The Mining Association of Canada | L'association minière du Canada

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Thomas Bigelow,
Clerk of the Standing Committee on Environment and Sustainable Development
E-mail: ENVI@parl.gc.ca

Mining Association of Canada submission on the *Impact Assessment Act* (Bill C-69) to the House of Commons Standing Committee on Environment and Sustainable Development

Summary

The Mining Association of Canada (MAC) 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* (IAA).

In this submission, MAC is proposing two amendments that are critical to our industry. Specifically, MAC is requesting that the Committee consider amendments with respect to:

1. **Transition:** Projects that are currently undergoing Agency assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), or those that will enter the process before the coming into force of the IAA, must be allowed to continue under CEAA 2012 unless the proponent requests transitioning to the IAA.

2. **Uranium mines and mills:** Designated projects that are uranium mines and mills, like any other designated mining project, should undergo Agency assessments with full access to provisions for cooperation with provinces and Indigenous governing bodies.

These amendments and the supporting rationale are outlined in further detail in this submission.

The submission also comments on key provisions of the IAA that we view as critical to the good functioning of the federal assessment process: cooperation with provinces and Indigenous governing bodies; coordination with federal regulatory departments; legislated timelines; tailoring of factors to be considered in assessments; appropriately assessing and addressing cumulative effects; decision-making by elected officials; and care needed in cost recovery.

Mining and Impact Assessment

The Mining Association of Canada (MAC) is the national organization representing the Canadian mining industry, comprising companies engaged in mineral exploration, mining, smelting, refining and semi-fabrication. Our members account for most of Canada's production of base and precious metals, uranium, diamonds, metallurgical coal, and mined oil sands. Canada produces over 60 minerals and metals from more than 200 mines, providing more than 400,000 direct jobs and 190,000 indirect jobs.

MAC has been actively engaged in all stages of the review of federal assessment processes, including submissions to the Expert Panel, participation in the Multi-Interest Advisory Committee, and comments on the Expert Panel Report and the government's Discussion Paper.

Canada's mining industry is a bedrock of the country's economy and our interest in this review is profound. Its outcome will determine whether our industry will continue to generate value for Canadians or continue an erosion that is underway[i]. Nearly all new mines and major expansions are subject to CEAA 2012 and are likely to be subject to a future federal assessment process. Data reported by the Major Projects Management Office (MPMO) in May 2017 showed mining projects represented 60% of all federal project assessments. For our industry to thrive in Canada, the process for reaching a decision on whether a mine can be built, and under what conditions, needs to be arrived at through a predictable, timely, coordinated, transparent and seamless process that continues to be grounded in meaningful consultation.

Canada's mining sector has pioneered meaningful partnerships with Indigenous Peoples. Through mechanisms such as Impact Benefit Agreements, the sector has worked to involve and share the benefits of mining with Indigenous Canadians. Proportionally, the mining industry is the largest private sector employer of Indigenous Peoples, and a major partner of Indigenous businesses. The training programs, education support and job experience offered by mines open lifetime career paths for Indigenous youth, which can lead to multi-generational transformation.

Indigenous participation in the mining sector is growing significantly. Our sector's continued contribution to economic reconciliation with Indigenous Peoples depends upon our ability to bring new mines into production.

Investment, whether foreign or domestic, is highly sensitive to unpredictability of process and timelines. Canada's perceived attractiveness as an investment destination has been deteriorating in recent years, evidenced by, among other factors, our reduced global share of exploration spending, a halving of mining investment intentions and the relative decline of our mining supply and services sector. Legislative and policy changes create uncertainty – poor design, transition or implementation of those changes could have long-lasting consequences for mining investment in Canada. The investment community is watching closely to see how this legislation will be transitioned and implemented. There has already been a significant investment chill in international investment into Canada.

Having reviewed the proposed *Impact Assessment Act* (IAA) with our members, and recognizing our extensive experience with federal environmental assessment, we are concerned that unless carefully implemented the IAA has the potential to further prolong

assessment and permitting of mining projects. In turn, this will damage Canada's investment climate and reduce our industry's overall competitiveness with other jurisdictions. If implemented well, however, our members also believe that the IAA has the potential to be an improvement on recent experience.

We are therefore pleased that the government has allocated substantial resources to help ensure that the Agency has increased capacity to manage the transition to and implementation of the IAA.

Requested Amendments

1. Transition

Projects that enter the CEAA 2012 process prior to the IAA coming into force must be able to continue under CEAA 2012. Doing otherwise would be extremely disruptive and would hamper investment by introducing several years of uncertainty. Legislative change introduces uncertainty for project proponents, the investment community and the communities where these projects are being proposed. Transition provisions must be designed to mitigate the uncertainty to the extent possible.

