

**Developing *Guidelines for Incorporating
Traditional Knowledge into the
Environmental Impact Assessment
Process***

The Mackenzie Valley Environmental Impact Review Board
Experience

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Abstract

Traditional knowledge is a critical component of environmental impact assessment in the Mackenzie Valley, Northwest Territories, Canada. However, it became evident to the Mackenzie Valley Environmental Impact Review Board (Review Board), that further guidance on the role of traditional knowledge in environmental impact assessment process was needed for industry, government and communities. Consequently, the Review Board developed *Guidelines for the Incorporation of Traditional Knowledge into the Environmental Impact Assessment Process*. This paper discusses three main challenges the Review Board faced in the development of these guidelines. The first was clearly communicating the purpose and intent of the document. There was a misconception that these guidelines would regulate traditional knowledge use by communities. Secondly there were concerns over the sufficiency of the public involvement with the guidelines. Some groups feared the document may be infringing on aboriginal rights and public involvement in the guidelines' development did not meet the government's duty to consult with aboriginal people. A third challenge was the difficulty in dealing with confidentiality and research ethics associated with traditional knowledge. The dilemma of balancing a fair and open process with confidentiality requirements needed to be addressed in the guidelines. In addition, the guidelines needed to elaborate on the responsibility of obtaining prior informed consent to use traditional knowledge in an environmental impact assessment. In conclusion, valuable lessons in planning a public consultation process have been learned, particularly the importance of being succinct with the public about the guidelines' intent and being cognisant of legal and political issues associated with this body of knowledge.

Background

The Mackenzie Valley is located in the Northwest Territories, Canada between the Inuvialuit Settlement Region to the north, Nunavut Territory to the east, Yukon Territory to the west and the 60th parallel of latitude on the south (excluding Wood Buffalo National Park). See Map 1. below.



Map 1. Mackenzie Valley, Northwest Territories, Canada

Until 1998, the Canadian Environmental Assessment Act (CEAA) governed the environmental impact assessment process in the Mackenzie Valley. However, once the Mackenzie Valley Resource Management Act (MVRMA) was assented on June 18th 1998, a new environmental management regime in the north was created. The MVRMA fulfills commitments made in aboriginal land claim agreements settled in the Mackenzie Valley. It provides significant decision making roles for aboriginal people such as co-management boards with responsibilities in the areas of environmental protection and resource management. ¹

Traditional Knowledge in Environmental Impact Assessments

One of the boards established by the MVRMA is the Mackenzie Valley Environmental Impact Review Board (Review Board). The Review Board is responsible for conducting environmental impact assessments of developments in the Mackenzie

¹ The co-management boards have no less than one half aboriginal nominations appointed to the board and no more than one half government nominated appointees.

Valley. The “impact on the environment” that the Review Board must determine is defined as:

“any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources.”²

When looking at a project’s impacts, the links between these environmental elements aren’t always clear in science. This is where traditional knowledge plays a significant role in northern environmental impact assessments.

Traditional knowledge is a body of knowledge often held by aboriginal people. Traditional knowledge is a sacred component of an aboriginal community’s culture. It is acquired through observations and experiences gained while living on the land. It may provide historical and modern perspectives on the social, cultural and ecological phenomena of the surrounding environment. It may identify possible impacts a development can have on the environment. Thus, traditional knowledge can be very relevant when gathering baseline information, making impact predictions and determining mitigation and monitoring methods. This is especially true when scientific data is lacking or land use plans are incomplete. For these reasons, the Review Board recognizes the importance and need of fully considering traditional knowledge in its decisions.

Such consideration of traditional knowledge is one of the most important elements of the MVRMA.

“In exercising its powers, the Review Board shall consider any traditional knowledge and scientific information that is made available to it.”³

The Review Board noted that the parties participating in an environmental impact assessment do not always understand what is needed to do a good job of incorporating traditional knowledge into the Review Board’s process. The Review Board feels it can provide some clarity to participants in environmental impact assessments by developing a set of guidelines on how to bring traditional knowledge forward in an environmental impact assessment proceeding.

