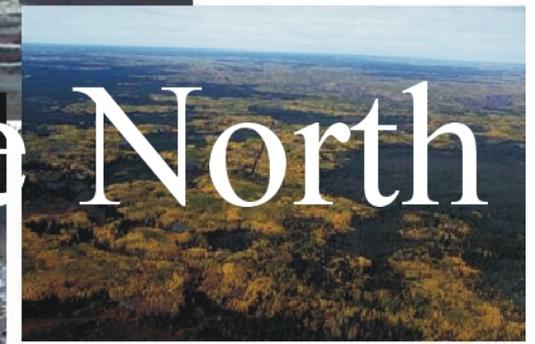




Mackenzie Valley
Environmental Impact Review Board



EIA

Made in the North

The Mackenzie Valley
Environmental Impact Review
Board's Submission to the 2005
NWT Environmental Audit

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List of Abbreviations

CEAMF	Cumulative Effects Assessment and Management Framework
CIMP	Cumulative Impacts Monitoring Program
EA	Environmental Assessment (refers to the specific EA process under the MVRMA)
EIA	Environmental Impact Assessment (refers to the general process of assessing impacts on the environment and includes all three levels of assessment under the MVRMA)
GNWT	Government of the Northwest Territories
INAC	Indian and Northern Affairs Canada
MVEIRB	Mackenzie Valley Environmental Impact Review Board (aka “the Board”)
MVLWB	Mackenzie Valley Land and Water Board
MVRMA	Mackenzie Valley Resource Management Act
REA	Report of Environmental Assessment (refers to the MVEIRB’s report and its reasons for decision at the end of an EA)
RWED	Department of Renewable Resources, Wildlife, and Economic Development
SEIA	Social and Economic Impact Assessment
SLWB	Sahtu Land and Water Board
TK	Traditional Knowledge

Introduction

This document is the Mackenzie Valley Environmental Impact Review Board's (MVEIRB) submission to the auditor for the 2005 NWT Environmental Audit. Section 148(3) of the *Mackenzie Valley Resource Management Act* (MVRMA) and the Terms of Reference for the NWT Environmental Audit provided guidance on the themes addressed in this document. The document first provides a summary of MVEIRB's view of the status of environmental impact assessment in the Mackenzie Valley. It then presents trends the MVEIRB has observed and the challenges these pose. Next the document discusses cumulative impact monitoring and then the regulatory regime under the MVRMA. Finally, it presents the greatest and most urgent challenges, in MVEIRB's opinion, between now and the next audit.

This document assumes the reader has some familiarity with the regulatory regime and with the environmental impact assessment (EIA) processes under the MVRMA. The MVEIRB's EIA Guidelines provide a general overview of EIA in the Mackenzie Valley and describe the processes followed in the three EIA stages, preliminary screening, environmental assessment (EA), and environmental impact review (EIR), in detail. The guidelines are accessible at the MVEIRB's web site, www.mveirb.nt.ca. For information on regulatory approval processes please contact the relevant regulatory authority directly. Information on land use permits and water licenses can be obtained from the Mackenzie Valley Land and Water Board at www.mvlwb.com.

Status

MVEIRB Internal Developments

Since the enactment of the MVRMA in December of 1998 much has changed in the environmental assessment regime in the Mackenzie Valley. Not only did the MVRMA introduce a new system, the new system itself has undergone constant adaptation and evolution since then. In addition, development activities in the Mackenzie Valley increased during this time.

The Board's environmental assessment process has undergone a metamorphosis since 1998 and continues to adapt to the changing needs and priorities of the parties involved in assessments. For example, early assessments routinely employed paper hearings, while virtually all assessments in recent years involved public hearings and informal community hearings. The Board is also increasing its efforts to understand and educate others on social and economic impact assessment (SEIA). Also, the Board is starting to put resources into bringing the results of its assessment back to the residents of the Mackenzie Valley as evidenced by the hiring of a community liaison officer.

On the technical side, the Board is now placing more emphasis on front end scoping and is employing a broader set of analytical tools, from databases to a geographic information system. Improved front end scoping allows the Board and parties to focus their resources on key issues. Utilizing more analytical tools is resulting, among other things, in a better linkage between the Board's report of assessment and the public record it is based on.

The MVEIRB is now in the position of having comprehensive and useful EIA Guidelines that have undergone an extensive review by EA parties.

Perhaps most importantly, over time the Board has changed its approach to decision making and reporting. Early assessments sometimes recommended measures to protect the environment without identifying a specific significant impact on the environment. This was seen as highly problematic by the responsible Ministers who were faced with implementing measures without, in their opinion, sufficient rationale. The Board now separates between binding “measures” and non-binding “suggestions”. A “measure” is a mitigation measure to prevent a specific significant impact that in the Board’s opinion is likely to occur. A “suggestion” is a way to further reduce the overall environmental impact of a project or future projects in the same area.

Public Participation

In the MVEIRB’s view the MVRMA is intended to allow the people of the Mackenzie Valley to participate in decision making. The level of participation of Mackenzie Valley residents is significantly higher today than pre-MVRMA. Moreover, the recent assessments of mineral exploration in the Drybones Bay area and of Imperial Oil Resources Ventures Ltd’s geotechnical investigations in the Deh Cho are prime examples of local communities driving the process. These assessments are evidence of how the MVRMA empowers local communities to require developments they are concerned about to undergo closer scrutiny.

Irrespective of the regulatory outcome of an EA, the fact that the Board (including its aboriginal members) is going to communities to listen to their concerns is in itself valuable. In the MVEIRB’s mind it represents a significant improvement over the pre-MVRMA decision making by a government, which has not heard from the concerns of the people affected first hand. Compared to pre-MVRMA days, decision making in resource management and environmental assessment is more decentralized today. Pre-MVRMA only the largest projects resulted in a panel review that afforded local communities some level of participation. Today the EA process engages those most affected by the impacts of proposed developments to a considerably greater extent. The Drybones Bay example shows that some communities are spending a considerable portion of their time and resources on the EA process. This is an indication that the EA process under the MVRMA is taken seriously and is seen as worthwhile.

Community capacity remains an issue. While the MVRMA regime has empowered communities to cause higher levels of assessment, it has not provided them with the capacity to meaningfully participate in these higher levels of assessment. [Appendix 3](#) contains a discussion of those capacity issues. Notwithstanding these issues, the Board has observed that some communities are starting to build some capacity to participate in EA processes on their own and are at times devoting significant resources to the process.

Future Challenges for the MVEIRB

The future for the MVEIRB is difficult to predict. Some accounts suggest the MVEIRB's workload may have peaked as development becomes more commonplace and the nature of new developments is better understood by the residents of the Mackenzie Valley. The Board, on the other hand, has found that its workload (the number of assessments, the nature of the developments assessed, and the complexity of each assessment) has proven to be unpredictable. Moreover, the Board has found the complexity of an assessment is governed less by the size of the proposed development and more by the sensitivity of the receiving environment, both biophysical and human factors.

To date no comprehensive analysis of development trends and their effect on the regulatory regime, e.g. through the examination of preliminary screening reports, has been undertaken. Nonetheless, there is anecdotal evidence that while the absolute numbers of early stage exploration in the minerals as well as the oil and gas fields remain high, the proportion of more advanced developments, such as advanced minerals exploration, mine development, and oil and gas drilling and production is increasing.

The MVEIRB sees a strong need to continue to develop guidelines specific to individual aspects of the EA process, for example on the use of traditional knowledge in EA and in the area of socio-economic impact assessment. Moreover, the pace of development in the Mackenzie Valley does not appear to be slowing down. In the absence of settled land claims, comprehensive land use planning and a network of protected areas, the MVEIRB expects to continue to be called upon to assess the impacts of a variety of developments in sensitive locations throughout the Mackenzie Valley.

Another concern for the Board is that not all of its measures are being implemented and that suggestions made in the Reports of Environmental Assessment appear to be disregarded by regulatory authorities or responsible Ministers. More accountability for at least considering these suggestions could be built into the system through the imposition of implementation reporting requirements for both measures and suggestions made in the REA, perhaps on an annual basis. The Board has attempted to introduce this concept in reference to developer commitments in both the recent Paramount Cameron Hills Extension and Imperial Deh Cho Geotechnical Program REAs. For information on implementation of measures see section "[Measures Implementation](#)" below as well as [Appendix 1](#).

Trends

The MVEIRB is not in the business of collecting environmental data or information on the general health of the environment. It can only offer observations on environmental issues that have featured prominently in EA over time. In addition, the MVEIRB can offer some observations on trends in the MVRMA environmental assessment process itself.

Environment

Human Environment: The MVEIRB has observed a clear trend towards more concern about, and emphasis on, the human environment. Social, cultural, and economic issues play an increasing role in environmental assessments in the Mackenzie Valley. Pre-MVRMA these issues could be addressed through EA only if they were a product of changes to the biophysical environment. Under the MVRMA an EA is to consider direct impacts on the social and cultural environment. Although not part of the definition of impact on the environment, the protection of the economic well being of residents of the Mackenzie Valley is a guiding principle under the Act.

Air Quality: Over the past few years, air quality has emerged as a serious concern that is not being addressed adequately. The Board is concerned that there does not appear to be an appropriate “regulatory home” for its measures regarding air quality. Water quality, on the other hand, appears to be seen as an issue that, although of great concern, is being addressed by the regulatory regime relatively well.

Wildlife: Residents of the Mackenzie Valley continue to be concerned about wildlife, with concerns about caribou being front and centre. Habitat fragmentation, hunting pressures, and the creation of access are all concerns not only voiced in relation to individual projects but on a cumulative basis.

