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December 22, 2016

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Re: Written Submission to the Expert Panel on the Review of Environmental Assessment Processes

Achieving Deliberative Public Involvement in Environmental Assessment

Introduction

Public involvement is one of many critical and vexing issues you have identified as being central to your review of environmental assessment (EA) processes. As you have already received considerable input on this subject, we will not reiterate the general issues, problems and opportunities regarding involvement. Rather, we endorse and build on the 'Principles of Meaningful Participation' and the associated suggestions for legal reform submitted by the Multi-interest Advisory Committee and the Canadian Environmental Network's Environmental Planning and Assessment Caucus. Our purpose here is to bring further clarity to the issue of deliberative involvement, which these and other submissions suggest is an essential element of meaningful participation.

Deliberative involvement has been discussed in the EA literature for at least 30 years. Suitable methods, such as sharing circles, mediation and workshops, are well established (Praxis 1988, Connor 2001, IAP2 2006), and the potential costs and benefits are well known. Costs can include increased financial and time requirements, which need to be mitigated - and often can be, with careful and effective planning. Benefits can include finding common interests, mutual learning among the participants, increased process legitimacy, reduced delays from conflict, and improved rigour of the assessment itself by ensuring that any issues raised are properly explored and well understood (e.g., Webler et al. 1995, Wiklund 2005, Sinclair and Diduck 2016). The benefits also extend beyond the EA itself in terms of potentially improved legitimacy and acceptance of post-EA decisions.

Despite this wealth of knowledge and some important real life examples, such as the Berger Inquiry, BAPE's (Bureau d'audiences publiques sur l'environnement) experiences with mediation in Québec, and the CEA Agency's guidance regarding participation in screenings, deliberative involvement has not caught hold in Canada. The political and administrative will to implement it in a consistent way has been lacking. Despite stated intentions, and the above-mentioned attractions, the investment in planning required to make it a reality seems to have been a deterrent. We therefore submit that deliberative involvement

requires a legislative foundation in the new federal EA regime. Without such a base, this crucial aspect of meaningful public participation will not become a reality in Canada.

Necessary Statutory Reforms

First and foremost, the 'Principles of Meaningful Participation' suggested by the MIAC and the CEN need to be enshrined in the new statute – either in the preamble, objectives or another suitable part of the act. Doing so would provide a framework for the overall public participation system established in the new EA regime.

Specific aspects of the principles would, of course, also require their own detailed legislative provisions that establish positive legal obligations. Such provisions would be, by themselves, vital to creating realistic prospects for achieving meaningful participation. Moreover, some provisions would also enable deliberative involvement; they are, in effect, 'on-ramps' to deliberation.

- For example, mandatory timely information sharing via a complete and accessible public registry would permit informed, balanced and fair dialogue among EA participants. Similarly, mandatory adequate participant assistance for far reaching proposals (discretionary for ones less so) would offer stakeholders, rightsholders, and public interest intervenors the opportunity to hire outside expertise and otherwise be prepared to engage effectively in deliberative forums.
- Additionally, a legislated system is needed for mediation and other forms of alternative dispute resolution (ADR) to help participants work together to achieve mutually acceptable solutions. Despite being included in CEAA 2005 and in CEAA 2012 guidance documents, mediation does not have an extensive history in federal EA (Doelle and Sinclair 2010). Our view is that strong provisions are thus needed in the new statute so that the full array of ADR's benefits can be realized. It should be mandatory for regulators to consider the use of ADR and to explain why it is not suitable if that is their determination. Although ADR could be relevant to all streams of assessment when serious conflicts arise, we see especially promising applications in the lead up to a public hearing to help participants identify common interests and narrow the range of disputed issues. As well, ADR would likely be most applicable in an effort to reduce contention over selected aspects of a project or undertaking, rather than in consideration of an entire impact statement, which would generally not be feasible.
- To create further opportunities for deliberative involvement, we recommend the establishment of an option for a public hearing that is less formal than the hearings currently mandated and practiced under CEAA 2012 and related statutes. We envision public meetings, structured roundtables, sharing circles or similar forums for non-adversarial discussion. The formality of current hearings has largely eliminated opportunities to discuss issues and solve problems during the hearing itself. At the end of a hearing, we are often left with just a series of position statements from participants, having had little opportunity for public discussion or testing of the ideas presented to provide a strong basis for the panel decision. An important aspect of creating an option for informal public hearings would be to ensure that in any given case they are compliant with the principles of natural justice and procedural fairness and, if not, the more formal hearing option would need to be adopted.

