

# A Framework for Determining Whether a Proposed Development Is Likely To Be Cause of Significant Public Concern

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## Introduction

### **Purpose**

This discussion paper explores approaches for deciding whether a proposed development is likely to be cause of significant public concern. The Mackenzie Valley Environmental Impact Review Board (MVEIRB) plans to develop a guidance document on this subject at a later date. The discussion paper outlines the current process used during environmental assessments in the Mackenzie Valley, presents a framework for a possible guidance document, and serves as basis for discussion among interested agencies, communities, or individuals. The Review Board welcomes input from aboriginal communities, government, industry, and the public at large.

### **Background**

Subsection 125(1) of the *Mackenzie Valley Resource Management Act* (the Act) requires a preliminary screener to “(a) *determine and report to the Review Board whether, in its opinion, the development [...] might be a cause of public concern; and (b) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.*” Section 128 of the Act requires the Review Board to order

an environmental impact review “*where the development is likely in its opinion to be a cause of significant public concern*”.

The Act uses the likelihood of public concern as a trigger for a higher level of scrutiny of a proposed development the same way it uses the likelihood of a significant environmental impact. It follows that finding the likelihood of significant public concern is equally important as finding the likelihood of significant adverse impact on the environment. Referral agencies frequently cite public concern as the reason for a referral to environmental assessment. The Review Board has found two proposed developments to be likely to cause significant public concern: the Mackenzie Gas Project and DeBeers’ proposed Gahcho Kue diamond mine.

This document deals with considerations for determining whether a development is likely to cause significant public concern within an environmental assessment context only. It serves as a discussion paper on how the Review Board may discharge its responsibility under section 128 of the Act but does not address the responsibilities of preliminary screeners under subsection 125(1). The test at the environmental assessment level is more stringent than at the preliminary screening level. The Review Board needs to decide whether a proposed development is *likely* to cause *significant* public concern rather than whether a development *might* cause public concern.

## **Overview**

The remainder of this discussion paper is organized into 5 sections as follows:

**Definitions:** Explores how *significant public concern* and its constituent terms significant, public, and concern are or may be defined;

**Available guidance:** Explores guidance provided by existing guidelines and case law within and outside the Mackenzie Valley;

**Review Board practice:** Provides an overview of how the Review Board has made such decisions in the past

**Public concern guidance document:** Discusses the framework for gauging public concern set by definitions, available guidance, and precedence. It outlines the purpose and possible contents of any guidance documents that may be developed in the future.

**Next steps:** Provides an overview over how the Review Board envisions moving forward with this important subject.

## **Definitions**

Despite its widespread use, the term “public concern” does not appear to be defined very well. A review of, among other things, the Oxford Canadian English Dictionary [1], Black’s Law Dictionary [2], and the Dictionary of Natural Resource Management [3], did not reveal a definition of the term. Black’s Law Dictionary, 8<sup>th</sup> ed. defines ‘public’ as an adjective to mean “relating or belonging to an entire nation, state or community” but does not define “concern” at all. The Oxford Canadian English Dictionary defines “public” as “concerning the people as a whole” and “concern” as “a matter of interest, importance” but also as “anxiety, worry”. The term public concern may thus be interpreted to mean “of interest to a community” or “to worry an entire nation”.

While both the Mackenzie Valley Resource Management Act and the Canadian Environmental Assessment Act use “public concern” as a trigger for a higher level of review, neither defines “public concern” or “public” or “concern”. A review of case law

commissioned by the Review Board in 2007 paints a similar picture. The term “public” is reported to be poorly defined but to generally not mean the inhabitants of the entire country. Rather it “may mean for practical purposes only the inhabitants of a village or such members of a community as particular advertisements would reach, or would be interested in a particular matter ...”.[2] The issue of measuring public concern has been addressed by the courts in very limited ways. Courts have largely deferred the definition of what constitutes public concern to the government agencies and administrative tribunals charged with making those decisions. [2]

The Canadian Oxford English Dictionary defines “significant” as: “of great importance or consequence”, but also as: “noteworthy, noticeable”. At times courts have used the absence of “insignificant” public concern as evidence of significant public concern. The latter naturally raises the question of how insignificant is defined and as such provides little guidance to the Review Board.

