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FACULTY OF ENVIRONMENTAL STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.
4700 KEELE ST.
TORONTO ON
CANADA M3J 1P3
T 416 736 5252
F 416 736 5679
fes.yorku.ca

Submission to the House of Commons Standing Committee on the Environment and Sustainable Development regarding Bill C-69 (The *Impact Assessment Act*, The *Canadian Energy Regulator Act* and amendments to the *Navigation Protection Act*)

Mark Winfield, Ph.D.
Professor
Faculty of Environmental Studies
York University

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1. Introduction and Background

I have followed legislative and policy developments around the federal environmental assessment and energy approvals processes throughout my career, beginning in the early 1990s. I have written and published extensively on the impact of Bill-38 on the environmental governance framework in Canada[1] and Canadian energy, environment, and climate change policy generally.[2]

With respect to the current review of the federal environmental and regulatory processes, I was the author of a discussion paper on the federal processes published in 2016 by the George Cedric Metcalf Foundation.[3]

I participated in the Environmental Assessment Expert Review Panel process and have hosted, through the Faculty of Environmental Studies Sustainable Energy Initiative (SEI)[4], a series of videoconference/webinar discussions on the reviews.[5] I made a submission in response to the government's discussion paper on the environmental and

[1] See, for example, Winfield, M., "The Environment, 'Responsible Resource Development' and Evidence Based Policy-Making in Canada", for Shaun Young ed., *Evidence Based Policy-Making in Canada* (Toronto: Oxford University Press, 2013); Winfield, M., "Implementing Environmental Policy in Canada" for D. VanNijnatten, ed., *Canadian Environmental Policy and Politics* (4rd Edition) (Toronto: Oxford University Press, 2016); Winfield, M., "Decision-Making, Governance and Sustainability: Beyond the Age of "Responsible Resource Development"' *Journal of Environmental Law and Practice,* Conference Issue, August 2016.

[2] See, for example; Winfield, M., and D.Macdonald, "Federalism and Canadian Climate Change Policy" for G.Skogstad and H.Bakvis, eds., *Canadian Federalism: Performance, Effectiveness and Legitimacy* 3rd edition, (Toronto: Oxford University Press, 2012).

[3] Winfield, M., *A New Era of Environmental Governance in Canada: Better Decisions Regarding Infrastructure and Resource Development Projects* (Toronto: George Cedric Metcalf Foundation, 2016)

[4] http://sei.info.yorku.ca/.

[5] See http://sei.info.yorku.ca/seminar-presentations/, March 23, 2016, March 13, 2017, November 1, 2017, and March 2, 2018.

regulatory review process in August 2017.[6] My comments on Bill C-69 build on a number of the themes identified in that submission.

2. General Comments on Bill C-69

The overall package of legislative reforms presented through Bill C-69 is extremely complex, replacing the *Canadian Environmental Assessment Act* with new legislation (the *Impact Assessment Act* (IAA)), creating a new Canadian Energy Regulator (CER), and making amendments to the *Navigation Protection Act*. However, the proposed legislation is a significant disappointment relative to expectations for the reform of the federal environmental and regulatory review processes established through the 2015 Liberal Party platform,[7] 2015 Mandate Letters to the Ministers of the Environment and Climate Change and of Natural Resources,[8] and the December 2015 Speech from the Throne.

Although Bill C-69 introduces a number of significant reforms, at its core, the legislation would retain much of the structures for the federal review of projects with potentially significant effects on the environment, economy, and society, established by the Harper government through Bills C-38 and C-45. The highly discretionary triggering mechanism for federal environmental assessments introduced through Bill C-38 is retained, as are the very high levels of political discretion throughout the act. There remains a strong focus on the substitution of provincial assessment processes for the federal process, rather than integration and upwards harmonization of multi-jurisdictional assessments.

The *Canadian Energy Regulator Act* (CAR Act – C-69 Part 2), is largely a renaming the National Energy Board (NEB), and while retaining much of the NEB's existing mandate and focus. This is despite the government's domestic and international commitments to a major low-carbon transition in the Canadian economy.[9] The amendments to the *Navigation Protection Act* (C-69-Part 3), are extremely complicated, but appear in practice to effectively leave the structures established through Bill C-45's replacement of the *Navigable Waters Protection Act* with the *Navigation Protection Act*, intact.