Bill C-69 proposes that projects that are or will be undergoing Agency assessment under CEAA 2012 at the time of coming into force of the IAA would have their assessment continued under the IAA unless they are in the final phase of the assessment. At this time, the effective date of the IAA has not yet been determined, nor have the final wording of the Act and related regulations, policies and guidelines. It is also impossible to predict whether an assessment under CEAA 2012 will have reached the final phase when the IAA comes into force. The proposed transition provisions thus confuse proponents, affected communities and the public about which assessment process will be followed. This uncertainty is problematic for proponents considering submitting projects for assessment in the next two years, which is the case for some of our members.

MAC recommends that the Committee consider the following changes to the transition provisions *by amending section 181 to read as follows so that projects undergoing CEAA 2012 Agency assessment will continue under CEAA 2012 but allow the proponent to request transition of the assessment to the IAA.*

> **Environmental assessments by former Agency under 2012 Act**
> **181(1)** Any environmental assessment of a designated project by the former Agency commenced under the 2012 Act before the day on which this Act comes into force is continued under the 2012 Act as if that Act had not been repealed.
>
> **Request of proponent**
> **(2)** Despite subsection (1), at the request of the proponent of a designated project referred to in (1), the Agency may terminate the environmental assessment in order to enable the proponent to commence the process established under this Act for a designated project in which the Agency considers that the proponent:

(a) has, before that day, collected the information or undertaken the studies required by the former Agency under subsection 23(2) of the 2012 Act by providing an initial description of the project under subsection 10(1) of this Act; or

(b) has not, before that day, collected the information or undertaken the studies required by the former Agency under subsection 23(2) of the 2012 Act by the Agency providing the notice of commencement of the impact design under subsection 18(1) of this Act which is deemed to be the day on which this Act comes into force.

(3) A request made by a proponent under subsection (2) must be made to the Agency within 60 days after the day on which this Act comes into force.

No referral to review panel
(4) If the 60-day period during which the Minister was authorized to refer an environmental assessment described in subsections (3) to a review panel under subsection 38(1) of the 2012 Act expired before the day on which this Act comes into force, the Minister is not authorized to refer the impact assessment to a review panel under subsection 36(1) of this Act.

Exception
(5) This section does not apply to an environmental assessment of a project that was the subject of an order made by the Minister under subsection 125(7) of the 2012 Act.

2. Agency assessment of all mines and mills

Uranium mines and mills, like all mines and mills, are subject to provincial regulatory and permitting frameworks, but are also regulated by the Canadian Nuclear Safety Commission (CNSC). Under CEAA 2012, the CNSC cooperates with the province in its oversight of uranium mines and mills. Bill C-69, however, would preclude cooperation and preclude Agency assessment for all designated projects that are regulated by the CNSC, treating all such projects as exclusively in federal jurisdiction.

There is no justification for such different treatment, as the complexity and impacts of uranium mines and mills are not in a different category from those of other mines and mills, and cooperative approaches are just as valuable. The CNSC, like other federal regulatory bodies, would have the opportunity to be engaged in an Agency assessment, as provided for in the IAA to encourage coordination within the federal government.

MAC urges the Committee to recommend changes to the provisions dealing with CNSC-regulated projects to permit designated projects related to uranium mines and mills to access the Agency assessment provisions of the Act, including the suite of provisions related to cooperation with provinces and Indigenous governing bodies *by amending sections 39, 43, 44, 46, and 67 to read as follows*.

39(2) However, the Minister is not authorized to enter into an agreement or arrangement referred to in subsection (1)…
(a) the *Nuclear Safety Control Act* other than a uranium mine or mill.

43 The Minister must refer the impact assessment of a designated project to a review panel if the project includes physical activities that are at a nuclear facility regulated under any of the following Acts:

(a) the *Nuclear Safety Control Act* other than a uranium mine or mill.

44(1) When the Minister refers an impact assessment of a designated project that includes activities regulated under the *Nuclear Safety Control Act*, other than a uranium mine or mill, to a review panel…

46 For the purposes of conducting…, including preparing a report with respect to that impact assessment, a review panel referred to in s. 43 may exercise the powers…

67(1) The Minister…the *Nuclear Safety and Control Act* other than a uranium mine or mill, designate…

MAC Comments on Key Provisions of the IAA

3. Importance of cooperation with other jurisdictions

Mining and other natural resource activities on provincial Crown land are constitutionally the responsibility of provinces. Each of Canada's provinces has a distinct approach to how it discharges that responsibility, with a mix of generic and sector-specific legislative requirements, standards, guidelines and site-specific permits, as well as environmental assessment processes for new mines. In addition to requirements for the building and operation of a mine, provinces require mines to develop reclamation plans and provide financial assurance for their implementation.

Inter-jurisdictional cooperation is essential in the assessment of mining projects, in setting post-assessment conditions, and in the design and implementation of follow-up and monitoring programs.