The Review Board itself defined “public concern” as: “widespread anxiety or worry” in its *Reference Bulletin Operational Interpretation of Key Terminology* of May 2006. The same reference bulletin defines “significant” as: “an impact that is ... important to its decision”. In both cases the reference bulletin provides additional information and guidance on how significance may be defined. The reference bulletin limits its guidance on the meaning of “significance” to: “significance of impacts on the environment.”

The definitions of “public”, “concern”, and “significant” create a wide spectrum of possible definitions of “significant public concern”. Defined very broadly, a group of people taking note may constitute significant public concern. Defined very narrowly, we may not find significant public concern unless the whole nation is in an uproar. The

courts, as well as the Review Board in its own practice, have set limits on the range of possible definitions. The courts established that public concern need not involve the entire nation, whereas the Review Board's past practice clearly sets the bar higher than a mere matter of interest.

## **Available guidance**

### ***Guidance documents for practitioners***

In 2005, the Review Board undertook a review of available publications for determining the significance of public concern or the likelihood of possible public concern caused by a proposed development. This review looked at readily available documents for practitioners and analyzed 11 documents ranging from the British Columbia Environmental Assessment Office's *Public Consultation Strategy/Framework for Lower Mainland Infrastructure Projects* to the Canadian Environmental Assessment Agency's *Canadian Environmental Assessment Act Reference Guide on Physical and Cultural Heritage Resources* and *Citizen's Guide to the Canadian Environmental Assessment Process*.

Of these 11 documents, five included advice on involving the public in the process but only the Review Board's own *Environmental Impact Assessment Guidelines (EIA Guidelines)* offered any advice on how the level of public concern might be assessed as it applied to preliminary screening only. A more recent (2008) key word search of an academic literature database ([www.ingenta.com](http://www.ingenta.com)) once again revealed few guidelines on how to gauge the significance of public concern.

In 2009, the Review Board broadened its search for available guidance documents to include jurisdictions in the United States, Australia, the Netherlands, and Ghana. In addition to web searches for easily obtainable guidance documents, this review included a search of peer-reviewed journal indices, as well as interviews with practitioners and academics. This much broader review yielded essentially the same results. Public concern frequently leads to higher level environmental reviews, yet very little published guidance exists on how to gauge the level of public concern or how to determine when a proposed development is likely to cause significant public concern.

The Review Board's *EIA Guidelines* suggest using the following criteria to determine, during a preliminary screening, whether a proposed development might cause public concern:

- Scale of the proposed development
- Proximity to community
- New technology
- Severity of worst case scenario
- Proximity to sensitive area
- Proximity to harvesting area.

The 2006 *Reference Bulletin on Operational Interpretation of Key Terminology* reiterates this set of criteria. These criteria were developed for the purpose of preliminary screening, not environmental assessment. They are strictly qualitative, do not require quantitative analysis or measurements, and can be applied without the need for an extensive public review. In short, they were written specifically to determine whether a

proposed project *might* cause public concern, not whether it is *likely* to cause *significant* public concern.

Ample guidance exists for determining significance, albeit not in the context of public concern. Commonly accepted criteria for defining significance of environmental impacts include:

- Magnitude
- Duration
- Frequency
- Reversibility
- Ecological context (e.g. sensitivity of receiving environment). [4]

### ***Guidance from case law***

In 2007 the Review Board commissioned a review of case law in Canada dealing with deciding significance of public concern. As outlined in the discussion of the definition of public concern above, this review did not yield well-developed or widely-accepted methods nor any clear precedents.

