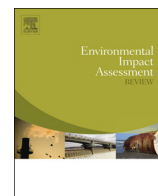




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Meaningful and efficient? Enduring challenges to Aboriginal participation in environmental assessment

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ABSTRACT

This paper explores the underlying practice-based challenges to meaningful and efficient Aboriginal participation in environmental assessment (EA) - participation that provides meaningful opportunities for Aboriginal communities to shape EA, yet assures a degree of efficiency for project proponents who need to obtain EA approvals in a timely and financially viable manner. We do so based on an analysis of the EA policy community's experience with uranium exploration and mining in Saskatchewan, Canada. Many of the challenges to meaningful and efficient Aboriginal participation that emerged are multi-dimensional, often concerning participation processes, decision-making, and relationships. Although scholars have explored many of these issues and have proposed numerous solutions, challenges persist in practice. Several other issues also emerged from our study that have received limited attention, including the non-commitment to early and ongoing participation by smaller project proponents, and the EA exemption of exploration projects; the limited availability of information to project developers on local right holders and Aboriginal interests; expectations about the integration of traditional knowledge and land use in EA not aligning with the information that is available to proponents; confusion about who is responsible for initiating early participation and consultation processes; the lack of early relationship building with potentially affected communities, particularly by governments; and the lack of other viable avenues, outside EA, for Aboriginal communities to raise more strategic issues of concern that affect traditional lands and treaty rights.

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1. Introduction

The importance of indigenous peoples participation in environmental assessment (EA) is recognized internationally (Hanna et al., 2014; IFC, 2012; Nakamura, 2008), and Aboriginal participation is institutionalized in EA systems across Canada. The benefits of Aboriginal participation in EA are numerous, including improved project design, enhanced mitigation options, and increased legitimacy of development undertakings (Prno and Slocombe, 2012; Rozema et al., 2012; Johnson and Dagg, 2003). The challenges to Aboriginal participation are also widely documented in the EA literature (O'Faircheallaigh, 2009), including the limited financial resources often available to Aboriginal communities to support participation (Spectra Energy, 2014; Kwiatkowski et al., 2009); the late timing of participation in the project development cycle (Damman and Bruce, 2012); participation fatigue in intense resource development regions (Noble et al., 2013); and limited influence over project outcomes (Booth and Skelton, 2011a).

Aboriginal communities have persistently demanded earlier, sustained, and more meaningful participation in EA processes (Glucker et al., 2013; Lajoie and Bouchard, 2006; Lawe et al., 2005). The definition of meaningful participation in EA has never been prescribed by law in Canada (Booth and Skelton, 2011a, 2011b); however, meaningful participation infers that those communities whose lands and traditional resources are potentially affected by development are intimately involved with the project planning, assessment and decision process, and work with project proponents and regulators to shape the manner in which impacts identified are addressed over the project lifecycle, from project design through project decommissioning and rehabilitation (Noble and Udofia, 2015). Industry and regulators, however, often maintain that meeting such EA participation requirements and expectations is increasingly burdensome, arguing for greater efficiencies in participation (Olsen and Hansen, 2014; Voutier et al., 2008; Owens, 2004) – specifically faster and less cumbersome processes and, subsequently, shorter timelines for EA approval (Noble and Hanna, 2015; Bond et al., 2014).

Meaningfulness and efficiency are not necessarily the same thing, but they can coexist and result in EA participation that is considered meaningful by those impacted by development, and efficient by those

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proposing and regulating development. Part of the challenge is that there has been limited research examining the challenges and opportunities for *both* more meaningful participation in EA and more efficient participation processes. Achieving meaningful participation of Aboriginal peoples in EA alongside a more efficient process for proponents has seldom been explored. Scholars have tended to focus on external tools or processes, such as privatized impact and benefit agreements, to accommodate for the shortcomings of the participatory EA process – namely, facilitating early engagement of affected communities and minimizing conflict and delays during project review and approval (Noble and Fidler, 2011; Galbraith et al., 2007). Improving Aboriginal participation in EA requires first an understanding of the nature and current challenges to both meaningful and efficient participation.

The purpose of this paper is to identify the underlying practice-based challenges to meaningful and efficient Aboriginal participation in EA – participation that is meaningful in providing the opportunity for Aboriginal communities to shape EA, and efficient in accommodating the needs of development proponents to obtain EA approval in a timely and financially viable manner. Our focus is on the ‘front-end’ of the EA process, from pre-project planning to environmental impact statement (EIS) approval, and on the perspectives of the various interests engaged in EA regarding meaningful and efficient participation. In doing so, our objective is to identify specific practice-based areas in need of research and policy attention if both meaningful and efficient Aboriginal participation in EA is to be realized, or even considered possible.

Our analysis is based on current EA systems and practices in north-west Saskatchewan, Canada – home to the world’s highest-grade uranium mining operations, and a region with significant oil sands development potential. Though our research is set within the Canadian context, the observations and lessons that emerge are applicable to understanding, and hopefully addressing, some of the underlying practice-based challenges to meaningful and efficient indigenous participation in EA in other resource development regions. In the sections that follow we first provide a brief discussion of the nature and role of Aboriginal participation in the Canadian EA system. This is followed by a description of our study area and research methods. Results are then presented, focused on what study participants identified as the main challenges to meaningful and efficient Aboriginal participation in EA, followed by a discussion of the implications of these for future EA participation practices.

