**Strategic Intervention in Project EIA in Canada**

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**Abstract**

The EIA of large energy and mining projects in Canada is increasingly subject to strategic interventions by interested parties who wish to pursue broader policy questions that are either not mandated by EIA legislation or beyond what may be reasonable in project EIA. This practice is heightening the frustration of the federal government and industry and cited broadly as a contributing factor to uncertainty, risk, delay and cost, and more importantly for a resource-rich country, an impediment to investment. The authors describe various contributing examples of this situation. Frequently, discretionary scoping in response to such interventions requires consideration of matters where there is an existing legislative and policy framework that would allow or facilitate the project.

**Introduction**

The Environmental Impact Assessment (EIA) of large energy and mining projects in Canada is increasingly subject to strategic interventions by interested parties who among other things wish to pursue broader policy questions that are either not mandated by project EIA legislation or beyond what may be reasonable in project EIA. The matter is confounded by opportunistic allegiances forged between special interest groups and local stakeholders, to leverage the project EIA process into the domain of matters perhaps more appropriately discussed in strategic environmental assessment (SEA), regional planning, or regulatory and planning processes. This paper explores this phenomenon in illustrative examples including the Lower Churchill Hydroelectric Development in Labrador which was recently completed, systematic broad scoping for large project EIA by the federal government, and the Old Harry’s offshore exploration drilling project. In the first two examples we will focus on the issue of administrating agencies using discretionary authority to include consideration of non-mandatory factors within the scope of project EIA, even where it makes little sense to do so. In this regard we will use the example of including broad consideration of the need for and alternatives to a project in the EIAs, response to lobbying by interveners during scoping, or through systematic anticipation of such issues by regulatory authorities and, we will argue, beyond the intention of EIA legislation. We also consider the Old Harry Project, an offshore drilling exploration project in the Gulf of St. Lawrence where the joint federal-provincial regulating board attempted to catapult a screening level EIA to a review panel in the face of organized opposition, even where clearly the activity is one where Parliament and the regulating authority consider it to be a routine activity mitigated with standard mitigation and known technology and the subject of a screening level EIA.

**Regulatory Framework**

In Canada, the federal government does not conduct SEA except on plans, policies and programs. There is a distinct lack of SEA in the form of regional or sectoral assessment to support project EIA, even though the *Canadian Environmental Assessment Act (CEAA;* Section 16.2) does at least afford consideration of the results of a study of environmental effects of possible future projects in a region, it affords no legislative basis, requirement, or process to support it. The joint federal-provincial petroleum boards in Nova Scotia and Newfoundland and Labrador do conduct SEA on an *ad hoc* basis prior to allowing exploration in lease areas, and these are updated periodically. The absence of legislated SEA is in Canada, is a general irritant to interveners who may wish to discuss or debate policy matters that go beyond the purview of project EIA.

As a means to inform the illustrations in this paper, we note that *CEAA* does not require the consideration of the purpose or alternative means of carrying out a project in a screening EIA, but does for those larger or more sensitive projects that require comprehensive studies, mediation or a review panel, typical of large energy and mining projects. Further, *CEAA* in Section 16(1)(e), affords responsible authorities or the Minister of Environment to consider any additional factor they may decide to include in the EIA “…any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project…”

It is argued that explicit reference to the example of need for and alternatives to the project demonstrates that Parliament recognized that this may be a relevant consideration in an EIA, but they elected to include it as a discretionary rather than mandatory factor. This is an important point for discussion later in this paper. The Canadian Environmental Assessment Agency (CEA Agency) does have an Operation Policy Statement *Addressing "Need for," "Purpose of,” "Alternatives to" and "Alternative Means" under the Canadian Environmental Assessment Act* (CEA Agency 2007). That guide outlines policy for responsible authorities on how to consider these matters when required in EIA (i.e., mandatory in higher level assessment for purpose and alternative means of carrying out the project), but entirely discretionary otherwise.

