POLITICAL OPPORTUNITY AND PUBLIC PARTICIPATION:
EIA IN NORTHERN CANADA AND SOUTH AFRICA

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ABSTRACT

POLITICAL OPPORTUNITY AND PUBLIC PARTICIPATION:
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University of Guelph, 2010

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This research critically examines the process of public participation in the politically contested arena of environmental impact assessment (EIA) in two case studies: the Ekati diamond mine in Canada’s Northwest Territories and the Richards Bay Minerals project in KwaZulu-Natal, South Africa. Each case offers the chance to examine and compare the potentialities of expanded public participation in EIA and the promise of deliberative environmental decision-making. The concept of deliberative public participation has become the new normative standard for citizen engagement in numerous planning and policy-making processes, including EIA. It calls for increased participation by previously disadvantaged communities in the decisions that affect them through multi-stakeholder dialogue. Addressing the need for a realistic assessment of deliberative democratic practice, this study explores the limits of deliberative process by looking at specific examples of EIA, bringing into focus political processes, power relations and the structural conditions affecting citizen engagement.
Acknowledgements

This project would not have been possible without the support and patience of a number of very important and inspiring people. I would like to extend enormous thank-you's to my advisor Dr. John Devlin for his leadership and vision, Meredith Davis for always being there, the rest of the Davis clan who have kindly adopted me and, as always, to my own family for continuously supporting each new adventure. Special thanks as well to those who took the time to contribute to this research by sharing their side of the story.

This work is dedicated to my grandfathers.
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<tbody>
<tr>
<td>ANC</td>
<td>African National Congress</td>
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<tr>
<td>BBBEE</td>
<td>Broad-Based Black Economic Empowerment</td>
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<td>BHPB</td>
<td>BHP Billiton</td>
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<tr>
<td>CA</td>
<td>Competent Authority</td>
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<td>CCME</td>
<td>Canadian Council of Ministers of the Environment</td>
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<td>CEAA</td>
<td>Canadian Environmental Assessment Agency</td>
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<tr>
<td>CERU</td>
<td>Conservation Ecology Research Unit</td>
</tr>
<tr>
<td>CIRL</td>
<td>Canadian Institute of Resources Law</td>
</tr>
<tr>
<td>CONNEPP</td>
<td>Consultative National Environmental Policy Process</td>
</tr>
<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
</tr>
<tr>
<td>DEAT</td>
<td>Department of Environmental Affairs and Tourism</td>
</tr>
<tr>
<td>DFO</td>
<td>Fisheries and Oceans Canada</td>
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<td>DIAND</td>
<td>Department of Indian Affairs and Northern Development</td>
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<tr>
<td>DIPs</td>
<td>Deliberative Inclusionary Processes</td>
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<tr>
<td>DME</td>
<td>Department of Minerals and Energy</td>
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<td>DMR</td>
<td>Department of Mineral Resources</td>
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<tr>
<td>DWEA</td>
<td>Department of Water and Environmental Affairs</td>
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<tr>
<td>EA</td>
<td>Environmental Assessment</td>
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<tr>
<td>EAP</td>
<td>Environmental Assessment Practitioner</td>
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<td>EARP</td>
<td>Environmental Assessment and Review Process/Panel</td>
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<td>EARPGO</td>
<td>Environmental Assessment and Review Process Guidelines Order</td>
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<tr>
<td>ECA</td>
<td>Environmental Conservation Act</td>
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<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<td>EIR</td>
<td>Environmental Impact Review</td>
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<td>EIS</td>
<td>Environmental Impact Statement</td>
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<td>EMAB</td>
<td>Environmental Monitoring Advisory Board</td>
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<td>EMF</td>
<td>Environmental Management Framework</td>
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<td>EMP</td>
<td>Environmental Management Plan</td>
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<td>EMPR</td>
<td>Environmental Management Programme Reports</td>
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<tr>
<td>FEARO</td>
<td>Federal Environmental Assessment Review Office</td>
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<tr>
<td>GNWT</td>
<td>Government of the Northwest Territories</td>
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<tr>
<td>I&amp;AP</td>
<td>Interested and Affected Party</td>
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<tr>
<td>IBA</td>
<td>Impact Benefit Agreement</td>
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<tr>
<td>IEM</td>
<td>Integrated Environmental Management</td>
</tr>
<tr>
<td>IEMA</td>
<td>Independent Environmental Monitoring Agency</td>
</tr>
<tr>
<td>INAC</td>
<td>Indian and Northern Affairs Canada</td>
</tr>
<tr>
<td>ISR</td>
<td>Inuvialuit Settlement Region</td>
</tr>
<tr>
<td>MoE</td>
<td>Minister of the Environment</td>
</tr>
<tr>
<td>MVEIRB</td>
<td>Mackenzie Valley Environmental Impact Review Board</td>
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<tr>
<td>MVLWB</td>
<td>Mackenzie Valley Land and Water Board</td>
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<tr>
<td>MVRMA</td>
<td>Mackenzie Valley Resource Management Act</td>
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<tr>
<td>MPRDA</td>
<td>Minerals and Petroleum Resources Development Act</td>
</tr>
<tr>
<td>NEMA</td>
<td>National Environmental Management Act</td>
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<tr>
<td>NEPA</td>
<td>National Environmental Policy Act</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Name</td>
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<td>--------------</td>
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<tr>
<td>NUM</td>
<td>National Union of Mineworkers</td>
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<tr>
<td>NWT</td>
<td>Northwest Territories</td>
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<tr>
<td>RBM</td>
<td>Richards Bay Minerals</td>
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<tr>
<td>RBCAA</td>
<td>Richards Bay Clean Air Association</td>
</tr>
<tr>
<td>RBIT</td>
<td>Richards Bay Iron &amp; Titanium</td>
</tr>
<tr>
<td>RERC</td>
<td>Regional Environmental Review Committee</td>
</tr>
<tr>
<td>S&amp;EIR</td>
<td>Scoping and Environmental Impact Report</td>
</tr>
<tr>
<td>TK</td>
<td>Traditional Knowledge</td>
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<tr>
<td>WESSA</td>
<td>Wildlife and Environment Society of South Africa</td>
</tr>
<tr>
<td>WLWB</td>
<td>Wek’èezhìı Land and Water Board</td>
</tr>
<tr>
<td>WRRB</td>
<td>Wek’èezhìı Renewable Resources Board</td>
</tr>
<tr>
<td>WWF</td>
<td>World Wildlife Fund</td>
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<tr>
<td>ZEAL</td>
<td>Zululand Environmental Alliance</td>
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Chapter 1: Introduction

The process of public participation in the environmental impact assessment (EIA) arena is at the forefront of theoretical and practical debates surrounding the democratization of planning and policy-making. This empirical study of the EIA and related environmental management processes for the Ekati diamond mine in Canada’s Northwest Territories (NWT) and the Richards Bay Minerals (RBM) project in KwaZulu-Natal, South Africa seeks to elaborate on these debates. EIA is a chief planning aid to environmental decision-making in both nations, representing an important forum for citizen participation in environmental policy making, particularly in the planning of large-scale development projects. Mounting criticism over the past two decades concerning the effectiveness and inclusivity of public participation in EIA, and in broader governance structures more generally, is reflective of the “deliberative turn” in planning, policy and political theory. The deliberative turn is founded on a critique of traditional methods of citizen engagement in policy formulation in which forms of “expert” scientific and technical knowledge are typically privileged while the public is seen as suffering from an information deficit; a process which has been captured by and tends to serve the interests of entrenched elites. To reverse the direction of policy discourse and democratize the planning process, deliberative theorists advocate a more “communicative” form of planning that ensures a plurality of voices through two-way interaction between decision-makers and the public as well as deliberation amongst participants. It holds the promise that by opening up a dialogical process involving all stakeholders previously disadvantaged groups and oppressed knowledges will gain equal consideration, thereby democratizing and legitimating the decision-making process.
The quality of public participation in EIA is increasingly measured against the normative standards of deliberative democracy, which call for unforced consensual agreement among all stakeholders through a process of open, undistorted, dialogical decision-making. Yet even as the rhetoric of deliberative democracy assumes a central position in environmental governance and policy-making theory more generally, questions are growing about the assumptions of deliberative theory and about the ability of such processes to give voice to disadvantaged communities, strengthen democratic decision-making, and improve outcomes. The deliberative conception of democratic engagement in environmental decision-making and elsewhere has been criticized as having little basis in empirical evidence and for ignoring the antagonistic nature of political engagement in the real world of power and resource imbalances. The concern is that while new governance spaces may have opened up, access to power and resources has not. More powerful actors can then use the rhetoric of deliberative public participation to colonize and coopt new democratic arenas. These concerns have been taken up in recent scholarship about public participation in EIA culminating in the charge that, despite all the rhetoric of deliberative decision-making, the EIA process can become little more than a “theatre with roles and script fixed in advance” (Hokkanen, 2001, p. 136).

**Purpose of the Study**

Effective public participation is widely recognized as essential to effective EIA and the effectiveness of that participation is increasingly measured against the ideals of deliberative democracy. However, critics argue that it is naïve to assume that the real world of antagonistic politics, value conflicts and power differentials that are an inherent
part of environmental governance can be easily remade to create dialogical decision-making. As Richardson (2005, p. 349) has argued, there is “an intrinsic problem with this idea that decisions over value differences can somehow be taken out of the EIA process by creating new institutions and practices”. Deliberative democratic approaches give insufficient attention to the real effect of political context, which includes “radical uncertainty, pluralism, complexity, and social inequality” (Chilvers, 2008, p. 157). In order to address these critiques there is a need for public participation research that avoids the “‘check list’ evaluative models” (Bickerstaff & Walker, 2005, p. 2123) derived from the limiting ideals of communicative rationality. A refocusing is needed “on the way in which the dynamic political processes within which EIA is embedded work out in specific contexts and influence the shape and extent of public participation in EIA” (O’Faircheallaigh, 2010, p. 26). Or as Richardson (2005, p. 362) calls for, there is a need for more “detailed stories” about EIA guided by a clear acknowledgement of the inescapable role of power and political context in order to identify the constraints that distort deliberative process.

The present study seeks to explore the limits of deliberative process by looking at specific examples of EIA, bringing into focus political processes, power relations and the structural conditions affecting citizen engagement. To properly explore the deliberative problematique, research must examine how these processes work out in actual case studies. Accordingly, this research asks Foucault’s (1982, p. 786) “little question, What happens?...flat and empirical”.
Approach

To answer the question “what happened” with public participation in the two case studies, analytic tools are borrowed from political process theory. Political process theory was developed to reveal how new opportunities or constraints dictate the mobilization of citizens in contentious political episodes (McAdam, 1996; Tarrow, 1994). The key analytic tool used by political process theory is the conception of the “political opportunity structure”, which can be used to explain opportunities and constraints for participation. This is done by focusing research on how “The opening of opportunities produces external resources for people who lack internal ones, openings where there were only walls before, alliances that did not previously seem possible and realignments that appear capable of bringing new groups to power” (Tarrow, 1994, p. 99). The approach recognizes that both the formal institutional or legal structures of a given political system as well as the more informal structure of power relations that characterize a system at a given point in time are important for explaining outcomes (McAdam, 1996, p. 26). Changing political contexts create or deny opportunities for social action and effective participation.

This research uses a small-\(N\) comparative methodology with “thick” case studies to describe the public participation procedures of EIA cases in Canada and South Africa. The study examines the Ekati diamond mine in Canada’s Northwest Territories and the Richards Bay Minerals titanium project located in South Africa’s KwaZulu-Natal province. Processes in each case could be understood as offering deliberative potential as both are situated within the context of advanced national EIA legislation with broad requirements for public participation. Both cases involve environmentally active
communities and examine companies with recognized corporate social and environmental responsibility mandates, which include provisions for sustainable development and extended public participation. Each mine has been operating for a sufficient period of time to provide some insight into the process of public participation throughout the EIA, EIA follow-up periods, and other relevant “parallel public participation” processes (Richardson, Dusik, & Jindrova, 1998). Finally, both have been operating within highly sensitive environmental as well socio-political climates. The critical exploration is constructed from the findings of documentary and literature analysis, including official reports, legislation, environmental assessments, extended transcripts, meeting minutes and media archives, supported by interviews with policy actors and observations of specific events. The quality of participation in each case study is explained in terms of opportunities or constraints generated by political realignments, institutions, external resources and new alliances in participatory spaces that make up the political process framework.