Cumulative Effects: Another fairly pronounced trend the Board has recognized over the past few years is rising concern over cumulative effects, both in terms of biophysical and social, cultural and economic impacts. Concern over cumulative effects has been cited frequently in referral decisions and several recent EAs (e.g. Paramount Cameron Hills Extension), have focused on cumulative effects. The Board, however, notes that the term ‘cumulative effect’ is not necessarily well understood by residents and communities of the Mackenzie Valley.

Baseline Data: Access to baseline data is critical for quality EA. More biophysical data is becoming available as developers are collecting data for their individual projects and as the level of development increases. Developers are at times reluctant to share data collected at their own expense. Moreover, such data is usually project specific, covers a small area and may not be comparable to data collected for other projects. The lack of standardized data collection and reporting affects the ability to conduct meaningful cumulative impact assessment.

The Review Board has expressed this concern, for example, in two recent REA, Paramount’s Cameron Hills Extension and Imperial’s Deh Cho Geotechnical Program. In both cases the Board directed measures towards the GNWT to bolster baseline data on ungulate populations.

Contaminated Sites: The Board views INAC’s efforts to clean up contaminated sites in the Mackenzie Valley as a very encouraging environmental trend. Moreover, in the Board’s opinion, planning for abandonment and restoration is improving in concert with security deposit systems now in place.

MVRMA Process

There are more environmental assessments in the Mackenzie Valley now than pre-MVRMA. The nature of developments that are being assessed shows that at least part of the increase stems from a broadening of the scope for developments undergoing assessment. Pre-MVRMA, only large projects were subjected to more than a preliminary screening. Today, some small projects are subjected to EA as well. Examples include mineral exploration programs in the Drybones Bay area, near the East Arm of Great Slave Lake and the Horn River, as well as oil and gas exploratory drilling in the Tulita area.

In addition to having smaller projects referred, the Review Board has also seen an increase in referrals on the basis of “public concern”. In the Board’s experience it is no longer the size and complexity of a proposed development alone that decides on the level of environmental scrutiny it receives. Location is becoming an important criterion in deciding which developments require assessment beyond screening. This trend may be indicative of two things. First, it shows that the MVRMA works in that it provides for a consistent EA process throughout the Mackenzie Valley but allows regional decision making. Second, it is a manifestation of a lack of land use plans and protected areas to guide development.

Increased community participation is broadening the scope of most assessments from mostly biophysical factors to include social, cultural and economic issues. At the same time, traditional knowledge is playing a more important role in decision making as the Board is making efforts to hear from traditional knowledge holders directly, e.g. through community hearings.

Challenges

A number of the trends identified above pose some challenges to the Review Board and to the regulatory regime overall. In addition, the Board anticipates some challenges arising from developments beyond the Mackenzie Valley.

Capacity: With the increased pace of development the demands on the Board as well as on EA participants, including government, aboriginal organizations, communities and non-governmental organizations have increased sharply.

Community capacity, or lack thereof, has long been identified as a weakness in the EA process (see also Appendix 3). More recently even government departments cite capacity shortcomings of their own.

The *Canadian Environmental Assessment Act (CEAA)* has been amended to provide participant funding not only at the panel review level but also at the comprehensive study level. Many EAs under the MVRMA are as complex and involved as a comprehensive study, and some may even be comparable to a panel review. Yet there are no participant funding provisions for EA, only for EIR.

Communities face challenges not only in their capacity to participate in the EA process, but also in their capacity to deal with environmental change.

The high pace of development puts a strain on general institutional capacity across all levels of government and community institutions. Concerns over impacts of developments on institutional capacity (e.g. policing, healthcare and social services) are being raised frequently in environmental assessments.

Traditional Knowledge: While the Review Board has made efforts to better incorporate traditional knowledge in its EA process, much work remains in clarifying what traditional knowledge is and how it can be used in the process effectively, efficiently, and respectfully. There is insufficient human, financial and institutional capacity to gather and interpret the traditional knowledge required in a timely manner.

Land Use Planning: The frequent referral of very small developments situated in sensitive areas to environmental assessments (e.g. mineral exploration in the Drybones Bay area) is indicative of a lack of comprehensive land use planning. The Board is asked to determine whether development should occur in a specific area or not. Such a determination is ordinarily done through land use planning or through the designation of protected areas, not through project specific EA. The Gwich'in Settlement Area is the only region within the Mackenzie Valley with an approved land use plan. With the exception of Nahanni National Park Reserve and the parts of the Thelon Wildlife Sanctuary, there is no permanently protected area between Wood Buffalo National Park and the arctic coast (i.e. the entire Mackenzie Valley as defined in the MVRMA).

Human Environment: Social, cultural and economic issues play an ever more important role in EA. Yet not only are the tools for social or cultural impact assessment less developed than those for the biophysical side, there is less baseline data available. Expert advice from government on social, cultural and economic issues is less comprehensive than for biophysical issues. Social, cultural or economic data collected by developers is usually project specific, not comparable to data from other projects and often not replicable. It is thus of limited use. The Board has limited influence over how information is gathered.

Transboundary Issues: Another set of issues arises from transboundary developments or transboundary impacts from developments. In the Board's opinion the provisions for such proceedings in the Act are unclear. The MVEIRB has memoranda of understanding with the National Energy Board and the Nunavut Impact Review Board and is in the process of establishing one with the Yukon Environmental and Socio-economic Assessment Board. These agreements are rather general and have not been tested through actual assessment proceedings. In the case of the currently ongoing assessment of the Bathurst Inlet Port and Road development, the MVEIRB is unclear as to what its role might be, despite an agreement. In the case of the Mackenzie Gas Project responsibilities are clearer, but it took two and a half years of negotiation to come to an agreement between all parties.

Land Claims: The lack of settled land claims throughout the Mackenzie Valley not only exacerbates the land use planning issue, it creates uncertainty on how to apply the EA process in the unsettled areas. One example is the question of harvesting compensation. The existing land claims include provisions for harvesting compensation, whereas in areas without a settled claim no provisions exist.

Other Challenges: An additional challenge the Review Board has identified is climate change. While it has not yet featured prominently in any EA, with the exception of the Mackenzie Gas Project, the Board anticipates that climate change issues will play an increasing role in future assessments.

The clean up of contaminated sites, such as Giant Mine in Yellowknife may pose somewhat of a challenge to the Board in that it presents an entirely new type of “development” to be assessed, with government being the developer. Cuts to government monitoring programs, e.g. the reduction of water monitoring stations in the Mackenzie Valley, jeopardize the regulatory regime’s comparatively well developed management of water quality.

Cumulative Impact Monitoring

The increased importance of cumulative effects in environmental assessments has not been matched by a corresponding increase in the quantity and quality of relevant information provided to the EA process. The importance of cumulative effects to the Board is indicated by measures it imposed in the Report of Assessment for the DeBeers Snap Lake Diamond Project. The Board recommended that, “the Government of Canada take the lead in implementing a regionalized, multi-party response to the monitoring for and management of cumulative effects in the Slave Geological Province”. It further recommended to the government of Canada to take “immediate action to implement the Blueprint for the Cumulative Effects Assessment and Management Strategy and Framework in the NWT and its Regions” including the allocation of stable long term funding.

The capacity to do good cumulative effects assessment is becoming more important as overall development increases throughout the Mackenzie Valley. It becomes critical in areas where the intensity of development increases, e.g. the Cameron Hills area.

The cumulative impacts monitoring program (CIMP) and the cumulative effects assessment and management framework (CEAMF) were launched 10 and 5 years ago respectively. It is unclear to the MVEIRB what information is being collected through CIMP or CEAMF and how this information can be used in the EA process. If government agencies use CIMP or CEAMF to prepare their contributions, this is not apparent to the Review Board. While government has directed considerable resources towards CIMP and CEAMF, there is not yet an effective linkage between the gathering of information and the use of that information in decision making for EA. The lack of easily accessible comprehensive information on cumulative effects limits the Board’s ability to determine the significance of cumulative impacts during an EA.

The Board generally does not seek out evidence on its own, but relies on parties to the EA to provide evidence. There have been exceptions, e.g. in the Drybones and Wool Bay diamond exploration EAs the Board commissioned a study by an independent contractor to collect information on cumulative effects. Also, in the case of the Paramount Cameron Hills Extension the Board retained a consultant to assist it in assessing cumulative effects. While the Board frequently retains outside resources to help interpret information, as an administrative tribunal it should not have to resort to collecting its own evidence.

Regulatory Regime

Measures Implementation

Feedback Mechanisms

The MVRMA is “an Act to provide for an integrated system of land and water management in the Mackenzie Valley”. The Mackenzie Valley Environmental Impact Review Board is one part of this integrated system. Figure 1 is a very simplified representation of how the MVEIRB fits in the regulatory regime, using a Land and Water Board authorization as example. Note that in many cases a government department may be the regulatory authority instead of a Land and Water Board.

Unlike the regulatory approval process, the MVEIRB’s environmental assessment process applies only to a small portion of the developments carried out in the Mackenzie Valley. Moreover, the MVEIRB does not normally interact formally with other parts of the system outside an actual EA proceeding. Government, on the other hand, is involved in all stages from preliminary screening to environmental assessment to issuance of the authorizations (e.g. providing input to the conditions of a land use permit), to enforcement. Government may also interact with a developer at the application stage or even before.

