

# Proposed Changes to the Regulatory Review and Environmental Assessment Process in Canada: Keeping an Eye Out for Blind Spots

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# Introduction

- Bill C-68 and Bill C-69
- Focus on changes to the CEAA 2012 and NEB Act – Bill C-69
- Decision-making, roles and responsibilities, timelines, process, risks and opportunities

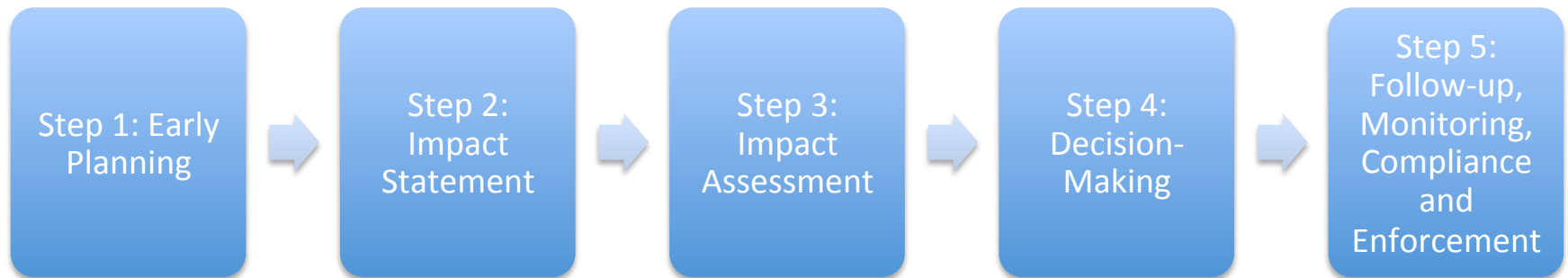
# How Did We Get to Bill C-69?

- 2012: Bill C-38
- 2015 federal election campaign promises
- New Liberal government led by PM Trudeau:
  - ❖ Mandate letter to Minister ECCC – Expert Panel Review of Environmental Assessment Processes
  - ❖ Mandate letter to Minister of NRCan – Expert Panel Review of NEB Modernization
- Interim principles for pipeline reviews (January 2016)
- (Perception of) a crisis of trust

# New Impact Assessment Act

- Replaces the CEA Act, 2012
- New regulations being developed with public and Indigenous input:
  - ❖ on designated projects
  - ❖ on information requirements and timelines
- New Impact Assessment Agency of Canada (IAAC) replaces the CEA Agency
- Minister of ECCC emphasizes this is a new “impact assessment system”

# Impact Assessment System at a Glance



# Role of the IAAC

- A name change for the Canadian Environmental Assessment Agency
- Added responsibility to lead the reviews of designated projects (pre-2012), lead public and Indigenous engagement, cooperate/negotiate with other jurisdictions on reviews
- Becomes the lead agency in federal IA – takes back the responsibility for review of NEB, CNSC projects
- Will be managing a bigger budget to implement new system

# Identifying Designated Projects

- Designated projects are those projects that have the potential to pose a significant risk to areas of the environment that fall under federal jurisdiction
- Minister of ECCC could also elevate a non-designated project to a federal IA review
- Potential for new projects to be added to the list: potash mines, large-scale wind facilities (+ offshore), smaller-scale hydro power facilities, in-situ oil sands (where no provincial carbon cap exists)
- IAAC is taking over the responsibility for review of certain projects currently under NEB, CNSC, etc.

# Factors to be Considered

- IAA includes a consideration of 22 factors, for example:
  - ❖ Alternatives to the project
  - ❖ Extent to which the project contributes to sustainability
  - ❖ Extent to which the project may assist or challenge the GoC in meeting its climate change obligations
  - ❖ The intersection of sex and gender with other identify factors



# Decision-Making on Designated Projects

- Minister of ECCC determines public interest for projects assessed by the Agency
- Cabinet makes public interest determination for projects assessed by a review panel
- Public interest determination would be determined by five factors
- Minister of ECCC can also kill a project if they are of “the opinion” that a designated project would cause “unacceptable effects within federal jurisdiction or unacceptable direct or incidental effects”
- The Agency is not tasked with making decisions or recommendations on whether a project should proceed
- Review Panels are asked to reach conclusions and may make recommendations

# Participation and Engagement

- More opportunities for the public and Indigenous communities to be involved in all stages of the review process
- No more “standing” or “interested party” test
- Expanded participant funding program
- Co-developed engagement plan for Indigenous participation in Step 1 (early planning)
- Panels will retain the right to determine how participation could be achieved