Main Findings

Expanding the scope of inquiry to include changes in the political context reveals the political structures and alignments that can create or deny opportunities for effective public participation. This exploration results in a set of inductive generalizations concerning the structural, political and other external factors that influence public participation in EIA processes across national jurisdictions. Main findings can be summarized as follows:

- The concept of political opportunity structure helped identify how specific political processes and realignments, such as Aboriginal land claims
negotiations in Canada or the democratic transition in South Africa, played an important role in the mobilization and impact of community stakeholders.

- Innovative institutional arrangements and ad hoc processes such as independent monitoring agencies, corporate social responsibility initiatives and negotiated agreements played a central role in public participation and creating the potential for deliberative decision-making.

- Despite their potential, these new institutions and forums for public participation are falling short of hopes for deliberative democracy, often due to persistent resource and power imbalances. Reliance on CSR as a primary institution for community participation can prove especially problematic.

- Finally, these institutions and processes are often operating parallel or exterior to statutory EIA processes, which have played a less influential role as a deliberative forum.

This study confirms the importance of examining the complex and dynamic political processes at work as research attempts to identify the weaknesses in deliberative institutional arrangements and capacity. Political process theory provides one fruitful approach, directing the inquiry toward political-contextual factors that can impact on the effectiveness of public participation.

**Organization of Thesis**

The literature review following this chapter traces the history of EIA and its diffusion around the world. It goes on to examine evolving conceptions of public participation in EIA and the ways in which the theory and practice of environmental decision-making have informed and engaged with scholarship on democracy, planning, administrative theory and policy theory. Theories of deliberative democracy and their
impact on conceptions of public participation in EIA are explored, as are critiques of the deliberative ideal and how these criticisms can be applied to new democratic spaces in the EIA arena. The chapter concludes with a review of how the concept of political opportunity structures can help explain the opportunities and constraints for transformative politics in public participation and define the specific research questions of this project.

Chapter three elaborates on methodological approaches and research methods. Following this, the case studies are given individual treatment in chapters four and five. These chapters offer an empirical exploration of each case study, including descriptions of each mine project and their respective political, social, environmental and regulatory context followed by a narrative of a major EIA and description of other important environmental management processes for each project. The quality of the public participation processes in each case study is then explained in an analysis organized around components of the political opportunity structure. First, realignments that can bring new groups to power such as regulatory changes, national political upheaval and major events are considered. Next, new institutional provisions for public participation are examined. For the Ekati case study, the important role of the Independent Environmental Monitoring Agency (IEMA) is featured and for RBM the prominence of corporate social responsibility (CSR) in stakeholder engagement is the focus. Finally, the strengths and weaknesses of these features are elaborated and critically assessed in a discussion of the final two components of political opportunity, the availability of external resources and the generation of new alliances. In this way, the quality of participation is explained through more macro political features impacting the practice of
public participation as well as aspects of the micro-politics of deliberation. The result is a broad description of each case study and an explanation of their deliberative limitations. These two narratives then provide the basis for a comparative analysis and a discussion of findings, lessons and limitations of the study in the concluding chapter.
Chapter 2: Literature, Themes and Questions

Environmental Impact Assessment

Impact assessment refers to the process of identifying the future consequences of a current or proposed action. The oldest, most well-established aspect of impact assessment is EIA, which the International Association for Impact Assessment defines as, “the process of identifying, predicting, evaluating and mitigating the bio-physical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made” (IAIA, 2009, p. 1). With its roots in a piece of US legislation promulgated in the late 1960s and the growing popular environmental awareness and democratic idealism of the time, rapid international institutionalization has seen EIA adopted as a project planning and decision-making instrument in over 100 geographically, politically and economically diverse nations around the world (Hironaka, 2002). EIA is now one of the most important and widely used policy tools for sustainable development (Duffy, 1992; Gibson, Hassan, & Holtz, 2005; Goode & Johnstone, 1988; Htun, 1990; Jacobs & Sadler, 1989; Morgan, 1998; Rees, 1988; Sadler, 1994) and has even been described as one of the most successful policy innovations of the 20th century (Bartlett, 1988). With consultation and public participation integral components of the evaluation process, the EIA system also represents a significant advancement in the effort to institutionalize deliberative democracy in environmental decision-making in many countries (Bartlett, 2005).

The first formalized EIA system emerged in the United States as part of the 1969 National Environmental Policy Act (NEPA). Although EIA has an even longer history of
informal practice (Fuggle, 1990), NEPA laid the fundamental building blocks for much of the subsequent EIA policy to be taken up around the world. The foundation of EIA, Weston (2004) explains, was developed and introduced in the 1960s in response to three key societal influences of the time: (1) the growth of modern environmental concern, (2) the preeminence of rational, scientific and objective decision-making, and (3) a demand for more public participation in environmental decision-making. The strength of environmental pressure groups and their use of litigation to force EIA on federal agencies led to rapid development of the regulatory tool in the US (Wathern, 1988). The tool that did develop mirrored the rational planning approaches that defined the times in which de-politicization and deference to “expert knowledge” were seen to provide greater legitimacy for controversial and complex decisions (Lawrence, 2000). These rationalist roots along with its generic procedural nature facilitated easy and widespread international adoption of EIA. Because environmental impact assessment procedures were relatively cheap, easy and uncontroversial to enact, satisfying constituencies such as environmental groups and international donors, they were a “perfect candidate for diffusion worldwide” (Hironaka & Schofer, 2002, p. 221). Now, forty years since NEPA, EIA has been incorporated into the policy and legislation of bilateral and multilateral aid and funding agencies, municipalities, and a great number of national governments, including many in developing and transitional economies (Lee & George, 2000; Petts, 1999a; Wood, 2003).
Public Participation and EIA

Public participation\(^1\) is an important element of the original NEPA legislation and is regarded by many as the “cornerstone” of EIA (Petts, 1999b; Sinclair & Diduck, 2005; Stewart & Sinclair, 2007; Wood, 1995). NEPA originally made citizen involvement central because it was considered a democratic “right” to allow people to be involved in the decisions that affect their lives. From a development perspective, it was also seen as a mechanism for information exchange with local communities whereby in opening up the process, citizens would have a more positive attitude towards whatever project was being proposed (Weston, 2004, p. 316). Today, all EIA legislation requires at least some practical measures for participation and in most jurisdictions participation is an essential element of the process. Without meaningful participation, the basic legitimacy of an EIA process is questionable (Gibson, 1993; Roberts, 1998). This recognition of the centrality of public participation in EIA has also extended to the promotion of citizen engagement throughout the project implementation, closure and reclamation phases (Baker, 2004), what is known as the post-decision stage or EIA follow-up period (Morrison-Saunders & Arts, 2004).

Since its inception and subsequent diffusion around the world, EIA has become one of the most important avenues for the public to affect environmental decisions. In Brazil, for instance, Rothman (2001) has found that environmental impact assessment is actually one of the few remaining institutional levers left available to affected people. According to Wood (2003, p. 75), EIA in Canada is the peoples’ best available

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\(^1\) Public participation can be defined, generally, as, “the practice of involving members of the public in the agenda-setting, decision-making, and policy-forming activities of organizations/institutions responsible for policy development” (Rowe & Frewer, 2005, p. 253).
opportunity for participation in environmental decision-making. The world over, the nature, extent and effect of public participation in environmental decision-making can be considered “important indicators of the conditions of late modernity and, in particular, the role of civil society” (Munton, 2003, p. 109). However, the “inherent weakness” of EIA has always been in the tension between the need for systematic, scientific and objective assessment, while also involving the public in that process (Weston, 2004, p. 316).

Although the importance of civic involvement in the realm of environmental decision-making is widely recognized, including by the rationalist scientific community, participation has long reflected the prominence of the “deficit model” approach to planning and policy-making, which presumes that there is a deficit in public knowledge and understanding of complex “technical” issues that can only be redressed in a top-down manner by expert knowledge (Burgess, Harrison, & Filius, 1998, p. 1446; Irwin, 1995; Wynne, 1991, 1995). Persson (2006, p. 608) describes this approach to public participation in EIA as “synoptic planning”, which may emphasize public involvement, “but in this case it is not about communicating values or interests, but rather to explain all the advantages of the suggested project”. In large part, the goal of public participation in this formulation of EIA has been “to transform the human dimension of natural resource management into a more stable and orderly administrative process” (Ventriss & Kuentzel, 2005, p. 525). The consequent diffusion of this culture of experts and the rationalist model of EIA has meant that environmental impact assessment largely proceeds in advance of discussion with the public rather than through discussion with them (Petts, 2003, p. 287; Shepherd & Bowler, 1997). Critics of rationalist, objective science-based decision-making of this sort argue that it ends up working to serve the
prevailing social, economic and political paradigm of capitalism (Weston, 2004, p. 317). In what Dryzek (1992, p. 26) calls the “compounding error” of the combination of administrative rationality, liberal democracy and capitalism, “the capitalist market ‘imprisons’ both liberal democracy and the administrative state by ruling out any significant actions that would hinder business profitability”.

It is this systematic, objective, procedural (also described as standardized, routinized, comprehensive, rational, reproducible, regulatory, empiricist, positivist) approach to EIA that has spread around the world and remains largely intact today (Weston, 2004). Serious questions are raised about what this approach has actually delivered in practice as EIA becomes “decoupled” from its original, more substantive goal of making better environmental decisions in a more democratic forum (Cashmore, Bond, & Cobb, 2007; Hironaka & Schofer, 2002; Lawrence, 1997; McDonald & Brown, 1995). There is now a growing body of concern regarding EIA “effectiveness”, particularly when discussion moves from issues of procedural implementation to the substantive environmental and democratic goals of EIA and its place within broader decision-making contexts (Benson, 2003; Cashmore, Gwilliam, Morgan, Cobb, & Bond, 2004; Jay, Jones, Slinn, & Wood, 2007; Sadler, 1996).

The Deliberative Turn in Politics, Planning and EIA

In response to concerns surrounding the “paternalistic culture of decision authorities” (Petts, 2003, p. 283) and taking cues from recent advances in normative political and linguistics theory, a number of commentators have moved the discussion about public participation in EIA away from the “truncated” politics of consultation
(Munton, 2003, p. 114) toward the more communicative process of collaborative planning and deliberative democracy. “Deliberative democracy,” a phrase first used by Bessettee (1980), has resonated with many theorists in planning (Fischer & Forester, 1993; Forester, 1989; Forester, 2000; Healey, 1997; Innes, 1995) and in policy and political science (Benhabib, 1996; Bohman & Rehg, 1997; Dryzek, 1990; Elster, 1998; Fischer, 2003; Gutmann & Thompson, 1996; Hæjer & Wageman, 2003). These analysts have recast the ideal of democratic process as participation and inclusion through reasoned political dialogue. It is part of a wider move from “government to governance” (Taylor, 2007a, p. 297) across the globe, also reflected in the growing emphasis in international development and national planning on empowerment through community participation.

This shift has been especially informed by the work of Jürgen Habermas (1975, 1984) in what has become widely known as the “deliberative” (Bohman, 1998) or “argumentative turn” (Fischer & Forester, 1993, p. 2). This body of critical theory recognizes the limitations of more episodic and representative, or “minimalist” (Goodin, 2008, p. 1) and “aggregative” (Gutmann & Thompson, 2004, p. 13), forms of democracy, as well as the barriers to participation arising from “instrumental rationality”. It champions instead a movement toward “communicative rationality” (Sanderson, 1999) predicated on Habermas’ concept of the heuristic “ideal speech situation” in which the power inequalities often present in communication between decision-makers and the public are redressed through deliberative processes. These processes, or “discursive designs”, are power-levelling communicative spaces in which democracy is defined by

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2 See Van den Hove (2006, p. 12) for an outline of the normative requirements of the Habermasian participatory approach. Also Wiklund (2005) for a discussion of the ideal type as it relates to EIA.
active citizen engagement directly with the processes of governance (Dryzek, 1987, 1990, 2000). Dependent on language through unhurried and reasonably open-ended discussion and debate, these social interactions are characterized by reflexivity, respect amongst participants for divergent positions and public reasoning and dialogue aimed at mutual understanding (Holmes & Scoones, 2000, p. 8-9). A deliberative space is “one where citizens can discuss and debate common concerns, access a wide range of information, and reflect and revise their understanding of issues” (Parkins & Mitchell, 2005, p. 530). In this ideal social environment, “all whose interests will be affected ought to have the opportunity to take part and all citizens should feel that their interests are being properly represented even if they do not become involved themselves” (Burgess et al., 2007, p. 300). Referred to by Goodin (2008, p. 2) simply as a process of “talking together”, this sort of communicative planning is “an ideal of planning process predicated on attempting to achieve undistorted, open, community-based consultation culminating in unforced consensual agreement of all participating actors, prior to the commencement of any agreed social or spatial action” (Gunder, 2010, p. 5).

