




Reference Bulletin



Procedures for Post Report of EA or EIR Consultation by the Federal Minister and the Responsible Ministers or a Designated Regulatory Agency

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- Subsections 130(1)(b)(ii), 131(1)(b), 135(1)(b), and 137(1)(b) of the *Mackenzie Valley Resource Management Act*

January 2005



Mackenzie Valley
Environmental Impact
Review Board



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REFERENCE BULLETIN ON SUBSECTIONS 130(1)(b)(ii), 131(1)(b), 135(1)(b) and 137(1)(b) OF THE MVRMA

PROCEDURES FOR POST REPORT OF EA OR EIR CONSULTATION BY THE FEDERAL MINISTER AND THE RESPONSIBLE MINISTERS OR A DESIGNATED REGULATORY AGENCY

INTRODUCTION:

This reference bulletin is intended to describe and clarify the procedures which will be followed by the Mackenzie Valley Environmental Impact Review Board (Review Board) in responding to a request from the federal Minister and responsible ministers or the Designated Regulatory Agency (DRA)¹ for consultation² on the recommendations made by the Review Board in a report of Environmental Assessment (EA) or Environmental Impact Review (EIR).

The *Mackenzie Valley Resource Management Act* (MVRMA) provides for a unique form of consultation between final decision makers and the Review Board after the completion of either an EA or an EIR. This consultation is intended to assist these decision makers to determine how to respond to Review Board recommendations made in an EA or an EIR.

The MVRMA does not provide specific guidance about appropriate procedures for the conduct of such consultation exercises (called “consultations” below).

¹ The “federal Minister” is the Minister of Indian Affairs and Northern Development. The term “responsible minister” is defined in section 111 of the MVRMA. The Schedule to the MVRMA set out the list of Designated Regulatory Agencies. The only agency listed at this time is the National Energy Board.

² This “consultation” process is an aspect of the decision-making process set out in the MVRMA and has no relationship to consultation requirements which may arise when proposed development activities affect the exercise of aboriginal or treaty rights.

THE STATUTORY FRAMEWORK:

When the Review Board completes its work on an EA or an EIR, it is required by sections 128(2) or 134(2) of the MVRMA, as the case may be, to make a report of Environmental Assessment or of Environmental Impact Review. Section 121 of the MVRMA requires that the Review Board include its reasons for decision in these reports. Once complete, such a report is conveyed to the federal Minister or the DRA as required by the circumstances.

These decision makers review the recommendations in the Review Board report. They have a number of options for their response to the report set out in sections 130 and 131 or 135 and 137 of the MVRMA, ranging from acceptance to rejection of the recommendations made by the Review Board.

One of the options included in the MVRMA is for the federal Minister or the DRA to “consult” with the Review Board with a view to possible modification of the Review Board’s recommendations.

Consultations are therefore possible after either an EA or an EIR. They are initiated by request of the federal Minister and responsible ministers or of the DRA.

The statutory provisions from part 5 of the MVRMA relevant to the consultation process are set out in Appendix 1.

These consultations are not intended to make substantial changes to Review Board recommendations. As indicated in the MVRMA, the consultation process is only intended to modify recommendations. If substantial change is required to a recommendation, the federal Minister or the DRA can refer the recommendation back to the Review Board for reconsideration³ or if the recommendation is unacceptable, it can be rejected.

REVIEW BOARD EXPERIENCE WITH CONSULTATIONS:

Since the MVRMA came into force in 1998, the Review Board has participated in consultations on Environmental Assessment Reports (EAR) on several occasions. Generally, the changes to Review Board recommendations resulting from consultations have addressed details associated with the implementation of the recommendations. To date, none of the consultations conducted under the MVRMA have involved the introduction of new information or of matters of public concern not before the Review Board in the EA proceeding.

³ See for example subparagraph 130(1)(b)(i), and paragraphs 131(1)(a), 135(1)(a) and 137(1)(a) of the MVRMA.

In order to conduct a consultation, the representatives of the Review Board and the federal and responsible Ministers or the DRA have generally exchanged correspondence and held a meeting.

