

Determining Significance of Public Concern

Introduction

This paper explores approaches for deciding whether a proposed development is likely to cause significant public concern. The paper discusses the definition of public concern, outlines the current process used during environmental impact assessments in Canada's Mackenzie Valley and presents a framework for a possible future guidance document. The environmental impact assessment regime in the Mackenzie Valley consists of three levels, preliminary screening, environmental assessment, and environmental impact review (panel review). The Mackenzie Valley Environmental Impact Review Board (Review Board) is the main instrument for environmental assessment and panel reviews.

Definitions

Despite its widespread use, the term "public concern" does not appear to be defined very well. A review of, among other things, the Oxford Canadian English Dictionary [1], Black's Law Dictionary [2], and the Dictionary of Natural Resource Management [3] did not reveal a definition of *public concern*. Black's Law Dictionary, 8th ed. defines *public* as an adjective to mean "relating or belonging to an entire nation, state or community" but does not define *concern*. The Oxford Canadian English Dictionary defines *public* as "concerning the people as a whole" and *concern* as "a matter of interest, importance" but also as "anxiety, worry". It also defines *significant* as: "of great importance or consequence" and as "noteworthy, noticeable".

While both the *Mackenzie Valley Resource Management Act* and the *Canadian Environmental Assessment Act* use "public concern" as a trigger for greater scrutiny, neither defines "public concern" or "public" or "concern". A review of case law commissioned by the Review Board in 2007 paints a similar picture. The term "public" is reported to be poorly defined but to generally not mean the inhabitants of the entire country. For practical purposes it may only mean the inhabitants of a village or members of a community reached by a particular advertisement, or would be interested in a particular matter.

The Review Board defines "public concern" as: "widespread anxiety or worry" in its 2006 *Reference Bulletin: Operational Interpretation of Key Terminology* [5]. It also defines a *significant* impact as "an impact that is...important to [the Board's] decision".

The definitions of "public", "concern", and "significant" create a wide spectrum of possible definitions of "significant public concern". Defined very broadly, a group of people taking note may constitute significant public concern. Defined very narrowly, we may not find significant public concern unless the whole nation is in an uproar. The courts, as well as the Review Board in its own practice, have set limits on the range of possible definitions as outlined in the guidance document framework section below.

Available guidance

Guidance documents for practitioners

The Review Board undertook a review of available publications for determining the significance of public concern or the likelihood of possible public concern caused by a proposed development. Initially this review focused on readily available documents and found a number of documents that included advice on involving the public in the process but only one with some advice on how to gauge the level of public concern. A broader search of jurisdictions in the United States, Australia, the Netherlands, and Ghana, as well as peer-reviewed journal indices and interviews with practitioners and academics, yielded similar results. Public concern frequently leads to higher level environmental reviews, yet very little published guidance exists on how to gauge the level of public concern or how to determine when a proposed development is likely to cause significant public concern.

Review board practice

Mackenzie Gas Project

In December 2003 the Review Board initiated an environmental assessment of the proposed Mackenzie Gas Project - a 1300 kilometre pipeline and associated gathering and processing facilities. Following a series of public hearings the Review Board concluded that the proposed development was likely to cause significant public concern and ordered an environmental impact review. Before this decision, the Review Board held multiple hearings in different communities and actively solicited written submissions from the public. All public hearings followed the same agenda and format making the results comparable.

In gauging the level of public concern for the Mackenzie Gas Project environmental assessment, the Review Board developed the following criteria:

- *Frequency of concern:* the frequency with which participants raised a particular issue, like impacts on wildlife.
- *Geographic distribution:* whether a concern was limited to one region or widespread across multiple regions.
- *Source:* the Review Board weighted a concern brought forward on behalf of a large potentially affected group, e.g. the residents of a municipality, more than concerns of an individual.
- *Severity of concern:* in addition to the severity or magnitude of the potential impact a concern was based on, the Review Board considered the extent to which an organization or individual went to express the concern, e.g. by incurring considerable costs to participate in a hearing.

