive Officer is in a conflict of interest include”
- Amend section 29 of the *Canadian Energy Regulator Act* to “For the purposes of the *Conflict of Interest Act*, the circumstances in which a commissioner is in a conflict of interest include”

Ensure that the Board and Commissioners reflect Canadian society and include a wider range of competencies:

- Amend section 14(1) of the *Canadian Energy Regulator Act* to add “(a) Directors will be appointed to reflect, to a reasonable extent, the diversity of Canadian society and ensure the Board maintains a range of competencies including in Indigenous traditional knowledge and worldview, public consultation, community development, renewable energy, and climate science.
- Amend section 26(1) of the *Canadian Energy Regulator Act* to add “(a) Commissioners will be appointed to reflect, to a reasonable extent, the diversity of Canadian society and ensure the Commission maintains a range of competencies including in Indigenous

traditional knowledge and worldview, public consultation, community development, renewable energy, and climate science.

Conclusion

We appreciate the opportunity to provide comments on Bill C-69. Overall we support the changes to federal energy regulation proposed in the *Canadian Energy Regulator Act*—as written it goes a great distance toward the objective of creating a 21st-century energy regulator. However, there are significant gaps in the legislation that must be addressed to ensure that it meets Canadians' expectations for fair, inclusive, evidence-based processes, restores public trust, and corrects the current disconnect between energy and climate policy.

In addition to our detailed recommendations, we urge the committee to hear from Indigenous nations from across the country to ensure the final legislative solution upholds the government's responsibilities on reconciliation and its commitment to upholding the principles and obligations of the United Nations Declaration on the Rights of Indigenous Peoples.

We look forward to appearing before the committee in the coming weeks to further discuss the legislation and our recommendations for ensuring the Canadian Energy Regulator is equipped to respond to the pressing challenges of the 21st century.