



canadian | association  
energy | canadienne  
pipeline | de pipelines  
association | d'énergie

---

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

---

**MARCH 2018**

**PREPARED BY: CANADIAN ENERGY PIPELINE ASSOCIATION**

## CONTEXT

The Canadian Energy Pipeline Association (CEPA) represents Canada's major transmission pipeline companies that transport 97 percent of Canada's daily natural gas and onshore crude oil production.

In the two years leading up to the introduction of Bill C-69 you can pick your poison: policies including a tanker moratorium off of British Columbia's northern coastline, proposed methane emission reduction regulations, clean fuel standards, provincial GHG emissions regulations, BC's restrictions on transporting bitumen, lack of clarity regarding the government's position on implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and fierce competition from energy-supportive policies in the United States. The cumulative effect of this suite of policies has significantly weakened investor confidence in Canada and is seriously challenging the energy sector's ability to be competitive.

Currently there is profound uncertainty in advancing new major pipeline projects. We now have a significant problem as a sector and as a country in accessing new markets for our products around the world. The development of new projects is grinding to a halt. CEPA member companies that have material assets in other countries are actively pursuing those opportunities because of the uncertainty and potential implications of further potentially seismic regulatory changes that will directly impact the pipeline sector. Our sector is suffocating because of it.

CEPA believes that a majority of Canadians still appreciate the significant contribution the oil and gas sector makes to Canada's economy and the livelihood of Canadians. We also hold firm in the belief that continued growth in the oil and gas sector is completely consistent with Canada's 2030 GHG emissions targets. In the consultation process leading up to the tabling of Bill C-69, CEPA took some comfort in assurances from the government that any new legislation would reflect shared values focused on a strong regulatory regime, safety, environmental stewardship, confidence, competitiveness and the kind of certainty and clarity needed for a reasonable prospect of actually building a new major pipeline in Canada.

In its current form, Bill C-69 cannot achieve greater certainty, clarity, and predictability required for investment in new linear infrastructure projects that can extend hundreds if not thousands of kilometers across provinces, communities and Indigenous communities. It is difficult to imagine that a new major pipeline could be built in Canada under the *Impact Assessment Act*. We are concerned that the government has effectively frustrated Regulatory Reform in order to advance their climate change agenda and has baked broad policy subject matters into an otherwise very technical decision-making process.

CEPA does not see anything within the *Impact Assessment Act* that will attract energy investment to Canada.

## BILL C-69

In the Prime Minister's mandate letter to the Minister of Environment and Climate Change, the Minister was asked to review environmental assessment processes to achieve three objectives: (1) to restore public trust; (2) to introduce new, fair processes; and (3) to get resources to market. Respectfully, CEPA does not believe the proposed *Impact Assessment Act* would accomplish any of these objectives.

Over the course of a year and a half of consultations, CEPA's 200 plus pages of submissions were meant to provide thoughtful and practical recommendations to address these three objectives. Our recommendations were premised on the underlying need to stem the erosion of Canada's competitive position in the natural resource sector. Our recommendations were guided by key principles that we believe would have set the framework to meet all of these goals:

- i. A process that ensures that broader public policy issues are addressed in more appropriate venues, outside of project reviews;
- ii. A science and fact-based process that is coordinated, efficient, and provides clarity and certainty; and
- iii. The National Energy Board ("NEB") as the best-placed regulator with technical expertise and full life-cycle responsibility for project reviews, operations and maintenance.

Regrettably, the *Impact Assessment Act* does not address these concerns. CEPA is profoundly disappointed that the proposed process appears to double down on the very factors that created the toxic regulatory environment for major projects that this regulatory review process was intended to fix.

The *Impact Assessment Act* does not address the pipeline sector's most fundamental concern – that of the unacceptably high financial risks associated with lengthy, costly reviews that trigger polarization within the process itself and political decisions at the very end.

Bill C-69 does not adequately address the need to find an appropriate venue to debate and resolve broader public policy issues. The Bill is flavoured throughout with the government's commitment to meeting climate change objectives, gender-based analysis, Indigenous reconciliation, and subjective and inherently unpredictable sustainability tests. Despite CEPA's very strong recommendation to remove broader public policy from project specific reviews, these issues are now explicitly included in the review process as factors to consider.

The *Impact Assessment Act* will not achieve greater certainty, clarity, and predictability. Instead, it introduces a new regulatory agency and unique new processes and information requirements that have never been tested. The public participation standing tests have been removed. Science and fact-based assessments will now be obscured by the layering of other policy based assessments that are ill defined, fluid and open to potential routes for obfuscation of the process. We cannot see that timelines will improve; we expect them to be longer.