In 2003, the Review Board began developing *Guidelines for the Incorporation of Traditional Knowledge into the Environmental Impact Assessment Process*.⁴ The

² MVRMA, s.2

³ MVRMA, s. 115.1

⁴ *Guidelines for Incorporating Traditional Knowledge into the Environmental Impact Assessment Process*. Mackenzie Valley Environmental Impact Review Board. Approved: May 18th, 2005. Available at: www.mveirb.nt.ca

guidelines outline the Review Board's expectations for incorporating traditional knowledge in project design and environmental impact assessment. This will enable developers to do a better job working with traditional knowledge holders prior to the start of an environmental impact assessment. In addition, with a clearer outline of when traditional knowledge can be presented to the Review Board during a proceeding, parties and the general public can participate and share their traditional knowledge in a more effective way to decision makers. This results in a more organized consideration of traditional knowledge and science by the Review Board and other stakeholders in an environmental impact assessment.

The Process

Traditional knowledge is held close to the hearts of communities and any activity that might impact a community's control over the use and management of traditional knowledge will be subject to much scrutiny. Due to this, developing *Guidelines for Incorporating Traditional Knowledge into the Environmental Impact Assessment Process* was not an easy task. The process the Review Board undertook in the document's development is outlined in Figure 1 below.

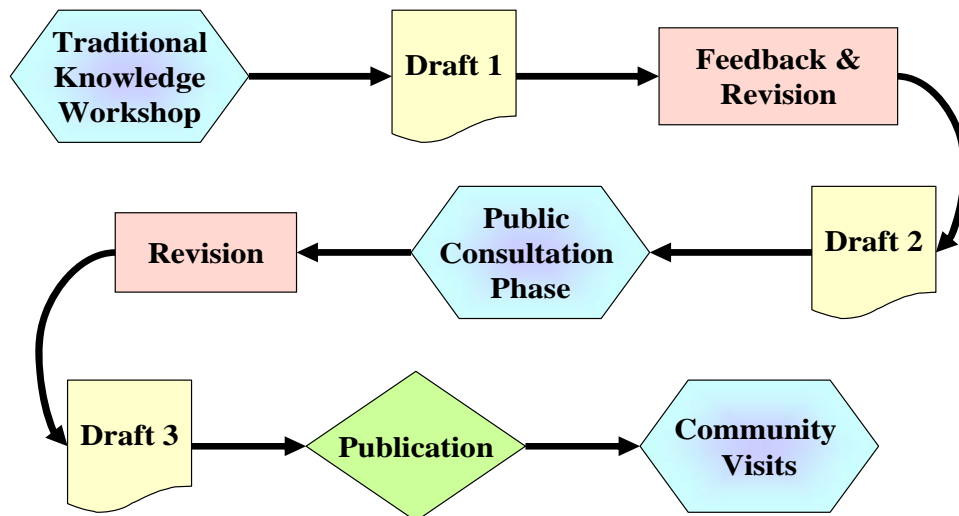


Figure 1. Process for Developing Guidelines for TK in EIA

The first stage in the development of the guidelines was a general workshop on the topic of traditional knowledge held in winter 2002. The workshop brought together many aboriginal representatives and elders from around the Mackenzie Valley. It facilitated dialogue on the topic of traditional knowledge in the north but did not venture into details about the actual development of guidelines for environmental impact assessment purposes. The following summer of 2003, the Review Board hired a

consultant to write a first draft. This document was sent out to selected workshop participants in the fall, and their feedback was collected over several months.

In September 2004, an internal staff review of the feedback took place and significant revisions were made to the guidelines. A second draft was approved and made available for comment over an eleven week public consultation period. This phase consisted of letters, emails, faxes and follow up phone calls. Various events allowed for the document to be showcased, including one-on-one meetings and workshop presentations. These activities sparked greater interest in the document. In response to requests for extensions to feedback deadlines, the Review Board also offered an additional month to those requiring extra time to submit comments. From start to finish the development of the guidelines took approximately two and a half years.

