



A New Paradigm for Social License as a Path to Marine Sustainability

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Traditional marine governance can create inferior results. Management decisions customarily reflect fluctuating political priorities and formidable special-interest influence. Governments face distrust and conflicts of interest. Industries face fluctuating or confusing rules. Communities feel disenfranchised to affect change. The marine environment exhibits the impacts. While perceived harm to diverse values and priorities, disputed facts and legal questions create conflict, informed and empowered public engagement prepares governments to forge socially legitimate and environmentally acceptable decisions. Integrity, transparency and inclusiveness matter. This article examines positive contributions engaged communities can make to marine governance and relates it to social license. Social license suffers critique as vague and manufactured. Here its traditional understanding as extra-legal approval that communities give to resource choices is broadened to include a legally sanctioned power to deliberate—social license to engage. The starting hypothesis rests in the legal tradition designating oceans as public assets for which governments hold fiduciary duties of sustainable management benefiting current and future generations. The public trust doctrine houses this legal custom. A procedural due process right for engaged communities should stem from this public-asset classification and afford marine stakeholders standing to ensure management policy accords with doctrinal principles. The (free), prior, informed consent participation standard provides best practice for engaged decision-making. Building on theories from law, social, and political science, we suggest robust public deliberation provides marine use actors methods to earn and sustain their social license to operate, while governmental legitimacy is bolstered by assuring public engagement opportunities are available and protected with outcomes utilized.

Keywords: marine governance, free, prior, and informed consent, public participation, public trust doctrine, social license to engage, stakeholder decision making, stakeholder deliberation, social license to operate

INTRODUCTION

Unsustainable use of marine resources and environmental degradation behooves governments responsible for their marine waters to devise more effective means of governance. The extra-legal concept of social license is one such means but requires a firmer footing to enhance its credibility and usefulness. Legalized rights of stakeholder engagement in decision-making for marine space

uses, via stakeholders' social license to engage (SLE), can provide a sound way for marine project proponents *and* the governments that oversee them to earn and maintain their social license to operate (SLO). This hypothesis grounds the primary author's Ph.D. thesis work in process – *Legally Sanctioned Engagement in Marine Governance: A New Paradigm for Social License as a Path to Ocean Sustainability*.

We propose that the marine space's distinctive character as a public natural asset generates a public right to engage in making decisions that accord with fiduciary principles of the public trust doctrine applicable to shared environmental assets. Our work contributes to marine governance research by synergistically linking three separate concepts—the legal public trust doctrine, the prior informed consent (PIC) participation model and the social license concept. Utilizing this theoretical linkage, it proposes creation of an implementation framework for best practice marine use decision-making that utilizes a fiduciary model of legal standards customizable to various marine applications and governance regimes.

Challenges to Optimal Marine Governance

Sustainably governing our world's marine space faces significant challenges. Not only does the interconnected marine estate lie in a multitude of international governmental jurisdictions (United Nations Convention on the Law of the Sea, 1982) other exigent factors include those dealing with actors, scale and knowledge (Campbell et al., 2016). Below, we overview four themes challenging effective marine governance and the decision-making behind it.

Fluctuating Political Priorities

Marine policy priorities that vary with political party or controlling regimes can lead to one step forward-two step back governance, lacking consistently high standards of sustainable use and protection (Wood, 2014; Bakaki et al., 2019).

Formidable Industry and Public Interest Influence

Diverse values and priorities held by different stakeholder networks (On Common Ground Consultants Inc., and Robert Boutillier and Associates, 2014) can create tension and conflict in marine governance. Economic development priorities can clash with marine conservation, esthetic, or recreational goals. Interest-aligned stakeholders can exert significant pressure on government actors to sway decision-making outcomes (Campbell et al., 2016).

Conflicting Government Roles and Responsibilities

Faced with external policy pressure and intra-governmental disagreements fed by the scope and often divergent nature of public service roles and responsibilities, government actors can find themselves at odds with making sustainable marine decisions. For example, governments' political responsibility to facilitate a robust and stable yet equitable economy can conflict with its fiduciary responsibility to protect public natural resources, which are often the site or source of economic development activities (Callahan, 2007; Wood, 2014).

Vague Environmental Principles and Bureaucratic Rules

Finally, marine policy principles, enabling statutes, and administrative rules can be vaguely written, leaving final use decisions and law enforcement subject to the variable discretionary interpretation of government administrators. These can also fluctuate based on the bias of political elites and their responsiveness to lobbying by vested economic interests (Wood, 2014; Scotford, 2017). In addition, areas of sovereign marine space usually fall under different bureaucratic regimes. For example, in federally constituted countries such as Australia, Canada, and the United States, the Exclusive Economic Zone customarily falls under national jurisdiction, while inshore areas of territorial seas can be governed under state/provincial legislation (United Nations Convention on the Law of the Sea, 1982).