That said, Bill C-69 does incorporate a number of improvements over the C-38 regime. Some of the most important areas of progress include:

- The introduction of factors to be considered by the minister and Governor-in-Council in decision-making within the impact assessment process (IAA s.63-65). These factors include contributions to sustainability and the effects of projects on

[6] Winfield, M., "Submission re: The Environmental and Regulatory Reviews Discussion Paper," August 2017. http://sei.info.yorku.ca/files/2018/03/EA-Discussion-Paper-Comments.pdf.
[7] Liberal Party of Canada, "A Clean Environment and a Strong Economy," A New Plan for a Strong Middle Class (Ottawa, 2015).
[8] https://pm.gc.ca/eng/mandate-letters.
[9] See, for example, The Pan-Canadian Framework for Clean Growth and Climate Change (Governments of Canada, Newfoundland and Labrador, Nova Scotia, New Brunswick, Prince Edward Island, Quebec, Ontario, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut, 2016).

Canada's ability to meet its international obligations including its climate change commitments.

- The elimination of the "standing test" (e.g. "directly affected") established through Bill C-38 for public participation in environmental assessment and NEB processes.
- The establishment of the new Impact Assessment Agency of Canada as the lead agency on assessments where approvals by federal "life-cycle" regulators, including the proposed CER, Canadian Nuclear Safety Commission (CNSC), and offshore petroleum boards, are required.

3. Specific comments on elements of Bill C-69.

3.1 Bill C-69 Part I: *The Impact Assessment Act*

The major areas of concern with respect to the IAI include: the mechanisms for triggering/designating projects for review; the provisions around public participation; the factors to be considered in decision-making; interagency and intergovernmental coordination; and decision-making processes. These aspects of the legislation are discussed in detail below.

3.1.1. Triggering/Designation of Projects.

The Bill C-69 retains the highly discretionary triggering process introduced through Bill C-38. That process relies on a designated project list to identify projects which may be subject to assessment. C-69 does introduce a new, planning, phase of the assessment process. However, that phase appears effectively to be a screening phase to determine if projects on the designated project list will actually be subject to assessment, as opposed to an initial phase in actual assessments.

The C-38 triggering structure represented a major step backward relative to the process in the pre-2012 *Canadian Environmental Assessment Act* (CEAA). The triggering mechanism under the previous legislation was largely non-discretionary, being grounded in requirements for specified federal legislative approvals (e.g.s.35 of the *Fisheries Act*) or projects having federal proponents, involving federal funding or occurring on federal lands. The pre-C-38 approach provided clarity and certainty to proponents and affected communities regarding which projects were subject to assessment.

In addition to introducing a high level of uncertainty as to whether projects will be subject to assessment or not, the designated project list approach runs a very high risk that projects that are individually relatively minor, and therefore not captured by the designated project list, but which may, cumulatively, cause significant effects, will be missed through the assessment process.

The designated project list approach also opens significant gaps with respect to projects within federal jurisdiction (i.e. occurring on federal lands, on where federal agencies are proponents). These types of projects, which constituted a significant portion of the

screening level assessments that occurred under the pre-C-38 CEAA, will not be subject to any form of assessment unless they involved the types of very large projects captured by the designated project list.

Recommendations

1. Bill C-69 should be amended to reduce the level of discretion in designation/triggering process for projects under the Act. Specifically:
    - All projects on the designated project list should be subject to assessment under the Act.
    - All projects requiring designated federal approvals, such as approvals under section 35 of the *Fisheries Act*, the *Canadian Nuclear Safety and Control Act*, and the *Navigation Protection Act*, should be subject to assessment under the IAA.

2. Mechanisms should be established to deal with minor, but potentially cumulatively significant projects.

Projects with Federal Proponents, on Federal Lands, or involving Federal Funding.

