Reference Bulletin

Preliminary Screenings Conducted by Governments and First Nations as Developers

Subsection 124(2) of the *Mackenzie Valley Resource Management Act*

January 2005

Mackenzie Valley Environmental Impact Review Board

Mackenzie Valley
Environmental Impact
Review Board

REFERENCE BULLETIN ON SUBSECTION 124(2)

PRELIMINARY SCREENINGS CONDUCTED BY GOVERNMENT AND FIRST NATIONS AS DEVELOPERS

INTRODUCTION:

The *Mackenzie Valley Resource Management Act*[1] (MVRMA) establishes a unique environmental impact assessment (EIA) regime based on the requirements of the Gwich'in and Sahtu Comprehensive Land Claim Agreements.[2] This regime calls for a preliminary screening to be conducted when a proposed development requires one of the licences permits or other authorizations set out in the *Preliminary Screening Requirement Regulations*[3] (PSRR) and in certain other circumstances.

Thus, most preliminary screenings are "application driven" and, subject to the Guidelines[4] issued by the Mackenzie Valley Environmental Impact Review Board (Review Board), are undertaken by the regulatory authority responsible for issuing the licence or permit or authorization, most often the Mackenzie Valley Land and Water Board. The EIA framework set out in the Gwich'in and Sahtu land claims is however, broader than the requirements found in subsection 124(1) of the MVRMA.

In fact, section 24.3.1 of the Gwich'in Agreement[5] specifies that

> "**All development proposals in the Mackenzie Valley .... shall be subject to the process of environmental impact assessment**" (emphasis added).

This requirement for EIA goes beyond the scope of the application driven process set out in subsection 124(1) and the PSRR. The term "development proposal" is very broadly defined in the Gwich'in and Sahtu land claims and includes all proposed

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[1] S.C. 1998, c.25.
[2] The Tli Cho Agreement and Bill C-14 which amends the MRMA for conformity with the Tli Cho land claim do not affect the operation of section 124(2) of the MVRMA described in this Reference Bulletin except that the Tli Cho Government may also be required to carry out a preliminary screening in the circumstances described in ss.124(2).
[3] P.C. 1998 – 2264, December 16, 1998.
[4] The Review Board has made guidelines pursuant to section 120 of the MVRMA. See the *Environmental Impact Assessment Guidelines,* March 2004, available on the Review Board's web site at www.mveirb.nt.ca/.
[5] Identical wording is found in s.25.3.1 of the Sahtu Agreement and similar language is found in s.22.2.1 of the Tli Cho Agreement.

development activity outside local government boundaries as well as some activities inside those boundaries.[6]

The result is that some developments which may not require a preliminary screening because they do not require a licence, permit or other authorization and do not trigger the PSRR may nonetheless be subject to preliminary screening. Subsection 124(2) of the MVRMA describes the developments which do not attract screening under the PSRR but which must still undergo preliminary screening because of land claim requirements.

This Reference Bulletin addresses the legal and operational considerations relevant to the application of ss.124 (2) of the MVRMA.

THE STATUTORY FRAMEWORK FOR APPLICATION OF SUBSECTION 124(2):

The authorities relevant to the interpretation of subsection 124(2) of the MVRMA are found in subsection 124(2) itself, defined in the Act or set out elsewhere in part 5 of the MVRMA.

We reproduce the text of subsections 124(1) and (2) of the MVRMA below because the interpretation of subsection 124(2) also requires reference to subsection (1):