John Dryzek (1993, p. 213) describes the deliberative turn as a shift “from Science to Argument”, providing a direct challenge to the deficit model and the entrenched interests of elites. In this model, differences in preferences are addressed “through processes which require them to be exposed to public debate and where arguments have to be presented in terms of the public good rather than personal benefit” (Munton, 2003, p. 112). Also referred to collectively as Deliberative Inclusionary Processes (DIPs) in policy process literature, these institutionally-orchestrated fora offer
a “new route” for non-elite citizens to influence policy (Holmes & Scoones, 2000)\(^3\) and have “the intention and potential to bring about movement, learning and change” (Isaksson, Richardson, & Olsson, 2009, p. 303). They can act as potential sites of empowerment by offering previously disadvantaged communities the opportunity to elevate their concerns.

Environmental issues are often in the vanguard of theoretical and practical debates about deliberative democracy “because of their complexity, the uncertainty surrounding their scientific understanding and the range of moral, ethical and political values that underpins them” (Munton, 2003, p. 110; see also, Fischer, 2000; O’Neill, 2007; Parkins & Mitchell, 2005). The deliberative turn has by extension had important influences on EIA theory and writing about environmental policy and risk-centred decision-making (Enevoldsen, 1998; Petts, 2005; Webler, 1995; Weston, 2004). Indeed, early innovation in deliberative mechanisms date back to the Berger Commission impact assessment of 1974-1977 in Canada (Berger, 1977) in which the views and opinions of publics typically marginalized were actively and systematically sought in a close approximation of the ideals of communicative rationality (Dryzek, 1982; Dryzek, 1992, p. 40; Fischer, 2000, p. 231-233; Gamble, 1979; Torgerson, 1996).

EIA can be understood as a “new democratic arena” that has opened up as part of the deliberative turn and has the potential to be a forum for communicative rationality (Cornwall & Coelho, 2007; Dayton, 2002; Petts, 1999b; Wiklund, 2005). Bartlett (2005, 3 Holmes and Scoones (2000, p. 7) consider DIPs a new route in addition to the other three alternative routes non-elite citizens have to shape policies. The other routes include (1) covert and subtle forms of resistance; (2) through community based action groups, trade unions, non-governmental organizations or social movements; and (3) by political means, including formal representative politics or more revolutionary and confrontational action. DIPs include innovations such as citizens’ juries, consensus conferences and deliberative polls (described in Goodin (2008), Chapter 2). Goodin refers to these as micro-deliberative innovations.
p. 53) considers EIA to be “perhaps the most significant example” of the institutionalization of “deliberative environmental democracy”. In this conceptualization, EIA becomes an arena where unhindered dialogue between stakeholders and policy makers offers disadvantaged communities the opportunity to participate in development decisions that will affect their lives. It is argued that not only does deliberative participation in the EIA arena have the potential to enhance democracy in environmental decision-making (Wiklund, 2005) but that this form of expanded participation can introduce an ecological rationality and improve environmental outcomes (Bartlett, 2005; Dryzek, 1992; Smith, 2003; Goodin, 1996).

The reversal of the direction of policy discourse through participation has three primary rationales, summarized by Torgerson (2003, p. 124):

(1) the inclusion of citizens is promoted in the name of democracy in order to counter the technocratic tendencies, either of direct expert rule or - what is usually more to the point - of experts mobilized for other oligarchical interests; (2) the inclusion of citizens is promoted in the name of communicative rationality that would counter mobilizations of bias in the policy process; (3) participation educates and empowers people as citizens.

Guo (2009, p. 68) similarly summarizes the three distinctive features of the argumentative turn as: “a theoretical shift to post-positivism; an institutionalization of democracy through participation; and a practical empowerment of the public”. These three functions are reflected in writing about the benefits of deliberative EIA, including its role in strengthening democratic decision-making and challenging expert assumptions (Parenteau, 1988; Petts, 2003; Shepard & Bowler, 1997), its contribution to individual and community empowerment (Fitzpatrick & Sinclair, 2003), and the important social learning component of the process (Daniels & Walker, 1996; Diduck & Mitchell, 2003;
Fitzpatrick & Sinclair, 2003; Palerm, 2000; Sinclair & Diduck, 1995, 2001; Webler, Kastenholz, & Renn, 1995). This in addition to the more practical benefits of deliberative democratic EIA, including improving the quality of technical assessments, increasing public trust and confidence in decision-makers, and improving legitimacy of the decision by, at the very least, “getting all the relevant alternatives and considerations onto the table” (Goodin, 2008, p. 4). Through deliberative participation in EIA, “public perspectives may define or reframe what the problem or issues actually are” (Petts, 2003, p. 274). Deliberative democracy in general, and deliberative processes in EIA specifically, are also said to improve environmental outcomes. As Bartlett (2005, p. 54) argues, the successful institutionalization of EIA can serve as a “beachhead of ecological rationality”. Deliberative institutions as a space for inclusive and reasoned political dialogue promise sensitivity to the plurality of values in society, including environmental values, “which will promote political judgement that takes into consideration different perspectives on the non-human world” (Smith, 2003, p. 53).

Deliberative public participation and communicative rationality have for many become the standard for successful, effective EIA process, as is reflected in the deliberative-type language in the following quote from Bartlett (2005, p. 56):

Successful EIA changes the criteria by which choices may be shaped and made. It requires consideration of particular sets of factual premises and otherwise precarious values, and it demands the kinds of reasoning associated with those values and factual premises. It changes patterns of relationships among organizations and among individuals inside and outside of organizations. It creates powerful incentives, formal and informal, that thereafter force a great deal of learning and self-regulation upon individual and organizational actors. And it provides opportunities for individuals to develop and affirm environmental values
and to press for innovative adaptation of structures and processes to a changing world.

This evolving standard is also captured in Chirstoff’s (1996) conception of weak versus strong ecological modernization. EIA is meant to have moved away from weak ecological modernization and is now measured against the normative standards of strong ecological modernization, a framework described in the table below.

**Table 1. Types of ecological modernization**

<table>
<thead>
<tr>
<th>Weak ecological modernization</th>
<th>Strong ecological modernization</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economistic</td>
<td>Ecological</td>
</tr>
<tr>
<td>Technological</td>
<td>Institutional/systemic (broad)</td>
</tr>
<tr>
<td>Instrumental</td>
<td>Communicative</td>
</tr>
<tr>
<td>Technocratic/neo-corporatist/closed</td>
<td>Deliberative/democratic/open</td>
</tr>
<tr>
<td>National</td>
<td>International</td>
</tr>
<tr>
<td>Unitary (hegemonic)</td>
<td>Diversifying</td>
</tr>
</tbody>
</table>

*Source: Christoff, 1996, p. 490.*

**Critiquing the Deliberative Turn**

The supposed shift from government to governance, the ascendency of “participation in development” and concepts of communicative planning and deliberative democracy have been subject to a host of challenges from a variety of critics. Some commentators, who Torgerson (2003, p. 117-118) refers to as the “conventional critics” of deliberative design, see such processes as being “impractical, incapable of reaching conclusions efficiently, opening the door to irrelevant distractions that are inimical to rational analysis”. In EIA, the conventional critics of deliberative process are many, warning of “participation run amok” (Rossi, 1997) degrading environmental decision-making (Breyer, 1993; Coglianese, 1997, 1999; Cross, 1998; Dana, 1994; Durodie, 2003;
Lane & Corbett, 2005; Löfstedt, 1999; Rose-Ackerman, 1994; Sanders, 1997; Sunstein, 2001, 2006; Van den Daele, 1992). Decision quality, fairness, and the chance of trivial or undesirable results are all flagged as potential “pitfalls” of enhanced democratic practice in EIA (see Dietz and Stern (2008, p. 54-66) for a discussion of these).

Criticisms of “the promise” (Hicks, 2002) of new modes of deliberative democracy as it relates to environmental governance coming from other than the conventional techno-rationalist camp are usefully organized by Bäckstrand et al. (2010) under three categories: empirical, structural and ontological critiques. The empirical critique cites a lack of evidence for the success of deliberative process to remedy prevailing governance, legitimacy and implementation deficits or lead to better environmental outcomes. Many officials and scholars “support vigorously” (Mihaly, 2009) expanded citizen participation, which has become a “reified concept” (Ventriss & Kuentzel, 2005, p. 528), while various policy and institutional developments have mandated active dialogue and deliberation in environmental decision-making (Petts, 2003; see, for example, the Aarhus Convention (UN/ECE, 1998)). However, it appears that the environmental effectiveness of these participatory innovations has mainly been “assumed rather than validated” (Bäckstrand et al., 2010, p. 17). Relatedly, “Successive studies suggest that, despite over forty years of community participation and partnership initiatives, communities remain on the margins of power” (Taylor, 2007b, p. 339).

The structural, political economist critique of deliberative modes of environmental governance warns that such processes are ultimately embedded in the hegemonic neoliberal system of market environmentalism, privatization and deregulation. In this condition, the structural conditions for deliberation are absent as large inequalities
in economic, institutional and social power persist (O’Neill, 2007). These important issues of political economy have been given insufficient treatment by deliberative democracy theorists. Theories of deliberative democracy “tend to a purely symbolic or cultural politics which fails to address the ways in which the structural imperatives of markets place constraints on the actual decisions of actors” (O’Neill, 2007, p. 186). There is little account for the concern that the existing distribution of power in the prevailing economic system “is inscribed in the new sites and spaces” of deliberation (Taylor, 2007a, p. 302). The “invited spaces” of deliberative democracy, as Cornwall (2004, p. 2) describes them, “have been transplanted onto institutional landscapes in which entrenched relations of dependency, fear and disprivilege undermine the possibility for the kind of deliberative decision-making they are to foster”. Bäckstrand et al. (2010, p. 17) argue that market forces have then colonized deliberative governance procedures and reinforced the very power asymmetries and inequalities that deliberative democracy is meant to redress.

Processes in communicative planning have even facilitated hegemonic capture by neoliberal ideology (Gunder, 2010, p. 12) as discursive designs in the policy process themselves become “cooptive devices that serve to domesticate dissident voices while reinforcing the powers that typically dominate the policy process” (Torgerson, 2003, p. 118). While new democratic spaces may have opened up, access to power and resources may have not and powerful stakeholders can instead use the rhetoric of deliberative public participation to “reinscribe and legitimate the current hegemony” (Purcell, 2009, p. 158). The result, as Taylor (2007a, p. 302) contends, is that “new governing spaces can thus be characterised as arenas of co-option and colonisation, inscribed with rationalities,
technologies and rules of engagement that are internalised by non-state actors and create privileged pathways for more powerful actors”. In EIA, Hokkanen (2001, p. 143) warns that the assessment process “has grown into a political instrument used to administer complicated plans with strong underlying political and economic interests”. Even in cases where the language of deliberation has replaced instrumental guidelines defined by “objectivity” and “expert knowledge”, asymmetries in power and resources are not sufficiently addressed and the effect, or intention, remains to secure and legitimize a smooth pathway for development (Ventriss & Kuentzel, 2005).

