

The Weak Link in EIA Effectiveness: Challenges in Process Administration

Jeffrey L. Barnes¹ and John Boyle²

Introduction

The authors, both veteran impact assessment (IA) practitioners in Canada and internationally, have observed negative trends in the administration of Environmental Impact Assessment (EIA) processes in Canada that are contributing to a decrease in EIA effectiveness. These trends are disturbing in that they indicate a drifting away from the central purpose of conducting EIA – to avoid significant adverse effects. The “weak link” we draw attention to is the general capacity of government officials managing EIA processes and the evolving bureaucratic systems they work within. The authors have noticed an increasing emphasis on process administration and a decreasing emphasis on the application of the discretion and informed judgement necessary to make EIA effective and efficient.

This paper explores examples of these negative trends and suggests measures to curtail them. In doing so, we attempt to understand the trends in the light of well-known general characteristics of bureaucratic administrations. These characteristics include bureaucracies being rather better at designing and managing defined processes than they are at managing change or uncertainty, or at accommodating procedural variations even if the same objective is being met. They also include the incentives that administrators face especially in their performance being evaluated based on their success at fulfilling their defined process responsibilities rather than on whether the purposes of a process are fulfilled in an efficient and effective manner. It is thus understandable that administrators put in place well-defined processes that make their working lives as predictable and risk-free, as possible. This focus on process is exacerbated when administrators don't have the training, experience or self-confidence to make judgment calls or innovate within their mandate. It is also exacerbated when a process (like EIA) is very public and thus political, and administrators naturally rely on process to avoid their own performance being jeopardized by risk or controversy, well-founded or not.

The discussions in the paper are based on considering the authors' EIA experience, collectively spanning more than 70 years, in light of the general characteristics of bureaucracies outlined above. This experience includes directing and/or managing major EIA studies, EIA policy development and process administration, and EIA training and capacity-building, largely in Canada but also internationally. Thus, while the paper focuses on the Canadian situation, it is also informed by experience in other countries and international organizations.

EIA Process Definition and Timelines

In Canada, as in most countries, EIA is established through law and regulation. While there are variances across the country in the degree to which those laws and regulations specify process and its administration, it is fair to say that generally the specifics of process design and administration are largely established not by law or regulation but through guidance and/or, more often, administrative practice.

¹ Vice President, Environmental Services, **Stantec Consulting Ltd.** | 845 Prospect Street Fredericton, NB Canada, E3B 2T7
Email: jeff.barnes@stantec.com • **Web:** www.stantec.com

² Vice President, Environment & Sustainability, **Hunter Dickinson Inc.** | 15th Floor - 1040 W. Georgia St. Vancouver, BC Canada, V6E 4H1
Email: JohnBoyle@hdimining.com • **Web:** www.hdimining.com

Focusing on the federal law, the *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* and its associated regulations define the EIA process only at a very high level for key milestones and deliverables. EIA guidance from the Canadian Environmental Assessment Agency (the Agency) provides, in considerably more detail, a number of steps, milestones and deliverables that are not required specifically by law but, on paper, are reasonable to fulfill the purpose of EIA. This process mirrors similar administrative practices established over many years under the superseded *Canadian Environmental Assessment Act (CEAA)* which is still being applied to projects requiring comprehensive studies or review panels that were commenced prior to the coming into effect of *CEAA 2012*. Practice is building upon this guidance to the extent that, in our view, the current administration of *CEAA 2012* by the Agency has become a complex, bureaucratic, time-consuming process not focused on the central purpose of EIA or on doing so in a timely manner (another stated purpose of *CEAA 2012*). We examine some aspects of this practice below.

In establishing *CEAA 2012*, Parliament prescribed timelines to hold responsible authorities and decision-makers accountable for timely process management. For a standard EIA, from the notice that an EIA is required, the decision-maker must make an EIA determination within 365 days and, for assessment by an independent review panel, within 24 months. It is important to note that these timelines exclude time (called “stop-clock time”) when government is waiting for a project proponent to provide information, for example the Environmental Impact Statement (EIS), or responses to information requests (IRs) following government and then public review of an EIS. These timelines are aggressive and put responsible authorities, their administrators, and decision-makers in a time crunch. This, of course, was Parliament’s intention. What Parliament didn’t seem to anticipate, and as we will examine below, is the bureaucracy’s uncanny ability to structure the consequent EIA process to ensure as much stop-clock time as possible without being accused of administrative unfairness by proponents or of causing unreasonable delay by decision-makers or politicians.