The Review Board determined the likelihood and significance of public concern only after considering all of these criteria.

The criteria for gauging public concern used in the Mackenzie Gas Project assessment employed a combination of qualitative and quantitative analysis and were developed after an extensive public involvement process. They proved to be quite appropriate for this particular environmental assessment and provided a great degree of transparency without relying too heavily on either qualitative or quantitative criteria.

Gahcho Kue diamond mine project

In 2006, the Review Board conducted an environmental assessment of a proposed open pit diamond mine at Kennady Lake in the Mackenzie Valley, the Gahcho Kue Project. Given the relatively large size of the project, the Review Board employed a similar strategy as for the Mackenzie Gas Project. While the Review Board once again conducted an extensive public participation process, it relied not only on public hearings but on a combination of separate staff-managed technical and community scoping workshops and technical and community hearings. Also, in this instance, the Review Board emphasized prioritizing issues by the parties in an attempt to focus any subsequent environmental assessment or impact review on the most important ones.

Unlike the Mackenzie Gas Project assessment process, workshops and hearings did not all follow the same agenda and format but provided considerably different venues to address the various needs of technical experts, governments, or communities. This resulted in high quality scoping but prevented a direct comparison of the outcomes or quantitative analysis. Geographic distribution criteria had little relevance for this project as it did not cross jurisdictional boundaries.

In this case the Review Board used three different indicators:

1. Participation rates and level of effort expended by participants to attend workshops and hearings to voice their concerns. This criterion in essence combines the frequency and severity criteria of the Mackenzie Gas Project assessment.
2. Criteria set out in the Review Board's own *EIA Guidelines* [6] including: size of development, proximity to communities or areas used for traditional harvesting, proximity to sensitive environments, use of new technologies, and the severity of the worst case scenario.
3. Evidence of adverse impacts on the environment that formed the basis of expressed public concern. This third measure reveals how robust the first two are. Concerns expressed in the absence of any evidence that they might come true were weighted considerably less than concerns over impacts backed by evidence of a possible or likely impact.

In the case of Gahcho Kue, the Review Board found that the high participation rates (e.g. 25 per cent of the population of a particular community turned out for a workshop) and demonstrated great efforts (e.g. by driving several hundred kilometers to attend scoping workshops and hearings) pointed to considerable public concern. The Review Board's *EIA Guidelines* criteria for determining public concern also indicated that the development might raise concern. The Review Board heard evidence that the concerns expressed by communities were not irrational fears but based on observation of existing negative environmental changes in an area that only recently started to undergo industrial development. They were backed by evidence that the proposed Gahcho Kue development may accelerate the environmental change.

These are two successful examples of using multiple, rational criteria to assist in deciding whether a development is likely to cause significant public concern. In both cases only the combination of all indicators convinced the Review Board to find that the proposed development was likely to be cause of significant public concern. In both cases the Review Board developed the criteria prior to making a decision but after gathering the evidence. The decision to order a panel review for Gahcho Kue has been tested in court and was upheld.

Public Concern Guidance Framework

A commonly accepted and widely used method to determine whether a development is likely to cause significant public concern does not exist in Canada. The relevant legislation does not provide much guidance or limitations and courts have not addressed the issue to a great extent. The NWT Supreme Court confirmed that a prescribed set of criteria is not required. However, in the Review Board's opinion, better guidance on this subject could result in a clearer distinction between projects that are adequately assessed at a mid-level environmental assessment and those that require a full panel review, particularly for smaller developments.

As outlined in the definitions section above, the various definitions of the terms "significant", "public", and "concern" allow a wide range of interpretations for the term "significant public concern" (see figure 1). They range from interest to a community to widespread anxiety in the entire nation. The Review Board's own precedent suggests that merely being of interest or importance to some people does not constitute significant public concern, whereas courts have rendered decisions that indicate nationwide anxiety need not be present.