Finally, the ontological critique of deliberative democracy maintains that the ideal of the “rational consensus” underestimates the degree of conflict and antagonism in political life (Mouffe, 2000). From the perspective of politics as antagonism, radical democrats such as Fraser (1992), Mouffe (1996, 2000), and Young (1996) argue “any attempt to foster inclusive participation and deliberation on equal grounds is naïve and even dangerously utopian” (Bäckstrand et al., 2010, p. 18). The “idealized-normative” model of participatory governance, Swyngedouw (2005, p. 1995) argues, is “symptomatically oblivious to the contradictory tensions in which these new forms of governance are embedded”. There are a number of problems with this perceived naïvety. For instance, the model has a tendency “to treat the local and the community as self-evident and unproblematic social categories” (Hicky & Mohan, 2005, p. 17). Equally problematic, the ideal of “rational consensus” not only underestimates the degree of

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4 For examples this type of cooption, see Isaksson et al. (2009) on roads planning; Few (2001) on conservation planning; and Healy (2009) for an example from hazardous waste disposal. In an example from Alonso and Costa’s (2004) study of public hearings for environmental licensing in a Brazilian case, the researchers found that deliberative and participation mechanisms were affected by asymmetries in socio-economic power, agenda power, and organizational and cognitive resources. The procedures “have the same problems that deliberative democracy’s theoreticians have been associating with ‘traditional’ representative mechanisms” (Alonso and Costa’s, 2004, p. 57).
antagonism in political interaction, it effectively restricts the scope of acceptable political
behaviour. Limiting the “scope and contentiousness of conflict” effectively “narrows the
boundaries of possible change, all under the guise of democracy and ‘fair and open’
deliberation” (Ventriss & Kuentzel, 2005, p. 521).

Many structural and ontological critics take aim specifically at the Habermasian
ideal of the “perfect polity” of deliberative democracy (a condition Friedmann (1987, p.
267) equates to a graduate university seminar) by starting with an analytics of power
inspired by Michel Foucault (Flyvbjerg, 1996; Marcuse, 1976; Roweis, 1983; Sharp &
Richardson, 2001; Yiftachel, 1994). As Kohn (2000, p. 426) warns, an inadequate
treatment of the role of power can blind us to the reality that under the guise of equality
and impartiality, deliberative democracy privileges the communicative strategies of
elites. Within new deliberation arenas, there is a great deal of scope for strategic
behaviour on the part of powerful actors (Cass, 2006, p. 21). For instance, powerful
actors can engage in what Ventriss and Kuentzel (2005, p. 535) refer to as a “politics of
policy confinement” in which participatory approaches serve to merely “manage” conflict
within the “legitimate parameters of the prevailing status quo” so that policy alternatives
are contained within “the conventional managerial and instrumental ethos of formal
organizations”. The result, outlined by O’Neill (2007, p. 150), is that, “If effectively
captured by powerful institutions deliberative processes potentially provide powerful
legitimation tools - indeed much more powerful than expert-based techniques like cost-
benefit analysis, which are widely perceived to lack democratic legitimacy”. These
concerns are reflected in wider critiques of participation in the literature (Cooke &
Just as critics of Habermas and deliberative democracy have done (e.g., Kohn, 2000), those that question progress in the movement toward deliberative EIA believe that there is insufficient attention paid to questions of power, value and ethics. Cashmore et al. (2008, p. 1233) warn that increasingly the practical limitations in the effectiveness of environmental assessment mentioned earlier may be attributed to such shortcomings in the theory. Communicative and collaborative concepts have come to “occupy an extremely hegemonic position in planning theory” (Purcell, 2009, p. 148). Sympathetic observers are often distracted by this unexamined archetype of public participation (Mihaly, 2009), the normative participatory ideal in Habermas’ utopian rational consensus, without engaging the “dark side” of planning and policy (Flyvbjerg, 1996; Flyvberg & Richardson, 2002; Huxley, 1998; Yiftachel, 1994); namely, how deliberative practices operate within the context of power. Here, according to Richardson (2005), theoretical debate around EIA has stalled. Ventriss and Kuentzel (2005, p. 520) argue that, “The citizen participatory approach, and its assumptions about fair and open communication, has such a powerfully intuitive appeal to the theories and institutions of democracy that critical scrutiny of these concepts appears needlessly academic”. The danger is that if the complex array of social forces including power relations in particular contexts are ignored, deliberative processes will simply become yet another procedural requirement in EIA open to political manipulation (Dietz & Stern, 2008, p. 52-54). The goal of public participation in natural resource management will then become the transformation of the human dimension “into a more stable and orderly administrative process” (Ventriss and Kuentzel, 2005, p. 525). In this way, the “instrumental norm” persists in EIA and “even as a language of consultation is replaced by one of deliberation,
the intention remains to secure and legitimise a smooth development pathway” (Isaksson et al., 2009, p. 295).

Neither a retreat into “rational” science nor a misapplication of communicative rationality can fully account for the issue of competing values and power relations in the political field of EIA (Richardson, 2005). To correct these deficiencies, writers like Chilvers (2008, p. 157) call for a “focusing on questions of knowledge, processes of expertise, and relations between citizens and specialists within analytic-deliberative processes” through a reconceptualization of deliberation “under conditions of radical uncertainty, pluralism, complexity, and social inequality”. Discursive deliberative processes, writes Torgerson (2003, p. 199), “emerge from contexts of power”. This recognition demands research into actual experiences with discursive designs in the policy process, “neither to praise them as open communicative forums nor to denounce them as inevitable tools of cooptation, but to examine the ambivalent potential they exhibit as they interact with contexts of power” (Torgerson, 2003, p. 128). Chilvers (2008, p. 158) similarly calls for empirical studies of citizen engagement with these processes by exploring the “construction, performance, and framing of participation”. In EIA, O’Faircheallaigh (2010, p. 26) signals the need for more research “on the way in which the dynamic political processes within which EIA is embedded work out in specific contexts and influence the shape and extent of public participation in EIA” while Richardson (2005, p. 362) calls for more “detailed stories” about EIA. Heeding these calls, the present study expands the discussion of public participation in EIA by adopting an analytic approach that is cognizant of political context, power relations and the structural conditions within which EIA is embedded and which impact upon the
effectiveness of deliberative procedure in actual case studies. In order to fulfil this agenda, the EIA process in each case study is understood as an extended episode of “contentious politics”. Analytic tools are borrowed from political process theory to guide this description.

**Contentious Politics, Political Process and EIA**

The deliberative democratic conception of public participation in environmental decision-making and elsewhere has been roundly criticized as having little basis in empirical evidence and for ignoring the antagonistic nature of political engagement in the real world of power and resource imbalances. As Flyvbjerg and Richardson (2002, p. 44) argue, communicative theory in planning is problematic “because it hampers understanding of how power shapes planning”. Critics of the normative conception of deliberative democracy in EIA processes similarly question the utility of the approach. In response, this analysis follows Richardson’s (2005, p. 343) conception of EIA as a site of political struggle. The focus is then shifted to what Flyvbjerg (1996) calls “real-life” rationality; an examination of not what should be done but what is actually done.

Analytic tools from the study of contentious politics, which has traditionally been used to explain popular resistance in political contention (McAdam, 1982; Tarrow, 1998; Tilly, 1995) can be of some use in assessing public participation in the EIA arena (Devlin & Yap, 2008; Rothman 2001) while expanding the discussion of power and the political contextuality of deliberative policy process in environmental decision-making (Brettell, 2003; Few, 2001, 2002). Contentious politics, or a “contentious episode”, occurs when “ordinary people, often in league with more influential citizens, join forces in confrontations with elites, authorities, and opponents” (Tarrow, 1998, p. 2). Not all
politics is contentious. As McAdam et al. (2001, p. 5) write, contentious politics is
defined as:

episodic, public, collective interaction among makers of claims and their objects
when (a) at least one government is a claimant, an object of claims, or a party to
the claims and (b) the claims would, if realized, affect the interests of at least one
of the claimants.

In short, the definition refers to “collective political struggle” (McAdam et al.,
2001, p. 5). Contention can either be “contained”, in which all parties to a conflict were
previously established as “constituted political actors”, or the episode can be
“transgressive”, where some parties to the conflict are newly self-identified political
actors and/or some parties employ “innovative collective action”, which often refers to
action outside the boundaries of the law (McAdam et al., 2001, p. 7-8). Contentious
politics can therefore include actions such as lawsuits and letter-writing campaigns or
protests and occupations. Processes in the EIA arena themselves “fall easily into the
category of contentious episodes” (Devlin & Yap, 2008, p. 19).

The study of contention explores the factors and processes that facilitate the
emergence and development of collective action. Emerging from this scholarship is the
“classic social movement agenda”, or “political process” model, where the outcomes of
political processes in a contentious episode are investigated as the consequence of four
explanatory variables, including: political opportunity structures, mobilizing structures,

The political process model, an especially popular tool for the study of contention

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5 This agenda is a synthesis (Tarrow, 1998, p. 19) and according to Caniglia and Carmin (2005) contains
three major schools of social movement theory: resource mobilization (mobilizing structures), political
process (political opportunity structures), and cultural-cognitive approaches (collective action frames and
repertoires of contention).
(Kriesi, 2004), sees “the timing and fate of movements as largely dependent upon the opportunities afforded insurgents by the shifting institutional structure and ideological disposition of those in power” (McAdam, 1996, p. 24). Political opportunity structures, the core concept of political process, are exogenous dimensions of the political environment (factors outside a social protest movement) that provide incentives for, or constrain, collective action by affecting people’s expectations for success or failure (Tarrow, 1994, p. 85). Political opportunity structure is the central analytic framework utilized in the present thesis.

There are a wide variety of interpretations of the concept and different theorists asking different questions identify a number of different factors as political opportunity. Most theorists highlight the role of the formal institutional legal structure of a given political system as well as the importance of the informal structure of power relations that characterize the system at a given point in time (McAdam, 1996, p. 26). Whatever the interpretation of political opportunity, all are concerned with the exogenous factors that enhance or inhibit prospects for effective participation, for particular sorts of claims to be advanced rather than others, for particular strategies of influence to be exercised, and for citizen groups to affect politics and policy (Meyer & Minkoff, 2004, p. 1457-1458).

Some examples of relevant shifts in the external political environment outlined by Tarrow (1998, p. 76-80) include increasing access to participation through shifting political alignments, divisions among elites and the emergence of influential allies. There are also more stable aspects of opportunity or constraint including “state strength”, a

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6 Relevant factors that are “commonly accepted as basic and widely generalizable”, according to Caniglia and Carmin (2005, p. 204) include: “(1) institutional provisions for participation, (2) stability of political alignments, (3) elite access and alignments, (4) elite conflict, and (5) level of repression”.

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state’s prevailing strategy toward challengers and modes of repression and social control (Tarrow, 1998, p. 81-85). Changes in these political contexts offer opportunities or threats, either enabling or inhibiting resource-poor groups to mobilize for a common purpose.

Although commonly applied to the analysis of Western liberal democracies and social revolutions of the past, the general framework of the political process approach is by no means restricted to these common applications (Kriesi, 2004, p. 85). The concept can be disaggregated from social movement theory for use in studying public engagement in other political processes. Political opportunity structures or threats can be a determining factor in the emergence of effective public participation. For instance, Taylor (2007a) argues that in new policy areas where participation occurs there is an opportunity for previously disadvantaged groups to influence the governance process. These opportunities can be identified and analyzed in the same way opportunity structures reveal social movement mobilization. Following Tarrow (1994, p. 99), Taylor provides a useful conception of the dimensions of political opportunity for the purpose of examining new governance spaces. These dimensions highlight opportunities in the external political environment that can be exploited by stakeholders and enable community players to become “active subjects” (Taylor, 2007a, p. 303). These opportunities include:

- realignments that can bring new groups to power;
- institutional provisions for participation;
- alliances that did not previously seem possible; and
- external resources for people who lack internal ones (ibid.).
These four components represent important factors in the opening and closing of challenging groups’ access to the political process (Caniglia & Carmin, 2005, p. 204; McAdam, 1998, 1982; Tarrow, 1998). Contrastingly, unfavourable realignments, inadequate institutional provisions, weak alliances or unavailable resources all act as constraints to public access to decision-making processes.