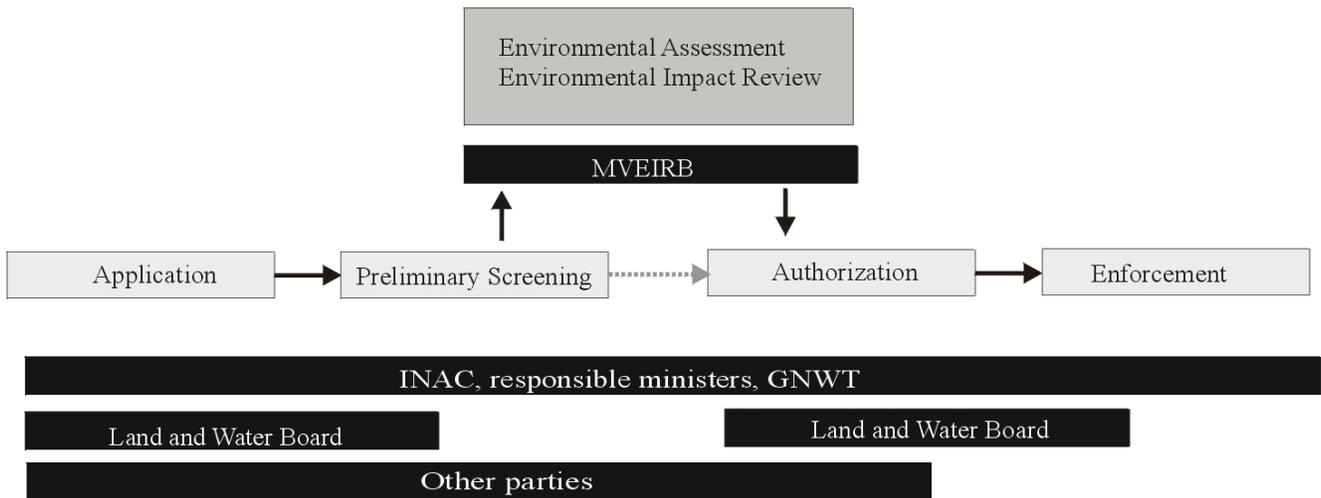


Figure 1: Simplified Overview of Environmental Regulatory Regime

Government inspectors provide feedback to the regulatory authority, be it a Land and Water Board or government itself, effectively creating a feedback loop. Regulatory authorities therefore have a way to verify the implementation and the effectiveness of any mitigation measures they prescribe. Although part of the same integrated system, the MVEIRB is not a regulatory authority and does not automatically receive any feedback on its measures. In fact, the Board has had limited success in obtaining any feedback,

even when actively pursuing it, with the exception of measures implemented through terms and conditions of a Land and Water Board authorization. Consequently, the Board does not have at its disposal a vital tool for evaluating and improving the quality of its assessments. The Board makes predictions about impacts on the environment without being able to verify these predictions. And it imposes measures to minimize or avoid the impacts it predicted without being able to verify the effectiveness of these measures.

The Review Board has recently initiated a process to verify the implementation of its mitigation measures and to, if possible, evaluate their effectiveness. This effort, while worthwhile, puts a strain on already scarce resources. See [Appendix 1](#) for a description and the results so far.

Regulatory Instruments

Under the MVRMA the Review Board recommends whether a proposed development should proceed through the regulatory process or not. If applicable, the Board subjects this approval to mitigation measures, which the Board designs to prevent or minimize significant impacts on the environment. The Minister of INAC, the Responsible Ministers, and the National Energy Board, if required, make the final decision.

In the Board's view once its REA is accepted, all measures contained in it must be implemented and enforced. If this does not occur then, the Board's determination that the development should proceed will no longer be valid as each mitigation measure is designed to prevent a specific impact.

Many of the Board's measures direct a land and water board or other regulatory authority to include specific conditions in the relevant permits or licenses. These measures have a "regulatory home" and the responsibility for their implementation rests with a specific and identified organization. Other measures, however, may be directed at the developer, or at a department or organization without regulatory role. In such cases there may not be an obvious "regulatory home" or "regulatory hook".

To date no level of government appears to accept responsibility for the enforcement of measures that are not directly linked to a specific regulatory instrument, resulting in "orphaned" measures. Similarly, the Board's suggestions, which tend to be more general in nature, are often not implemented by any level of government. Appendix 1 contains more detailed information on the implementation of measures.

Timeliness of Process

Timeliness of the EA process is an often cited issue. Developers tend to criticize the Board (and the regulatory regime in general) for taking too long. At the same time EA participants, particularly communities, routinely criticize the Board for moving too fast, not providing them with enough time to respond, and thus putting undue strain on their resources. Government tends to remain neutral in this discussion. The Board however frequently receives requests for extending comment periods from government departments and regularly receives government submissions late. This indicates that, from a practical point of view, government finds the process too fast rather than too slow.

It is not uncommon for the Board to extend timelines throughout an EA, although it makes best efforts in estimating time requirements at the outset of an EA. The number

and complexity of issues cannot always be predicted accurately. Logistical considerations, demands on parties from outside the EA process, and other unforeseen circumstances often require an adjustment of timelines. The Board has to be fair to all parties, including communities, aboriginal organizations, government, and the developer.

The Board is of the opinion that its EA proceedings, while taking considerable time, do not unduly prolong the process. While the EA is in the Board's hands, it is usually being worked on continuously. The EA proceedings are entirely open and transparent and any party can determine the status of an EA at any time through the public registry or an enquiry with staff.

The situation is different, however, during those stages in the EIA process that are not entirely under the Board's control. These include steps during which parties are to provide input or during which the developer is asked to provide information. While the Board has some control over the timelines for participant comments, it has little to no control over the time the developer spends to produce material.

Table 1 shows that the post-REA process may have more of an impact on timelines than any delays caused by the developer or other parties. The post-REA process can take as long as or longer than the EA process itself. The timeline for the post REA process is the time elapsed between the date the Board submits its REA to the federal Minister and Designated Regulatory Authority (if applicable) and the time the REA is then accepted and permitting can proceed. Unlike the EA, this phase of the process is not transparent and none of the parties, including the MVEIRB, is able to determine the status of a proceeding. The table lists environmental assessments with the timelines for the EA and the post-REA processes, and any ministerial consultation where appropriate.

Of the EAs examined the actual EA process took an average 9.7 months, while the post-REA process lasted an average 6.7 months to date. With several decisions still pending, the average post-REA process time may still increase. It is also noteworthy that without the two diamond mines (Snap Lake and Ekati Expansion) the average EA took only 8.2 months and the average post REA process took 7.3 months.

The data has not yet been compiled for all EAs undertaken by the Board.

Project	EA Timeline	Minister Timeline	Post-REA Process
Bruce Domes	5.5	n/a	No significant impact
BHP Ekati	21	2	Accepted
Ranger Oil	6	1	Accepted
CZN –mineral exploration	7	n/a	No significant impact
ExplorData – oil and gas expl.	2	n/a	No significant impact
CZN-Cat camp	7	14	Reconsideration
Paramount Liard B	10.5	3.5	Accepted
Paramount Cameron	11	3	Consult to modify
Patterson Lumber	9	4.5	Consult to modify
CZN Zinc – test plant	10	15	Reconsideration
CZN Zinc - phase 2	6.5	n/a	No significant impact

DeBeers Snap Lake	26	2.5	Accepted
Western Geco	12	17.5	Consult to modify
Northrock Resources	4.5	1	Accepted
Consol Gold – Drybones Bay	10	1.5	Accepted
NA General – Woolbay	9.5	13	Consult to modify; Decision pending
New Shoshoni – Drybones Bay	9	13	Decision pending
Snowfield – Drybones Bay	8	6	Consult to modify
MGP	5.5	0	EIR ordered by Board
Paramount Cameron Hill Extension	12	9	Consult to modify; Decision pending
Deh Cho Bridge	11	n/a	No significant impact
Average	9.7	6.7	

Table 1: EA Timelines: *All times are given in months. EA timeline refers to the time elapsed between the Review Board receiving a referral and submitting its REA. Minister timeline refers to the time elapsed from the Board’s REA submission to the acceptance of the REA by the responsible Ministers so the regulatory process can proceed. The Post-REA Process column describes the nature of the post REA process. “No significant impact” does not require a post REA process.*

Working Relationships

The quality of the MVEIRB’s EAs depends to a large degree on the quality of the input provided by the parties to the assessment. There are a number of factors that influence the quality of information provided to EA proceedings that may be grouped under the heading ‘working relationships’.

Roles and Responsibilities

There is some confusion over roles, especially over the roles of government, in the EA process. The Department of INAC for instance participates in EA as expert adviser and possibly as an intervener. It then makes the final decision on the development (i.e. judges the outcome of the EA). INAC often also acts as the land owner and may be the developer as well. INAC must manage multiple mandates, including environmental protection as well as economic development. The GNWT faces similar multiple mandates.

Both INAC and the GNWT coordinate their participation in EA through a centralized unit. Consequently, there is no apparent separation between the various roles of government. Expert advice is given to the Board through the same channels as interventions, for instance. In the Board’s opinion the absence of protocols that provide a clear distinction between the various roles of government creates a legal risk for the EA process. The Board itself may have been contributing to this situation by not clearly labeling requests for expert advice as such.

As discussed above under [Cumulative Impact Monitoring](#), the Review Board is also uncertain about the role of programs such as CIMP. The same is true for government agencies that are not usually participating in assessments, e.g. INAC's enforcement arm, which is probably the single most knowledgeable group of people regarding the situation on the ground. MVEIRB does not have a way of directly accessing this pool of knowledge and is not sure if the knowledge is being made fully available to it through the one window communication. Generally the Board does not have direct access to government experts at the federal or territorial level.

Scope of EA and Government Participation

MVRMA s. 115 requires the Board to "have regard to"

(a) *The protection of the environment [...] and*

(b) *The protection of the social, cultural and economic well-being of residents and communities [...]."*

Following the guiding principles outlined by the MVRMA, the Board has put equal importance on the biophysical aspects and the social, cultural, and economic aspects of recent EAs. Input into the EA process from communities and the public also reflects at least equal importance of social, cultural and economic issues. The same is not true of government participation in the EA process which is largely concentrated on the biophysical aspects.

