

Canadian Environmental Assessment Agency,
Ottawa, Ontario K1A 0H3

Comments on the draft Technical Guidance for assessing the Current Use of Lands and Resources for Traditional Purposes under the Canadian Environmental Assessment Act, 2012.

Submitted by:

Peter Douglas Elias, Ph.D ,
<contact information removed>

Introduction

On December 16, 2015, the Canadian Environmental Assessment Agency invited members of the public, Aboriginal groups, and environmental assessment practitioners to provide comments on the draft *Technical Guidance for assessing the Current Use of Lands and Resources for Traditional Purposes under the Canadian Environmental Assessment Act, 2012*. I am an environmental assessment practitioner.

For the past four decades I have worked with First Nations and Métis communities on issues involving Aboriginal interests, rights, title and natural resources. Long ago, I was one of the first researchers in the field of use and occupancy studies. More recently, I have worked with a team on behalf of First Nations reviewing environmental assessment (EA) submissions to the National Energy Board (NEB), the Canadian Environmental Assessment Agency (CEAA), and various provincial and territorial regulatory bodies.

In this latter capacity, I have reviewed 16 EA submissions offered by proponents of resource-based projects, including two proposals for mines, one for a hydro-electric installation, two for pipelines, one for an off-shore drilling operation, and ten for proposals involving the Alberta oil sands. My responsibility was to review the socio-economic and cultural components of the EA submissions to determine, on the one hand, whether the proponent satisfied NEB or CEAA requirements and, on the other, whether the submissions adequately reflected the socio-economic and cultural

conditions of Aboriginal communities potentially affected by the proposed developments. I view current use as an aspect of a community's socio-economic and cultural conditions.

At issue

With respect to Aboriginal peoples, the *Canadian Environmental Assessment Act, 2012* requires a proponent to take into account the potential effects of a proposed development on “(i) health and socio-economic conditions, (ii) physical and cultural heritage, (iii) the current use of lands and resources for traditional purposes, or (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.” (*Canadian Environmental Assessment Act, 2012*, 5(c)(ii), page 7) This very general prescription is repeated in the *Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012* and in *Prescribed Information for the Description of a Designated Project Regulations*. Similarly, the *National Energy Board Filing Manual, June 2015*, contains references to ‘socio-economic effects’, ‘socio-economic elements’ and ‘socio-cultural setting’. (*National Energy Board Filing Manual, June 2015*, page 4A-58)

Thus, while both the NEB and CEAA require an EA to discuss socio-economic and cultural conditions (elements, setting) in Aboriginal communities, I have found that both agencies set the bar very low in terms of information which will satisfy an EA. Even so, most EA's barely manage to meet what is required by the regulators and abjectly fail to meet what is required by science. Apparently, this level of performance on the part of proponents has been deemed acceptable by the NEB and the CEAA, much to the detriment of Aboriginal communities.

I understand the December 16 invitation is for comments on current use guidelines and that my comments here drift into the larger context of EA's, the CEAA and the NEB. However, current use is a subject which must be addressed in most EA's overseen by those regulatory agencies. At present, current use along with socio-economics and culture are trivialized in the EA's I have reviewed. The feeble efforts put into current land and resource use research by proponents is very far from exhibiting best practices in this field. It is not as though best practices are secret – they are ignored seemingly with the implicit approval of the regulators. My colleagues on the review team and I routinely raise criticism directed at what proponents offer as current use studies. Often, the proponent simply points at the NEB and CEAA documents and asserts that it has done what is required. And, that is that.

I am concerned that even the best-intentioned policy addressing current use, as well as socio-economics and culture in general, will falter in the face of proponents of resource-based projects who seek ways and means of putting the very least effort into this necessary task. Worse, their minimalist efforts may be accepted as satisfactory by the CEAA and the NEB.

