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The construction of 'local' interest in New South Wales environmental planning processes

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ABSTRACT

Deliberative democracy in the form of community participation is considered a 'key priority' in New South Wales (NSW) environmental planning. Community participation plays an increasingly central role in state significant developments, which are often sites of contestation. Community participation processes draw upon particular factors of place-based identity, which engage with notions of procedural legitimacy in subtle and not-so-subtle ways. This paper uses a legal geography analysis to explore this link between place-based identity and the experience of procedural legitimacy. We highlight a case study in which a contested coal mining development near Lithgow, NSW was approved by the NSW Planning Assessment Commission (PAC). This analysis examines how 'local' justice was constructed and mobilised in specific ways by proponents and opponents alike. Spatial factors of identity manifested in distinct ways in participation processes, particularly with respect to (i) claims to legitimacy and (ii) the lived experiences of engagement in a public forum. This case study demonstrates the way in which dualistic spatial terms such as 'outsider' opposition and 'local' support can render multiple interests of both human and non-human communities invisible. In so doing we are engaging with current work on environmental justice that examines the intersection of scale, efficacy and equity in processes of environmental governance.

KEYWORDS

Community participation; New South Wales (NSW); Planning Assessment Commission (PAC); state-significant development; scale; legal geography

Introduction

Processes of environmental decision making are increasingly embedded with principles of deliberative democracy. This is part of a transition away from the hierarchical, one-size-fits-all application of environmental regulations towards more inclusive, place-specific and collaborative approaches (Bartel 2014; Gunningham 2009). This shift is characterised by greater public participation in the deliberative process in order to '... take account of local circumstances ... local knowledge and capacities ...' and thereby achieve better quality environmental outcomes (Gunningham 2009, 146). Mechanisms such as citizen assemblies and juries, deliberative polls, and town meetings facilitate this public inclusion, and tend to hybridise, rather than revolutionise, traditional regulatory frameworks in

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which final decision-making authority is retained by a state-sanctioned decision maker (Ravazzi 2017). This is the case in New South Wales' land-use planning decisions and development approval processes, where community participation is procedurally embedded within an approval system in which the final decision rests with the New South Wales (NSW) Minister for Planning and Environment, or an appointed body. The NSW Department of Planning and Environment (DP&E) identifies community participation as:

a key priority in order to capture and consider an appropriate diversity of views when making planning decisions ... to ensure that planning outcomes respond, wherever possible, to the community's needs, interests and concerns. (DP&E 2015, 7)

This participatory mechanism is often used as a way of increasing public confidence in state decisions (Finanzio 2015), on the basis that it substantively improves the fairness and quality of outcomes (Smith 2003; Stokes 2012). However, the vagueness of whose needs, interests and concerns constitute those of the community becomes problematic in contested decisions, with multiple groups making different and even conflicting claims. Australian examples suggest that, in development decisions involving highly conflicting interests, community participation forums have the potential to reinforce polarisation and lead to extended legal contestations (Bartel, McFarland, and Hearfield 2014; Jessup 2013). Under these conditions, the capacity of participation mechanisms to function equitably and effectively is contested (Koch 2013; Taylor 2007), prompting '... wider questions about resource use and the linkages between space, power, and society as a whole ...' (Turton 2015, 63). Such critical linkages highlight the importance of evaluating the role and experience of community participation within environmental governance frameworks, precisely because '... law frequently operates as if space does not matter ...' (Bartel et al. 2013, 339). In this paper we examine the relationships between notions of place, identity and community within environmental regulation and the participatory processes embedded within it.

Bridging space and law

It is the work of legal geography to bridge the two worlds of spatial and legal awareness, and this has been realised through approaches such as Delaney's nomosphere (2010b, 2014), and the employment of scalar analysis in legal case studies (Bartel 2014; Jessup 2013). One purpose of this bridging is to ground environmental law by highlighting its constructed nature as a mechanism employed to govern human-environmental actions. Implicit in this is an acknowledgement that processes of governance are not guarantors of justice, but rather are vulnerable to intentional and incidental co-option as a result of where and how they are employed. Bartel (2014), Bartel and Graham (2015) and Gillespie (2012, 2016) uncover the ways in which one-size-fits-all environmental regulation processes can be maladaptive when faced with the specificity of place, marginalising the communities who live there in the process. Jessup's work develops this idea that the quality of environmental decisions should be entirely dependent on whose perspectives are procedurally validated, with a focus on the capacity of legal avenues to remediate procedural exclusion (2010, 2013). This scholarship is defined by particular physical spaces and the communities who inhabit them, and questions how the law addresses procedural privilege or marginalisation with regards to place when enacting processes of governance.

The role of the physical world in shaping the effect and employment of the law appears to be a blind-spot in embodied legal practice because law ‘... in all its discretionary and rule-bound variety, co-produces places through an attentiveness to, and sometimes an apparent dismissal of, spatiality ...’ (Bennett and Layard 2015, 406). This is problematic, as legal process is often relied upon to ‘rescript narratives’ (Jepson 2012, 614) and compensate for broader social inequity, so the spatial blindness of these processes can make them complicit in injustice. This is particularly acute as any consideration of place must acknowledge that ‘... law is both felt and made (at least in part) locally ...’ (Bennett and Layard 2015, 3). Considering this, the construction and representation of ‘local’ in regulatory processes deserves closer scrutiny. This paper seeks to expand an understanding of environmental decision making in NSW by engaging with its ‘social spatialization’ (Delaney 2010a, 13) in order to acknowledge that the lived experiences of people and environments both shape, and are directly shaped by, local manifestations of environmental governance.