3. Mechanisms should be established for the review of projects occurring on federal lands, or where federal agencies are proponents. Specifically, Bill C-69, Part 1, s.109 should be amended to require that any undertaking where a federal authority:
    - is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;
    - makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out; or
    - has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part;

    should be included on the Designated Project List.

    The non-transparent and non-accountable self-assessment process for projects on federal lands and outside Canada, that would be established through ss.81-91, should be removed from the Bill.

Regional and Strategic Assessments

4. Section 109 of Bill C-69 Part 1, should be amended to establish a Strategic and Regional Undertakings List of categories of regional and strategic undertakings automatically subject to assessment, developed in an open process with explicit criteria centred 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.

5. A new section should be added to Bill C-69, Part 1, to establish a formal designation process for strategic and regional undertakings not captured in the designated strategic undertakings list regulation. The process should be parallel to that in s.9(1) for projects (physical activities) and would provided a credible foundation for a ministerial decision to appoint a regional or strategic assessments committee.

3.1.2. Public Participation

The proposed *Impact Assessment Act* (IAA) would remove the standing test (i.e. the requirement to be "directly affected" by a project to be able to participate in its assessment) for public participation in assessment processes introduced through Bill C-38. Although this would be an important step forwards, public participation provisions contained in the new legislation remain weak, being largely hortative statements of principle (s.27), rather than specific requirements to facilitate participation at key stages of the assessment process.

Recommendations

6. Part 1 of Bill C-69 should be amended to identify specific stages in the assessment process at which public and indigenous input will be invited, and designating the minimum steps (e.g. posting on the registry, invitation of comments) required to facilitate participation. Additional steps to facilitate participation should also be permitted.

7. Section 75 of Part 1 of Bill C-69 should be amended to require the establishment of participant funding programs in relation to impact and regional and strategic assessments (i.e. The Agency shall establish…).

3.1.3. Factors to be Considered in Assessment

Section 22 of Part 1 of Bill C-69 requires that cumulative effects, purpose and need for projects, alternative means, alternatives to projects, contribution to sustainability, impacts Canada's ability to meet climate change commitments and other environmental obligations, and a range of other factors be taken into account in assessments. However, Bill C-69 includes no requirements for the comparative evaluation of the

relative performance of alternatives in the achievement of these goals, or the identification of key trade-offs among those alternatives.

Recommendations:

8. Section 22 of Part 1 of Bill C-69, should be amended to require a comparative evaluation of alternatives to designated projects in relation to factors (h)-(t) identified in section 22(1), and the identification of major trade-offs between those factors among the alternatives to be considered.

9. Section 22 (1) of Part 1 of Bill C-69 should be amended to add the evaluative criteria: “intergenerational impacts of the designated project.”

10. Section 22 (1) of Part 1 of Bill C-69 should be amended to add the evaluative criteria: “intragenerational impacts of the designated project on environmental justice.”

11. Section 22 of Part 1 of Bill C-69 should be reorganized to separate structural aspects of the assessment process (consideration of effects (((1(a)), purpose and need (1(d), alternative means ((1(e)), alternatives to ((1(f)), mitigation measures ((1(b)), consideration of traditional knowledge ((1(g)) from evaluative factors ((1(h-t)) .

3.1.4. Interagency and Intergovernmental coordination

Bill C-69 places a strong reliance on a substitution model for interjurisdictional assessments (ss.31-35). It does not appear to contemplate any alternative approaches to interjurisdictional assessments. The legislation should be supportive of a cooperative and integrated approach to assessment when more than one government is involved in the approval of a project. Joint assessments should be integrated in the direction of the highest standard for public participation, the scope of assessment and decision-making criteria. Substitutive or equivalent process approaches should be avoided. All of the levels of government involved in the assessment of projects should be actively involved in the review process.

While intergovernmental cooperation is highly desirable, circumstances may arise when an effective and transparent review process cannot be established through such cooperation. In these circumstances, the federal government must retain the capacity to conduct its own assessment of a project or undertaking and reach its own decisions regarding its approval.

The proposed legislation does require consideration of public comments and establishes criteria for substitution (s.33), but the application of these criteria are ultimately at the discretion of the minister (“if he or she is satisfied” (s,33(1)).

