



Reasons for Decision

Review Board consideration of requests to order an environmental assessment of Thaidënë Nene National Park Reserve proposal

August 2, 2019

1. Introduction

Parks Canada recently completed a preliminary screening under Part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA) for the establishment of Thaidënë Nene National Park Reserve (TDNNPR). After receiving the preliminary screening decision¹ on July 5, 2019, the Review Board received letters from the Northwest Territories / Nunavut Chamber of Mines (Chamber of Mines) and the North Slave Metis Alliance (NSMA) requesting that the Board order an environmental assessment (EA) of the proposed establishment of Thaidënë Nene National Park Reserve.

These are the reasons for the Review Board's decision related to the preliminary screening for the establishment of the TDNNPR.

2. Decision

After careful review of the preliminary screening and the requests made by Chamber of Mines and the NSMA, the Review Board has decided **not to exercise its discretion under ss.126(3) MVRMA and has not ordered an EA** of the establishment of Thaidënë Nene national park reserve.

3. Background

All materials received by the Review Board in relation to the preliminary screening of Thaidënë Nene National Park are on the Board's website at <http://reviewboard.ca/registry/preliminary-screenings>.

3.1 Parks Canada's preliminary screening

Parks Canada began the preliminary screening process on April 5, 2019 with distribution of a park development description to interested parties and notification to the Review Board². This was followed by:

¹ [Parks Canada preliminary screening](#)

² [Development description Thaidënë Nene National Park Reserve establishment](#)

- May 6: Parks Canada [compiled comments](#) received from reviewers of the Development Description
- June 20: Parks [Canada responded to comments](#) received the during public review
- July 3: Parks Canada [compiled comments from the second review period](#)

On July 5, Parks Canada completed its [preliminary screening with reasons for decision](#) and notified the Review Board as required by the MVRMA.

3.2 Letters sent to the Review Board

The Board received two letters addressing the TDNNPR proposal and the Parks Canada screening:

- from the Chamber of Mines on July 15th, 2019
- from the NSMA on July 19th, 2019

3.2.1 Letter from the Chamber of Mines

The Chamber of Mines' letter requests that the Review Board order an EA for the following rationale:

- the Parks Canada claim of 90% support for the national park is statistically biased as it does not reflect the hundreds of companies represented by the Chamber of Mines
- the proposed Park does not allow for an access corridor even though there are examples of corridors in other northern national parks (Nahanni, Ukkusiksalik park in Nunavut)
- the Mineral and Energy Resource Assessment was not sufficiently funded, was not an accurate resource assessment, and areas with high mineral potential were missed
- final boundaries were set behind closed doors between Parks and the GNWT

The Chamber's overall concern is about reduced access to potentially mineral rich lands for exploration and lost economic opportunities but it raises questions about the Parks Canada decision-making process as well.

3.2.2 Letter from the NSMA

The NSMA letter requests an EA and outlines concerns related to:

- NSMA members' ability to exercise rights in the protected areas; and

- NSMA involvement in the establishment of the park, management of the park, and impact benefits agreements.

4. Legal Context

Land claims and the MVRMA re: screening of parks and definition of development

The MVRMA is unusual when compared to other environmental assessment legislation because the definition of development under section 111 MVRMA includes “measures carried out by a department or agency of government leading to the establishment of a park”.³ As a result, the TDNNPR proposal is a development and Parks Canada was required by law to screen it. This MVRMA requirement has its roots in land claim agreements.⁴

Review Board discretion to order an EA under subsection 126(3) MVRMA

Preliminary screeners are responsible for applying the following tests, set out in section 125 of the MVRMA:

- Might the development proposal cause significant adverse impacts on the environment?
- Might the development proposal be a cause of public concern?

Parks Canada has conducted a screening and concluded that no EA is required.

The Review Board, notwithstanding the outcome of any preliminary screening, has the authority to order an EA.⁵ The Review Board’s authority to call an EA on its own motion is discretionary and is not limited by the tests set out in section 125 of the MVRMA. The Review Board is not obligated to apply any test set out in the MVRMA or to take any decision in relation to a preliminary screening. If the Review Board decides that an EA is necessary and appropriate it may use its discretionary powers to order an EA.

Ten-day pause

The Thaidëné Nene National Park Reserve screening was one of the first screenings to be subject to the newly enacted ten-day pause period under subsection 125 (1.1) MVRMA.⁶ The ten-day pause period does not create any new authority to call an EA. It simply gives the

³ For example, this is not the case in Nunavut where the definition of “project” under the *Nunavut Planning and Project Assessment Act* does not include parks.

⁴ See for example, paragraphs 24.1.2(a) and 25.1.2(a) of the Gwich’in and Sahtu land claim agreements, respectively.