EIS Guidelines, Preparation and Review

CEAA 2012 requires that proponents of projects designated by regulation file a Project Description. The Project Description must include information required by regulation and associated guidance (CEA Agency 2012). The Project Description provides the basis for screening by the responsible authority to determine whether an EIA is required and, if so, for preparing EIS Guidelines. The prescribed timelines, and the detailed prescription of and guidance for filing requirements, have resulted in an efficient and effective framework for reaching screening decisions. While laudable, it is in our view the only example of improved timeliness and efficiency under the new legislation. Nonetheless, and perhaps reasonably, the Agency can declare stop-clock time if it feels more information is required in the Project Description, a process element actually established by the law.

Through guidance, the Agency has established a process whereby Draft EIS Guidelines are provided to a proponent, are subject to a public review, and are then finalized. The proponent then prepares an EIS. The EIS is subjected to Agency review (which may result in stop-clock time requests for more information), and then review by the public, Aboriginal peoples, and other federal government departments (all of which may also result in requests for more information and associated stop-clock time). Following this, the Agency writes its mandated EIA Report as a draft which, after public review, is finalized; it is this report that is the basis for EIA decision-making by responsible authorities. It is important to note that, apart from the Project Description and EIA Report, none of the process documents described above (*e.g.*, EIS Guidelines, EIS, IRs, and responses to IRs) is prescribed by *CEAA 2012*, and all of them provide ample opportunity for the Agency to stop the clock.

To meet its timelines, the Agency has felt compelled to develop standard, generic EIS Guidelines with specific “inserts” for sectors like mining, to facilitate their timely release, review and finalization. To date, there is little to no evidence that accepted Project Descriptions are used to adequately scope Draft EIS Guidelines issued for public and regulatory review. This is unfortunate because good scoping in guidelines should focus an EIS on those

matters that are material to making a good planning decision, and this requires judgment and decisions that evidently the Agency does not have the time to develop or possibly the capacity or willingness to make. The consequence is broadly-scoped, ill-defined EISs that result in time and resources wasted – by the proponent, public and government – on analyzing, and asking questions about, factors which are irrelevant or inconsequential to the EIA planning decision, much of which occurs during stop-clock time. Barnes *et al.* (2013), citing examples of two mining projects, suggest that while the use of generic EIS Guidelines may be a good starting point for proponents and the Agency, the opportunity lies with the Agency to better tailor these to properly inform scoping of the EIS requirements to suit the subject project and its setting. The same phenomenon of “less than good” scoping was described by Barnes *et al.* (2010) for energy and mining projects in Canada under the superseded CEAA and provincial EIA processes. Experience within the author’s practice shows ongoing evidence of poor EIS scoping and a consequent waste of resources, largely during stop-clock time, to address issues irrelevant to an EIA decision.

Once the EIS Guidelines are finalized, the clock is “off” until the proponent files its EIS. Questions and clarifications are then asked by the Agency, other government departments, and the public in the form of IRs. There can be, and often are, a series of IR iterations, including new or evolutionary requests, before the information needed to make an EIA determination is deemed acceptable by the Agency. While the proponent is preparing responses to IRs it is stop-clock time, and it can be considerable. For example, on a current project under review under the antecedent EIA legislation, a period of 14 months elapsed between receipt of the first of six overlapping rounds of IRs on the EIS and completion of the last response, all during stop-clock time and following a three-month review of the EIS prior to issuance of the first round of IRs. This IR process resulted in no changes to the conclusions of the EIA or to any substantive changes in mitigation or monitoring requirements. In our experience, stop-clock time for projects under *CEAA 2012* has totaled about seven months and always involved more than one round of IRs. Pervasive in this process is the tendency of administrators to seek resolution to all IRs. This is often regardless of IR duplication, their relevance to understanding the environmental effects of a project, or relevance to making an EIA determination. Administrators in such circumstances often fail to exercise sufficient if any judgment on the relevance or need for IR responses or even if the IR is within the purview of the proponent. Now, there may well be cases where there are legitimate deficiencies in an EIS that require resolution through the IR process to support a planning-level EIA decision, but extensive, detailed, and sometimes irrelevant or frivolous IRs from interveners opposed to a project are pervasive. They have learned this is an excellent strategy for confounding and delaying the EIA process. Nonetheless, the onus is put on the proponent to resolve all outstanding “issues” that are raised in the IRs, often irrespective of relevance.

