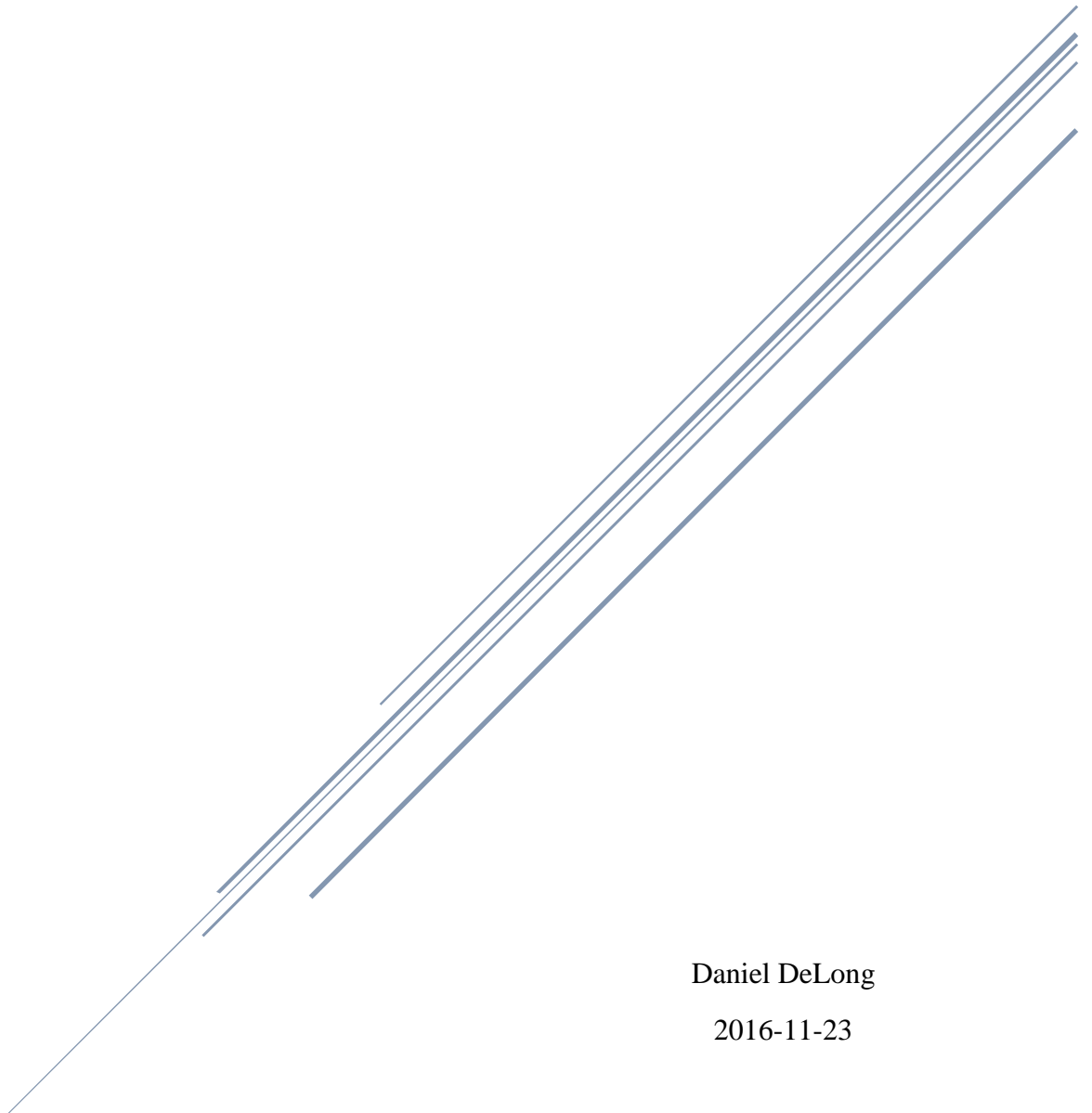


THE PUBLIC PARTICIPATION PROCESS IN THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT



Daniel DeLong

2016-11-23

Abstract:

This report evaluates the public participation process in the context of the 2012 Canadian Environmental Assessment Act. The aim of this study is to identify the flaws and shortcomings of the current Act and research best-practice recommendations outlined in the scholarly literature, with the intent of providing solutions for overcoming these issues. A brief introduction is followed by an overview of the scholarly literature on the topic, an analysis of public participation in an historical context, identification of the current issues with public participation in environmental assessment, and a set of proposed methods for overcoming them. The goal of this paper is to provide feedback to the review panel tasked with revising the Canadian Environmental Assessment Act and offer practical solutions, based on best-practice recommendations, which could be implemented in the new rendition.