The particulars

My comments, below, are preceded by a reference to the contents of the *National Energy Board Filing Manual, June 2015*. These references state what must be included in an EA submitted to the NEB. My comment then follows, and is intended to illustrate the extent to which EA's I have examined actually meet the NEB's requirements. The *NEB Filing Manual* is used here because it is more specific and detailed than similar CEAA documents which also require proponents to consider a range of social, economic and cultural matters, including current use.

A submission to the NEB, must

“Describe the socio-cultural setting of the study area, indicating the predominant cultural and Aboriginal groups; demographic features of the local population and workforce; and prevalent socio-cultural concerns of residents, families and workers in the study area.” (*National Energy Board Filing Manual, June 2015, page 4A-58*)

The study area is “The area within the spatial boundaries of the scope of the environmental and socio-economic effects assessment.” (*National Energy Board Filing Manual, June 2015, page x*) The study area, once delineated, shows the Aboriginal communities which must be considered in the resulting EA. Typically, an EA submitted by a proponent identifies as small a study area as possible, in part to minimize the number of Aboriginal communities whose socio-economic and cultural elements must be considered in whatever research is undertaken for purposes of the EA.

Until recently, proponents in the oil sands relied on the Alberta Aboriginal Consultation Office (ACO) to identify which Aboriginal communities must be consulted and considered in an EA. Alberta's views on this matter favoured further restrictions on eligible communities. As a result, proponents felt quite justified in ignoring the concerns of some Aboriginal communities with a proven interest in lands and resources potentially affected by the project. A proponent of one project acknowledged in its EA that current use maps showed two Aboriginal communities had a significant historic and contemporary presence on lands where the project was to be located. Nevertheless, they were not included in the socio-economic and cultural parts of the EA, because the ACO did not name them as worthy of consideration. Too often, then, EA's start by imposing unjustifiable restraints on the participation of Aboriginal communities, and result in broadly-felt suspicions about the entire process. The new government in Alberta has started to modify the ACO's mandate and this may improve the situation.

The *NEB Filing Manual* requires proponents to “... describe current local economy and trends.” (page4A-26) It also asks the proponent to “Provide an overview of the predicted socio-cultural effects on the local community from the project.” (page 4A-58)

In order to describe the local economy and predict socio-cultural effects, these requirements presume that the proponent possesses and will present information about the socio-cultural conditions of potentially affected Aboriginal communities. Most EA's I reviewed can barely identify the languages spoken in Aboriginal communities and offer no information at all describing community level economics or cultural traditions and institutions, including patterns of current use and, therefore, cannot successfully consider how the project will affect these matters.

The *Filing Manual* says the potential effects of the project may include “stresses on community, family and household cohesion.” (page 4A-58) Elsewhere, the *Filing Manual* includes phrases and words such as ‘local community’, ‘community level’, ‘cultural traditions and institutions’, and ‘community, family and household cohesion’. EA's I reviewed include little or no information describing community, family or household structures and functions and, again, cannot predict whether or how the project might affect these matters.

The *Filing Manual* states that an EA must

“Provide supporting evidence (*e.g.*, references to scientific literature, field studies, local and traditional knowledge, previous environmental assessment and monitoring reports) for:

- **information and data collected;**
- **analysis completed;**
- **conclusions reached; and**
- **the extent of professional judgment or experience relied upon in meeting these information requirements, and the rationale for that extent of reliance.” (4A-26)**

Without exception, the EA's I have reviewed rely largely (and in some instances, exclusively) on off-the-shelf statistics from Statistics Canada and provincial and territorial equivalents to provide socio-economic information.

Proponents insist that citing official statistics meets the requirement that the EA indicate the “demographic features of the local population and workforce”, including populations in Aboriginal communities. They go further by claiming that simple demographics, along with some economic profiling, are all the socio-economic information that is required in an EA. Even if this was acceptable, Statistics Canada acknowledges that its statistical descriptions of Aboriginal communities are often inaccurate and unreliable. As well, as a matter of policy, Statistics Canada does not report the actual statistics of small communities out of concern that doing so could lead to the identification of individuals in those communities.

