



Reference Bulletin on consultation and engagement in environmental impact assessment

Understanding the Review Board's responsibilities for statutory consultation

January 2024



Contents

| | | |
|----|---|---|
| 1. | Introduction | 3 |
| 2. | The Review Board’s mandate | 3 |
| 3. | Statutory consultation requirements in environmental impact assessment | 4 |
| 4. | Good environmental assessment and meeting the mandate of the Board require good engagement and consultation | 4 |
| | Building on consultation through outreach, education, and engagement..... | 5 |
| 5. | Guidance to developers and others | 6 |
| 6. | The Review Board’s statutory consultation requirements are a component of the Crown’s broader Duty to Consult | 6 |
| | The Crown’s Duty to Consult relies on the Review Board’s processes | 6 |
| | The Review Board assesses impacts on section 35 Treaty and Aboriginal rights through the lens of its mandate under the Act..... | 7 |
| 7. | Crown process following the issuance of the <i>Report of Environmental Assessment</i> | 7 |
| 8. | Other Review Board requirements for consultation | 8 |
| 9. | Next Steps | 8 |





1. Introduction

The Mackenzie Valley Resource Management Act (the Act) sets out the framework for resource management decision-making in the Mackenzie Valley of the Northwest Territories. The Mackenzie Valley Environmental Impact Review Board (Review Board) is the main instrument established to carry out environmental assessments and environmental impact reviews in the Mackenzie Valley under part 5 of the Act. The Review Board has statutory consultation requirements set out in several different sections in Part 5 of the Act.

The objectives of this reference bulletin are to:

- outline the Review Board’s unique mandate, roles, and responsibilities as it relates to consultation and engagement,
- define the Review Board’s statutory consultative requirements under part 5 of the Act and describe how we will fulfill these requirements through consultative and participatory environmental assessment processes and
- distinguish the Review Board’s statutory consultative requirements from the Crown’s duty to consult.

This reference bulletin also indicates where developers, Governments, communities, and other interested parties can find more information about the Review Board’s expectations for engagement in environmental impact assessment processes.

2. The Review Board’s mandate

As the main instrument for conducting environmental assessments and environmental impact reviews, collectively known as environmental impact assessment (EIA) in the Mackenzie Valley of the Northwest Territories, the Review Board has a unique role and responsibility with respect to consultation and engagement in the integrated resource co-management system established by the Act. The Review Board has a broad mandate, and must ensure that its processes are expeditious and consider:

- the protection of the environment from significant adverse impacts of proposed developments,
- the protection of the social, cultural, and economic well-being of residents and communities in the Mackenzie Valley, and
- the importance of conservation to the well-being and way of life of Indigenous peoples¹ in Canada to whom section 35 of the *Constitution Act* applies, and who use an area of the Mackenzie Valley.²

¹ Referred to in the Act as “aboriginal” peoples. In this Reference Bulletin, the preferred terminology of “Indigenous” people has been used throughout to mean the same.

² as per section 115 of the Act.



In addition to these guiding principles, the Review Board has specific legislated timelines within which it must conduct its EIA proceedings.^{3,4} The length of time provided for the Review Board to conduct these proceedings means that it can ensure consultative and collaborative EIA processes that provide communities, Indigenous Governments, members of the public and other interested parties with many opportunities for participation.

3. Statutory consultation requirements in environmental impact assessment

The statutory requirements for consultation set out in the Act demand a high level of care and consideration. They are based on a definition of consultation set out in section 2 of the Act and settled land claims in the Mackenzie Valley.

Actual consultation requirements of the Act include subsections 123.1 and 127.1 which require the Review Board to carry out consultations required by land claims and to consult with first nations on whose lands the development is to be carried out, or with the Tłı̨chʔ Government if the proposed development is to be carried out wholly or in part on Tłı̨chʔ lands. The Review Board is also required to consider the concerns of the public including Indigenous people relative to a proposal for development.

In addition to statutory consultation requirements, and consistent with case law under section 35 of the Constitution Act, 1982, the Review Board's processes are designed to assist the Crown, whether territorial or federal, to discharge its obligations when a proposed development gives rise to a duty to consult.