Government Participation: It is not apparent to the Board to which extent departments charged with social, cultural, or economic issues participate in EA. These departments are responsible for implementing related measures. They are then likely to cause and/or participate in a consult to modify process. The Board notes that in recent consult to modify processes measures addressing social, cultural or economic matters have been the main issue. For example, in the recent Paramount Cameron Hills Expansion EA government suggested to remove all measure related to social and economic issues. Moreover, at times issues or information are brought before the Board for the first time in a consult to modify process.

Members of the public as well as representatives of aboriginal and community organizations have raised concerns about a lack of government presence in community hearings or public information sessions. Government departments have argued that they did not actively participate in certain EAs because they did not have any issues or concerns with the proposed development. In the Board's view this is a legitimate reason to not intervene in the proceedings. Notwithstanding the lack of any concern by government, government is still needed in the EA process as expert advisor. In the Board's view governments absence when government does not act as intervener further contributes to the perceived lack of separation between different government roles.

Community/Aboriginal Organization Participation: The Board finds that communities and aboriginal organizations often duplicate government's efforts by hiring consultants to address biophysical issues, rather than focusing on their own areas of expertise, for example TK or social and cultural issues. More pro-active communication by government may alleviate this problem over time. Currently communities and aboriginal organization do not seem to trust government science enough.

In addition, the Board perceives a lack of understanding of the purpose and the limitations of the EA process among many organizations. The Board occasionally sees itself confronted with issues for which an environmental assessment cannot provide a remedy, e.g. disputes over the awarding of contracts for a development.

Legislative and Other Challenges

Legislative Amendments: The Review Board has identified a number of potential amendments to the MVRMA that, in its opinion, would provide more clarity and certainty for environmental impact assessment processes in the Mackenzie Valley. The suggestions deal largely with practicalities, such as a situation where the Board can strike a three person panel to conduct an Environmental Impact Review, but is required to meet in full for an Environmental Assessment.

Other issues include the definition of local government, the reasons for a referral, timeframes for a referral, cost recovery, and the length of board member appointments among others. A full description of the suggested amendments is provided in [Appendix 2](#).

Integrated Resource Management: The MVRMA is "an Act to provide for an integrated system of land and water management in the Mackenzie Valley [...]". The Act created a framework consisting of:

- the environmental impact assessment process, administered by the Mackenzie Valley Environmental Impact Review Board;
- the land and water regulatory process, administered by the Land and Water Boards; and
- the land use planning process, administered by the Land Use Planning Boards.

Furthermore, in the Board's opinion, the MVRMA is founded on the assumption that the remaining land claims in the Mackenzie Valley will be settled in a reasonable timeframe.

Currently only the EIA process has been implemented throughout the entire Mackenzie Valley as contemplated by the Act. In the absence of land claim settlements outside the Gwich'in, Sahtu, and Tlicho Settlement Areas the regulatory framework, while being applied, does not allow for the kind of regional decision making envisioned by the Act.

Only the Gwich'in Settlement Area has an approved land use plan. A draft exists in the Sahtu and in the Deh Cho one is being developed. The land use planning process has yet to begin in other areas of the Mackenzie Valley, including the Slave Geological Province, which experiences intense mineral exploration and mining development. Another important part of land use planning, the designation of protected areas is also only in its infancy.

In short, the Mackenzie Valley has a hybrid regulatory environment that has large parts of this framework missing. This is causing problems with the EA process, and there have been instances where the EA process was used to address land use planning questions. For example in the Drybones Bay EAs the Board was being asked to determine whether any development should be allowed rather than whether a particular development is likely to have significant impacts.

Conclusions

Following the discussion above, the MVEIRB concludes that there is room for improvement in the environmental regulatory regime in the Mackenzie Valley. While the Board has identified numerous issues, it is of the opinion that the following items are the most important and most urgent ones to address:

1. **Availability of good baseline data/information:** The Review Board requires good information to make good decisions. Biophysical as well as social, cultural and economic data must not only be collected but must also be brought forward to the EA proceedings in a meaningful, effective and timely manner. This requires full participation by government in the EA process, regardless of whether or not the government perceives any issues with the proposed development.
2. **Increased capacity:** Communities and, to lesser extent, government must be enabled to participate in EA effectively. This requires appropriate institutional, human and financial resources. The Review Board cannot provide these resources to any EA participants, nor is it the place of the Review Board to determine exactly what these resources are. The Review Board must, however, point out that the timeliness, effectiveness, and efficiency (i.e. the quality of environmental assessment) is directly correlated with the capacity of its participants. [Appendix 3](#) provides further information on this subject
3. **Land use planning and claim settlement:** Land use plans, protected areas, and certainty over land ownership are critical to integrated resource management. The establishing of land use plans throughout the Mackenzie Valley as well as the settlement of outstanding land claims should be a priority for government and aboriginal organizations.
4. **Legislative Amendments:** The Board has now had over six years experience with the MVRMA and has identified a number of areas that should be improved or clarified (i.e. transboundary development issues). [Appendix 2](#) provides a listing of these.
5. **Efficient post-EA process:** There must be accountability for the time, effort, and resources spent in an EA and during the time between EA and the Ministers' final decision. In the Board's view more complete participation in the EA process by government is an important first step towards reducing the frequency and complexity of consult to modify proceedings.
6. **Implementation and Follow up:** There needs to be an organization responsible for implementing and enforcing each mitigation measure once accepted by the Minister. The Board must be able to verify its impact predictions. It must also be able to verify the implementation of its measures and suggestions. To that end it needs feedback from regulatory bodies. Also

part of government monitoring or inspection activities should be specific to EA measures.

7. ***Transboundary Issues***: As the MVRMA provisions for transboundary developments or developments with transboundary impacts are ambiguous, agreements with neighbouring jurisdictions will be required.

Appendix 1 – Implementation of Measures

Introduction

The Mackenzie Valley Environmental Impact Review Board routinely prescribes mitigation measures in its reports of environmental assessment to prevent or minimize significant adverse impacts on the environment. These measures are designed to mitigate against predicted impacts. The regulatory regime under the Mackenzie Valley Resource Management Act (MVRMA) does not currently contain an automatic feedback loop through which the Board can verify its impact predictions and determine whether its measures were implemented and effective in mitigating against the predicted impacts. After nearly six years of operation without this vital tool for improving the outcome of environmental assessments, the Board initiated a program to follow up on EA measures and suggestions in the fall of 2004.

Ultimately the goal of this program is to evaluate the effectiveness of mitigation measures prescribed by the Board with the objective of increasing the quality of environmental assessment by continually improving the effectiveness of mitigation measures. Initially the Board set out to verify whether its measures had been implemented at all. This document represents an interim report on this effort.

Terminology

Recommendation: Until 2001 the Board did not distinguish between mitigation measures to address specific significant adverse impacts and general ways to improve the environmental performance of a proposed development or similar future developments. The Board used the term ‘recommendation’ for all mitigation measures, whether binding or not, as well as for its recommendation under MVRMA s. 128. Since 2001 the Board distinguishes between mitigation addressing specific significant adverse impacts and general suggestions to improve environmental performance. Binding mitigation continued to be labeled ‘recommendation’ until early 2005. Today the term ‘recommendation’ refers only to the section 128 recommendation.

Suggestion: In 2001 the Board introduced the term ‘suggestion’ to describe mitigation which, in the Board’s opinion, would improve the environmental performance of a development or of similar future developments. With the introduction of suggestions the Board distinguishes between binding mitigation, until recently labeled ‘recommendation’ which in the Board’s view must be implemented, and non-binding mitigation which is not a requirement for the development to proceed.

Measure: Since early 2005 the Board uses the term ‘measure’ to describe mitigation which must be carried out for the Board’s recommendation that the development proceed to be valid.

Methods

Database

The first major step was to list all the measures the Board has recommended since its establishment in December 1998. To this effect a database was created containing a table with general EA information and, linked to it, a table with information on specific measures. Figure 1 presents a custom form for easy entry and retrieval of general EA information, while Figure 2 represents a custom form designed to simplify data entry and analysis for the implementation verification stage.

The screenshot shows a window titled "EA Information" with a blue title bar. The form contains the following fields and values:

- file #: EA00-003
- developer: Paramount Resources
- project title: Paramount Liard East
- REA link: [Reasons for Decision\Paramount-LiardEast\Paramount_LiardEast_Decision.pdf](#)
- EA Status: EAD
- complete (ministerial approval): Louie Azzolini

At the bottom, the record navigation shows "Record: 3 of 32".

Figure 1: Database form for general EA information

The screenshot shows a window titled "implementation" with a blue title bar. The form contains the following fields and values:

- identifier: R-EA03-002-2
- short title: Water Sources
- complete text: CGV will only withdraw water from small source lakes at the Hearne Channel location if there is sufficient water in those lakes to ensure that less than 5 percent of the water is taken.
- verification protocol: correspondence to DFO
- implementation status: fully implemented
- implementation notes: Consolidated Goldwin told DFO that there is sufficient water but has not yet submitted a post project report.
- implementation link: (empty)
- Text16: DFO

At the bottom, the record navigation shows "Record: 122 of 129".

Figure 2: Database form for verification of implementation of individual measures

Verification Protocols

To facilitate efficient processing of information a series of protocols were devised to verify if a measure was implemented at all. At this stage the analysis was limited to simply determining whether or not a measure recommended by the Review Board was implemented by the appropriate authority. No attempt was made to measure the success of the measure, or to determine whether or not it had its intended effect. Table 1 contains the protocols with a brief description.