Most proponents do little to enhance official statistics. Usually, they are simply stripped out of the source records and presented in the EA as a table, with very little analysis and commentary concerning the significance of the numbers - the prose part of socio-economic assessments are little more than words replicating the numbers in the report's various tables. Thus, the data most frequently encountered in an EA are simply not up to the task of 'indicating' what the *NEB Filing Manual* says must be indicated.

In spite of failing to find useful information in official statistics, proponents never undertake original social scientific research which might provide the data and information required in an EA. Neither do they engage Aboriginal communities in cooperative socio-economic research which might benefit both the community and the proponent. Field work in potentially affected Aboriginal communities is never done. At least in the biological fields, the proponent must "Provide justification if field work was not carried out." (4A-47) Oddly, this is not required if the proponent failed to carry out socio-economic, cultural or current use studies in the field.

Instead of original research, proponents report that they rely on desktop analysis, literature review, news releases, government and industry reports, interviews, engagement with stakeholders, information shared by Aboriginal community members during Project field studies and Project-related meetings, and the professional experience of the assessment team. Each of these approaches to data production requires a closer look, since they seem to be acceptable to the regulatory agencies as sufficient for the purposes of an EA.

Desk-top research involves assembling off-the-shelf statistics, information provided in other proponent's EA's, and the professional expertise of the proponent's EA writers. The problems associated with off-the-shelf statistics are discussed above.

News releases and government and industry reports are very often partisan or commercial in nature and cannot be taken at face value in a science-based research program.

Proponents commonly mine the data contained in earlier EA's submitted to the NEB or the CEAA. If the data contained in these earlier submissions are flawed (as they inevitably must be since they all follow the same flawed approach to research), then the proponent's new EA is similarly flawed. Many years ago, when I was an undergraduate, my professors referred to this as 'repetition of error', which is all too common in EA submissions to both the NEB and CEAA, and unacceptable in any notion of science.

Further, by relying on earlier EA's as primary sources of data, each iteration of the data falls further and further behind in terms of 'indicating' current socio-economic conditions. Some EA's

I have reviewed try to pass off decades-old data found in earlier EA's as relevant in a new EA. Patterns of historic use become patterns of current use.

It is common for EA's to include many pages of references to literature reviewed in the course of writing the EA. Twenty or thirty or more pages of references are not unusual, but they rarely even cite peer-reviewed socio-economic or cultural literature, much less make good use of insights gained by authentic researchers. Indeed, the authors of most EA's seem quite unaware of the very extensive socio-economic and cultural literature that has been produced by generations of Canadian researchers. For example, the *NEB Filing Manual* uses the phrase "social and cultural well-being", and this phrase appears repeatedly in some of the EA's I have reviewed. It is never defined or operationalized as part of a research strategy – apparently, it is just dropped into the EA because the *Filing Manual* uses it.

When one proponent was asked in an Information Request (IR) to say what "social and cultural well-being" meant in terms of a research strategy, the response was astounding. The proponent insisted that the EA complied with NEB requirements as set out in the *Filing Manual*. The *Filing Manual* does not define social and cultural well-being, and so neither did the EA. (As an aside, a simple Google search yields 12,000,000 hits for "social well-being" and 13,000,000 hits for cultural well-being. Surely, somewhere in that mass of commentary there would be a useful idea about what "social and cultural well-being" means and how to measure it.)

Similarly, EA's are too often larded with jargon such as 'holistic lifestyle', 'inter-related socio-economic element', 'project interactions', and 'directly or indirectly linked' without defining these terms as part of a research methodology. Providing concrete definitions of these terms is critical as they appear to have a role in the proponent's assessment of the effects of a project on social and cultural well-being. When asked in an IR to provide definitions, one proponent responded simply that the researchers used the terms in the same sense as they are used in the *Filing Manual*. None of these terms are defined in the *Filing Manual*. Nevertheless, as is taught at the earliest stages of a scientific education, it is the responsibility of researchers to define what is meant by key terms used in their research. Both the EA and the response to this IR failed to do so, but the NEB declined to insist the proponent make its research methodology clear.