Recommendation:

12. The overall approach to intergovernmental cooperation around assessments embedded in Bill C-69 should emphasize the integration of multijurisdictional requirements and upwards harmonization of processes rather than substitution.

13. The chapeau of Section 33(1) should be amended to read that "The Minister shall only approve a substitution if:" This will make the application of the criteria mandatory in determining whether a substitution of another jurisdiction's assessment process is acceptable.

3.1.5. Joint review panels

The provisions (ss.43-50) of Bill C-69 Part 1 around multi-jurisdictional review panels are extremely complex. They appear to require the appointment of at least one member from rosters established by the CNSC, proposed CER or an offshore petroleum board where an assessment involves activities regulated by those entities. The provisions have prompted concerns that in practice panels could be dominated by life-cycle regulator members, as there is no upper limit to their presence on panels.

Recommendation

14. Section 44, of Part 1 of Bill C-69 should be amended such that life-cycle regulator roster-based appointments can only constitute a minority of review panel members (i.e.1/3; 2/5)

3.1.6. Decision-Making

Under the proposed IAA process, if adverse effects within federal jurisdiction are identified through the assessment process, the minister must refer to the assessment to the Governor-in-Council, to determine if a project is in the public interest. In effect, the minister can approve projects if there are no adverse effects within federal jurisdiction identified, but only the cabinet can reject projects or impose conditions on them.

Section 63 of the proposed IAA outlines factors to be considered by the minister and Governor-in-Council in decision-making. The factors to be considered include a number of important considerations, including contributions to sustainability, impacts on Indigenous groups and their rights, effects on Canada's ability to meet its environmental obligations, including commitments with respect to climate change. These provisions are a significant advance relative to the decision-making criteria contained in earlier versions of CEAA.

However, the factors identified in Section 63 do not fully cover the assessment criteria outlined in s.22 of the legislation, including the consideration of alternatives to undertakings (22(1)(f)), and public comments received ((22(1)(n). Nor does Section 63

require the comparative evaluation of alternatives relative to the factors identified in sections 22 and 63.

Section 65 requires that the reasons provided for the determination made by the Minister or Governor in Council must demonstrate consideration of the factors referred to in section 63. These provisions are an important addition to the legislation. However, the test for demonstrating consideration in decision-making is unclear, and could potentially be interpreted in a minimalistic manner.

Recommendations

15. Section 63 (a) of Part 1 of Bill C-69 should be amended to read "the extent to which the designated project contributes to sustainability, taking into consideration the factors identified in s.22 of this act."

16. Section 65 of Part 1 of Bill C-69 should be amended to require that decision statements made under the section demonstrate "meaningful and substantive" consideration of factors referred to in s.63.

3.2. Bill C-69 Part 2: The *Canadian Energy Regulator Act*

Part 2 of Bill C-69 deals with the creation of the Canadian Energy Regulator. Other than renaming the agency, the provisions largely roll over the provisions of the existing *National Energy Board Act*. Given the domestic and international challenges facing the Canadian energy sector, including the need to address Canada's commitments with respect climate change, and the importance of reconciliation with Canada's indigenous peoples, the government's approach constitutes a major disappointment and missed opportunity.

My comments on Part 2 of Bill C-69 are focused on three themes – the mandate of the new Canadian Energy Regulator, the provisions related to public participation in decision-making by the regulator, and the long-term role of the regulator in the gathering and disseminating information related to energy matters in Canada, and in providing policy advice on these matters.

3.2.1. Mandate

The goals set out in the purposive section of the act fairly narrow, and inadequate in the context of the challenges facing the Canadian energy sector. The provisions add references to ensuring that energy projects and infrastructure are constructed, operated and abandoned in a manner that is "safe, secure, and efficient and protects, people, property and the environment (s.6)." Given the government's strong emphasis on the importance of achieving low-carbon transitions in the Canadian economy, and domestic and international commitments to reducing Canada's greenhouse gas emissions,

specific reference to those goals should be included in the purposive section of the act, and in the mandate (s.11) of Canada's primary energy regulator.

