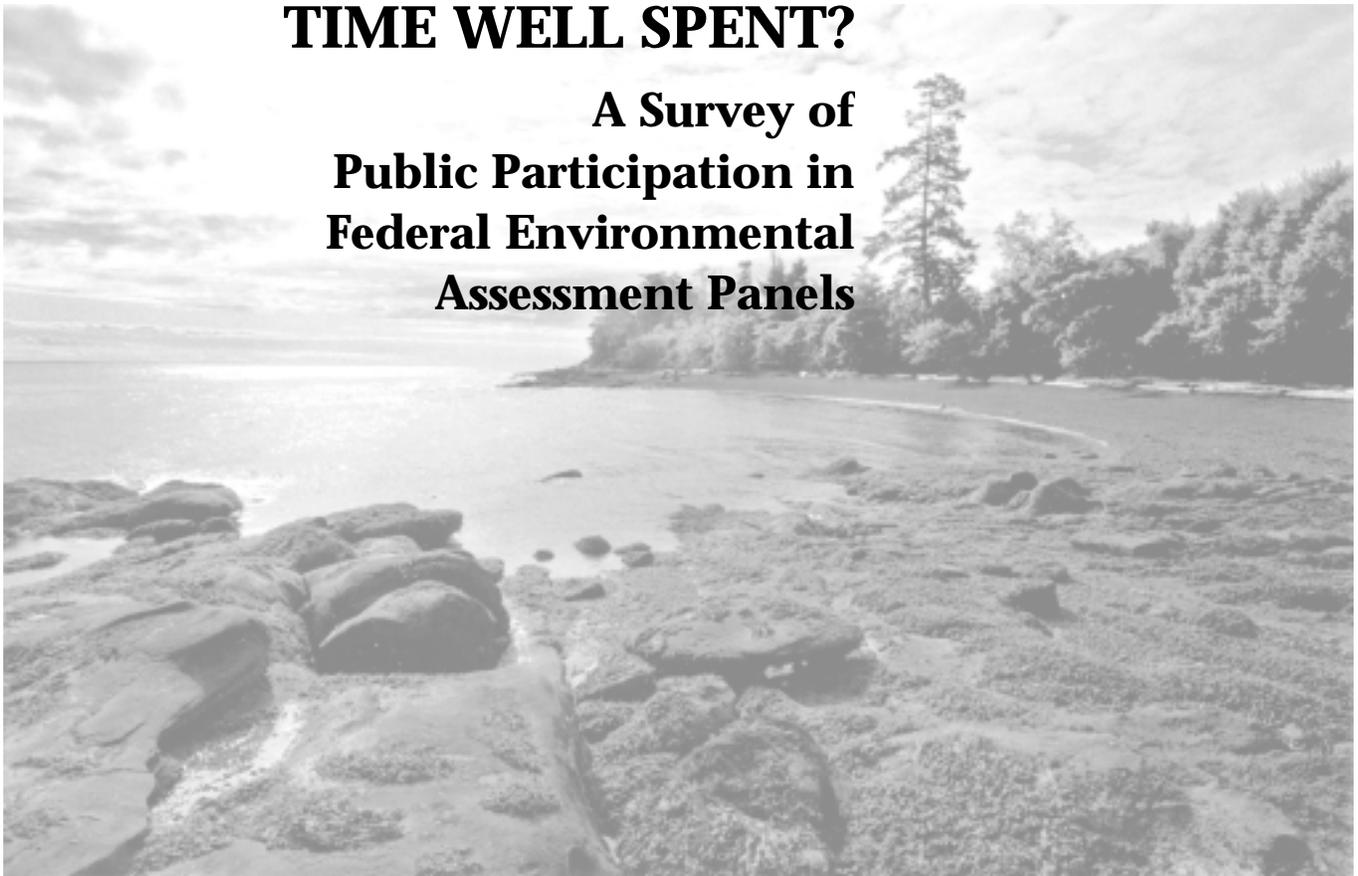


February 2004

TIME WELL SPENT?

A Survey of Public Participation in Federal Environmental Assessment Panels



Susan Rutherford and Karen Campbell
West Coast Environmental Law



TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
ACRONYMS	2
1.0 INTRODUCTION	3
1.1 OVERVIEW OF CEEA	3
1.2 WHAT IS A CEEA REVIEW PANEL?.....	5
2.0 IS PUBLIC PARTICIPATION IN REVIEW PANELS WORTHWHILE?	8
2.1 HOW WE CONSIDERED WHETHER PARTICIPATION IS WORTHWHILE.....	9
3.0 COMMENTS ON REVIEW PANEL PROCESSES	10
3.1 WHAT WORKS	10
3.2 WHAT DOESN'T WORK	11
4.0 COMMENTS ON PANEL REVIEW CONCLUSIONS	14
4.1 WHAT WORKS	14
4.1.1 <i>Public Discussion of Context</i>	14
4.1.2 <i>Need for Baseline Data</i>	15
4.1.3 <i>Need to Address Environmental, Scientific and Ecological Concerns</i>	15
4.1.4 <i>Need to Address Concerns for Communities and Community Rights</i>	17
4.1.5 <i>Confidence in the Overall Scope and Findings</i>	18
4.2 WHAT DOESN'T WORK	19
4.2.1 <i>Lack of Baseline Data</i>	19
4.2.2 <i>Inadequate or Late Consultation</i>	19
4.2.3 <i>Limited Panel Response to Real Concerns</i>	20
4.2.4 <i>Concerns about Follow-up and Monitoring</i>	22
5.0 CONCLUSION	23
6.0 RECOMMENDATIONS.....	24
APPENDIX 1: CEEA FACTORS.....	27
APPENDIX 2: SELECTED EA ISSUES.....	28
APPENDIX 3: OVERVIEW OF REVIEW PANEL PROCESSES.....	30

Author's Note and Acknowledgments

The CEAA review panel process is complex. Our survey is intended to provide an overview of some experience with review panels to date. We apologize for any errors or omissions that remain despite our efforts to avoid them.

Funding for this project was generously provided by:

*The Walter & Duncan Gordon
Foundation*



*The Law Foundation of British
Columbia*



EXECUTIVE SUMMARY

This paper provides a qualitative overview of the role of public participation in the review panel process under the *Canadian Environmental Assessment Act* (CEAA). Our purpose is to assess experience with public participation to date, and to make recommendations to strengthen the role of the public in environmental assessment panels. In our view, a strong, credible process will better help to protect people and the environment, now and into the future.

To conduct this study, we reviewed the CEAA panel reports produced to date, and we interviewed a number of people who participated in CEAA panels from a “public”, as opposed to industry, or government, perspective.¹ Because we were especially interested in oil and gas hearings, we further considered two other panel processes, even though these were not CEAA panels: the Georges Bank Review Panel Report under the Canada-Nova Scotia Offshore Petroleum Board² and the Alliance Pipeline Reasons for Decision of the National Energy Board in 1998. The Georges Bank Review Panel is of particular interest because the panel recommended that a moratorium on petroleum activities in the area remain in place.

Our study is neither exhaustive nor comprehensive; instead, we have identified notable examples and reported on recurring themes. It is our hope that this information can be used to guide and strengthen future CEAA review panels.

Is public participation in CEAA hearings worthwhile? The answer is a qualified yes. Our overall impression is that the role of the public in review panels has been, for the most part, effective and has had a positive impact on the outcome of the EA. Public concerns and ideas were reflected in panel deliberations and recommendations, thereby having an indirect effect on federal decision-making. Additionally, we found several instances where public concerns and ideas had a direct impact, evidenced by proponents changing and improving their plans for project implementation.

Yet, despite some advances, there are numerous impediments to ensuring effective public participation in CEAA review panels. Limits on participant funding, poorly developed processes with short timelines, and narrow project scope are some of the factors that cause challenges for the public. Finally, perhaps one of the biggest factors influencing the quality of public participation in hearings is the personal commitment and genuine concern of the individuals who are representing interests other than government or industry. Funding and resources are often scarce: participation in environmental assessment review panels calls for volunteer time, resourcefulness, and concern for the earth, which thankfully, does not appear to be in short supply.

¹ To protect confidentiality, we have not identified our interviewees, except by reference to the hearing in which they were participants.

² The Georges Bank Review Panel arose out of the Canada-Nova Scotia Accord Acts of 1988 which placed a moratorium on petroleum activities on the Bank and required a public review of the environmental and social impacts of exploration and drilling by an independent panel. The panel was appointed in 1996 and issued its report in June 1999. *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3.



