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Paper Title: The Community in Environmental Decision Making: Help or Hindrance?

Author(s): Nick Wimbush

Organisation: Planning Panels Victoria (Department of Environment, Land, Water and Planning (Vic))

Country: Australia

Email: nick.wimbush@delwp.vic.gov.au

Paper: Introduction

Formal and informal community engagement has long been undertaken in environmental and planning decision making in Australia both nationally and at the State and Territory level. This takes many forms including written submissions on exhibited documents, participation in reference groups and advisory committees, public events such as public meetings and through formal hearing processes.

The practice of community engagement is well entrenched and has become a specialist field as regulators and proponents seek the views of the community; whether that be a local, regional or wider community or special interest groups within the community.¹

This paper explores some of the contemporary themes within community engagement in environmental and planning decision making and highlights the need to recognize the benefits of effective community engagement.

Why do parties undertake engagement or seek to be engaged?

Third party engagement (ie engagement beyond the regulator – proponent relationship) can be undertaken for a variety of reasons, with the reasons for engagement different depending on

¹ *Environmental impact assessment in Australia* (2014) by Mandy Elliott provides a very good insight into the broader field of public participation in EIA, particularly in Chapter 4.

the party. For example a department or agency or local government may see engagement in many terms including:

- Informing the community of what is proposed;
- Seeking the community's views on what is proposed;
- Enabling the community to influence the outcome in terms of project design and delivery; or indeed whether it should be approved;
- Assisting with transparency and the legitimacy of the eventual decision; and
- Providing external review of the proposal to test and hopefully improve the environmental outcomes of the project.

A proponent may see community engagement as:

- A burdensome but necessary requirement of regulators;
- An opportunity to inform the community and engender support for a project;
- Improve knowledge of the project and in particular its benefits - social, economic and environmental; and
- An opportunity for project improvement by tweaking or redesigning based on community input and local knowledge.

Third parties will also have different motivation for seeking to be engaged. The community in this sense can be defined in many ways whether local, regional, state, national or even international; whether they are particular interest groups or the broader community. The perspectives commonly include:

- Participation in community engagement to support a project for its real and perceived benefits;
- Opposition to a project or parts of it for personal or broader reasons;
- The opportunity to gain information and understand a proposal better; and
- The opportunity to influence the project environmental or other outcomes to benefit the community.

These are intentionally simplistic categorizations for illustration only and in practice the motivations for engagement by parties will cross over many different areas and be for many different reasons.

Whatever the motivation to engage or get engaged, it is critical that the objectives of the community engagement are understood by all parties. For example the public inquiry process for the Victorian Desalination Project in Victorian in 2008² had the following primary objective set through the Ministerial Terms of Reference:

The principal objectives of the Inquiry are to establish a sound understanding of the environmental effects of the project and to advise on the best approach to reduce or otherwise manage these effects.

Thus the objective of that element of the community engagement was not to seek the views of the community on *whether* the project should proceed, but rather, how it could best proceed to minimize or reduce environmental impact. Clarity around the objectives of community

² Victorian Desalination Plant (EES) [2008] PPV 126.

engagement are critical to prevent unrealistic expectations about what the consultation and engagement might achieve.

Why is engagement important?

Beyond the motives of those engaging or being engaged, the fundamental questions are around why is such engagement important? In practice it may cover many of the areas mentioned above.

Information sharing and gathering

At its basic level, consultation and engagement is about informing the community as to what is being proposed and its likely impacts, both positive and negative, and how the negative impacts are proposed to be managed. The provision of clear information understood by the particular community will be critical in developing support for a project.

As well as providing information, consultation should be seen as an important opportunity for collecting information. This may include information on the communities themselves with the aim of identifying additional communities and individuals to be consulted who may have an interest in a project.

Improvement of project design or delivery

Proponents and regulators should be open to the possibility if not likelihood that the community engagement will result in improved project outcomes. This may result from the sourcing of local knowledge of the environment itself (bio-physical, social and economic), more community support leading to reduced approval timeframes and cost and other elements. The consultation will often also assist in identifying the issues that are *critical* to the community, as opposed to those that are marginal.

This will not always result in reduced project cost, but should result in better project outcomes. To explain this apparent contradiction, an example might be where a longer, more expensive construction transport route is used; but one that results in the reduction or removal of community opposition. As discussed later in this paper early consultation and engagement should seek to identify these issues at an early stage.