The Challenges

The Review Board faced three main challenges when developing its *Guidelines for Incorporating Traditional Knowledge into the Environmental Impact Assessment Process*. Firstly was dealing the misconception and resulting concern that these guidelines would or could regulate traditional knowledge. Secondly the Review Board had to deal with concerns over the sufficiency of the public involvement with the guidelines' development. The third challenge was the difficulty in dealing with confidentiality and research ethics associated with traditional knowledge.

1. Communicating Purpose of Guidelines

One of the first challenges the Review Board faced was communicating the purpose and intent of the guidelines. After both the first and second drafts of the guidelines, it became clear that some aboriginal groups in the Mackenzie Valley were uncomfortable with the Review Board's decision to make guidelines in the area of traditional knowledge. There was a misconception that the guidelines may usurp aboriginal community or regionally based policies governing traditional knowledge management and use. Some groups feared the Review Board may infringe on their aboriginal rights over traditional knowledge and they felt the Review Board did not have the authority to create any guidelines in this area. This concern likely arose from two factors connected to the guidelines.

The first factor was the way in which the document addressed the Review Board's authority to decide on the weighting of evidence. Both draft 1 and draft 2 assigned the Review Board with the authority to verify and authenticate traditional knowledge

presented to it. However, it became clear from the feedback received that this authority should rest in the hands of the community and not the Review Board.

The second factor was likely due to the title of the second draft being “Traditional Knowledge Guidelines”, a title commonly used by communities and regional organizations for policies on appropriate traditional knowledge study protocol. This misnomer fostered concern about the document before analysis of the content often took place. Without proper clarity about the nature and purpose of the guidelines, it is not a surprise that criticism arose on the process that the Review Board followed in developing them.

2. Sufficiency of Public Involvement

The second challenge was to deal with dissatisfaction of the degree of public involvement in the guidelines’ development. Some aboriginal organizations believed the Review Board had a “duty to consult” over these guidelines and the process had not met that duty. This is believed to have resulted from the fear that the guidelines would play the role of community or regional traditional knowledge policies.

The initial workshop had lacked specifics about incorporating traditional knowledge into environmental impact assessments. In addition, after draft one was created, public comment, although possible, was not actively solicited. The large lag time between draft 1 and draft 2 also resulted in staff turnover being a contributing factor to the misunderstanding of what the guidelines were all about. Essentially, some groups felt draft two was the first time they had been asked for input and this was not sufficient for a set of guidelines that were perceived to be asserting power over an aboriginal right.⁵

The Review Board considered the concerns but concluded with confidence that the process adopted for the guidelines met the consultation needs. Nevertheless, the Review Board recognized it had not been sufficiently clear about the guidelines purpose. The Review Board felt it could resolve both the challenge of communicating the purpose and intent and the challenge of justifying the process used, by making some important

⁵ It should be noted that the “duty to consult” sentiment stems from the recent decisions in Canadian courts that determined the government of Canada had a duty to consult on decisions which impact aboriginal rights. The legal implications on an independent body such as the Review Board are still being worked out. [*Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511] [*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550]

changes to the document and communicating better with communities about the guidelines.

The revised guidelines place the verification and authentication of traditional knowledge in the hands of the communities. In addition, the revised guidelines place more emphasis on the importance of acknowledging and following any community and regional traditional knowledge policies and guidelines. The Review Board also changed the title to “*Guidelines for Incorporating Traditional Knowledge into the Environmental Impact Assessment Process*”. This will clarify the difference between community and regional policies and the Review Board’s guidelines. However, the Review Board still needed to clarify with groups that the guidelines will not infringe on aboriginal rights.

Through a round of community visits over the summer of 2005, the Review Board explained that it was not interested in becoming a traditional knowledge management body. It was explained that the guidelines are not designed to govern how traditional knowledge would be collected, used, or interpreted by communities or stakeholders. Those areas can be addressed in community and regional traditional knowledge policies and protocols. Instead the Review Board clarified that it has the responsibility of doing environmental impact assessments in the Mackenzie Valley and part of that is to make sure parties to those assessments understand how the process works. This includes how traditional knowledge can be incorporated into the decision making. The Review Board strongly believes that by having the guidelines, traditional knowledge will gain more authority in the environmental impact assessment process and this is a beneficial outcome for communities and other parties to an environmental impact assessment.