> **124.** (1) Where, pursuant to any federal or territorial law specified in the regulations made under paragraph 143(1)(*b*), an application is made to a regulatory authority or designated regulatory agency for a licence, permit or other authorization required for the carrying out of a development, the authority or agency shall notify the Review Board in writing of the application and conduct a preliminary screening of the proposal for the development, unless the development is exempted from preliminary screening because
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> > (*a*) its impact on the environment is declared to be insignificant by regulations made under paragraph 143(1)(*c*); or
> > (*b*) an examination of the proposal is declared to be inappropriate for reasons of national security by those regulations.
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> (2) Where a development that does not require a licence, permit or other authorization is proposed to be carried out by **a department or agency of the federal or territorial government or by the Gwich'in or Sahtu First Nation,** the department or agency or the first nation shall, after notifying the Review Board in writing of the proposal for the development, conduct a preliminary screening of the proposal, unless
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> > (*a*) in its opinion, the impact of the development on the environment will be manifestly insignificant; or
> > (*b*) the development is exempted from preliminary screening for a reason referred to in paragraph (1)(*a*) or (*b*).
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> **(emphasis added)**

[6] Only those activities likely to have a significant impact on air, water or renewable resources are included within local government boundaries. The test in the MVRMA for a referral to environmental assessment from a development inside local government boundaries is different. See section 125, especially 125(2) of the MVRMA.

Reference to the bolded portions of subsection 124(2) above indicates that it only applies to departments or agencies of the federal or territorial governments or to the Gwich'in and Sahtu First Nations themselves. No other developers are bound by this subsection.

There are several definitions from the MVRMA relevant to the interpretation of ss.124 (2) including:

> **s. 2.** "Mackenzie Valley" means that part of the Northwest Territories bounded on the south by the 60th parallel of latitude, on the west by the Yukon Territory, on the north by the Inuvialuit Settlement Region, as defined in the Agreement given effect by the *Western Arctic (Inuvialuit) Claims Settlement Act*, and on the east by the Nunavut Settlement Area, as defined in the *Nunavut Land Claims Agreement Act*, but does not include Wood Buffalo National Park of Canada.
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> **s. 111.** "development" means any undertaking, or any part of an undertaking, that is carried out on land or water and, except where the context otherwise indicates, wholly within the Mackenzie Valley, and includes measures carried out by a department or agency of government leading to the establishment of a park subject to the *Canada National Parks Act* and an acquisition of lands pursuant to the *Historic Sites and Monuments Act.*

So review of these authorities and subsection 124(2) indicates those organizations to which this preliminary screening obligation may apply, the geographic area of its application, and the kinds of activities which constitute developments. These authorities provide essential scope for the application of subsection 124(2).

The terms "licences, permits or other authorizations" are used in both subsections (1) and (2) of section 124 of the MVRMA in a slightly different context and this could raise an interpretation question. This phrase is clearly a reference to those instruments listed in the PSRR. Because of the reference to "the regulations made under paragraph 143(1)(b)" it is clear that subsection 124(1) is only referring to the "licences permits or other authorizations" set out in the PSRR.

The terms "licence, permit or other authorization" is used again in subsection 124(2) but without repetition of the words "regulations made under paragraph 143(b)" of the MVRMA. The question could thus be asked if the subsection (2) reference is to the same list of authorities or if it could include some other licences or permits which are not listed in the PSRR? In the Review Board's view, section 124 should be read to be internally consistent. So the reference to "licences, permits or other authorizations" in subsection (2) should also be interpreted to be a reference to those instruments listed PSRR.

The result is that when a federal or territorial government department or agency or a First Nation proposes a development that requires a licence, permit or other authorization found in the PSRR list, the preliminary screening will be done by the appropriate regulatory authority. If, however, the government department, agency, or First Nation proposes a development that either does not require any kind of licence, permit or authorization or simply requires one not listed in the PSRR, that organization must still conduct a preliminary screening because of subsection 124(2) of the MVRMA.

This interpretation of subsection 124(2) is also consistent with the intent of the Gwich'in and Sahtu land claims.[7]

It is also important to point out that paragraphs 124(2) (a) and (b) include exemptions from the requirement for government and First Nations to conduct a preliminary screening under that subsection.