It is our observation that this IR process, its fullness not likely anticipated by Parliament, can help to clarify important EIA issues. At the same time, and recalling the general characteristics of bureaucracies outlined above, such an extensive use of IRs and stop-clock time can also be understood as serving administrators’ need to minimize any controversy or risk, perceived or real, which might be associated with their analysis and recommendations in the EIA Report for the decision-maker. It also minimizes the need for administrators to be accountable for any judgement calls in making those recommendations. This risk minimization exercise is all during stop-clock time, thus leaving fewer difficult judgments for administrators to make “on the clock” while preparing the EIA Report. Now, we suspect that administrators may justify stop-clock time on the basis that a project proponent has not provided sufficient information or that further clarification or information is required. They may be mindful that decision-makers, usually politicians, while interested in timely EIA do not wish to be perceived as “rubber-stamping” projects with inadequate information, and are typically unfamiliar with the technical matters at issue and need to rely upon the expertise of the bureaucracy. While there may be merit to this argument in some cases, it does not serve to explain the all-too-common requirement that proponents respond to numerous superfluous IRs, and to do so “off the clock”.

Our overall observation from the discussion above is that, despite Parliament’s desire for more timely EIA decisions, the bureaucracy has responded true to the characteristics outlined in the Introduction above to mitigate

the effects of the regulated timelines on their work load and on the need to make judgments in the face of the inevitable uncertainty and risk associated with real life. Stop-clock time affords the opportunity to minimize or eliminate all uncertainty, controversy or risk, and maximizes the time administrators have on the clock to prepare an EIA Report with as little informed judgement as possible on their part. Our observations about why administrators are shy about making judgement calls in the face of uncertainty, controversy or risk are explored in the next section of this paper.

Administrator Capacity

There is no doubt that competent management of a fair and responsible EIA process is a “very tall order.” EIAs are complex documents to prepare and review, requiring inputs from the physical, biological and social sciences (including policy and planning), from the applied sciences like engineering, and from experienced management to knit together a coherent story. And an EIA process (in the developed world, at least) prescribes consultation with the public, Aboriginal people and stakeholder groups, and thus requires balancing often conflicting interests to provide informed advice to decision-makers. Forging a multi-disciplinary undertaking into an inter-disciplinary product that is useful to decision-making is an art as much as it is a science.

One might thus expect that EIA administrators, at least for major projects in complex sectors like hydropower and mining, would at minimum be mid-career professionals with the training and experience to understand both their own process (the easy part) and the substantive aspects of projects, and with the management expertise to balance the various interests involved, including those of decision-makers and politicians. Senior EIA administrators have acknowledged to the authors that there is a general dynamic within the federal civil service of high rates of staff turnover for a variety of reasons that contribute to experience-related capacity issues. Consequently, few operational staff members have substantive EIA training, almost none have ever written an EIS, and their background is increasingly in less technical disciplines like planning or public administration and not in the basic and applied sciences that are so important to good EIA. EIA administrators must frequently rely only on other government “experts” for technical information, officials whose responsibilities are primarily technical support to permitting processes and only peripherally to the planning level decision-making that is EIA of which they have little understanding. We are thus increasingly seeing EIA administrators who haven’t the training, experience, and self-confidence to judge the relevance of the technical advice they receive to the EIA decision they are tasked with, and project proponents having to deal with wildly detailed technical IRs that are often marginally relevant to EIA, if at all.

Meanwhile, EIA administrators also have to provide ample opportunity for the public to be consulted about EIAs. In Canada, such consultation is complicated by the constitutionally-guaranteed rights of Aboriginal people and government’s duty to consult them and, if deemed necessary, ensure accommodation for infringements of those rights. Because EIA is typically the only opportunity for the public and Aboriginal people to be consulted about a project, administrators have to contend not only with project-related issues but also often with larger concerns such as the type or general pace of development in a region, and legacy grievances from past development activity. Public consultation during EIA has a long history in Canada, and administrations have deep experience with it. Aboriginal consultation, however, has become increasingly fraught in recent years as Aboriginal people gain clearer rights through the courts, the scope of those rights is constantly changing, and everyone (including EIA administrators) is hard-pressed to know how to deal with them respectfully and meaningfully. With CEAA 2012 the responsible authorities have gained full responsibility for the Crown’s duty to consult First Nations. With this new responsibility, it is the authors’ observation that the administrative experience and capacity to address Aboriginal rights issues is particularly thin, and EIA administrators seem especially confounded with questions about how much consultation is enough, what accommodation is really required, and who should provide it – government or a project proponent.