Given that the Act provides little guidance on the actual conduct of these exercises, the consultation process has varied from case to case depending on the developer, the federal and responsible Ministers involved, whether the DRA was involved or not and on the basis of the specific facts and circumstances in the EA as well.

The Review Board has never conducted an EIR and so has no experience with consultation under sections 135 or 137 of the MVRMA.

There are a number of questions with respect to the process of conducting a consultation and the roles and authorities of the participants.

Below we set out a series of the considerations which have arisen in the context of consultations to date and the Review Board's current position on consultation procedures. Some aspects of consultation procedure are clearer than others. All involve interpretation of the provisions of the MVRMA.

1. The Scope of a Consultation:

A consultation meeting will be limited to a consideration of those recommendations upon which the federal Minister or the National Energy Board have requested consultation. The Review Board is of the view that no other issues considered in the EA or EIR may be raised.

Under subsection 130(1) and 131(1) of the MVRMA the federal Minister or the DRA have the discretion to specify the list of recommendations upon which the consultation will take place. This list of recommendations, chosen by the federal Minister and responsible Ministers or DRA, defines the scope of the consultation.

Unless the federal or responsible Ministers or the DRA provide new information or advise of matters of public concern as provided for by the MVRMA, no new information or evidence will be considered in a consultation.

2. The Nature of a Consultation:

A consultation process should be "on the record" and the results should be documented and reported in order to ensure transparency in the part 5 MVRMA decision making process.

The Review Board will place any request for consultation on the public record for the EA or EIR in question. Any relevant correspondence or materials prepared for the consultation will also be placed on the public record.

A summary of the issues raised in relation to the recommendation(s) which are the subject of the consultation and any resolution achieved along with the text of any modified recommendations will also be placed on the public record for an EA or EIR.

The consultation should explore the context and rationale for the Review Board recommendations which are being considered. It must also involve a discussion of the difficulties or concerns arising from the recommendation(s) which led the Minister or the DRA to decide to consult the Review Board. It is essential for the parties to the consultation to understand respective positions in order for the consultation to succeed.

The purpose of a consultation process is to modify a Review Board recommendation. At the EA stage of the part 5 process, under subparagraph 130(1)(b)(ii) or paragraph 131(1)(b), the recommendation must either be adopted with modifications or rejected. If rejection occurs, the Act makes it mandatory for an EIR to be conducted.

After an EIR, under paragraph 135(1)(b) or 137(1)(b) a recommendation may be adopted with modifications after consultation or simply rejected.

3. The Parties to the Consultation Process:

It is not possible for the federal Minister or DRA to meet with the Review Board directly to conduct consultations. The actual participants in a consultation are the representatives of the Minister or DRA and the representatives of the Review Board.

The federal Minister and the DRA have no explicit statutory obligation under the MVRMA to include others in a consultation, including the parties to an EA or an EIR. Since the consultation takes place on the request of the federal Minister or the DRA, any decision about involving others, such as the parties to an EA or an EIR, is for them to make.

Based on the provisions of section 3 of the MVRMA, the Review Board could, in appropriate circumstances, meet separately with parties to an EA or an EIR to seek assistance in framing its response to the decision makers. Such circumstances, however, are likely to be the exception rather than the rule.

4. Modifying a Review Board Recommendation:

As has been indicated, the purpose of a consultation is to modify a Review Board recommendation. This necessarily involves a change in the wording of the recommendation.

To date, all consultations have resulted in a consensus on revised wording for the recommendations for which the consultation has been conducted. Consequently, the revised wording has been agreed to by representatives of the parties to the consultation and subsequently recommended to the Review Board for its approval. Once this approval is achieved, the Review Board then communicates its views on the jointly modified recommendation to the Minister or the DRA, as the case requires. At that stage the Minister or the DRA decides whether to accept the recommendation as modified or reject it.

In the context of a consultation under subparagraph 130(1)(b)(ii) or paragraph 131(1)(b), there is a limit on the federal Minister and responsible ministers' or DRA's capacity to modify a recommendation. If the changes proposed fundamentally alter the purpose, substance or effect of a recommendation this is tantamount to a rejection of the recommendation. The proper course of action, in this instance, is to reject the original recommendation thus triggering an EIR.