⁵ It should be noted that similar wide “oversight discretion” is provided to regulatory authorities and governments under ss. 126(2) of the MVRMA.

⁶ See the Review Board [Reference Bulletin on the pause period](#).

Review Board and other referral authorities⁷ time – after a preliminary screening decision – to decide whether to exercise their discretion to refer a development proposal to EA.

Review Board practice is to monitor the conduct of screenings and to review all screening decisions. In the past, and consistent with the wording of ss.126(3), the Board has ordered an EA as soon as it decided one was needed, rather than delaying until the screening was complete. Board practice is to get developments to the appropriate level of assessment in a timely and efficient way, as soon possible, and get on with the process. The Review Board does not need to wait until the ten-day pause period is engaged in order to consider the exercise of its 126(3) discretion.

The Review Board's independence

Mackenzie Valley Land claim agreements and the MVRMA intend that preliminary screening be completed early in the process of considering a development. This environmental impact assessment framework ensures that preliminary screening decisions are made by regulators or authorities with specific and detailed knowledge of the project. Once a screening decision is made, however, the law provides for independent oversight of such a decision by the Review Board. Any decision to overrule a preliminary screener is discretionary. The scope for the exercise of the Review Board's discretion is very broad and it can be exercised notwithstanding any decision made by a preliminary screener, or even if a screening has not been completed.⁸

5. The Decision and Reasons

The Review Board has decided not to exercise its discretion under ss. 126(3) MVRMA and has not ordered an EA of the establishment of Thaidënë Nene National Park Reserve. The reasons for this decision are set out below.

5.1 Preliminary means preliminary

Preliminary screening is intended to be carried out before a development is acted upon, when it is still feasible to make changes, for example through voluntary project adjustments or environmental assessment measures, to prevent impacts and address concerns.

Section 118 underpins Part 5 of the MVRMA to ensure that irrevocable decisions are not made before the environmental impact assessment (EIA) process required by land claims and the MVRMA has been completed.

⁷ Under subsection 126(2).

⁸ See subsections 126(3) and (4) of the MVRMA.

118(1) A licence, permit or other authorization required for the carrying out of a development shall not be issued under any federal, territorial, Tlicho or Deline law unless the requirements of this Part have been complied with in relation to the development.

As indicated above, in this case, the “development” is the establishment of the TDNNPR.

Action was taken to establish the national park before the screening was complete

The decision to establish the TDNNPR was taken after years of planning and engagement, numerous planning iterations and adjustments, and the setting of park size and boundaries in legislation passed by Parliament.

Section 4(a) of the Parks Canada’s Screening Report states that:

“Amendments to the [*Canadian National Parks Act*] pertaining to the establishment and management of Thaidene Nene were tabled in Parliament on April 8, 2019 and given Royal Assent on June 21, 2019, after Parliamentary review in the House of Commons and the Senate of Canada. However, they will not come into force until the relevant agreements have been signed and executed, the land transferred from the GNWT to Parks Canada, and an Order in Council accepting transfer of the land from the GNWT and bringing the amendments into force is passed.”

However, the review period for the preliminary screening began on April 4, only a few days before amendments to the *Canada National Parks Act* (CNPA) were tabled, and the screening was not completed until July 5th – **two weeks after the CNPA amendments were passed and given Royal Assent.**

Parks Canada’s approach to screening appears to be inconsistent with the MVRMA

The MVRMA and the land claims it is based on require that development proposals undergo preliminary screening **before** they proceed. Part 5 of the MVRMA establishes the screening and environmental assessment processes and one of its central purposes set out in section 114 is “to ensure that the impact on the environment of proposed developments receives careful consideration **before actions are taken in connection with them**”.

The Review Board acknowledges the careful planning and negotiations which went into the TDNNPR proposal, but the timing of the legislative process relative to the screening is problematic.

In the view of the Review Board, it is not consistent with the MVRMA to complete a preliminary screening after irrevocable decisions to proceed with a development have already been made. That seems to be that case with TDNNPR. While it might be theoretically possible for Parliament to reverse or repeal its TDNNPR establishment decision, the Board is of the opinion that such an action is effectively impossible.

Moreover, now that Parliament has already spoken about TDNNPR establishment and its boundaries, it seems likely that any subsequent decision by an administrative tribunal addressing those matters would be of no effect.

If questions about the inconsistency between the Parks Canada actions under the MVRMA and the CNPA were to be raised, in the Review Board's view, a Court could be expected to look to the most recent and specific legislative authority – and that would be Parliament's decision to enact the changes necessary to establish TDNNPR.

The Amendments already made to the Canada National Parks Act⁹ raise significant legal questions about the value of an EA in this case

The Review Board is left to consider what an EA could reasonably be expected to accomplish after Parliament has already decided on the boundaries of TDNNPR?

