




Reference Bulletin



Procedures during the Review Board's consideration of making its own motion to refer a development to environmental assessment



Section 126 of the *Mackenzie Valley Resource Management Act*

Draft December 2007
Revised: January 3, 2008



Mackenzie Valley
Environmental Impact
Review Board



REFERENCE BULLETIN

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SECTION 126 OF THE MVRMA

INTRODUCTION:

The *Mackenzie Valley Resource Management Act* (MVRMA) provides for a three tiered environmental impact assessment (EIA) process including:

- i) *preliminary screening* - a first review of a development application to determine if the proposed development **might** have significant adverse impacts on the environment, or **might** cause public concern. The screening is conducted by a land and water board or other regulatory authority.
- ii) *environmental assessment* - a more thorough study of a proposed development's application to determine if the development is **likely** to have significant adverse impacts on the environment, or **likely** to cause significant public concern.
- iii) *environmental impact review* - the highest level of review of the environmental effects of a project conducted by an independent panel, which is established by the Mackenzie Valley Environmental Impact Review Board (Review Board).

The Review Board is responsible for environmental assessments and environmental impact reviews and oversees the preliminary screening process.

At the preliminary screening stage, regulatory authorities, designated regulatory agencies (DRA)¹ and certain other bodies are required to conduct a review of an application for a licence, permit or other authorization to determine if a proposed development should proceed into the regulatory process or whether further consideration of its environmental impacts should take place by way of an environmental assessment.

The MVRMA makes provision for the Review Board to exercise an oversight role in respect of preliminary screenings. The Review Board may on its own motion refer a development to environmental assessment (EA), notwithstanding any determination on a preliminary screening. Subsection 126(3) of the MVRMA is the key authority in this respect.

The MVRMA does not provide specific guidance about the procedures the Review Board must follow or the timelines which apply to the exercise of its ss.126(3) responsibilities. Consequently, questions about this process have arisen from time to time. The Review Board is of the view that the MVRMA EIA process will benefit from clarification of the way in which the MVEIRB exercises its oversight responsibilities under subsection 126(3) of the Act.

This reference bulletin has been prepared to describe and clarify the procedures that the Review Board will follow when considering the exercise of its authority to order a proposed development to an EA under ss.126(3) of the MVRMA.

THE STATUTORY FRAMEWORK:

The following sections of the MVRMA set out the statutory framework governing how the Review Board and regulatory authorities must proceed.

Referral on preliminary screening

126. (1) The Review Board shall conduct an environmental assessment of a proposal for a development that is referred to the Review Board following a preliminary screening pursuant to section 125.

Referral from a department, agency, First Nation or local government

126. (2) Notwithstanding any determination on a preliminary screening, the Review Board shall conduct an environmental assessment of a proposal for a development that is referred to it by

(a) a regulatory authority, designated regulatory agency or department or agency of the federal or territorial government;

¹ The National Energy Board is the only DRA at this time.

(b) the Gwich'in or Sahtu First Nation, in the case of a development to be carried out in its settlement area or a development that might have an impact on the environment in that settlement area;

(c) the Tlicho Government, in the case of a development to be carried out wholly or partly in the part of Monfwi Gogha De Niitlee that is in the Northwest Territories or a development that might have an impact on the environment in that part; or

(d) a local government, in the case of a development to be carried out within its boundaries or a development that might have an impact on the environment within its boundaries.

Subsections 126(1) and 126(2) set out a mandatory requirement for the Review Board to conduct an EA once a referral decision is made by a regulatory authority or any other referring organization.²

Referring a Proposed Development to EA on its Own Motion

Subsection 126(3) also grants the Review Board the discretionary authority to order an EA of a proposed development regardless of any preliminary screening decision.

126(3) Notwithstanding any determination on a preliminary screening, the Review Board may conduct an environmental assessment of a proposal for a development on its own motion.

In those circumstances where the Review Board gives consideration to the exercise of its ss.126(3) authority, it will provide written notice of this decision to the affected regulatory authority(s) and the developer. The Review Board may order a proposed development to an EA, regardless of any determination made by the preliminary screener even if a preliminary screening has not been commenced or, if commenced, has not been completed.