- Greater deliberation could also be achieved with new provisions that allow for iterative rounds of hearings. Such provisions would permit, and encourage, the division of hearings into multiple sessions. This would provide time for all parties to discuss issues outside of the hearing setting, gather additional information, do further analysis, as well as affording the needed space to apply ADR.
- Another aspect of meaningful participation that requires a mandatory statutory foundation is the provision of opportunities for public involvement, including deliberative forums, at the scoping stage of EA. This would permit detailed exploration, from diverse perspectives, of need and alternatives and the development of robust sustainability criteria. It would also permit development of a public participation plan tailored to a wide array of participants, which of course could be modified as needed as the case proceeded. Further, the development of clear participation plans should be a requirement for all EA streams.
- Statutory provisions are needed requiring opportunities for public participation, including deliberative forums, in follow-up and monitoring on a scale appropriate to the circumstances, with full transparency in decision processes as a critical pre-condition. Research and practice confirm the benefits of such participation, including outcomes such as mutual learning and enhanced trust, and in various contexts – including everything from independent oversight committees to citizen-based programs and basic regulatory compliance (e.g., Noble and Storey 2005, Morrison-Saunders et al. 2007; Sinclair and Diduck 2016).
- Finally, we suggest that the discretion that is likely to be built into these statutory and regulatory provisions for meaningful participation be balanced with a set of legislative principles against which specific decisions can be measured to ensure the appropriate exercise of such discretion. Such principles might include transparency in the decisions taken, inclusiveness in coming to the decision, culturally sensitive and appropriate approaches, and recognition of the capacity and resources of participants.

Necessary Regulatory Reforms

Operational details of many of the statutory provisions noted above would, of course, have to be outlined in regulation. Continuing with the examples above, particulars regarding the content, accessibility, and timely upkeep of the public registry should be specified in regulation. Likewise, a participant assistance regulation could set out the types of assessments to which the program applied, procedures for applying for assistance, decision criteria and similar operational essentials.

To further encourage deliberative involvement, we suggest the following requirements also be established in regulations.

- The EA Authority should be mandated to engage with stakeholders, rightsholders, and public interest organizations to develop ongoing EA education and training programs and, in individual EAs, to prepare and implement public participation plans. In regard to this last point, the regulations must make clear the responsibility of the EA Authority to participate, thereby not leaving it to proponents to carry out participation plans. The perceived or real conflict of interest associated with such arrangements often deters widespread and active public participation.

Partnerships among government agencies, the public, and proponents, appropriate to the scale of the project or undertaking, must be required where possible.

- Government agencies should be directed to engage, where needed, in deliberative involvement forums, sharing and explaining their knowledge, particularly relevant scientific and technical studies, and answering questions where they have the information and ability to do so. Impartial scientific and technical information is a basic currency of discussion and dialogue.
- The EA Authority should be mandated to develop an easily accessed, well-organized and searchable electronic library (or linked set of libraries) of EA case materials, including documentation of impact predictions and monitoring findings, records of decisions and justifications, and associated cases in law. By making this available to all, such a resource could be used by all parties in the assessment community to inform deliberative involvement and ultimately improve future assessments and decisions over time. In order to comply with federal bilingualism requirements, a central bilingual registry could link to external libraries as well as to government (bilingual) libraries.
- Opportunities and methods for deliberative involvement, appropriate to the circumstances of each case, should be mandatory in public participation plans. A regulation should be enacted and guidance documents prepared that list and describe deliberative techniques available for use in EA and which support their implementation. A short list of such techniques includes advisory committees, consensus conferences, participatory open houses, mediation, sharing circles and workshops. Further examples can be found in the extensive practical and academic literature on the subject (e.g., Praxis 1988, Connor 2001, IAP2 2006, Diduck et al. 2015).

Conclusion

We have been working together on meaningful public participation and deliberative involvement in EA and other environmental governance processes for over twenty-five years. Our contention is that while techniques for more meaningful and deliberative participation have flourished, public involvement practice in Canada at the federal level remains wanting. We attribute this in large part to a lack of statutory and regulatory direction and feel that the only way of achieving the goals of bringing more trust, public confidence, process legitimacy and societal learning to federal assessment processes is through adopting the sorts of legislative changes we have suggested here. Lastly, while we feel that implementing the legislative and regulatory provisions we suggest could be of benefit when addressing UNDRIP, the recommendations contained here have not been developed for UNDRIP or government-to-government cooperation or in direct consult with Indigenous people.

We appreciate the opportunity to offer our thoughts about advanced public involvement practice, and wish you luck with your report development.

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