Similarly, given the government's strong emphasis on the importance of reconciliation with Canada's indigenous peoples, the purposive and mandate sections of the legislation should make specific reference to those goals. This would be consistent with the proposed commission's statutory duty to consider the impacts of its decisions and recommendations on the rights of the indigenous peoples of Canada (s.56).

Recommendations:

17. Section 6 of Part 2 of Bill C-69 should be amended to include the following sections:

> (e) to ensure that the development, operation and abandonment of pipelines, power lines, offshore renewable energy projects, the exploration for and exploitation of oil and gas, and trade in energy products, contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change, and to Canada's transition to a low-carbon economy.
>
> (f) to ensure that the development, operation and abandonment of pipelines, power lines, offshore renewable energy projects, the exploration for and exploitation of oil and gas, and trade in energy products occurs in a manner that ensures respect for the rights of the indigenous peoples of Canada as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

18. Section 11 of Part 2 of Bill C-69 should be amended to include the following sections:

> (h) making decisions, orders, and recommendations within its jurisdiction that contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change, and to Canada's transition to a low-carbon economy.
>
> (i) making decisions, orders and recommendations within its jurisdiction that respect for the rights of the indigenous peoples of Canada as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

3.2.2. Factors to be Considered in Decision-Making re: Pipelines

Part 3 of the legislation deals with the process for making recommendations to the Governor in Council regarding the approval of interprovincial pipelines. Section 183

provides a series of factors to be considered in the formulation of such recommendations. The provisions make general reference to environmental effects, including cumulative effects (183(2)(a), and environmental agreements entered into by the government of Canada (j). There are also references to effects on the interests, concerns and rights of Indigenous peoples (d, e), social, health and economic effects, and the economic viability of a proposed pipeline (h). The inclusion of these factors is an important element of the act, particularly in light of the implication that the assessment of proposed pipelines, like all other projects, under the proposed Impact Assessment Act, is ultimately discretionary.

However, there are some significant gaps in the factors to consider established through s.183, relative to those established in s.63 of the IAA. These include references to contributions to sustainability and impacts on Canada's ability to meet its environmental obligations and commitments in respect of climate change.

Recommendation

19. Section 183 (2) of Part 2 of Bill C-69 should be amended to include:

- "contributions to sustainability, including intergenerational and intragenerational impacts,"
- "comments received from the public," and
- "impacts on Canada's ability to meet its environmental obligations and commitments in respect of climate change"

in its list of factors to be considered in decision-making regarding pipeline projects.

Consideration of Factors in Decision-Making

The provisions of s.183 of the Canadian Energy Regulator Act provide some direction to the commission in its consideration of proposed pipelines. However, unlike the provisions (ss.63-65) of Part 1 of C-69, the Impact Assessment Act, there are no provisions in Part 2 requiring that the Commission or Governor in Council demonstrate their meaningful consideration of these factors in their recommendations or decisions.

Recommendations:

20. Section183 of Bill C-69, Part 2, should be amended to require that the Commission's report and recommendations regarding a proposed pipeline demonstrate meaningful and substantive consideration of the factors identified in section 183(2).

21. Section186 of Bill C-69, Part 2, should be amended to require that the Governor-in-Council demonstrate meaningful and substantive consideration of the factors

identified in s.183(2) in its direction to the Commission with respect to an application.

3.2.3. Consideration of Factors in Non-Pipeline Recommendations and Approvals.

The requirement to consider the factors outlined in section 183 CER Act is limited to recommendations and approvals related to pipelines (Part 3). They do not apply to International and Interprovincial Power Lines (Part 4), and Offshore Renewable Energy Projects and Offshore Power Lines (Part 5), and imports and exports of electricity and oil and gas (Part 7).