Paragraph (a) gives the government department or agency the subjective discretion to proceed without a preliminary screening when in its opinion the impact of the development on the environment will be "manifestly insignificant". This last phrase means clearly or obviously insignificant.

Paragraph (b) exempts from screening under subsection 124(2) those kinds of developments whose impacts have been declared to be insignificant by the regulations made under paragraph 143(1)(c) of the MVRMA. These regulations are called the *Exemption List Regulations.*[8] The other circumstances in which a preliminary screening would not have to be carried out under paragraph 124(2)(b) would be when reasons of national security make it inappropriate to do so.

In cases where a government department or agency or a First Nation avails itself of an exemption from the requirement to conduct a subsection 124(2) preliminary screening because of a decision that the impacts are either manifestly insignificant or not appropriate because of national security concerns, the decision maker should publish written reasons for this decision pursuant to section 121 of the MVRMA.

OPERATIONALIZING THE OBLIGATIONS SET OUT IN SUBSECTION 124(2):

When must government or First Nations conduct a preliminary screening in response to subsection 124(2) of the MVRMA? The words in section 114 provide that answer:

> **114.** The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments, and
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> .....
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> (*b*) to ensure that the impact on the environment of proposed developments receives careful consideration **before actions are taken in connection with them**; **(emphasis added)**

Once a subsection 124(2) preliminary screening is required, the MVRMA does not impose any new or different requirements on the process. In other words, a subsection 124(2) preliminary screening is conducted in the same way as other screenings.

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[7] See the land claim sections cited in footnote 5 above.
[8] P.C. 1998 – 2265, December 16th, 1998.

The preliminary screener must make its decision based on the test set out in section 125 of the MVRMA and it must notify the Review Board of its decision. Although subsection 124(1) only applies to preliminary screenings triggered by a requirement for a licence permit or other authorization listed in the PSRR, we suggest that it is also appropriate for a government department or agency or for a First Nation to notify the Review Board in writing that it is conducting a subsection 124(2) preliminary screening. Once a subsection 124(2) preliminary screening is complete, the decision-maker is bound by section 121 to issue and make public its reasons for decision.

A detailed outline for the conduct of a preliminary screening has been set out in Section 2 the Review Board's *Environmental Impact Assessment Guidelines March 2004* and will not be repeated here.

CONCLUSION:

The requirement to apply the EIA process set out in the MVRMA to all developments in the Mackenzie Valley is derived from land claims and is mandatory. Subsection 124(2) of the Act sets out that requirement in greater detail. It only applies to the operations of government departments, agencies and First Nations. There are exemptions to the requirement set out in subsection 124(2) and they are found in paragraphs (a) and (b) of the subsection.

Once a developer to which subsection 124(2) applies initiates a preliminary screening, it should notify the Review Board. Once initiated, a subsection 124(2) preliminary screening is subject to the same rules as any other screening. A decision on a subsection 124(2) preliminary screening must be reported to the Review Board and written reasons for decision must be issued and made public.

The requirement to conduct preliminary screenings under subsection 124(2) extends the application of the MVRMA EIA process in order to ensure that the commitments made in land claims for the protection of the environment of the Mackenzie Valley are honoured.

Questions relevant to ss.124(2) preliminary screening decisions:

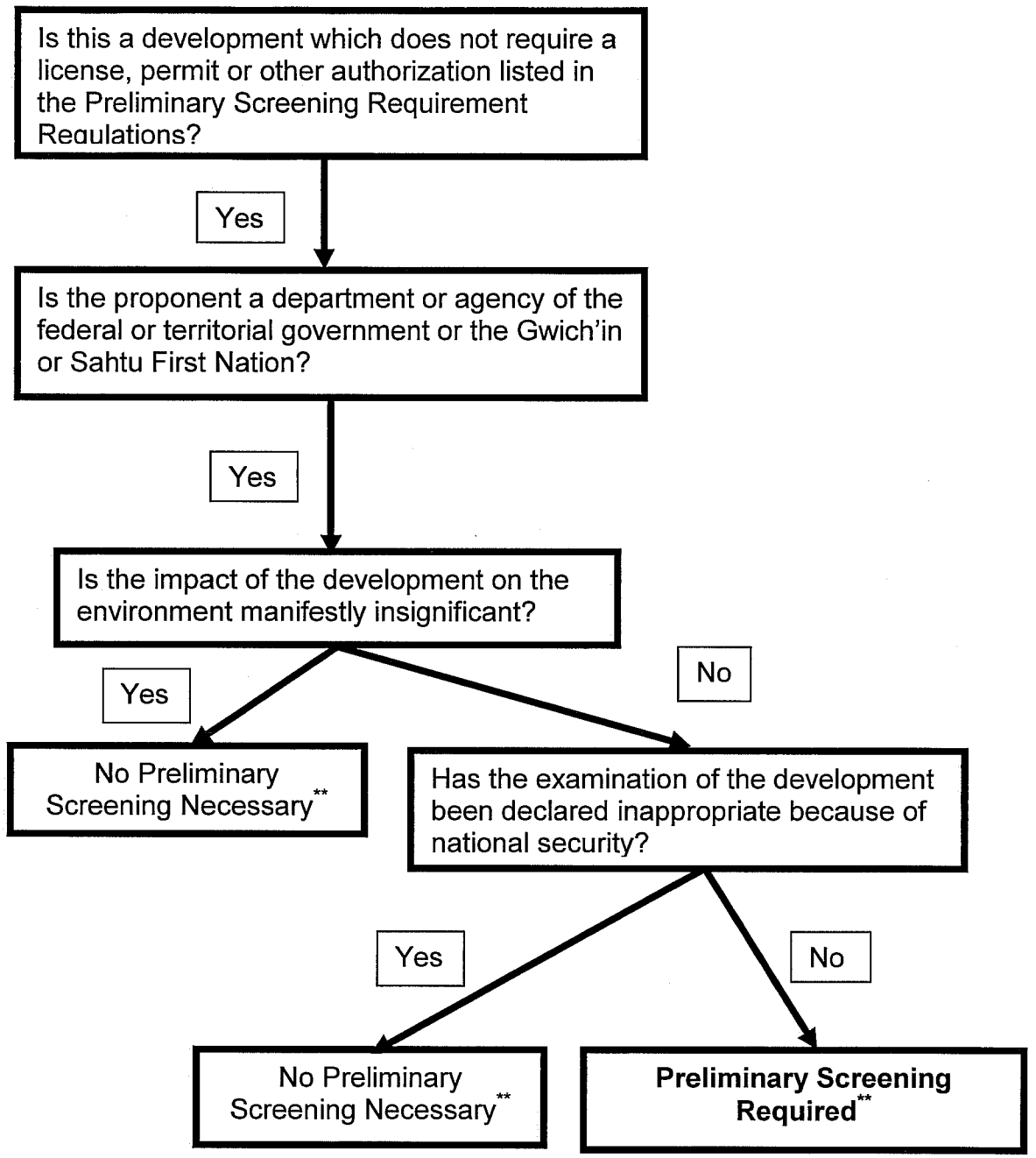
1. Is this a development which does not require a licence, permit or other authorization listed in the Preliminary Screening Requirements Regulations?

2. Is the proponent a department or agency of the federal or territorial government or the Gwich'in or Sahtu First Nation?

3. Is the impact of the development on the environment manifestly insignificant?

4. Has the examination of the development been declared inappropriate because of national security?

Subsection 124(2) MVRMA decision making process



** **Note: The Preliminary Screener must notify the Review Board of its decision and must make public its reasons for decision.**

Approved by the Mackenzie Valley Environmental Impact Review Board by Motion # 041214-09 on the 14th day of December 2004.

Certified by: T. Burlingame

Todd Burlingame, Chairperson

Jun 06 2005

Date