ACRONYMS

The Agency	Canadian Environmental Assessment Agency
CEAA	Canadian Environmental Assessment Act
CPCN	Certificate of Public Convenience and Necessity (under the NEB Act)
CSR	Comprehensive Study Report
DFO	Department of Fisheries and Oceans
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEB	National Energy Board
OBM	Oil-Based Drilling Muds
SBM	Synthetic Based Drilling Muds
SOEP	Sable Offshore Energy Project

1.0 INTRODUCTION

Environmental assessment (EA) is an important planning tool that is considered an integral component of sound decision-making. It involves gathering and evaluating information about the potential impacts of a proposed course of action, and integrating environmental and economic factors to ensure that proposed developments are sustainable.

There are many benefits to an effective EA process. Consideration of environmental effects early in the planning stages of a project promotes better design and planning, as it provides proponents with an opportunity to consider alternatives to the project or means to mitigate potential impacts. EA has been proven to reduce the potential for conflict surrounding a project, as it often results in increased acceptance by the community of the project. EA can also contribute both direct and indirect benefits to decision-making, such as the withdrawal of environmentally unsound proposals and the generation of “green industry” proposals.³

Public participation is an essential component of a meaningful environmental assessment. By identifying issues and alternatives, and avoiding problems and conflict, effective EA processes can actually result in reduced project costs and reduced social, environmental and health costs; conversely, a failure to incorporate public consultation can lead to increased costs and unsatisfactory outcomes.⁴

1.1 OVERVIEW OF CEAA

The purposes of the *Canadian Environmental Assessment Act* (CEAA) include ensuring that environmental impacts are considered before actions are taken, encouraging actions that promote sustainable development, avoiding duplication, and providing opportunities for public participation. There are 4 different levels of review envisioned by CEAA, each one increasingly more rigorous: screenings, comprehensive studies, review panels and mediation.

The vast majority of EAs are conducted by way of screening; precious few end up being subjected to a review panel. Because of the way the Act is triggered, it will not necessarily guarantee that larger projects will be subjected to a more rigorous assessment. For example, the EA of the fixed link bridge between New Brunswick and Prince Edward Island was conducted by way of a screening. One author’s recent review of experience with federal EA is worth summarizing:

- Over 99.9 percent of the twenty-five thousand federal EAs conducted between 1995 and 2000 were screenings; only forty-six projects were subjected to comprehensive studies, ten projects were reviewed by panels that held public hearings, and no projects were referred to mediation.

³ See Karen Campbell, “Environmental Assessment and the Export Development Corporation: The Shock of the Possible”. (NGO Working Group on the Export Development Corporation – A working group of the Halifax Initiative Coalition, March 2001), pp. 5-6.

⁴ Campbell, “Environmental Assessment and the Export Development Corporation”.



- Projects are never stopped at the screening level, and follow up programs are only required for about 5 percent of screened projects.
- The federal government spends about \$40 million annually on EA.
- The amount of participant funding in the first 5 years of CEAA totalled \$840,046 or about 0.5 percent of total federal expenditure on EA during this period.⁵

Legislative amendments enacted in 2003 will have an impact on the role of the public in EAs.⁶ The federal government has increased its commitment to participant funding by making it available for comprehensive study level assessments. Yet at the same time, this, and another legislative change may result in even fewer panel hearings by which the public can participate in major decision making. This additional change states that once a comprehensive study track has been embarked upon, there is no possibility of referring the project to a panel review, regardless of the environmental implications.

It bears noting that CEAA leads only to the scrutiny of certain federal “projects” — meaning physical works, undertakings, or activities, and not federal policies, plans or programs. Assessment of the latter, commonly known as “strategic EA”, is not legislated. Currently, federal policies, plans and programs may be subjected to a discretionary strategic EA, as stipulated by the “Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals”.⁷

We worry that some of these recent changes may mean that the Agency is moving away from review panels and more towards EA by comprehensive study. In our view, panels are not utilized often enough. They tend to be the best process available to facilitate the actual exchange of ideas on whether and how a project should be allowed to proceed.

⁵ David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2003), pp. 152-153.

⁶ S.C. 2003, c. 9.

⁷ The Directive text is at http://www.ceaa-acee.gc.ca/016/directive_e.htm. The Directive was given in 1999; recent amendments effective January 1, 2004, now require departments to provide a public statement of environmental effects.

1.2 WHAT IS A CEAA REVIEW PANEL?

Under CEAA, the Environment Minister can refer a project to a review panel directly, or the responsible authority⁸ can refer a project to the Minister where a screening has occurred,⁹ and where:

- (i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects, or
- (ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects [and the responsible authority has not determined that the effects cannot be justified in the circumstances]; or
- (iii) where public concerns warrant a reference to a mediator or a review panel.¹⁰

A review panel is required to hold public hearings, and consider all of the factors identified in the Act, including the significance of the environmental effects of the project, the cumulative effects, mitigation measures, public comments (see Appendix 1 for a full listing of these factors). Since the inception of CEAA in 1995, ten¹¹ review panels have been concluded.

Sometimes both provincial and federal EA legislation require an EA to be conducted, though hearings are rare. Where there is concurrent jurisdiction, panels may be designated as joint federal-provincial EA review panels, further to the provisions of federal-provincial harmonization agreements.¹²

In some situations, other federal authorities, such as the National Energy Board (NEB), also have overlapping jurisdiction to carry out an assessment of the environmental effects of a project. For example, under the *National Energy Board Act*, projects such as trans-provincial power lines or pipelines must obtain a “Certificate of Public Convenience and Necessity”

⁸ *Canadian Environmental Assessment Act* (CEAA), S.C. 1992, c.37, s. 34(c) and (d). Section 2 states that a “responsible authority in relation to a project means a federal authority that is required ... to ensure that an environmental assessment of the project is conducted.”

⁹ Pursuant to CEAA s. 25, the responsible authority has additional discretionary powers to request the Minister to refer the project to a mediator or a review panel.

¹⁰ CEAA, s. 20(1)(c), and similarly worded in s. 23(b).

¹¹ The ten are: Express Pipeline Project [Alberta, gas pipeline] (report May 1996); Terra Nova Development [Newfoundland, offshore petroleum] (report August 1997); Sable Offshore Energy and Maritimes and Northeast Pipeline Projects [Nova Scotia, offshore and onshore gas drilling/pipeline] (report October 1997); Little Bow/Highwood Diversion Plan [Alberta, water diversion] (report May 1998); Voisey’s Bay Mine and Mill [Labrador, nickel mine] (report March 1999); Cheviot Coal Mine Project [Alberta, coal] (report September 2000); Sunshine Ski Development Project [Alberta] (project withdrawn and panel disbanded in 2000); Canadian Millennium Pipeline Project [Ontario] (project withdrawn and panel disbanded in 2001); and Red Hill Creek Expressway Project [Ontario] (court decision determined CEAA does not apply so panel disbanded in 2001); and GSX Canada Pipeline Project [BC, gas pipeline] (report July 2003).

¹² See also CEAA, s. 40(2).



from the NEB before they may proceed, and the application entails (amongst other things) an assessment of environmental effects.¹³ For projects which also trigger a CEAA EA¹⁴ and which are referred to a CEAA review panel, it is common for the Canadian Environmental Assessment Agency (the Agency) and the NEB to decide on a joint process. While the NEB must answer a different question than is asked in the CEAA process, CEAA authorizes a joint process, recognizing the need to avoid duplication.

The overlapping jurisdiction is demonstrated by the fact that eight out of the ten CEAA review panels held to date have been joint processes with either a province or the NEB. These projects were also extremely large projects that attracted a significant amount of public concern at both the federal and provincial level.

The Alliance Pipeline hearing exemplifies some of the quirks and dangers inherent with overlapping jurisdiction. This was an exclusive NEB hearing, not a joint panel review; yet, the public input from the hearing contributed to the federal EA process, in this case a comprehensive study. The NEB held its hearing *before* the comprehensive study was completed, thus the regulatory process commenced before the responsible authorities¹⁵ had determined whether the project would be likely to cause significant adverse environmental effects.¹⁶ In addition, the NEB regulatory approval process was underway before the EA had been completed. Thus, the comprehensive study was not available in time for the NEB hearing, and the public did not have an opportunity to comment on the federal EA at the only public hearing that was held in this process.¹⁷

In the recent joint review panel established for the GSX Canada Pipeline project, two different decisions were issued after the hearing. First, the joint NEB/DFO panel issued a report, which determined that the project would not cause a significant adverse

¹³ *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 52.