Role of community participation in the New South Wales environmental process

In Australia, a turn towards participatory environmental governance frames community participation as the public’s ‘... voice in policy choices ...’ (Bishop and Davis 2002, 14). Community input is gathered through submissions at public hearings and online avenues hosted by the state, before it is evaluated, synthesised and—ideally—reflected in the final development decision (Laurian 2004). This paper starts from an understanding that community participation can act as a ‘... safeguard against the depoliticisation of environmental politics ...’ (Walker and Bulkeley 2006, 7) only if it is incorporated into transparent decision making. Given the centrality of community participation in development decisions, a closer inspection of who is included in such processes, and how their input is procedurally acknowledged is a profitable and necessary avenue of investigation.

Of particular interest is the way in which deliberative mechanisms interact with and achieve community participation objectives in contested developments. In NSW, development proposals that impact environmentally sensitive areas of state significance, or which have a capital investment value of more than \$30 million,¹ are classified as state significant development (SSD).² Rather than being decided by the NSW DP&E on behalf of the minister, as other development proposals are, SSD proposals are handled by a Planning Assessment Commission (PAC) (DPE 2017). The PAC is an independent panel of generally three experts chosen by the minister to consult on, and in some circumstances decide, the fate of SSDs (PAC 2015a).³ The PAC initiative follows the long rise of SSD planning policies in NSW. Mention of ministerial ‘call in’ powers over matters of state significance for state or regional environmental planning appears in the original *Environmental Planning and Assessment Act 1979* (NSW) (s. 101) (Park 2010). Community engagement in the form of public meetings and written submissions, in addition to independent investigation into the specifics of development proposals, form the bulk of the PAC’s deliberative process. A participatory governance approach is increasingly embedded in processes of environmental decision making (Bulkeley and Mol 2003), with the PAC presented as a way of increasing the independence, and thus the quality, of decisions (Williams 2014). This ‘... panelisation of decision-making ...’ (Williams 2014, 426) is a substantial

factor in NSW planning decisions, particularly in contentious land-use cases, for two reasons. First, the use of the PAC mechanism shifts the decision-making onus away from the NSW Minister of Planning and the Environment onto non-elected officials. Second, and most significantly in terms of community participation, the use of the PAC restricts appeal rights to judicial review *only*, provided a formal public hearing has been held.⁴ As such, in the absence of finding an error in the application of the law, a PAC decision cannot be challenged or appealed. This increases the necessity for an equitable and effective deliberative process. As projects with a ‘... wider significance and impact than on just the local area ...’ (DPE 2017), the outcome of SSDs tends to be of interest to a wide range of stakeholders, including industry proponents, the state, public stakeholders and affected communities. Here, affected communities are understood to be not only locationally proximate human (and non-human communities) but also the national and global communities they constitute. State significant developments that trigger both the environmental and economic criteria tend to become sites of contention, as can be observed in high-profile PAC decisions that have resulted in lengthy oppositional litigation.⁵ In addition, the use of the PAC has substantially increased since its 2011 inception, with 60 high-profile project decisions made by the PAC in 2014–15 (PAC 2015c). The scale and significance of SSDs, combined with the lynchpin function of community participation in the PAC decision-making process, suggest a greater need for critical engagement with the equity and efficacy of these processes.

The spatiality of community

Studies examining the convergence of identity and participatory inclusion tend to articulate the importance of capturing local perspectives in legal representations of place. Identity is the sense of self that is created, understood and maintained through symbolic interactions with the cultural and material context of the place in which one lives (Jones 2011, 161), and can be complex, shifting, individual, and communal. Identity, both individual and communal, can influence the ways in which individuals engage in democratic processes (Rutherford 1990). As Bennett (2015) highlights, fragility in the face of change or heterogeneity can lead to continuity becoming synonymous with authenticity. Australian legal geographers, including Jessup (2010, 2013), Bartel (2014) and Gillespie (2016), use case study analysis to underscore the spatial and scalar implications of local knowledge claims. This scholarship complements broader examinations of how scale intersects with regulation and justice (Arcioni and Mitchell 2005; Masterman-Smith et al. 2016) to highlight the need for greater procedural acknowledgement (and weight) of the lived experience in environmental decisions. However, far from advocating localism, these studies emphasise that it is the privileging of scaled knowledge that leads to injustice, be it the regional over the local (Jessup 2013), the state over the individual (Arcioni and Mitchell 2005; Bartel 2014) or the international over the local (Gillespie 2012). These studies reinforce that there is ‘... nothing inherent about any scale ...’ (Brown and Purcell 2005, 279), despite the frequent invocation of ‘local’ in efforts to legitimise particular socio-political agendas (Kurtz 2003). Community identity is neither homogeneous nor static; however, examining strategies of spatial legitimacy in conflict between local and/or external actors is helpful in illustrating the role of place-based identity in environmental–human perceptions (Sherval and Hardiman 2014). Indeed, the Land

and Environment Court (NSW) has considered issues associated with the challenges of place-based (localised) concerns vs broader interests. One example is found in the judgment of Preston CJ in *Taralga Landscape Guardians* [2007 NSWLEC 59], in which his Honour found that broader community interests about clean energy sources outweighed localised resident concerns. Nonetheless, it remains the situation that both political and popular discourse engages with and perpetuates spatial understandings of identity, utilising such divides between urban and regional to strategically construct and endorse particular governance strategies (McManus and Pritchard 2000). As Mohan and Stokke (2000) highlight, this strategy of equating locality with legitimacy allows inequalities and power struggles at the local scale to be rendered invisible or co-opted. There is increasing acknowledgement that while local knowledge has the capacity to improve the substantive impacts of environmental regulation by tailoring it to local conditions, it can also trigger resistance to changing practices and impede beneficial environmental initiatives (Bartel and Graham 2015). Recent work from Turton (2015, 2017) and Ey and Sherval (2016) builds on this to contrast the ways in which the spatiality of extractive industries in rural Australia become socio-culturally embodied in local understandings of place. In such cases, strong emotional community reactions are elicited in response to change in these industries. As McManus (2006) highlights, human values determine how ecological knowledge is applied and incorporated in projects that engage with competing human and non-human interests. Thus participation in deliberative processes becomes a matter of competing understandings of place. These accounts demonstrate the way in which processes of participatory decision making intersect with the historical, social, and environmental specifics of place that shape the communities involved. In turn, they highlight the complexity, and problematic invisibility, of this intersection in the efficacy and equity of environmental governance. It is for this reason that the trend away from reifying any particular scalar contribution towards a more balanced recognition of a wide variety of input is increasingly recognised as a central element of best-practice environmental decision making (Bartel, McFarland, and Hearfield 2014). The way to achieve this, according to Cash et al. (2006), is procedural systems that minimise scalar boundaries, and move away from polarised environmental discourses that pit the legitimacy of one scale against another. This paper is a contribution to the growing body of analysis that actively questions how well we are achieving this in processes of NSW environmental governance.