The lack of awareness of the published research literature can lead to some rather remarkable statements in an EA. In one EA, the proponent claimed that "Many Aboriginal people maintain a holistic lifestyle thereby making it difficult to assess each socio-economic element entirely independently." The published literature is replete with models of research that do exactly what the proponent claims is too difficult to be done for an EA. Surely, considering the importance of the EA, this is where researchers should show they are masters of their field.

Proponents claim that the information gleaned from interviews, engagement with stakeholders, and project-related meetings constitutes legitimate research efforts. Usually, it is difficult to assess the value of these efforts in terms of ‘indicating’ socio-economic and cultural conditions in Aboriginal communities, since they are rarely made as part of a coherent research strategy. Since the Crown has shifted its obligation to consult onto proponents, these functions are routinely incorporated as part of the proponent’s efforts to consult with Aboriginal communities. Consultation (by the Crown or proponents) should not be construed as research, because consultation and research have entirely different purposes and ways of doing things.

Instead of sound scientific methods, proponents rely on the expertise of the team assembled to write the EA. Expertise is often not easy to measure, because EA’s do not usually include the CV’s of the EA’s authors. In one instance, the proponent finally made CV’s available in response to an IR.

There were four members of the socio-economic assessment team. None of the team members held degrees in relevant fields, but two had their Masters degree in marginally related fields, such as archaeology and political theory. None had a Ph D. None claimed to have authored peer-reviewed publications. None claimed to have conducted field research. None claimed to have developed professional relationships with Aboriginal communities. None had teaching experience. What their CV’s did show was that each of the team members had experience in satisfying provincial and federal regulatory requirements. They may be qualified to produce the minimal information required by the NEB or the CEAA, but neither they nor their ‘research’ are qualified to determine what is a Valued Component of Aboriginal culture. (In contrast, the “heritage resources assessment must be completed by a qualified archaeologist or paleontologist and include details of the field methodology used in the study” (4A-57). It seems just about anybody can complete the socio-economic, cultural and current use studies required for an EA. Detailed methodologies of these studies are neither required nor proffered in most EA’s.)

In the face of the many inadequacies identified in most EA’s, my reviews of EA’s usually result in IR’s in which I plead for more and better information about Aboriginal communities that might be affected by the proponent’s project. These requests are often rebuffed. One response to such a request stated, “The framework and qualitative methods for assessing socio-economic effects used in the ESA have been implemented and approved by the NEB over the past five years for numerous projects ...”. This same sentence was offered in response to several other IR’s. In other words, the proponent claimed shoddy research is consistent with NEB and CEAA expectations and, therefore, nothing more needs to be done.

Finally, where proponents are unable to get information from easy sources – official statistics, other EA’s, casual conversations with various agencies, news releases, and so on – they rely on

ephemera. One proponent stated in its EA that, “Many of the quantitative estimates of impact and the discussion of social effects ... are based on assumptions ...”, without even attempting to specify what the assumptions were or definitions of their role in research. Again, this is inconsistent with any known approach to science.

The *NEB Filing Manual* requires,

“a copy of the Aboriginal consultation protocol, if established, along with any documented policies and principles for collecting traditional knowledge or traditional use information, if applicable. (page 3-4, 3-9, etc.)

Consultation can reveal concerns communities have about the potential effects of a proposed project, and this could be a useful contribution to an EA. However, what is revealed through interviews and engagement with stakeholders is rarely reported in an EA. The typical EA will include a section dedicated to describing a consultation protocol and what steps the proponent took to consult. In some instances, this section of the EA is quite lengthy and reflects considerable efforts on the part of the proponent to meet the Crown’s legal obligations. Other EA’s deal with consultation in less than a page and seem to suggest that the proponent discovered the least possible degree of consultation needed to pass the regulatory agency’s requirements. Thus, the concrete results of consultation, interviews, discussions, and so on are very variable from EA to EA.