¹⁴ Such as new pipelines greater than 75 km in length, which are listed on the CEAA Comprehensive Study List Regulation.

¹⁵ These included the NEB, Fisheries and Oceans Canada, the Prairie Farm Rehabilitation Administration and the Province of Saskatchewan.

¹⁶ See p. xv. Instead, the NEB used the public comments received at the hearing to complete the CSR; and the CSR was completed not only pursuant to the CEAA but also to satisfy the NEB's responsibilities under s. 52 of the *NEB Act*.

¹⁷ In the NEB hearing on the Grizzly Extension Pipeline and Weejay Lateral, where the NEB planned what seemed would be an identical process (i.e., for the NEB hearing to be held prior to the completion of its CSR and used as a tool for completing the CSR), an intervenor filed a motion asking for the hearing to be stayed until after the CSR was completed, complaining that the rules of natural justice were being violated. The intervenor argued that s. 5(2) of CEAA, which requires an EA to be carried out "as early as practicable in the planning stages and before irrevocable decisions are made", implies that the CSR ought to be completed *before* the start of any hearing pursuant to s. 52 of the *NEB Act*, so that the public would "know the case to be met" and so the public would have the opportunity to comment orally on the completed CSR, prior to the NEB making its decision. The NEB dismissed the motion and found that so long as the NEB did not make its decision until after the CEAA process was completed, there was no violation of CEAA or the rules of natural justice. The NEB, as master of its own process, ruled that it could adjourn the oral hearing until after the CSR was completed, to enable public comments on the CSR (authorized pursuant to s. 22(2) of CEAA) to be made orally and not merely in writing. See Appendix III to the NEB's Reasons for Decision in hearing GH-2-2002.

environmental effect. This panel gave little consideration to the greenhouse gas emissions and end use impacts evidence submitted by members of the public. However, the subsequent NEB Reasons for Decision, considered the potential greenhouse gas emissions from the facility and recommended that measures be taken to address them.¹⁸

At its conclusion, CEAA requires the review panel to prepare a report setting out the “rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and a summary of any comments received from the public” and to submit the report to the Environment Minister and the responsible authority. The panel’s recommendations are not binding; but, because review panels are open and transparent processes, the panel’s report and considered recommendations hold significant scientific and political sway.

¹⁸ Joint Review Panel for the GSX Canada Pipeline Project: Panel Report, July 2003; NEB Reasons for Decision, GH-4-2001, November 2003.



2.0 IS PUBLIC PARTICIPATION IN REVIEW PANELS WORTHWHILE?

The answer is a qualified yes. Our overall impression is that public participation in review panels has been, for the most part, effective and has had a positive impact on the outcome of the EA. We found that public concerns and ideas were reflected in panel deliberations and recommendations, thereby indirectly affecting federal decision-making. We also found several instances where public concerns and ideas had a direct impact, evidenced by proponents changing and improving their plans for project implementation.

In the sections below on “What Works” and “What Doesn’t Work”, we highlight some of the successes as well as some of the challenges in panel reviews. Considering these two sections together, it is clear that the federal government knows how to carry out effective consultations that are responsive to public input; the problem is that it does not consistently and diligently apply that know-how when decisions are being made in designing the consultation processes, and in responding to issues and problems. While there are successes, there remains room for both procedural and substantive improvements.

Review panels are the most comprehensive EA process under CEAA, requiring the widest scope of review and the most accessible process for public participation.¹⁹ Additionally, with a hearing, participants are afforded a unique opportunity to:

- personally communicate to a panel what values the community holds for the resource or area, and how the project will impact upon those values or personally affect them;²⁰
- provide to the panel independent scientific research or traditional knowledge, regarding project impacts, wildlife species, habitat, ecology, and more; and be able to explain that knowledge to the panel;
- become educated about the process and the issues surrounding the project and the EA; and as a result of that participatory education, become more effective participants in the public consultation process;²¹ and

¹⁹ Screenings do not necessarily require public participation (see CEAA s. 18(3)), nor do they have to consider the factors listed in CEAA s. 16(2). Participant funding is only in relation to review panels and mediations: s. 58(1.1). Bill C-9, *An Act to Amend the Canadian Environmental Assessment Act*, which came into force last year, has expanded participant funding to include comprehensive studies and joint review panels.

²⁰ William A. Ross, “Reflections of an Environmental Assessment Panel Member” (University of Calgary, 1999), p. 1, noted one of the “real benefits of hearings” as being that “members of the panel ... are given the opportunity to hear directly from those affected by projects, who describe what those projects mean to them”.

²¹ “... education becomes both a precondition for, and an outcome of, fair and effective consultation of stakeholders.” See Patricia Fitzpatrick and A. John Sinclair, “Learning Through Public Involvement in Environmental Assessment Hearings”, *Journal of Environmental Management*, Volume 67 (2003), 161-174, p. 165.

- be physically present and so bring pressure to bear upon the panels to ask the hard questions and to seek out²² any further or missing necessary information, research or evidence.

There are numerous specific benefits derived from having effective review panels, foremost among them being the ability to engage directly in important local decision-making that will have significant long-term impacts. We support continued improvement to the panel review process as a means of conducting EAs.

2.1 HOW WE CONSIDERED WHETHER PARTICIPATION IS WORTHWHILE

We weighed the effectiveness of public participation in CEAA review panels by noting the apparent influence of public participation on the panel's report and recommendations or on the proponent's actions. We took the indicators of influence to be such things as:

- references in the reports to public input;
- procedural changes that were prompted by public comments;
- public scrutiny that led to panel disapprovals or to recommendations regarding mitigation, follow-up or substantive changes; or
- changes by the proponent that had similar beginnings.

We term all of this "apparent" influence, since we cannot know what the panel's report would have looked like without public participation. Our review of the panel reports unfortunately did *not* allow us to evaluate *how often* or *what* public comments were overlooked or underreported; we were only able to observe the public input that was in fact noted and discussed.

It bears emphasizing that the most that the public can *directly* achieve within the CEAA panel review process is to influence the panel or the proponent. The panel's report and recommendations get passed on to the Environment Minister and the responsible authority for a decision;²³ in this way, the public's influence on federal decisions is, at best, *indirect*.

²² CEAA s. 35(1) provides: "A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to (a) give evidence, orally or in writing; and (b) produce such documents and things as the panel considers necessary for conducting its assessment of the project."

²³ CEAA s. 37(1.1) provides that the responsible authority shall take into consideration the report, and with approval of the Governor in Council, respond to the report, and take a course of action in accordance with the approval of the Governor in Council.



3.0 COMMENTS ON REVIEW PANEL PROCESSES

Panels are directed to hold “hearings in a manner that offers the public an opportunity to participate in the assessment”;²⁴ however, the particular methodology is not prescribed. This opens the door to using a range of methodologies to make the hearings process more effective. The following comments are based upon our review of the public hearing process.

3.1 WHAT WORKS

A traditional panel review process involves holding hearings on a certain date in a single location; however, when consultation procedures are “smarter” and more flexible than that, the accessibility of the process is increased. The use of a mixture of flexible consultation methodologies was most evident²⁵ in the Voisey’s Bay, Georges Bank and Sable Island consultation processes. In Georges Bank, the panel stated:

The Panel faced many challenges in conducting the review, and none was more important than the need to engage the affected communities in a joint learning process leading up to the hearings in 1999. A communications plan to gather and disseminate relevant information was clearly needed.²⁶

Some of the diverse methodologies that may encourage inclusiveness and accessibility for the panel review process include:

- public notice through the use of advertisements, broadcasts and mailings (provided the notice is appropriately targeted so as to result in *actual notice* to the targeted community);
- the use of websites for information or reference material (complementary to conventional paper-based means of notification), or 1-800 information lines;
- public consultation meetings for scoping out issues, and defining the project, issues and process, including informational meetings and workshops;
- workshops/materials explaining the technical background of the project, in lay language;²⁷
- full public access to all information and materials related to the EA;²⁸

²⁴ CEAA, s. 34(b).

²⁵ Appendix 3 sets out in table format a brief summary of procedural aspects of all of the panels.

²⁶ Georges Bank report, p. 12.

²⁷ Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, p. 166.

²⁸ Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, p. 172, observed how key this was to an effective public review process.