Generally, the discussion of the modifications proposed for a recommendation takes place in a single meeting. It is possible however, pursuant to the definition of consultation in the MVRMA, for the Review Board to take a reasonable period of time to prepare its views. Thus, a second meeting of the representatives of the parties could be required.

The MVRMA requires that representatives of the federal Minister or the DRA disclose any new information or matter of public concern which may have led to the decision to consult and which may not have been known to the Review Board at the time of its original decision. New information would include evidence relevant to a Review Board decision and recommendation which might result in a change to the recommendation.

CONCLUSION:

The consultation process is intended to assist final decision makers under the MVRMA to decide whether to accept with modifications or reject a Review Board recommendation after an EA or an EIR. The procedure adopted for the conduct of a consultation must respect the Review Board's decision making process and the requirements of section 3 of the MVRMA while properly reflecting the statutory authorities of the federal Minister and responsible ministers and the DRA.

The consultation process should, to the extent possible, be transparent and any modification of Review Board recommendations should be undertaken using a process that ensures that the ultimate accountability for such modifications rests with the federal Minister and responsible ministers or DRA.

APPENDIX 1. MVRMA Provisions Related to Consultation

128. (2) The Review Board shall make a report of an environmental assessment to

- (a) the federal Minister, who shall distribute it to every responsible minister; and
- (b) any designated regulatory agency from which a licence, permit or other authorization is required for the carrying out of the development.

130. (1) After considering the report of an environmental assessment, the federal Minister and the responsible ministers to whom the report was distributed may agree

.....

(b) where a recommendation is made under subparagraph 128(1)(b)(ii) or paragraph 128(1)(d),

- (i) to adopt the recommendation or refer it back to the Review Board for further consideration, or
- (ii) after consulting the Review Board, to adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal;

.....

(3) If the federal Minister and responsible ministers consider any new information that was not before the Review Board, or any matter of public concern not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b)

131. (1) A designated regulatory agency shall, after considering a report of the Review Board containing a recommendation made under subparagraph 128(1)(b)(ii) or paragraph 128(1)(d),

.....

(b) after consulting the Review Board, adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal.

.....

(4) If a designated regulatory agency considers any new information that was not before the Review Board, or any matter of public concern that was not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b).

.....

134. (2) A review panel shall issue a report containing a summary of comments received from the public, an account of the panel's analysis, the conclusions of the panel and its recommendation whether the proposal for the development be approved, with or without mitigative or remedial measures or a follow-up program, or rejected.

135. (1) After considering the report of a review panel, the federal Minister and responsible ministers to whom the report was distributed may agree to

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(b) after consulting the review panel, adopt the recommendation with modifications or reject it.

(2) If the federal Minister and responsible ministers consider any new information that was not before the review panel, or any matter of public concern not referred to in the panel's reasons, the new information or the matter shall be identified in the decision made under this section and in their consultations under paragraph (1)(b).

137. (1) A designated regulatory agency shall, after considering the report of a review panel,

(a) adopt the recommendation of the review panel or refer it back to the panel for further consideration; or

(b) after consulting the review panel, adopt the recommendation with modifications or reject it.

(2) If a designated regulatory agency considers any new information that was not before the review panel, or any matter of public concern that was not referred to in the panel's reasons, such new information or such matter shall be identified in the decision of the agency and in any consultation under paragraph (1)(b).

Also important in the context of consultations is the description of "consultation" found in section 3 of the Act:

3. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

(a) by providing, to the party to be consulted,

(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,

(ii) a reasonable period for the party to prepare those views, and

(iii) an opportunity to present those views to the party having the power or duty to consult; and

(b) by considering, fully and impartially, any views so presented.

**Approved by the Mackenzie Valley Environmental Impact Review Board by
Motion # 040728-04 on the 28th day of July 2004.**

Certified by: T. Burlingame
Todd Burlingame, Chairperson

Jan 05 2005
Date