Assembly of First Nations

Submission to the Standing

Committee on Environment and Sustainable Development

Study on *Impact Assessment Act, Canadian Energy Regulator, and Navigable Waters Act* (Bill C-69)

April 15, 2018

The summary, issues, concerns and priorities presented in this brief reflect those of passed resolutions, technical sessions, submissions to the EA and NEB Expert Panel, submissions to Standing Committees, and other relevant work. It does not necessarily reflect the official responses from the respective Provincial Territorial Organizations (PTOs), Tribal Councils, First Nations, citizens, women, elders and youth.

Introduction

The Assembly of First Nations (AFN) appreciates the opportunity to provide a submission to the House of Commons Standing Committee for its study of Bill C-69, as it relates to the *Impact Assessment Act*, *Canadian Energy Regulator Act*, and the *Canadian Navigable Waters Act.*

In this submission, AFN is proposing a group of amendments that are critical to the operationalization of the "nation-to-nation" relationship, as well as the fulfillment of the Crown's obligation to protect and uphold First Nations' inherent and constitutionally-protected rights. Specifically, the AFN recommends the Committee consider amendments on:

1. **UN Declaration on the Rights of Indigenous Peoples (UN Declaration)**: reference the UN Declaration and require the Act to be in compliance with the Declaration's minimum standards.
2. **Protecting First Nations' inherent and constitutionally-protected rights**: The proposed Act does not sufficiently protect or uphold the s.35 rights of First Nations, nor does it recognize the potential for First Nations' inherent rights.
3. **Legislating Joint Decision-Making**: enable First Nations to make "joint-decisions" in all designated projects, including Agency-led, Review Panels, and Federal Lands. This includes the support and recognition of First Nation led assessments.
4. **Reducing excessive Ministerial Discretion**: ensure that federal discretion does not override inherent and constitutionally protected rights.
5. **Strengthening the protection of Indigenous Knowledge Systems**: Include protections / confidentiality provisions that enable First Nations to protect their "traditional knowledge" from disclosure without consent.

These amendments, the intent, and their supporting rationale, are outlined in further detail in this submission. Given the breadth of the Acts, recommendations specific to each of the Acts are organized in "Chapters". First Nations maintain there must be legislative language that not only recognizes but respects First Nations inherent rights and jurisdiction. This submission is focused on legislative amendments.

Assembly of First Nations

The Assembly of First Nations (AFN) is the national, political organization of First Nation governments and their citizens, including those living on and off reserve. Every Chief in Canada is entitled to be a member of the Assembly, and the National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens. The AFN has 634 member nations within its assembly. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action, and to advance the aspirations of First Nations.

The AFN supports First Nations by coordinating, facilitating and advocating for policy change, while the leaders of this change are the First Nations themselves. Chiefs, and the First Nations they represent, must be an integral part of meeting the challenge of sustainable, transformative policy change.

The AFN is mandated by Resolutions (86/ 2016, 20/ 2017, 73/ 2017) to participate in this review. Specifically, Resolutions 86/ 2016 and 20/ 2017, outline the Chiefs-in-Assembly's position with respect to the environmental and regulatory reviews:

a. Broadening the definition of "Environmental Effects."
b. Lengthening timelines for First Nations-specific consultation.
c. Increasing opportunities for First Nations consultation within environmental processes.
d. Engaging First Nations at the strategic policy level.
e. Ensure adequate funding for First Nation engagement and consultation in all federal and provincial/territorial environmental assessment review processes.
f. Ensure the inherent rights, Title and jurisdiction of First Nations as governing authorities are recognized, including their decision- making powers using a " one assessment" approach.
g. Respect the free, prior, and informed consent standard throughout a full and honourable joint process.
h. Rights-based collaboration and jurisdiction - based engagement with First Nations in decision- making.
i. Mandatory inclusion of traditional knowledge, when shared, and following the OCAP® (ownership, control, access and possession) principles.
j. Ensure adequate core capacity arrangements.
k. Recognize and support First Nation led assessments.

The input First Nations across the country provided into this submission demonstrates how concerned First Nations are with the operation and functioning of Canada's environmental laws. [1] Getting this review right is an essential step on the journey towards reconciliation.

[1] For a concise description of issues and challenges that First Nations face in the current environmental assessment regime, please refer to Squamish's submission to the Environmental Assessment (EA) Expert Panel.

Contents

Context

This submission will consider what the legislation *actually says and requires*, not what the current government describes as the "spirit" of the Act which it will implement through policy. In its current form, the Act relies on a broad number of discretionary powers, including, but not limited to, determining: whether a project is required, what the scope of factors to be considered is, when substitution of "equivalent" provincial processes will occur, and conditions (to add or remove) in an Impact Assessment Act (IAA) decision statement.[2] For First Nations, laws must be written in anticipation of future governments that may be hostile to our rights, jurisdiction, and authority. In this context, legislation must constrain and/or require those governments to respect what has been written in the legislation.

It must be noted, at the outset, that Bill C-69 does not withstand an analysis using the *10 Principles Respecting the Government of Canada's Relationship With Indigenous Peoples* announced by the Federal Government. This recognizes that "*Indigenous nations are self-determining, self-governing, increasingly self-sufficient, and rightfully aspire to no longer be marginalized, regulated, and administered under the Indian Act and similar instruments."* We reiterate that this realization must permeate all of Canada's engagement with First Nations, and it is in this vein that the following considerations are being advanced with respect to the *Impact Assessment Act (IAA)*, the *Canadian Energy Regulator Act (CERA)*, and the *Canadian Navigable Waters Act (CNWA).*

[2] For more examples of the discretionary powers, please refer to the analysis by CELA.

Requested Amendments

Theme 1: The United Nations' Declaration on the Rights of Indigenous Peoples (UN Declaration) as a Guiding Reconciliation Framework

Problem
Despite the Prime Minister, and his cabinet Ministers' repeatedly confirming that the government has endorsed the *UN Declaration* "without qualification", the IAA, CERA, and CNWA are silent on any mention of the *UN Declaration.* In light of Call-to-Action #43 of the Truth and Reconciliation Commission[3], the UN Declaration can actually help provide the framing context *for* resource-based projects and sustainable forms of development, and the new environmental regime.