**Lower Churchill Hydroelectric Development**

The Lower Churchill Hydroelectric Development is a proposed 3074 MW project on the Lower Churchill River in Labrador, Canada. The Governments of Canada and Newfoundland and Labrador recently completed a Joint Review Panel EIA under *CEAA* and the *Environmental Protection Act* (*EPA*) of the province. The two jurisdictions signed an Agreement (Government of Canada and Government of Newfoundland and Labrador 2007) to establish a Joint Review Panel and harmonize the EIA processes so that the review panel would conduct one assessment, with separate decisions by respective governments at the end of the process under their respective legislation. The Agreement for the Panel and the EIA Guidelines (Government of Canada and Government of Newfoundland and Labrador 2008) both include consideration of the need for and alternatives to the project. In both instances the scope of the consideration is well defined but broadly scoped to include quite broadly matters related to cost and energy policy. While the *EPA* does require consideration of these factors, *CEAA* does not. Hence under *CEAA*, their inclusion is discretionary. The province has an energy policy (energy is a provincial jurisdiction in Canada) that includes the development of this project (Government of Newfoundland and Labrador 2007). In other words, it was the policy of provincial government to develop the project yet through the bureaucratic process of establishing Review Panel Terms of Reference and EIA Guidelines, the Province broadly scoped the consideration of the mandatory factor under the *EPA* or on the discretionary factor under *CEAA.*

During the conduct of the EIA review, the Panel and local and national environmental groups asked a round of extensive and detailed questions about the need for and alternatives to the project, among other related factors. This resulted in extensive focus and iteration. During the hearings, the national and local interest groups pursued this matter vigorously and the Panel similarly supported this line of enquiry and participated in it. In their final report, the Panel made conclusions regarding the need, purpose, and rationale for the project (Report of the Joint Review Panel 2011) and did not accept that developing the hydroelectric potential of the lower Churchill River was a “need”, and that therefore the project should be compared to reasonable alternatives that address the future demand for electricity, and delivered a renewable energy future and long-term revenues for the province. The Panel concluded that because the two project generating stations are subject to separate sanction decision, the Panel would assess them separately with respect to alternatives, justification in energy and economic terms, and where possible, with respect to other considerations. Respecting alternatives to the project, the panel concluded that none were economically or technically feasible compared to the project and none could meet the stated need to develop the hydroelectric potential of the Churchill River. The Panel concluded that the proponent’s analysis, showing one of the generation sites to be the best and least-cost way to meet domestic demand requirements, was inadequate and recommended new, independent analysis based on economic, energy and environmental considerations. In the Government Response to the Panel (Government of Newfoundland and Labrador 2012), the government rejected the Panel’s recommendations regarding need for and alternatives to the project, particularly, and issued a decision for the project to proceed. The matter now is before the Courts, with interveners arguing that the Panel failed to assess and reach conclusions on the need for and alternatives to the project.

The broad inclusion of these additional discretionary factors under *CEAA* and under the *EPA* has caused a major excursion of a project EIA into matters of energy policy, project rationale and economic feasibility. Ultimately, the governments have rejected this in issuing the project approval but are now facing a challenge in the Federal Court of Canada. The lesson from this is that discretionary scoping of factors relating to policy in response to strategic interventions can encourage debate in project EIA that may not be appropriately considered in project EIA. This has contributed to a protracted review process that started in late 2006, only to be finished in 2012, with the ultimate decision still under review by the Courts. Retrospectively, it is questioned whether governments might have averted this protracted and controversial debate through better attention to the consequences of including these discretionary factors related to energy policy and feasibility. Was the broad inclusion of such discretionary factors to the extent required in the EIA Guidelines “good scoping?” The need for and alternatives to the project may have been better addressed prior to the EIA in a provincial Public Utilities Board review or some other administrative process that would address such matters.

**Generic Guidelines for Comprehensive Studies**

In 2010, *CEAA* was amended to make the CEA Agency the decision-making authority for all comprehensive studies, EIAs of larger projects on the *Comprehensive Study List Regulations* like energy and mining projects. In response to this, the CEA Agency developed *Guidelines for the Preparation of an Environmental Impact Statement for the Comprehensive Study Process Pursuant to the Canadian Environmental Assessment Act* (CEA Agency 2011). The purpose of these is to identify for the proponent the information requirements for the preparation of an Environmental Impact Statement (EIS) in support of comprehensive studies.

As noted previously, alternatives to and rationale for projects is not a mandatory factor for EIA under *CEAA*. However, in the guidelines for EIS preparation (CEA Agency 2011), these factors are now required information for all comprehensive studies. As noted earlier, the inclusion of these additional factors for consideration was explicitly intended by Parliament in *CEAA* to be discretionary. Mandatory requirement in this CEA Agency guidance has the tendency to undermine the intent of Parliament in *CEAA that it be discretionary*. While this may seem to be somewhat of a triviality the following observations are offered.

