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Ecojustice Submissions on Bill C-69

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Introduction

Ecojustice appreciates the opportunity to provide suggestions to the Standing Committee on Environment and Sustainable Development to help strengthen Bill C-69. This is a historic opportunity to enact modern laws to protect Canada's biodiversity and natural heritage and to plan for the impacts of climate change.

Ecojustice is a national environmental law charity. Since 1990, we have provided free legal services to Canadian conservation groups and other concerned citizens working to protect the environment. In this capacity, lawyers from Ecojustice appear across the country before courts and tribunals at every level. Lawyers from Ecojustice have frequently intervened in cases before the Supreme Court of Canada and the Federal Court of Canada dealing with the interpretation and application of federal environmental assessment law. We have also represented clients in joint review panel processes for the proposed Enbridge Northern Gateway and Kinder Morgan Trans Mountain Expansion projects, the Imperial Oil Kearl Oil Sands Mine and Shell Jackpine Mine Expansion projects, in litigation resulting from those assessments, and before the Trans Canada Energy East Pipeline NEB Panel. We have also worked on several occasions with the federal and provincial governments to reform environmental assessment laws.

Our comments on Bill C-69 are informed by these circumstances:

(1) Based on Ecojustice's extensive history in the courtroom and our lawyers' expertise in environmental assessment law, Canada has some of the weakest environmental laws in the industrialized world. Currently, we see gaps in what is proposed that will mean, at best, Bill C-69 will merely slow the rate of Canada's environmental degradation. The new laws should clearly reflect an intention to protect the environment and build public trust.

(2) A key weakness of Canada's environmental laws is the lack of clear standards for behavior, resulting in decisions that reflect a bias towards short-term economic and political thinking. Canada's environmental and regulatory laws must constrain government decision-making based on the rule of law, provide transparent and science-based decision-guiding criteria, establish an obligation to provide reasons, and recognize that the most credible decisions are those where the law enables review by the courts in appropriate circumstances. In our experience, laws with well-defined purposes and requirements provide both clear direction to industry and greater certainty in the event that decisions made under them are challenged in court.

This brief contains suggestions that Ecojustice regards as the minimum necessary to address gaps in the bill and strengthen the environmental laws before the Committee.

Proposed Impact Assessment Act ("IAA")

The IAA introduces several welcome changes, such as mandating a new assessment agency to consider a broader set of factors, including contribution to sustainability, Indigenous knowledge and Canada's climate commitments; and increases transparency around environmental decision-making by requiring the Minister and Cabinet to provide reasons for environmental approvals. However, without improvement in several areas, the IAA will fall short of delivering a modernized process that meaningfully protects Canadians and the environment. We request that the Committee direct its attention to the following:

1. **Remove discretionary off-ramps that can block assessments**

The IAA is meant to review a select number of the thousands of projects carried out in Canada. Only those projects with the "most potential for adverse effects in an area of federal jurisdiction"[1] will be designated on the "project list" as subject to assessment under the Act. However, the IAA grants the Agency and Minister wide discretion to allow even those select few projects to go un-assessed. Taking a precautionary approach, a designated project should always trigger an impact assessment unless it becomes clear that it does not implicate federal jurisdiction.

The following discretionary loopholes should be closed:

- Section 16 currently allows the agency to determine that an impact assessment of a designated project is not required, based on any factors it considers relevant. If a project is potentially impactful enough to warrant being on the Project List, then the IA should not be optional. **The section should be amended to allow the Agency to determine that an assessment is not required only if it determines that there is no potential for impacts on areas within federal jurisdiction.**

- Section 7 prohibits a proponent from proceeding with a designated project that will have an effect on a list of areas within federal jurisdiction. As worded, the provision leaves open the possibility that a project will not be submitted for assessment if the proponent believes that there will be no such effects. Such ambiguity is unnecessary, since the fact that a project is designated means that it is likely to have federal impacts. **The section should therefore be amended to clarify that a designated project may not be carried out unless an assessment occurs.** If the Agency subsequently determines that the project will not, in fact, have federal effects, it can halt the assessment.

The "project list" should be significantly expanded to increase the number of listed projects. If the list was more comprehensive, there could be limited situations where flexibility to exempt a project from the IA requirement would be appropriate (such as where a regional impact assessment has been conducted). However, since the status quo is such that very few assessments occur and the government has not yet indicated its intentions with respect to the project list, it is not appropriate at this juncture to allow administrative exemptions from the core assessment requirement.