In summary, scholars such as Flyvbjerg and Richardson (2002, p. 44) argue that communicative theory in planning is problematic “because it hampers understanding of how power shapes planning”. Critics of the normative conception of deliberative democracy in EIA processes similarly question the utility of the approach. Following Richardson (2005, p. 343), EIA is instead understood here as a site of political struggle, a story of contentious politics. The focus on what Flyvbjerg (1996) calls “real-life” rationality shifts the focus from what should be done to what is actually done, hence the investigation of two actual case studies. By exploring political opportunities or constraints for public engagement in these real-life EIA processes and recognizing the contentious nature of political action in the EIA arena, it is possible to move beyond the narrow confines of the normative deliberative approach. Political process theory applied to EIA broadens the scope of inquiry to account for political context with attention to realignments that can bring new groups to power and institutional provisions for participation. Exploring the complex array of social and political forces at work in the EIA process better enables us to probe the “ambivalent potential” (Torgerson, 2003, p. 119) of deliberative EIA. The approach also helps operationalize the study of power by focusing on new alliances and resource opportunities or constraints.
Research Questions

This first research question simply asked, “what happened” in the case studies. What were the political, social and environmental contexts and how did the regulatory framework for EIA evolve? Also, what did major EIA processes look like in practice and how was the public engaged in those processes and throughout the life of each project? The second research question asked whether participatory EIA and/or parallel processes succeeded or failed to give voice to minority or disadvantaged groups in the case studies? Finally, the analysis explored how contextual factors could explain these public participation outcomes. What factors influenced the deliberative quality of the public participation processes and the outcomes achieved over time? The framework outlined by Taylor (2007a) provided the basis for this analysis, directing attention to realignments that brought new groups to power, institutions for participation, alliances and external resources within and across the case studies.
Chapter 3: Methodology and Methods

Heeding the call for more empirically grounded and contextualized work on public participation in the EIA arena (O’Faircheallaigh, 2010; Richardson, 2005), this research undertook an in-depth exploration of two case studies. The research process was qualitative and inductive. The methods allowed for broad exploration of the case studies, and the analysis proceeded in a continuous, iterative fashion. This chapter describes the study’s methodological design, data collection methods and the analysis approach.

Methodological Design: Small-N Comparative Case Research

This study utilized a comparative case study approach. Following Denscombe (2007), the decision to use a case study approach was a strategic one that related to the scale and scope of the investigation. A case study is understood here as a broad “research strategy”, rather than a singular method for “doing” social science research (cf. Yin, 2009). A “research strategy”, as defined by Verschuren (2003, p. 122), refers to “a coherent set of methods, techniques and procedures for generating and analysing the research material, as well as to the way the researcher looks at reality and conceptually designs the research project”. Therefore, following Verschuren’s definition, the methodological approach for this study is a “case research” approach, defined as:

a research strategy that can be qualified as holistic in nature, following an iterative-parallel way of preceding, looking at only a few strategically selected cases, observed in their natural context in an open-ended way, explicitly avoiding (all variants of) tunnel vision, making use of analytical comparison of cases or
sub-cases, and aimed at description and explanation of complex and entangled group attributes, patterns, structures or processes (Verschuren, 2003, p. 137).

The focus of a case research approach, as opposed to a variable-oriented approach, is on gathering in-depth knowledge of specific cases, which have been selected because they are substantively or theoretically significant in some way (Ragin, 2001). The cases in this study were “selected purposefully to permit inquiry into and understanding of a phenomenon in depth” (Patton, 2002, p. 46, emphasis in original). The case research approach is especially suitable for studying phenomena that are highly complex and/or embedded in their cultural context (Verschuren, 2003). This small-N, “deep” or “thick” case study methodology (Blatter & Blume, 2008), what Peet and Watts (1996, p. 38) refer to as “political-ecological thick description”, was deemed appropriate for the present study due to the complex nature of political processes and public participation in EIA. By delving deeply into the case studies, the research was able to uncover what Nietzsche (1974) refers to as the “rich ambiguity” of politics in the EIA arena (quoted in Flyvbjerg, 2006, p. 237). The approach helped answer the “how” or “why” questions (Yin, 2009) in an exploration of “the plot” (Vaughan, 1992). In addition, an element of “emergent design flexibility” facilitated openness to adapting the inquiry as understanding deepened and situations changed (Patton, 2002, p. 40).

Selection of Cases

A case selection exercise helped narrow the focus and define the boundaries of each case while also contributing to the analysis. The act of selecting the cases for inquiry, or “casing” as Ragin (1992) terms it is an important research tactic and could be considered a type of research method. Ragin (1992) outlines six stages in the casing
process, although more casing is possible if needed. Casing works in a top-down fashion beginning with the broadest category, working down to empirically defined units. The first casing begins with the most general, a conventional category of social phenomena. In the second casing, the focus is situated historically and developmentally. Where is the case? How is the case? When is the case? The third casing involves the selection narrowing within this historically situated category. Casing at this stage does not involve selection on a random basis, but on the basis of theoretical interests. Here, Vaughan’s (1992) criteria of choosing cases based on conventionalized definitions present in the research literature is helpful. One must keep in mind, however, as Ragin points out, that this third casing can be provisional in nature, and open to refinement or redefinition depending on later findings.

The first three categories are still fairly broad and are guided by the theoretical framework. A fourth casing involves the selection of specific groups. In this stage, practical concerns often overwhelm most other factors. Denscombe (2007) highlights some of these practical considerations, which include matters of convenience, whether the case is intrinsically interesting, whether the study is part of some commissioned research and whether there are unique opportunities that the researcher should take advantage of. Here, the researcher must also decide between examining a typical instance, extreme instance or a least likely instance (or a combination). The fifth casing is a narrowing further of the empirical focus. Here the main empirical units for analysis – the specific groups – are selected. In this stage, the researcher also determines the specific empirical evidence to be collected from the group. This is where methods come into play.
The sixth (and potentially seventh and eighth) casing will emerge from an analysis of the theoretically structured evidence generated via the fifth casing (Ragin, 1992). This process can be both empirical and theoretical and may necessitate a return to, and redefinition of, the third casing. The entire process is useful because it helps the researcher link the empirical to the theoretical and back again. This stage becomes part of the overall findings of the research. Ragin (1992, p. 224-225) summarizes the entire process, which explains the iterative nature of the present study:

In each of these casings ideas and evidence interact. In each casing more and more of the empirical world is more structured by theoretical ideas. And in each casing more and more of the empirical world is pruned from the analysis… As researchers our primary goal is to link the empirical world and the theoretical – to use theory to make sense of evidence and to use evidence to sharpen and refine theory. This interplay helps us to produce theoretically structured descriptions of the empirical world that are both meaningful and useful.

The following table summarizes the casing exercise as it unfolded for this study.
Table 2. Stages in the casing exercise

<table>
<thead>
<tr>
<th>Broadest conventional category of social phenomena</th>
<th>EIA and public participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Focus is situated historically and developmentally</td>
<td>Focus on nations with a history of EIA, relatively advanced legislation with requirements for public participation</td>
</tr>
<tr>
<td>Narrowing within category 2</td>
<td>Canada and South Africa chosen with focus on large scale and contentious projects</td>
</tr>
<tr>
<td>Selection of specific groups</td>
<td>Ekati and RBM projects chosen as instances of (seemingly) good public participation and stakeholder engagement track records (extreme instance)</td>
</tr>
<tr>
<td>Further narrowing of empirical focus</td>
<td>Focus on major EIA process (original EIA for Ekati and St. Lucia EIA for RBM). Stakeholders and sources that can reveal information about the political opportunity context were selected and data collection methods (see below) were decided upon</td>
</tr>
<tr>
<td>Emerging from analysis of theoretically structured evidence, further narrowing of the case</td>
<td>As will be shown, the final casing stages led to a focus on an institution for participation in each case study and the resources and alliances affecting the political opportunity structure (IEMA for Ekati and CSR for RBM)</td>
</tr>
</tbody>
</table>

Canada and South Africa, Ekati and Richards Bay Minerals, were chosen as subjects for this research through the casing process outlined above. Each region and then specific mining project, upon early casing around steps three and four, was understood as an “extreme example” or best practice instance of public participation. Both mining projects were also characterized by high levels of political involvement and claims-making in at least some points throughout their history and therefore could be considered “contentious episodes”. For example, in a 1997 independent review of the regulatory and negotiated process that led to the approval of the Ekati diamond mine proposal, the Canadian Institute of Resources Law declared, “One of the strengths of the BHP process was the inclusiveness of affected interests and their direct participation in
decision-making” (CIRL, 1997, p. iv). Information about the Richards Bay Minerals project was not as readily available. In operation since the 1970s, the mining project is most widely known for a proposal to mine the coastal sand dunes of the St. Lucia wildlife reserve, which involved a high-profile EIA process that took place around the time of South Africa’s democratic transition in the early 1990s. In a process “fraught with controversy” (Weaver, Greyling, van Wilgen, & Kruger, 1996, p. 106), the episode was characterized by unprecedented levels of public interest and engagement in the EIA process, which eventually ended in a rare blocked proposal (Kruger, van Wilgen, Weaver, & Greyling, 1997, p. 23). In this way, contention and expanded public participation are also hallmarks of RBM’s history. Since the St. Lucia episode, what little information could be found in the early casing process indicated that RBM as a company has stood out as a positive example of consultation and engagement with the rural communities in the region of its operations.

Following Devlin and Yap (2008), both case studies and their respective EIA processes are understood as contentious episodes that put boundaries around the inquiry. For the Ekati case, the original EIA process beginning in 1994 marks the start of the contentious episode. The decision to approve the project three years later does not mark the end of the contentious episode. Rather, the EIA process continues into the follow-up period. “Decisions may be contested, and post-approval monitoring may give rise to a continuation of the contentious episode as the project context shifts from the approval process to the implementation process” (Devlin & Yap, 2008, p. 19). This has certainly been the case with the Ekati project and the EIA process as an example of contentious

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7 Not included, for instance, is regulation of exploration, which is an important public consultation episode in its own right.
politics continues up to the present day. Although the RBM project has been in operation since the 1970s, this study begins with the St. Lucia EIA in the early 1990s. Before this time there were no legislated requirements for EIA in South Africa and the St. Lucia EIA represents the first significant opportunity for stakeholder involvement in the development of the mine. Therefore, both case studies begin in the early 1990s and examine opportunities for public participation right through to present day. In addition to similar time frames under study, some other points of confluence between the two case studies, all of which aid cross-case comparison, are listed below. Both mining case studies:

- are large scale and disruptive open pit mining operations;
- operate in fragile ecosystems;
- are significant economic drivers in their respective regions;
- include rural indigenous stakeholders who are facing economic hardships such as high unemployment and poverty;
- have operated against a backdrop of ongoing land claims processes by those rural indigenous stakeholders;
- have seen the involvement of affluent environmentalist and conservation groups in the EIA processes;
- are high profile operations with significant media coverage at times;
- have been the focus of political contention, such as strike action, public protest and litigation;
- have been characterized by high levels of public participation in some EIA processes;
- are characterized by significant EIA follow-up and closure and reclamation planning processes, often involving high levels of public participation;

- are operated by resource companies that include CSR and sustainable development mandates; and

- operate in jurisdictions with advanced EIA legislation and broad requirements for public participation.

Data Collection Methods and Fieldwork Strategies

As is common with the case study approach, this research combined various data collection methods for the empirical dimension of the thesis. The study relied on qualitative data gathered from documentation, archives, interviews and some direct observations, which combined helped yield “detailed, thick description” (Patton, 2002, p. 40). Field work consisted of six weeks spent in Yellowknife, NWT, headquarters of BHP Billiton Diamonds, operator of the Ekati diamond mine, and five weeks spent in Durban, South Africa with multiple visits to the Richards Bay area in KwaZulu-Natal province and the nearby Richards Bay Minerals head office and project site. This sort of direct contact or close observation of the people, situations and phenomenon under study allows the researcher to develop important personal experiences and insights that become an important part of the inquiry (Patton, 2002, p. 40).

A significant portion of the data collected in the research project came from documentation evidence collected both during and outside of the field visits. Documentation reviewed included primary and secondary sources such as company and monitoring agency reports, public hearing transcripts, environmental assessments, government legislation, media reports, editorials, and meeting minutes as well as peer
reviewed articles about the cases. Documentation evidence was gathered from Internet searches, the LexisNexis database, company websites, the resource library for the Ekati diamond mine at the Independent Environmental Monitoring Agency (IEMA) office in Yellowknife, and the University of KwaZulu-Natal library and Campbell Collections archives in Durban, South Africa. This evidence was supported by a number of political and sociological studies of the regions and case studies.