Background
In May 2016, Canada announced its full and unqualified support for the UN Declaration on the Rights of Indigenous Peoples. First adopted by the UN General Assembly in 2007, the UN Declaration affirms Indigenous peoples' rights that "*constitute the minimum standards for the survival, dignity, and well-being of the Indigenous Peoples of the World*". This means that inclusion of the UN Declaration must be understood as the floor, not the ceiling, with which to begin crafting a process that respects and reaffirms the inherent or pre-existing collective human rights of First Nations' as well as the human rights of First Nation individuals.

The Environmental Assessment (EA) Expert Panel recommended a process for impact assessment that incorporated the UN Declaration throughout: from treating Indigenous Peoples as another order of government, to including Indigenous Peoples in decision-making at all stages of impact assessment in accordance with their own laws and customs, to imposing a requirement that Indigenous Peoples' consent must be sought before a project could be approved.

Recommendation
The AFN recommends that the IAA, CERA, and CNWA are all amended to reflect and respect the minimum standards outlined in the UN Declaration as a essential ~~f~~framework for the legislation, and eventual implementation of several procedural guarantees such as free, prior and informed consent, within these Acts. This government's repeated affirmations of its unqualified endorsement of the UN Declaration and the Prime Minister's affirmation before the UN General Assembly that the Declaration is not "merely aspirational" require this.

Suggested Amendments

To address these issues, the following provisions should be added**:**

- **Preamble** Whereas the Government of Canada has "adopted, without qualification" the United Nations Declaration on the Rights of Indigenous People.

- **Preamble** Whereas, Canada is committed to fully implement Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples, that Indigenous peoples have the right to

[3] Call-to-Action #43 of the TRC calls on "[F]ederal, provincial, territorial, and municipal governments to fully adopt and implement the UN Declaration as the framework for reconciliation

maintain and strengthen their distinctive spiritual relationship with their traditionally owned and otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

- **Preamble** Whereas the Government of Canada is committed to achieving reconciliation with Indigenous peoples through a legislative framework that recognizes their societies, and legal traditions, consistent with universal declarations of human rights and the core international human rights instruments adopted by Canada (for example, the UN Declaration)

- **Purpose (f)** to promote *information-sharing, protection of sensitive information*, communication and cooperation with Indigenous peoples of Canada with respect to impact assessment.

Add a section on *Duty of Minister to IAA, CERA, and CNWA*, stating:

- **IAA**
  1. When making a decision or creating regulations under this Act, the Minister, Governor in Council, the Agency, and a Committee under IAA shall do so in a manner consistent with the protection of the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.
  2. The Minister, Governor in Council, the Agency, and a Committee under IAA as the case may be] shall ensure that the Act is applied consistently with the United Nations Declaration on the Rights of Indigenous Peoples.

- **CERA**
  1. When making a decision or creating regulations under this Act, the Minister, Governor in Council, the Regulator, and Commission shall do so in a manner consistent with the protection of the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.
  2. The Minister, Governor in Council, the Regulator, and Commission as the case may be shall ensure that the Act is applied consistently with the United Nations Declaration on the Rights of Indigenous Peoples..

- **CNWA**
  1. When making a decision or creating regulations under this Act, the Minister, and Governor in Council shall do so in a manner consistent with the protection of the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.
  2. The Minister and Governor in Council, as the case may be shall ensure that the Act is applied consistently with the United Nations Declaration on the Rights of Indigenous Peoples.

Theme 2: Protections of First Nations' inherent and constitutionally-protected rights

Problem

The sections in Bill C-69, for example IAA: ss. 9(2), 16(1)(c), 22(1)(c), 84 (a) and CERA: ss. 56(1), 183(2)(e), codifying how to "take into account" s.35 rights under the Constitution are not sufficient to protect the s.35 rights of First Nations. Further, the current wording of "consider adverse impact" does not even meet the requirements of the constitutional duties in *Sparrow* or *Haida*. There is no requirement or duty under the Act to comply with the test in *Sparrow* for minimal impairment or justification for proven rights or the test under *Haida* to accommodate impacts on asserted rights. Finally, the inclusion of non-derogation clauses in the legislation (s. 3 of the IAA and CERA and s. 2.2 of CNWA) is likely to be neutral in effect, given the broad nature of those clauses.

Background

First Nations are rights holders, who hold inherent and constitutionally-protected rights set out in their own governance and legal systems, as well as under *Section 35* of the Constitution. In practice, this means that First Nations rights cannot be undermined by colonial interpretation of their rights (i.e. s.35). Instead, First Nations must first interpret and describe their inherent rights, grounded in Indigenous law, Indigenous legal traditions, and customary law. These legal orders, which lay the foundation for First Nations' concepts of self-determination and sovereignty, are essential to starting true "Nation-to-Nation" dialogues and expressing the respect for our rights and title.

For the millennia, prior to contact with European explorers, First Nations exercised control over their territories through their own governance authorities. These governance authorities provided First Nations the ability to enter into international relationships forming the legal basis for them to enter Treaties with foreign Nations, which in turn formed the very basis of Canada and its claims to sovereignty.[4] As a result, the notion of Canada's sovereignty and territorial integrity fundamentally rest upon the sovereignty of First Nations. The right to self-determination is rooted in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, which articulated that "*all peoples have the right of determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development*".[5]

The Supreme Court of Canada, in *Tsilhqot'in Nation v. British Columbia,* articulated that Aboriginal title holders had the full range of landowner rights, unconstrained by pre-sovereignty uses:

> *Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.*[6]

[4] *Haida Nation v British Coumbia*, 2004.
[5] Morales, S. (2017). Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult. *UN DECLARATION Implementation: Braiding International, Domestic and Indigenous Law, Special Report.* Retrieved from: https://www.cigionline.org/sites/default/files/documents/UN DECLARATION%20Implementation%20Special%20Report%20WEB.pdf
[6] [2014] 2 SCR 257 at para. 75.

Therefore, an Aboriginal title holder, even those Indigenous landowners that have a treaty with Canada, have significant and modern rights to be co-decision-makers in collaborative impact assessment regimes.

Recommendation
The AFN recommends that the provisions in all three Acts dealing with s.35 rights be strengthened to ensure that the Minister and Governor-in-Council must uphold or protect s.35 rights in decision-making under the Act and where making regulations or orders under the Act. Further, the AFN recommends that the current definition of rights be expanded to include the inherent rights that First Nations hold, as well as those recognized and affirmed in international agreements.