[1] "Consultation Paper on Approach to Revising the Project List", p. 2.

2. Better public participation through assessment plans

Environmental assessment makes decision-making more accountable and transparent by engaging the public. A recurrent criticism of Canada's environmental assessment legislation is that it does not accord government the "social license" to act. Yet, it has been found that effective public participation has a positive impact on the outcome of, and public faith in, environmental assessment, including where project approvals were issued.[2] Meaningful engagement of community members and stakeholders in the assessment requires an early opportunity to shape the IA process. Decisions on matters such as scoping, timelines, and additional assessment criteria should reflect the particular concerns and priorities of affected people.

In order to meaningfully engage low-income populations, Indigenous communities, and other socially marginalized groups, the Minister, Agency, and proponents may need to consider adaptive and innovative approaches to public outreach (i.e. disseminating relevant information) and participation given that these populations often face different and greater barriers to engagement.[3]

While the IAA helpfully introduces an early planning phase to assessments, the outcome of that process is not clear. We therefore recommend that, following the early engagement process, the Agency issue an Assessment Plan based on public input received during that process. The Assessment Plan should cover:

- The scope of the review, including the factors to be considered;
- The plan for collecting and analyzing information, including what information must be provided, who is responsible for providing that information, and who may be appointed to review the information;
- The opportunities that will be provided for meaningful public participation during the assessment;
- Whether Indigenous communities or vulnerable populations are present and could be impacted by the proposed project;
- Any collaboration agreement that the Minister has entered into with any provincial or Indigenous jurisdiction;
- Suggested timelines for the assessment;
- Criteria to guide the Minister or Cabinet's, as the case may be, determination under section 63;
- Any environmental, social, economic and health values, concerns, priorities and plans; and
- Any other information relevant to the assessment.

Section 22(2) regarding scoping should be consequentially amended to indicate that the scoping decision will be guided by the Assessment Plan. Section 28(2) regarding timelines should refer to those established by the Agency, if different from the legislated default.

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[2] Rutherford, Susan & Campbell, Karen, *Time Well Spent? A Survey of Public Participation in Federal Environmental Assessment Panels*, West Coast Environmental Law, February 2004, at: http://wcel.org/sites/default/files/publications/ASurveyofPublicParticipation.pdf

[3] See, e.g. "Promising Practices for EJ Methodologies in NEPA Reviews: Report of the Federal Interagency Working Group on Environmental Justice & NEPA Committee" (March 2016), available online: https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.

3. Environmental Justice

The social, cultural, and economic impacts of a project are key considerations in any Impact Assessment. In Canada, low-income populations, Indigenous communities, and other socially marginalized groups are disproportionately exposed to environmental hazards while also disproportionately lacking access to environmental benefits. Indeed, as recently recognized by the UN Special Rapporteur on Human Rights and the Environment, states such as Canada have an obligation to protect against environmental harm that contributes to discrimination, and to require prior assessment of the environmental impacts of proposed projects and policies that includes consideration of their potential effects on the enjoyment of human rights, including by ensuring proposals comply with obligations for non-discrimination and obligations owed to those vulnerable to environmental harm.[4]

While section 22 of the IAA incorporates some social and economic concerns, including the intersection of sex and gender with other identity factors, consideration of the environmental justice implications of projects is missing. Such an assessment would determine if there is a potential for any disproportionately high and adverse human health or environmental effects to low-income, Indigenous, or vulnerable populations.

Environmental justice considerations are already incorporated into environmental decision-making in the United States, including in the *National Environmental Policy Act*. Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[5] was issued in 1994. It required the government agencies to create a policy that "identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[6] This led to a number of policies, importantly the Environmental Protection Agency's "Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses",[7] which sets out a mechanism for including environmental justice in environmental assessment.

To incorporate environmental justice considerations into the IAA, the following should be added:

- Definitions of "environmental justice" and "vulnerable populations"[8];

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[4] "Framework Principles on Human Rights and the Environment" (March 2018), available online: http://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf.

[5] Executive Order 12898, online: https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf

[6] *Ibid* at s 1-103(a).

[7] April 1998, online: https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf. See also note 3 for promising practices incorporating environmental justice considerations in environmental assessments.