However, the case law review resulted in a number of recommended questions a decision maker may ask when gauging the level of public concern. These are:

- What are the concerns of the general public, if any?
- What public involvement activities did the proponent undertake under the *Public Involvement Guidelines*, as published by the Mackenzie Valley Land and Water

Board (MVLWB)? Were they appropriate given the scope of the development?

What kind of media coverage of the development was there during the public involvement?

- What was the response from aboriginal individuals and organizations?
- What was the response from local and regional government officials, and from community organizations, such as homeowner groups, senior citizen organizations, service clubs and environmental groups?
- What was the response from professional and business associations, small-business operators, educational institutions and public-interest groups?
- What was the *amount* of response to the development proposal and what form did it take?
- Were any letters received by the Land and Water Board, the Review Board, or a responsible department or minister?
- Were public meetings held to discuss the development and related issues? How many meetings? What was the attendance? Was any consensus reached? Did any formal positions or requests arise from the meetings? Were there any government(s) or proponent representatives present to respond to concerns?
- What was the media coverage of the proposal and of the public concern arising from the proposal? Did the media coverage generate further public debate on the issue?
- Was the public concern widespread or local? Was it only from residents living near the project or further away?
- Are there any formal interventions before the Review Board?

- Were any petitions made concerning the proposal? How many signatures were collected on each petition? Was the petition received by the intended recipient?
- What kind of concern was there from groups and societies and was there any formal position on the proposal communicated to the relevant government department(s) or to the Review Board, depending on whether the Review Board is handling the initial assessment or whether it has been triggered by something else? [2]

### ***Summary***

No guidelines or commonly accepted practices exist for determining “significance” as it relates to “public concern” about a proposed development. There is, however, some advice available on how a tribunal may come to a reasoned and reasonable decision. The relevant case law provides some practical advice on how to approach the decision as to whether a proposed development is likely to cause significant public concern.

### **Review board practice**

Operationally, the Review Board has defined the criteria that should be considered when determining what is significant public concern on a case-by-case basis. This discussion paper presents two examples, the Mackenzie Gas Project and the Gahcho Kue Diamond Mine project.

### ***Mackenzie Gas Project***

Starting in December 2003, the Review Board conducted an environmental assessment of the proposed Mackenzie Gas Project, a 1300- kilometre pipeline and associated gathering

and processing facilities. The Review Board designed the first phase of the environmental assessment to gauge the level of public concern in order to decide whether an environmental impact review was required. Following a series of public hearings, the Review Board decided that the proposed development was indeed likely to be the cause of significant public concern. Consequently, it ordered that an environmental impact review be conducted.

Before reaching a conclusion on the level of public concern, the Review Board held multiple hearings in three different communities and actively solicited written submissions from the public. In total, 86 organizations, institutions, and individuals presented over 650 statements of concern to the Review Board. Nine days of public hearings were held, and all followed the same agenda and format, thereby making the results comparable.

The Mackenzie Gas Project crossed three jurisdictions as well as three distinct regions within the Mackenzie Valley. It attracted attention from the media and individuals across the nation and internationally, an indication that it certainly was of interest to more than one community or region.

In gauging the level of public concern for the Mackenzie Gas Project environmental assessment, the Review Board developed the following criteria:

- *Frequency of concern:* A simple measure of how often participants to the assessment raised a particular issue, e.g. impacts on wildlife. The frequency of a concern is one measure of its importance or significance.
- *Geographic distribution:* The level and nature of concern varied within the Mackenzie Valley and among Mackenzie Valley residents and national and international organizations or individuals. Whether a concern was limited to one

region or widespread across regions served as an indicator of its relative importance.