Suggested Amendments
To address these issues, the following provisions should be strengthened and /or added**:**

- Definitions:
  - ***Indigenous governing body*** means a council, government or other entity that is authorized to act on behalf of *Indigenous Peoples* that holds rights, *including those* recognized and affirmed by s.35 of the *Constitution Act, 1982.*

    "First Nation Governing Authority" means a First Nations' government, created through traditional, customary, or constitutional processes, that is responsible for managing and directing the affairs of Indigenous peoples and their activities, including the powers, duties, and functions in relation to impact assessment, and that has been described as a First Nation Governing Authority in an agreement with the Agency, or the Minister for the purposes of this Act.

  - ***Indigenous Peoples of Canada*** has the meaning assigned by the definition Aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982***.**

    - **ADD:** For greater certainty, Indigenous peoples in this act have different rights and jurisdictional responsibilities. A proper definition, which respects each of the three Aboriginal peoples, will have different rights because of their prior ownership of their lands, their pre-existing laws and sovereignty, and pre-existing exclusive control over resources and waters.

Non-derogation clause (formally the *Rights of Indigenous Peoples)* for greater certainty, this Act shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under s.35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them**.**

With a non-derogation clause alone, a court is very unlikely to interpret the Act as preventing provisions in the Act from negatively impacting or infringing s.35 rights. Canada has described the purpose of non-derogation clauses in legislation as simply a reminder that s.35 rights exist. [7]

- 6 (g) to *protect* the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act.

[7] "Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights", Final Report of the Standing Senate Committee on Legal and Constitutional Affairs (December 2007) at p. 14.

- **Add**: to uphold the honour of the Crown, including the important responsibilities of the federal government to implement and observe treaties across Canada, and recognize early Crown commitments to Indigenous societies that their customs and legal traditions will be protected by the governments in Canada

- **IAA 155 (j): *protect*** the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act.

Sections requiring decision-maker to "consider" or "take into account" "any adverse impact" on s.35 rights should be amended to include a clause requiring consideration s.35 and UN DECLARATION, IAA s. 9 (2), 16(1)(c), 22(1)(c), 84 (a), & CERA ss. 56(1), 183(2)(e):

- **9(2)** Before making the order, the Minister must consider**:**
    (a) any adverse impact that a physical activity may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;
    (b) the obligations to protect and minimally impair the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and
    (c) the provisions of the United Nations Declaration on the Rights of Indigenous Peoples.

This includes any relevant assessment referred to in section 92, 93 or 95 of IAA

There should be a constant and important obligation on Canada to ensure that First Nations have the capacity to actively participate throughout the impact assessment processes within their own laws and legal traditions.

Theme 3: Joint Decision-Making with First Nations' Governing Authority

Problem

The use of Ministerial or Cabinet decision-making, undermines the nation-to-nation relationship and the Crown's reconciliation objectives. While significant improvements have been made in certain respects, the draft *Impact Assessment Act* includes a number of serious omissions and shortcomings that have far-reaching adverse implications for First Nations. The bottom line in the draft *Act* is that, even if environmental processes are carried out, the Governor in Council always **retains the power to infringe constitutionally-protected inherent and Treaty rights** of First Nations, as long as it provides reasons for such decisions. The Governor in Council can override whatever safeguards may be in the Act and approve a proposed project as being in the "public interest" if reasons are provided. To date, the Supreme Court of Canada and other courts have accorded wide deference to the Government in Council (GIC) to make such decisions. In this line of thinking, no matter the procedural strength of a consultation process, the objectives of reconciliation cannot be achieved if the final decision to approve a project can be made unilaterally by government and without confirmation from the affected First Nation that its views and concerns have been addressed.[8]

Furthermore, the existing definition of "jurisdiction" is only afforded to First Nations who have entered agreements with the Minister, outlined in paragraph 114(1)(e) of IAA.

Background

An appropriately constructed and supported process that accommodates First Nations' rights, jurisdiction, knowledge, and role in decision-making will move all parties towards a model of cooperation between jurisdictions to the highest standard. This speaks to the importance of multi-jurisdictional protocols that will align federal and provincial processes with First Nation led-processes in order to foster cooperation, respect, and transparency. The relationship, along with the nation-to-nation relationships, would most appropriately be defined and articulated prior to an individual project-level EA. Further, as the nation-to-nation relationship is revitalized, there is an immediate need to create a legislated government-to-government relationship between First Nations governments and the appropriate federal authority.

The rights recognition framework, along with the nation-to-nation relationships, would most appropriately be defined and articulated prior to an individual project-level EA. If there is a void, legislation or regulation should guide better processes. Further, as the nation-to-nation relationship is revitalized, there is an immediate need to create a legislated government-to-government relationship between First Nation governments and the appropriate federal authority. For this reason, it is essential that an early engagement phase be legislated. Moreover, within the Early Planning Period, the diversity of First Nations should be reflected in how their rights and titles are recognized at this very early stage.

Recommendation

The AFN recommends that the IAA and CERA strengthen provisions to enable shared "procedural" decision-making points throughout the early engagement phase, assessment phase, decision phase, and the monitoring and follow-up phase. True "nation-to-nation" discussions require the recognition of First Nations as a "governing authority". This will enable multi-jurisdictional protocols that will align federal and provincial processes with First Nation led-processes in order to foster cooperation, respect, and transparency.

[8] Morales, S. (2017). Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult. *UN DECLARATION Implementation: Braiding International, Domestic and Indigenous Law, Special Report.* Retrieved from: https://www.cigionline.org/sites/default/files/documents/UN DECLARATION%20Implementation%20Special%20Report%20WEB.pdf

Suggested Amendments

- IAA Purpose (e) to promote cooperation and coordinated action between the federal government, provincial governments, and the federal government and Indigenous Governing Bodies, with respect to impact assessments.

A purpose of the IAA should be to promote cooperation and coordination between all jurisdictions, including Indigenous Governing Bodies.

Agency's obligation – offer to consult

12. For the purpose of preparing for a possible impact assessment of a designated project, the Agency must offer to consult and share information with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project and any Indigenous Peoples or Indigenous Governing Authority that may be affected by the planning or carrying out of the designated project.