According to Talen (2000, 172), the focus on 'community' in community participation is problematic because '... as an element of planning practice, the notion of *community* is not well thought out ...' The rationale behind embedding environmental planning policy with references to community is that self-defined groups will respond to self-defined problems in 'their area' (Lane and Corbett 2005). Thus community is understood as inherently place-bound. However, in practice identifying and defining the 'community' in community participation is a complex and contested exercise, given that both place-bound and placeless communities are active in crafting the socio-political sphere. Gusfield (1975) was the first to distinguish communities of place from communities of interest and while this is a useful approach we acknowledge that the two are not mutually exclusive. The former is understood geospatially, and is often (but not always) bureaucratically recognised through units such as postcode, city, and neighbourhood. The latter is understood as a placeless alliance of common interest, whose boundaries are invisible and whose existence may go unnoticed by non-members. Duane (1997, 772) expanded Garfield's

work to define placeless communities based on ‘... commonalities in how they relate to a particular ecosystem or resource as beneficiaries of that place or contributors to its condition ...’ In a regulatory climate that increasingly recognises the interconnected character of environmental problems, both legal and non-legal factors need to reflect a multi-scalar understanding of both space and community in the regulation of environmental space (Herbert, Derman, and Grobelski 2013). Manzo and Perkins (2006) socio-political relations are often expressed in spatial terms through the concepts of being marginalised, an insider or an outsider, suggesting that perceived spatiality is reflected in whether individuals feel that they have a place at the collective bargaining table. Connolly’s (2013) consideration of new materialism highlights that human interests must neither be ignored nor prioritised, but rather acknowledged as part of the complex human/non-human relationships that shape and are shaped by the physical world. This supports moves to challenge and deconstruct binary economic–environmental framings within environmental decision making, recognising instead the more nuanced possibilities between people and place (Bartel, McFarland, and Hearfield 2014; Power 2005) and the human and non-human world (Jackson 2006). As Wright (2015) notes, places and institutions are central in the construction and performance of identity, and while performance here is extended to include more-than-human material agents, issues of power, agency and capacity in instances of human–non-human conflict are not explored. The question thus remains: how is the attributed active, political agency of the non-human world felt in anthropocentric places and institutions? Recognising that there are ‘spaces and bodies that traditional property law has managed to circumvent’ (Philippopoulos-Mihalopoulos 2014, 20), it is argued that spatial critiques of legal process ensure that claims to universality are falsified through demonstrations of whose or which interests are rendered invisible to the law.

Representations of community in Australian environmental justice scholarship

Any assessment of community participation in environmental decision making must recognise that social and political power imbalances manifest in the physical world through processes of recognition. This acknowledgement lies at the heart of studies characterised within an environmental justice (EJ) framework, with Čapek (1993, 8) identifying EJ as the ‘respectful and unbiased’ procedural acknowledgement of all community claims regarding the environment. It is in this context of equitable claim recognition that we also begin to consider the relationship between deliberative processes and the experiences of non-human communities. Environmental justice scholarship provides an ideal conceptual vehicle to situate this attention, as Schlosberg (2007) considers that the equitable recognition and participation of all living systems—human, animal and plant—in processes of environmental decision making are fundamental to achieving EJ.⁶ Schlosberg’s framework redefined the justice community by expanding the boundaries of inclusion to non-human life. This shift away from exclusive anthropocentrism made more ‘space’ visible to EJ analysis, facilitating an increasing diversification in its application. In this, equitable recognition under the law is critical to inclusion in the justice community. As Graham (2015) notes in her examination of longwall mining’s subsidence impacts, environmental law does not account for the ways in which human values dictate

what is deemed worthy of protection. In presenting a Wild Law alternative, she suggests that focusing legal attention on the right of the land to not be damaged rather than exclusively regulating the agents of damage (mining companies, the state), the interests of the non-human world can more effectively be represented and protected. Such a reframing reconstitutes the human–environment relationship and takes steps towards including non-human perspectives and interests within the justice community. In their proposal for a nexus of legal geography and political ecology, Andrews and McCarthy (2014) argue that legal geography can productively illuminate the ways in which non-human communities and spaces impact and are impacted by legal struggles. Just so the combination of legal geography and EJ—both reflections of the nuanced entwinements between process and place.

While Masterman-Smith et al. (2016, 360) describe EJ scholarship in Australia, particularly in non-urban contexts, as ‘embryonic and patchy’, there is a growing body of case study analysis focusing on how different communities mobilise through procedural participation mechanisms. Community participation is considered a defining feature of Australian EJ in both ‘principle and practice’ (Hillman 2004, 34), so much so that Arcioni and Mitchell (2005) equate EJ with the equitability of community participation mechanisms. In his analysis of a waste facility siting in rural NSW, Jessup (2013, 73) describes this case study as having ‘... the hallmarks of a typical environmental justice controversy ...’ Several Australian EJ case studies highlight that justice is not only a measure of equitable stakeholder inclusion in governance processes, but also of the equitable representation of their concerns in decision-making outcomes. Spatial and scalar factors of exclusion are highlighted as barriers to such representation, particularly regional co-optation (Jessup 2013), geographic exclusion (Jessup 2010), or interscalar political contestations (Arcioni and Mitchell 2005; Higginbotham et al. 2010). These studies demonstrate the importance of examining the strategies of claim mobilisation enacted in environmental disputes, and the ways in which they define legitimacy and exclude or include particular stakeholders.