Recommendation:

22. The requirements for consideration of the factors outlined in section 183 of the proposed CER Act, and the requirement that the Commission and Governor in Council demonstrate meaningful consideration of these factors in their recommendations and decisions should be extended to other matters before the commission, including International and Interprovincial Power Lines (Part 4), and Offshore Renewable Energy Projects and Offshore Power Lines (Part 5), and imports and exports of electricity and oil and gas (Part 7)

3.2.4. Public Participation

Like the *Impact Assessment* Act, the *Canadian Energy Regulator Act* removes the standing test ("directly affected) for participation in National Energy Board processes, introduced through Bill C-38. However, like IAA, the participation provisions (ss.74, 75, 183(3) in the CER Act are general and discretionary (e.g. "the Regulator may establish processes that the regulator considers appropriate to engage with the public…") rather than establishing specific steps and mechanisms that need to be followed in order to ensure the participation of members of the public in decision-making.

Recommendations:

23. The CER Act should be amended to identify specific stages in the approval process at which public and indigenous input will be invited, and designating minimum steps (posting on a registry, invitation of comments) to facilitate participation. Additional steps to facilitate participation should also be permitted.

24. Public comments received should be identified as one of the factors to be considered in the commission's recommendations and Governor-in-Council's determination of whether project certificates and other approvals should be granted.

25. The establishment of a participant funding program (s.75) in relation to CER hearings should be mandatory, rather than discretionary (i.e. "the Regulator shall establish…)

3.2.5. Advice and Information Gathering

The CER Act would continue the NEB's current mandate to provide policy advice on energy-related matters to the Minister (s.80). The provision raises questions regarding the wisdom of the continued mixing of regulatory and energy policy advisory functions within the same institution. These functions are separated, for example, in the United States between the Energy Information Administration[10] and the Federal Energy Regulatory Commission[11] and other energy-related regulatory bodies.

Recommendation

26. The mandate of the CER should be focussed on its regulatory functions. The former NEB's energy policy advice and information gathering and dissemination functions should be moved to a new institution focussed on informing a low-carbon sustainable energy transition in Canada.

3.3. Bill C-69 Part 3: Amendments to the *Navigation Protection Act*

The provisions of Bill C-69 related to the *Navigation Protection Act*, are extremely complicated, but in practice would do very little relative to the regime for the protection of navigable waters established through Bill C-45.

The most significant change appears to be that all projects classified as "major" under the Act will require review under Act regardless of whether they involve waters designated under the Act or not. Even where projects are subject to approval under the legislation, they will only be reviewed through a narrow lens of direct impacts on navigation, rather than their wider impacts on the physical and ecological integrity of waterways. The authority of the federal government to take such wider considerations into account in decision-making under the former *Navigable Waters Protection Act* was established through the Supreme Court of Canada's 1992 decision regarding the Oldman Dam project in Alberta.[12]

[10] www.eia.gov.
[11] www.ferc.gov.
[12] Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3.

These changes are a major disappointment relative to the expectations of the "restoration of lost protections" promised in the Liberal Party's 2015 election platform.

The provisions of Bill C-68, amending the *Fisheries Act*, with respect to the protection of fish habitat, may provide an appropriate model for the structuring of approvals under the *Navigation Protection Act*. The provisions of Bill C-68 restore the requirement for approval of any "harmful alteration or destruction of fish habitat," and establish a registration system and approval system for minor works that may affect fish habitat.

Recommendation

27. The original provisions of the NWPA, requiring the approval of the Minister of Transport for any activities interfering with navigation in all navigable waters should be restored. A mechanism could be established for minor projects affecting navigable waters. "Minor" projects would need to be clearly defined, mechanisms for public notice and opportunities to comment and request more detailed individual project reviews would need to be established, a registry of such projects established, along with mechanisms to address cumulative effects, and adequate resources for inspection and enforcement provided.

4. Further Information

I thank Committee members for considering my submission. I would be pleased to respond to any questions that members of the Committee or its research staff may have regarding my views on Bill C-69.

Mark S. Winfield, Ph.D.
Professor
Co-Chair, Sustainable Energy Initiative
Coordinator MES/JD Program
Coordinator BES Certificate in Sustainable Energy
Faculty of Environmental Studies
York University
4700 Keele St.
Toronto, Ontario
M3J 1P3
Tel: 416-736-2100 ext. 21078/Cell 416-434-8130

e-mail: marksw@yorku.ca