The National Energy Board ("NEB"), now the Canadian Energy Regulator, ("CER") is side-lined on major pipeline project reviews. CEPA consistently emphasized that the NEB was the best placed regulator to oversee the full life-cycle of a pipeline from the planning and approval process to construction, operations, maintenance and abandonment. Instead, Bill C-69 carves out the review of major pipeline projects and places it with the new Impact assessment Agency ("the new Agency"). That new Agency does not have the rich history of administrative decision-making and technical expertise of the NEB. Instead, the new Agency is mandated to perform a broadened role, assess a wider scope of issues and is expected to implement the government's political agenda related to climate change, reconciliation and gender objectives. It is not an independent, expert regulator. CEPA is not convinced that it will have the capacity to conduct these broadened, political reviews, even with the announcement of \$1 billion of new spending to support the implementation of the *Impact Assessment Act*.

Given these concerns, it is hard to imagine that any pipeline project proponent would be prepared to test this new process or have a reasonable expectation of a positive outcome at the end. With

built-in climate change tests covering upstream and downstream GHG emissions, it is preposterous to expect that a pipeline proponent would spend upwards of a billion dollars only to be denied approval because the project must account for emissions from production of the product to consumption in another part of the world. If the goal is to curtail oil and gas production and to have no more pipelines built, this legislation has hit the mark.

## **i. Broader public policy issues**

CEPA consistently advocated for a de-politicization of the process and said that broader public policy issues that are beyond the scope of a specific project, including and especially upstream and downstream climate change impacts, must be dealt with outside of project specific reviews. A two-part review was proposed as a means to address two fundamental dysfunctions of the existing process: (1) the significant financial risks caused by a lengthy process that concluded with a political decision in the end; and (2) the corruption of the regulatory process itself with policy matters that cannot be properly dealt with in a quasi-judicial, science and fact based proceeding.

The two-part review would separate out the broader public policies issues from the well-established technical and environmental review of a project. The first part of the review would address the broader policy issues and determine whether a project is in the public interest – the question of “if” a project could proceed. If found that there were no showstoppers and a project could proceed, the second part would be a project specific assessment that would consider “how” a project could proceed.

This proposal was accepted by the NEB Modernization Expert Panel as a key element to restoring public confidence in regulatory process.

Unfortunately, Bill C-69 does the opposite. Instead of accepting the proposed two-part review or suggesting an alternate solution that would achieve the same objectives, Bill C-69 takes what our industry said was a problem, and builds that into the legislation as a goal of the legislation. For instance, a requirement to consider whether a project hinders or contributes to Canada’s ability to meet climate change commitments is now hard-wired into the scope of factors to consider under s.22. It is also one of the five factors that the Minister or Cabinet must consider under s. 63 when making a decision at the very end of the process. It is hard to imagine anything more politicized than that.

### ***Early Planning Phase***

There has been some suggestion that an effective Early Engagement and Planning stage would fulfil some of the same objectives as the proposed two-part review. We don’t see that in the proposed legislation.

CEPA voiced strong opposition to the CEAA Expert Panel recommendations for a planning stage that would seek consensus, relegate the proponent to a bystander in its own project and introduce unworkable processes and too much uncertainty. The Government Discussion paper in June 2017 walked back those recommendations and suggested an Early Planning Phase that was more acceptable. CEPA suggested that to be effective, an early planning stage must: (1) be a disciplined process; (2) have legislated timelines; (3) cannot be expected to gain consensus on process or issues; and (4) must be able to identify policy issues that are beyond the scope of the project and find more appropriate venues to debate those issues outside of the review.

While the first three objectives appear to have been addressed in the Bill, the fourth is not. In fact, it appears that some of the CEAA Expert Panel's more troubling recommendations have crept back into the *Impact Assessment* Act. The fundamental problem in the early planning phase proposed in Bill C-69 is that it does not deal with the broader policy issues. At the end of the planning phase there will be tailored and customized guidelines based on what the new Agency hears from public and Indigenous groups, including views on the more political factors set out in s. 22 such as various views on "sustainability" and ability to meet climate change goals.

CEPA also consistently opposed evolving Environmental assessment into a "sustainability assessment" that looks at whether a project will result in a net positive contribution to sustainability. CEPA's concerns were that a sustainability assessment was inherently subjective, could increase federal intrusion into provincial jurisdiction, result in decisions that the federal government didn't have jurisdiction to enforce and require the proponent to scope in factors that are beyond the project. Ultimately it would lead to further politicization.