Interviews were conducted with key informants in a largely “unstructured” (Burgess, 1982) manner. Unstructured interviews “provide the opportunity for the researcher to probe deeply, to uncover new clues, to open up new dimensions of a problem and to secure vivid, accurate, inclusive accounts from informants that are based on personal experience” (Burgess, 1982, p. 107). This is not to say the interview is completely without structure. The researcher does establish a framework within which the interview is conducted, allowing the conversation to remain flexible within the confines of the interviewee’s experiences and attitudes that are relevant to the research problem. The informant is encouraged to “discuss these experiences naturally and freely” (Burgess, 1982, p. 107). This strategy was particularly well suited to the exploratory and inductive nature of the research project as the focus of the study narrowed and adapted over time. Key informants were selected in a nonprobabilistic, purposive manner with the focus on contacting individuals that could reveal evidence related to the political opportunity structure framework. Some snowball sampling was also employed, making use of participants’ own networks to discover other key informants. Most interviews were conducted in person, although a few were conducted over telephone and email. Notes were taken during the interviews and most were audio
recorded digitally and transcribed. Interviewees were asked to sign informed consent agreements, a copy of which is located in Appendix I. Those individuals that granted interviews and waived confidentiality are listed in Appendix II along with their position descriptions. In addition to this list, a number of other key informants were contacted but were unable or unwilling to participate or did not respond to a request for an interview while some requested full confidentiality.

Evidence was also gathered from a couple instances of direct observation including observation of the IEMA Annual General Meeting on 3 December 2009 in Yellowknife, which was attended by representatives of BHP Billiton, the major Aboriginal stakeholders, government agencies and the IEMA Board of Directors. I also was given a personal site tour of RBM’s mining, smelting and environmental reclamation operations in South Africa with the company’s ecologist in May 2010.

Analysis

Using within-case and cross-case analysis (Eisenhardt, 1989, p. 539-541; Mahoney, 2007) this research contributes to the debates surrounding deliberative-democratic resource management by producing an empirically rich exploration of two large projects involving public participation and by identifying political opportunities and limitations for participation in the EIA arena. Individual case studies are dealt with in turn before proceeding to a cross-case analysis in the concluding chapter that explores patterns and themes across the two cases (Patton, 2002, p. 57). The analysis proceeds in an inductive manner as described by Patton (2002, p. 58):

Inductive analysis is built on a solid foundation of specific, concrete, and detailed observations, quotations, documents, and cases. As thematic structures and
overarching constructs emerge during analysis, the qualitative analyst keeps returning to fieldwork observations and interview transcripts, working from the bottom up, staying grounded in the foundation of case write-ups, and thereby examining emergent themes and constructs in light of what they illuminate about the case descriptions on which they are based. That is inductive analysis.

The political opportunity framework described earlier guides the inductive analysis of the two case studies presented below. Each case study begins with a broad overview of the mining project and relevant historical and regulatory contexts as well as a description of the major EIA processes for each project. These case narratives provide the basis for a critical analysis of public participation in terms of the four components of political opportunity, each of which is examined in turn. The casing exercise helps steadily narrow the focus of interest in this analysis, along the way highlighting what are inevitably only some of the interesting and relevant political opportunities or constraints in each case history. The first component of political opportunity to be addressed is realignments that bring new groups to power, the most macro-level component that includes the changing regulatory environment and wider political processes at work. Next, the discussion is narrowed somewhat with an examination of institutional provisions for participation, which are a product of some of the macro-level realignments. The focus is on one standout institution in each story. For the Ekati case, the role of an independent environmental watchdog is highlighted and at RBM the centrality of corporate social responsibility is discussed. Finally, the influence of opportunities or constraints surrounding alliances and resources for public participation are reviewed. In order to elaborate further on the impact of the institutions identified in the previous section, the role of alliance and resource opportunities relevant to these institutions is
highlighted. This narrowing of the analysis following the casing approach and my own interpretation of the political opportunity framework is captured in the figure below.

**Figure 1.** Casing and political opportunity structure in the analysis
Chapter 4: Ekati Diamond Mine

This chapter presents a history of the Ekati project, Canada’s first diamond mine, which includes discussion of the social, environmental, regulatory and political context of the case study. Following the presentation of the case study is a critical analysis of the Ekati story in terms of political opportunities or constraints for public participation in EIA and other ongoing environmental decision-making processes for the mine considering these contextual factors. The result is a “detailed story” about public participation in the development and operation of the mine.

Case Study

The appetite for diamonds is a powerful hunger, and it transforms the places where it is awakened... In the Barrens, too, discovery provoked a rush of newcomers. A vast and little-traveled land suddenly reverberated with the noise of helicopters. If the strike in the Barrens shook the old order of the diamond world, so diamonds shook the balance in the Barrens (Hart, 2002, p. 241).

In the late 1980s, after years of exploration across the Canadian north, geologists Chuck Fipke and Stewart Blusson began to concentrate their search for diamonds in the tundra around Lac de Gras, some 300 km northeast of Yellowknife, NWT. Fipke had formed the company Dia Met Minerals in 1983 to finance the prospecting and by 1989 the geologists had discovered diamond indicator minerals. In 1990 Dia Met formed a joint venture with BHP Minerals, a subsidiary of Broken Hill Proprietary Company, an Australian mining conglomerate and one of the largest miners in the world.8 One year later, BHP and Dia Met’s discovery of diamonds beneath a small lake near Lac de Gras

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8 In 2001, BHP Ltd merged with Billiton to become BHP Billiton.
sparked one of the biggest staking rushes the world has ever experienced (Kjarsgaard & Levinson, 2002, p. 220), attracting all the major players in the global diamond trade and eventually turning the entire industry upside down. In little over ten years from Fipke’s discovery of diamond-bearing kimberlite pipes in Canada’s north and with the subsequent construction of the Ekati mine in 1997 followed in later years by the Diavik and Snap Lake mines, the country rapidly became the world’s third largest producer of rough diamonds by value after Botswana and Russia. The north of Canada is also considered to be the premier diamond exploration region in the world and the country is slated to become the leading diamond producer within a decade (Even-Zohar, 2007, p. 296).

Today, the Ekati mine is run as a joint venture of mine operator BHP Billiton Diamonds Inc. (80 percent) and geologists Fipke and Blusson (10 percent each). The claim block, currently a 2,663 km² area in the Coppermine River drainage basin of the Northwest Territories, is located in the environmentally sensitive tundra region known as the barren lands (see Figure 2). Ekati consists of a number of open pit mines, which required “dewatering” lakes and the removal of overburden to access the diamondiferous kimberlite deposits below. Once the inverted cone-shaped open pits are mined to maximum depth, underground mining commences at most sites. Waste rock excavated

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9 Diavik Diamond Mine, a joint venture between Diavik Diamond Mines Inc. (Rio Tinto plc.) (60 percent ownership) and Harry Winston Diamond Limited Partnership (40 percent ownership), located near Ekati on Lac de Gras, began production in 2003. Further south, Snap Lake Mine owned and operated by De Beers commenced commercial production in 2008. Other Canadian diamond mines include Victor Mine in northern Ontario and the now defunct Jericho Mine in Nunavut. The proposed Gahcho Kué Diamond Project near Snap Lake, the largest new diamond project under development globally, is currently undergoing an EIR.

10 There have been six open pit mines dug on the Ekati claim block. Underground mining has commenced or is planned for most of these. There are also two additional open pits planned with mining to commence in 2013 and 2018 respectively (BHP Billiton, 2009a). See BHP Billiton (2009a, p. 2-17) for an overview of the Ekati life of mine plan.
from the pits is stored in large piles while kimberlite ore is trucked or conveyed to the onsite processing plant where diamonds are separated. Remaining waste material is processed in the Long Lake Containment Facility, a chain of tailings ponds that act as sedimentation cells. Mining and processing are continuous, running 24 hours a day, 365 days per year, employing approximately 800 people with an average additional 700 contractors on site providing a variety of support services. Hiring preference is given to local northern and Aboriginal residents (BHP Billiton, n.d.). Current life-of-mine plans predict mining will continue at Ekati until 2021 (BHP Billiton, 2009a) although the possibility of production for an additional two decades is being examined (H. Butler, personal communication, November 23, 2009).
The mine site is accessible only by air except for a brief ten week window in the winter when truckers must navigate a 450 kilometre ice road to supply the mine’s operations. Located only 200 km south of the Arctic Circle, the region’s many lakes are covered with up to two metres of ice for nine months of the year during long and extremely cold winters. Although remote, the entire Lac de Gras region is an important traditional area for northern Aboriginal peoples with archaeological evidence of human use of the area dating back at least 3,500 years (BHP Billiton, 2009a). The Bathurst caribou herd, of central concern for many of the region’s Aboriginal peoples and their
traditional way of life, crosses near or through the Ekati claim block during its annual northern migration.

Ekati lies in the traditional territory of five Aboriginal groups: the Dene Tłı̨chǫ, Yellowknives and Chipewyan peoples as well as the Métis and Copper Inuit. The nearest community is the village of Wekweeti, located 130 km to the west of the mine and home to 150 mostly Tłı̨chǫ people. Other primarily Tłı̨chǫ communities in the region include, Bechokǫ (formerly Rae-Edzo), Gamètì (formerly Rae Lakes), and Whatì (formerly Lac La Martre) (see Figure 3). Many Yellowknives Dene and Chipewyan reside in the communities of Dettah, N’dilo and Łutselk’e while the Copper Inuit live mainly in the Kitikmeot region of Nunavut northeast of the mine site. The nearest Inuit village, Kugluktuk, is located 400 km downstream of the mine at the outlet of the Coppermine River although an Inuit outpost camp is located less than 100 km northeast of Ekati at Pellatt Lake (BHP Billiton, 2009a). These Aboriginal groups are considered the central public stakeholders in the Ekati diamond mine. They have been the focus of consultation and public participation processes for EIA and ongoing environmental management of the project.
**Figure 3.** Location Ekati Diamond Mine and nearby communities

Source: Created by author. 
Original image source: http://commons.wikimedia.org/wiki/File:Carte_administrative_du_Canada.png 
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**EIA in Canada and the Mackenzie Valley**

Environmental assessment (EA)\(^\text{11}\) in Canada, according to Wood (2003, p. 75), represents one of the most visible manifestations of the government’s commitment to the environment, offering the best available opportunity for public participation in

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\(^{11}\) EIA is referred to as Environmental Assessment (EA) under Canadian federal legislation and the Mackenzie Valley Resource Management Act.
environmental decision-making. The country is in many ways considered a world leader in environmental impact assessment (Wood, 2003), although the process in Canada is complicated somewhat by the multi-jurisdictional environment within which EIA takes place (Fitzpatrick & Sinclair, 2009). Both federal and territorial regulations have impacted the Ekati mine over time. This section outlines the development of these regulatory systems with a focus on the Mackenzie Valley district in the Northwest Territories, where the Ekati project is located.

In Canada, interest in EIA spilled over the border shortly after the decision-making tool was introduced in the United States under the provisions of NEPA (Gibson, 2002; Wood, 2003). A 1973 cabinet decision in Canada established the first environmental assessment procedures with the non-mandatory federal Environmental Assessment and Review Process (EARP). An amendment by a second decision in 1977, and reaffirmed in the Government Organization Act 1979, established the responsibility of the federal Minister of the Environment (MoE) for the environmental assessment of federal projects, programs and activities (Wood, 2003, p. 70). In 1984, EARP was adjusted and registered formally as a Guidelines Order (EARPGO), which clarified roles and responsibilities of various parties involved in EA and codified largely unwritten and vague processes arising out of the 1974 cabinet policy (Canada, 1984). Although the order in council included firmer language of obligation, it provided no enforcement mechanism while considerable flexibility on when and how to apply the requirements remained (Delicaet, 1995; Gibson, 2002).
Eventually, after much demand for reform of the EARP Guidelines and some key federal court decisions\(^\text{12}\), the Canadian Environmental Assessment Act, which provides a legal basis for federal environmental assessment, received royal assent in June 1992 and finally came into force on 19 January 1995. The Act applies to projects where the Government of Canada has decision-making authority, whether as a proponent, land manager, source of funding or regulator. Although similar to EARP, the Act intended to be less discretionary while a new, more autonomous agency, the Canadian Environmental Assessment Agency (CEAA), replacing the pre-existing Federal Environmental Assessment Review Office (FEARO), was given additional powers over the EA process (Wood, 2003, p. 71). Bill C-19, introduced in 2001, receiving royal assent in June 2003 and coming into effect on 30 October 2003, amended the Canadian Environmental Assessment Act to provide for more meaningful public participation and more predictable and timely EAs.