One EA I reviewed dedicated many pages to describing the efforts the proponent took to engage Aboriginal communities. The EA glowed with praise for the free exchange of ideas and concerns, but the proponent was able to condense community concerns to exactly four bulleted lines in the EA. There is no way of knowing from this how community members phrased their concerns and how their concerns were subsequently framed by the proponent’s socio-economic assessment team. This is most unfortunate because in my experience discussions of concerns are usually quite expansive, with those voicing concerns going into the details of why they are concerned, the cause of their concerns, and how their concerns might be mitigated in project planning. These discussions could be a starting point for incorporating local knowledge into the EA.

Usually, I or my colleagues ask in IR’s that a proponent show exactly how local knowledge was used to shape project planning. The response is typically defensive or dismissive and disappointing, since local knowledge has a very faint presence in most EA’s. One proponent simply responded that it was a matter of opinion as to whether local knowledge was adequately considered in the EA; the proponent would not offer anything more on the subject. In fact, the proponent may be correct, insofar as NEB and CEAA requirements grossly understate the importance of local knowledge in project planning. Even more problematic, 19(3) of the CEAA 2012 seems to leave it to the proponent to decide if the EA will take traditional knowledge into account. Predictably,

some proponents choose to ignore traditional knowledge when the regulator offers them the opportunity to do so.

A common response from a proponent is that traditional knowledge and current use research is incomplete but underway and will be incorporated in the EA later. This means the regulator will make a decision before this information is in hand, and then trust the proponent to adjust their plans in order to accommodate the knowledge and current use findings. I do not know of that happening after the NEB or CEAA has made its decision. Neither do I know if either agency has established procedures in place to make sure that information absent from but promised in the EA is actually reflected in subsequent plans.

The *NEB Filing Manual* clearly states that,

“A description of the existing environmental and socio-economic setting within the study area (also known as “baseline information”) is necessary to predict the effects of a proposed project. This baseline information provides a backdrop against which a project’s effects are assessed, including the cumulative effects of a project. The applicant is not expected to provide extensive descriptions of features of the environment or socio-economic components that would clearly not be impacted by a proposed project.”(page 4A-25)

Because of the inadequacies found in too many EA’s, the EA’s cannot and do not establish descriptions of baseline conditions for Aboriginal communities. This fault means that neither the proponent, the communities, nor the regulatory agencies can monitor the effects of a project, nor can they initiate proper mitigation should the project have negative or unintended socioeconomic or cultural consequences. Monitoring and mitigation planning are prime requirements for any project regulated by the NEB or CEAA, a requirement that for the most part cannot be met by the EA’s I have reviewed.

Further, in this section of the *Filing Manual*, as well as others, the NEB seems to leave it to the proponent to decide which features of the environment or socio-economic components would clearly not be impacted by a proposed project and, therefore, would not require extensive consideration in an EA. Not surprisingly, proponents find that many features of the environment or socio-economic components are of this kind. When IR’s are made for additional information, the response is usually that the regulator does not expect the proponent to provide such information.

For example, when asked to provide more detailed descriptions of First Nations communities in the study area, one proponent stated flatly that, “the Terms of Reference [for the EA do not] require a specific discussion of the environmental effects of the Project on Labour and Economy,

or other socioeconomic VECs, for First Nations people. Differentiation of these environmental effects for First Nations separately from non-Aboriginal [communities] is neither required, nor appropriate. It is also not possible in an EIA to distinguish potential environmental effects on small-scale local or community economies in a diverse socioeconomic landscape” Claiming that it is not appropriate to differentiate First Nations and non-aboriginal communities seems to ignore the fact that First Nations can be distinguished on the basis of their possession of aboriginal rights which can be effected differentially by the project. In any event, there are volumes of published peer-reviewed research showing exactly how to address small-scale community economies.