When the CEA Agency developed guidelines for EIS preparation (CEA Agency 2011), we believe the inclusion of these discretionary factors for all comprehensives studies to be a reaction to public interventions on previous large project EIAs. It is our opinion that the influence of large national organizations wanting to use project EIA as a forum or opportunity for broader policy debate, has led the CEA Agency to include alternatives to and rationale for projects in all comprehensive studies. While on the surface this may seem to be reasonable, it is argued that it not only takes away the discretion intended by Parliament, it affords significant opportunity to broaden project EIA to consider broader policy issues. It burdens project EIA to in some cases pursue the objectives and special interests of interveners.

Such excursions have the tendency to distract project EIA as it did with the Lower Churchill Hydroelectric Development and place proponents in very difficult situations. For example, an oil and gas proponent conducting an EIA for an offshore petroleum development would have to assess the need for and alternatives to the project under the requirements of CEA Agency guidance. Yet that proponent would have previously conducted exploration under a comprehensive licensing process under the auspices of an offshore petroleum board, with the expectation of development subject to the completion of an EIA. Is it reasonable to expect that the proponent would have to speak to alternatives to the project? Simply, the purpose of the project is to develop that significant discovery. The company may have no intent or licenses to develop oil or gas elsewhere and for the proponent, is there really a reasonable alternative to the project beyond the null alternative? Similarly, the need for the project is to create return on investment for shareholders. Interveners given the expectation of a policy discussion in project EIA guidelines are not satisfied with and frustrated by a proponent who states reasonably there is no alternative to this project and that it is pursuing it to make money for its shareholders. Yet with a broadly scoped, ill-defined requirement to assess the need for and alternatives to the project, a discretionary factor, interveners can have the expectation of discussing climate change, the use of hydrocarbons, economic feasibility, the need for alternative energy, and a plethora of other policy issues. It is submitted that the interventions to seek inclusion of broader issues and their acceptance by the CEA Agency, is resulting in the de-railing of project EIA and the creation of uncertainty and a consequent loss of investment.

**Old Harry Project**

The Old Harry Project is the drilling of one offshore petroleum exploration well in the Gulf of St. Lawrence, in the jurisdiction of the Canada-Newfoundland and Labrador Offshore Petroleum Board.  Such projects require a screening under *CEAA*; they involve an activity that is well understood with proven technology.  This area was opened to exploration by the Board and geophysical and exploration drilling was at least contemplated.  Further, the area was the subject of a SEA and subsequent update (LGL 2005, LGL 2007).

When the EIA of the Old Harry Project was initiated, there was a concerted effort of interveners from the Magdalen Islands of Quebec (due to the proximity to the drill site ~100 km) and elsewhere in the Gulf, primarily fisherman, tourist industry, Aboriginal organizations, and a number of organized national and regional environmental groups.  Petitions were developed and letter campaigns launched to ask the Board to refer the project to a Review Panel.  The Board referred the one exploration well program of 20-50 days to a panel review in light of organized lobbying and petitioning by the above noted stakeholder groups.  As noted by the Minister in his response neither the Board nor the expert departments and agencies consulted identified evidence indicating the project would likely cause significant adverse environmental effects.  The Minister of Environment rejected the referral given the nature of the Project, noting that a project specific EA under the Act is not the most appropriate mechanism to consider issues beyond the project being reviewed, and did recommend the Board undertake consultation and further updating of the SEA.  The Board has since launched an extensive, unprecedented consultation program around the Project which defies the regulatory intent and arguably the sensitivity of the Project given well established mitigation for potential environmental effects, and the existing policy to allow exploration in the area.

**Discussion and Conclusions**

It is evident from these specific examples that there exists an undercurrent of strategic intervention by groups to use project EIA to provide a platform for broader policy debate. The authors fear that some government administrators of EIA processes are naïve to these interventions and the nuances thereof. Often it is in a slavish deference to accommodate public intervention and consultation as the basis for good EIA. While the authors are advocates for meaningful public engagement, it is felt that such groups are doing so with not only a view to broaden policy debate, but also to advance an anti-development agenda by broadening the scope of work and the time and cost necessary to pursue it.

To address this concern, regulatory agencies need to do better scoping within the intended mandate of legislation as advocated by Barnes et al. 2010 and respect the rights of proponents to propose projects within the existing legislative framework. As well, administrators need to balance fairness in consultation against strategic interventions by groups who are not necessarily directly affected by the potential environmental effects of a project, and may be using project EIA to further their own agenda. It is worthy of note that in a significant draft revision of *CEAA* currently before Parliament, the Government has proposed amendment to the discretionary factors clause to remove the example of need for and alternatives to the Project. The authors speculate that this is in tacit recognition of the problems caused by its rote discretionary inclusion in all comprehensive studies and review panel EIA guidelines by CEAA administrators.

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