Benefits and Costs of Public Stakeholder Engagement

To govern effectively when faced with competing priorities and values, legislators and administrators “need mechanisms with which to view and understand the relevant public values at play for a given policy issue or controversy. (and) frameworks that allow them to more effectively and consciously consider which public values to uphold and which tools and methods are most likely to do so” (Nabatchi, 2018, p. 6). “(N)o single institution can be expected to hold all of the expertise and knowledge needed for good decision-making.” (Richardson and Razzaque, 2006, p. 170). A framework of best-practice marine project review and management procedures containing robust public engagement should provide those entrusted with governing highly valued natural resources, such as the marine space, with a much-needed mechanism to balance conflicting views that often frustrate a clear direction.

Understandably, it can cost additional time and money to implement the integral participatory processes, including those related to early project planning and development (Richardson and Razzaque, 2006). However, a plethora of benefits support increasing citizen participation in governance, including public education, facilitation of transparency, accountability, and legitimacy, and reduction of unproductive conflict (Callahan, 2007; Reed, 2008). These benefits, along with improved corporate relations, goodwill and governmental trust that can develop from inclusive and transparent decision-making, have flow-on rewards.

In times of widespread mistrust and lack of confidence in government leaders (Wike et al., 2019),¹ the integrity of the process for governing environmental resources especially matters (van Putten et al., 2018). As beneficiaries of public natural resources, marine stakeholders have a reasonable interest being

¹For example, in Pew Research's Spring 2018 Global Attitudes Survey of 27 countries, 60% of respondents felt that, “No matter who wins an election, things do not change very much” describes their country well and 54% felt that, “Most politicians are corrupt” describes their country well (Wike et al., 2019).

involved in decision-making regarding activities affecting that resource (Callahan, 2007).

In Arnstein's renowned "ladder" representing levels of citizen participation, credible consultative processes involve partnerships that include discussion, deliberation, and negotiated outcomes (Arnstein, 1969; International Association for Public Participation, 2017). It is not one-way reporting to keep others informed of pre-determined plans and outcomes (Ross et al., 2002; Callahan, 2007). Robust, legally sanctioned stakeholder engagement should reduce counter-productive conflict about marine governance, support diverse, socially licensed stakeholder relationships, increase likelihood of environmentally sustainable marine management (Nanz and Steffek, 2006) and legitimize decisions made. Likewise, transparent decision-making should improve management quality (Richardson and Razaque, 2006; Callahan, 2007; Nordquist et al., 2018). Effective marine management is ultimately measured against ecological sustainability,² which is in civil society's highest and best long-term interest (United States Supreme Court, 1892). In the short-term, however, its importance can be diluted by competing policy considerations such as economic development and political expediencies.

We argue that citizen stakeholders are entitled to fair, consistent and accountable treatment with more than merely a voice in legislative decisions about the marine estate. Marine stakeholders have right to a *say* in those decisions to ensure they utilize local knowledge and conform to standards of care embodied in governments' fiduciary role. This role carries legal obligations of honesty, full disclosure and acting in public beneficiaries' best interest as stewards of the natural asset. We further argue that these rights are embodied in a legal theory of public trust, which courts of law can uphold. Discussion of these propositions follows.

DISCUSSION

An Expanded Paradigm for Social License

We envision social license to encompass a framework of marine management standards and public participatory consent rights. We also advocate its use as the ultimate barometer of governmental decision-making in public natural resource governance.

"Social license to operate" is traditionally understood as the extra-legal "stamp of approval" that a substantial majority of community stakeholders give to proponents and operators of commercial endeavors (Parsons et al., 2014;

Moffat et al., 2015). One issue with social license concerns what portion of a stakeholder community can sanction a project's approval (Reed et al., 2009). Without a tallied vote, a quantifiable majority is uncertain. However, attaining acceptance commonly requires factors of legitimacy, credibility and trust being present in relations between the community and a business (On Common Ground Consultants Inc., and Robert Boutillier and Associates, 2014; van Putten et al., 2018). The presence of SLO can be recognized on a continuum from absence of significant conflict over operations to community enrollment in the vision and mission of a company or industry³.

The SLO concept also has geographically diverse usage and endorsement. Its intangible nature and the practical questions that begets create a lack of universal understanding of its meaning and differences in assumptions relative to its application. This includes critique of corporate use as a method to manage development opposition or downplay conflict (Hall et al., 2015; Moffat et al., 2015). We find shortcomings in the concept for additional reasons relating to lack of protocols and processes for its expression and the limited purpose of its traditional meaning. For example, the best criteria and process for SLO attainment in discrete sectors are not well substantiated in current practice. Further, SLO is often used only in relation to community views of private sector conduct (van Putten et al., 2018).

A Proposed New Social License to Engage

Social license should encompass not only more rigorous criteria for its attainment, but also be applied more broadly.