2. Aboriginal participation in environmental assessment

Aboriginal interests are one of many interests in EA, alongside project proponents, government departments and agencies, environmental non-government organizations and affected non-Aboriginal communities, to name a few (Noble and Udofia, 2015). The various interests involved in EA can be conceptualized as a policy community (Pal, 2014), comprised of actors who share an interest in EA and its outcomes and who, over time, have shaped or attempted to shape EA processes (Stone et al., 2001). This policy community consists both of those who make decisions and of those outside formal decision making institutions who seek to influence decisions (Pross, 1990). It also encompasses the network of interactions and relationships that form around issues of importance to those within the policy community (Atkinson and Coleman, 1992). The more complex the policy community and its network of interactions, as is the case with EA, the more important is meaningful participation and engagement of the various interests (Miller and Demir, 2006).

The importance of meaningful Aboriginal participation in EA has a long history, in both scholarship (e.g. Couch, 2012; O’Faircheallaigh, 2009; Shapcott, 1989; Usher, 1982) and in practice. Arguably, many of the current expectations about what constitutes meaningful Aboriginal participation in EA, and critical and cross-cultural impact assessment in general, were shaped, in part, by the Berger Inquiry of 1974–1977 into the proposed Mackenzie pipeline project, extending from Canada’s western Arctic and down through the Mackenzie Valley of the Northwest Territories (Couch, 2012; Gibson and Hanna, 2009; Bocking, 2007).

The Berger Inquiry, which lasted three years and engaged 35 northern communities, concluded that the proposed pipeline would pose a significant threat to Aboriginal way of life, and recommended a moratorium on pipeline development until such a time that Aboriginal land claims had been settled (Berger, 1977). What was significant about the pipeline inquiry in terms of Aboriginal participation was not the conclusion, but the process by which it was reached (Noble and Udofia, 2015; Anderson et al., 2006) – engaging dozens of Aboriginal communities along the Mackenzie River to hear their concerns, in their own languages and own communities, about the impacts of the pipeline project on northern life.

Currently, Aboriginal participation is recognized in some form in most all EA systems with Aboriginal populations. Amongst the stated purposes of the Canadian Environmental Assessment Act, 2012, for example, is to promote communication and cooperation with Aboriginal peoples with respect to EA (sec 1(d)); and to ensure opportunities for meaningful participation (sec 1(e)). In practice, however, notwithstanding increased recognition of Aboriginal rights and culture in many EA laws and regulations, challenges to ensuring meaningful Aboriginal participation persist (Kirchoff et al., 2013; O’Faircheallaigh, 2009). Lawe et al. (2005:207), for example, drawing on the Mikisew Cree’s involvement in effects monitoring in the Athabasca oil sands, report that “stakeholder input has generally improved in Canada in the last decade...but true meaningful involvement is difficult, and had not frequently occurred from a community/First Nations perspective.” Booth and Skelton (2011a: 49) report similar concerns regarding the West Moberly First Nations’ experience with First Coal Corporation in British Columbia, arguing that “time, resources and good will have been wasted in an adversarial and confrontational response to a failure in an environmental assessment process.” O’Faircheallaigh (2009: 99) argues that “Aboriginal people have been almost entirely excluded from participation”, or have faced practical barriers to participation, including the failure of governments and industry to lend legitimacy to traditional knowledge; cultural alienation and reliance solely on written rather than also oral information; and the lack of financial resources to become engaged.

In recent years, the desire of governments and industry for a more streamlined EA process, resulting in faster EA approvals (Noble and Hanna, 2015; Bond et al., 2014), has introduced additional challenges to meaningful Aboriginal participation – shortened timelines for participation (Kirchoff et al., 2013; O’Faircheallaigh, 2009), and attempts to achieve greater efficiencies in consultation and participation processes that have been described by government and industry as onerous and time-consuming (Udofia et al., 2015; Salomons and Hoberg, 2014; Voutier et al., 2008). Commissioned studies such as the ‘Road to improvement: The review of regulatory systems across the North’ (McCrack, 2008), for example, explored opportunities for shortening regulatory timelines for resource development reviews and approval processes; and, nationally, the introduction of the Canadian Environmental Assessment Act, 2012, has meant fewer EAs of projects that may have the potential to affect Aboriginal lands and resources, alongside tighter timelines for consultation (Noble and Hanna, 2015; Kirchoff et al., 2013).

To achieve even greater efficiencies, if not to resolve their own capacity constraints, governments are increasingly discharging their legal duty to consult with Aboriginal peoples through the EA participation programs of project proponents (Noble and Udofia, 2015; Booth and Skelton, 2011c). The duty to consult refers to the legal obligation of governments, under the Canadian Constitution Act, 1982, to consult with Aboriginal peoples regarding decisions that have the potential to impact on Aboriginal or treaty rights. The result, however, has often been increased *inefficiencies* in EA participation as Aboriginal communities have legally challenged EA processes and decisions due to the lack of meaningful participation (Miller, 2015; Assembly of First Nations, 2011), due in part to the limited timeframe for engagement and the lack of clarity between the legal consultation obligations of governments and the EA participation initiatives of project proponents (Noble and Udofia, 2015).

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