Contents

Abstract:	1
Introduction:	3
Literature Review:	3
Historical Context:	4
Identification of the Problem:	5
Proposed Solutions:	6
Conclusion:	7
Works Cited:	9

Introduction:

Environmental assessment (EA) is a crucial regulatory process which aims to ensure that significant projects and endeavors are completed in a sustainable and environmentally conscious framework. Ensuring that this process is of the highest quality possible will increase the likelihood of a successful long-term outcome for a project and minimize the associated environmental effects that it is anticipated to have. With the introduction of the new Canadian Environmental Assessment Act (CEAA) in 2012, many mechanisms and safeguards from the original act were removed or heavily edited, reducing the quality of the federal assessment process. In light of the current CEAA review, I will evaluate the following theme, which was identified by the expert panel assigned to this process: “What do you think meaningful, effective, and inclusive participation in the environmental assessment process looks like?”

The objective of this report is to offer a critical analysis of the 2012 CEAA in the context of the above theme and provide constructive feedback and recommendations on how to improve the process in the new iteration of the Act. To accomplish this I will investigate best-practice procedures and recommendations identified in the academic literature, as well as other relevant materials, and synthesize these findings into a concise set of recommendations for review by the panel. These recommendations will ultimately aim to improve the CEAA and increase the effectiveness and legitimacy of the assessment process within the context of public participation.

Literature Review:

Peer-reviewed literature on the topic of public participation in the environmental assessment process are extensive and well researched, with notable authors such as John Sinclair, Meinhard Doelle, Robert Gibson, as well as many others, having contributed a great deal of professional information on the topic. Within this literature there is a general consensus that the current federal EA process has significant shortcomings; constructive public participation in the EIA process is largely hindered by “poor communication, poor access to information, and lack of transparency in the decision making process” (Nadeem & Fischer, 2011, 36).

One of the most notable barriers to public participation in CEAA 2012 relates to the opportunity to engage in the process. This has been directed through the redefining of the term “interested party”, which states that “a person is an interested party if [in the opinion of the review panel] the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise” (Government of Canada, 2012, 5).

The term “directly affected”, which does not appear in the definition of the term from the 1992 CEAA (Government of Canada, 1992, 4), “is being used by project proponents as an opportunity to make sophisticated legal arguments for limiting public participation” (Srivastava & Campbell, 2016, 79)

Another significant issue identified in the literature is the stage in the assessment process in which the information about the project is released to the public, as well as the timeframe in which the public has an opportunity to comment on the assessment. In the 2012 CEAA, the proponent is not required to publicly post information on the project until “the Agency is satisfied that the description of the designated project includes all of the required information” (Government of Canada, 2012, 9). This is problematic since it does not require that the public be given an opportunity to become engaged in the early stages of the screening process; “a fundamental problem is the lack of recognition of the need for early participation and a lack of openness to rethink a project at the time the public is engaged” (Doelle & Sinclair, 2006, 189)

Similarly, the public is only provided a brief window of time to comment on an assessment after it has been posted and before the agency is required to move on with the screening process; “45 days after the posting of the notice on the Internet site, the Agency must conduct the screening, which must include a consideration of any comments received from the public within 20 days after the posting of the notice” (Government of Canada, 2012, 9). These “strict timelines tend to put members of the public at a disadvantage relative to proponents” (Doelle, 2012, 15)

There are also barriers to acquiring participatory funding in the 2012 CEAA. In the instance where the Minister approves a substitution, “the obligation for funding does not apply with respect to any designated project” (Government of Canada, 2012, 35). This can make it more difficult for citizens and interested parties to engage in the assessment process and voice their concerns if they do not live in the immediate vicinity of the project (Gibson, 2012, 184; Rutherford & Campbell, 2004, 83).

