

FIRST NATION PARTICIPATION IN SOURCE PROTECTION IN ONTARIO

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Issue

In the initial phases of the source protection regime in Ontario, what are the barriers to participation for First Nation communities? Also, has Aboriginal Traditional Knowledge (ATK) been incorporated into the assessment and planning stage of source water protection? What can be done to increase participation for First Nations while also recognizing their treaty, title and aboriginal rights? What steps can the province take to strengthen the source protection process with respect to First Nations' communities?

Background

First Nations communities have witnessed an increase in pressure placed on water in their communities from economic development such as mining, forestry, petrochemical processing and hydroelectric dams. Also, historical contamination from military and industrial activities have resulted in high levels of PCBs and other pollutants in water systems located on First Nation's territories (Standing Senate Committee on Aboriginal Peoples 2007). The Assembly of First Nations reports that 20% of Canada's 600 First Nations' communities live with contaminated water posing severe health risks (AFN 2007). Currently, Health Canada data indicates there are 93 standing boil water advisories in First Nation communities across the country, some of which are long-standing (Health Canada 2009).

First Nations also have a myriad of legal entitlements/ rights to govern and protect water. Under the treaties between Canada and First Nations, the right to water was never relinquished to the Crown. Aboriginal title, aboriginal rights and treaty rights are protected under s.35 of the Constitution Act of 1982. It reads, "The existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed". Aboriginal title refers to the territorial lands of aboriginal people far beyond those sectioned off as reserves. Title also includes right to resources on those lands. Most importantly, title rights recognize indigenous right to be included in all decisions that affect their traditional land and resources (including water). Aboriginal rights are those rights that are distinct to aboriginal people in maintaining their traditional way of life. Water is vital in the actualization of many of these rights such as fishing, hunting and spiritual practices. Treaty rights and modern land claims also involve waters. Control and co-management over water resources were elements of most historic treaties.

As noted by Justice O'Connor (2002) in the Walkerton Inquiry Report, provincial governments like Ontario also have responsibilities related to drinking water. Involvement of First Nations in the watershed planning process is one recommendation he made. Clearly a provincial regime has many jurisdictional challenges in the First Nation's context but First Nations can engage with provincial water policy efforts on a voluntary basis. However, their involvement is in conjunction with the aforementioned rights.

Current Status

Under the *Clean Water Act* (CWA) 2006, the province of Ontario has begun the task of implementing the source water protection regime as one component of the multi-barrier approach for the protection of drinking water. This includes the creation of 19 Source Protection Committees (SPC's) for many watersheds in mostly the southern part of the province.

Regulation 288/07 of the *Clean Water Act*, stipulates First Nation membership in the SPCs. First Nations in the watershed may have from 1-3 seats on the committee based on population and the number of different Nations in the watershed. Ontario Regulation 287/07 and the proposed Assessment Report regulation requires that the Chiefs of First Nations communities with reserves in the watersheds be notified of their opportunity to review and comment on the Terms of Reference and the Assessment Report.

As few as 28 of the 133 First Nations in Ontario have reserve land which falls within a source protection region. This does not include land in which First Nations' have outstanding land claims. Only 12 of the 19 SPCs have seats for First Nation's representatives. Based on the current coverage of SPCs, there are 23 First Nation's seats in total with 12 currently filled.

In terms of implementation, all SPCs have generated their Terms of Reference (TOR) and are beginning to work on their source protection plans with 2012 as the goal for executing the source protection plans. The majority of TORs make little mention of First Nation involvement outside of having seats on the SPCs. Only one makes mention of the possible value and integration of ATK in the source protection plan.

Key Considerations

In a research study conducted by the author with funding from the Walter and Duncan Gordon Foundation, those involved in the source protection process from First Nations communities were interviewed about barriers to participation in this process.

Based on the research, the most glaring barriers described by members of First Nations communities include resources and capacity, municipal dominance of the SPCs, the negative impact of a "stakeholder" view of First Nations engagement, the geographical scope of the policy and the lack of appreciation and integration of ATK.

Options

The overall sentiments expressed by participants in the study were that the current source protection regime in Ontario fails to meet the needs of First Nations communities. Many interviewees suggested that simply having seats on the committees without having the capacity to effectively participate was a symbol of mere tokenism. Many did applaud the idea behind source protection, but did not envision themselves, or their communities playing a large enough role.

Conclusion / Recommendations

In order to address some of these barriers to participation and engagement some solutions are obvious and others more challenging. First, acknowledgement by the provincial government that First Nations are not stakeholders and they must play a more nuanced role than simply SPC members. Second, it was recommended that funding directly to First Nations is required so First Nations can do water quality and source protection reports for their own territories. Given that SPCs are beginning the technical stage of taking inventories of the threats to drinking water sources this is a very timely recommendation. Related to this, the federal government must be engaged in the process, particularly related to funding. Finally, the source protection regime needs to be expanded to include northern communities, as this is where many First Nation communities are located.