While the literature on SLO suggests a collection of elements believed to necessitate its attainment and, to a lesser extent, its retention, a dearth of practical guidance exists on a process for acquiring and linking those elements to sustainable marine management. Our research aims to help fill this gap by examination of empirical evidence of marine stakeholder views on marine project approval processes and sustainable marine governance. Utilizing case studies of salmon aquaculture industries in Tasmania, Australia, and Nova Scotia, Canada, in addition to drilling offshore Nova Scotia, we aim to propose a customizable implementation framework for participatory marine management. Results of this research, its implications and applications will appear in future publications and presentations associated with the Ph.D. thesis.

In the interim, we posit that the premise behind SLO is best understood and utilized through study of Greek Sophist philosophy reflecting empowerment of the governed (Keeley, 1995). Viewed through this lens, the concept is reframed to encompass civil society's power to deliberate and negotiate the rules governing them and their domain—what we term a SLE. This imbues social license with a *multifaceted* grant of action. Social license should not only represent an *operational* permit for industry predominantly free of non-productive conflict. Rather,

²Ecological sustainability as used herein draws from Richardson and Razaque (2006, p. 166) "*Sustainability depends largely on the way economic, social and environmental considerations have been integrated in decision-making.*"; Goldsmith et al. (1972). ("*. . . a society . . . depend[ing] not on expansion but on stability.*"); World Commission on Environment and Development (1987, p. 43), in which resource exploitation and investment direction (among others) are "*. . . in harmony and enhance both current and future potential to meet human needs and aspirations.*").

³Ibid, at *What Is the Social License?*

the essence of social license should also represent a *participation* permit for civil society that is legally sanctioned and protected.

Further, a framework for marine governance is best developed from criteria necessary for creation of value-influenced relationships like social license. This research finds these criteria embodied in the concept of PIC as a best-practice standard for engaged participation (World Commission on Environment and Development, 1987). Traditionally known as free, prior informed consent, PIC is most often recognized with indigenous peoples in relation to their land, community space and natural resources (United Nations, 2007). In our research, the practice provides a benchmark for high-level engagement of public stakeholder networks in decision-making about marine space uses. The intrinsic nature of PIC is as a qualitative process by which a project proponent strives to achieve agreement to proceed from stakeholder groups potentially affected in some material way. The group members and application method of PIC depends on the specific context of its use because it is not a “stand-alone” right. Rather, the freedom to engage in deliberative decision-making derives from rights associated with underlying things that a marine activity might potentially affect (United Nations REDD Programme, 2013). For example, the right to participate in marine decision-making arguably derives from society’s substantive right of access to and enjoyment of a healthy, sustainable marine space held by the state as a public trust asset.

Elements generally recognized as essential for establishing PIC are:

1. A voluntary participation process with **Freely-given** project acceptance (Food and Agriculture Organization of the United Nations, 2016);
2. Stakeholder consent given **Prior** to official project approval or grant of legal license and before financing (Hanna and Vanclay, 2013);
3. Stakeholders fully-**Informed** about project details, their rights, implications, risks and worst-case scenarios (Goodland, 2004);
4. **Consent**. Descriptions include:
 - 4.1 a collective decision made in phases by rights-holders, “reached through their customary decision-making processes” (United Nations REDD Programme, 2013);
 - 4.2 acceptance of at least 51% of potentially affected parties (Goodland, 2004) (but ordinarily a substantially larger majority);
 - 4.3 a process with participation and consultation being central (Barelli, 2012);
 - 4.4 a voluntary agreement designed to make a project acceptable (Goodland, 2004).

While application of PIC in diverse marine stakeholder communities can instigate discontent, an inclusive deliberative process should best assure socially licensed decisions. At any rate, management of marine resources by government agencies with only token involvement of impacted and interested stakeholders is already a common source of marine community conflict.

It is through legal legitimization of a participatory consent protocol, like PIC, that extra-legal, socially licensed, mutually endorsed relationships between a network of diverse marine use stakeholders (interested citizens, project proponents, and government officials) has potential to exist.

The Public Trust Doctrine: A Normative Legal Foundation for Social Licenses to Operate and Engage

If project proponents’ SLO and public stakeholders’ SLE include a right of stakeholder consent in public natural resource management decisions, a legal basis is needed for ensuring both management practice standards and a right for citizens to participate in deliberation about them.

The legal public trust doctrine fundamentally stands for the premise that certain natural resources are part of an inalienable public trust. As such, government authorities have a fiduciary role to sustainably manage and guard those resources against harm. Further, every citizen is considered a beneficiary of the trust and may invoke its terms to hold government trustees accountable, with potential judicial protection against violation of their related rights (Sand, 2007). The doctrine’s historic focus in the United States, the jurisdiction where the doctrine has received greatest legal affirmation, is in regard to navigable waters (Sax, 1970; Thompson, 2006).

