Mackenzie Valley Review Board

Reasons for Decision

Review Board consideration of requests to order an environmental assessment of the proposed Thaidene Nëné Territorial Protected Area

August 15, 2019

1. Introduction

The Government of the Northwest Territories (GNWT) recently completed a preliminary screening under Part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA) for the establishment of Thaidene Nëné Territorial Protected Area (territorial protected area). After receiving the preliminary screening decision[1] on July 3, 2019, the Review Board received letters from the North Slave Metis Alliance (NSMA) and the Yellowknives Dene First Nation (YKDFN).

These are the reasons for decision for the Review Board's consideration of the preliminary screening and associated letters related to the establishment of **Thaidene Nëné Territorial Protected Area**.

2. Decision

After careful review of the preliminary screening, the request made by the NSMA, and the letter received from the YKDFN, the Review Board has decided **not to exercise its discretion under ss.126(3) MVRMA and has not ordered an environmental assessment (EA)** of the establishment of Thaidene Nëné Territorial Protected Area.

3. Background

All materials received by the Review Board in relation to the preliminary screening of Thaidene Nëné territorial protected area are on the Board's website at http://reviewboard.ca/registry/preliminary-screenings.

3.1 GNWT's preliminary screening

GNWT began the preliminary screening process on May 8, 2019 by sending notification to a distribution list (including the Review Board) and providing a description of the proposed territorial protected area. This was followed by:

- June 7: the GNWT compiled comments from reviewers.
- June 17: Lutsel K'e Dene First Nation (LKFN) submitted a letter responding to the Chamber of Commerce' letter.[2]
- July 2: LKDFN sent a letter to GNWT about the preliminary screening.

[1] GNWT preliminary screening reasons for decision

[2] The Chamber of Commerce letter is found on pdf pp 65-68 of June 7 compiled comments.

- July 3: GNWT completed its preliminary screening and reasons for decision, as well as a preliminary screening comment table, 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 territorial protected area:

- from the NSMA on July 19th, and
- from the YKDFN on July 22nd.

3.2.1 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 and management of the territorial protected area, and related impact-benefit agreements.

3.2.2 Letter from the YKDFN

The YKDFN letter takes issue with the proposal for a territorial protected area on the north side of McLeod Bay. The YKDFN letter does not specifically request that an EA be required.

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 proposed territorial protected area is a development and the GNWT was required by law to screen it. This MVRMA requirement has its roots in land claims.[4]

[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.

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?
- Or might the development proposal be a cause of public concern?

The GNWT 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 or 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 one.

Ten-day pause

The GNWT's screening of the territorial protected area 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 Review Board and other referral authorities[7] 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. Review 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 to consider the exercise of its ss.126(3) discretion.

[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.

[7] Under subsection 126(2).

The Review Board's independence

The MVRMA 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 Thaidene Nëné Territorial Protected Area. However, the Board is deeply concerned by GNWT's preliminary screening reasoning in relation to how it considered public concern under section 125 of the MVMRA.

In particular, it appears to the Review Board that the GNWT based its preliminary screening on an incorrect interpretation of the might test under s.125 of the MVRMA. The Review Board is also concerned, based on its review of the GNWT's reasons, with the government's apparent assumptions about what impacts may be included in the scope of an EA if one were to be ordered. The GNWT reasons state that "there is no likelihood that the proposed development might be a cause of public concern in relation to a potential impact on the environment that could be included within the scope of an environmental assessment".[9]

The Review Board's concerns and reasons for its decision are set out below.

5.1 The scope of preliminary screenings

Screening decisions should not be based on speculative conclusions about what the scope of a hypothetical EA might be – the scope of an EA is a decision wholly within the discretion of the Review Board for each EA it carries out. Screenings must focus on the tests set out in s.125 of the MVRMA.

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

[9] GNWT preliminary screening and reasons for decision, page 1 paragraph 2, page 2 paragraphs 3 and 7.

5.2 Regard for well-being under Part 5 of the MVRMA

Section 115 of the MVRMA states that all environmental impact assessment (EIA) processes conducted under Part 5 (including preliminary screening and EA) must have regard for the "social, cultural, and economic well-being of communities and residents of the Mackenzie Valley" and the "well-being and way of life of Aboriginal peoples". These are some of the guiding principles of Part 5 and are fundamental considerations in carrying out all levels of environmental impact assessment under the MVRMA.

While a screening involves only a limited evaluation of a development proposal and potential impacts, it still must "have regard for" well-being. If an EA is ordered or referred, there is time for a more fulsome examination of the implications a development proposal may have on the well-being of Mackenzie Valley residents.

Economic well-being

Economic well-being is a consideration which is explicitly set out in the MVRMA and potential socio-economic impacts can be a valid trigger for referral to EA.

Under its authority in section 120 of the MVRMA, the Review Board developed, consulted on, and published *Socio-Economic Impact Assessment Guidelines*. The preliminary screener must adhere to the Guidelines and apply them when conducting a screening. Chapter 4 of the Guidelines provides specific information on how socio-economic impacts should be considered during a preliminary screening.

Social and economic impacts are often complex. The MVRMA nonetheless includes social impacts as part of the definition of impact on the environment, and specifically lists "economic" well-being in paragraph 115(1)(b). Impact on the environment is thus broadly defined, and the scope for EIA in Part 5 is broadened further by the well-being considerations mandated under 115(1)(b). A preliminary screener cannot narrow the scope of the matters which must be considered during a screening. The clear language of the MVRMA and land claim agreements set out these requirements.