Agency's obligation – summary of issues

14 (1) the Agency must provide the proponent of a designated project with summary of issues, prepared by the Agency or an Indigenous Governing Body, or both, with respect to that project that it considers relevant, including issues that are raised by the public or by any jurisdiction or Indigenous group that is consulted under section 12, and with any information or knowledge made available to it by a federal authority that the Agency considers appropriate.

Decisions Regarding Impact Assessments

16 (1) After posting a copy of the notice on the Internet site under subsection 15(3), the Agency must collaborate with any Indigenous Governing Body that is consulted under section 12, to, subject to section 17, decide whether an impact assessment of the designated project is required.

(c) Any direct, indirect, or cumulative impact that the designated project may have on the rights of the Indigenous peoples of Canada, including those recognized and affirmed by section 35 of the Constitution Act, 1982.

Time limit for information or studies

19. The AFN recommends adding a provision that enables the inclusion/commissioning of studies not led by the proponent. First Nations are concerned that baseline studies, such as those on direct, indirect, and cumulative impacts on s.35, should not be conducted by the proponent. If the current approach is maintained, First Nations and other interested groups are left with having to hire their own third party reviewers, at great expense, to advise them whether the findings of the proponent are accurate.

Factors to be considered

22 (1)(c) the impact that the designated project may have on any Indigenous Peoples and any direct, indirect, or cumulative impact that the designated project may have on the rights of the Indigenous peoples of Canada, including those recognized and affirmed by section 35 of the *Constitution Act, 1982*.

(r) any study or plan that is conducted or prepared by a jurisdiction, including an Indigenous Governing Body, that is in respect of a region related to the designated project and that has been provided with respect to the project.

Theme 4: Reducing Excessive Ministerial Discretion

Problem

Similar to CEAA 2012, the IAA allows the Minister of the Environment and Climate Change and the Agency to exercise a significant amount of discretion. Generally speaking, this discretion can only be exercised by the Minister if, "in his or her opinion," the proposed activity "warrants" designation due to its "adverse effects," or due to "public concerns" about such effects. While there is value in Ministerial flexibility, First Nations are concerned that language of "consider" or "take into account" may enable the avoidance of inherent and constitutionally protected rights.

Background

Examples of the broad discretionary powers under the IAA, and IAA/CER Review Panels (many of which resemble existing CEAA 2012 provisions) include, but are not necessarily limited to:

- Determine that an impact assessment is not required for a designated project (s.16).
- Determine the scope of the factors to be considered during the impact assessment process (ss.22(2)).
- Require the proponent to collect additional information or conduct studies (s.26).
- Extend or suspend time limits for impact assessments (ss.28(5) to 28(9)), as well as establish, decrease or increase time limits for review panels (s.37 to 38).
- Delegate any part of the impact assessment to other jurisdictions (section 29), substitute "equivalent" provincial processes for the federal impact assessment process where "appropriate" (s.31).
- Refer an impact assessment to a review panel if it is in the "public interest" to do so (s.36).
- Establish "regional assessments" on federal lands or other lands (s.92 to 93) and "strategic assessments" of federal plans, policies or programs, or any "issues," that are "relevant" to impact assessments (s.95).

For First Nations, laws must be written with a view towards potential future governments that may be hostile to our rights, jurisdiction, and authority. In this context, legislation must constrain and/or require those governments to respect what has been written in the legislation.

Suggested Amendments

(2) Scope of factors:

(a) the Agency, <u>in collaboration with any Indigenous Governing Body that is consulted under section 12.</u>

(b) the Minister, <u>in collaboration with any Indigenous Governing Body that is consulted under section 12,</u> if the impact assessment is referred to a review panel.

These amendments are intended to ensure that factors, such as Culture (l), traditional knowledge (g), or sex and gender (s) don't get scoped out without participation from a First Nations' Governing Authority. We would prefer to see the Scope of Factors jointly decided on as part of the multi-jurisdictional cooperation outlined in the Impact Assessment Plan.

28 (5) – 28 (9): Indigenous Governing Bodies must be consulted when the Agency, Minister, or Governor in Council contemplate the extension or limitation of a designated project's assessment.

S. 36 & 63: Concerning the decisions of the Minister and the Governor in Council on proposed projects to replace the requirement that the decisions “include a consideration of the following factors” with requirement that the decisions “**be based on consideration of the following factors**”.

More will be discussed on the Project List below.

Theme 5: Full inclusion and protection of Indigenous Knowledge Systems

Problem
The three proposed Acts in Bill-69 deal with the "traditional knowledge of the Indigenous peoples of Canada" in several places. While the inclusion of the consideration of "traditional knowledge" is a positive step, the current wording of the provisions across all three Acts is problematic:

1. Use of the term "traditional knowledge" is narrow and uncertain.
   The term "traditional knowledge" is not defined in any of Acts. This creates uncertainty about what will be considered by the government to be "traditional knowledge". In addition, the Acts do not use the terminology of Indigenous Knowledge Systems (IKS), which better captures the nature of Indigenous Knowledge and makes clearer the distinction between "use" and "knowledge": "use" being data about locations of current or historical resource harvesting, etc., vs. "knowledge" which includes principles, e.g. knowledge about sensitivities of animals or plants at particular times of the year.

   The use of the term "traditional" raises the concern that the "knowledge" being considered will be frozen in time, and that it could exclude the evolution of Indigenous Knowledge that occurs over time in response to new circumstances and changes in the environment.

2. There is no recognition or protection of the intellectual property rights of First Nations in their knowledge.
   One of the ongoing problems for First Nations and other Indigenous groups is the appropriation of our knowledge by individuals, companies, and academics for their own gain. This can often lead to significant harm to First Nations. There are many examples of a First Nation disclosing, in the context of a regulatory proceeding, the location of a special medicine for the purposes of protecting that medicine, only to then have an outside entity use that information for profit, to the determinant of the identified medicine and the First Nation.

   Indigenous Knowledge belongs to those who are the guardians of it, be it the Nation or individuals within a Nation, and an attempt to include Indigenous Knowledge in regulatory processes should not have the unintended consequence of widespread theft of that knowledge. Such protections are required to be consistent with Article 31 of UN DECLARATION, which states in part: "[Indigenous peoples] also have the right to maintain, control, protect and develop their intellectual property…"

3. Indigenous Knowledge that is disclosed should only be used for that regulatory process.
   First Nations have direct experience of disclosing Indigenous Knowledge or use information in the context of a regulatory proceeding only to have that information used against them by the provincial or federal governments. This is completely inappropriate, especially when viewed against the protections for corporate information. Further, the immunity provisions for Crown disclosure create a disincentive for the Crown to use Indigenous Knowledge in a responsible way.