Transparency³

Consultation is an opportunity for the proponent and regulators to clearly explain what is proposed, what the potential impacts might be, and how they will be managed. This should be a fundamental aim of consultation.

However, equally if not more important is the role of transparency in ensuring trust in the system itself. For a third party being able to understand exactly how a decision has been arrived at, what factors have been considered, who has been involved and given what advice, will go some way to ensuring a decision, even an adverse one, will have some level of understanding and hopefully acceptance.

Conversely, any sense of secretiveness or determinative decisions or actions being made out of the public view will void trust in the process and may fundamentally damage the process itself.

³ An excellent paper on this topic was written by Adrian Finanzio SC and Rupert Watters of the Victorian Bar titled *Public participation, transparency and accountability – Essential ingredients of good decision making* presented to the Accountability and the Law conference in Brisbane earlier this year.

This can lead to longer project approval times as Freedom of Information cases and other court or tribunal action is taken to try and divulge the facts behind a matter.

Maintaining the legitimacy of decision making by regulators and governments is essential to ensuring confidence in the system. This means that environmental impacts are comprehensively identified and risks managed to protect the broader environmental and amenity standards that the community expects.

An interesting recent example has occurred in Victoria in relation to a quarry in regional Victoria. It has been reported that the relevant government agency advised the proponent in a project meeting (non-public) to apply for a planning permit for a shallower quarry that would not intersect with groundwater with the expectation that this would increase the chances of regulatory approval. An application could then be made to deepen the quarry under delegated powers at a later date without requiring a new permit.⁴ The advice was minuted and released under an FOI request to the local community.

Whatever the merits of the advice, the fact that such conversations were occurring away from the public eye raises questions about transparency and the confidence that the community can have in the regulatory process.

Accountability

The companion to transparency is accountability. Accountability is important at many levels in environmental and planning decision making including:

- Accountability of regulators in decision making; has a fair assessment against policy and regulatory frameworks been undertaken, was the best advice sought, were the views of relevant experts considered, were the community consulted to an acceptable level?;
- Accountability of proponents; have assertions (economic, environmental, social) made in support of a project been fairly tested?

Accountability is often measured in the breach. If a project element fails, for example unintended or more than expected consequences on a threatened fauna species, then accountability for the error or poor prediction, needs to be identified to improve future assessments as well as respond to the existing issue.

Parties may be held to account in many ways including for example through regulatory enforcement, the media, through parliamentary or government enquiries and even through judicial action. Wherever and however a party is 'called to account' at a later stage, the thoroughness and rigour applied to project development and assessment, including community consultation, will be important in demonstrating that accountability has been taken seriously from an early stage in the process.

Accountability for government proponents appears somewhat different in that government projects are often assessed and undertaken in a politicised environment. Fundamentally the approach should be no different in terms of community consultation and engagement. Accountability may be ultimately enforced at the political level through the ballot box but this does not remove the need for accountability at all levels of project development and decision making.

⁴ <http://www.theage.com.au/victoria/birregurra-quarry-row-regulator-coaches-miner-in-how-to-avoid-council-and-vcat-judgment-20151002-gk07ky.html>

The recent move by the former Abbott government to revise the *Environment Protection and Biodiversity Conservation Act 1999* to reduce standing in response to the Mackay Conservation Group's win in the Federal Court is an interesting development. It appears to be a particularly strong response given the Court's finding that it was the Commonwealth at fault. Perhaps even more interesting has been the backlash to such a move from a broad spectrum of groups and individuals from non-environment movement backgrounds interested in Unconventional Gas (UG), who may similarly have standing challenged if any curtailment is enacted. At the time of writing it is not clear if the Turnbull government will proceed with this review.

Informed consent

Whilst the 'consent' of the community is not sought as part of the regulatory approval process, there is no doubt that the views of the community are important in the decision-making process, either through the specific regulatory approval process or the broader political decision making environment.

The clear demonstration that community engagement has either identified and resolved issues or attempted to do so and clearly articulates why such resolution has not been possible provides a level of comfort to decision-makers that the views of the community have been genuinely consulted.

This means the informed views of the community have been sought; the issues and solutions explored; and where solutions or changes to the project have not been to the communities satisfaction; the reasons can be clearly articulated. This should contribute to a sound framework for the decision-maker.