Public concern is a separate and parallel consideration to the potential impacts on the environment. The Review Board's EIA guidelines specifically reference consideration of well-being when discussing the might test for public concern.

5.3 The preliminary screening "might" test and public concern

The Review Board is concerned with the reasoning and rationale used by GNWT in determining how public concern was to be considered in its preliminary screening determination. In

particular, the Review Board is deeply concerned with how the GNWT appears to have modified the might test found in s.125 of the MVRMA.

A preliminary screener does not have the authority to modify the tests prescribed under the Act. The GNWT reasons conclude that "there is no likelihood that the proposed development might be a cause of public concern in relation to a potential impact on the environment that could be included within the scope of an environmental assessment". It is less than clear how such a conclusion might be drawn from an application of the tests set out in section 125 of the MVRMA.

S. 125(1) of the MVRMA reads as follows:

Except as provided by subsection (2), a body that conducts a preliminary screening of a proposal shall

> (*a*) determine and report to the Review Board whether, in its opinion, the development might have a significant adverse impact on the environment or might be a cause of public concern; and
>
> (*b*) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

The Review Board defines "might" as a *realistic possibility.*[10]

The Review Board's *EIA Guidelines,* produced under section 120 of the MVRMA, talk about how the might test can be practically applied, saying that one reasonable approach is to ask "are there relevant unanswered questions about this development?" and that "this applies both to environmental impacts and public concern".[11] The Guidelines also point out that screeners should apply their professional judgement and consider uncertainty about impacts or concerns when deciding whether to refer a development to EA.

The Guidelines acknowledge that the public concern test "has proven problematic to screeners…partly due to the subjective nature of the test." However, the test stems from the land claim agreements and is written in law – it may be challenging to apply but it is incumbent on screeners to duly consider it and apply it to the best of their ability, consistent with the intent and letter of the MVRMA.

[10] See the Review Board's Reference Bulletin on *"Operational Interpretation of Key Terminology in Part Five of the Mackenzie Valley Resource Management Act"* for the Review Board's interpretations of the terms might, likely, adverse, significant, and public concern.

[11] Pg. 17 of the Review Board's *EIA Guidelines*

5.4 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 screening (and, where required, EA) process required by land claim agreements and the MVRMA has been completed.

As indicated above, in this case, the "development" is the establishment of the territorial protected area.

Action taken to establish the territorial protected area

The proposed Thaidene Nëné Territorial Protected Area is being established under the *Protected Areas Act* that came into force on June 20, 2019. The establishment of the territorial protected area is contingent on the Minister of GNWT-ENR entering into an establishment agreement or agreements for the protected area with one or more Indigenous governments or organizations, which are yet to be finalized.[12] It therefore appears to the Review Board that no irrevocable action has been taken by GNWT and that there has been no contravention of s. 118(2) of the MVRMA.

However, in the Review Board's view it would be more consistent with the intent of the land claim agreements and MVRMA to have conducted the screening earlier in the planning process for the territorial protected area.

5.5 The letters

In considering the requests set out in letters, the Review Board's focus was on two questions. Is an EA needed and could an EA effectively address the concerns raised?

Letter from the NSMA

In the Board's view, EA is not the appropriate tool to address NSMA's requests for greater involvement in establishment or future management of the territorial protected area. It is up to GNWT and the relevant first nations and metis governments/organizations to figure out how to proceed.

[12] S. 14.(1) of the *Protected Areas Act*

Letter from the YKDFN

Having reviewed the YKDFN letter, the Review Board encourages the GNWT to carry out direct, meaningful, and timely engagement with the YKDFN, as well as the NSMA and other affected Aboriginal peoples, in relation to the establishment and future management of the proposed Thaidene Nëné Territorial Protected Area.

6. Conclusion

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

Nevertheless, the Review Board remains deeply concerned with the reasoning and rationale used by GNWT in how public concern was considered in its preliminary screening determination.

Preliminary screeners should adhere to the might test and their responsibilities prescribed under the MVRMA. Potential impacts on the environment and public concern need to be duly considered and screeners need to have regard for well-being, as set out in the MVRMA.

Screening decisions should not be made based on speculative statements about what the scope of a hypothetical EA might be – the scope of EA is a legal decision made by the review board for each EA it carries out.

7. Future considerations

It is important to implement future preliminary screenings in the manner set out in law, as well as having regard for the guidance provided in the Review Board's guidelines developed in accordance with s.120 of the MVRMA.

Timing of screenings

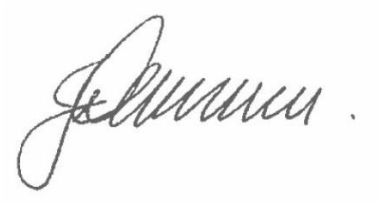
Preliminary screenings are meant to be preliminary; they should be – and the land claim agreements and the MVRMA say they legally must be – conducted before substantive actions have been taken in relation to a development proposal. Preliminary screening does not need to wait until the details of a development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

Regional Strategic Environmental Assessment (RSEA)

Going forward, the Review Board suggests that RSEA, as a type of regional study under Part 5.2 of the MVRMA, should be considered before establishment of specific protected areas 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/whether we accept comments or consider requests for EA.



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JoAnne Deneron
Chairperson