[8] "environmental justice" means the equitable distribution of environmental hazards and benefits in Canadian society. It includes fair treatment and meaningful involvement of people regardless of characteristics such as race, colour, national origin, income, or membership in a historically disadvantaged community with respect to the development, implementation, and enforcement of this Act and related regulations and policies.

"vulnerable population" means persons who are subject to disproportionate human health or environmental impacts from a designated project due to their status as:

(a) Infants, children, or adolescents;
(b) Women;
(c) Seniors;
(d) Individuals with a pre=existing medical condition;
(e) Workers exposed to health risks as a result of a designated project; or
(f) Persons who are socially vulnerable due to their:

- A purpose of the Act that is to promote environmental justice by ensuring designated projects do not have a disproportionate negative impacts on Indigenous peoples or on vulnerable populations on the basis of grounds including race, colour, national origin, and income;
- A new consideration under section 22 of whether the area impacted by the project is home to low-income, racialized, or other vulnerable populations and whether the human health or environmental effects of project, including its cumulative effects, may be disproportionately high and adverse with respect to these populations; and
- A decision-making criterion in section 63 concerning the extent to which the designated project contributes to environmental justice.

4. Mandate upstream and downstream climate considerations

Section 22 crucially provides that assessments must take into account "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." It is important to clarify that consideration of climate impacts should include the "lifecycle" emissions of the project — that is, upstream, direct, and downstream emissions. Lifecycle analysis is the guidance for assessing federal actions in the United States.[9] In order to meet Canada's commitment under the Paris Agreement to reducing our greenhouse gas ("GHG") emissions to 30 per cent below 2005 levels by 2030, Canada must also assess lifecycle emissions of designated projects under the IAA, over the lifespan of the project.

The government's approval of the Kinder Morgan Trans Mountain pipeline expansion project (the "TM Project") provides an example of how more still needs to be done under the IAA to ensure that GHG considerations are mandatory and meaningful factors in project decisions. The original TM Project review process excluded consideration of upstream and downstream GHG emissions.[10] However, in accordance with the federal government's interim EA principles, Environment and Climate Change Canada released a GHG assessment for the project, estimating that it would result in an upstream increase of up to 15 megatonnes of CO2 equivalent ("MtCO2e") per year.[11] The downstream emissions of the TM Project were never assessed but are estimated to be 65 MtCO2e per year[12], equivalent to 8 to 9 per cent of Canada's entire annual GHG emissions.[13] Such downstream emissions should be considered in IAs because our fossil fuel exports may well

a. Income;
b. Race;
c. Colour
d. National origin;
e. Or geographic location.

[9] Goldfuss, Christina, "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" (1 August 2016) at 1.
[10] Canada, National Energy Board, Trans Mountain Expansion Project Report, OH-001-2014 (Calgary: NEB, 2016).
[11] Environment and Climate Change Canada, Trans Mountain Pipeline ULC – Trans Mountain Expansion Project: Review of Related Upstream Greenhouse Gas Emissions Estimates (Ottawa: ECCC, 2016) at 5.
[12] Marc Lee, "Pipelines vs Paris: Canada's climate conundrum" (22 April 2016) *Canadian Centre for Policy Alternatives Behind the Numbers* (blog), online: <http://behindthenumbers.ca/2016/04/22/pipelines-vs-paris-canadas-climate-conundrum/>.
[13] Environment and Climate Change Canada, Canadian Environmental Sustainability Indicators – Greenhouse Gas Emissions (Ottawa: ECCC, 2016) at 5 for finding that Canada's GHG emissions in 2014 were 732 MtCO2e.

result in greater emissions than those domestically burned, and because climate change is a global issue transcending national borders.

To incorporate lifecycle assessments into the IAA, section 22(1)(i) should be amended to require consideration of the extent to which the lifecycle and lifespan direct, indirect and cumulative effects of the designated project hinder or contribute to the Government of Canada's ability to meet its international and national environmental, climate change and biodiversity obligations and commitments.

5. <u>Sustainability and "bottom lines" in decision-making</u>

Section 63 mandates that the Ministers determination on the outcome of an assessment "must include a consideration" of several factors, including:

- The extent to which the designated project contributes to sustainability;
- The extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse; and
- 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.