Historical Context:

Public participation in Canada, in the context of formal EA, dates back to the mid-1900s, but it was not until the adoption of “CEAA of 1992 that it became entrenched as a legal requirement in the federal EA process” (Srivastava & Fluker, 2016, 69). Public participation in

EA is “based on the democratic ideal of citizen representation in decision making” (Shepherd & Bowler, 1997, 728), and is a critical component of the assessment process.

The CEAA 1992 established the importance of public participation by enshrining it in section four as a fundamental purpose of the Act: “to ensure that opportunities are provided for meaningful public participation during an environmental assessment” (Government of Canada, 1992, 7). This clause remained the same in the 2012 Act, but the 1992 definition of “interested party” omitted the term “directly affected”, and consequently allowed for a more general opportunity for public engagement; ““interested party” means, in respect of an environmental assessment, any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious” (Government of Canada, 1992, 4).

Furthermore, the 1992 Act did not codify a particular timeframe for when the public was permitted to comment or engage with the process when being reviewed by a panel; all “comments from the public that are received in accordance with this Act and the regulations” (Government of Canada, 1992, 22) must be considered.

Based on these changes, as well as others, such as the removal of the requirement to offer participant funding if a project is substituted to a review panel, it is clear that significant changes were adopted in the 2012 CEAA which significantly reduced opportunities for public engagement.

Identification of the Problem:

The current CEAA, implemented under the Harper government in 2012, has some significant shortcomings in the context of public participation. Many of the provisions concerning public participation in the previous iteration of the Act were diluted in the 2012 rendition; a recent study of CEAA 2012 concluded that although “federal environmental assessment still includes public participation, any participation beyond the submission of written comments now seems to be more of a privilege than a right” (Srivastava & Fluker, 2016, 65). In instances where the public does have the opportunity to become involved in the process, they are usually excluded from the early planning stages, since CEAA 2012 “encourages the proponent to fend the project design before the EA process begins (sic)” (Doelle, 2012, 15).

Furthermore, the adoption of the term “directly affected” as a condition in the definition of “interested party”, the withdrawal of participant funding when a project is subject to substitution, and the narrowing of the timeframe in which the public is able to comment on an assessment have seriously diminished the opportunity for effective public participation. To encapsulate all of these issues is the complexity EA, and the challenges that laypeople may encounter when trying to engage with the process. Written material is often mired in complicated language and technical jargon, and participatory opportunities in the form of public hearings and open houses are often intimidating, since “highly formal hearing procedures impact people's level of comfort, willingness to participate, and ability to absorb information” (Sinclair & Diduck, 2016, 7). Consequently addressing these issues, which have been identified in the scholarly literature, is vital to abolishing the barriers to effective public participation in the current CEAA.

Proposed Solutions:

Foremost, the public needs to be provided with a reasonable opportunity to become involved in the process; “a fair process demands that public participation exercises are held at an open location, at a convenient time, and outside of official working hours” (Zuhair & Kurian, 2016, 135). Furthermore, proponents and regulatory authorities should be encouraged to organize “less formal and more participant friendly public hearings” (Sinclair & Diduck, 2016, 7) and “independent facilitators should be made available on request, especially at the early stages of engagement, to facilitate productive discussion between the proponent and interested members of the public” (Doelle & Sinclair, 2006, 193). These opportunities for public engagement must be provided in the early stages, or prior to, the official screening process; “EA legislation has to promote a process that provides for extensive front-end consultation” (Doelle & Sinclair, 2006, 191).

The definition for “interested party” must remove the “directly affected” condition and revert back to how it was worded in the 1992 Act (Government of Canada, 1992, 4); this will allow for a wider audience to engage in the assessment process when a review panel has been established. The time-limit imposed on providing feedback on the screening process (Government of Canada, 2012, 9) should also be removed, or greatly extended, to allow more flexibility for those who want to have an opportunity to participate. Adopting the clause used in

the 1992 CEAA would be an easy way of resolving this, since it does not impose the same short-lived time limit. Furthermore, instead of enforcing strict time limits for the screening process, the new CEAA should go beyond this and encourage “ongoing involvement by extending participation programs to the monitoring and follow-up phases of EA” (Sinclair & Diduck, 2016, 6).