MAC is therefore encouraged that the IAA enables a range of cooperative approaches, including substitution, cooperative assessments, joint review panels and delegation (such as sections 21, 29, 31 through 35, and 39). While MAC is further encouraged that these provisions have been extended to Indigenous governing bodies, it will be important that the Agency provide clarity on the process and factors to be considered leading to a Ministerial decision regarding delegation or substitution.

The effectiveness of these cooperative approaches would be improved through inter-jurisdictional agreements. MAC hopes that the Agency will use its augmented capacity and the provisions of the IAA (such as paragraphs 114(1)(c) through (f)) to proactively develop such agreements with provinces and Indigenous governing bodies. Having agreements in place would allow prospective project proponents to understand what assessment process would apply in the project location, which is critical information when considering whether to proceed with a project.

In addition to cooperation in the assessment itself, it will be critical to ensure that post-assessment follow up and monitoring are integrated, and consistent with provincial and federal regulatory requirements.

Furthermore, conditions developed pursuant to section 64 should be confined to residual matters not addressed by provincial or federal regulators and should be drafted to avoid impinging on their role. It is not realistic to expect an assessment at a single point in time to be relevant over the operating life of a project in the face of changing science, technology and society. A smooth transition of responsibility to the life-cycle regulator, which in the case of mining is the province, should be the goal. As noted elsewhere, the federal government has other legislative and regulatory means to protect federal interests that do not depend on impact assessment. Conditions should be developed in consultations with the life-cycle and other regulators as well as the proponent.

MAC is therefore encouraged by the inclusion of paragraph 64(4)(a). MAC also supports the inclusion of the ability to amend conditions (section 68), in recognition that unforeseen factors may arise after the conditions are finalized.

4. Importance of coordination with federal regulatory departments

Beyond provincial assessment and permitting and federal assessment, many mines require other federal approvals. Integrating information gathering, Indigenous consultation and public participation for other federal approvals in the impact assessment of a project can reduce unwarranted duplication of consultation and comment requests, thus reducing the burden imposed on affected communities. Coordination can also improve timeliness by eliminating duplication of administrative processes.

MAC therefore is encouraged by subsection 13(2) and related provisions of the IAA.

5. Value of legislated timelines

Legislated timelines are critical for industry and for the smooth functioning of assessment. It is our experience that process decisions can be postponed indefinitely in the absence of legislated timelines. Without an explicit driver to advance an assessment, it is inevitable that government capacity will be diverted to other priorities and difficult decisions will be postponed.

MAC is therefore encouraged that the IAA imposes legislated timelines for each phase of the assessment process, including early planning, impact assessment and decision-making.

At the same time, MAC recognizes that flexibility is needed to adjust timelines to facilitate cooperation with other jurisdictions and to accommodate the unique circumstances of each designated project. However, such flexibility must be used appropriately within transparent constraints.

The time limit of 180 days allocated to the early planning phase (subsection 18(1)) will require effective management to ensure that the deliverables contemplated in this phase can be

completed. Taking into account the new early planning and engagement phase, and that the review of the adequacy of submitted information is included in the time limit for information or studies (section 19), the 300 days allocated to impact assessment (subsection 28(2)) may be overly generous.

6. Tailoring of factors

Subsection 22(1) greatly expands the factors that the impact assessment "must take into account" and includes several that will not be appropriate for all designated projects. For example, while it is appropriate to consider alternative means for carrying out a mining project, it would not be appropriate to ask a mining project proponent to assess alternatives to building a mine (paragraph 22(1)(f)).

MAC's understanding is that subsection 22(2) allows the Agency or the Minister to determine the scope of factors that must be taken into account thus addressing the degree to which a factor listed in subsection 22(1) is relevant to a specific designated project. It will be essential that the early planning phase results in factors tailored to each designated project. If not, the assessment process will be unworkable and overwhelming, particularly for smaller proponents.

7. Appropriately assessing and addressing cumulative effects

The mining industry is not the only user on the land base. Its impacts are localized, and, on most metrics of environmental effects, its impacts are dwarfed by other activities. CEAA 2012 is disproportionately applied to mining projects and not to the sources of most environmental effects. Thus, the project-by-project approach to addressing cumulative effects in CEAA 2012 is dysfunctional, penalizing responsible project proponents while failing to address cumulative effects resulting from activities that are not designated projects.

MAC is encouraged by the approach proposed in the IAA, which includes cumulative effects as a factor to consider (paragraph 22(1)(a)(ii)) but not as a sole factor in decision making (sections 60 through 63). The IAA also proposes to strengthen the provisions for regional and strategic assessment (sections 92 through 103).

Governments are better placed to undertake cumulative effects assessment on a regional basis than individual project proponents.