“Protocol”	Description
MVLWB Public Registry – simple check	The public registry maintained by the Mackenzie Valley Land and Water Board was searched. In some cases simply for the presence of a required document. In many cases, however, this search involved verifying a Land Use Permit or a Water Licence contained conditions implementing the Review Board’s measure.
SLWB Public Registry – simple check	The public registry maintained by the Sahtu Land and Water Board was searched using the same parameters as for the MVLWB public registry.
MVLWB Public Registry - compare LUP/WL conditions to commitments	In some cases a simple check for the presence of a document or a certain conditions did not suffice and a comparison between the permit or licence conditions and the commitments table in the REA was necessary.
MVEIRB Public Registry	A few measures could be verified through the MVEIRB’s own public registry.
Correspondence to	In a number of cases the implementation of a measure could not be verified through public registry information. Correspondence to various government departments asking specific questions was chosen as the most effective way to deal with such measures.
Not verifiable	A number of measures were deemed as not verifiable. E.g. where an organization was asked to <i>consider</i> some action, it was concluded that following up on this measure would likely be meaningless.

Table 1: Verification Protocols

Wherever uncertainty existed if a particular protocol would succeed in supplying the required information, a back up protocol was devised. Preference was given to analysis of public registries, particularly those located in Yellowknife, as these could be accessed without drawing on the resources of any outside organization to any great extent.

Implementation Levels

Essentially there are four levels of implementation:

- *unknown*, where the measure was not verifiable or the necessary information was not forthcoming;
- *not implemented*, where a required document, such as a report to be submitted to a land and water board, or an appropriate permit condition could not be found in a public registry;
- *fully implemented*, where a required document or condition was found in a public registry or where a government department provided appropriate information; and
- *partially implemented*, where a permit or licence condition only requires a portion of the measure, or where a condition requires cooperation with a third party and this cooperation could not be verified.

Data Set

Table 2 lists all environmental assessments started at the time the program was initiated. All projects that were complete with Ministerial approval were included in the analysis with the exception of the Ranger Oil Liard Gas Pipeline project and the BHP Ekati Expansion project. These represent the earliest assessments in which the Board included mitigation measures. Individual measures were not linked to a specific significant impact. The Minister did not accept these measures, but did not initiate a consult to modify process either. Consequently, the status of these measures is unclear and they were excluded from the analysis.

file #	developer	project title	EA Status
99-061	Ranger Oil	Ranger Oil Liard Gas Pipeline	Complete (Ministerial Approval)
	Deh Gah Got'ie	Deh Gah Got'ie Cameron Hills Lumber Harvest	Cancelled
EA99-003	Bruce Domes	Domes Timber Harvest	Complete (Ministerial Approval)
EA99-004	BHP Diamonds	Sable, Pigeon and Beartooth Kimberlite Pipes (Ekati Expansion)	Complete (Ministerial Approval)
EA99-999	Digga	Digga Cameron Hills Lumber Harvest	Cancelled
EA00-002	Canadian Zinc	Canadian Zinc Fuel Cache Retrieval and Clean Up Project	Cancelled
EA00-003	Paramount Resources	Paramount Liard East	Complete (Ministerial Approval)
EA00-004	Paramount Resources	Paramount Cameron Hills Exploration Drilling	Complete (Ministerial Approval)
EA00-998	Explor Data	Explor Data Liard Seismic Survey	Complete (Ministerial Approval)
EA00-999	Paterson Saw Mill	Patterson Pine Point Timber Harvest	Complete (Ministerial Approval)
EA01-001	RTL Robinson Ltd	RTL Drybones Bay Quarry	Cancelled
EA01-002	Canadian Zinc	Canadian Zinc Prairie Creek Decline and Pilot Plant	Complete (Ministerial Approval)

EA01-003	Canadian Zinc	Canadian Zinc Phase II Drilling	Complete (Ministerial Approval)
EA01-004	DeBeers Canada	DeBeers Snap Lake Diamond Mine	Complete (Ministerial Approval)
EA01-005	Paramount Resources	Paramount Cameron Hills Gathering System	Complete (Ministerial Approval)
EA01-006	Canadian Forest Oil	CFO Beta Seismic	Cancelled
EA01-007	Canadian Forest Oil	CFO Highway Seismic	Cancelled
EA02-001	Northern River Surveys	NRS Liard River Seismic	Cancelled
EA02-002	WesternGeco	WesternGeco River Seismic	Submitted (waiting for Ministerial Approval)
EA02-003	Canadian Tungsten	CanTung Mine	Cancelled
EA03-001	Northrock Resources Ltd.	Northrock Summit Creek B-44 Exploration Well	Complete (Ministerial Approval)
EA03-002	Consolidated Goldwin	Consolidated Goldwin Drybones Bay Mineral Exploration	Complete (Ministerial Approval)
EA03-003	Northamerican General Resources	Northamerican General Resources Wool Bay Mineral Exploration	Submitted (Waiting for Ministerial Approval)
EA03-004	New Shoshoni Ventures	New Shoshoni Drybones Bay Mineral Exploration	Submitted (Waiting for Ministerial Approval)
EA03-005	Paramount Resources	Paramount Cameron Hills Expansion	Submitted (Waiting for Ministerial Approval)
EA03-006	Snowfield	Snowfield Drybones Bay Mineral Exploration	Complete (Ministerial Approval)
EA03-007	Imperial Oil	Mackenzie Gas Project	Complete (Ministerial Approval)
EA03-008	Deh Cho Bridge Corporation	Mackenzie River Bridge	active
EA03-009	Imperial Oil Resource Ventures	Imperial Deh Cho Geotechnical Investigations	Active
EA0405-02	Canadian Zinc	Canadian Zinc Prairie Creek Exploration Drilling Expansion	Active
EA0405-03	Fortune Minerals Ltd.	Fortune Minerals Meridian Lake Mineral Exploration	On Hold
EA0504-01	Jane Lind	Jane Lind Horn River Mineral Exploration	Cancelled

Table 2: Environmental Assessments as of December 1, 2004

Originally the Review Board did not distinguish between binding ‘measures’ and non-binding ‘suggestions’. Moreover, the Board only recently changed its nomenclature to ‘measures’ to describe individual mitigation measures as distinct from its ‘recommendation’ to approve or reject a development (MVRMA s. 128(1)). Thus in the early assessments all mitigation is labeled ‘recommendation’, in more recent assessments binding mitigation is labeled ‘recommendation’ and non-binding ‘suggestion’. In the most recent assessments, which are not included in this analysis, binding mitigation is labeled ‘measure’ and non-binding ‘suggestion’.

For the early assessments it is not possible to separate between mitigation that in the new nomenclature would be measures and that which would be suggestions. Consequently in

this analysis, all mitigation labeled ‘recommendation’ was treated as a measure. Suggestions are not included in the analysis.

Results

Implementation Levels

The implementation status says nothing about the effectiveness of a measure. It simply describes whether or not it has been translated into a regulatory instrument.

All Measures

In a first step, all measures included in the analysis were examined as a whole. As Figure 3 shows, a large majority of those measures for which implementation has already been verified was fully implemented. However, 20 % of all measures have either not been implemented or were implemented only partially. Also, over one third of the measures have not yet been verified due to lack of response from parties, mostly government departments. An additional 7 % of measures were deemed unverifiable.

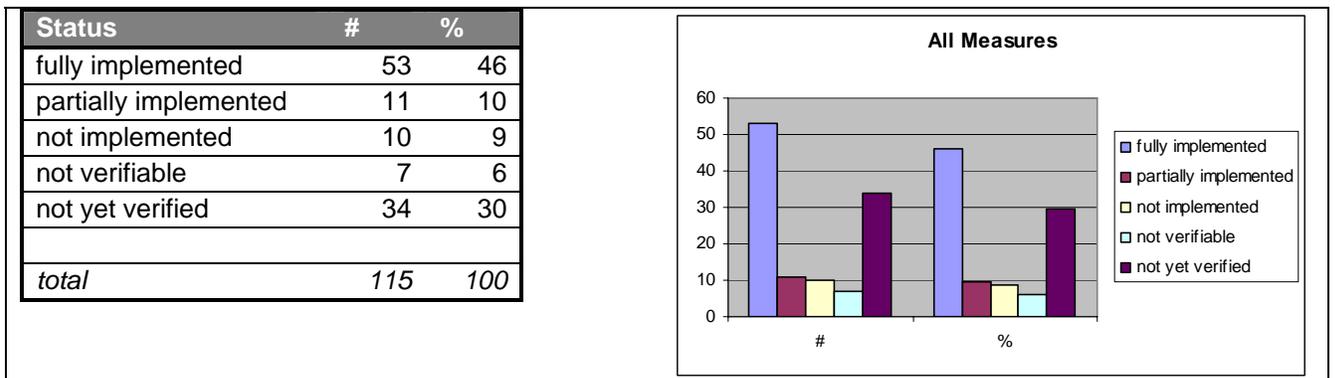


Figure 3: Results for all measures

Pre-/Post-Introduction of Suggestions

In a second step, measures were separated into assessments prior to the introduction of suggestions and those since. The comparison of the two, as presented in Figure 4, does not show an increase in levels of implementation as one might expect. On the contrary, the percentage of fully implemented measures decreased, while the portion of not-implemented measures increased significantly. While the former may be explained by some of the assessment reports being too recent to be implemented already, the latter clearly suggests that the introduction of suggestions alone did not improve the level of implementation of measures. The percentage of partially implemented measures decreased as well.

Another interesting observation is the fact that ‘not yet verified’ and ‘not verifiable’ measures together make up roughly the same portion before and after the introduction of suggestions. However, since the introduction of ‘suggestions’ the percentage of ‘not

verifiable' measures increased by the same amount as 'not yet verified' measures decreased. This result is again surprising as one would expect that with the introduction of suggestions the number of more general measures, which tend to be more difficult to verify, would drop. This result may be a reflection of a shift from mostly addressing biophysical issues to addressing more social, cultural and economic issues.