- courses on “How to be an intervenor”²⁹ or “How to participate in a CEAA review panel”;
- consultation on whether the environmental assessment provided is adequate (and whether the project is ready to go to a hearing);
- multiple phases to a consultation over time, or multiple hearings, at various locations, and in smaller communities and not just large urban centres, including a schedule whereby some sittings occur “after-hours”;³⁰
- in some cases considering informal hearings, rather than a quasi-judicial process;³¹
- translation services for those who need it, or video-conferencing;³²
- adequate participant funding for the scoping process and the hearing;
- facilitation or use of demonstrative evidence or “views”, where appropriate; and
- invitation/opportunity to comment on the process and whether it was effective and accessible.

3.2 WHAT DOESN'T WORK

A number of obstacles may impede the effectiveness of a hearings process and undermine the public's statutorily prescribed “opportunity to participate in the assessment”:

- No funding³³ or inadequate funding for hearing participants. For example, participant funding for the reconvened Cheviot Coal Mine process fell far short of the need: whereas participants requested \$210,578, only \$30,000 was available under the program. Given the enormous resources that project proponents invest in preparing and presenting expert reports, it is absolutely critical for participants to have access to

²⁹ Such a how-to course was offered in the Sable Island review, and was found to be a tool for “levelling the power relations” of the hearing: see Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, p. 168.

³⁰ Fitzpatrick and Sinclair commented that a standard business hours schedule (8:30-5, Monday to Friday) may have precluded working people and students from attending the Sable hearings: “Learning Through Public Involvement”, *supra*, p. 167.

³¹ See notes 39 through 41, *infra*.

³² Videoconferencing was requested by an intervenor but refused in the Sable Island project: Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, p. 169.

³³ Since December 15, 1994, participant funding for CEAA panels has been statutorily prescribed under section 58(1.1); however, funding is limited and Agency literature warns that “Not all applications will be successful.” The Agency determines the total funding amount but individual funding decisions are made by the President of the Agency on the recommendation of an independent Funding Review Committee established for each panel. See *Participant Funding Program: Guide and Application Form for Assessments by Review Panels* (CEAA Operational Policy Working Group, December 2000).



funding so that they may hire consultants to provide independent advice and research, and meet expert opinion with expert opinion.³⁴

- Poor advertising of available funding. In stark contrast to the shortages above, it was nothing short of a scandal that in the Terra Nova process, some \$75,000 was available yet only two applications for funding were received and only \$26,410 was allocated.³⁵
- Unrealistic time limits. Tight timing is a constant challenge for hearing participants. In the recent announcement of the Joint Federal Provincial Review Panels for Oil Sands Projects (Canadian Natural Resources Ltd. Horizon Mine and Shell Jackpine Mine), the first oil sand projects subject to a joint panel review; the announcement was posted July 9, 2003 and set a deadline for funding applications of July 30, just three weeks later. Sufficient notice and preparation time must be allocated, with a view to the fact that many participants such as non-governmental organizations consist of unpaid volunteers who work on a part-time basis with few resources.
- Public and First Nations consultation being initiated too late in the process or without due care to cultural differences, precluding appropriate issue definition and resulting in alternatives being rejected before they have even been considered.³⁶
- A general lack of engagement of the public in the scoping process, and lack of funding for the scoping process. Too often participants are still in the capacity-building process when important decisions are made. By the time people are notified, funded and “up to speed”, the scoping decisions have often already been made and issues may have been “scoped out” of the process.³⁷
- An overly-narrow definition of the project. For example, it makes no sense to have one EA for the production project and a separate EA for trans-shipment,³⁸ since the two activities and their impacts are intertwined. Projects need to be defined comprehensively so that their total effect and viability may be evaluated.
- An overly-formal hearing process. A quasi-judicial process can be intimidating and seem more expensive to participate in, due to the attendant legal formalities,³⁹ the

³⁴ Personal communications with Sable and Georges Bank participant (February 12, 2003), with Terra Nova participant (February 10, 2003) and with Voisey's Bay participant #2 (February 27, 2003). See also Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, for conclusions in this regard.

³⁵ Terra Nova report, p. 9. The panel commented: “According to some participants in the review process, more applications for funding would have been made had the program been more widely advertised.”

³⁶ CEAA s. 5(2)(i) states that the EA is supposed to be carried out as early as is practicable in the planning stages and before irrevocable decisions are made.

³⁷ Personal communication with Sable participant #2 (October 9, 2003).

³⁸ Personal communication with Terra Nova participant (February 10, 2003). Also see discussion of scoping in the Sable project, *infra*.

³⁹ Personal communication with Sable and Georges Bank participant (February 12, 2003).

presence of legal counsel in expensive suits,⁴⁰ and the requirement to register as an “intervenor”. In Sable, there was some evidence the quasi-judicial process may have actually deterred the general public from participating.⁴¹ On the other hand, some participants in more informal processes have sought the right to cross-examine witnesses, to guarantee their opportunity to meet the opponent head-on.⁴²

- A panel that appears predisposed to a particular outcome.⁴³ Justice demands an impartial and open hearing.

⁴⁰ *Ibid.* and see interviewee comments quoted in Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, pp. 168-172. Voisey’s Bay participant #2 (February 27, 2003) recalled vividly the “Day of the Suits” when “a truckload of Bay Street lawyers arrived with their suits and briefcases,” and “community member after community member said, ‘get the Bay Street guys out of here!’” There was a strong impetus to keep the hearing informal and community-focused.

⁴¹ Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, pp. 166-67, calculated that for Sable, in the informal hearings 29 percent of the participants were the general public; whereas in the formal hearings, this number dropped to 2 percent but was “replaced” somewhat by increased levels of NGO, aboriginal and government participation. They also noted that the more formal process tended to make the hearing more adversarial and less of a dialogue about solutions, and further, limited evidence on the basis of relevance to questioning (pp. 168-72).

⁴² Personal communication with Voisey’s Bay participant #1 (February 6, 2003).

⁴³ Panelists are appointed by the Minister in consultation with the responsibility authority, and shall be “unbiased and free from any conflict of interest relative to the project and who have knowledge or experience relevant to the anticipated environmental effects of the project.” (See CEAA, s. 33(1)(a)(i)).



4.0 COMMENTS ON PANEL REVIEW CONCLUSIONS

This section gives examples of some of the achievements and disappointments related to the substance of the issues, and the importance of public participation in this context.

4.1 WHAT WORKS

4.1.1 PUBLIC DISCUSSION OF CONTEXT

Hearings provide an opportunity to see the project in the environment's existing social, historical and ecological context. Context is always important, but it is overwhelming for some development proposals. During a hearing, the physical presence and voice of members of the public are powerful reminders to both the proponent and the panel of the heavy responsibility arising out of that context.

For example, the Voisey's Bay nickel mine and mill project report in Labrador exemplifies the breadth of the concerns that were raised by the Innu and the Inuit people as these First Nations contemplated the intrusion of the proposed nickel mine operation into their traditional territory and way of life. Some of the impacts that were explored at the hearings included:

- project development prejudicing unresolved land claims and aboriginal rights claims, and negative impacts on traditional land uses such as hunting and food gathering, and on archaeological sites;
- concerns about pollution, including acid mine drainage created by the mine tailings, management of dust and tailings, and concern over the "downstream" effects of such pollution;
- negative impacts including disruption and disturbance of endangered species and their nesting grounds;
- worry over the potential loss or disruption of traditional community values of co-dependence and other community practices, as a result of introducing a rotating shift-work schedule upon the community's members and their traditional way of life, for example as people leave and re-join the community before and after a two-week shift;
- a desire that the project produce long-term (20 – 25 years) jobs and economic stability and a desire to avoid a pattern of short-term disruptions; and
- the undeniable fact that there is no "going back": once the development is built, the area will lose its untouched quality forever.

The number and extent of the impacts can be daunting, and can seem especially so when the discussion must be squeezed into the finite process of a public hearing. One experienced hearings participant underlined this dilemma when he commented that timelines were

“always a problem”, given that the community was asked to make “life- and future-altering decisions ... on 90 days notice”.⁴⁴

4.1.2 NEED FOR BASELINE DATA

The panel reports document discussion of public concerns for the environment, proper scientific study, and ecological effects, and attempts to address these concerns.

In virtually every case, the public consistently demanded that more and better baseline data be collected. This demand is usually transformed into a panel recommendation for further baseline data to be collected. While it is discouraging that the baseline data presented was so often inadequate, the public focus on, and panel acceptance of, the need to gather baseline data, underscores how essential it is for evaluating the state of the environmental health (in hard data terms), at all of the pre-project, production and post-production stages.