When should third party engagement occur

Generally third party and community engagement should be initiated early on in project planning to assist in identifying key issues that will need to be addressed or managed through environmental and planning approvals.

Engagement at this stage can significantly influence project design and potentially lead to more efficient project delivery if the community is on board at an early stage. Going to the community late with a resolved design gives the appearance of a *fait accompli* which can negatively influence the following formal consultation and approvals process in the eyes of the community.

Early consultation is not always possible because of, for example, competition amongst proponents for a resource. Wind energy project developments in Victoria, particularly western Victoria, has long been accompanied by suggestions of proponents' representatives racing through the countryside in a bid to get participant farmer landholders 'signed up' to a project in the areas of best wind resource. The result of this has been neighbours in some public hearings suggesting that they are not made aware of the project until a wind energy design is publicly released, often as a highly resolved design.

Early engagement on specific projects is the desirable aim. However, increasingly, it appears community engagement and activism at an industry or issue level is occurring ahead of the development of specific projects. An example is that of UG which is controversial in most jurisdictions. In Victoria a moratorium on onshore UG (with most interest in coal seam gas) is in place pending the outcome of a Parliamentary Inquiry due to report in December 2015. The

Inquiry received 1 600 submissions. The Opposition in Victoria has recently stated it will seek to extend the moratorium to 2020 if elected.⁵

UG is an interesting case study as it has united in opposition a range of groups not traditionally considered to be aligned in their environmental, social and economic interests; namely rural producers and communities and city based conservation groups. The broader implications of this for project and industry development will become clearer in the next few years.

Early engagement is desirable, but is not always achievable or achieved.

Consultation and regulatory processes: in parallel or series?

Another element of engagement relates to multiple approval processes; each with distinct consultation and engagement requirements. An example of this is the recent upgrade of a new electricity terminal station in Brunswick, Victoria. The proponent, a private electricity delivery company was required to seek regulatory approval for the upgrade of an existing terminal station to cater for increased inner city demand. The approval process for electricity supply required regulatory investment tests, primarily to determine whether the proposed upgrade was necessary and the most economically desirable approach.

After several years obtaining the electricity market regulatory approvals, the proponent then sought planning permission through the local planning scheme. At this point significant public opposition to the project arose, and planning and environmental approval took another several years; overall perhaps an eight year process to get to the point where construction of the upgrade commenced.

A more coordinated approach would seem desirable to reduce assessment and consultation timeframes and ensure community engagement occurs at point in the process where it can be most effective.

A Victorian government review of the approval process has not been published at the time of writing.

The how of third party engagement – a fair hearing

The mechanisms for community engagement are well established and may include public meetings, displays, exhibition and advertising of formal assessment documentation, community reference groups and other forms.

The focus of this section of the paper is how the community input is considered in applying it to a particular project through the environmental or planning approval process.

For community engagement to be effective, the community input needs to be considered, and seen to be considered. This includes:

- Public availability of submissions or other public input so that all parties may see what the community thinks of a project;⁶
- Clear articulation of how the issues in the submission or other community input have been responded to and what, if any, impact it has had on the project;
- Where appropriate, a public hearing to allow the community to verbally elaborate on their submission and call expert evidence if desired;

⁵ Reported in The Age: <http://www.theage.com.au/victoria/victorian-opposition-pledges-to-extend-coal-seam-gas-moratorium-until-2020-20150928-gjwc9l.html>

⁶ With due consideration given to privacy and confidentiality.

- Clear public reporting of the consultation results to decision makers so that the extent, level and result of community engagement can be seen by the eventual decision maker and broader community.

In Victoria public inquiries are allowed for by the enabling legislation but not required. In Victoria, by long established practice, all projects subject to an Environment Effects Statement (EES) assessment have a public hearing component. If the Minister for Planning determines that an EES is required; then a public hearing is held.

An EES hearing (which may meet hearing requirements under other legislation as well, particularly the *Planning and Environment Act 1987*), may range from five days up to nearly 50, with a usual range in the order of 10-15 days.

The hearings are coordinated by Planning Panels Victoria, a small independent unit of the Department of Environment, Land, Water and Planning with individual hearings having members with particular specialist skill sets directly appointed by the Minister for Planning. These members are drawn from a small pool of full time members and a larger pool of part time members. The inquiry members do not have statutory independence such as a tribunal or court, but are statutorily bound by legal principles such as natural justice.