- *Source*: the Review Board considered differences in the nature of concerns expressed by individuals, organizations representing a group of individuals, and institutions representing various interests, such as municipal governments. In general the Review Board weighted a concern brought forward on behalf of a large potentially affected group, e.g. the residents of a municipality, more than concerns of an individual.
- *Severity of concern*: in addition to the severity or magnitude of the potential impact a concern was based on, the Review Board also considered the extent to which an organization or individual went to express the concern, e.g. by incurring considerable costs to participate in a hearing. Evidence from individuals or parties who went to great lengths and expense to participate in the assessment generally received more weight.

The Review Board determined the likelihood and significance of public concern only after considering all of these criteria.

The criteria used in the Mackenzie Gas Project assessment employed a combination of qualitative and quantitative analysis. This set of criteria was developed after an extensive public involvement process to correspond to the empirical findings. It proved to be quite appropriate for this particular environmental assessment and provided a great degree of transparency without relying too heavily on either qualitative or quantitative criteria. ??

The quantitative portion of the analysis was made possible only because of the extensive public review process. A similar analysis may not be possible during the scoping phase of a smaller development that does not involve multiple hearings in multiple locations.

Also, criteria such as geographic distribution may not be relevant for projects that do not span such a large area, but where local concerns may be plentiful.

### ***Gahcho Kue diamond mine project***

In 2006, the Review Board conducted an environmental assessment of a proposed open pit diamond mine at Kennady Lake in the NWT – the Gahcho Kue Project. This was to be the fourth diamond mine in the Mackenzie, and the first assessed entirely under the regime established by the Act. Given the relatively large size of the project, the Review Board employed a similar strategy as that used by the Mackenzie Gas Project and first set out to scope the issues and gauge the likelihood and level of public concern.

While the Review Board once again conducted an extensive public participation process, it relied not only on public hearings but on a combination of separate staff-managed technical and community scoping workshops and technical and community hearings. Also, in this instance, the Review Board emphasized prioritizing issues by the parties in an attempt to focus any subsequent environmental assessment or impact review on the most important ones. Unlike the Mackenzie Gas Project assessment process, workshops and hearings did not all follow the same agenda and format but provided considerably different venues to address the various needs of technical experts and governments, on one hand, and which can be very different from those of communities. on the other. This resulted in high quality scoping but prevented a direct comparison of the outcomes of different events. Consequently, the Review Board did not conduct a quantitative analysis.

Moreover, the Gahcho Kue project was limited to one jurisdiction and, while of interest to various communities in the Northwest Territories, it did not physically cut across several regions. This rendered criteria such as geographic distribution less useful.

Rather than applying the same criteria as in the Mackenzie Gas Project to gauge the level of public concern related to the Gahcho Kue Project, the Review Board used three different indicators:

1. Participation rates and level of effort expended by participants to attend workshops and hearings to voice their concerns. This criterion in essence combines the frequency and severity criteria of the Mackenzie Gas Project assessment. It provides a measure of how widespread and deep-rooted existing concerns were.
2. Criteria set out in the Review Board's *EIA Guidelines* and in its *Reference Bulletin on Operational Interpretation of Key Terminology in Part Five of the MVRMA*. In essence, these are the criteria described in the introduction above. These provide a relatively simple measure of how likely the development is to raise concerns, notwithstanding evidence of existing ones.
3. Evidence of adverse impacts on the environment that formed the basis of expressed public concern. This third measure reveals how robust the first two are. Concerns expressed in the absence of any evidence that they might come true were weighted considerably less than concerns over impacts backed by evidence of a possible or likely impact.

In the case of Gahcho Kue, the Review Board found that the high participation rates (e.g. 25% of the population of a particular community turned out for a workshop) and

demonstrated great efforts (e.g. by driving several hundred kilometers to attend scoping workshops and hearings) pointed to considerable public concerns. The Review Board's *EIA Guidelines* criteria for determining public concern also indicated that the development might raise concern.

The Review Board heard evidence that the concerns expressed by communities, at least with regard to caribou, are not irrational but are based on observation of existing negative environmental changes in an area that only recently started to undergo industrial development, and are backed by evidence that the proposed Gacho Kue development may accelerate the environmental change.