Recommendation: Bill C-69 should be amended to ensure policy issues are addressed ahead of the Impact assessment itself. This can be accomplished by using the proposed 180-day early planning phase to have the government gather input from stakeholders, including the potential policy issues raised by a project. At the end of the 180 days: (1) the government would make a determination of whether the project was in the public interest; (2) the new Agency would prepare guidelines for the Impact assessment that focussed on project specific environmental impacts and remaining technical matters.

The net effect of this is that the proponent would know if the project met a positive public interest determination (no political showstoppers) and would also know the parameters of a more detailed Impact assessment.

Cabinet decision making would be at the end of the 180-day early planning phase; no further Cabinet or political involvement would be required for the Impact assessment phase as it is based on scientific environmental and technical matters.

### **Section 17**

Perhaps the closest thing that Bill C-69 proposes as an alternate means to achieve the objectives of the two-part review can be found in s. 17. Section 17 gives the Minister power to direct the new Agency not to conduct an Assessment if the Minister "is of the opinion" that the project would cause unacceptable effects within federal jurisdiction or unacceptable direct or incidental effects. This would stop the project from proceeding before it even completes the early planning phase. In this regard, there is a proposed mechanism for the Government to stop a project before the project undergoes years of assessment costing hundreds of millions of dollars. Unfortunately, the provision seems rather arbitrary and does not appear to be grounded in science based reasoning. This is concerning because this cause can be used to kill a project. Furthermore, if there is a mechanism such as s. 17 to stop a project in its track at the outset, there should also be a mechanism such as the two-part review that determines that there are no political show-stoppers.

Recommendation: s. 17, which allows the Government to direct the new Agency to not conduct an assessment because of the potential for unacceptable effects, be removed. Alternately, it should be amended to also allow the Government to determine that there are no political show-stoppers.

## ii. Process Clarity, Certainty and Predictability

When introducing Bill C-69, the Minister stated that proponents would have better rules, more certainty, clarity and predictable and timely reviews. CEPA doesn't believe Bill C-69 achieves this.

### **Timelines**

Although the legislation suggests that timelines will be more certain and shorter, this is not the case for pipeline projects. The maximum timeline under existing legislation is 18 months from the time an application is deemed to be complete to a Cabinet decision at the end of the process. Bill C-69 extends that to 29 months, not including the time required by a proponent to complete an Impact assessment report, which will add many more months. This is a significant and material increase to a process that can already span many years because of the need for upfront studies and consultation before the regulatory application and work required to meet regulatory conditions at the end of a review.

Bill C-69 also references the potential for time extensions at least 40 times, significantly reducing the probability than any project will meet the legislated timelines.

With the expanded scope of factors to consider and the removal of the standing test, it is difficult to imagine that these timelines can be met for large linear infrastructure projects. Faced with pipeline review process that could extend beyond 4 or even 5 years, it is not very likely that any new major pipelines will be proposed in Canada. Market conditions can significantly change in that lengthy period of time and investment decisions may be altered.

Recommendation: CEPA recommends that the maximum timeline for overall review be reduced to 24 months, including the 180 days for early planning. This still represents an increase from the current practice, but is a reasonable balance for those very large pipeline projects that would be on the Project List and referred to a joint review panel.

### **Science-based decision-making**

There is also a shift away from science based decision-making in the *Impact Assessment Act* to a blend of environmental and policy factors outlined in s. 22 and s. 63. The scope of the new Impact assessment will be broadened beyond the current assessment of biophysical impacts of a project and mitigation measures to reflect the government's commitment to sustainability, Indigenous reconciliation, climate change and gender based analysis. These factors are difficult to assess on a scientific basis and are difficult to implement in practice.

CEPA is concerned that Bill C-69 protects Indigenous Traditional Knowledge gathered for a project and requires it to be confidential, not to be disclosed without written consent. This is in contradiction to the overall transparency provisions within the Bill and places the proponent at a disadvantage because it may not be privy to important information that s. 22(1)(g) says is mandatory for the decision-maker to consider.

### **Standing Test**

The standing test under CEAA 2012 and the NEB Act have been eliminated. CEPA advocated for an inclusive approach to public participation, with scalable and flexible levels of involvement. A detailed recommendation was provided that outlined how to accommodate the general public's desire to be heard with a process that allowed those who were directly affected to participate in a meaningful way. CEPA's position was that the standing requirements were reasonable for more

formal opportunities such as Intervenor status, but opportunities must be provided for everyone to participate in some way.