These criteria are all essential and welcome additions. However, Ecojustice finds the provision drafted in such a way as to provide no enforceable standard – "must consider" has never been interpreted by our courts to mean "must meet this standard". There is no legislative guidance on the way in which these factors must be considered, or the kinds of outcomes that are acceptable as a result of that consideration. We therefore propose a "floor" for each of these criteria that will have the effect of placing an outside boundary on Ministerial or Cabinet discretion, and communicate to all participants in IA the minimum expectations for the results of assessments. The "floors" provide that the decision maker shall not determine that effects indicated in an assessment report are in the public interest if they:

a) Will result in a significant adverse environmental effect, unless the alternative is a more significant adverse environmental effect.
   Rationale: The Minister or GIC should be able to identify an adverse effect (on the environment, health, social or economic conditions) that is prevented through the authorization of another, less severe, adverse effect. This increases accountability and transparency in decision-making.
b) Will result in the crossing of an ecological threshold
   Rationale: prevents decisions from having catastrophic effects on ecosystems. Environmental thresholds can be considered as part of the assessment, or defined in regulations and guidance. Note that mitigation measures (63(c)) may prevent an effect from causing an ecological threshold to be crossed.
c) Are likely to significantly hinder Canada's ability to meet its international or national environmental, climate change or biodiversity commitments or obligations
   Rationale: prevents breaches of Canada's international obligations commitments.
d) Are inconsistent with the outcomes of an regional or strategic assessment

Rationale: Ensures that regional and strategic assessments are applied effectively (see below).

6. Sustainability assessments of federal projects

The removal of the "significant adverse environmental effects" test and its replacement with sustainability assessment is a welcome change. However, the Duties of Certain Authorities in Relation to Projects provisions in ss 81 to 91 of the IAA continue to use the old significance test, which is unacceptable. These provisions essentially operate as a screening or lower level assessment for projects and activities that are not captured on the "project list." Since the list is likely to capture only a small number of projects, it is important that these less rigorous reviews also consider the sustainability criteria and not simply use the flawed "significant adverse environmental effects" test. It is contrary to the IAA's goal of "fostering sustainability" that federal reviews are subject to different considerations than designated projects.

In addition, federal assessments should capture not only projects on federal lands, but those with federal proponents or that are federally funded. Note that projects or classes of projects deemed to have insignificant effects may be exempted from assessment under section 88 – similar to the "exclusion list" under the 1992 *Canadian Environmental Assessment Act*. However, we recommend that such exclusions be made by the Minister or Agency to ensure cumulative of excluded projects are fully taken into account.

Finally, federal assessment should utilize the expertise of the newly created Impact Assessment Agency. This will ensure that assessments of federal projects are independent and are seen to be independent.

We therefore recommend that the Agency be mandated to perform screening-type assessments of non-designated projects on federal lands, with a federal proponent, or that are federally funded, subject to designated exclusions. These assessments should be carried out with reference to the decision criteria in section 63 of the IAA.

7. Mandated regional and strategic assessments

Regional and strategic assessments can give clear directions to the public and industry on what is and is not acceptable in future project specific assessments. This will reduce the controversies that occur at the project level, where specific projects are often used by the public as surrogates for broader regional or policy concerns. Unfortunately, the IAA does little to ensure that regional and strategic assessments will actually be conducted, leaving their initiation entirely to the discretion of the Minister.

To remedy this gap, the IAA should create a schedule identifying regions for which regional assessments must be carried out by the Minister within a period of years and a second schedule identifying the subjects for which strategic assessments must be carried out by the Minister within a period of years. It should also authorize the Expert Committee created under section 157 to recommend regions and subjects to be included on the respective schedules, and require the Minister to respond with reasons to the Expert Committee's recommendation within a given number of months. Finally, the IAA should establish a funding program to facilitate the conduct of regional and strategic assessments and the participation of federal departments and provincial, territorial and Indigenous governments in these assessments.

8. Opportunities for review and appeal

The courts are the proper arbiters of when an assessment report is legally compliant and whether the decision conforms to the evidence before the decision maker. Attempting to grapple with the current unclear legislation, the Federal Court of Appeal removed the courts from that role with regard to the *Canadian Environmental Assessment Act, 2012* regime.[14] This was a stark change from 20 years of previous jurisprudence, which required a legally prepared environmental assessment report as a precondition to final decision making.[15] That aspect of the previous law was sound.