The hearing outputs are recommendations to an ultimate decision maker, usually the Minister for Planning. Importantly the role of such inquiries is to not only report on the adequacy of environmental documentation, but also to consider written and verbal submissions and conclude on the weight or substance of the submissions, and how, if at all, they should influence the project outcome.

This is not a direct argument that a public hearing is appropriate in all cases or that the Victorian model of assessment and hearings is the best; a number of significant system reviews at the Parliamentary and departmental level over the past 15 years have clearly indicated that there are improvements to be made.

It is however an argument that a public hearing, acknowledging its potential attendant cost, inconvenience and other downsides, is an effective way of shining a light on the process and making sure that parties arguing for or against a particular project are required to stand up and defend or challenge the case on its merits in the public arena.

The expert citizen submitter

The increasingly complex nature of public inquiries⁷ and tribunal hearings demands an increasing level of engagement by community participants. Some third party participants may be experts in their particular fields or technically competent to write and present 'expert' submissions based on their proximity to a project or a broader interest in the issues.

In Victoria at least there is in the author's view an increasing community capacity for laypeople to respond and engage effectively through major project assessment. This often occurs when individuals and groups, usually but not always objectors, invest significant time and resources to understand issues where they might not have technical expertise. This includes thoroughly considering published environmental documentation, examining expert witness statements, questioning experts, undertaking other research and making their own submissions.

⁷ For example the East-West Link Hearings in Melbourne in 2014 ran for 30 days and heard from (or received statements from) 37 expert witnesses.

The submitters are often highly organised and demonstrate a high level of understanding of the assessment process and the project itself. The submissions often demonstrate a high level of technical competence and can raise uncomfortable issues for the expert witness and proponent. This has been particularly observed for major projects, and has often resulted in a more thorough and considered project assessment than might otherwise have occurred without such a level of scrutiny.

This of course is not to say that every submission, whether written or verbal, is of such quality to result in changes to a project or a recommendation or decision to refuse a project. It does mean that proponents should develop their project and environmental management framework knowing that it is likely to be genuinely tested through the community engagement, and particularly hearing, process.

Alongside this rise in expertise, is a common call for financial support for third parties in the community engagement process. Third party submitters in major project hearings often face an array of legal advocates and expert witnesses funded by corporate or government sources whilst having to run technical and lengthy cases on a self-funded basis. This is a broader policy issue which requires consideration but any change has obvious financial implications for the process itself.

The weight of numbers

In general the numbers of submissions is not, and should not be, determinative of a regulatory environmental or planning approval process. This is for several reasons:

- The importance of science based or evidence based decision making that results in decisions that are technically sound, respond to relevant policy and regulatory frameworks, effectively identify and manage risk, and result in effectively managed environmental impacts;
- The numbers of submissions may well be evenly weighted; thus making a decision on this basis impossible⁸;
- The number of submissions generated from the community is often not related to the potential level of environmental impact.

The community engagement and response through formal inquiry or tribunal processes should thus be focused on the merits of submissions rather than the number of submissions. In *Minawood*⁹, the Victorian Civil and Administrative Tribunal (the Tribunal) stated:

Clearly public opinion cannot dictate a decision because popular views may be contrary to factors that the decision maker must properly consider. There may be room for popular opinion to influence the establishment or amendment of planning controls or policy, but numbers for or against a proposal are not relevant per se in administrative decision making. Rather, it is the substance or merits of the views expressed, viewed through the prism of planning relevance, that must guide the decision maker. Thus 100 objections based on an irrelevant consideration will not outweigh a single good objection based on a relevant consideration.

⁸ See for example *Mornington Safe Harbour (EES)* [2011] PPV 47 where an Environment Effects Statement for a proposal to upgrade a harbour and marina attracted 2,018 submissions, divided evenly for and against the upgrade.

⁹ *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440 at [28]- [29] quoted in *Stonnington City Council v Lend Lease Apartments (Armada) Pty Ltd* [2013] VSC 505 and referenced from *Lend Lease Apartments (Armada) Pty Ltd v Stonnington CC* [2012] VCAT 906.