The Innu and Inuit in the Voisey’s Bay hearing achieved a victory when the government required the Panel to give “full consideration to traditional ecological knowledge, whether presented orally or in writing.” This commitment was negotiated and was referred to in the panel’s Terms of Reference, appended to the Memorandum of Understanding which was signed by the provincial and federal governments, the Labrador Inuit Association and the Innu Nation. Traditional knowledge was also highlighted through a presentation that was made by Innu and Inuit elders at the hearing, funded by the proponent.⁴⁵

4.1.3 NEED TO ADDRESS ENVIRONMENTAL, SCIENTIFIC AND ECOLOGICAL CONCERNS

Another repeated theme is the need to ensure that the actual development activity happens in the least intrusive manner. The following considers some of the diverse concerns that were raised and the responses they invoked.

In the Express Pipeline project, the public challenged the timing of construction activities. The proponent originally proposed to carry out the construction in the spring; but, changed the construction to the fall on advice from the public that autumn would be preferable for reducing impacts to migratory birds, their nests and their young.⁴⁶ The majority panel then recommended that the proponent stick to the new fall construction schedule.⁴⁷

In the Voisey’s Bay hearing, the proposed winter shipping activities were contentious. In the operational plan, the proponent had planned to ship the nickel ore concentrates during the winter, using ice-breakers to pass through the ice of Edwards Cove. The Innu and Inuit objected that the ice-breaking would not only de-stabilize the whole bay and render it unsafe for traditional hunting activities; but, also that it risked oil spills and could potentially disrupt

⁴⁴ Personal communication with Voisey’s Bay participant #2 (February 27, 2003).

⁴⁵ Personal communication with Voisey’s Bay participant #2 (February 27, 2003).

⁴⁶ Express Pipeline report, pp. 11-13.

⁴⁷ The “majority” panel means that the panel was not unanimous in its recommendations, however, a majority of panel members concurred on the issue at hand. Express Pipeline Report, p. 13-14. Clean-up activities were excepted from this scheduling requirement.



the return of wildlife to the area. The panel recommended a prohibition on winter shipments.

Unique characteristics and project location were frequently the subject of controversy. In each of the following panels, public concerns resulted in the plans being modified:

- In the Sable Island project, there was elevated concern over the impacts the offshore oil development would sustain on the fishery and on the ecology of the surrounding sea beds and sea life. Some groups strategically focused their efforts on a critical area known as “the Gully” and emphasized the need for environmental monitoring, research and protection in relation to impacts on the Gully. Their pleas were heard: the panel recommended that the proponent “initiate or contribute to basic physical-biological oceanographic research in the Gully” and “collect pre-development baseline data in sensitive areas.”⁴⁸ The concern also led to the establishment of a Code of Practice and a proposal for environmental effects monitoring in the Gully.⁴⁹
- In the Voisey’s Bay project, the panel responded to public concerns over nesting grounds located in the vicinity of a proposed airport by recommending that the airport be realigned. As a further measure to preserve the nesting grounds, the panel also recommended that the proponent reduce the category of the airport from its proposed Category One status – or at the very least, operate the airport with restrictions during critical migratory waterfowl staging periods.⁵⁰

Discussions in the Terra Nova offshore oil panel review focused on a number of operational practices and related technical and legal environmental issues:

- Public participants felt strongly that the proponent’s environmental impact statement (EIS) was “too optimistic” in its plan for iceberg management, and that “difficulties and potential hazards (regarding icebergs) may have been understated.”⁵¹ The contrast between this high level of public concern and the proponents’ more rosy view of the issue led the panel to recommend criteria for an ice management plan, including provision for a third party audit of the plan’s effectiveness. The panel commented that “a carefully-designed third party audit of the effectiveness of the proponents’ ice management plan would serve to validate the proponents’ optimism and satisfy public concerns.”⁵²
- Similarly, Terra Nova participants pushed for a clearer protocol to address the fact that when the ship would arrive at the oil field, its legal status would change from being a “ship” into being an “oil rig” and that this would lead to a change in the ship’s command. To this concern, the panel recommended:

⁴⁸ Sable report, pp. 40 and 44-45.

⁴⁹ *Ibid.*, pp. 39-41. The panel further recommended that monitoring with a taint test be carried out to ensure that the aquaculture industry would not be negatively affected by potential tainting (pp. 34-37).

⁵⁰ See Voisey’s Bay report, Recommendation 68.

⁵¹ Terra Nova report, p. 38.

⁵² *Ibid.*

[T]he marine captain should be ultimately responsible for the safety of the vessel and her crew in respect of all weather or sea-state hazards. A mechanism for the formal and continuous consultation between the captain and the offshore installations manager should be clearly in place. The marine captain should be the one to implement, when it is necessary, the protocols to disconnect the vessel and remove it to a safe area.⁵³

- Participants worried about the effects the rig lighting would have on seabirds. The panel noted in particular the Canadian Wildlife Service's concern regarding lighting and a colony of 3,000,000 pairs of Leach's Storm Petrels nesting within a 350 kilometre foraging range. The panel recommended the proponent put in place a program to monitor the birds' attraction to, and collisions with, the offshore facility.⁵⁴
- The public also raised concerns about impacts on the sea environment and on wildlife resulting from oil spills, rig activity and noise. The panel recommended a "zero-tolerance" policy for oil spills (and in accordance with that, establishment of "a set of protocols to determine when oil transfers are unsafe"), and recommended that "monitoring of abundance and activity of marine mammals, and especially of identified individuals, be conducted and be related to specific activities and attendant emitted noise of the Terra Nova development."⁵⁵

4.1.4 NEED TO ADDRESS CONCERNS FOR COMMUNITIES AND COMMUNITY RIGHTS

In the Voisey's Bay hearing, the public persuaded the panel that it was unjust for the project to move forward, so long as the First Nations title and rights claims remained unresolved. The panel sought independent legal advice on how to apply the then recent decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*, to the facts at hand.⁵⁶ In the result, the panel recommended that the project be held off until an Impact Benefits Agreement had been negotiated and agreed upon by the parties. For some, the achievement of this recommendation spoke to the success of this EA process.⁵⁷

In the Little Bow/High River project, the panel took notice of a strong sense of community evidenced by the participants' stated desire for the project not to proceed unless it was "win-win"; in particular, the downstream users did not want the project to proceed unless it would not adversely affect upstream users.⁵⁸ There was also a closely related concern that the fishery habitat be protected.

⁵³ Terra Nova report, Recommendation 43, p. 41.

⁵⁴ Terra Nova report, p. 58.

⁵⁵ *Ibid*, pp. 72-73.

⁵⁶ Personal communication with Voisey's Bay participant #2 (February 27, 2003); *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

⁵⁷ Personal communication with Voisey's Bay participant #2 (February 27, 2003).

⁵⁸ Little Bow Highwood Diversion report, pp. 8-35 and 8-36.



4.1.5 CONFIDENCE IN THE OVERALL SCOPE AND FINDINGS

Hearings provide the public with an opportunity to colour the “lens” through which the panel views a project. Sometimes the results can be substantial.

In the Sable review, under the original terms of reference, the panel was supposed to evaluate independently the onshore and offshore components of the project; however, during the scoping process, one of the intervenors, Ecology Action Centre, questioned the panel’s ability to address the question of the viability of the whole project, with the project being split into two separate applications.⁵⁹ The panel agreed with that submission and changed the scope of the review to consider the impacts of the onshore and offshore components of the project together in their entirety.⁶⁰ This was a major success.

Strong public submissions urging precaution undoubtedly encouraged the Terra Nova panel to make Recommendations 2 through 4 of the “Fundamental Findings” which guided the panel’s 71 more specific recommendations. These were:

Recommendation 2: The Panel recommends that a precautionary approach govern all aspects of the Terra Nova development.

Recommendation 3: The Panel recommends to the Government of Canada and the Government of Newfoundland and Labrador that adequate resources be allocated to the Board for the implementation and follow-up of the recommendations of this report.

Recommendation 4: The Panel recommends that the Board take a more active role in the exercise of its full mandate.⁶¹

In the Georges Bank review, overwhelming public concerns combined with strong input from the fisheries industry persuaded the panel to maintain the offshore oil moratorium:

The arguments that point to the great value of Georges Bank, ecologically and as a fishery, weighed against a lack of public need for and limited benefits from petroleum exploration are persuasive.⁶²

The Express Pipeline panel review is notable because it resulted in a split panel, with one member dissenting from the majority’s approval of the project. The dissenting panelist relied heavily on concerns and arguments that were raised by the public.⁶³

⁵⁹ Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, p. 165.