There are recent examples in Canada where the absence of a standing requirement has led to highly inappropriate participation that had no probative value with respect to the issues to be decided in the review.<sup>1</sup> Bill C-69 gives a large discretion to the new Agency or CER to determine when and how the public can participate and how to consider their input. This might allow for the type of scalable and flexible participation that we recommended, but it could also be used to clog the hearing process in an attempt to delay projects to the point that they are abandoned.

Recommendation: Guidelines or regulations need to be developed that accommodate an inclusive approach to public involvement at the same time as recognizing the need to maintain procedural fairness, use of science and fact-based evidence and timelines.

### ***Investor Certainty***

Investors require clear and transparent processes to provide the degree of certainty needed to make investment decisions that can involve spending upwards of a billion dollars to simply attempt to get through the regulatory process.<sup>2</sup> Prior to filing for a project review, pipeline proponents must complete complex route-specific environmental, socioeconomic and engineering assessments, finalize complex commercial negotiations, secure shipper commitments and conduct extensive engagement with Indigenous groups, private landowners and other affected communities and stakeholders. All of this project feasibility assessment work must be done in advance of any initial regulatory submission. This also requires the proponent to make significant financial commitments long before the regulatory process even begins.<sup>3</sup>

The proposed process in the early planning phase involves a fundamental and radical change to all aspects of this process and would run counter to how proponents must plan projects and make investment decisions.

Recommendation: The proposed 180-day early planning phase should consolidate early stakeholder consultations related to both specific matters to be addressed by the technical impact assessment as well as potential policy matters associated with a public interest determination. Public and Indigenous consultation could be managed by the

---

<sup>1</sup> For instance, the Northern Gateway Joint Review Panel allowed for opportunities for the public to make oral presentations, file letters of comment and seek formal intervenor status. As the process unfolded, 4554 applications to make oral presentation were received, 221 applications for intervenor status were submitted and another 5,582 people had already filed letters of comment. An examination of some of the applications for oral presentations revealed form letters and included children, fake names such as Captain Jack Sparrow, Venezuela's state-owned oil company and people who had never even heard of the pipeline project. One environmental group claimed to have signed up more than 1400 of the applicants through a "mob the mic" initiative.

<sup>2</sup> According to pipeline industry estimates, direct costs for project proponents of development and regulatory applications account for 4%-11% of total development and construction costs, with an average of 7%. For a major pipeline project, such as Energy East with a total of \$15.7 billion, 7% is equivalent to \$1.1 billion. For a smaller project with a total cost of \$500 million, the regulatory application component would be approximately \$35 million. Few companies have the resources and ability to commit such amounts (which cannot be recovered in the instance of regulatory denial) unless there is a very high likelihood of receiving regulatory approval without conditions that undermine the business rationale for the project. "*Risks and Cost of Regulatory Permit Applications in Canada's Pipeline Sector*", March 31, 2017, Holburn and Joudermilk, Ivey Business School Energy Policy and Management Centre, at p. 8

<sup>3</sup> In practice, pipeline companies' financial exposure to regulatory denial or delay is typically larger than the direct cost of the regulatory application, due to contractual obligations with shippers and suppliers. Shippers often require a commitment by the pipeline company for an in-service operating date for the pipeline; and purchase order lead times for specialized pipe, materials and machinery from suppliers, who may be located in other countries, often require contractual commitments to be agreed before regulatory approvals have been obtained. "*Risks and Cost of Regulatory Permit Applications in Canada's Pipeline Sector*" March 31, 2017, Holburn and Joudermilk, Ivey Business School Energy Policy and Management Centre. Page 8

New Agency and the Major Projects Management Office (“MPMO”) could manage the policy identification process on behalf of the GIC.

When the early planning process is completed: (1) A decision is made by the GIC on the policy matters and public interest determination; and (2) The environmental and technical Impact assessment would be deferred back to the Canadian Energy Regulator to conduct the Impact assessment using the guidelines recommended by the new Agency.

While still a procedural departure from the existing process, this recommended process at least balances these changes against the benefits of an early public interest determination. Regardless of all the considerations noted, the risk of the transition to a new agency, processes and information requirements in and by itself is daunting and will introduce tremendous risk and uncertainty as well as costs.

### **iii. NEB as best-placed regulator**

Throughout the consultation process, CEPA emphasized that ALL reviews must be conducted by the NEB as the best placed regulator. We offered advice on what could be improved within the NEB to address perceived loss of public confidence by some of the public. Although many of the recommendations in the *Canadian Regulator Act*, such as the governance structure, are sound and will lead to a modernization of the regulator, CEPA is disappointed that authority to review and approve major pipeline projects has been carved out of the NEB/CER mandate.