4. Proposed confidentiality provisions are completely inadequate.
   All three proposed Acts provide for nominal protection of the confidentiality of "traditional knowledge". However, the Acts allow for disclosure if it "is authorized in the prescribed circumstances." This allows any future government to decide to disclose Indigenous Knowledge without consent for potentially any reason. This provides no certainty to First

Nations that the information they provide will be treated respectfully or appropriately. Many, if not all First Nations, will simply choose not to provide Indigenous Knowledge if they know there is a significant risk that the information won't be protected.

5. Use of Indigenous Knowledge in the IAA: Scope does not include Strategic and Regional Assessments.
   Finally, the current Impact Assessment Act has no requirement that Strategic or Regional Assessments consider Indigenous Knowledge. Without this requirement, the utility of any Strategic or Regional Assessment to First Nations will be limited.

Recommendation
The AFN recommends that term "traditional knowledge" be replaced with "Indigenous Knowledge" and that the term be defined in the Acts as: "'Indigenous Knowledge' includes Indigenous Knowledge or information arising from Indigenous Knowledge Systems, as prescribed by regulation". In addition, provisions should be added to all three Acts to provide the ability to make such regulations, as well as the ability to make regulations "respecting any processes or protections for the consideration of Indigenous Knowledge, after consultation with the each of the Indigenous peoples of Canada."

Suggested Amendments
Improve confidentiality and intellectual property protection
Using the provisions of the Canadian Navigable Waters Act as the template, we recommend the following amendments be made to the confidentiality provisions for all three Acts.

- **Confidentiality**
  26.2 (1) Any *Indigenous Knowledge* of the Indigenous peoples of Canada that is provided to the Minister under this Act, in confidence, is confidential and shall not knowingly be, or be permitted to be, disclosed without written consent.

- **Exception**
  (2) Despite subsection (1), the Indigenous Knowledge referred to in that subsection may be disclosed if:
  (a) it is publicly available;
  (b) the disclosure is necessary for the purposes of procedural fairness and natural justice in a legal proceeding regarding the decision for which the Indigenous Knowledge has been provided to the Minister ~~or for use in legal proceedings~~; or
  ~~(c) the disclosure is authorized in the circumstances set out in the regulations made under paragraph 28(1)(g.2).~~

  (2.1) Any disclosure in paragraph (2)(b) shall only be for the minimum amount necessary for the purposes of procedural fairness and natural justice, and only for that purpose.

  (2.2) Indigenous Knowledge provided to the Minister cannot be used against the entity or person providing that Indigenous Knowledge by any person or entity, including but not limited to any emanation or agency of the provincial or federal Crown.

  (2.3) The provision of Indigenous Knowledge to the Minister, or any subsequent disclosure under (2) shall not be deemed to be a waiver of any privilege that may exist with respect to the information provided.

- **Further disclosure**

(3) *The Minister <u>shall</u> impose conditions with respect to the disclosure of Indigenous Knowledge by any person to whom it is disclosed under paragraph (2)(b) for the purposes of procedural fairness and natural justice.*

- **Duty to comply**

(4) *The person referred to in subsection (3) shall comply with any conditions imposed by the Minister under that subsection.*

(4.1) In the case of a contemplated disclosure under paragraph (2)(b), the Minister, Agency, or the adjudicative body, as the case may be, shall permit the withdrawal of the Indigenous Knowledge if the Indigenous governing body is not satisfied with the conditions placed on the contemplated disclosure and requests the withdrawal in writing.

- **Protection from civil proceeding or prosecution**

(5) Despite any other Act of Parliament, ~~civil or~~ criminal proceedings shall not be brought against Her Majesty in right of Canada, the Minister and any person acting on behalf of or under the direction of the Minister for the full or partial disclosure of the traditional knowledge referred to in subsection (1) made in good faith under this Act or for any consequences of the disclosure.

- **No waiver of Intellectual Property**

(6) Any Indigenous Knowledge provided to the Minister is, and remains, the intellectual property of the Indigenous governing body, or persons therein under the laws of that Indigenous governing body.

Require the consideration of Indigenous Knowledge in any Strategic or Regional Assessment
The following provision should be added to the *Impact Assessment Act*:

96(1.1) In establishing the terms of reference with respect to the assessment referred to in subsections (1) and (2), the Minister must require that the Committee or the Agency consider any <u>Indigenous Knowledge</u> of the Indigenous peoples of Canada that is provided to the Minister, Committee, or Agency, as the case may be.

Impact Assessment Act

Over the course of the last year, First Nations and their representative organizations have advanced many innovative and thought-provoking solutions to the number of challenges facing First Nations in the current environmental assessment regime.[9] To complement these submissions, the AFN developed a *Technical Submission to EA Review Expert Panel,* outlining four core pillars – Rights and Title, Jurisdiction, Indigenous Knowledge Systems, and Capacity – as well as a formal mechanism for First Nations involvement to outline the foundation to a new relationship between First Nations and Canada within the impact assessment process. The input First Nations across the country provided into this submission illustrates just how important these issues are to First Nations. It also demonstrates how concerned First Nations are with the operation and functioning of Canada's impact assessment laws. Getting it right is an essential step on the journey towards reconciliation.

Outside of the above themes, there remains significant gaps in particular sections of the Impact Assessment Act. Therefore, AFN recommends the following topics receive more attention:

a. Test for Decisions
b. Review Panels
c. Regional and Strategic Impact Assessments
d. Dispute Resolution
e. First Nations' participation in impact assessments

AFN Comments on Specific Provisions:

a. Test for Decisions

The AFN recommends:

a. If a "Public Interest test" is maintained, there needs to be clear provisions outlining how the decision-maker (i.e. Minister or Agency) plans to balance constitutionally-protected rights with economic benefits.

b. Amend s.63 concerning the decisions of the Minister and the Governor in Council on proposed projects to replace the requirement that the decisions "*include a consideration of* the following factors" with requirement that the decisions "*be based on* consideration of the following factors."

c. Include the revised paragraph s.63's factors in all "public-interest" decisions, including in s.36.