We look to the doctrine’s ability to serve as the legal basis for required marine standards of care necessary to attain SLO. The SLO can benefit from rigorous linkage to these fiduciary duty elements of the public trust as the criteria under a SLO attainment protocol. We also tap the doctrine as the basis for stakeholder rights to engage in marine decision-making under a model of PIC.

In legal jurisdictions firmly recognizing the doctrine, governments’ role is that of a trustee in a fiduciary capacity to citizen beneficiaries⁴. The doctrine is commonly understood to include the duties depicted in **Table 1**, which also may be legislatively enacted or judicially defined (Archer et al., 1994; Wood, 2014). Duties having the nature of overarching policy should be embedded in legislative preambles that direct the laws’ purpose and intent. Duties having discreet methods for operationalization should be contained in appropriate sections of the substantive legislation with sufficient detail as to adequately guide administrative rule-making that supports their mandate.

Our research considers the doctrine’s normative potential for governance of all environmental resources in the marine estate. Because the public trust duties of care should apply equally whether the waters and resources are under local, national, or international management and control, it follows that the right for public stakeholder decision-making participation should also apply. In four large-scale trials, Weeks concluded the possibility exists for large, public deliberation processes that enable governments to take effective action on difficult issues

⁴To varying degrees, the Doctrine or its core principles exist as a component of environmental law in several countries including Australia, Brazil, Canada, Ecuador, Eritrea, India, Kenya, Nepal, Nigeria, Pakistan, Philippines, South Africa, Sri Lanka, Tanzania, Uganda, and the United States. See Hare and Blossey (2014).

TABLE 1 | Public Trust Governmental Duties of Care.

Trustee's substantive duties	Trustee's procedural duties
Take, keep control of public assets; use moderation in privatization	Undivided loyalty to public beneficiaries versus private interests
Diligently preserve public trust assets; guard future interests	Furnish complete, accurate information to public beneficiaries
Vigorously enforce claims of harm against public assets	Be impartial among citizen beneficiaries
Keep public trust assets beneficial; maximize value	Adequately supervise assets and use cautionary management
Restore assets when damaged	Use good faith and skill in asset management

(Weeks, 2000). Further, an international example of participatory decision making in action is the Commission for Environmental Cooperation (CEC) concerning North American environmental issues. The CEC also enables empowered participation in environmental law compliance via public submissions of enforcement concerns (Commission for Environmental Cooperation, 2020). Finally, direct democracy via ballot issue voting remains the purest form of participatory decision making in appropriate situations.

The Independent World Commission on Oceans has declared “[a] more informed and active civil society with significantly enlarged opportunities to participate in ocean affairs is a precondition for a more responsive and democratic system of ocean governance. It is in the critically important area of ocean governance that competing issues and divergent interests and opinions must be accommodated and reconciled.” (Independent World Commission on the Oceans, 1998).

We propose civil society’s permit for deliberative engagement on marine use affairs, encompassed in a SLE and nested under a standard of PIC, should be legally sanctioned and judicially protected through legislative or common law revitalization of the public trust doctrine. The doctrine can extend legal standing rights to citizens to protect their beneficiary interests in sustainable ocean resource management when government actors abuse or neglect duty of care terms under the public trust (Turnipseed et al., 2009).

CONCLUSION

“Humanity’s relationship to the sea is not just a legal property relationship, but a social relationship of participation.” (Van Dyke et al., 1993).

The foundational rationale of our research is that diverse stakeholders have a value and/or priority-driven interest in reaching a mutually agreeable position on marine resource uses, especially when their values and priorities diverge. SLO is the carrot that makes a participatory consent process worth pursuing. And a participatory consent process, akin to PIC, presumptively available to civic marine stakeholders under a public trust legal theory of SLE, is a means for possible creation of that social acceptance. While unanimous agreement on decisions is unlikely, our proposals in this article widen the participation sphere for input, thus improving chances of developing a SLO. However, if non-governmental marine stakeholders are not empowered to make *final* decisions, the full community of consultative and beneficial parties should receive a report of official conclusions

reached, including their rationale, along with a process by which stakeholders can petition the governmental authority to reconsider its decision on specified grounds.

When separated, PIC and social license miss not only the nature of their relationship, but also their ability to work symbiotically for creation of win³ outcomes (for project proponents, governments, and concerned stakeholders) in marine space activities. As beneficiaries of public marine assets, civic stakeholders hold power through their SLE in decision-making to shape sustainable management of the public marine trust. These voices, and the decisions made by way of them, represent the real relationship between PIC and social license.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

AUTHOR CONTRIBUTIONS

LU-K conceived of the presented idea and developed the theory. All authors discussed the results and contributed to the final manuscript. All authors contributed to the article and approved the submitted version.

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