

**Presentation to EA Reform Panel
3 October 2016
Halifax, Nova Scotia**

Introduction and Overview

The East Coast Environmental Law Association (ECELAW) is a public interest environmental law charity based in Halifax, Nova Scotia. We are the only such organization in Atlantic Canada. Our mission is to facilitate innovative and effective environmental laws and the fair application of those laws. We do that by raising awareness, supporting education and collaborating on legal initiatives that focus on providing Atlantic Canadians with a clean, healthy environment.

I would like to acknowledge the efforts of the federal government to engage with Canadians on a truly reformed environmental impact assessment process. We have waited many years for this, and we appreciate the opportunity to present to you today to contribute to a future legal framework for EIA that addresses the many lessons we have all learned.

As a member of the Environmental Planning and Assessment caucus of the CEN, ECELAW supports the 12 Pillars of the Next Generation EA developed through the EA Reform Summit.

In the interest of time and capacity, I am going to focus today on Pillar # 1 Sustainability as a core objective and Pillar # 8 Participation for the people.

I have personal experience with several EIA processes in this region that I believe have valuable lessons including, the Fundy Tidal Energy Strategic EIA, 2008, Emera Brunswick Pipeline Project, 2012, First Substitution and Energy East Pipeline Project, however I will draw from experience with the 2007 Whites Point Quarry and Marine Terminal Joint Panel Review process for my comments today.

Public Participation

Meaningful public participation is early, ongoing, accessible and dynamic. It occurs at all levels of assessment and has the ability to influence outcomes.

From 2003 to 2007 I personally provided support and legal advice to community members on Digby Neck who opposed the proposed Whites Point Quarry and Marine Terminal project. I worked with the members to obtain participant funding through CEAA, I coordinated submissions by more than 25 experts who voluntarily gave of their time and expertise to review material, undertake research and submit comments. I participated in the full two weeks of public hearings.

One of the key complaints throughout the WPQ EIA process was the failure of the proponent to provide a complete EIS that was logical, well supported and met the EIS Guidelines. This had an enormous impact on public participation and expert review of the EIS. We had to re-package the information in the EIS to deliver it to the volunteer expert reviewers. Given they were

providing their time and expertise at no cost we could not ask them to review 3000 pages of a disjointed EIS to pick out the myriad of sections that were relevant to their review.

The JRP repeatedly asked the proponent, via information requests, to submit studies and documentation that was required by the EIS Guidelines. Ultimately, and much to the surprise of the community, the JRP set down the dates for the public hearings before the information requests were met, because, we presumed, there was concern that the process (clearly being held up by the proponent) was taking too long and the government and JRP would be held responsible for the delay.

The Whites Point JRP was a committed, well-informed panel that appeared to take seriously all of the information received. The experience of presenting to the panel was, for most, a positive experience. However, the funds provided to review the EIS, obtain expert advice, prepare submissions and participate in the process were far from adequate. The challenges posed by the behavior of the proponent, including their unwillingness to take the process seriously or meet its requirements compounded the difficulties faced by members of the public seeking to participate. There was well-coordinated and successful participation by the community in this case because some of the members were retired professionals who gave of their time and others organized amazing lobster dinners to raise funds to support the work.

The next generation of EA in Canada must recognize and address the inherent imbalance between a project proponent and citizens who may oppose the project or have concerns or questions. There are multiple ways to address this imbalance that range from having independent science to improving funding for citizen participants.

Furthermore, next generation EA must ensure that proponents are held accountable when they fail to meet the requirements of the EIS Guidelines and information requests from those responsible for assessing the project.

Sustainability as a core objective

All assessments should ensure the long-term health of the environment and social values, and the equitable distribution of risks, impacts and benefits.

Sustainability as a core objective is the first pillar of next generation EIA because it requires a fundamental shift in our approach to project assessment. If make the focus of an EIA on demonstrating a net contribution that goes beyond short-term gains or a handful of jobs than we view the project proposal with a different lens. No longer do we simply consider the lowest threshold of no 'significant adverse effect' but rather, on balance, will the proposed project make a long-term positive contribution to the health of the environment, the economy and social values.

There is academic literature on net contribution to sustainability that can provide you with guidance far beyond my presentation today, however, I would like to focus on the Joint Review

Panel for the White's Point Quarry and their determination that the proposed quarry and marine terminal would make little or no net contribution to sustainability.

The EIS Guidelines set out by the JRP for Whites Point stated that the panel would evaluate the Project's contribution to sustainability on the basis of several factors including

'...the extent to which the Project makes a positive overall contribution towards the attainment of ecological and community sustainability, at both the local and regional levels' (at page 91).

The JRP provided clear guidance to the proponent on their duty to consider the impact of the proposed project on the long-term sustainable development of local communities. What the JRP received, and they speak to this in their final report, was an Environmental Impact Statement that focused only on short to medium term employment opportunities.

The JRP noted in their Final Report that

'...the proponent failed to consider how benefits derived from the Project over its lifetime might be used to create long-term sustainable employment opportunities and maintain a healthy and resilient environment' (at page 91).

The JRP for the WPQ took a well-considered approach to sustainability assessment and clearly applied that approach to the assessment of the proposed project.

The history of EIA decisions in Canada reflects a mindset that every proposed project is ultimately a good project and every proponent is ultimately a good proponent. All that is needed to ensure the project and proponent are good for Canada is imposed (and arguably dubiously enforced) conditions and mitigation measures.

The Whites Point JRP took a different approach and determined that not every project is a good project or can even become a good project. To that end, and within their legal mandate they recommended that the project not proceed and in keeping with that recommendation they did not identify mitigation measures.

Next generation EA needs to incorporate the principles of sustainability to ensure that those responsible for the assessment of a proposed project can use those principles to guide their work.

ECELAW is now an intervenor in the Federal Court proceedings to have the NAFTA Tribunal decision in favour of Bilcon set aside; a decision that maligned the work of the JRP and paid little attention to how the proponent conducted themselves during the course of the EA.

On Friday evening, our organization, ECELAW, held a fundraiser to raise money to support our intervention in the Federal Court proceedings. And so it goes, more than 10 years after we worked so hard to raise funds and bring experts to the JRP to critique the proponent's claims,

we are doing much the same thing in the hope that we can stave off this bizarre threat to environmental law in Canada.

We need to learn from this to ensure that future EA processes are immune from this type of challenge. Incorporating the principles of sustainability, taking a learning approach to EIA and ensuring that review panels have the room to be innovative in their approach and recommendations are some of the possibilities that should be considered.

There is much more to say, but I will stop here and hope to provide a written submission before the December 18 deadline.

By Lisa Mitchell, Staff Lawyer
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