The draft legislation has changed the test from significance of adverse environmental effects not to sustainability but, rather, to a public interest test. This means that projects that do not "pass" an assessment against all the pillars of sustainability can still receive approval. For example, a project may have negative societal effects (negative effects on a small community resulting from an influx of mine workers) but positive economic effects (some job creation in the community). A sustainability test would seek to address all of the impacts of a project whereas the public interest test may see more categories of impacts ignored or left unaddressed.

b. Review Panels

[9] For a concise description of issues and challenges that First Nations face in the current environmental assessment regime, please refer to Squamish.

Under section 36 (1), the Minister "may" decide if it is in the "public interest" to refer the designated project's impact assessment to a review panel. First Nations in Canada have made submissions that a collaborative regime would jointly-decide how an impact assessment should proceed. This is a consideration under section 36 (2) within the public interest subsection:

(d) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it.

Significant capacity gaps, such as funding and First Nations coordination to ensure the appropriate collaboration takes place prior to a final determination and this may be policy issue in how the Act operates to allow for the cooperation with First Nations governments. The Minister's ability to suspend the time limit in the prescribed activities is important, but more was expected in the legislation to make the necessary requirements of any federal government to collaborate with First Nations, with deep consultation on how the process will work. It is more likely that an impact assessment with a Review Panel will be required to achieve the free, prior and informed consent standard with at least one First Nation jurisdiction.

Section 39(1) should be amended as follows:
When the Minister refers the impact assessment of a designated project to a review panel, he or she *shall, subject to any limitation in this Act,* enter into an agreement or arrangement with any jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction in section 2 that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project, respecting the joint establishment of a review panel and the manner in which the impact assessment of the designated project is to be conducted by that panel.

Other jurisdiction (New subsection):

(4) When the Minister refers the impact assessment of a designated project to a review panel, the Minister and the Minister of Crown and Indigenous Relations and Northern Affairs may enter into an agreement or arrangement with any Indigenous jurisdiction referred to in section 2 in relation to an assessment of the impacts to Aboriginal and treaty rights of the designated project respecting the joint establishment of a review panel and the manner in which the impact assessment of the designated project is to be conducted by that panel.

In addition, the AFN is supportive of any accommodation of land claim agreements similar to language such as found in section 40 (4) as "must, to the extent possible" which require the Minister to positively act on Canada's treaty obligations.

c. Regional and Strategic Independent Assessments

The AFN recommends that:

a. Provisions pertaining to regional and strategic impact assessments enable full collaboration with First Nations Governing Authority, including the ability to lead, where cumulative impacts may occur or already exist on federal lands or marine areas, or where there are potential consequential cumulative impacts to matters of federal interest.

b. Amend s.109 to provide for a regulation to designate categories for regional and strategic impact assessments, including the ability for First Nations to "request" the designation.

Given the existence, but non-application of the regional and strategic provisions in CEAA 2012, it is essential that regional and strategic undertakings are supported by the identification of categories of regional and strategic undertakings automatically subject to assessment, for example, through a regulation-based Strategic and Regional Undertakings List, developed in an open process with full and meaningful participation of First Nations with explicit criteria centered on implications for sustainability, including categories of regional and strategic undertakings of the federal government, on federal lands, with federal financial support and requiring federal licensing.

c. Include clear and prescriptive guidelines on how to conduct cumulative effects assessment in full partnership with First Nations in accordance with updated best practices.[10]

There needs to be provisions to create a regulation that can clarify how and by whom cumulative effects, broad alternatives and big policy issues are to be addressed in project level assessments in the absence of completed and up-to-date regional or strategic assessments.

d. The phrase "that is relevant to conducting impact assessments" is removed from paragraph 95(a) pertaining to Strategic Impact Assessments.

The proposed amendment would allow (without requiring) the application of impact assessment to any federal policies, plans or programs without constraining assessments to only those policies, plans or programs that may affect or inform project-level assessments. As the Government's Rights Recognition Framework crystalizes, it should be expected that their rights "recognition" approach should be adapted to an impact assessment process.

d. Dispute Resolution

The AFN recommends the inclusion of mechanisms (informal or formal) to resolve disputes that occur in the course of an assessment, especially at key points of decision (i.e. outputs of early planning, assessment phase, and the decision). Section 73 of CERA could be used as a starting point.

An increasing amount of project decisions are being challenged in court. An improved process could hopefully go a long way to change that, but there will always be points of disagreement between parties in an assessment process. One proposal would be to have an independent assessment of either the decision not to agree by the First Nation or the decision of the Minister to go forward without the First Nation's agreement, or both. This manner of "within legislation" dispute resolution could be helpful in keeping First Nations' disputes out of the courts. Much more work needs to be done to create internal mechanisms to honour the relationship between the Crown and First Nations, and incorporate Indigenous legal traditions of dispute resolution within important shared or claimed territories. This could be an important objective to advance reconciliation with First Nations.

[10] Musqueam Indian Band (2016). Submission to the Expert Panel on the Review of Environmental Assessment Processes. Retrieved from: http://eareview-examenee.ca/wp-content/uploads/uploaded_files/2016.12.21_mib-to-expert-panel-fed-ea-process-review-final.pdf

e. First Nations' participation in Impact Assessments

The IAA refers to increasing representation of Indigenous Peoples in the impact assessment approach. While this is an important step, it does not consider the "distinctions-based approach" outlined in Principle 10 of the *Federal Government's 10 Principles Respecting the Relationship.* To support this Principle, and the avoidance of a pan-Indigenous approach, **the AFN recommends that wherever there is reference to establishing a roster, advisory council, committee, Directors or Commissioners, the words *must include at least one Indigenous person from First Nations, Metis, or Inuit*.** Specifically, we suggest the following amendments:

- ***The Minister must establish the following rosters:***
  (d) a roster of persons who hold First Nation, Metis, or Inuit heritage and who may be appointed as members of a review panel established under subsection 47 (1).

- **Advisory council to be established:**
  117 (1) The Minister must establish an advisory council to advise him or her on issues related to the implementation of the impact assessment and regional and strategic assessment regimes set out under this Act. <u>The membership of the committee must include at least one Indigenous person from each Indigenous Peoples of Canada.</u>

- **Appointment:**
  157 (2) The Agency may appoint any person with relevant knowledge or experience as a member of the expert committee. The membership of the committee must include at least one Indigenous person <u>from each Indigenous Peoples of Canada</u>.

