May 24, 2019

An Open Letter to Senators on Bill C-69

Dear Senator _____,

Indifferent to climate and biodiversity crises. Shills for the oil and gas industry. Anti-democratic.

These will be the public perceptions of Senators if amendments proposed by the Energy, Environment and Natural Resources (ENEV) Committee are passed by the Senate at third reading.

The ENEV Committee is proposing roughly 200 amendments, many of which will damage the ability of the government to gather information about impacts of proposed projects in support of good decision-making. The worst of the amendments would

- Weaken Canada's ability to consider its climate commitments in assessing development projects;
- Limit assessments to studying only those environmental effects that fall within federal jurisdiction;
- Take away assessment of new pipelines and nuclear reactors from the Impact Assessment Agency and hand the assessments back to the regulators who have failed to carry out proper assessments since 2012; and
- Limit public participation in impact assessment processes needed for projects to succeed.

The ENEV Committee has misunderstood the challenges facing federal assessment, many of which are manifest in the controversial reviews of the Trans Mountain and Energy East projects. These challenges largely stem from the Harper government's hastily enacted *Canadian Environmental Assessment Act, 2012* (CEAA 2012) not Bill C-69.

Bill C-69 addresses with some success the failures of CEAA 2012 by establishing a single federal assessment agency, removing legal constraints on public participation, establishing a sound constitutional footing for federal law, and providing more flexibility in legislative timeframes that are impairing federal-provincial collaboration in impact assessment.

The ENEV Committee's proposed amendments would exacerbate CEAA 2012's problems and constrain federal authority to understand the ecological, social and economic impacts to allow sound decision-making. If enacted, these amendments would increase public mistrust of the process, spur litigation, and increase uncertainty for project proponents.

Worst of all, the ENEV Committee seems to have understood its role to be to provide legislated guarantees that major oil and gas industry projects will be approved whatever the harm to climate or nature. The very week that the House of Commons debated the climate emergency, the ENEV Committee proposed amendments that would weaken the ability of federal reviews to assess climate impacts of projects and exempt from assessment high-carbon projects such as in situ oil sands projects. The very month that a United Nations report concluded that extinction looms for one million species of plants and animals due to unsustainable human activities, the ENEV Committee proposed amendments limiting the scope of environmental factors that federal reviews could assess.

The ENEV Committee amendments seem indifferent to the twin global crises of climate change and biodiversity destruction, let alone seize the opportunity that Bill C-69 presents to address these crises.

Nature Canada urges you to vote against the amendments proposed by the ENEV Committee.

Why this open letter?

This open letter provides some history of, and context for, federal environmental assessment law, and addresses key misapprehensions about Bill C-69. The reasons why Bill C-69 as passed by the House of Commons improves on CEAA 2012 and why the ENEV Committee's amendments would make Bill C-69 worse than CEAA 2012 are explained.

I am writing this letter because I have some responsibility for the fact that there is a federal environmental assessment statute. Not as much as Hon. Jean Charest, who orchestrated passage of the *Canadian Environmental Assessment Act* (CEAA) in 1992 on behalf of the Mulroney government, nor as much as Hon. Sheila Copps, who convinced the Chrétien government to approve the regulations needed to bring that statute into force in 1995. But some.

In the late 1980s at Canadian Wildlife Federation, I initiated the successful Rafferty-Alameda judicial review that led to enactment of CEAA, and in the early 1990s directed the team at the Canadian Environmental Assessment Agency that developed the regulations for CEAA. In the early 2000, I advised on CEAA reforms as a consultant to the House of Commons Environment and Sustainable Development Committee. I was an advocate for stronger impact assessment legislation in the years leading to enactment of *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and the past three years leading to parliamentary debates on Bill C-69. On behalf of Nature Canada, I testified on Bill C-69 at the House of Commons Environment and Sustainable Development Committee. I have experienced, professionally, the entire history of federal environmental assessment legislation.

Why require impact assessment as a matter of law?

The impetus for legal requirements to assess the environmental impacts of development stems from the fact that such impacts were—and continue to be--ignored or downplayed in project planning and approval processes. As a result, governments often made and continue to make poor decisions that result in unsustainable development.

The ENEV Committee seems to have labored under the mistaken notion that federal governments pay too little attention to the economic benefits of projects being assessed, and so proposed amendments to redress this perceived imbalance. This is simply erroneous. The driving force for environmental assessment laws since the 1970s has been that governments too often pay attention *exclusively* to

short-term economic benefits of projects, ignoring their longer-term economic, social and ecological costs.