In interpreting these results one must bear in mind that the number of measures since the introduction of suggestions is still relatively small. At the time of this analysis, several reports of assessment were waiting for approval. The same analysis redone near the end of 2005 may show a different picture.

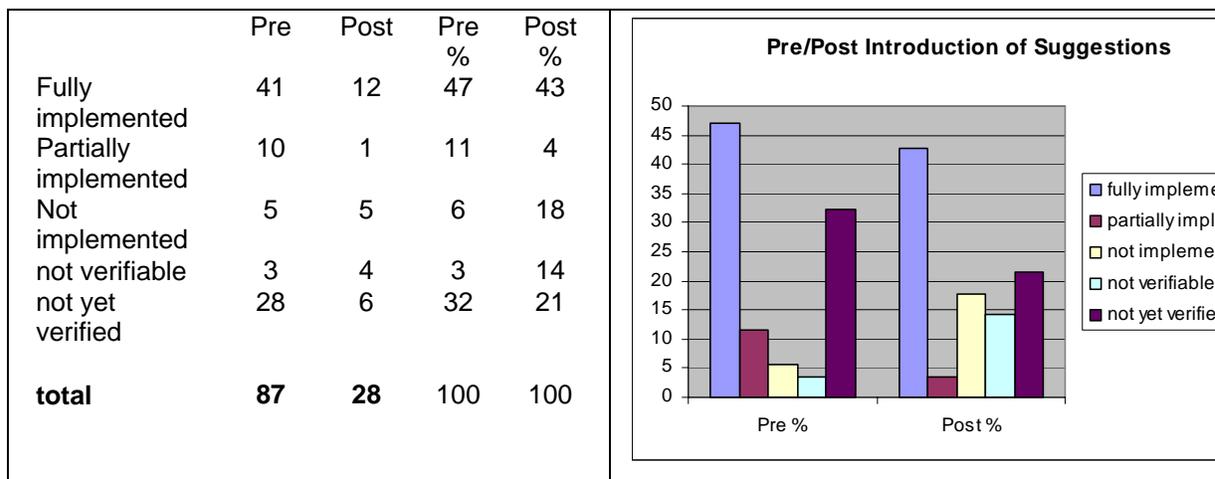


Figure 4: Measures before and after the introduction of suggestions

Analysis by Year

Figure 5 presents an analysis of measures grouped by the year the assessment was started. Results may be slightly different if the year in which the assessment was concluded had been used instead. Here the picture is more what one would expect of an organization that is trying to improve the quality of its environmental assessments. The proportion of fully implemented measures is greatest among the most recent assessments, as is that of the partially implemented ones. The proportion of not implemented measures decreased over time and in fact none of the measures from the most recent assessments was deemed to be not implemented. The same is true for measures that are not verifiable. Similarly, there are no not-yet-verified measures with the most recent assessments. However, this category does not show a constant improvement like the others.

	Numbers	Numbers	Numbers	Numbers	%	%	%
	00	01	03	total	00	01	03
fully implemented	12	31	10	53	43	42	71
partially implemented	1	8	2	11	4	11	14
Not implemented	5	5	0	10	18	7	0
Not verifiable	4	3	0	7	14	4	0
Not yet verified	6	26	2	34	21	36	14
total	28	73	14	115	100	100	100

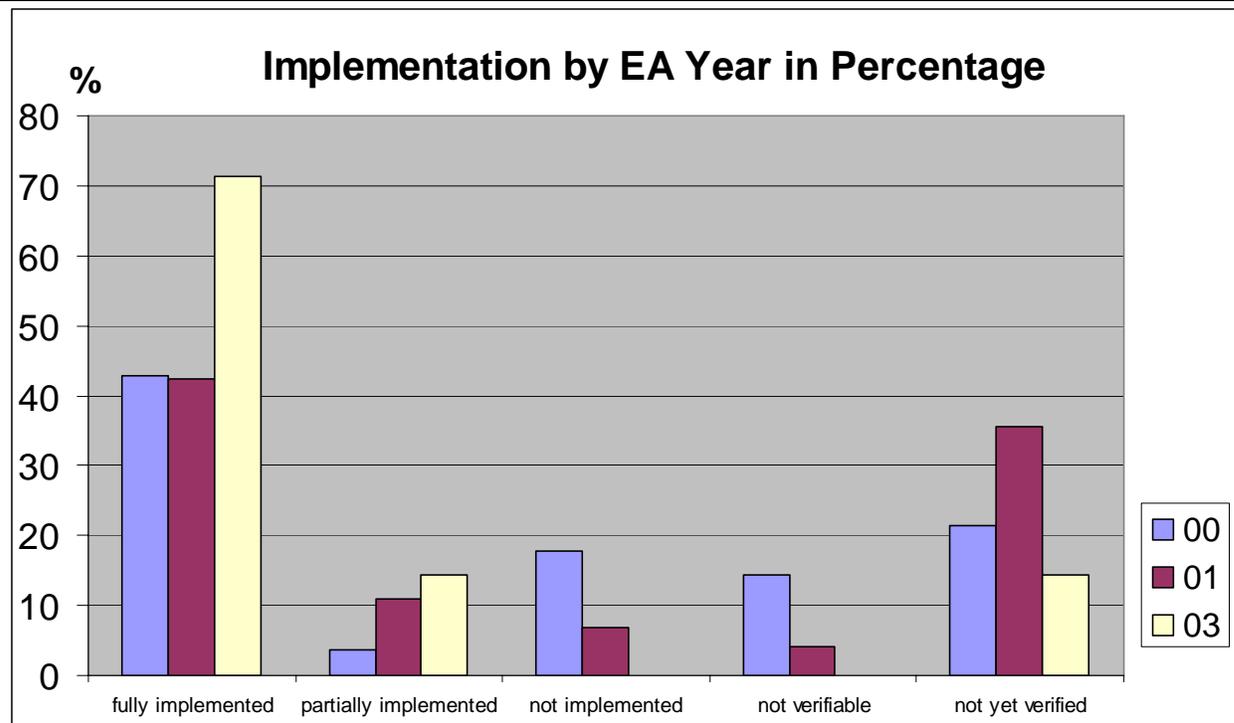


Figure 5: Measures sorted by year the assessment was started

Discussion

Overall the results are somewhat ambiguous. Clearly, a relative majority of measures have been implemented. The introduction of suggestions, although generally welcomed by parties, does not appear to have had an immediate and measurable positive effect on the implementation of measures. The “success rate” as far as the implementation of measures is concerned started to improve even prior to this change. A comparison of the analysis of all measures and pre-/post- suggestions on one hand with that of the year by year analysis seems to indicate that time elapsed since the assessment is not a factor in the implementation of measures. It appears that measures either are implemented immediately or not at all.

These results contain considerable uncertainty. In addition to the small sample size since the introduction of suggestions there is the issue of a large number of measures having not yet been verified. This is especially relevant since so far most measures have been verified via land and water board public registries. The majority of those were aimed

directly at a land and water board or involved the submission of reports to a land and water board. The still outstanding measures were mostly aimed at government or developers. Thus the measures that have been verified and those that still need to be verified are of a different nature. The results from the measures verified so far are not necessarily transferable to the remaining measures.

Conclusion

Because the results are not final, a conclusion is difficult to reach. At this point all that can be said with some certainty is:

- A relative majority of measures have been implemented, i.e. translated into a regulatory instrument one way or the other.
- The measures that have not been implemented represent a minority, even if all of the still outstanding measures were to turn out not-implemented.
- The Board has issued measures that cannot be verified, although not in the more recent assessments that were analyzed.
- A significant portion of measures have not yet been verified due to a lack of response from various government departments.
- Overall there seems to be an increase in the “success rate”, but there remains room for improvement.

Essentially we now that measures aimed at or involving a land and water board are largely being implemented. For measures that do not involve a land and water board the level of implementation is unknown.

The fact that this examination of implementation levels is not yet complete after several months of effort - although it pales in comparison with the anticipated effort to determine the effectiveness of measures – underscores the need for an automatic feedback loop from enforcement agencies to the Review Board.

Appendix 2 – Legislative Amendments

The following table contains recommended Improvements to the Mackenzie Valley Resource Management Act (MVRMA).

No.	Issue	Relevant Section(s)	Background/Rationale
1	The MVRMA requires the Review Board to accept all EAs referred to it.	s.126(1) and (2) MVRMA	<p>It could be both efficient and in the public interest if the Review board had some discretion in relation to the acceptance of certain referrals.</p> <p>Instances where this discretion might be appropriate would be, for example, instances where a proposed development:</p> <ul style="list-style-type: none"> - is substantially completed - is manifestly insignificant under s.124(1)(a) but was screened and referred anyway, or <p>in other cases where the conduct of an EA is not in the Review Board's opinion in the public interest.</p>
2	Need for the Board to have the capacity to declare a division for an EA proceeding	s. 126 and s.132(1) MVRMA	<p>Currently an EA requires the participation of a quorum of members (5) whereas a higher level EIR requires only 3 panel members some or all of which need not be Board members.</p> <p>The relative number of Board/Panel members required at these stages of the process is not consistent with the level of scrutiny being applied to a development.</p> <p>A provision to allowing the Review Board to constitute a division of the Board would need to be added to Part 5 of the MVRMA.</p>
3	Consistency of MVRMA with Text of Land Claims & Scope of Post	s.128(1)(b)(ii) Para 24.3.5(a) of the GFA Para 25.3.5(a)	<p>Unless the MVRMA is read in conjunction with the Gwich'in and Sahtu Land Claim Agreements; the Review Board would appear to be limited to recommendations that are directly linked to findings of significance.</p>