3. Confidentiality and Research Ethics

The final challenge the Review Board faced was not directly linked to the miscommunication difficulties. Rather, the issue was associated with confidentiality and research ethics relating to traditional knowledge evidence. The confidentiality section and prior informed consent references in the document received a great deal of comment and feedback from groups, both aboriginal and non-aboriginal. Traditional knowledge is a sacred wisdom to communities and it is often handled in very specific culturally sensitive ways. The Review Board is intent on trying to give respect to both the cultural sensitivities associated with traditional knowledge and the procedural fairness required for its processes and subsequent decisions. However, the draft guidelines lacked adequate clarification of how to reconcile these sometimes conflicting interests.

With respect to confidentiality, the Review Board recognizes that as a public board in Canada there are limits to the confidentiality it can offer to any evidence that is brought forward. It was necessary to make this clearer in the final guidelines. The *Access to Information and Privacy Acts* do not currently grant an exemption for traditional knowledge. Therefore public access to the Review Board's records can be possible even if traditional knowledge is filed confidentially with the Review Board. In spite of this, the Review Board does want to offer some reasonable options to parties in an environmental impact assessment.

The first way of handling the confidentiality issue was to highlight the option for the developer and community to work with one another before and outside of the environmental impact assessment process. The benefits to this option are significant for many reasons. Firstly, the developer is not subject to access to information and privacy legislation like the Review Board. Thus, any information shared with the developer by traditional knowledge holders and communities can be considered truly confidential and will not need to be a part of the record. The Review Board will only need to seek confirmation that the traditional knowledge influences project design, impact prediction and mitigation and monitoring methods. A secondary benefit is that developers will gain much more value by working directly with the traditional knowledge holders rather than waiting for the information to come forward during environmental impact assessments via the Review Board.

The Review Board recognizes there will be circumstances where confidential traditional knowledge will need to be shared directly with the Review Board. Revisions were made to the confidentiality section to allow for a case-by-case decision making process. These changes now allow the Review Board to examine a confidentiality request, in consultation with other parties to the proceeding before determining a final course of action. The Review Board hopes by allowing this flexibility in procedure, fairness in each environmental impact assessment can be maintained.

In order to elaborate on the principle of informed consent as requested, the Review Board needed to determine what the obligations are for the Review Board and for other parties involved. The first thing the Review Board did was explain better in the guidelines the responsibility of developers in working with traditional knowledge holders. Developers need to gain prior informed consent for any traditional knowledge being used for environmental impact assessments and project design purposes. The guidelines recommend developers consult with community and regional organizations on this topic,

since some aboriginal organizations may already have policies and procedures in place. Further to this, the Review Board advises parties that it may ask aboriginal organizations to confirm that the prior informed consent of traditional knowledge holders was obtained. Hopefully with the expansion on this topic, developers will understand the importance of this ethical obligation prior to working with traditional knowledge holders.

The Lessons

It is evident that a strong communication strategy is very important when dealing with a sensitive topic such as traditional knowledge. The Review Board did not anticipate the concern that was generated in this area, and many lessons were learned in the process. It is imperative to communicate the purpose and intent of the document clearly and early. In addition, it is important to reaffirm the authority of communities and regional organizations over the actual management of traditional knowledge. Impact assessment organizations need to determine what areas the organization intends to provide guidance on and what areas communities will need to provide guidance on.

Understanding where the line is drawn is critical prior to starting a guideline development process for traditional knowledge in environmental impact assessment. In addition, impact assessment organizations need to be certain that adequate forums are provided to community members and leaders to provide insight and input. Research must be performed on the legal boundaries and obligations that exist in protecting traditional knowledge prior to the start of any guideline development.

The Review Board intends to review its *Guidelines for Incorporating Traditional Knowledge into the Environmental Impact Assessment Process* regularly and if revisions are required, the Review Board hopes to accommodate the need quickly. The Review Board's main concern is respecting the aboriginal people and maintaining a fair and open process. Learning from experience, the Review Board hopes that the guidelines will provide clarity for all participants involved in environmental impact assessments in the Mackenzie Valley.