Legal requirements to assess environmental and sustainability impacts of development projects are as needed now as they were in the 1970s when the La Grande hydroelectric and Mackenzie Valley pipeline projects were first proposed. Adverse project impacts on nature and local and Indigenous communities continue to get short shrift.

The ENEV Committee seems to have missed the point that successive federal governments prior to 2012 have understood for decades: legally binding rules are essential if major development projects are to make positive contributions to the lasting wellbeing of Canada and Canadians while avoiding significant adverse environmental effects.

Why require assessment of climate impacts of high-carbon projects?

Given the global climate change crisis, it would seem prudent for responsible governments to make use of whatever tools are available to reduce greenhouse gas emissions and plan for the coming climate chaos. Bill C-69 is one such tool. Assessing high-carbon projects allow the federal government to better predict GHG emission levels from proposed projects, ensure that best available technologies are employed to reduce GHG emissions, and ensure that climate adaptation measures are incorporated into project designs.

Here is a concrete example of how this is not being done. Colacem, an Italian multinational corporation, proposes to construct a cement-for-export plant near the Ottawa River 70 km upwind of Montreal. The cement plant would generate one megatonne in greenhouse gases emissions annually, as well as acid gas pollution that would worsen Montreal's air quality. No environmental assessment is being undertaken by Ontario or Canada, despite a petition from Nature Canada and Ontario and Quebec nature groups that a panel review be commissioned. Neither level of government has carried out an independent, publicly available analysis verifying Colacem's emissions estimates nor an assessment that best-available technologies would be implemented. In the absence of an impact assessment, Canada is in the dark. Cement plants are not proposed to be assessed under Bill C-69.

The ENEV Committee's amendments would make matters worse. The ENEV Committee proposes to amend Bill C-69 to exempt from assessment other high-carbon projects such as in situ oil sands projects, certain oil and gas pipelines, and oil and gas refineries. Further, the ENEV Committee's amendments would enable the exemption of high-carbon and other projects where a regional or strategic assessment has been carried out. Finally, the ENEV Committee's amendments would limit consideration of Canada's climate commitments in project assessments to the results of a strategic assessment of climate.

Why require assessment of other impacts (biodiversity, pollution) of projects?

The ENEV Committee seems to have assumed that current federal and provincial regulatory processes are doing a good job conserving nature and protecting the environment, so that impact assessments under Bill C-69 are not necessary except perhaps for truly huge projects. The evidence entirely contradicts this assumption. Canada produces more GHGs per capita than other OECD countries aside from the U.S. and Australia. Canada protects less of its land for nature than any other developed country. Canada produces more garbage per capita than any other country. Truly, the world needs less Canada.

Even when regulatory agencies are explicitly tasked with assessing a project's effects on biodiversity, too often they foul the nest. According to the Federal Court of Appeal, the National Energy Board's initial review failed to properly assess Trans Mountain's effects on marine species at risk associated with the increased oil tanker traffic in the Salish Sea. This failure is extraordinary, as if the NEB members were not aware of the Exxon Valdez or the Queen of the North: ship disasters that occurred on this same coast. How could the NEB fail to see that the effects of marine oil spills on species at risk such as southern resident orcas and marbled murrelets was a critical assessment issue in the Trans Mountain project?

Apparently unconcerned about the adverse effects of major projects on nature, the ENEV Committee's amendments would boost the powers of federal life-cycle authorities, as elaborated on below, as well as limit assessments to studying only those environmental effects that fall within federal jurisdiction, contrary to the Supreme Court of Canada's *Oldman* decision, and limit consideration of Canada's environmental obligations in project assessments to the results of strategic assessments.

How to improve the timeliness and efficiency of impact assessments?

Bill C-69 includes several measures that would improve the timeliness of impact assessments: abandonment of the "directly affected" test; inclusion of an early planning process; and adjustment of some mandatory timelines. The early planning process provisions were included to improve timeliness and efficiency by establishing an early, coordinated approach to identifying key assessment issues and providing opportunities for focusing assessment work.

The ENEV Committee's amendments would undo or restrict these current Bill C-69 measures, thus leading to greater public skepticism about projects as well as litigation.

The current law, CEAA 2012, has failed to improve the timeliness and efficiency of assessments. The mandatory timelines imposed by CEAA 2012 often conflict with provincial timelines, thereby making the goal of "one project, one assessment" more difficult to achieve. Indeed, CEAA 2012 is at least partially responsible for the crisis of public mistrust in federal assessment processes; prior to 2012, federal and joint review panels enjoyed public trust for the most part, in my experience, and demonstrated that they were fully capable of managing hearing processes even for controversial projects.