Only the combination of all three indicators convinced the Review Board to find that the proposed development was likely to be cause of significant public concern.

### **Summary**

The Mackenzie Gas Project and the Gahcho Kue environmental assessments are two successful examples of using multiple, rational criteria to assist in deciding whether a development is likely to cause significant public concern. Both approaches were custom-designed for the project in question. In both cases the Review Board set the criteria prior to making a decision, but developed the criteria after the evidence had been gathered.

The Gahcho Kue decision has been tested in court and was upheld. The NWT Supreme Court's decision on Gahcho Kue confirms that a well-considered argument suffices and a predetermined, generally applicable set of criteria is not necessarily required.

## **Public Concern guidance document**

This section outlines the purpose and possible contents of a proposed guidance document.

### ***Background***

A commonly accepted and widely used set of criteria or methods to determine whether a development is likely to cause significant public concern does not exist in Canada. In fact, no widely accepted definition of public concern exists within, nor probably, outside, an environmental impact assessment context. The relevant legislation does not provide much guidance (or limitations) on the identification of significant public concern. There do not appear to be any guidance documents within a North American jurisdiction on how to identify significant public concern. Moreover, courts have not addressed the issue to a great extent.

The absence of a legislated definition may be a deliberate attempt by Parliament to provide decision makers like the Review Board with discretion. The NWT Supreme Court confirmed that the Review Board possesses a broad range of discretion. Any guidance document in this area must be careful not to fetter this discretion.

In the Gahcho Kue case the NWT Supreme Court further confirmed that a prescribed set of criteria is not required. Nonetheless the Review Board is of the opinion that some guidance on how public concern will be considered in an environmental assessment is warranted, particularly for smaller developments, which may not be associated with as extensive a scoping process as the Mackenzie Gas Project or the Gahcho Kue project. In the Review Board's opinion, better guidance on this subject could result in a clearer distinction between projects that are adequately assessed in an environmental assessment

and those that require an environmental impact review. Such a distinction would allow the Review Board to more closely tailor the environmental assessment and the environmental impact review process and remove some of the overlap that exists between these two levels of impact assessment.

### ***Purpose of guidance document***

A guidance document on determining whether a development is likely to be cause of significant public concern will mainly serve to make the identification of public concern more transparent. It will allow parties to decide up front what sort of criteria the Review Board will use, or what questions it might ask. The guidance document will take into account that the Review Board has to make a decision on each development on its own merit. The Review Board does not make decisions about developments or land uses in general. While applying a common set of criteria, the Review Board will make an informed judgment in each individual case. The guidance document cannot provide a check list of conditions that will automatically result in an identification of significant public concern.

### ***Significance spectrum***

As outlined in the definitions section above, the various definitions of the terms “significant”, “public”, and “concern” allow a wide range of interpretations for the term “significant public concern” (see figure 1). One end of the spectrum is a very narrow interpretation, which might find significant public concern only if anxiety of great consequence is widespread among the entire nation. The other would be a very broad interpretation, which may find significant public concern if noticeable worry exists within

a group of interested people. The Review Board’s own definition of public concern as “widespread anxiety or worry” indicates that in the Review Board’s opinion, public concern must go beyond being of interest or importance to warrant an environmental impact review.



Figure 1: The Significance Spectrum

To make its decision the Review Board may define “public concern” as “widespread worry or anxiety within the relevant public”. The definition of “relevant public” will depend on the location, size and nature of the proposed development and its proximity to the that section of the public. .

### ***Public concern criteria***

The Review Board must base its decision as to whether a proposed development is likely to be cause of significant public concern solely on the public record for its environmental assessment of that development. This means the Review Board has to estimate the level of concern present or likely to be present in the public from the evidence of public concern submitted to the record by parties or individuals. This evidence can fall into three broad categories: amount or frequency, distribution, and nature of concern.