So, managing an EIA process in a fair and responsible manner is indeed a very tall order. That under-resourced EIA administrative capacity is so pervasive likely speaks rather more to the lack of importance governments place on good EIA than it does to the competence, commitment and sincerity of EIA administrators. It is thus understandable that administrators attempt to escape the risky storms of technical and social controversy that can accompany projects and EIA, and take refuge in the relatively simple and risk-free management of process.

Conclusions and Recommendations

The authors have observed the bureaucratization of process, and a steady migration of EIA administration towards the management of detailed process, and away from making the informed judgments necessary to keep EIA focused on its key planning objectives. We acknowledge that there is variation in performance in this regard across Canada and it would appear that the level of experience and capacity in some jurisdictions is relatively high. Our view is that central drivers for this trend are an aversion to administrative and administrator risk, a lack of capacity to manage rather than avoid or minimize risk, and a consequent predilection of EIA administrators to using stop-clock time that burdens proponents with the obligation to make problems go away, thereby minimizing risk, controversy, and uncertainty for themselves and the decision-makers they serve. All is apparently aimed at making the recommendations of the administration to the decision-maker unassailable, or at least with as little risk as possible. This tendency is transforming the prime EIA objective into managing risk for the administrators and by extension the administration, rather than necessarily ensuring a project meets the environmental protection and sustainability objectives of government.

As emphasized above, this is not because EIA administrators are incompetent, insincere or not committed to their work. Rather, in the light of the general characteristics of bureaucracies outlined in the Introduction above, it is argued that this trend is due to the incentives administrators face in managing a process characterized by technical and political uncertainties, by different interest groups promoting their own agendas in the only forum available to them, and by under-resourced capacity to both understand and manage the issues they must contend with.

What might we suggest as ways to mitigate and perhaps reverse these troubling trends? Certainly, much improved training and mentoring of EIA administrators and their technical advisors is a high priority. Only seasoned administrators should take on the larger, more complex projects, with less experienced staff learning from these assignments and starting with management of the relatively easier projects. Of course, such an initiative implies increased resources for staff and training, something which has been problematic for environmental agencies worldwide for decades.

A more doable strategy would be regulations or guidance prescribing just one round of IRs, with perhaps another round of subsequent questions of clarification. This approach would have the salutary benefit of concentrating the minds of EIA administrators, their technical advisors, and the public and Aboriginal interveners on key issues relevant to making an EIA decision, while leaving the technical details to subsequent discussions about permits and other authorizations. It would limit the pervasive efforts of motivated opponents taking advantage of bureaucratic risk aversion in EIA to stymy process and delay fair consideration of proposed projects in a timely manner. In British Columbia, the EIS review must be completed within a prescribed timeline of 180 days with stop-clock time typically only in exceptional circumstances and almost always at the request of the proponent; this is a good approach to constraining stop-clock time and one worthy of broader consideration.

As we hope is evident from this discussion and the longevity of our careers as practitioners, the authors are unequivocally convinced of the value of EIA to responsible project planning, review and approval, and to the sustainable development objectives that EIA serves. We trust that our counterparts in government will take our diagnosis of the problems we all face in achieving these objectives in a spirit of healthy discourse, and will work with EIA practitioners to chart a way forward to a more efficient and effective implementation of EIA in Canada.

References

Barnes, Jeffrey L., Loretta Hardwick, and Carole Chan. 2010. *A Review of the Project Scope and Environmental Assessment Scope for Energy and Mining Projects Across Canada*. Presented at the 30th Annual Meeting of the International Association for Impact Assessment, April 6-11, 2010, Geneva, Switzerland.

Barnes, Jeffrey L., Sandra Webster, Neil Cory, and Mary Murdoch. 2013. *Scoping under New Federal EA Regime in Canada*. Presented at the 33rd Annual Meeting of the International Association for Impact Assessment, May 13-16, 2013, Calgary, Canada.

Canadian Environmental Assessment Act, 2012. Statutes of Canada, Chapter 19, Section 52.