⁶⁰ Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*.

⁶¹ Fitzpatrick and Sinclair, “Learning Through Public Involvement”, *supra*, p. 64.

⁶² Georges Bank report, p. 58.

⁶³ The dissenting panelist found that the proponent, in a rush to move the project forward and to “mitigate” impacts, had been “wholly insufficient” in its approach to gathering baseline data and assessing the effects of the project on species and ecosystems. Without these, the panelist concluded that she could not find that the impacts would be insignificant or that they could be mitigated; therefore, she could not authorize the project to proceed. On an appeal of the responsible authority’s project approval, however, the Federal Court of Appeal upheld the majority’s approach to the assessment process, and specifically rejected an argument that CEAA

4.2 WHAT DOESN'T WORK

4.2.1 LACK OF BASELINE DATA

While it is good that the review panel process consistently confirms the need for strong baseline environmental and ecological data before a project is approved, it is also discouraging that the case for baseline data needs to be made time and again.

Clearly, the public's ability to participate in EAs would be strengthened if appropriate baseline data was made available prior to the EA process being conducted. In this way, limited public time and energy would not need to be dedicated to seeking out basic information.

4.2.2 INADEQUATE OR LATE CONSULTATION

Both the Sable Report and the Little Bow/Highwood Diversion Report noted that inadequate and late consultation with First Nations had resulted in the development of mistrust and misunderstandings.⁶⁴ Regarding the failings of the Sable process's outreach to aboriginal communities, one of the interviewees in a study by Fitzpatrick and Sinclair commented,

They would just ship a bunch of documents to them assuming they have the resources and the will and the interest to disburse [sic] them, and have the organization and infrastructure to become part of the process. And the Aboriginal Community felt very strongly that shipping of cartons of documents to an office is not sufficient.⁶⁵

The panel on the Sable Island project commented on the problem and the belated efforts to redress the situation:

Direct, face-to-face contact with aboriginal communities at the Project outset would likely have gone a long way toward alleviating aboriginal peoples' concerns, and avoided mistrust and misunderstanding. The Proponents have belatedly recognized this. Consultations have been initiated and have achieved positive results. For example, Sable Offshore Energy Project (SOEP) has agreed to avoid situations where, if an aboriginal archaeological site was uncovered, work on the site would continue in the absence of consultation with affected parties. Work will be halted pending consultation. The Proponents have also agreed along with aboriginal representatives to review specific environmental mitigation procedures. Discussions are underway between the Proponents and aboriginal representatives with respect to a protocol or agreement on future consultation, particularly for areas such as land use, rare and medicinal plants and archaeological resources. During Argument, two of the three aboriginal intervenors expressed satisfaction with the progress made to date. The Panel feels strongly that the best approach to achieve effective communication is through a written protocol or agreement that spells out responsibilities and roles for the cooperative study, the monitoring of potential impacts, and the development of appropriate mitigation, when

requires a sequential examination of the factors in section 16(1). See *Alberta Wilderness Assn. v. Express Pipelines Ltd.* (1996), 137 D.L.R. (4th) 177 42 Admin. L.R. 296 (Fed. C.A.).

⁶⁴ See Sable report at pp. 28, 90, and Little Bow/Highwood Diversion report, p. 8-51.

⁶⁵ Fitzpatrick and Sinclair, "Learning Through Public Involvement", *supra*, pp. 169-70.



required. Notwithstanding, the Panel would stress that any approach must be cost effective, efficient and timely.⁶⁶

In the Express Pipeline review in Alberta, the proponent initiated consultations so late that it had actually entered into land option agreements with land owners prior to vetting the details of the route with interest groups or government departments.⁶⁷ There was also great concern over the routing of the pipeline through rare and ecologically sensitive grasslands south of Cypress Hills, and certain wetlands.⁶⁸ The majority panel concluded that “[a] more thorough consultation with these parties [provincial agencies and interest groups], particularly for the southern portion of the route, could possibly have identified concerns in a more timely manner and would have resulted in more efficient use of the review process.⁶⁹

4.2.3 LIMITED PANEL RESPONSE TO REAL CONCERNS

In the Sable and Maritimes and Northeast Pipeline Project, many rural landowners suggested that the proposed pipeline threatened their quality of life. They voiced worries over pipe safety, visual effects, adverse effects on wildlife, property, trespass and the aesthetics of pipeline right-of-ways. The panel responded moderately, stating that it believed that all of these could be “mitigated to insignificance through proper planning, construction and maintenance practices”.⁷⁰ Unless the anticipated measures truly reduce the concerns “to insignificance” as billed, the public may feel co-opted by a fruitless process.

In the Sable Island project, the public objected to the noise the gas processing plant would generate, yet the proponent stuck to its plan to meet the maximum noise level permitted by law. The panel conceded that the proponent would be within the legal noise limit but expressed worry over the anticipated public friction on the issue. The panel recommended that the proponent “revisit its use of the upper limit”⁷¹ – a weak recommendation, considering the project was only at the planning stage.

Again in the Sable Island project, various intervenors, both public and government, raised concern over the proponent’s planned use of oil-based drilling muds (OBM), rather than

⁶⁶ Sable report, p. 90. During the Alliance Pipeline hearing, the proponent, First Nations and Métis entered into a (similarly belated) memorandum of understanding regarding meaningful participation and for opportunities to be made available to these communities. The Certificate of Public Convenience and Necessity (CPCN) ordered the proponent to monitor and report on the understanding’s commitments on a quarterly basis during construction and annually for three years after the commencement of operations. (Alliance report, p. 54).

⁶⁷ Express Pipeline report, p. 9.

⁶⁸ Express Pipeline report, pp. 31-46.

⁶⁹ Express Pipeline report, at p. 8. Some late accommodation was effected when Express and some of the participants agreed to enter into a memorandum of understanding to cooperate and consult during the post-construction reclamation efforts and monitoring. The MOU also recognized the existence of outstanding concerns in respect of biodiversity protection and reclamation, and set up an Advisory Committee to provide ongoing advice on those issues. The parties who entered into the MOU were Express, the Alberta Wildlife Association, the Federation of Alberta Naturalists, and the Alberta Fish and Game Association (p. 38).

⁷⁰ Sable report, p. 8.

⁷¹ Sable report, p. 54.

synthetic-based muds (SBM). The Department of Fisheries and Oceans (DFO) submitted that the justification for using OBM rather than SBM was insufficient, given the potential for effects on fish habitat.

In response, the panel noted that the proponent's choice of OBM was consistent with "Offshore Waste Treatment Guidelines", which had been developed by a number of groups including DFO. The panel allowed the use of OBM but recommended that the proponent "further explore the alternatives to the use of OBMs and commit to considering and implementing the most environmentally and geotechnically sound options when available."⁷² The panel also recommended an environmental effects monitoring program, "to ensure that mitigative effects are effective and to confirm predicted environmental effects with respect to discharges of drilling wastes and produced water including sublethal effects of produced water, flocculation of waste and the creation of chlorinated hydrocarbons within the 500 metre radius of the drilling platforms ..."⁷³

When making recommendations, panels need not limit themselves to ensuring bottom-level regulatory compliance. The EA process strives to go further than that: its purpose is to identify issues and problems; come up with alternatives and creative solutions; and to plan appropriately, for more environmentally sound and socially acceptable results. Considered, creative recommendations are both the opportunity and benefit of having an effective panel review process. In the examples from Sable, the proponent's choice to operate at the regulatory standard's limit underlines the need for stricter regulatory standards. When standards are set too low, that which is "legal" is at risk of being found to be "acceptable". Nonetheless, in our view, when the panel recommended little more than passive acceptance of the noise and OBM regulatory standards, despite the obvious problems with the standards, it failed to meet the creative task with which it was charged.

While a myriad of complex and technical recommendations are often the result of an EA, this outcome is not essential. In keeping with the notion that the task of the panel is a creative one, panels do have more flexibility than, say, courts. One rare and innovative example of a panel using this flexibility is the Georges Bank Panel, which concluded with one very simple recommendation to protect the unique fisheries and ecological values of the region.

The Panel recommends that action be taken to have the moratorium or petroleum activities on Georges Bank remain in place.⁷⁴

This moratorium was extended from 1999 until 2012.

