

**Considerations to  
Improve Environmental Impact Assessment in Canada**

**Submission of the East Coast Environmental Law Association (2007) to  
the Expert Panel Reviewing  
Federal Environmental Impact Assessment**

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Submitted December 23, 2016

## **I. Background**

The East Coast Environmental Law Association (ECELAW) established in 2007 as a non-profit organization, responds to community inquiries, carries out legal and policy research and presents educational resources and opportunities to increase public awareness of environmental laws in Atlantic Canada. Our objective is to build capacity in the public and among legal practitioners so that we can work together to ensure that environmental laws are effectively used and strengthened.

On October 3, 2016, ECELAW presented to the EA Reform Panel in Halifax, Nova Scotia. Our presentation focused on 2 of the 12 Pillars of Next Generation EA developed through the EA Reform Summit. We provide the following written submissions, in addition to those comments, to assist the Government of Canada in creating a truly reformed Environmental Impact Assessment (EIA) process for Canada.

We wish to articulate our full support of the submission by the Canadian Environmental Network (CEN) Environmental Planning and Assessment (EPA) Caucus, entitled *Achieving a Next Generation of Environmental Assessment*. ECELAW is a member of the EPA Caucus.

In this submission we will highlight four areas for consideration:

1. EIA should be holistic, incorporating biophysical, social, economic and cultural considerations.
2. Improve decision-making by making the EIA process accessible and based on mutual learning.
3. Recognize intergenerational equity in EIA.
4. Establish a national approach to EIA: Aquaculture Example.

## **II. Considerations**

- 1. EIA should be holistic, incorporating biophysical, social, economic and cultural considerations.**

Development inherently impacts the host communities and the citizens who live there. The impacts may be positive and negative, ranging from job opportunities and economic growth to environmental degradation, stressing social infrastructure and cultural loss.

How a community is affected by a development and how members of the community perceive the development can vary. Take for example two proposed quarry projects in Nova Scotia: the Whites Point Quarry (proposed in 2003) and the Black Point Quarry (proposed in 2014). The quarry projects were both proposed in coastal areas, were approximately the same size, both included a marine terminal and both had US-based proponents seeking a source of aggregate. Both quarries were subject to federal EIA.

There was strong community-based opposition to the White's Point quarry, including opposition from local government officials. The project was referred to a Joint Panel Review that ultimately recommended, in 2007, that the project not proceed based on the likelihood of significant adverse effects to community core values. The project did not proceed.

Although there was opposition, there was general community support for the Black Point quarry. The local government supported the project as a means of diversifying the local economy. The project did not proceed to a Panel. The project was approved in 2016.

The history of the White's Point and Black Point quarry projects reflects the need for a holistic approach to EIA. Biophysical aspects of a proposed project are key to an assessment, but the social, economic and cultural impacts of the proposal should be fully incorporated into the EIA.

The current federal approach to EIA does not provide clear direction on the integration of social, economic and cultural impacts into the assessment process. EIA should fully incorporate a holistic assessment approach. For a development to proceed successfully with social license the means of engaging the community should reflect the nature of the community. Early engagement with the community is key to understanding the culture and values that will become part of the assessment.

## **2. Improve decision-making by making the EIA process accessible and based on mutual learning**

Community and public involvement in the decision-making process should be considered as beneficial to the development of the proposed project, not as an obstacle, human relations project or as a simply box to check. Strong public participation practices enable the proponent and government to share information, take the community aspirations into consideration and gives the community influence in the EIA process.<sup>1</sup> For the proponent and the government, strong community involvement gives access to local knowledge, a broader range of solutions, avoidance of litigation and enables a transition to sustainability.<sup>2</sup>

Next generation EIA processes shift the role of the citizen in the decision making process away from simple consultation towards a mutual learning experience. Thus creating a dialogue between the proponents, government, and communities. In this way, a common understanding can be achieved, empowering citizens and ensuring against feelings that the project was already decided upon prior to consultation.<sup>3</sup> Not only is this shift beneficial to all parties but also it can lead to more sustainable resource use patterns, address needs for

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<sup>1</sup> Momtaz S, Gladstone W. Ban on commercial fishing in the estuarine waters of New South Wales, Australia: community consultation and social impacts. *Environ Impact Assess Rev* 2008;28:214 at 223.

<sup>2</sup> Stewart J, Sinclair A. Meaningful public participation in environmental assessment: perspectives from Canadian participants, proponents and government. *J Environ Assess Pol Manag* 2007;9(2):161 AT 162.

<sup>3</sup> A. John Sinclair & Alan P Diduck, "Reconceptualising public participation in environmental assessment as EA ciics" (*Forthcoming 2016*) *Environmental Impact Assessment Review* at 2.

institutional innovation and change towards sustainability.<sup>4</sup> Better decisions are made when all citizens who have an interest have the capacity and the confidence to put their ideas forward, including those marginalized such as First Nations and low-income communities. This will alleviate resource drain on citizen organizations and allow for higher quality participation, which will be discussed further in this submission.

As stated in Theme 7 (Principles of Meaningful Public Participation in Environmental Assessment and the Essential Steps to Getting There) of the EPA Caucus Submission

“Meaningful public participation refers to processes that incorporate *all* of the essential components of participation, from the opportunity to provide input to active and critical exchange of ideas among proponents, regulators, and participants.” (at page 34).