Methods

Springvale extension development proposal case study

This case study examines the processes of community participation surrounding the Springvale Extension Development Proposal (SEDP), a mine-extension application submitted to the NSW DP&E in early 2014. The proponent of the SEDP was Centennial Coal’s Springvale Colliery,⁷ a coal mine located in Wallerawang, a small township 10 km north-west of Lithgow and 150 km west of Sydney, NSW. The SEDP outlined a plan to extend an existing operation area of the Springvale Colliery by 5810 ha, the majority of which lies on Newnes Plateau within the Newnes State Forest.⁸ This extension allows an additional 20 longwalls to be mined, from which 4.5 million metric tonnes of coal will be extracted per year over the next 13 years, generating 310 jobs and up to \$368 million in operation incomes, state royalties and taxes (PAC 2015b). As a coal mining development application, the SEDP was classed as an SSD. As a result, the environmental impact statement for the project was made publicly available from 12 April until 26 May 2014, during which time it received over 200 submissions in opposition. In accordance with SSD conditions, these objections triggered the use of a PAC (Figure 1).

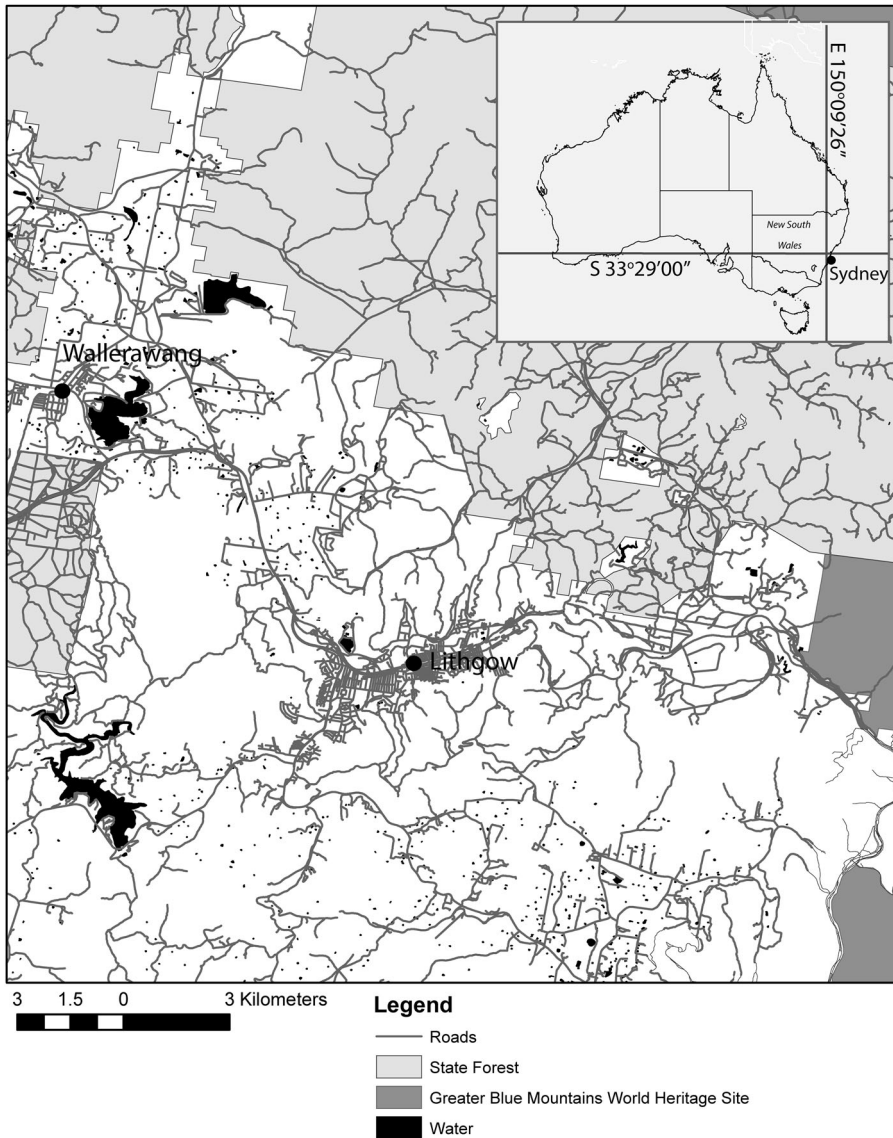


Figure 1. Map showing the location of the study site.

There were two main sources of environmental opposition to the SEDP. The first was the threat posed by the development to threatened swamp communities. The longwall mining operations outlined in the SEDP are located directly beneath the endangered Newnes Plateau Shrub Swamp community, which is listed as an Endangered Ecological Community (EEC) under Schedule 2 of the *Biodiversity Conservation Act 2016* (NSW) (BCA),⁹ indicating that they are at very high risk of extinction in New South Wales. In addition to this, the Newnes Plateau Shrub Swamp is classified as a Temperate Highland Peat Swamp on Sandstone (THPSS), an EEC listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) as having a very high risk of extinction in the wild. Longwall mining was listed as a Key Threatening Process for these communities under Schedule 4 of

the BCA due to the elevated risk of mining-related subsidence. Subsidence occurs when pressure arising from the removal of the coal seam can cause the sandstone plateau upon which the swamps rest to crack and potentially replacing drought-tolerant swamp vegetation with eucalypt trees, decreasing the bushfire resilience of the region (Lechner et al. 2012). The Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) was commissioned by the Federal Department of the Environment and the NSW DP&E to provide advice regarding the SEDP. While SEDP proponents argued that adequate safety measures had been incorporated into the planning documents to mitigate subsidence risk, the IESC report advised avoidance:

It is highly likely that impacts to THPSS and dependent threatened species will be severe and potentially irreparable. Further, there is no scientific literature currently available to demonstrate the effectiveness of potential mitigation or remediation measures. The only known strategy to minimise impacts to THPSS is to alter the mine layout such that swamps are not undermined by longwall panels ... (IESC 2014, 1)

The proposal was not amended to reflect this advice, triggering ongoing opposition to the SEDP, considering that the EECs on Newnes Plateau play a key hydrological role in the region by filtering water and moderating the flow of downstream watercourses (Kohlhagen, Fryirs, and Semple 2013). THPSS communities also provide the habitat for several uncommon and threatened flora and fauna species (Kohlhagen, Fryirs, and Semple 2013). Of significance is the Blue Mountains Water Skink (*Eulamprus leuranensis*), a species with a recovery plan under 269A of the EPBC Act, and the Giant Dragonfly (*Petalura gigangtea*), which is classified as endangered under Part 2, Division 3 of the BCA.¹⁰ The fragility of this system to anthropogenic disturbance means that few examples of healthy swamp ecosystems exist outside of protected areas (Fryirs et al. 2014).

The second issue of concern was Springvale's position within the Sydney Drinking Water Catchment. Springvale's low elevation on Newnes Plateau results in surface and ground water permeating the mine, requiring dewatering pumps to work constantly to keep the mine dry. This process results in high quantities of saline water being discharged into local waterways, including Cox's River, via mine discharge points. Springvale's water is not treated, despite having discharge salinity levels three times the level recommended by the Australian and New Zealand Environment Conservation Council guidelines (ANZECC 2000). Springvale is currently working with the NSW Environmental Protection Authority (EPA) to decrease the salinity of mine water discharge. However the main opposition to this aspect of the development arose due to the fact that Cox's River flows west of the Blue Mountain's and into Warragamba Dam, the drinking water supply for over 80 per cent of the Sydney region.

The main source of local opposition came from members of the Lithgow Environmental Group (LEG), a local volunteer group that undertakes regular water quality testing and botanic cataloguing in the region, including on Newnes Plateau. The LEG, along with several other local environmental groups, including the Blue Mountains Conservation Society (BMCS) and the Colo Committee, actively and consistently opposed the SEDP before the PAC on the grounds that protection measures detailed in the proposal were insufficient and required amendment.¹¹ The Colong Foundation for Wilderness (Colong Foundation) was also in opposition to the SEDP and, along with local environmental groups, made extensive submissions to the PAC outlining environmental concerns

with the proposal. As a Sydney-based wilderness advocacy group that is active and influential throughout Australia, the involvement of the Colong Foundation was significant in the PAC process as it mobilised substantial opposition to the SEDP from its national support base. This not only validated and supported the arguments of local opposition, it broadened the representation of non-human communities in the deliberative processes surrounding the SEDP.

Opposition to the SEDP was countered by support for the project, in which two factors were particularly significant. Springvale's development application highlighted the significance of maintaining a local supply of coal to the nearby Mt Piper Power Station, which generates 15 per cent of the electricity supply for NSW. Overwhelming support for the SEDP also came from the residents in the Lithgow region¹² where coal mining employment plays a significant economic, social and cultural role.

The concerns of these groups were represented to the PAC in distinct ways. Strategies of assigning legitimacy through constructions of local as well as the different experiences of participation form the crux of this analysis.

Fieldwork was carried out in Lithgow and Sydney between July and August of 2016, involving interviews with direct and indirect participants (Table 1). Participants were identified through their participation in the public hearings held in Lithgow, a record of which is publicly available on the PAC website. Individuals were contacted via their representative organisation's email or telephone number. All initial contact complied with the ethics approval this study received from the University of Sydney (2013). Sixteen semi-structured interviews were conducted, ranging from 84 minutes to 32 minutes in duration. Where possible, interviews were conducted in person; however, in cases where this was not possible a telephone interview was conducted. All participants were de-identified in this study except for Minister Stokes, who consented to be identified in the study owing to his role at the time of this study within the NSW planning system.

Table 1. Interview participants and type

Direct stakeholders participated in their capacity as a mining industry, environmental, or political representative from the Lithgow region

No.	Identifier	Direct stakeholder role	Interview location	Interview type
1	DS1	Senior Councillor at Lithgow City Council	Lithgow	In person
2	DS2	Senior Official at Lithgow City Council	Lithgow	In person
3	DS3	Member of environmental group	Lithgow	In person
4	DS4	Member of environmental group	Lithgow	In person
5	DS5	Regional research academic	Sydney	Telephone
6	DS6	Member of environmental group	Sydney	Skype
7	DS7	Member of environmental group	Sydney	Telephone
8	DS8	Member of environmental group	Sydney	In person
9	DS9	Member of environmental group	Lithgow	Telephone
10	DS10	Official at Blue Mountains Council	Sydney	Telephone
11	DS11	Mining Representative	Sydney	Telephone

Indirect stakeholders participated in their capacity as a mining industry, environmental, or political representative from outside the Lithgow region with an interest in the SEDP

No.	Identifier	Indirect stakeholder role	Interview location	Interview type
12	Minister Stokes	NSW Minister for Planning and the Environment	Sydney	In person
13	IS13	Senior Legal Council	Sydney	Telephone
14	IS14	National Environmental	Sydney	Telephone
15	IS15	National Environmental	Sydney	Telephone
16	IS16	Senior Legal Council	Sydney	In person