We recommend that the IAA include provisions permitting judicial review of the assessment report and appeal of the "public interest" determination, as follows:

> 28(4.1) Anyone with a genuine interest in the report, or whom the court considers to be an appropriate party, may, within 60 days of the day the report is posted on the Internet site, apply to the Federal Court to review the report on any ground or grounds set out in section 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.
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> 55(2) Anyone with a genuine interest in the review panel report, or whom the court considers to be an appropriate party, may, within 60 days of the day the report is posted on the Internet site, apply to the Federal Court to review the report on any ground or grounds set out in section 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.
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> 65.1(1) An appeal from a determination made under section 60(1)(a) on any question of law or jurisdiction lies to the Federal Court.
>
> 65.1(2) An appeal from a determination made under section 62 on any question of law or jurisdiction lies to the Federal Court of Appeal, with leave of that court.
>
> 65.1(3) An appeal under subsections (1) or (2) may be brought by anyone directly affected by the determination, by anyone with a genuine interest in the matter, or by anyone that the Court, in its discretion, considers an appropriate party.

These provisions accord the proper degree of deference to panel reviews and Cabinet by requiring leave of the Federal Court of Appeal in those instances. Directly affected persons have standing, as would those the court considers to be proper parties, such as those with public interest standing. [16]

[14] See *Gitxaala Nation v Her Majesty the Queen*, 2016 FCA 187, at para 124.
[15] See, for example, *Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans) (CA)*, [1999] 1 FC 483 at paras 15-19; *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 at paras 14, 73, 79; *Imperial Oil Resources Ventures Ltd v Canada (Minister of Fisheries and Oceans)*, 2008 FC 598 at para 6; *Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 39; *Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520 at paras 1, 17; *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 at para 281.
[16] See *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524.

Proposed Canadian Energy Regulator Act ("CERA")

1. Add climate considerations

The CERA makes no mention of "climate" as a factor to be considered for pipelines which are not designated projects under the IAA, except by inference in a requirement for the regulator to consider "environmental agreements entered into by the Government of Canada" (s.183(2)(j) and s.262(2)(f)). That is major oversight considering the massive climate implications of projects regulated under the CERA.

We recommend the following, also set out in a joint submission to the Committee dated April 5, 2018:

- Add a clause to s.6(b) indicating that one of the purposes of the Act is "to contribute to maintaining a healthy and stable climate for future generations."
- Amend s.186(1) to require that decisions by the Governor in Council be **based on** a set of factors identical to those in s.63 of the *Impact Assessment Act*, and amend the reasons for decision in s.186(2) of the *Canadian Energy Regulator Act* to require reasons **based on** those factors. Make similar amendments in s.262 (power lines).
- Amend the factors to consider in s.183(2)(j) to include "the extent to which the project in comparison with reasonable alternatives would contribute to sustainability"; and to replace "(j) environmental agreements entered into by the Government of Canada" with " (j) the extent to which the designated project, **including lifecycle and lifespan direct, indirect and cumulative effects**, hinder or contribute to the Government of Canada's ability to meet its **international and national** environmental, **climate change and biodiversity** obligations and commitments."

2. Implement robust follow up and compliance monitoring

Often, project approval following environmental assessment is complemented by a list of direct activities that must accompany project development to ensure the intended environmental outcomes. Although addressed somewhat in CEAA 2012, for the most part there is little diligence to ensure compliance. The CERA should require proponents to provide annual reports on the status and results of follow-up programs, which should then be made publicly available. The Commission should evaluate the efficacy of follow-up programs and make this information publicly available, and it should report on compliance with conditions of approval.

We recommend that section 187, which mandates compliance with the Act and orders made under it, be amended to include a reporting requirement. This will provide the public with important information about the ongoing safety of projects, and will enable the Commission to aggregate and report on compliance data.

3. Extend the limitation period for reviews

Judicial review is necessary as a last resort to ensure that environmental assessments are conducted in accordance with all applicable mandatory statutory requirements, including the CERA, the IAA and the federal *Species at Risk Act*. Environmental assessment and project approval often reflects exceptional complexity. In view of that complexity, a 90-day deadline for bringing an application for judicial review should

apply instead of the expedited 15- day deadline, which was introduced in the 2012 amendments to the *National Energy Board Act* and is left in place in section 188(2)(a)) of CERA.

For non-designated projects, the special requirement to seek leave to apply for judicial review for a decision to approve a CER-regulated pipeline, also introduced in the 2012 amendments to the NEB Act, should be eliminated. This added step adds unnecessary costs for all parties.