Canadian Energy Regulator Act

Over the course of the last year, First Nations and their representative organizations have advanced many innovative and thought-provoking solutions to the number of challenges facing First Nations in the current iteration of the National Energy Board (NEB). For the NEB to "modernize" and truly respond to these challenges, several themes have emerged from the hundreds of First Nations' presentations and submissions to the NEB Expert Panel.

To complement these submissions, the AFN developed a *Technical Submission to NEB Expert Panel* outlining: the need for First Nations' engagement at the strategic level, a legislated requirement for a clear assessment of impacts on Aboriginal and Treaty Rights, adequate funding for meaningful First Nations' engagement and institutional development, among other priorities outlined in Resolution 86/2016. Other foundational topics, such as the protection and implementation of constitutionally protected rights, First Nations' jurisdiction and involvement in decision-making, Indigenous Knowledge Systems, and cumulative impacts, were discussed at in-person sessions that the AFN hosted in Montreal, Edmonton, Moncton, and Ottawa. Given the importance of the operation and functioning of the NEB to First Nations, modernizing the NEB in accordance with First Nations' inherent and constitutionally-protected rights is an essential step on the road to reconciliation.

Outside of the above themes, there remains significant gaps in particular sections of the *Canadian Energy Regulator Act*. Therefore, AFN recommends the following topics receive more attention:

a. Test for Decisions

The draft legislation requires that a Public Interest Test for decision-making be incorporated in the CERA, consistent with the IAA. CERA Sections 63(1), 69, and 70 should be amended to include this consideration.

The AFN Recommends that:

a. The five factors considered in a "public-interest test" in the IAA are incorporated in CERA decision-making, including for non-designated projects. This includes the reference to the *Sections 63(1), 69, and 70* in CERA.

b. For a "Public Interest test", there needs to be clear provisions outlining how the decision-maker (i.e. Minister or Agency) plans to balance constitutionally-protected rights with economic benefits.

c. Amend the "Public-interest test" section concerning the decisions of the Minister and the Governor in Council on proposed projects to replace the requirement that the decisions "*include a consideration of* the following factors" with requirement that the decisions "*be based on* consideration of the following factors."

b. Non-designated Projects

The AFN Recommends that:

a. The Commission, in projects that are subject to an Order under s.214, must consider impacts on inherent and constitutionally protected rights before

approving certificates under Section 180 or exempting "non-designated" projects from Section 180(1) using Section 214(1).

b. Provisions are created to include First Nations participation, including as First Nation's Governing Bodies, in the conduct of non-designated projects.

Approximately 90% of projects will be "non-designated" projects. The Canadian Environmental Assessment Agency is still revising the Project List, thus, what constitutes a "non-designated" project subject to the CERA has yet to be established. Furthermore, the review process for "non-designated" projects may take various forms, either by requiring a certificate under Section 180 or by receiving exemption from Section 180(1), at the discretion of the Commission, through Section 214(1).

c. First Nations' participation

The IAA refers to increasing representation of Indigenous Peoples on the adjudicative and corporate functions of impact assessment. While this is an important step, it does not consider the "distinctions-based approach" outlined in Principle 10 of the Federal Government's 10 Principles Respecting the government of Canada's Relationship with Indigenous Peoples. To support this Principle, and the avoidance of a pan-Indigenous approach, ***the AFN recommends that wherever there is reference to establishing a roster, advisory council, committee, Directors or Commissioners, the words must include at least one Indigenous person from First Nations, Métis, or Inuit heritage****.*

Specifically, the AFN suggests the following amendments:

a. A distinctions-based approach be taken with respect to the designation of full-time and part-time Commissioners, with at least one full-time Commissioner each of First Nation, Inuit, and Métis heritage.

b. A distinctions-based approach be taken in the formation of the Board of Directors for the Canadian Energy Regulator, with one board member each of First Nation, Inuit, and Métis heritage.

c. *The Minister must establish the following rosters:*
(d) a roster of persons who hold First Nation, Métis, or Inuit heritage and who may be appointed as members of a review panel established.

d. The requirement for at least one Commissioner from the Canadian Energy Regulator to sit on review panels be amended for inclusion of the First Nation, Inuit, and Métis Commissioners, in accordance with the distinctions-based approach, on panels reviewing designated projects of interest to the respective Indigenous Peoples of Canada they represent.

d. Factors to be considered

The AFN recommends that the factors to be considered in Section 183 (2) must be consistent with the factors considered within the IAA. This includes:

- **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.**
- **The extent to which the designated project contributes to sustainability.**

e. Regulations prescribing the disclosure of Traditional Knowledge.

The AFN Recommends that the following amendments be made:

- **Applying the specific amendments outlined in *Theme 5: Full inclusion and protection of Indigenous Knowledge Systems* on Page 14 to Section 58 and 59 of the Act.**
  - **a. For greater certainty, amend s.59 to remove the Governor in Council's ability to make regulations prescribing the circumstances in which the traditional knowledge of the Indigenous peoples of Canada, that is provided to the Regulator under this Act in confidence, may be disclosed without written consent and instead reinforce that written consent for disclosure is required.**

Sections 58 and 59 of the CERA enable the Governor in Council to make regulations prescribing circumstances in which traditional knowledge of the Indigenous Peoples of Canada provided to the Regulator under this Act, in confidence, may be disclosed without written consent. As well, Section 58 protects the Regulator, Minister, and any person acting on their behalf or direction from civil proceeding and prosecution for disclosure in good faith of any traditional knowledge of the Indigenous peoples of Canada under this Act.

Canadian Navigable Waters Act

The 2012 amendments to the *Navigable Waters Protection Act* (NWPA) affected First Nations from coast to coast to coast. For First Nations, the free and unencumbered use of the waterways in their territories is critical to their cultures and ability to exercise a range of s.35 rights, and for other important purposes.

The 2012 amendments gutted the NWPA meant that the vast majority of waterways relied on by First Nations are not protected from interference with navigation, or the consequential environmental impacts of that interference.