Discussion

Constructions of local

The first key finding was that stakeholders employed geospatial means of procedural exclusion and inclusion through particular constructions (and contestations) of ‘local’ interest. A pervasive argument employed in the SEDP decision-making process was that the majority of opposition to the project came from individuals and organisations outside the Lithgow region, and were thus less credible than the input of residents from the Lithgow region, a view that pervaded local news coverage. Direct stakeholder interviews reinforced this perceived link between spatial proximity and the legitimacy of participant input:

I believe that you should not be able to have a say unless you are a rate payer in the area affected. And I feel absolutely strongly about that. (DS1)

[Environmental opposition will] garner support in the streets of Newtown or Balmain because the people there don’t know any better about the local context. (DS2)

But he’d come from Palm Beach to be there [at the PAC hearing], you know, hadn’t actually been in the swamp area and was making a whole lot of claims. (DS11)

These statements indicate a strategy of spatial exclusion whereby the habitual physical proximity of a participant to the site of contention increases the legitimacy of their input. This association between ‘local’ and ‘legitimate’ was countered by both local and non-local opponents of the mine, justifying their involvement based on the formal environmental protections applied to the EECs in question. Thus the ‘legal thickness’ (Bennett and Layard 2015, 4) of the SEDP site was employed as a counter-strategy to extend the boundaries of procedural inclusion:

That’s what democracy is, that this is the heritage of all Australians—present and future. Therefore, all Australians have equal rights to make comment on it. (DS6)

The THPSS are a nationally listed endangered ecological community, of national significance ... there are issues there that extend beyond local community perspectives. (DS9)

National heritage listed values are being impacted, world heritage, internationally significant values are being protected, the public interest in public land is being impacted. (DS8)

These responses highlight the multi-scalar nature of the legal designations employed at the SEDP site, suggesting that the health of these EECs is of interest not only to residents of NSW but also both Australian residents and—given the connection between the EPBC Act and the international *1992 Convention on Biological Diversity* (1760 UNTS 79)—residents of the globe. These statements present two clear strategies of inclusion. Springvale Extension Development Proposal supporters created and perpetuated a narrative in which legitimate participation was reserved exclusively for local residents. This effectively undermined all opposition to the proposal, as local opposition held minority status and all non-local input was dismissed out of hand. The persuasiveness of this construction of legitimacy was reflected in the comments of indirect stakeholders:

Start with the notion that they [local residents] obviously have a more direct interest and their views are entitled to greater weight than those who don’t. (IS16)

I do have some sympathy for the idea that those that bear the direct benefits or consequences of an application have a particularly strong right to be heard ... I would say that the views of the locals are the ones that are particularly acute. (Minister Stokes)

These responses reinforce that the weighting of input should correlate to the level of impact the decision will have on local interests. Place-relational factors were used to delegitimise oppositional contributions to the PAC, the logic being that procedural legitimacy should be granted only to authentic actors, namely those that adhere to the dominant communal patterns of identity and value acknowledged in this region. Here the ‘ontological security’ (Bennett 2015, 2) of the dominant identity group can be seen to be threatened. This group very effectively mobilised and defended privileged input by marrying locality to legitimacy.

However, this construction of ‘local’ interests was not extended to non-human communities likely to be impacted by the SEDP:

To suggest that you could close a coalmine down because of a butterfly—there are many people out there that think that that’s just way over the top. (DS1)

This statement conveys an embedded hierarchy in conceptions of the ‘local’, in which impacts are evaluated according to the spatial dominance of particular groups rather than according to spatial proximity. Environmental opposition to the proposal used the legal designation of the EECs as a mechanism to represent the interests of these non-human communities in deliberative processes. Thus we can see that this strategy of using the law to counteract the dominance of the ‘local as legitimate’ construction in fact reinforces its central tenet. The only difference between the arguments employed by opposition and support of the SEDP was the communities they applied it to. In representing the interests of EECs through legal designations, environmental opponents did not contest the dominant construction of ‘local’ legitimacy but rather challenged its embedded anthropocentrism. This statement presents Springvale’s approval and local environmental protection as binary outcomes, sentiment expressed with regularity during the SEDP. The majority of environmental opponents to the SEDP stated that they sought amendment to the SEDP, to reflect and substantively address their concerns, rather than outright opposition. This highlights the importance and advantage of public participatory processes that accommodate nuanced consideration of ‘what [is] proposed, where it [is] proposed and how it [is] proposed’ (McManus, 2006, 69), rather than binary yes/no decisions on existing, more-or-less static proposals

This reliance on the legal environmental designations of the site highlight the inherent aspatiality of law, existing as it does only in theory until it is applied in space (Delaney 2010a). As Bartel et al. (2013) remind us, law often (and problematically) operates as if this is not the case, discounting the influence of spatial context on legal outcomes. Further, the comment of Minister Stokes highlights that the communities included in constructions of ‘local’ have political implications for how threats to their well-being are prioritised:

In politics, all decisions are local. Locals may passionately care about a particular development but a small number of people might have a passionate view. At a larger scale, a lot more people might have a more generalised view. So the question of scale is not just about the number of people affected but the degree to which they care. (Minister Stokes)

The political persuasiveness of local interest as exclusively human interest reinforces Bulkeley’s (2005) rejection of constructions of nested scalar power in which the local is subordinate to the ‘higher’ scales. All communities in the SEDP based participation

legitimacy on the understanding that, as Minister Stokes put it, ‘those that bear the direct benefits or consequences of an application have a particularly strong right to be heard’, as both local and regional environmental groups can be seen to be advocating for the rights of the non-human swamp communities impacted directly by this decision. This echoes the foundational purpose of community participation to provide all community groups with ‘... a voice in policy choices ...’ (Bishop and Davis 2002, 14), and of EJ as a mobilising strategy that includes non-human interests in such processes. Scalar analysis reveals that the difference in SEDP expectations was not a result of clashing local and non-local interests but rather a contestation over who (or what) was recognised as representing local interests. The construction of ‘local’ interest in this case highlights that ‘... law is both felt and made (at least in part) locally ...’ (Bennett and Layard 2015, 3), weakening the law’s ability to react to and account for the co-opting influence of place in decision-making processes.