ECELAW fully supports the ten overarching principles for meaningful participation in federal EA identified and summarized in the EPA Caucus Submission at pages 34 to 40.

Regarding principle number 4: **Formal processes of engagement, such as hearings and various forums of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes**, we wish to provide further comment.

The use of a formal hearing process for specific EIAs should be clearly articulated in legislation. Under the current process, the panel hearing process in CEAA 2012 is significantly different than the more formal NEB hearing process. It is frequently not clear to members of the public seeking to participate in the hearings why the processes are so different. Where a formal hearing process is required, the reasons for the formality should be made clear and funding support provided to participants should account for the need for legal representation in the formal process.

Additionally, even in a formal hearing process public participation should be made accessible through plain language and clear processes. Submissions should be encouraged in an environment that is not made unnecessarily intimidating. The process and funding made available should recognize that many citizen-participants are volunteers or work for charitable organizations. Flexibility in scheduling and adequate funding should be available to encourage participation.

Regarding principal number 9: **Programs recognize the knowledge and acumen of the public**, we wish to provide further comment. Environmental impact assessment is a primary vehicle to engage ‘the public’ in future planning. To successfully engage the process should recognize ‘the public’ as a collection of individual citizens, not simply consumers or

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<sup>4</sup>Sinclair P, Cowell S, Lofstedt R, Clift R. A case study in participatory environmental systems assessment with the use of multimedia materials and quantitative LCA. (2007) 9:4 J Environ Assess Pol Manag 399–42 at 416.

stakeholders. The EIA process should recognize the knowledge and capacity citizens contribute to improving the process and the proposed project.

Proposed projects do not enter the EIA process fully perfected. They are conceived and created by citizens. A next generation EIA process that views EIA as a learning and decision-making process gains momentum and sophistication through engagement with citizens who can enhance the proposal, suggest alternate solutions and identify factors not already considered. To that end, participation should not be limited to those directly impacted by the project. Broader participation brings more information to the decision-makers, recognizes that impacts frequently have far-reaching effects and fits with the purpose of EIA to encourage informed decisions that seek sustainability.

### **3. Recognize intergenerational equity in the EIA process**

Next-generation EIA should serve the public interest and in so doing recognize the importance of intergenerational equity. We have a litany of projects in Canada that externalize an enormous negative environmental burden to future generations. The decision-making framework to allow this burden did not fully consider the costs to be borne by future generations.

Sustainability assessment and cumulative effects assessment are two valuable methods to begin the process of considering how decisions made today will affect the future. Theme 6 in the EPA Caucus Submission (A Sustainability Approach to Environmental Assessment) sets out 6 sustainability criteria (at page 32). These criteria provide a path to an assessment approach that requires one to consider a broad spectrum of impacts including those that will have consequences for intergenerational equity.

### **4. Ensure a national approach to EIA: Aquaculture Example.**

Theme 3 (Triggering and Scoping) of the EPA Caucus Submission specifically addresses the impact of the removal of the Law List Regulations with the passage of CEAA 2012 (at page 21). Our submission will focus on one example of the impact of those changes.

CEAA 1992 applied to any project undertaken by the federal government or where federal government action, including a regulatory decision, triggered the Act. Open-net finfish operations triggered CEAA because of the federal permit required under section 5 of the *Navigable Waters Protection Act*. These operations were the subject of a screening level EIA under CEAA 1992.

Changes made with the passage of CEAA 2012 limited federal EIA to a specific list of designated projects found in *Regulations Designating Physical Activities*. If the project is not on the list, a federal EIA is not required. The list of 'designated projects' does not include aquaculture. As a result, all aquaculture projects that were to receive a federal EIA were deemed to no longer require one.

Between 2002 and July 6, 2012, there were 35 CEAA screenings of proposed aquaculture operations/activities in Nova Scotia. CEAA 2012 marked the end of federal EIA for open-net finfish aquaculture, including an end to mandated public consultation that was part of the screening process. Given proposed aquaculture projects are not subject to EIA by the provincial government, the amendments to CEAA meant no EIA for aquaculture in Nova Scotia.

In 2014, the Independent Aquaculture Regulatory Review for Nova Scotia released a comprehensive report calling for the complete overhaul of aquaculture regulation in the province. The Panel recommended a strategic environmental assessment process to be used by the provincial government to classify coastal areas in the context of aquaculture development and a specialized EIA process be applied to new license proposals. Although the government of Nova Scotia committed to full implementation of the Panel Recommendations, the legislative changes that followed implemented only a fraction of the recommendations.

Aquaculture development is one example where the elimination of federal EIA has not been replaced by robust provincial assessment. At the very least, a national approach to EIA should reinstate triggering in areas of federal regulation such as the *Fisheries Act*.

### **III. Closing**

In addition to the EPA Caucus submission, we have reviewed several other written submissions made to the Panel including those made by Ecojustice, MiningWatch Canada and the Canadian Environmental Law Association. It is clear that the Panel process has facilitated participation by many of the best EIA experts, practitioners and academics in Canada. There is recognition among many of the need for informed, collaborative decision-making to establish a forward path to sustainability. The blueprint exists in the material you have before you.

We wish you the best with the task that lies ahead.