While the proposed amendments to the renamed *Canadian Navigable Waters Act* (CNWA) are an improvement over the current Act, there are still a number of significant gaps. Therefore, AFN recommends the following amendments:

- Reduce excessive and unguided discretion.
- Return to impact assessment trigger for some works.
- Expand public registry to properly track cumulative effects.
- Strengthen weak protections for section 35 rights and Indigenous knowledge.

1. Reduce Excessive Discretion

The increased discretion for the Minister to address problems of navigation related to works or obstructions is positive, given that under the current Act the Minister is effectively unable to deal with serious interference with navigation on unscheduled waters. However, in a number of cases, the Act provides too much unchecked discretion to the Minister and Cabinet.

a. Remove power to exclude waters by regulation

The entirely discretionary ability of the Governor in Council (GIC) in s.28(1)(g.1) to make regulations exempting any navigable water from the Act is far too broad. There is no direction or guidance as to when or how this provision will be used. It also seems unnecessary given the powers under the Act already to remove waters from the Schedule. What are the situations in which navigable waters should be entirely exempted from the Act? If the provision is aimed at drainage ditches or other types of similar waterways, then the discretion of the GIC should be so limited.

b. Restrict discretion to exempt waters

The GIC also has the power to make orders exempting any water from the provisions in ss.21, 22, and 23 regarding dumping and dewatering. The GIC may make such an order, if it is of the opinion, that it would be in the "public interest" to do so, which is not defined. These are broad powers that provide no protection for First Nations rights. AFN suggests the following:

24 (1) The GIC may, by order, exempt from the application of any of sections 21 to 23, any rivers, streams or waters, in whole or in part, if the Minister receives an application for an exemption and the GIC is satisfied that it would be in the public interest, including the obligation to protect the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.

c. Provide more guidance on dewatering provisions

It is not enough to limit dewatering only if it extinguishes navigation. It is enough for First Nations that rely on these waters for navigation to be significantly interfered with for it to impact First Nations rights. AFN recommends the following changes:

23 (1) No person shall take any action that lowers the water level of a navigable water or any part of a navigable water to a level that extinguishes significantly interferes with navigation for vessels of any class that navigate, or are likely to navigate, the navigable water in question.

~~(3) For the purposes of this Act, navigation is not extinguished if the Minister is of the opinion that there are sufficient measures in place to mitigate the impact of the lower water level on navigation and he or she approves the work whose construction, placement, alteration, rebuilding, removal, decommissioning, repair, maintenance, operation or use lowers the water level of a navigable water or part of a navigable water.~~

2. Return to having impact assessment triggers for works

It is counterproductive to the principles of sustainability and protection of s.35 rights not to require an impact assessment where a work substantially interferes with navigation. Projects that impact rights to navigation frequently also impact the s.35 rights of First Nations and the environment. The project list approach does not appropriately capture the impacts on s.35 rights of these types of projects that are in or near water. It is important that these projects be assessed holistically – looking at the combined impacts on navigation as well as s.35 harvesting rights impacts.

3. Expand Public Registry to include all works

Many First Nations have expressed concerns about the lack of baseline data and monitoring under the current system. Cumulative impacts to navigation that interfere with s.35 rights is a significant problem in some areas. This can occur even with minor works where a key fishing area become inaccessible as a result of proliferation of in-water works, such as docks, boat ramps, etc. There should be a basic requirement that all works (including major and minor works) be submitted to the public registry.

27.2 (1) The Minister must establish and maintain a registry in which information that he or she specifies is deposited, and which shall include information on the location and type of all new major works, works, and minor works.

Failure to require that this information be placed in the registry significantly limits the ability of First Nations to monitor the cumulative impacts of all works on navigation and access to their rights.

4. Improve protections: s.35 Rights and Indigenous knowledge

A number of First Nations and First Nation organizations have raised concerns on the problems with Bill C-69, as a whole, in terms of how it addresses s.35 rights and the consideration and protections for Indigenous knowledge. In addition to these overarching concerns (which also apply to the CNWA), there are a number of specific provisions in the CNWA that need to be changed to adequately protect s.35 rights and consideration of Indigenous knowledge.

a. Notification process is unreasonable

The proposed amendments for works on non-scheduled waterways provide only a slight improvement over the opt-in regime that currently exists. The proposed timelines for notification are completely unrealistic for First Nations, and there is no requirement that affected First Nations be notified directly, only that a notice be "published". For many remote First Nations, the combination of the lack of access to reliable internet and the timelines almost guarantee that many will not know about the proposed work until well after the deadlines.

Even for communities with reliable internet, given the massive burden on First Nations with limited staff capacity to process notices regarding the duty to consult, a process based on short timelines and a requirement for First Nations to constantly check an online registry is doomed to fail.

b. Duty to notify should require notification of affected First Nations

First Nations are often the most, immediately and directly, affected by dangers to navigation. Often federal, provincial, and territorial authorities are a long way away, e.g. the Ahousaht Nation near Tofino, in British Columbia, saving a capsized whale-watching boat because there were no federal parties nearby. For this reason, the lack of a requirement to notify First Nations directly about risks to navigation puts both the rights and the safety of First Nations at risk because of the potential for a lag in time for First Nations to receive notice through Transport Canada channels. Therefore, the AFN recommends:

10.3 (1) An owner of a work in, on, over, under, through or across any navigable water must immediately notify the Minister and any potentially affected Indigenous governing body if the work, or its construction, placement, alteration, rebuilding, removal or decommissioning, causes or is likely to cause a serious and imminent danger to navigation.

15 (1) The person in charge of an obstruction in a navigable water must immediately give notice of the existence of the obstruction to the Minister and any potentially affected Indigenous governing body, in the form and manner, and containing the information, specified by the Minister.

c. Unintended consequences of exceptions to navigable waters

Some First Nations have expressed concerns that, excluding from the definition of navigable waters, any waters where the lands to access those waters are owned by one owner will encourage large land-owners to buy up lands so as to prevent the application of the Act to those waters, which could have the effect of blocking access to First Nations. For those reasons, AFN recommends those limiting parts of the definition of navigable waters be removed.

d. Requirement to consider Indigenous knowledge and s.35 rights

In addition to the concerns about the lack of protection for s.35 rights, generally in Bill C-69 and in the CNWA, the proposed s.2.3 does not require the Governor in Council to consider cumulative effects, Indigenous knowledge, or the protection of s.35 rights when making regulations or orders. This is very problematic, especially given the breadth of some of the proposed regulation and order-making provisions.