4. Good environmental assessment and meeting the mandate of the Board require good engagement and consultation

The Review Board recognizes that meaningful and collaborative consultation with Indigenous Governments and Organizations and the public is essential for understanding the concerns of Indigenous people about the developments being assessed, the potential impacts of a development on the biophysical or human environment, and the mitigations required to address significant adverse impacts. By running collaborative and consultative processes, the Review Board will hear evidence relevant to the importance of conservation to the well-being and way of life of Indigenous peoples. Conservation is not defined in the Act, but it is in settled land claims in the Mackenzie Valley. It is clearly related to protecting the integrity of ecosystems and wildlife habitat to ensure long term productivity.

³ Timelines include 9 and 16 months for environmental assessments without and with public hearings, respectively, as defined in subsections 128(2) and 128 (2.1) of the Act.

⁴ In contrast, legislated timelines for Type A or B licences with a public hearing cannot exceed 9 months.



The Review Board understands its responsibilities for consultation and looks to the definition of consultation provided in the land claims and the Act as a basis for meeting these requirements. Consultation is defined in the land claims and Act to mean:

- a) the provision, to the party to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter,
- b) the provision of a reasonable period of time in which the party to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the party obliged to consult, and
- c) full and fair consideration by the party obliged to consult of any views presented.

The Review Board will meet these consultative requirements by running fair, transparent and inclusive EIA processes including:

- hearing directly from potentially affected Indigenous governments, communities, and the public,
- designing fair and flexible workplans and processes that provide all parties with adequate time to prepare for and participate meaningfully in the proceeding,
- posting all relevant documents to the online public registry⁵,
- ensuring that all Review Board decision documents have plain language summaries which will be interpreted into relevant Indigenous languages,
- communicating clearly with EIA participants and the public about EA processes, outcomes, and reasons for decisions.

Building on consultation through outreach, education, and engagement.

While the Act sets out the Review Board's statutory consultative requirements, the Review Board views these as a starting point for more comprehensive and proactive engagement with Indigenous Governments, Organizations, and people. The Review Board will continue to work with Indigenous Governments, Organizations, and people to develop EIA processes that provide opportunities for fair, inclusive, and transparent engagement. The Review Board will also ensure that its strategic goals, objectives, and vision align with these principles.⁶

To help meet this objective, the Review Board will work with communities and Indigenous Governments to develop consultation and engagement protocols that define:

- how the Review Board should interact, communicate, and engage with communities during EIA processes and
- how the Review Board can best fulfill its requirements for consultation in an EIA.

These protocols could identify specific activities and requirements for each EIA process the Review Board undertakes including identifying engagement approaches, preferred communication pathways and protocols for the respective government, organization, or community. These protocols are

⁵ except for those requiring confidentiality

⁶ See our Strategic Plan for 2023-2027 [here](#).



separate and distinct from the requirements of Engagement Plans that developers enter into with communities and Indigenous Governments for a proposed development.

5. Guidance to developers and others

Developers do not have legislated requirements for consultation with the groups and communities that may be affected by their projects. However, the Review Board strongly encourages developers to work collaboratively with local communities, First Nations, and all levels of government in all aspects of their work. Specific guidance to developers on best practices for collaborative engagement and project planning can be found throughout the Review Board's suite of guidance material including the:

- draft *Guideline for developers of Major Projects to go directly to EA*,
- *Environmental Impact Assessment Guidelines*,
- *Guideline for Preliminary Screeners*,
- *Socioeconomic Impact Assessment Guidelines*, and
- *Guidelines for Incorporating Traditional Knowledge in EIA*.

All draft and finalized Review Board guidelines are available on our website.⁷ Developers are also encouraged to look to the Mackenzie Valley Land and Water Board's *Engagement and Consultation Policy and Guideline (2023)*^{8,9} for additional guidance.

6. The Review Board's statutory consultation requirements are a component of the Crown's broader Duty to Consult

The Crown's Duty to Consult relies on the Review Board's processes

The Governments of Canada and the Northwest Territories (collectively or individually acting as the Crown) have a duty to consult, and where appropriate, accommodate section 35 rights holders when they consider actions that might adversely impact asserted or established Aboriginal or treaty rights held by those groups. The Crown's duty to consult with Indigenous groups has been developed and clarified by the Supreme Court of Canada through a series of decisions since 1990.¹⁰

While the Crown cannot delegate the duty to consult, the Review Board can play a significant role in fulfilling this duty through its EIA proceedings.¹¹ In its processes, the Review Board often collects evidence related to impacts on Treaty or Aboriginal rights and proposes mitigation measures to avoid or reduce those impacts. Review Board processes contribute procedurally and substantively to accommodation and the satisfaction of the Crown's duty to consult.