MAC agrees that the outcome of relevant regional and strategic assessments, as well as provincial or Indigenous studies or plans, should be considered in project impact assessment (paragraphs 22(1)(p), (q) and (r)). MAC also agrees that they should not be a prerequisite to nor delay individual project assessments. It would be unreasonable and prohibitive to Canada's investment climate to delay projects while awaiting governments to address all relevant gaps.

While the revision of the regulations designating physical activities (paragraph 109(b)) is subject to separate consultations, MAC notes that our sector is concerned that the IAA will remain arbitrarily and disproportionately applied to our industry. Should this be the case, it will hamper

our sector while not achieving the sustainability, public trust, and Indigenous reconciliation goals the IAA is purported to advance.

8. Decision-making by elected officials

The decision whether a project should proceed will be a complex and partly subjective balancing decision that will have to take a diversity of inputs into account. MAC therefore agrees that the decision should rest with elected officials as outlined in sections 60 through 62, based on factors specified in section 63. In particular, MAC is encouraged that the full merits of a proposed project, and the project's contribution to sustainability, will be core factors in making the decision.

MAC agrees that, for Agency assessments, the Minister should make the decision or refer the decision to Governor in Council. The requirement for publication of the reasons for the decision (subsection 65(2)) will enhance transparency.

9. Care needed in cost recovery

While MAC does not oppose cost recovery in principle, we are concerned that implementation of sections 76 through 80 may be arbitrary and unreasonable. What is particularly concerning is that the aggregate of increased costs being contemplated by the IAA, the *Fisheries Act* and the *Canadian Navigable Waters Act*, together with cost increases expected from the Clean Fuel Standard and carbon price, will prove overwhelming to mining project proponents in Canada.

Canada is the only country that MAC is aware of that imposes on mining projects environmental assessments by two (and possibly three, including Indigenous) levels of government. Mining project proponents are required to pay cost recovery fees for provincial assessments and permitting, and to a federal regulator in the case of uranium mines. Imposing separate fees for the federal assessment process would constitute duplicate bills for what is promised to be "one project, one assessment".

In considering cost recovery, MAC would therefore urge the government to ensure that any cost recovery be:

- Integrated with and not additional to provincial fees and cost recovery;
- Linked to performance guarantees, including timeliness;
- Set as a graduated fixed fee per assessment, with a small number of gradations;
- Reasonable so as not to discourage smaller companies without a revenue stream; and
- Based on expectations of average project-specific direct assessment costs, excluding overhead costs such as policy development or regional assessments.

Closing Summary

MAC is requesting that the Committee consider amendments so that projects undergoing Agency assessment under CEAA 2012 before the coming into force of the IAA be allowed to continue under CEAA 2012, unless the proponent requests transitioning to the IAA.

Additionally, MAC is requesting that the Committee consider amendments so that designated projects that are uranium mines and mills undergo Agency assessments with full access to provisions for cooperation with provinces and Indigenous governing bodies.

With these amendments, and with careful and disciplined implementation, the IAA has the potential to function well and may be an improvement over CEAA 2012. In particular, MAC notes the importance of cooperation with provinces and Indigenous governing bodies, coordination with federal regulatory departments, legislated timelines, tailoring of factors to be considered in assessments, appropriately assessing and addressing cumulative effects, decision-making by elected officials, and care needed in cost recovery.

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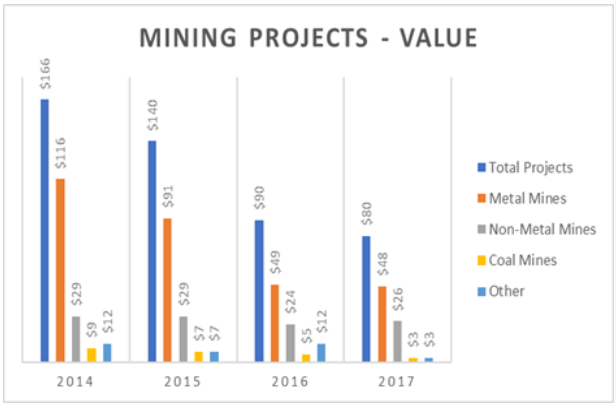

The above tables illustrate the decline in Canada's attractiveness as a destination for mineral investment. The first table is sourced from Natural Resources Canada's *Natural Resources: Major Projects Planned and Under Construction – 2017 – 2027* report, which found that:

- Total projects planned and under construction have decreased by more than 50% (or $86 billion) in value from June 2014 to June 2017; and
- Metal mines experienced the single largest drop, accounting for 81% or 40 of the 49 suspended projects, and 79% (or $68 billion) of suspended investment.

The second table – a global base-metals index (Source: S&P/TSX) – depicts a market rebound in January 2016, with upward price mobility persisting until early 2018.

Together, the tables indicate continued downward trends in mineral investment in Canada despite a rebound in prices, suggesting that policy and regulatory uncertainty are impacting business investment more than market forces at current prices.