For example, some the concerns submitted to the Review Board by the Chamber of Mines are about the boundaries and the idea of a corridor through the park. If an EA were conducted and resulted in measures referencing these boundaries or a corridor, could the Minister responsible for National Parks implement them now that Canada has already given Royal Assent to this legislation? A conflict between what an EA might conclude and what has already been approved by Parliament could easily arise.

Assuming for the sake of these reasons that the Review Board identified measures which might address NSMA s.35 concerns, similar questions arise. Could the Minister make changes to the TDNNPR boundary to accommodate the NSMA now that Parliament has spoken?

While to the Review Board the legislative actions initiated by Parks Canada seem inconsistent with the requirements of Part 5 of the MVRMA, Parliament's overarching authority must be recognized. In the Review Board's view the difficulties resulting from the timing of the amendments to the CNPA and the preliminary screening are not matters which the Board can resolve. Furthermore, it appears to the Review Board that an EA would be unlikely to resolve concerns about TDNNPR boundaries, as they have already been fixed by Parliament.

5.2 Background and Letters

In considering the requests set out in the letters, the Review Board's focus was on two questions. Is an EA needed and could an EA effectively address the concerns raised? In the circumstances, the Review Board's consideration of the concerns raised by the letters has been confounded by Parks Canada's approach to and the timing of the preliminary screening.

⁹ See Division 23 of Bill C-97 - now S.C. 2019 c.29 s. 333. Royal Assent 21 June 2019.

Letter from the Chamber of Mines

The Chamber disagrees with Parks Canada’s boundary choices, but the Review Board is not convinced that an EA could even address this issue at this time. TDNNPR represents a disposition of land that has been negotiated by three levels of government over an extended period. The Chamber has made submissions to Parks Canada and GNWT about the park’s size and boundaries, and a corridor through the Park. Despite these concerns, Parliament has already amended the schedule to the National Parks Act to allow for the creation of Thaidënë Nene National Park Reserve. Even if the Review Board wanted to do an EA, it is unlikely that an EA could change what Parliament has done, and in the Board’s opinion it would be legally problematic to try.

Letter from the NSMA

Parks Canada’s screening report for the park states that one of the purposes of the park is to help preserve the area for cultural and traditional practices and “(w)ithin the proposed park reserve First Nations and Métis people will continue their traditional use of the area.” Parks Canada also states that the TDNNPR management plan can address broader issues such as cooperation with First Nations and Métis. In the Board’s view, EA not the tool to address NSMA requests for greater involvement in park establishment or future management. It is up to Parks Canada and the relevant first nation and metis governments and organizations to figure out how to proceed.

5.3 Consideration of the History of the Development of the TDNNPR

The Review Board recognizes the long history of the development of the proposed TDNNPR. As was noted by Parks Canada in the Preliminary Screening, consultations on the development have been on-going with the Łutsël K’e Dene First Nation, the closest community to the proposed TDNNPR, since the 1960s. At the initiative of the LKDFN an establishment agreement for the TDNNPR was eventually achieved.

Parks Canada has also consulted with other Indigenous Governments and Indigenous Government Organizations with territories overlapping the proposed Thaidënë Nene National Park Reserve and have been negotiating agreements with the other Akaitcho First Nations (Yellowknives Dene First Nation and Deninu K’ue First Nation) and the Northwest Territory Métis Nation.

6. Conclusion

The Review Board has carefully considered the materials related to the preliminary screening decision and the letters received from the Chamber of Mines and the NSMA. The Board has decided that this is not a case in which it should exercise its discretion under ss. 126(3) of the MVRMA.

7. Implementation of the MVRMA EIA Process

It is important to implement future preliminary screenings in the manner set out in law, as well as having regard to the guidance provided for in the Review Board's *Guidelines for Environmental Impact Assessment in the Mackenzie Valley*, developed in accordance to s.120 of the MVRMA.

Timing of screenings

Preliminary screenings are meant to be preliminary; they should be – and the land claims and the MVRMA say they legally must be – conducted before substantive actions have been taken in relation to a development proposal. Preliminary screening does not need to wait until the details of a development proposal are finalized.

Regional Strategic Environmental Assessment

Going forward, the Review Board suggests that a regional strategic environmental assessment, as a type of regional study under Part 5.2 of the MVRMA, should be considered before establishment of specific protected areas, as a way to inform planning and explore the implications for broader well-being.

The ten-day pause period for preliminary screenings

The ten-day pause is not another public comment period. The Review Board will look at updating our reference bulletin to provide more guidance on how we manage the preliminary screening registry, and how or whether we accept comments on preliminary screenings, or consider requests for EA.



JoAnne Deneron
Chairperson