# Timelines

- Step 1: Early Planning = max. 180 days (6 months)
- Step 2: Impact Assessment = as long as it takes a proponent to prepare the assessment report
- Step 3:
  - ❖ Agency-led Assessment = max. 300 days (10 months)
  - ❖ Review Panel = max. 600 days (20 months)
- Step 4:
  - ❖ Decision by Minister = 30 days
  - ❖ Decision by Cabinet = 90 days
- Timelines do not include “time outs” requested by Panels
- Timelines can be extended by the Minister or by Cabinet

# Philosophical Shift

- Shifting from environmental assessment (EA) to impact assessment (IA)
- Shifting the emphasis from significance to sustainability
- Including early planning and engagement stage
- Focusing on integrating climate change considerations throughout all steps of system
- Advocating for “proactive strategic and regional assessment”

# New Canadian Energy Regulator

- Bye-bye NEB, Hello CER!
- Continues to regulate the lifecycle of projects/activities previously within NEB's jurisdiction
- Will continue to advise and report on energy matters
- Will also regulate offshore renewable energy developments (e.g., offshore wind)
- No longer is the lead agency in the review of certain energy transmission projects – now led by the IAAC
- Will retain the responsibility to review non-designated projects

# CER Organization & Governance

- Governance model has been modernized
- No longer a Board that oversees strategy, adjudication, and day-to-day operations of regulator
- New part-time Board of Directors (up to 9) and Chair to provide oversight of governance matters, strategic organizational direction
- New CEO, responsible for daily operations, separate from the Board
- Hearing Commissioners responsible for project reviews and decision-making
- Up to 7 full-time Commissioners
- At least one member of the Board of Directors and one Commissioner must be Indigenous

# Role in Designated Project Reviews

- CER is no longer the lead reviewer in federal IA for designated energy projects
- Activities under CER's jurisdiction that are designated projects will automatically trigger a review panel led by IAAC
- CER will provide expertise and one CER commissioner will be included on the review panel
- CER will lead reviews of non-designated projects – public hearings required for reviews

# Factors to be Considered

- Factors have been expanded and included in legislation, for example:
  - ❖ Environmental effects, including cumulative effects
  - ❖ Health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors
  - ❖ Interests and concerns of Indigenous people
  - ❖ Effects on the rights of Indigenous people pursuant to s. 35 of the *Constitution Act, 1982*



# Timelines

- A report must be submitted to the Minister within the specified time limit – max. 450 days (15 months) after application has been deemed complete
- Timeline is the same as current legislated timeline
- Lead Commissioner may grant “time-outs” and Minister may decide to extend the timeline

# Decision-Making

- The Commission will forward its recommendation on non-designated project to the Cabinet in a report
- Its recommendation will recommend whether or not to approve the project
- Cabinet can accept the recommendation, request reconsideration of the recommendation and/or conditions, or it can order the Commission to reject the application (irrespective of the recommendation)
- No restoration of pre-2012 independence of the regulator

# Indigenous and Public Involvement

- Provides a mechanism for CER to engage the public and Indigenous peoples outside of a formal hearing process
- CER can also establish “committees or programs” to enhance the involvement of Indigenous peoples and groups
- Includes a mechanism to empower Indigenous governing bodies to undertake powers and duties of the CER Act

# Blind Spots

GoC's stated goals:

- ❖ Protect the environment
- ❖ Regain public trust
- ❖ Strengthen the economy
- ❖ Support reconciliation with Indigenous peoples

# Blind Spots con't

- Undermines independence and credibility of regulators
- Increased politicization of Project-related decisions
- Decisions made in a policy vacuum
- Probability of legal challenges based on interpretation of new legislation

# Opportunities

- Clarity on policy framework
- Reconciliation with Indigenous people and communities is an opportunity, not an obstacle
- Opportunities for “new” approaches to impact assessment methodology:
  - ❖ GBA+ analysis
- If there is a bridge to build to better work with Traditional Knowledge, build it
- Opportunity for Indigenous involvement throughout the lifecycle of CER-regulated projects

# Next Steps

- ECCC is currently seeking input on the two proposed regulations (project list, information requirements/timelines) – until June 1, 2018
- Review and analysis of input – Summer 2018
- Consult on regulatory proposals – Fall 2018
- Finalize regulations – early 2019
- Federal election – October 2019

# Interesting Links

- [Bill C-69 First Reading](#)
- [Impact Assessment Regulations - Consultation Papers](#)
- [Expert Panel Report on Environmental Assessment Processes](#)
- [Expert Panel Report on NEB Modernization](#)



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