One unintended consequence of this lax approach to understanding socio-economic and cultural conditions in Aboriginal communities is that there are now many documents in the public domain which have been approved by the NEB and CEAA and, from their approval have gained credibility in some quarters. Aboriginal communities are now in the position of having to refute the contents of EA’s when they are offered as evidence in unrelated matters. For example, the Government of Alberta was engaged in an overhaul of their land use plans, and in making those plans EA’s were used to depict conditions in Aboriginal communities. Possibly worse, the general public gets from the EA’s a wrong impression of Aboriginal communities. By using only off-the-shelf statistics, EA’s portray Aboriginal communities as full of unemployed, uneducated, poor people. They say nothing about the vitality of traditional practices and culture. Considering the frailties of the EA’s, this amounts to misrepresentation.

The *NEB Filing Manual* requires proponents to,

- **identify and analyze predicted cumulative environmental and socio-economic effects;**
- **identify proposed mitigation measures to protect the environment and address socioeconomic effects, and to analyze their effectiveness; and**
- **evaluate the significance of any predicted cumulative effects.**^{4A-39}

One EA concluded that the effect of the proposed project would, at worst, be an inconvenience for Aboriginal communities. In an IR, the proponent was asked to define ‘inconvenience’ as part of a research strategy, and to show the threshold at which cumulative inconveniences would become something more profoundly negative. The response was that “The scope of the cumulative effects assessment is a Project-specific cumulative effects assessment as required under the *CEA Act 2012*, which is appropriate for the scale of the Project.” I have no idea what this means, and neither does anybody else. But, apparently CEAA was satisfied.

Since most EA’s do not provide much by way of baseline information, and therefore cannot monitor for cumulative effects, they cannot and do not provide measures to mitigate socio-economic and cultural effects.

The most common conclusion reached in EA's I have reviewed is that the proposed projects will have 'negligible' or 'insignificant' effects on Aboriginal socio-economics, culture, or current use of lands and resources. This is hardly surprising, given the quality of the information on which these conclusions are based.

“The NEB will review and assess the scope of the ESA based on the evidence before it. Although elements of the project or the scope of factors to be considered may change over the course of a proceeding (e.g., as a result of public or Aboriginal input, or changes to the project), the application is usually the prime source of information and starting point for establishing what the Board will consider in the environmental assessment of a project.”(page 4A-20)

Since an EA is the prime source of information before the NEB (or the CEAA) it is vital that it be reliable, accurate and complete. Anything less must result in decisions that are not greeted with the confidence of Aboriginal communities or the Canadian public at large. At present, too many EA's fall far short of the usual standards for good science.

The NEB and, to a lesser degree, the CEAA do invite proponents to explore in depth the socio-economic and cultural circumstances of Aboriginal communities that might be affected by a proposed project. Table A-3 of the *NEB Filing Manual* includes a statement that “Table A-3 was designed to assist Applicants in identifying detailed information needs specific to individual socio-economic elements. **The elements and circumstances described in the table are not exhaustive.**” (*National Energy Board Filing Manual, June 2015, page 4A-58. Emphasis added.*) This comment suggests the Filing Manual does not prohibit a more meaningful understanding of Aboriginal communities and concerns, or set an upper limit on what must be considered in an EA.

Usually, however, proponents do treat the very abbreviated list of 'socio-economic elements' mentioned in the *Filing Manual* as though it is exhaustive and that nothing more than a few readily-available statistics fully satisfies what an EA requires. This minimalist reading of the *Filing Manual* neglects a more nuanced and perceptive approach to understanding challenges the project might present to Aboriginal communities. It seems that because neither agency insists on rigour in these areas, proponents make the least effort they can get away with, knowing they will not be challenged.

Hopefully, this approach to Aboriginal people's history and culture, including current use, will change under new leadership. The Minister of Natural Resources' Mandate Letter encourages the Hon. Mr. Jim Carr to:

“ensure that decisions are based on science, facts, and evidence, and serve the public’s interest; provide ways for Canadians to express their views and opportunities for experts to meaningfully participate, including provisions to enhance the engagement of Indigenous groups in reviewing and monitoring major resource development projects.”

The Mandate Letter also encourages the Minister to

“Modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.”

If Mr Carr can effect these changes, then another part of the Mandate Letter will be accomplished –public trust in the environmental assessment process may be regained.