The Act states that environmental assessment in Canada “provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development” (Canada, 1992). It sets out the responsibilities and procedures for carrying out an EA of a project\(^\text{13}\) that involves federal

\(^{12}\) Specifically, in the Rafferty-Alameda dam (1989) decision, the Federal Court of Appeal ruled EARPGO to be a law of general application, while in the Oldman River dam (1992) case, the Supreme Court ruled that EARPGO applies where a federal department has “affirmative regulatory duty” (CEAA, 2010). The decisions held the Order-in-Council to be a law of general applicability, binding on the federal government (Wood, 2003).

\(^{13}\) A project is an undertaking in relation to a physical work or other undertaking described in the Inclusion List Regulations. The Act only applies to proposed projects and not policies, plans or programs. Strategic environmental assessment (SEA) is used to assess the latter, and while SEA is not legislated, there is a Cabinet directive for its conduct (Canada, 2004).
government decision-making. There are four types of EAs that may be required under the Act including two types of self-directed EAs (screening and comprehensive study) and two types of independent EAs (mediation and review panel). See Appendix III for more details.

Canada, by nature of its constitutional structure, is characterized by overlapping legislative responsibilities regarding the environment between the federal and provincial or territorial governments (Harrison, 1996; Kennett, 2000). As a consequence, the federal as well as each provincial and territorial government have separate legislated EIA requirements, while EIA is also part of some Aboriginal claims-based agreements as well as many city planning processes. In practice, this means that one project may be subject to multiple EIAs, though inter-jurisdictional coordination attempts to integrate these processes (Fitzpatrick & Sinclair, 2009, p. 253). For instance, the 1998 Canada-wide Accord on Environmental Harmonization and the sub-agreement on environmental assessment, endorsed by the Canadian Council of Ministers of the Environment (CCME) and signed by every province and territory except Quebec, delineates specific roles and responsibilities to provide a “one-window approach to the implementation of environmental measures”, which, in the case of environmental assessment, aims for a single assessment and a single review process which may involve more than one jurisdiction (CCME, 1998). Bi-lateral agreements between the federal and provincial authorities regarding coordination of EIAs are negotiated under the auspices of this

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14 The Act is triggered when a federal authority: proposes a project; provides financial assistance to a proponent to enable a project to be carried out; sells, leases, or otherwise transfers control or administration of federal land to enable a project to be carried out; or provides a licence, permit or an approval that is listing in the Law List Regulations that enables a project to be carried out. An EA is still possible under the Act if the Minister of the Environment considers that the project has the potential to cause significant adverse environmental effects across boundaries between non-federal and federal lands, or across provincial or international boundaries (CEAA, 2003).
accord. For larger EIAs where a joint panel is struck, project specific agreements are negotiated. The CEAA, which reports to the federal MoE, is empowered to negotiate agreements with other jurisdictions to promote harmonization and to coordinate projects subject to multi-jurisdictional environmental assessments or comprehensive studies (CEAA, 2003).

The Canadian federal EA process also allows for a substitution of the federal process if the replacement process is deemed appropriate, as is the case in the Mackenzie Valley region in the NWT. There are two main sets of legislation that govern resource management in the NWT: the Inuvialuit Final Agreement, which established the Inuvialuit Settlement Region (ISR), and the Mackenzie Valley Resource Management Act (MVRMA), which applies to the Mackenzie Valley. The Canadian Environmental Assessment Act, outlined above, applies only in the ISR. Meanwhile, the MVRMA, which was proclaimed in 1998, establishes public boards to regulate the use of land and water, to prepare regional land use plans to guide development, and to carry out environmental assessment and reviews of proposed projects in the Mackenzie Valley. The Mackenzie Valley, as defined in the MVRMA, includes all of the Northwest Territories, with the exception of the Inuvialuit Settlement Region and Wood Buffalo National Park (INAC, 2007). There are five distinct regions throughout the valley: Gwich’in, Sahtu, Tłįchǫ, Deh Cho and Akaitcho (for a map see MVEIRB, 2004, p. 2).

The MVRMA came into being in 1998 as a result of the Gwich’in and Sahtu Comprehensive Land Claims Agreements. In 2003, the Tłįchǫ (formerly Dogrib Treaty 11) also signed a Land Claims and Self-Government agreement with Canada (establishing the Wek’èezhìı management area) and the three groups have established
regional boards for land and water management under the MVRMA. The Deh Cho and Akaitcho are still in the process of negotiating claims. These regional boards form an integral part of the valley-wide Mackenzie Valley Environmental Impact Review Board (MVEIRB), a co-management body established by the MVRMA responsible for the EIA process in the Mackenzie Valley. Each regional board has jurisdiction over the issuance of land use permits and water licenses in their own settlement area, while the Mackenzie Valley Land and Water Board (MVLWB), created in 1998 under the MVRMA, deals with unsettled claims areas and transboundary land and water use applications. Appendix IV lists the various Mackenzie Valley co-management boards and organizations involved in EA and regulatory processes.

The process of EIA in the Mackenzie Valley provides a unique example of an integrated resource management regime that has replaced the federal system, based on co-management and an unusually broad definition of impact on the environment to include biophysical impacts as well as direct impacts on social, cultural, and heritage resources (Haefele & Cliffe-Phillips, 2004). The responsibility for environmental assessment was previously undertaken by Indian and Northern Affairs Canada (INAC) and the NWT Water Board. Today, the MVEIRB is the main instrument for EA and review, replacing the Canadian Environmental Assessment Act in the Mackenzie Valley except under specific instances. INAC involvement now consists of providing information and expertise to the various resource management boards and coordinating the response of other federal departments and the territorial government to EAs (INAC, 2002). In addition, the Minister of INAC is responsible for appointing all members of the
Review Board, which is made up of at least seven individuals including a chairperson. Half of these members are nominated by First Nations, half by government.

The three stages of EA under the 1998 MVRMA are: preliminary screening, environmental assessment and environmental impact review (EIR). The Review Board operates at arm’s length, independent of government and nominating bodies, to decide on what recommended measures and suggestions to make in the EA and EIR, which are made to the Minister of INAC. The final decision lies with the Minister, although the entire process leading up to the Review Board’s report and recommendation is entirely at the discretion of the Board itself.

Preliminary screening, required of most developments, refers to the initial environmental examination of a development proposal for potential significant adverse effects. They are usually conducted by land and water boards, but the other agencies, such as Department of Fisheries and Oceans (DFO) and the National Energy Board, may also lead preliminary screenings or even conduct simultaneous screenings (see Appendix V for a more detailed overview of the preliminary screening process). From here, the development is allowed to proceed, which happens in the majority of cases, or it is referred to the Board for an environmental assessment (MVEIRB, 2004).

The environmental assessment stage builds upon the work of the screening. It involves a more in-depth study of the potential impacts of a proposed development, reporting on the possible ecological, social, cultural and economic impacts, including cumulative effects; the mitigation measures to reduce or avoid these impacts; public comments; and anything else the Board deems relevant. The MVEIRB is the only body in the Mackenzie Valley that conducts environmental assessment (see Appendix VI for a
more detailed overview of the environmental assessment stage). Once the assessment is complete and the Review Board has issued a Report of Environmental Assessment, the Minister of INAC and the responsible ministers decide to either allow the development to proceed to the regulatory stage or to refer it to an EIR\(^\text{15}\) (MVEIRB, 2004).

An EIR, the third and final level in the Mackenzie Valley EA process, involves the appointment of an independent Review Panel by the MVEIRB. The Review Panel can recommend approval of the project as proposed, approval with mitigative measures, approval with a follow-up program, approval with a combination of mitigative measures and a follow-up program, or rejection of the proposal. The Panel’s report is sent to the Minister of INAC, who can adopt the recommendations, refer the report back to the Panel for further consideration, adopt the recommendation with modifications (after consulting the Panel), or reject the recommendation (see Appendix VII for a more detailed overview of the EIR stage) (MVEIRB, 2004).

Ekati is today under the jurisdiction of the MVRMA, located within the Wek’èezhìı management area on Tłı̨chǫ lands. Wek’èezhìı was established with the signing of the Tłı̨chǫ Land Claims and Self-Government agreement on 25 August 2003. Ratified by Tłı̨chǫ voters the following year, the agreement empowered the Tłı̨chǫ Government to pass and enforce a wide range of its own laws, to own resources, receive tax revenues and protect resources and the environment. The Wek’èezhìı management area is within the wider Mǝwhi Gogha Dǝ Nįįtł’èe, which refers to the Tłı̨chǫ traditional use area laid out in the Tłı̨chǫ Agreement as originally described by Chief Monfwi during the signing of Treaty 11 in 1921. Also established by the agreement are the Tłı̨chǫ lands,

\(^{15}\text{The proposal can also be referred to the federal Minister of the Environment at this stage for a joint review under the Canadian Environmental Assessment Act.}\)
a 39,000 km² block within Wek’èzhìì where the Tłı̨chǫ Government is the governing authority (for a map see WRRB, n.d.). All four Tłı̨chǫ communities, Behchokò, Gamètì, Wekweeti and Whatì, are located here.

As part of the Tłı̨chǫ Agreement, the Wek’èzhìì Land and Water Board (WLWB) and the Wek’èzhìì Renewable Resources Board (WRRB) were established. The WRRB is the wildlife management authority for the region, while the WLWB, of particular importance for the operation of Ekati, regulates the use of land and water and the deposit of waste throughout the area, issuing, amending, extending, renewing or cancelling Water Licenses and Land Use Permits within Wek’èzhìì. It is also responsible for preliminary screenings of development proposals as described earlier, which may lead to an EA or EIR. Both boards are co-management bodies with members appointed by the federal, territorial and Tłı̨chǫ governments and act as regional panels of the MVLWB.

Environmental Management of the Ekati Mine

The original environmental assessment for the Ekati diamond mine, then known as the NWT Diamonds Project, was first initiated in 1994 when the Minister of the Department of Indian Affairs and Northern Development (DIAND, now INAC) referred the Project to the federal Minister of Environment for a public review by an independent Environmental Assessment Review Panel under the old federal EARPGO. However, this original EA was to be conducted, according to Sheila Copps, Minister of the Environment at the time, “in the spirit of the Canadian Environmental Assessment Act.”
which would come into effect a few weeks later (quoted in CARC, 1996).\footnote{This statement was interpreted by certain participants as implying that the panel review would address the list of mandatory factors to be considered that is contained in section 16 of CEAA” (CIRL, 1997, p. 12).} In April, 1994 the now-defunct Northwest Territories Regional Environmental Review Committee (RERC), an interdepartmental committee of federal and GNWT officials and representatives of Aboriginal organizations, conducted the first screening stage of the EA process and went on to recommended that the NWT Diamonds Project be subject to panel review. The panel review formally began with the appointment of four panel members on 8 December 1994. The EA Panel was to: consider the project’s short- and long-term environmental effects, including cumulative effects, and the social effects related to these environmental effects; consider the short- and long-term general socio-economic effects; give full and equal consideration to traditional knowledge; and hold both technical and community hearings (CEAA, 1996). The federal government originally allocated $250,000 to the panel to conduct the assessment and an additional $250,000 for intervenor funding, although the final cost has been assessed at $900,000 (CIRL, 1997, p. 13).

In the spring of 1995 the Environmental Assessment Review Panel (EARP) held scoping meetings in eight Northwest Territories communities to help define the scope and content of the guidelines for the Environmental Impact Statement (EIS). The Panel received over 50 written submissions and heard from approximately 125 presenters before issuing the final guidelines for the EIS. The EIS was prepared and submitted by BHP in July 1995 (BHP & DIA MET, 1995a, 1995b, 1995c, 1995d, 1995e). The four-volume 4500-plus-page report was then subject to a 90-day public review process. Early in 1996 the EARP panel went on to hold 18 days of public hearings in nine NWT
communities to review issues pertaining to traditional knowledge (TK), environmental management plans, water, wildlife, vegetation and socio-economic effects. It received over 75 written submissions and heard around 260 presentations (CIRL, 1997; O’Reilly, 1998; Ross, 2004).