No.	Issue	Relevant Section(s)	Background/Rationale
	EA Decision Making	of the SFA	<p>Subsection 128(1)(b)(ii) states “On completing an environmental assessment of a proposal for a development, the Review board shall... (ii) recommend that the approval of the proposal be made subject to the imposition of such measures as it considers necessary to prevent <u>the significant adverse impact.</u>”</p> <p>However s.24.3.5(a) of the GLCA states “... a development shall be assessed by the Review Board in order to determine whether the proposed development will likely have a significant adverse impact on the environment or will likely be a cause of significant public concern. <u>In making its determination the Review Board may consider terms and conditions to the proposed development which would prevent significant adverse impact on the environment and may recommend the imposition of such terms and conditions to the Minister.</u>”</p> <p>If mitigation measures, which reduce predicted impacts below the level of significance cannot be adopted (because the Review Board decided that the measures would prevent significant adverse environmental impacts) then the regulatory approvals for a project could not include measures, which are necessary to prevent significant environmental impacts.</p>
4	The MVRMA specifies no time frame within a referral to EA must be made. As a result the time at which the authority of a Preliminary	s.62 s.118(1) ss.126(2) ss.126(3) s.143(1)	<p>Section 62 and s.118(1) prohibits the issuance of any permit, license or authorization until all of the requirements of Part 5 (MVERIB) have been complied with.</p> <p>Subsection 126(2) provides that any RA, DRA, Federal or Territorial agency or Department, land claimant organization or any local government may refer a proposed development for EA (notwithstanding any determination on a preliminary screening).</p>

No.	Issue	Relevant Section(s)	Background/Rationale
	<p> Screener or other RA can issue a permit etc. remains uncertain.</p>		<p> Subsection 126(3) also provides that the Review Board may conduct an EA on its own motion (again, notwithstanding any determination on a preliminary screening).</p> <p> However, the MVRMA does not include a provision setting a time frame within which the Review Board (or any other referring body) must make a referral decision. In the absence of such a time frame, the MVLWB (and developers) cannot be certain that developments may not be ordered to an EA even though permits or licenses have been issued.</p> <p> The Review Board believes the most appropriate solution would be to promulgate a regulation under paragraph 143(1)(a) of the Act setting out appropriate deadlines within which a referral to EA must be made.</p>
5	<p> 3 Day Pause Period may not be legal</p>	<p> s.118 s.120 s.143(1)</p> <p> NWT Land Use Regs</p>	<p> The MVRMA does not put a time limit on referrals by Local Gov'ts and Land Claims groups (not withstanding a determination by an RA on a preliminary screening (PS)).</p> <p> The MVEIRB and MVLWB have agreed to an informal 3 day pause period between the time of completion of a preliminary screening and the issuance of a licence or permit to allow for referrals by other authorities under s.126.</p> <p> At present the MVLWB tends to approve land use permits at the same meeting as the associated preliminary screening reports i.e. no time for MVEIRB, and others to exercise their prerogative to refer to EA per s.126.</p> <p> This practice has evolved due to the fact that the MVLWB must process LUPs within 42 days per the NWT Land Use Regulations. There is insufficient time available between completion of the PS and approval of the final</p>

No.	Issue	Relevant Section(s)	Background/Rationale
			<p>permit etc. for other eligible referral bodies to exercise their prerogative under s.118.</p> <p>A "3 day pause period" informally agreed to by the MVEIRB and the MVLWB seemed to be a partial solution. However it seems this approach may not be legally sound. Further, once a license is duly approved it cannot be taken back from its recipients because of an EA referral.</p> <p>Optional Solutions (?)</p> <p>One approach could be to introduce a ten working day period between the time of Preliminary Screening determination the MVLWB approval of the final License, permit etc.. A ten-day time period would seem reasonable for MVEIRB, LGs and LC groups to exercise their prerogative to refer to EA.</p> <p>Preliminary Screenings must then be completed at least 10 working days prior to approval of permits etc. by the MVLWB and other Regulators. This would need to apply to issuance of all other applicable permits, licenses and authorizations.</p> <p>Revise the NWT Land Use regulations to allow additional time for observance of s.126.</p>
6	Cost Recovery		<p>Provisions for developer's contributions to the cost of the Board's processes are not incorporated into the MVRMA. Such provisions are included in the CEAA.</p> <p>In the event of a joint MVEIRB/CEAA Panel Review there is an inconsistency created by the different treatment of process cost by the two different federal statutes. This disparity in the ability to contribute to process costs could also affect the ability of the Review Board to influence the design of the Joint Process</p>

No.	Issue	Relevant Section(s)	Background/Rationale
			<p>between CEAA and the MVEIRB and the balance of the “joint relationship”.</p> <p>From a public policy perspective it may be useful to consider this opportunity to reduce EIA process costs in the Mackenzie Valley.</p>
7	Significant public concern requires referral to Panel Review (EIR)	s.128(1)(c)	<p>If the Review Board finds that there is significant public concern after the conduct of an EA it must refer the development to an EIR. Even though it is possible that measures could be recommended to address and mitigate this public concern.</p> <p>Thus an EIR may be required when measures recommended by the Review Board would suffice to resolve the problem.</p>
8	Participant Funding		<p>Provisions have not been made in the MVRMA for participant funding to assist Parties to the EA processes set out in the MVRMA.</p> <p>The capacity of the Parties to participate in a timely and effective manner directly affects the quality and timeliness of the EIA processes of the Review Board.</p> <p>A program of funding assistance would improve the capacity of aboriginal organizations and northerners to play a meaningful role in the MVRMA part 5 process. Currently under CEAA, participant funding is available for Comprehensive Studies.</p>
9	Length of Board Member	s.14(1)	Section 14(1) specifies the term of the Review Board Appointments at 3 years.

No.	Issue	Relevant Section(s)	Background/Rationale
	Appointments		<p>Experience has shown that the “learning curve” is considerable before a Board member becomes fully knowledgeable and conversant with his/her roles and responsibilities as a Board member.</p> <p>A 3 year terms does not allow a reasonable period of time for the Board to benefit from the investment that must be made in each new Board appointee before they become fully contributing Board members.</p> <p>By comparison the National Energy Board member appointments are for a period of seven (7) years.</p> <p><u>A revised term of 5 years for Board member appointments is recommended.</u></p> <p>Further, following expiry of a Board Members term, <u>it would be helpful if Board Members could continue to participate on files in which they participated as Board members until the EA file in question is completed so as to ensure quorum can continue to be met in each instance.</u></p>
10	Definition of Local Government	s.2 and 126(2)(c)	<p>A number of “local governments” fall outside the definition provided in the MVRMA. In particular, a first nation or Band Council cannot refer a proposed development to EA unless it is incorporated as a local government under the laws of the NWT Government – even though in some communities they perform all of the functions of a local government.</p> <p>This issue has caused frustration by first nations and undermines the general acceptance of the MVRMA in the unsettled land claim areas.</p>
11	Inconsistent referral criteria	s.125 ss.126(2)(a) ss.126(2)(b) ss.126(2)(c)	<p>The referral criteria are inconsistent with regard to the nature of the impact.</p> <p>S.125 requires that all preliminary screeners determine that there might or likely be a</p>

No.	Issue	Relevant Section(s)	Background/Rationale
			<p>significant adverse impact for a referral decision to be made.</p> <p>The referral test is then lowered in s.126 (i.e. after a preliminary screening is completed) such that adverse impacts only – not significant adverse impacts are required for a referral.</p> <p>Further ss.125(2)(a) states that local governments (as a preliminary screener) can only refer a proposed development to EA if it is <u>likely</u> to have a <u>significant</u> adverse impact within its boundaries. However, according to ss.126(2)(c), once a preliminary screening is completed, it is only necessary to conclude there <u>might</u> be an adverse impact if the proposed development is located outside (or inside) the local government’s boundaries. These referral criteria are inconsistent and lead to confusion and uncertainty.</p>
12	Uncertainty regarding “Follow-up Program” provisions for Environmental Assessments	s.111 s.134(3)	<p>S.111 states that a “follow-up program” means a program for evaluating “<u>the soundness of an environmental assessment or environmental impact review</u>”</p> <p>S.134(2) states that a review panel shall submit a report including recommendations whether the project be approval, with or without mitigative measures or <u>a follow up program</u>, or be rejected.</p> <p>However s.128 does not similarly provide that a follow-up program may be one of the recommended outcomes of an environmental assessment report. An explicit provision would provide helpful clarification of the Act in this regard.</p> <p>In certain instances, a follow-up program to an environmental assessment would be a very useful evaluation tool as it would be for environmental impact reviews.</p>

No.	Issue	Relevant Section(s)	Background/Rationale
13	Review of Regulations pursuant to the <i>MVRMA</i>		<p>Given the experience gained since the coming into force of the <i>MVRMA</i> in 1998, it would be timely to review the following regulations in particular:</p> <ul style="list-style-type: none"> • Preliminary Screening Requirement Regulations • Exemptions List Regulations • Mackenzie Valley Land Use Regulations <p>Experience with the regulations have identified the need for various procedural and administrative improvements that would improve the effectiveness of the regulations.</p>
14	Definitions of 'environment', 'impact on the environment' and the Review Board's mandate provisions are not consistent.	s.2 s.111 s.115	<p>The s.2 definition of “environment” is focused on biophysical components of the environment.</p> <p>S.111 however provides a broader description of “environment” to include the social and cultural environment as well as heritage resources.</p> <p>S.115 establishes the guiding principles of the Review Board as (a) to protect the environment from significant adverse impacts and (b) to protect the “social, cultural and economic well being of residents...”</p> <p>Greater clarity, consistency and certainty should be provided to all stakeholders by a more coherent definition of the term “environment” and wording for the guiding principles.</p>

Appendix 3 – Key EIA Stakeholders – Need for Additional Capacity

Background:

Certain key stakeholders (parties) to the EIA process do not have the capacity to consistently provide quality and timely information that reflects their respective views on a proposed development. Without quality and timely information from all parties to the EIA process, the process may not be duly fair, balanced, objective or expedient; all requirements governing the conduct of the Board mandate pursuant to the *Mackenzie Valley Resource Management Act (MVRMA)*. Moreover, for the Review Board to properly incorporate traditional environmental and cultural knowledge (TK) into its environmental impact assessment (EIA) process, First Nations and other aboriginal community organizations require the capacity to respond in a quality and timely manner.