This can be difficult for communities to accept as a concept or principle because in reality it can mean a few well-argued submissions in a public process (inquiry or tribunal) can prevail over hundreds or even thousands of submissions that profess to be against (or for) a project. It can also mean an inquiry or tribunal evaluating evidence and submissions against the policy and regulatory framework conclude that the bulk of submissions should be considered irrelevant; provoking understandable community concern.

This largely, but not only, arises in the sphere of social impacts as opposition to a project will often include opposition based on proposed real or perceived changes to an established community.

One such example is the Lend Lease Apartments project in Orrong Road, Armadale in Melbourne (references footnoted) where the Tribunal directed that a permit issue for an apartment complex in the face of over 600 local objections; a decision later affirmed by the Victorian Supreme Court.

In response to this and other cases¹⁰ the Victorian Government has recently passed legislation, to commence on 12 October 2015, to amend the *Planning and Environment Act 1987* to require responsible authorities and the Tribunal to consider, but not be bound by, the number of objectors to a proposal in the context of significant social impact.

The accompanying Planning Advisory Note (63) provides guidance on how this will operate in practice and makes it clear that the number of submissions *may* be a relevant consideration in decision making.¹¹ It also makes clear that pro-forma objections or petitions should be treated with caution.

A disconnect between community and submitter interest and potential environmental impact is also common in environmental and planning assessment. The Victorian Desalination Project with a capital cost of approximately \$4 billion and the potential for significant local and broader environmental impact on the marine and terrestrial environment, greenhouse gas emissions and other social and economic impacts, attracted 405 submissions.

The Mornington Safe Harbour, referenced in footnotes previously, had a proposed capital cost in the order of \$10 million and the potential for significant, but localized, environmental and social impact yet it attracted over 2,000 submissions.

The Mortlake Power Station, an open cycle peaking gas fired power station built at 550MW with the capacity to expand to 1,000MW in regional Victoria attracted only 11 submissions, of which three were from the community.¹²

Where to from here

Community engagement in many forums and forms has been embedded in environmental and planning decision making for many decades. It is difficult to see the community and all its elements allowing this reality and expectation to be substantially eroded, and the recent response to the Mackay Conservation Group Federal Court victory is perhaps the most recent example of this.

¹⁰ For example *McDonald's Australia Pty Ltd v Yarra Ranges SC* [2012] VCAT 1539

¹¹ http://www.dtpli.vic.gov.au/__data/assets/pdf_file/0009/284841/AN63-Planning-and-Environment-Amendment-Recognising-Objectors-Act-2015_Oct-2015.pdf

¹² *Mortlake Power Station (EES)* [2006] PPV 35

The mechanics of consultation have been well developed over time, and fundamental rules have not changed significantly, consult early, consult often and consult genuinely with the expectation that your project or decision may be affected by the consultation outcomes.

What has changed in recent years is the ability for communities to connect instantaneously and share information across the country and across the world. Websites and social media are used to communicate information and respond to new issues in very short timeframes as well as being used as campaign tools for and against projects. These forms of technology are widely used by Government, proponents and the community in engagement in environmental and planning approvals.

As with its use elsewhere in society, the new communications technologies are enabling greater flexibility and rapidity in engagement and response; but also raising challenges in terms of the capacity to deal with information and the demands of maintaining the platforms and content themselves.

The web as a repository of information readily on hand streamlines the distribution of information and also means that issues addressed in similar proceedings around the State, nation or world are at the parties' fingertips.

The new technologies are also raising completely new issues. In a recent major public hearing in Victoria a community group was live blogging on the proceedings; effectively a performance scorecard on the participants in the hearing, including the Inquiry itself. Does this matter?

This raises many challenges for proponents and regulators and the age of 'Dr Google evidence' is well and truly upon us, making it more difficult, but even more essential, to sift out the jewels in consultation input. It also raises many opportunities and is leading to more informed submitters and as discussed previously the rise of the 'citizen expert submitter'. This can only lead to more comprehensive assessment and overall improved project environmental outcomes.

Conclusions

Community input to environmental and planning decision making is well entrenched in Australian jurisdictions in differing ways and to differing extents. There is no doubt in the author's mind that well run, open consultation and engagement can lead to improved project outcomes and environmental performance.

There must be an appropriate regulatory framework around consultation, but leaders in the field will always go above and beyond these minimum requirements, which themselves change over time. The focus must always be on evidence based decision making and the merits of submissions and community input. New technologies offer new challenges and new opportunities for informed com