The Review Board's practice, however, is not to exercise this authority until after it reviews preliminary screening results. It is the Review Board's view that it is preferable to avoid interrupting a process mandated by the MVRMA and to ensure that the highest quality information is available prior to considering the exercise of its discretion pursuant to subsection 126(3).

A decision by the Review Board under ss.126(3) supersedes any preliminary screening decision made by a regulatory authority. Subsection 126(3) is intended to give the Review Board the opportunity to review and, if appropriate, override a preliminary screening decision.

This authority is confirmed in subsection 126(4) of the *Act*.

² See subsections 124(2) and (3) of the MVRMA for an indication of organizations other than regulatory authorities which must conduct preliminary screenings.

s.126(4) For greater certainty, subsections (2) and (3) apply even if a preliminary screening has not been commenced or, if commenced, has not been completed.

The circumstances which could warrant an exercise of the Review Board's discretion pursuant to subsection 126(3) include instances where:

- the preliminary screening did not consider all components of the development;
- additional information about impacts on the environment or public concern is available to the Review Board which was not considered by the preliminary screener;
- in the Review Board's opinion, the "might" test has **not** been properly applied;
- the preliminary screening did not adequately consider the mandatory factors set out in s.114 and s.115 of the MVRMA;
- it is justified by public concern.

The Review Board is required to provide written Reasons for Decision in all instances when it exercises its authority under ss. 126(3).

The Three Day "Pause Period"

The MVRMA does not provide specific guidance about procedures or timelines which apply when the Review Board is considering the making of a determination under subsection 126(3). Recognizing this shortfall, the Review Board has requested that regulatory authorities not issue a license, permit or authorization for three working days following a preliminary screening decision. This requirement is also explained in the Environmental Impact Assessment Guidelines³, established by the Review Board under s.120 of the MVRMA.

The gap between the preliminary screening decision and the issuance of a regulatory authorization, referred to as the "three day pause period", allows the Review Board an opportunity to review screening decisions. The Review Board is committed to providing written notice to the preliminary screener within the three-day timeframe to let it know if the Review Board:

- a) decides to exercise its authority under ss.126(3); or
- b) requires additional time to make a decision under ss.126(3).

The Review Board will strive to consider whether or not to exercise its discretion pursuant to subsection 126(3) of the MVRMA to refer a proposed development to EA on its own motion within three (3) working days following receipt of a preliminary screening report. However, in some instances; the Review Board may require more time to make such a decision. Whenever this

³ Insert citation.

occurs, notice in writing will be provided to the regulatory authority, within the three day “pause period”.

Between the time the Review Board gives notice of its intention to consider its ss. 126(3) discretion and a final ss. 126(3) determination, the requirements of Part 5 of the MVRMA have not been completed. Consequently, until the Review Board makes a decision a license, permit or authorization must not be issued.

Section 118(1) reinforces this interpretation which is reinforced by section 62⁴ of the *Act*. Section 118 states that:

“No license, permit or other authorization required for the carrying out of a development may be issued under any federal, territorial or Tlicho law unless the requirements of this Part have been complied with in relation to the development.”

“Part” in the case of s.118(1) refers to Part 5 of the MVRMA which describes the provisions and authorities specific to the Review Board’s process and under which regulatory authorities exercise their preliminary screening authorities. This provision based in the *Act* itself overrides any timelines set out in MVRMA regulations. The regulatory process may not proceed until a determination is made under Part 5 of the *Act*.

No Notice During Three Day Pause Period

If the regulatory authority is not formally notified that the Review Board intends to consider the exercise of its subsection 126(3) authority by the end of the three day pause period, it may proceed to make any necessary regulatory determination for the development.

For further information,

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¹ Section 62 states:

“A board may not issue a license, permit or authorization for the carrying out of a proposed development within the meaning of Part 5 unless the requirements of that Part have been complied with, and every license, permit or authorization so issued shall include any conditions that are required to be included in it pursuant to a decision made under that part.”