⁷ Available online [here](#).

⁸ Available online [here](#).

⁹ Available online [here](#).

¹⁰ [Haida \(2004\)](#), [Taku River \(2004\)](#), [Mikisew Cree \(2005\)](#), [Little Salmon/Carmacks \(2010\)](#), [Rio Tinto \(2010\)](#), [Clyde River \(2017\)](#) and [Chippewas of the Thames \(2017\)](#).

¹¹ [Chippewas of the Thames \(2017\)](#) and [Ross River Dene Council \(2024\)](#).



For example, when conducting an EIA, the Review Board is required to consider the protection of the biophysical environment, as well as the social, cultural, and economic well-being of residents, and the importance of the conservation to the well-being and way of life of Indigenous peoples. The Review Board encourages Indigenous Governments or Organizations to provide evidence during EIAs that describes adverse impacts from the project on right(s) including:

- the nature of the right(s) that might be impacted,
- which adverse impact(s) of the project affect those right(s), and
- any proposed mitigation to address or avoid those impacts(s).

The Crown uses this evidence to understand the views of impacted Indigenous governments, Organizations and rights holders who might be adversely affected by a proposed development.

The Review Board assesses impacts on section 35 Treaty and Aboriginal rights through the lens of its mandate under the Act

In its processes, the Review Board can consider any project-specific or cumulative impact related to its mandate. For example, when considering potential effects on social, cultural, and economic well-being and the importance of conservation to the well-being and way of life of Indigenous people who use an area of the Mackenzie Valley, the Review Board can assess impacts on things like:

- important harvested fish and wildlife species
- the ability to harvest those species
- quantity, quality, and flow of water
- water use
- continued use and value of a culturally important area
- the ability to transfer knowledge between generations and
- the ability for people to live on, access, steward and use the land in the ways they aspire to.

The nature of these considerations means that the Review Board often receives evidence about and assesses impacts related to Treaty and Aboriginal rights protected under section 35 of the Constitution Act. While the Review Board must focus on impacts described in section 115 of the Act, it can also consider whether these impacts might also affect the exercise of an Aboriginal or Treaty right when determining the potential significant adverse impacts of a development and any required mitigation.

The Review Board is required to propose any mitigations necessary to avoid, minimize or otherwise address significant adverse impacts related to issues relevant to its mandate. Through its processes, the Review Board can consider and minimize or eliminate the impacts of activities associated with developments that affect the exercise of Aboriginal or Treaty rights, but the Crown remains ultimately responsible for consulting on and ensuring that accommodation for infringements on these rights are adequate.

7. Crown process following the issuance of the *Report of Environmental Assessment*

Once the Review Board finalizes a Report of Environmental Assessment for a proposed development, the Crown consults all potentially affected Indigenous Governments and Organizations asking if there are any outstanding impacts on Treaty or Aboriginal rights that have not been adequately mitigated through the measures of the Board, and if so, what additional or different mitigation may be required to



adequately address those impacts. The Crown may, if it deems it necessary, consult with the Review Board to modify any measure(s) within the Report of Environmental Assessment to address any outstanding impacts on Treaty or Aboriginal Rights, refer the development to environmental impact review or ask the Review Board to reconsider its decision based on the new information gathered during the Crown's post Report of Environmental Assessment consultation.

8. Other Review Board requirements for consultation

Section 120 of the Act authorizes the Review Board to establish guidelines respecting the processes described in Part 5 of the Act. In so doing, the Review Board must consult with First Nations, the Tłı̨chǫ Government, and the federal and territorial Ministers.

In addition to guidelines, the Review Board issues policies, reference bulletins and other reference materials. Where appropriate, the Review Board may develop these materials collaboratively with interested and affected parties, to the extent possible. The Review Board will also communicate about the development process and policy outcomes in meaningful and appropriate ways.

9. Next Steps

The Review Board will continue to run consultative and participatory EIA proceedings as required by the Act and described in this reference bulletin. It will update its guidance materials and policies when necessary to better reflect the law and the Review Board's evolving approach to consultation and engagement. The Review Board will continue to work with Indigenous Governments and Organizations, the federal and territorial governments, developers, communities, and the public in the future to update these materials, in fulfillment of our mandate to conduct fair, transparent, and inclusive environmental assessment processes.