Proposed Canadian Navigable Waters Act ("CNWA")

For more than 140 years, protecting the right of navigation and navigable waters was central to federal environmental governance. The 2012 changes eroded that legacy of protection when they transformed the *Navigable Waters Protection Act* into the *Navigation Protection Act* ("NPA") eliminating protection for the vast majority of Canadian waterways. The government promised to review the previous government's changes to the *Navigable Waters Protection Act* in order to restore lost protections and incorporate modern safeguards. In our assessment, the proposed *Navigable Waters Act* generally fails to restore previous protections and least meets the government's commitments.

Before presenting our recommendations, it is useful to describe the pre-2012 regime. Prior to 2012, Canada's environmental laws clearly required environmental impacts to be considered prior to any federal government approval on navigable waters. The requirement that the government consider environmental impacts in decisions concerning navigation was eliminated in Bill C-38, through amendments to the *Canadian Environmental Assessment Act*. Later in 2012, Bill C-45 limited the requirement for the federal government to approve development on navigable waters, so that it only applied to the rivers, lakes and oceans that appear on a list or schedule – which initially included just 159 rivers and lakes (plus three oceans). This was a loss of key legal protections for the vast majority of Canada's estimated 2.5 million navigable rivers and lakes.

1. Recommendations to ensure restoration of protections for waters previously protected

The current proposal for classifying waters that will receive protection under the CNWA falls far short of restoring protections for the vast majority of water bodies protected prior to 2012. There are two particular problems with the current proposal. First, s. 47 of Bill C-69 limits protection to waterbodies where there is a "reasonable likelihood" that the waterbody will be used "during the year" for certain purposes. These limitations unduly exclude waterbodies that were traditionally used for navigation but may not be used at the present time and prevents consideration of the possible use of waterbodies by vessels in the future, particularly as climatic patterns shift. Second, Bill C-69 imposes further limitations based on the nature of the property surrounding the waterbodies. This again provides or exempts protections based on a simple point in time review, rather than possible future land holdings (particularly the settlement of land claims in places like British Columbia). The current proposal seems to be crafted out of administrative and political expediency rather than anything aimed at truly protecting navigation.

Because of these shortcomings**, we recommend a return to the pre-2012 test for navigability, which was actually aimed at protecting all navigable waters**.

In the alternative, **Bill C-69 should be amended to replace the words "reasonable likelihood" with "possibility". The further limitations based on the surrounding lands should be abandoned, or limited only to those waterbodies that are fully contained on privately owned land and not hydrologically connected to any other water bodies that are part of a system that contains navigable waters**.

2. **Environmental considerations should inform decision-making under the CNWA**

The proposed CNWA is notable for the complete absence of any provisions that explicitly protect the environment. While it is possible that some of the general discretionary powers would allow the Minister to request or consider the environment, it is also possible that an applicant for an approval could challenge such an exercise of discretion as being outside the scope of the Act. **Thus, we recommend that proposed s. 7(7) be amended to specify that environmental impacts of proposed projects be considered under the Act.**

3. **The CWNA should include explicit linkages with the IAA**

One of the strongest environmental protections prior to the 2012 revisions was the requirement for an environmental assessment prior to the issuance of certain approvals under the NWPA. Bill C-69 does not adequately describe the government's intentions for impact assessments which would allow an informed analysis of the bill.

Ecojustice does not propose a return to environmental or impact assessments for all approvals under the CNWA, **but at a minimum, all projects that are not deemed "minor" should be subject so some level of assessment under the IAA. Further, there should be a discretionary power for the Minister to require an impact assessment where assessments are not mandatory.**

In proposing these, amendments, it is important to note that impacts on navigation are not always correlated with impacts on the environment. Projects may have minimal or positive impacts for navigation, but environmental impacts (such as dredging). Further, as the IAA contains mechanisms for First Nations consultation, increased linkages with the IAA would help fulfill the government's constitutional obligations.

4. **The continuation of the schedule of significant waters while adding a three-tiered classification for projects is needlessly complex and should be abandoned**

The retention of the schedule for protected waters while adding a classification system creating three tiers of projects appears to be an attempted merger of two incompatible systems.

As explained above, **Ecojustice supports an approach that protects all navigable waters and recommend that the schedule of waters be abandoned.**

The proposal to subject different types of projects to differing levels of scrutiny is more defensible, but only if there is consideration of environmental values and sufficient discretion for the Minister to require and impact assessment where appropriate.