The mandatory timelines for hearings in CEAA 2012 led the National Energy Board to refuse interveners the opportunity to ask oral questions in the Trans Mountain hearings (ostensibly to save time). This decision led some interveners to abandon the hearings: what is the point of hearings if interveners are not permitted to ask questions? The CEAA 2012 restrictions on public participation in NEB pipeline hearings to experts and directly affected persons led many more to consider the entire process illegitimate.

That mandatory timelines are counterproductive to timely, efficient assessments is not a new idea. A July 2015 report to the Energy and Mines Ministers Conference in Halifax concluded that mandatory timeliness may "undermine the effectiveness of public and Aboriginal engagement and consultation in the review".

Restricting public participation using the "directly affected" test under CEAA 2012 was also counterproductive in many hearings, leading to more lengthy assessments and delays in approvals due

to public mistrust of the process. The ENEV Committee's amendments authorizing the Agency and Panels to determine what constitutes "meaningful public participation" would again lead to public mistrust of the process.

Why a single federal assessment agency?

The 1992 *Canadian Environmental Assessment Act* recognized numerous federal departments and agencies as "responsible authorities" for environmental assessment purposes; CEAA 2012 essentially reduced the number of responsible authorities to three: the Canadian Environmental Assessment Agency (Agency), the National Energy Board (NEB), and the Canadian Nuclear Safety Commission (CNSC).

The trend to fewer federal assessment bodies was undertaken to achieve greater efficiencies within the federal government overall; numerous assessments were delayed or initiated late on account of internal disagreements among federal departments that had some decision-making responsibility for projects being assessed.

However, the merging of environmental assessment and regulatory processes under CEAA 2012 obscured differences between planning and regulatory functions. The National Energy Board's mismanagement of the reviews of Northern Gateway, Trans Mountain and Energy East projects in particular fueled public mistrust of federal assessment due to this confusion of roles as well as the fundamental lack of competence at the NEB in terms of managing public participation.

Bill C-69 wisely proposes to have only one federal assessment agency, which would achieve greater efficiencies within the federal government in terms of coordinating assessments with provincial and Indigenous governments, while leaving intact the regulatory responsibilities of the Canadian Energy Regulator (CER), CNSC and offshore petroleum boards.

Under Bill C-69, the CER and CNSC would have authority to nominate one representative to sit on a three-person impact assessment panel to be appointed by the Minister of Environment and Climate Change. This provision recognizes that these regulatory agencies have important expertise to bring to the review panel process.

The ENEV amendments would allow the regulatory agencies to control the majority of members of federal assessment panels, resulting in a weakening of the single federal assessment agency approach, thus generating uncertainties and delays.

Conclusion

In conclusion, much is at stake for the Senate as a parliamentary institution in how Senators deliberate and decide on Bill C-69 and the other three environmental bills (Bills C-48, C-55 and C-68) being considered in this session.

In Nature Canada's view, the Senate has a constitutional duty to study legislation and refer any proposed amendments to the House of Commons for reconsideration. But the Senate has no right to block legislation duly passed by the democratically elected House of Commons, especially given that the government's electoral mandate in October 2015 made enactment of these stronger environmental laws a priority. The stated tactic of some Senators to "run out the clock" on Bill C-69 with the

prorogation of Parliament in late June, if successful, would likely have dramatic consequences for the Senate eclipsing any controversy over expenses.

Nature Canada acknowledges that several ENEV Committee amendments have merit and others are unlikely to harm the impact assessment process. But the ENEV Committee's decision to report Bill C-69 back to the Senate with a perhaps unprecedented 200 amendments, with significant conflicts among amendments, serious drafting issues, and few weeks remaining in the parliamentary session, is problematic if not embarrassing for a body that prides itself on sober second thought.

Nature Canada urges the Senate to reject the ENEV Committee's amendments.

Sincerely

Stephen Hazell
Director of Policy and General Counsel

Nature Canada

Established in 1939, Nature Canada is the oldest national conservation charity in Canada. Since that time, Nature Canada has been working to protect habitats and the species that depend on them, as well as connecting Canadians to nature. Nature Canada is the national voice for nature representing 90,000 members and supporters and a network of provincial and local nature organizations across Canada.

Nature Canada has been an active intervener in federal environmental assessment hearings since the 1980s including, most recently, the National Energy Board reviews of the Energy East and Trans Mountain projects, and the Joint Panel Reviews of the Northern Gateway, EnCana Shallow Gas Infill Development, and Mackenzie Gas projects.