Throughout the public engagement process there must be a more effective method of communication instead of only having public hearings and open-houses; “a deliberative participatory process should ensure that there is a two-way flow of information” (Zuhair & Kurian, 2016, 135). Public participation must go beyond individuals voicing their concerns and instead require that proponents or government officials respond with constructive feedback. To further facilitate constructive communication, the new CEAA must recognize the value of social media and allow for the “material available in the EA registry to be accessible on social media outlets” (Sinclair & Diduck, 2016, 3). These reports and files must be also be “comprehensible to all stakeholders, and the executive summary should be written in non-technical language” (Nadeem & Fischer, 2011, 46), to help make the EA material more accessible to laypersons who wish to engage in the process.

Finally, participant funding should not be restricted to an interested party in the case of a substitution (Gibson, 2012, 184), and subsequently removing clause 57 (2) in the 2012 CEAA should be a priority. Adopting the provision established in the 1992 Act would be an appropriate solution to this issue, providing an opportunity for non-local experts and interested citizens to engage in the assessment process.

Conclusion:

The CEAA is a cornerstone of environmental assessment in Canada, and a key protective measure which aims to mitigate the negative environmental effects associated with significant development projects. With the implementation of the new Act in 2012, many changes were adopted which reduced the capacity for inclusive and effective public participation in EA. Now, with a review process underway, there is an opportunity to correct many of these issues and update the Act, with provisions for new and improved approaches to the assessment process.

Addressing the key flaws and shortcomings identified in the current CEAA, in the context of public participation, is crucial for providing a constructive, transparent, and legitimate

assessment process. Based on the scholarly literature, I would advise that the review panel responsible for the revision of the CEAA adopt the best-practice recommendations identified in the context of this report; this will ultimately result in a more effective EA and a CEAA that conforms to contemporary public participation standards.

Works Cited

- Canadian Environmental Assessment Act, 2012 S.C. 2012, c. 19, s. 52. Ottawa: Department of Justice.
- Canadian Environmental Assessment Act S.C. 1992, c. 37. Ottawa: Department of Justice.
- Canadian Environmental Assessment Agency. 2016. Glossary: Explanations of Terms. Retrieved from <http://www.ceaa.gc.ca/default.asp?lang=En&n=B7CA7139-1&offset=3&toc=hide#vec>.
- Doelle, M. 2012. CEAA 2012: The end of federal EA as we know it? *Journal of Environmental Law Practice*, 24, 1-17.
- Doelle, M., Sinclair, J. 2006. Time for a new approach to public participation in EA: promoting cooperation and consensus for sustainability. *Environmental Impact Assessment Review*, 26, 185– 205.
- Gibson, R. 2012. In full retreat: the canadian government’s new environmental assessment law undoes decades of progress. *Impact Assessment and Project Appraisal*, 30, 179-188.
- Nadeem, O., Fischer, T. 2011. An avaluation framework for effective public participation in EIA in pakistan. *Environmental Impact Assessment Review*, 31, 36–47.
- Rutherford, S., Campbell, K. 2004. Time well spent? A survey of public participation in federal environmental assessment panels. *Journal of Environmental Law and Practice*, 15, 71-83.
- Shepherd, A., Bowler, C. 1997. Beyond the requirements: improving public participation in EIA. *Journal of Environmental Planning and Management*, 40, 725-738.
- Sinclair, J., Diduck, A. 2016. Reconceptualizing public participation in environmental assessment as EA civics. *Environmental Impact Assessment Review*, 1-9.
- Srivastava, N., Fluker, S. 2016. Public participation in federal environmental assessment under the canadian environmental assessment act 2012: assessing the impact of “directly affected”. *Journal of Environmental Law and Practice*, 29, 65-81.
- Zuhair, M., Kurian, P. 2016. Socio-economic and political barriers to public participation in EIA: implications for sustainable development in the maldives. *Impact Assessment and Project Appraisal*, 34, 129-142.