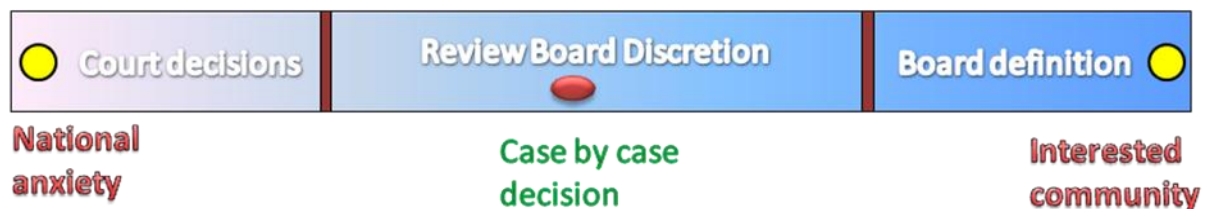


Figure 1: The Significance Spectrum

Public concern criteria

The Review Board must base its decision solely on evidence in the public record for its environmental assessment of a development. This means the Review Board has to estimate the level of concern present or likely to be present in the public from the evidence of public concern submitted to the record by parties or individuals. This evidence can fall into three broad categories derived from the Review Board's experience: amount or frequency, distribution, and nature of concern. Generally, the Review Board requires evidence of actual public concern being present rather than just an expectation that a proposed development will raise concern in the future. The three categories may be further described as follows:

Amount and frequency of concern:

This refers to the number of times specific concerns are expressed but also to the number people or organizations participating in meetings and hearings relative to the size of the relevant public. It also includes a consideration of the level of efforts by the relevant public to express its concerns. High participation rates, high frequency of similar concerns and high level of efforts point towards significant concern.

Distribution or source of concern:

Criteria in this group deal not only with the geographic distribution of concern but also with the distribution among individuals, organizations, and communities. Generally speaking, concerns that are present across different demographic groups, regions, or organizations are more indicative of significant public concerns than concerns restricted to one particular group. Evidence from potentially directly-affected communities may be weighted higher than evidence of concern from further abroad.

Nature of concern:

The nature of concern may be described as the basis for the concern as well as its severity. For this the Review Board will examine the record for any evidence of potential impacts. Concerns linked to evidence of possible real impacts or observations of similar developments may be weighted heavier.

The Review Board's own precedent suggests that in most cases evidence of significant public concern must be present in all three categories above. However, under exceptional circumstances, particularly strong evidence in one area may outweigh a relative lack of evidence in another. Before making a decision the Review Board must satisfy itself that it has made reasonable efforts to probe for existing public concern across what it considers to be the relevant public.

Conclusion

The identification of significant public concern in environmental impact assessment has similar consequences to the identification of significant environmental impacts as both can lead to a higher level of review of project. Yet unlike impacts on the environment, legislation does not define "public concern" and little guidance exists. Precedent suggests criteria include the amount or frequency, the distribution, and the nature and severity of the concern. The Review Board issued a discussion paper that outlines the framework above in more detail (www.reviewboard.ca). The Review Board plans to develop a guideline based on this framework and on the feedback received in 2011.

References

- [1] *The Canadian Oxford Dictionary*, Katherine Barber ed., Oxford University Press, Toronto, 2001
- [2] *Black's Law Dictionary*, Bryan A. Garner ed., West (Thomson Reuters), 2004.
- [3] *Dictionary of Natural Resource Management*, Julian and Katherine Dunster ed., UBC Press, Vancouver, 1996
- [4] *Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects*, Canadian Environmental Assessment Agency, Ottawa, 1994.
- [5] *Reference Bulletin: Operational Interpretation of Key Terminology*, Mackenzie Valley Environmental Impact Review Board, Yellowknife, 2006
http://www.reviewboard.ca/reference_lib/index.php?section=20
- [6] *Environmental Impact Assessment Guidelines*, Mackenzie Valley Environmental Impact Review Board, Yellowknife, 2004,
http://www.reviewboard.ca/reference_lib/index.php?section=18