⁷² Sable report, pp. 28-33. Significantly, the panel in Terra Nova also recommended that the Canada-Newfoundland Offshore Petroleum Board update its standards on discharges, since they were not as good as "best available technology" and were in fact lagging behind other jurisdictions. See p. 44.

⁷³ Sable report, pp. 28 – 33.

⁷⁴ George Banks report, p. 59.



4.2.4 CONCERNS ABOUT FOLLOW-UP AND MONITORING

Often, many of the recommendations of a review panel pertain to follow-up and monitoring once the EA has been completed. Yet once the EA is done, and the project has received its approval, the formal opportunities for public input have ended (unless the public continues to play a role in the permitting requirements).

Follow-up and monitoring is vital to determining if the predictions made in an EA were in fact accurate, and if the specified mitigation measures are being carried out, and are having the predicted effect. It is at this stage that the real opportunities exist to ensure that the project is developed consistent with the recommendations of the Minister's order and/or the review panel.

Yet the track record of the Agency to ensure follow-up and monitoring to date has been minimal. As mentioned earlier, follow-up programs are only required for about five percent of screened projects. And while the track record of the Agency is likely better with review panels, this is a shortcoming that needs to be remedied. The ability of an EA to ensure sustainable development is only as good as the actions that result from it. If the recommendations in an EA are not implemented and monitored, then it may as well never have been conducted.

The government has recognized this shortcoming and taken some steps to strengthen the follow up provisions of CEAA in its recent changes, particularly with respect to screenings. The Agency is also committed to implementing a quality assurance and control program. These positive steps are the beginning; the success of these measures remains to be seen.

Participants should ask panels to recommend the establishment of an independent watchdog to monitor and report publicly on the proponent's implementation of the project and conditions to the approval. In Terra Nova, the panel recommended a third party audit of the monitoring programme, and for the data to be made publicly available.⁷⁵ Groups may want to ask to have a representative on the watchdog.⁷⁶ Do not rely solely on government boards such as the Canada-Nova Scotia Offshore Petroleum Board to carry out assessment and monitoring. Such bodies are vulnerable to becoming captive to the industry they regulate and, in focusing on regulation, may overlook the more fundamental questions, such as "should we even be doing this at all?"⁷⁷

⁷⁵ Follow-up programs are authorized under section 16(2)(c) of CEAA. The panel stated: "The rationale for such a position is clear. The data in question are not proprietary but relate to the health and sustainability of the Grand Banks and its resources, which is a matter of utmost importance to all Newfoundlanders." (p. 50).

⁷⁶ Personal communication with Sable and Georges Bank participant (February 12, 2003). An interesting example is the Independent Environmental Monitoring Agency established to monitor the Ekati diamond mine development near Yellowknife. More information is available at <http://www.monitoringagency.net>.

⁷⁷ A couple of interviewees noted their disappointment with the independence of these kinds of boards: Personal communications with Sable and Georges Bank participant (February 12, 2003) and Terra Nova participant (February 10, 2003).

5.0 CONCLUSION

Despite the many challenges associated with public participation in CEAA review panels, public participation is critical: people can and do affect the process, decisions and outcomes of project reviews in a variety of ways. Public input has resulted in small and sometimes significant improvements in the process of consultation and in the planning and implementation of the proposed projects. Our review of process has focused on increasing accessibility; our review of the results has addressed such diverse matters as environmental impacts, community context and concerns, and the scope and thoroughness of project science and planning.

Public influence over project decisions has been both direct and indirect: direct, when the public persuaded the proponents themselves to make changes; and indirect, when public influence on decision-makers was communicated via panel recommendations. Even in those cases where change was not necessarily effected, the process fostered the exchange of information, the identification of issues and a public discourse. The discourse afforded by a panel review process is unique, and likely not replicated in comprehensive studies or in screenings. As stated above, in our view, panels are not utilized often enough, as they are often the best process available to facilitate the actual exchange of ideas on whether and how a project should be allowed to proceed.

Notwithstanding that the process can work effectively, it is clear that in some cases procedural and other obstacles has made public participation in the process difficult, expensive or too late to make a difference. These obstacles undermine public access to, and confidence in, the panel review process, and ultimately, the potential for a successful EA.



6.0 RECOMMENDATIONS

So what should the public, the Agency and project proponents consider, with a view to strengthening the process and outcomes? We recommend consideration of the following:

Review panels maximize the potential for an effective EA process and should be encouraged. Although the panel review process may appear to be more expensive than other processes, the short-term and long-term savings and “dividends” that are realized from conducting an effective panel review – such as public acceptance, identification of issues and reduction of project and social costs – must be considered.

Appropriately selected, impartial panel members who openly consider all of the evidence in their reports give everyone confidence in the process and the decisions. When key participant groups are allowed to give input into panel member selection, this increases public acceptance and confidence in the process.⁷⁸ Meeting issues with further investigation, accommodation and solutions is one of the indicators of an effective process. The most credible reports identified the participants and their comments; seriously discussed participant concerns; and tried to address concerns with concrete, detailed recommendations for change or accommodation.

Adequate participant funding is needed to ensure that the public interest is well represented. Funding needs to be sufficient to allow groups to secure consultants with expertise in the environmental impacts of the particular industry in question, qualified to carry out their own research to assess and challenge the opinions of the proponent’s expert. With funding usually in short supply, coordination and cooperation among participants maximizes the use of funding. The Agency needs to better advertise that funding is available. Groups need to encourage other groups to participate.

An early, accessible consultation process and an inclusive agenda are key. Flexible, thoughtful and educational processes and materials increase accessibility and the effectiveness of the consultation. At the early “scoping” stage, when issues are gathered and processes are determined, appropriate and thorough public consultation is key to an effective EA process. Failure to consult properly risks marginalizing groups and their concerns, and risks important issues and alternatives being precluded from consideration. At scoping, broad, comprehensive project definition ensures related project components and effects are not compartmentalized into separate EAs.

Independent follow-up and monitoring of project operations helps to ensure and *reassure* the public that commitments are being met and impacts are being monitored, as operations move forward and repeat. As discussed earlier, groups should ask panels to recommend the establishment of an independent watchdog to monitor and report publicly on the proponent’s implementation of the project and conditions to the approval. Ultimately, an EA will only be as good as its implementation.

⁷⁸ For the Voisey’s Bay panel, the key groups agreed on all of the panel members, and this went a long way towards achieving community support for the process. (Personal communication with Voisey’s Bay participant #2 (February 27, 2003).

Participants can learn from others how to make participation most effective. Review panels are time-consuming. One participant alluded to the relentless pace of a hearing and the volume of material to be reviewed by referencing the “ten faxes a day”.⁷⁹ Another observed with frustration that even though his group was actively involved from the very beginning, the group still felt pressed for time in preparing, given the short timelines that were given, which seemed especially short when weighed against the amount of time the proponent had invested in preparing for the hearing.⁸⁰

For invaluable insight, find someone who is intimately familiar with the industry who can point you to the industry’s everyday impacts as well as any “games” that get played out on-site.⁸¹ This could be someone who has previously worked in the industry or may even be a current insider who is willing to advise you. When providing comments, guard against generalities and hypotheticals. If you object to a particular practice, tailor your criticism to the specific practice that is planned, not just the family of such practices. Similarly, make specific requests and recommendations that the panel can adopt in ready-made form.⁸² Consider the use of other persuasive tools, such as the power of demonstrative evidence or icons. This might entail the use of pictures or drawings in your submissions;⁸³ or it could mean inviting the panel for a “view” of the habitat.

Learn from the experience of others. Read the CEAA reports and talk to hearing participants. Some recurring issues and themes are set out in Appendix 2. Weigh the benefit of picking a few key weak points about the project and focusing your efforts.⁸⁴ Although this doesn’t mean you should give up on the larger issues, consider whether there might be an advantage to strategically focusing on an issue that you can win. On the flip side, be careful about what you choose to leave out, as panels may make assumptions regarding what was *not* raised at the hearings. For example, in the Terra Nova report, the panel observed generally, “Participants at the hearings expressed no concerns about the decommissioning plans...”⁸⁵ and then concluded specifically, “The Panel is *also convinced* that the decommissioning and abandonment plans outlined in the EIS were adequate. [emphasis added]”⁸⁶

⁷⁹ *Ibid.*

⁸⁰ Personal communication with Terra Nova participant (February 10, 2003).

⁸¹ Personal communication with Sable and Georges Bank participant (February 12, 2003).