Experience of participation

Another key finding relates to some of the physical experiences of participation, and the acknowledgement that this involved different burdens for different individuals. In the SEDP, the ‘new governance’ mechanism (Gunningham 2009) of holding public meetings *in situ* demonstrates how procedural mechanisms worked to exclude the input of opponents of the SEDP. This relates directly to emergent work in legal geography. For example, Harm-Benson (2014) has noted that citizen engagement in challenging government decisions (in the USA) can seem to ‘operate under a veil of neutrality’ (216) that can mask complex decision-making dynamics. Both PAC hearings were held during work hours on weekdays, conditions that acted as a participation barrier both for non-Lithgow residents as well as Lithgow residents working office hours. The choice of time, date, and location greatly influenced the likelihood that shift-working miners could attend, whilst decreasing the likelihood that non-miner Lithgow residents and non-resident participants could attend. Electronic submission was available to all participants and did not place any spatial requirements on participation (we note that electronic submissions create a digital/literacy divide in terms of access and participation but we have not expanded this aspect of PAC hearings in this paper). However, written and verbal participation are significantly different, and speak to the ‘public’ nature of participation. Public hearings are important forums in the decision-making process, both as a form of democratic stakeholder recognition (Finanzio 2015), and strategically, as face-to-face communication tends to provide a more authentic exchange than written accounts (Coyle 2016). The argument here is not that the meeting should have been held elsewhere, or that SEDP supporters should have been in any way discouraged from attending. Rather, that all interested stakeholders should, within the bounds of the practicable, have been provided with an equal opportunity to attend and participate in public hearings. Public hearings are ‘invited spaces’ in which power hierarchies are embedded (Cornwall 2008, 275). Regardless of intention, the choice of timing and venue for the SEDP PAC hearings can be seen to exclude a significant proportion of potential participants, many of whom opposed the SEDP. As Minister Stokes’ comment reflects, the political dominance of the context of place over the aspatiality of laws protecting ecological interests is an influential factor in deliberative decision making. Physical barriers to participation act to

exacerbate this further. It is evident from stakeholder interviews that the implications of procedural choice of venue and time impacted the experience of participation for those opposing the SEDP. Direct stakeholder interviews revealed that the experience of participation was fundamentally different for SEDP opponents than it was for supporters:

That was ... hit you like a brick wall when you walked in, death stares from all the miners. (DS3)

I went to both of the PAC meetings and I regard the first one as one of the most unpleasant human interactions of my adult life ... I actually worried about my physical safety. (DS5)

In Lithgow I thought we were going to have a riot ... you could have cut the tension with a knife at that particular hearing ... It was the most aggressive I've ever seen. (DS6)

... one of the tensest and most aggressive public meetings that I've been to ... very intense, very heightened emotional, aggressive atmosphere. It was very intense. (DS7)

you've got to get up in front of 200 angry miners at the PAC, and some of the locals did, it's quite threatening. (DS9)

These statements highlight the way in which participation was shaped by the physicality of the forum, in problematic ways. Supporters of the SEDP conveyed a very different experience of these public PAC hearings:

The PAC hearings were a bit like a drama day, lots of drama and it's quite stressful and people get very antagonistic about things ... there is a Great Wall of China between the two [groups]. (DS1)

... there was probably some tension in the air. I thought fairly well that there was a reasonable amount of respect and listening to the other's point of view without interjecting. I have heard from some of the environmental people that some of their side of the argument have felt intimidated on the way out, but I didn't personally witness any of that. What I did witness personally was a level of listening, and respect to let the others have their say. (DS2)

I think that the atmosphere was very positive for the people who were speaking for the application. But I think that the people who spoke against it were given cordiality—they weren't being interrupted and they weren't being booed. If someone sees the lack of applause at the end of a speech as being rude well you can't help that. (DS11)

These contrasting accounts of the physical act of participation highlight that the spatial setting and attendance of public PAC hearings significantly impacted who participated, as well as the experience and risks of that participation.

The enduring understanding of environmental input as both threatening and malicious is demonstrated in the response of DS2:

Now, accept the umpire's decision, and move on—why go through this process. Whilst I recognise there's a legitimate right to take such an action, I think it's mean spirited ... (DS2)

We can see from some responses that public opposition was taken as a personality flaw. In light of this, statements by environmental opponents demonstrate a counter-strategy in which the legal designations of the SEDP site were again used to deflect this adversarial framing by shifting the focus onto the procedural framework:

... they're trying to get rid of the so-called green tape, which are in fact environmental laws that the community fought for many decades, to try and protect heritage. (DS6)

... all we're doing is arguing the best case we can according to the existing rules. Because the PAC people can't do anything other than apply the rules and all you can do is present the evidence in the context and seek a ruling. (DS8)

The social burden borne by environmental groups demonstrated in this case raises the question—where does the responsibility lie to ensure environmental outcomes are adequately accounted for? All interview participants recognised the value of local and regional volunteer environmental groups, acknowledging their role in environmental monitoring and quality. However, community cohesion is impacted when adversarial constructions of participation are perpetuated. Their experience throws the issue of social cost of participation and the burden of environmental representation into sharp relief:

We've been harassed. We've been abused. We're still being harassed ... (DS4)

It is quite challenging taking a public position in dissention to mining in a mining community... those who do it do so at significant personal cost ... it's like democracy, it's an ongoing dialogue, vigilance, fight. It never stops. (DS9)

I dearly love the place [Lithgow]. I think it's a fantastic area and I feel really sorry that my name is mud locally. I've sided with some of the conservationists. (DS)

These responses suggest that despite playing a valued role in environmental outcomes, local and regional environmental groups bore a higher cost of participation than local proponents or non-local opponents, a discrepancy that was not procedurally acknowledged. The input of indirect stakeholders suggests that these unacknowledged aspects of participation are characterised by how deliberative responsibility is acknowledged. For example, the following comments by Minister Stokes suggest that the quality of deliberative processes is the responsibility of participants:

Participation is not there to derail the process, and equally the process needs to be genuinely listening ... it depends on the motives of those participating, as to whether it works or not ...