Generally, the Review Board requires evidence of actual public concern being present

rather than just an expectation that a proposed development will raise concern in the future. The three categories may be further described as follows:

***Amount and frequency of concern:***

This refers to the number of times specific concerns are expressed but also to the number people or organizations participating in meetings and hearings relative to the size of the relevant public. It also includes a consideration of the level of efforts by the relevant public to express its concerns. The Review Board may ask the following questions when examining the public record:

- How many people participated in public meetings and expressed concerns?
- How many times was a particular concern raised?
- How many written submissions have been made?
- How in-depth are the written submissions?
- To what length have people gone to make their concerns known?

High participation rates, high frequency of similar concerns and high level of efforts point towards significant concern.

***Distribution or source of concern:***

Criteria in this group deal with the geographic distribution of concern but also the distribution among individuals, organizations, and communities. The Review Board may ask:

- Are concerns being raised by individuals or organizations?

- Are concerns being raised by people living in close proximity, who are potentially directly affected?
- Are they being raised within a group of like minded people or across a wide spectrum of interests, within a single town, or within an entire region?
- How consistent are concerns between individuals or groups?
- Are the many individuals or groups raising concerns individually or is there evidence of a coordinated effort coming from a single source?

Generally speaking, concerns that are present across different demographic groups, regions, or organizations are more indicative of significant public concerns than concerns restricted to one particular group. Evidence from potentially directly affected communities may be weighted higher than evidence of concern from further abroad.

***Nature of concern:***

The nature of concern may also be described as the basis for the concern as well as its severity. For this the Review Board will examine the record for any evidence of potential impacts. The Review Board may ask:

- Is the concern based on fear of the unknown or can it be linked to a potential or even likely impact from the proposed development?
- How severe is the concern, or how severe would the impact be that people are concerned about?
- Is the concern based on observations from past developments with similar characteristics?

- The Review Board’s preliminary screening criteria may also be used to evaluate the nature of concern.

The Review Board’s own precedence suggests that in most cases evidence of significant public concern must be present in all three categories above. However, under exceptional circumstances, particularly strong evidence in one area may outweigh a relative lack of evidence in another. Before making a decision the Review Board must satisfy itself that it has made reasonable efforts to probe for existing public concern across what it considers to be the relevant public.

## **Conclusion**

The identification of significant public concern in an environmental assessment has similar consequences as the identification of significant environmental impacts. For example, the criteria the Review Board used for both environmental impact reviews it has ordered are based on public concern. Yet unlike impacts on the environment, the Act does not define “public concern”. Little guidance on how to measure or gauge the level of public concern exists. The Review Board is of the opinion that a guidance document outlining how the Review Board deals with the question of public concern during an environmental assessment would be helpful for all participants in an environmental assessment.

The NWT Supreme Court confirmed the Review Board’s approach of using multiple criteria to form a reasoned judgment for the Gahcho Kue case. The Review Board proposes to develop a guidance document that explains this approach in more generic terms so it may be applied to a wider range of proposed developments.

## Next steps

The purpose of this paper is to initiate a discussion on the need for, as well as the contents and format of, a guidance document on determining whether a proposed development is likely to be the cause of significant public concern. Over the next year, the Review Board will seek input from all interested parties and individuals in a variety of ways, e.g. during practitioners' workshops, community visits, or one-on-one meetings. The Review Board will ask government agencies, First Nations and Metis organizations, communities, industry and the public to submit comments at any time, particularly on the following questions:

1. Would such a guidance document be helpful?
2. What format should this document be in?
3. Are the criteria listed above useful?
4. Are there other criteria the Review Board should consider?

Depending on the feedback received, the Review Board anticipates drafting a guidance document in late 2010 for public distribution and comment. The Review Board will decide at that time what form the guidance document will take, such as a reference bulletin or a guideline under section 120 of the Act.

Comments and questions should be directed to:

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