⁸² In the Little Bow/Highwood Diversion hearing, the intervenors suggested, and the panel endorsed, a number of additional criteria for a management plan. This was a clear success for the intervenors, as the additional criteria addressed many important procedural and substantive issues which would otherwise not have been specifically identified, including for the process to “... strive for balanced and representative public consultation with an independent facilitated process”; and for the plan to “...address all sources of pollutants including non-point agricultural sources ...”, “significant future development”, “fisheries management considerations including the need for habitat improvement” inflow needs, and flood protection and planning (p. 8-17).

⁸³ Personal communication with Sable and Georges Bank participant (February 12, 2003).

⁸⁴ Personal communications with Sable and Georges Bank participant (February 12, 2003) and Terra Nova participant (February 10, 2003).

⁸⁵ Terra Nova report, p. 59.

⁸⁶ Terra Nova report, p. 59.



As best you can, learn about procedural and substantive legal requirements. Find out if there's an environmental law clinic in your area that can help you with legal questions. Support your evidence with argument, and bolster your argument with as much evidence as you can gather. Tell a complete story: let the panel know what you think, why, and what conclusions they should draw from it. Keep in mind that your efforts at the panel review may have broader repercussions and influence in the longer term, even if you don't see the results immediately.⁸⁷

⁸⁷ One participant told us that his group had repeatedly complained during the hearing that there was no overall plan for the coast and coastal ecology, and that the province was charging ahead without considering the "big picture." Some time later, the provincial government established an office of "coastal sustainability planning." Shortly thereafter, the participant had a casual encounter on the street with that office's newly appointed official. When the official commented to the participant, "I guess I should thank you guys for my job ...," it was driven home to the participant that his group's words had indeed had an impact. (Personal communication with Terra Nova participant (February 10, 2003)).

APPENDIX 1: CEAA FACTORS

Every panel review must consider the factors set out in section 16 of CEAA, which provides:

- | | |
|--------------------------|---|
| Factors to be considered | <p>16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:</p> <ul style="list-style-type: none">(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;(b) the significance of the effects referred to in paragraph (a);(c) comments from the public that are received in accordance with this Act and the regulations;(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and(e) 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, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered. |
| Additional factors | <p>(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:</p> <ul style="list-style-type: none">(a) the purpose of the project;(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;(c) the need for, and the requirements of, any follow-up program in respect of the project; and(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future. |
| Determination of factors | <p>(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a), (b) and (d) and (2)(b), (c) and (d) shall be determined:</p> <ul style="list-style-type: none">(a) by the responsible authority; or(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel. |
| Factors not included | <p>(4) An environmental assessment of a project is not required to include a consideration of the environmental effects that could result from carrying out the project in response to a national emergency for which special temporary measures are taken under the <i>Emergencies Act</i>.</p> |

1992, c. 37, s. 16; 1993, c. 34, s. 22(F).



APPENDIX 2: SELECTED EA ISSUES

When planning for a panel review, consider a range of issues (and consult with ecologists, biologists, traditional users and other specialists to come up with your list):

- wildlife effects – disruption, direct killing at locale, displacement, relocation, inability to adjust, possible loss of young, fragile reproduction, effects on habitat or foraging territory;
- habitat – fragmentation, disturbance, loss;
- pollution – effluent onto land, sea or into air, soil contamination, stream and groundwater contamination, persistence and accumulation of contaminants in organisms; pollution that travels downstream or through the ocean; noise;
- construction and operation phase pollution, post-operation pollution, clean-up issues and reclamation issues;
- industry-specific effects, such as the effects of drilling on spawning fish, sonic booms, effect of tainting on larvae;
- potential for long-term health effects, both to wildlife and to humans;
- roads and other linear development, and their direct and indirect impacts (fragmentation, increased risk of wildlife collisions and deaths, increased risk of fire, litter, recreational users gain access, spread of noxious weeds, introduced species, pressure on existing species);
- loss of traditional use of area or resource;
- loss of or disturbance to traditional way of life; impact on community culture and values, such as co-dependent society, hunting, gathering, subsistence;
- loss of recreational uses and associated economic benefits;
- loss of existing commercial use of renewable resource (direct and indirect, such as impacts on fishery felt not just by fishermen but by people in the fish processing factories; economic impact if Canadian fishery is perceived as tainted; communities that depend on fishing);
- depletion of finite non-renewable resources (like hydrocarbons);
- risk of spills and environmental disasters, catastrophic events and risks associated with “100-year weather events”;
- loss of pristine wilderness areas and the silence of the wilderness;
- lack of important baseline data: it is important to know what is there before it is lost;
- existence of alternatives to the project;

- macro issues such as coarse filter biodiversity and also cumulative impacts (for example, migratory birds flying the eastern seaboard will be impacted as oil rigs appear, you get staggered effect along their flight line and usual places of rest);
- mitigation issues, such as choices regarding location, time of year for construction, operation methodology, how site rehabilitation will be effected and with whose help and oversight; and
- if the developer is going to commit to protecting unusual or endangered species it finds along the way, urge the developer to commit to hiring someone with environmental expertise.



APPENDIX 3: OVERVIEW OF REVIEW PANEL PROCESSES

Review Panel	Number of Hearing Days	Number of Locations	Number of Other Days	Other Comment re: Process	Funding	Number of Presenters	Number of Public Interest Groups
Voisey's Bay Nickel	32	11 (10 in Labrador and 1 in St. John's)	16 days, various locations in Labrador and Newfoundland, for scoping sessions in phase 1	Memoranda of Understanding re: Terms of Reference; panel to visit proposed site and proposed alternative shipping route. Some US group interest and participation; Special funding from proponent for elders to present traditional knowledge	\$150,000 to 12 groups, Phase 1 \$259,000 to 13 groups, Phase 2	Not reported	13 funded
Terra Nova	7 days	4	1-2 public information sessions	Panel noted poorly advertised funding	\$75,000 available but only \$26,410 awarded	Over 20; also over 70 written submissions	2 funded
Sable Island	56 days of quasi-judicial; 2 days informal	2 for quasi-judicial (Halifax and Fredericton) 2 for informal (Moncton and Fredericton)	20 information or scoping sessions held throughout Nova Scotia and New Brunswick	4-stage consultation program by proponent, involving info, briefings, "How to be an intervenor" class*, news releases, directed communications, meetings, 800-line availability, telephone surveys. Establishment of ongoing consultative structures, a Benefits Advisory Committee, Sable Community Advisory Committee, SOEP-Fisheries Liaison Committee and SOEP-Country Harbour/Drumhead Fisheries and Aquaculture Liaison Committee	\$125,000*	125 registered intervenors* 51 participants at informal hearings* 1270 exhibits	9 groups funded* (The report never mentions intervenors by name; always attributes comments as being by "the intervenors" or "the fishing industry" – not as helpful)
Alliance Pipeline	77 days	4	Scoping process prior to (no details reported)		n/a	73+	Approximately 14
Express Pipeline	Approximately 37 days	1 (Calgary)	Held 5 open houses in select communities along proposed pipeline during May 1995	Commenced consultation April 1995. Distribution to parties of project info packages and fact sheets; 24-hr collect call telephone Inquiry line; notification materials to landowners within proposed corridor; notices in 12 community papers; consultations with environmental groups	Not reported	5+ (5 named more made oral presentation. Only 3 examined environmental issues)	3 (2 of the 3 public interest groups joined to present a combined intervention at the hearing)
Little Bow/Highwood	19 days	2 (Vulcan and High River (3 days only))	1 pre-hearing information session; one pre-hearing conference	Proponent established: public advisory committee, public meetings, group meetings, open houses, newsletters, media releases. Prior to the hearing, the panel initiated an "issue-focused" approach to the review. Directed panel secretariat to conduct meetings with municipalities and public to facilitate effective participation	Not reported	Approximately 30 378 exhibits	Approximately 11
Cheviot Coal reconvened hearing (Oct 1999)	Not reported	Not reported	Not reported		\$30,000.00 divided among 10 groups (11 applications requesting \$210,578.76)	47	10 funded (Agency encouraged cooperation and coordination of effort to avoid duplication and good use of available funding)
Georges Bank	11 days Non-judicial but structured (1999)	4	7 introductory meetings (1996); 6 information sessions (1997)	Also held facilitated community workshops to discuss issues and exchange information (1998); published 4 editions of a newsletter; posted a website with a bibliography; commissioned a number of studies	Not available	91 (+ 8 written submissions)	5+ groups (Some US group interest and participation)

(*denotes information sourced from Fitzpatrick and Sinclair, *supra*. note 19).