When the government’s June 2017 Discussion Paper suggested that major pipeline projects would be subject to a joint review process between CEAA/NEB, CEPA acknowledged the government’s intention and suggested that only the largest of all pipeline projects should be subject to this process and that any joint review must be fully integrated within the NEB review. This was based on the technical expertise of the NEB over nearly 60 years of overseeing the planning and approval, construction, operations, maintenance and abandonment.

Instead, Bill C-69 states that the new Agency will conduct the review, in “collaboration” with the CER. We don’t know what that looks like. We do know that review panels will be panels of 3, with only 1 panel member to be chosen from the CER. CEPA does not believe that the new Agency has, or will have, the technical expertise to be the lead agency for pipeline project reviews that are regulated throughout their lifetime by another regulator. The necessary expertise is within the lifecycle regulator. The more appropriate way to facilitate the goal of one project, one assessment is to utilize the expertise of the best placed regulator. That requires having the CER lead the assessment.

Recommendation: All reviews should be conducted by the CER, which has been modernized and is the best placed regulator to review pipeline projects. Alternatively, any Joint review panels of 3 members should have 2 members from the CER, and only one from the new Agency.

CEPA is pleased that projects that were previously defined under the s. 58 exemptions of the *National Energy Board Act* (projects under 40 km or tanks, reservoirs, storage or loading facilities, real or personal property, immovable or movable and any connected works) will continue to be assessed by the CER under s. 214 of Bill C-69. CEPA is also pleased that projects that don’t fall within the s. 214 exemption (i.e. exceed 40 km), but aren’t considered major enough to be on the Project List, will be assessed by the CER. These provisions

acknowledge the lifecycle expertise of the regulator and that the environmental impacts of these smaller projects do not warrant the type of joint review process envisioned in the *Impact Assessment Act*.

### **Project List**

Consultations on what will be on the Project list are underway. It is not clear what projects will be on the Project List and what projects will remain with the CER. CEPA is preparing a separate submission for the Project List consultation that will outline clear criteria for what projects would be captured by the new Agency and what projects will remain within the CER. This is a critical question for our industry. Any pipeline project on the Project List will be subjected to the highest possible form of review set out within that legislation – a joint review panel. The process that will be used for projects on the list will make it extremely difficult, costly, timely and create too much risk for any designated linear project to ever proceed.

CEPA's position is that all reviews should be conducted by the CER. However, understanding that the government intends to capture new major pipeline projects, only the very largest of pipeline projects should be on the list. Everything else should remain with the CER as the regulator with decades of lifecycle oversight, expertise and existing processes that have proven effective.

## **Conclusion**

CEPA's submission is founded on the desire to have a healthy natural resource sector providing maximum economic benefits for all Canadians. These economic benefits, in turn, fund the basic necessities for a prosperous and sustainable society including health, education and other social programs that support Canada's high standards of living. To that end, the competitiveness of the natural resource sector is vital for Canada's foreseeable future. Only the most dogmatic and regressive policy advice would suggest the opposite.

CEPA has offered the views of member companies based on their direct experience in investing, building and safely operating the energy infrastructure that supports the Canadian economy and the everyday lives of Canadians. Project proponents and their investors will continue to evaluate the feasibility of developing resource projects in Canada against other investment options. In doing so, they need to understand the processes, what tests and criteria must be met, the length of time to obtain approval, the overall cost and ultimately the risk that the project will be denied or economically unviable at the end of that process.

The Government's June 2017 Discussion Paper suggested a more balanced approach between the views of the more radical environmental elements and industry. Bill C-69 tilts the balance wholly in favour of the environmental perspective, some whose goals are to keep fossil fuels in the ground and never see another pipeline built.

The investment climate for energy development in Canada has already been strongly affected by the regulatory delays of some major pipeline projects. Bill C-69 introduces even more risk and uncertainty. The net effect of the *Impact Assessment Act* is an impractical and unworkable process that will create unmanageable uncertainty and a decision-making framework that will insert broader policy issues squarely into a process that is not equipped to resolve them.

It is CEPA's view that the *Impact Assessment Act*, as currently proposed, will not restore public trust. It will not introduce fair processes that provide predictability and certainty. It will not help to get resources to market in the future. Bill C-69 does not provide a vision as to how it fits into

Canada achieving longer term energy objectives; it doesn't reflect the reality of the importance that oil and gas will continue to play in the global energy mix for the next several decades; and therefore does nothing to help Canada achieve full value of its resources in the world markets.