The relationships between different communities is [*sic*] to some extent not really relevant to the PAC.

Placing the burden of equitable representation of social and environmental interests in deliberative forums onto participants shifts the responsibility from the state's application of the decision-making framework. The corollary is that participants will bear both positive and negative costs. Taken together, these statements suggest that the state acknowledges that the factors impacting the quality of authentic deliberation—how and why individuals are participating—are irrelevant to decision makers. This lack of consideration of the physical logistics of community forums, and their implications for participants, reinforces the way in which the unacknowledged spatiality of deliberative processes shapes their substantive outcomes. IS13 suggests that giving voice to this aspect of community participation is necessary in reframing procedural responsibility and, by extension, its efficacy and equity:

To think that this PAC forum, in certain circumstances, is any less controversial than two people fighting in court over access to their own child ... is just completely naïve. And quite irresponsible. There is just no protections [*sic*] for the process or the community. (IS13)

This statement demonstrates that placing the burden on the decision-making framework facilitates an acknowledgement of the inequitable distribution of risk embedded in

participation mechanisms. The procedural expectation of decision making, both from participants and from the state, has implications on how the burdens of participation are acknowledged, and on where the onus of blame is located when the outcome is unsatisfactory. This case demonstrates that perpetuating constructions of local that pit the interests of different local groups as competing and exclusionary is neither effective nor equitable in the long term for the community as a whole. We argue that framing the coal expansion proposal in this way is overly simplistic. In this simplistic rendering there is a real possibility that the PAC process can become less effective; potentially hijacked through a starkly dichotomous, dualistic discourse. The consequence is likely to lower the tone of public policy debate in areas of critical importance.

Conclusion

Bulkeley (2005) suggests that environmental governance is being ‘reconfigured’. This raises the question: is the new configuration any more effective in providing contextually appropriate environmental protection? This case study analysis suggests that the pervasiveness, and the persuasiveness, of an anthropocentric construction of ‘local’ interest influenced how different individuals and groups were encouraged to participate in SEDP processes, and which threats (and whom they affected) were recognised. In so doing, it engages with and contributes to contemporary debates regarding the rising influence of community participation, in which the capacity of environmental governance systems to account for the specificity of place is increasingly questioned in terms of equitable participation.

The SEDP case study demonstrates the way in which dualistic spatial terms such as ‘outsider’ opposition and ‘local’ support can render the interests of non-human communities invisible. The interaction between the public, the PAC, and the law in this case reveals a governance approach that continues to exhibit a fundamental inability to truly engage with the implications of space in deliberative processes. By highlighting previously unacknowledged aspects of community participation, this research does the work of legal geography by examining how the experiences of participants differed as a result of how and where these processes took place, and the equitability of that experience in terms of burdens and benefits. This analysis examines the ways in which space and scale engage (and are engaged by) deliberative decision making, highlighting that if the ‘worlded’ (Braverman et al. 2014, 1) processes around SSDs fail to proportionally and procedurally enable all claims to justice, they necessarily inhibit equitable human and non-human representation. Acknowledging that different community understandings of scalar and spatial identity are embedded in strategies of claim mobilisation in processes of environmental governance, and that these understandings impact the equity and effectiveness of these processes, is the first step to achieving genuine forums of deliberation.

Notes

1. Under Section 5 of Schedule 1 of the NSW State Environmental Planning Policy (State and Regional Development) 2011.
2. Under the NSW State Environmental Planning Policy (State and Regional Development) 2011 in accordance with 89C of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).
3. Constituted under 23B of the EP&A Act.

4. Under Section 99 (7) of the EP&A Act.
5. See *Warkworth Mining Limited v. Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; *Upper Mooki Landcare Inc v. Shenhua Watermark Coal Pty Ltd and NSW Minister for Planning* [2016] NSWLEC 6; *Hunter Environment Lobby Inc v. Minister for Planning* [2011] NSWLEC 221; *Barrington-Gloucester-Stroud Preservation Alliance Inc v. Minister for Planning and Infrastructure* [2012] NSWLEC 197.
6. It is acknowledged that the two are not mutually exclusive. Schlosberg (2007) identified distribution, recognition, participation and capacity as central to EJ.
7. Springvale Colliery is owned by Centennial Coal Pty Ltd, a subsidiary of the Thai-owned Banpu Public Co. Ltd, and the Korean-owned SK Kores Australia Pty Ltd.
8. Managed for both conservation and natural resource use under the *National Parks and Wildlife Act 1974* (NSW).
9. Formerly the *Threatened Species Conservation Act 1995* (NSW). Details relevant to this discussion regarding swamp designation and identified threats remain the same under the *Biodiversity Conservation Act 2016* (NSW).
10. NSW National Parks and Wildlife Service. 2001. Blue Mountains Water Skink (*Eulamprus leuarensis*) Recovery Plan. NSW National Parks and Wildlife Service, Hurstville, NSW.
11. The Blue Mountains Conservation Society was involved in litigation against Delta Electricity regarding water contamination of Cox's River following a failed water transfer scheme between Springvale Mine and Delta Electricity's Wallerawang Power Station. The litigation ran for over 2 years before being settled out of court. See *Blue Mountains Conservation Society Inc v. Delta Electricity* [2009] NSWLEC 150 (9 September 2009) and *Delta Electricity v. Blue Mountains Conservation Society Inc* [2010] NSWCA 263 (18 October 2010).
12. Reference to Lithgow residents is inclusive of residents of Wallerawang, Portland, and Marangaroo and elsewhere in the region. This term has been used for simplicity.

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