Aboriginal communities and NGOs, specifically, do not have sufficient human and financial resources to consistently provide quality and timely input to the Review Board's EIA processes.

Need for Quality and Timely Information and Advice

Direct input from many parties leads to better recognition of issues, better knowledge of environmental conditions as well as a more inclusive and fair process. In particular, s.114 (b) and (c) of the *MVRMA* require the Review Board “to ensure the impact on the environment of proposed developments receives careful consideration...” and “to ensure that the concerns of aboriginal people and the general public are taken into account in that process”.

The Review Board is also charged by s.115 of the *MVRMA* to carry out its environmental impact assessment process “in a timely and expeditious manner” having regard to:

- (a) the protection of the environment from the significant adverse impacts of proposed developments; and
- (b) the protection of the social, cultural and economic well being of residents and communities in the Mackenzie Valley.

For the Review Board to make EIA decisions, it is critical that the Review Board receives quality and timely information and advice for its EIA process. Further, the Review Board, by virtue of the *MVRMA*, exercises quasi-judicial authorities and must act in accordance with natural justice and administrative law in its proceedings. In particular, the Review Board must ensure that its process is balanced, objective and fair in the way it treats the evidence advanced by all interested parties.

For the Review Board to fully and expeditiously consider a proposed development in a balanced and objective manner it must receive quality and timely information and advice from all interested parties that reflects their respective points of view on a proposed

development. A process, where only government and the developer have the funds to fully state their case, may not be seen to be balanced and objective.

While it is not the duty of the Review Board to obtain quality and timely information, it is in the Board's interest to encourage quality and timely input. The necessary human and financial capacity must be available to all interested parties for this to occur.

Consultation Requirements

Meaningful dialogue with all parties to the process is essential to good environmental impact assessment decisions. The procedural content of any such dialogue, which must be conducted by the Review Board as part of its EIA processes, is specified by s.3 of the *MVRMA*. Section 3 sets out requirements for notice, a reasonable time period to prepare views, and an opportunity to present those views. It also requires the Review Board to consider "carefully, fully and impartially any views so presented." As referenced earlier, s.114(c) includes a specifically requires the Review Board to ensure that the concerns of aboriginal people and the general public are taken into account in its EIA process.

Perhaps more significantly, the Federal government has a fiduciary obligation to consult with Aboriginal peoples arising from s.35 of the *Constitution Act, (1982)*. The Federal government has a fiduciary duty to consult Aboriginal peoples when a government decision or action will have the result of infringing on the exercise of aboriginal or treaty rights.

It must be emphasized however, that the Review Board is not vested with any fiduciary duties. This is Canada's and at times the NWT Government's responsibility. Care must be taken not to take on the government's role in this regard. Nevertheless, the greater the capacity of aboriginal communities to provide quality and timely information and advice to the EIA process; the less risk that the EIA process will be subject to legal challenge regarding the Review Board's or the Federal government's obligations to ensure proper dialogue and consultation with the various parties to the process.

Traditional Knowledge (TK)

Section 111 of the *MVRMA* defines "impact on the environment" to mean "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." Sub-section 115 (b) requires the EIA process to have regard to "the protection of the social, cultural and economic well being of residents and communities of the Mackenzie Valley."

Cultural impact assessment in the Mackenzie Valley is focused on the culture of the predominately aboriginal communities and residents in the area affected by the proposed development. The capacity to consistently provide quality and timely traditional environmental and cultural knowledge does not exist within all aboriginal communities. As a result there is an urgent need to ensure that traditional environmental and cultural knowledge is available to the Review Board in a timely manner for its EIA process.

The discussion of the capacity of Aboriginal communities and NGOs can be readily expanded to include the capacity to respond to the processes of the other *MVRMA* Co-management Boards as well; namely the various Land and Water Boards and Land Use Planning Boards. Many of the capacity needs to fulfill the process requirements of the other Co-management Boards are similar to those of the Review Board while others are unique to each Board. A full examination of the capacity needs of Aboriginal communities and NGOs to address all *MVRMA* processes could be undertaken if there was sufficient interest by the responsible parties. The needs described in this discussion paper, however, are needs specific to the Review Board's EIA process.

Discussion:

Focus on Aboriginal communities and NGOs?

The general need for quality and timely input from all interested parties to the EIA process, the participation process prescribed by the *MVRMA* and the fiduciary obligation of the Federal Government to consult aboriginal people specifically, as well as the special requirement on the Review Board to ensure traditional environmental and cultural knowledge is carefully considered; all drive the need for capacity by the parties to the EIA process.

Unfortunately, not all parties have the necessary human and financial resources to contribute to the Review Board's processes in the required manner. However, some parties are less in need than others.

There are two parties, which stand out in terms of their limited human and financial capacity to contribute to the EIA process in a timely and quality manner. They are:

1. Aboriginal communities affected by a proposed development
2. "Not for Profit" interveners; namely, Non-Government Organizations and individuals granted permission to formally participate

Other parties tend to be much better resourced and able to provide quality and timely input to the Review Board's EIA process.

Factors:

Some factors that will affect the design of available options include the following:

1. The developer bears the cost of seeking input from aboriginal and community organizations, including the acquisition of relevant traditional environmental and cultural knowledge required by the EIA process.
2. The fiduciary obligation of the Federal government to consult aboriginal people on decisions affecting their rights creates a further obligation to ensure Aboriginal peoples (communities) have the capacity or readiness to respond in a quality and timely manner to the EIA process.

3. The MVRMA includes provisions for participant funding only at the EIR level, and does not provide for cost recovery. Further, Administrative Law governing procedural fairness requires that the Review Board not create an apprehension of bias in its proceedings by arbitrarily favouring one party over another in terms of human or financial assistance to participate in the EIA process.

Capacity Building Needs

Base Capacity (Fixed Capacity Needs)

Base capacity is the human and financial capacity that must be permanently established to ensure sufficient readiness - so that timely and quality input can be provided when a proposed development is under EIA. Base needs include:

- Effective EIA participation protocols (for developers, the Review Board and Responsible Ministers) that are both expedient and meet the requirements of the *MVRMA* and the fiduciary obligations of the Federal government to Aboriginal people.
- Community education and awareness of the *MVRMA* and how to participate in an effective manner in the EIA process.
- Organizational development advice and support for Aboriginal communities regarding EIA preparedness measures e.g. development of operational policies to guide TK information collection, research, interpretation and management.
- Translator/Interpreter Needs
 - A comprehensive and current interpreter/translator dictionary of EIA terminology for the Aboriginal languages of the Mackenzie Valley.
 - A trained on-going corps of Aboriginal language interpreter/translators in EIA terminology.
- An on-going program of community-specific and regional traditional environmental and cultural knowledge baseline research and documentation.
- Aboriginal residents trained in traditional knowledge research and EIA.
- An Elders Council (or another appropriate body) in each community to guide research into aboriginal traditional environmental and cultural knowledge and to validate all traditional information developed by a First Nation.
- Aboriginal communities with the necessary human and financial resources to provide the required base capacity to respond in an effective and timely manner to the EIA process.
- An on-going capacity needs assessment and monitoring process to facilitate community readiness to respond in a quality and timely manner to the Review Board's EIA process (e.g. through linkages to the proposed Boards' Forum)

Development Specific Capacity (Variable Capacity Needs)

Development specific capacity is the incremental human and financial capacity required to provide the timely and quality input when a specific proposed development is referred to the Review Board for EIA. These needs include:

- Community education and awareness of the *MVRMA* and how to participate in an effective manner in the EIA of a specific proposed development.
- A protocol to guide developers on the appropriate process for the acquisition of traditional knowledge from Aboriginal communities.
- Aboriginal communities with the necessary human and financial resources to participate in the EIA of a proposed development impacting on their community in an effective and timely manner.
 - Ability to identify and participate in preliminary screening proposed developments in their area.
 - Capacity to identify local sensitive areas or local areas of special use.
 - Understanding of issues and considerations raised by others in the EIA process.
 - Capacity to evaluate proposed mitigation measures.
- NGOs with sufficient human and financial resources to participate in the EIA of a proposed development such that the varied interests of the general public are adequately addressed (e.g. participant funding).

Options:

The responsibility to address individual capacity needs does not typically fall to the Review Board but to others. Capacity needs, however, do impact on the Review Board's ability to incorporate TK into the Board's EIA process and the Review Board's ability to produce quality and timely EIA. The Review Board has therefore a vested interest in seeing those issues addressed.

The Traditional Knowledge Workshop held by the Review Board in November 2002 identified a number of options to increase the capacity of Aboriginal communities to be ready and able to provide quality and traditional environmental and cultural knowledge. Some of those options involved the roles and responsibilities of developers, Aboriginal communities and the Review Board in the conduct of an EIA. Others centered on the financial capacity to research and document traditional knowledge and the creation of an appropriate institution, such as an Elders Council, to validate the traditional knowledge provided to developers and the Review Board.

Participant funding has been sought by NGOs and communities in the Mackenzie Valley to assist in funding more effective participation in the EIA of proposed developments. To date there is no general program of participant funding available to any parties. The *Canadian Environmental Assessment Act (CEAA)* has been amended to provide participant funding not only at the panel review level but also at the comprehensive study

level. Many EAs under the MVRMA are as complex and involved as a comprehensive study, and some may even be comparable to a panel review. Yet there are no participant funding provisions for EA, only for EIR.