The Panel submitted its report to the Ministers of the Environment, DIAND and the public on 21 June 1996. Although it concluded that the environmental impacts were mitigable and that the project should proceed, it made 29 recommendations. These dealt with water quality and management; the speedy settlement of outstanding land claims; the need for new policies, and monitoring and management plans to deal with the loss of fish habitat, air quality, the risk of trucks spilling fuel, caribou, birds, protection of the interests of Northern business, and the exploration of archaeological and historical sites; Aboriginals’ hunting and fishing rights on the proponent’s claim area; and the Federal Government’s developing a capacity for diamond valuation in Canada prior to their export and sale (CEAA, 1996). The report appeared in English and French, and its executive summary in Inuinnaqtun, Dogrib and Chipewyan. The table in Appendix VIII outlines the principal steps in the EA process to this point.

On 8 August 1996, the Minister of DIAND, Ronald Irwin, announced that he accepted the Panel report and was conditionally approving the proposed mine. However, because a number of the Panel’s recommendations fell outside the scope of existing regulatory permits, and there were no finalized agreements with the Aboriginal groups, there was a concern that the project would be tied up by “endless wrangling” (Couch, 2002, p. 274). Furthermore, there was significant dissatisfaction with the process on the
part of Aboriginal groups and some non-governmental participants. As O’Faircheallaigh (2006, p. 11) finds in a review of the process to this point:

The Aboriginal groups were greatly concerned about the environmental impact of Ekati and did not feel that the EIA process adequately addressed their concerns. In their view adequate time and resources were not provided to support a thorough process; the findings of the Environmental Review Panel were flawed and its recommendations weak, failing to address issues raised in Aboriginal submissions; and Canadian and NWT regulatory bodies had failed to seriously address these issues and indeed in some cases had not even taken the trouble to appear in front of the Panel.

Non-governmental intervenors also took issue with the official EA process. The Northern Environmental Coalition was “disappointed with the panel’s superficial report and overly general recommendations”, Kevin O’Reilly wrote in an article entitled “Diamond Mining and the Demise of Environmental Assessment in the North” (O’Reilly, 1996, p. 1). For a multitude of reasons, he went on to call the EA process “fundamentally flawed… neither rigorous, comprehensive, nor fair” and labelled the recommendations of the Panel “weak and insipid” (ibid.) (see also Nikiforuk, 1997; CARC, 1996). The

\[17\] In its critique of the process, CARC (1996) questioned the “quality” of the EIA process, particularly the Panel’s treatment of technical issues. Funding for the Panel and intervenors provided by the Government of Canada was deemed to be “wholly insufficient”. The final EIS Guidelines did not fully incorporate suggestions from intervenors gathered during the Panel’s EIS scoping exercise. Specifically, there was insufficient attention to “regional perspectives, traditional knowledge, and cumulative impact analysis”. The Panel proceeded at too brisk a pace, especially in allowing only five months for communities to digest the EIS and build a response. The combined effect of these problems led to “serious procedural deficiencies” in the three types of hearings that were scheduled (community hearings, general sessions and technical sessions) including insufficient time frames and inconsistent questioning procedures. “Although the panel’s guidelines called for ‘full and equal consideration’ for traditional knowledge, aboriginal participants, government officials, environmental groups, and CARC agreed that the EIS failed to meet this requirement.” The EIS was incomplete when submitted to the Panel (which was only two months after receiving the EIS guidelines). The Panel allowed information from the 1995 field season to be submitted in December 1995, but did not alter its hearings scheduled to begin in January 1996. “Intervenors had only days to analyze the new data before the hearings commenced. This was improper and unfair.”
World Wildlife Fund (WWF) even initiated legal action on 3 July 1996 to challenge the EARP report on the grounds of procedural unfairness. Considering these factors, the Minister began a second phase of the process by making his approval of the BHP diamond mine subject to “satisfactory progress” within the next 60 days on a number of regulatory instruments and non-regulatory agreements that would ensure Aboriginal participation (Canada, 1996; O’Faircheallaigh, 2006).

What followed were intense, “frantic” (O'Reilly, 1998) negotiations at Yellowknife’s Explorer Hotel over the next two months to meet the Minister’s deadline. The processes represented “negotiated and quasi-judicial” proceedings exterior to the EA, ultimately producing the final regulatory and benefits package (CIRL, 1997, p. i). The main components of that package included: a negotiated Environmental Agreement that involved the Aboriginal groups, the proponent and both levels of government; a Socio-Economic Agreement between the GNWT and BHP addressing the economic and social impacts of the project from the perspective of the NWT as a whole; Impact and Benefit Agreements (IBAs) negotiated bilaterally between BHP and each of the Aboriginal groups; a water licence issued by the NWT Water Board required for the use of water and deposition of wastes18; a Fisheries Act authorization by the Department of Fisheries and Oceans (DFO) authorizing fish habitat destruction in mining and construction operations; and six land leases for the areas of BHP’s mining operations (CIRL, 1997).

Although DIAND would not allow Aboriginal groups to be actual signatories to the Environmental Agreement, Aboriginal participants did insist on full involvement in the negotiations. Legal council for the Tłı̨chǫ suggested that as an alternative to

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18 In 2005, the Water Licence was renewed by the NWT Water Board’s replacement, the MVLWB. It is now administered by the regional WLWB.
becoming signatories, the parties could sign a separate implementation protocol that would ensure direct participation of Aboriginal groups in finalizing and implementing any agreement (O’Reilly, 1998). And so on 18 October 1996, a draft agreement was initialled and the Implementation Protocol for the Environmental Agreement was signed by the federal government, the GNWT, BHP and four Aboriginal groups: Dogrib Treaty 11 Council (Tłı̨chǫ), the Akaitcho Treaty 8 (specifically the Yellowknives Dene First Nation and the Łutselk’e First Nation), North Slave Métis Alliance, and the Inuit as represented by Kitikmeot Inuit Association. The protocol constituted “an innovative means of formally recognizing Aboriginal involvement and interests without making Aboriginal groups signatories to the agreement itself” (CIRL, 1997, p. 17). Under its terms, a funded implementation group consisting of representatives of all parties was to be established within two weeks of the execution of the Protocol with initial financial support provided by Canada and the GNWT. This negotiation protocol dealt with two issues: finalization of the Environmental Agreement and the development and implementation of a work plan for the establishment of an arms-length watchdog group for the mine: the Independent Environmental Monitoring Agency (IEMA).

After legal and technical review by all parties, the final Environmental Agreement was ultimately signed on 6 January 1997 by Canada, GNWT and BHP Diamonds. It was considered “unprecedented in its scope and public profile” (CIRL, 1997, p. 17). Kevin O’Reilly, who was part of the Northern Environmental Coalition19 of conservation groups involved in public hearings and reviewing the proponent’s EIS, reported that “the Environmental Agreement went well beyond what government and BHP had ever

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19 The Northern Environmental Coalition was made up of the Canadian Arctic Resources Committee (CARC), Canadian Nature Federation, Ecology North and World Wildlife Fund Canada (WWF).
anticipated” (O’Reilly, 1998). With IBAs signed with each of the four Aboriginal groups, a socio-economic agreement with the territorial government completed, the water license approved, the issuance of land leases, authorization of fish habitat destruction approved, the independent watchdog agency established and the Environmental Agreement signed, the Minister was satisfied and the project could proceed.\(^{20}\)

Construction of plant facilities began in May 1997.

The protection of Aboriginal interests in the land and the promotion of effective participation of Aboriginal peoples in the environmental management of the Ekati project are central purposes of the Environmental Agreement (Canada, GNWT, BHP, 1997) (see Appendix X for the full Statement of Purpose). Because they are not signatories to the Ekati Environmental Agreement, Aboriginal groups are not recognized as having legal interests in the environmental management and monitoring of Ekati. However, through the negotiated Agreement, O’Faircheallaigh (2006, p. 27) writes that recognition was ultimately afforded Aboriginal peoples as

- signatories of the Implementation protocol;

- through their ability to nominate a majority of Board members to IEMA;

- through their role in considering BHP Billiton’s annual, environmental impact and environmental management plans;

- through the inclusion of Aboriginal participation and the requirement for BHP to give traditional knowledge “full consideration along with other scientific knowledge” (Canada, et al., 1997) in environmental management of the mine through the conduct of traditional knowledge studies; and

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\(^{20}\) See Appendix IX for an outline of the current Ekati environmental management framework and various monitoring programs and environmental management plans required by the Environmental Agreement, Water Licence and Fisheries Authorizations.
in the provisions dealing with protection of archaeological sites.

Other important features of the legally binding Agreement include: the requirement for BHP to provide to the Minister security deposits to ensure performance of its obligations; ensuring effective EIA follow-up and the application of adaptive management principles; and various reporting requirements for BHP, including the submission of an Annual Report as well as a comprehensive Environmental Impact Report every three years.

Another central component of the Environmental Agreement was the establishment of the Independent Environmental Monitoring Agency (IEMA). In its EIS, BHP had proposed its own version of an “independent environmental advisory group consisting of academic, Aboriginal and community members, to review the environmental program of the project on an ongoing basis” (BHP & DIA MET, 1995b, p. 5.43). Its mandate would have been limited to environmental matters (O’Reilly, 1998). However, two informal stakeholder meetings held outside the Panel hearings discussed the idea of a monitoring body with much more authority (O’Reilly, 1998). In its report the Panel did not make an independent watchdog of any sort part of its list of recommendations, although it did support in its overall findings BHP’s version of an environmental advisory group (CEAA, 1996, p. 22). The Panel was “of the opinion that a separate multistakeholder body is not required to manage the monitoring program for this Project. It believes that responsibility for monitoring must ultimately rest with government and the Proponent” (CEAA, 1996, p. 22-23). The proponent, BHP, also “did not support the concept of an independent environmental watchdog” of the sort proposed by the Aboriginal and non-governmental stakeholders (O’Faircheallaigh, 2006, p. 18; see
also Macleod Institute, 2000, p. 18). In the end, the company was “caught off guard” (CIRL, 1997, p. 66) by the Environmental Agreement recommendations, including the requirement of an independent monitoring agency that had much more authority than the company ever envisioned (O’Reilly, 1998). The watchdog agency that eventually emerged from the negotiations was certainly unique. As Bill Ross, IEMA’s current chairperson, has written, “There have been many advisory bodies, but the Agency has the mandated responsibility to recommend action by BHPB and the regulators to improve environmental management at the mine. These recommendations must be responded to publicly” (Ross, 2004, p. 188).

Although the Aboriginal groups were not signatories to the actual Agreement, they did become “Members” of the Monitoring Agency “Society”, which was incorporated under the Societies Act of the NWT in 1997 as a non-profit organization. The Members of the Society include the following seven organizations or agencies:

- Dogrib Treaty 11 Council (Tlíchọ)
- the Akaitcho Treaty 8 (specifically the Yellowknives Dene First Nation and the Łutselk'e First Nation)
- North Slave Métis Alliance
- Kitikmeot Inuit Association
- BHP Diamonds Inc.
- Canada
- GNWT
The board of the Agency consists of seven directors who, according to the Environmental Agreement, “shall not act in representative capacity” (Article V, 5.4(a)). Each Aboriginal society group appoints one director while BHP Billiton, Canada and the GNWT jointly and in consultation with the Aboriginal groups appoint three directors.

The current Board is constituted as follows:

**Table 3. Current IEMA board members**

<table>
<thead>
<tr>
<th>Appointee</th>
<th>Date Appointed</th>
<th>Appointed By</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill Ross, Chairperson</td>
<td>April 1997</td>
<td>BHP Billiton, GNWT and Government of Canada (in consultation with the Aboriginal governments)</td>
</tr>
<tr>
<td>Tim Byers, Vice-Chairperson</td>
<td>May 2001</td>
<td>Akaitcho Treat 8 (Łutselk'e First Nation and Yellowknives Dene First Nation)</td>
</tr>
<tr>
<td>Jaida Ohokannoak, Secretary Treasurer</td>
<td>December 2003</td>
<td>Kitikmeot Inuit Association</td>
</tr>
<tr>
<td>Audrey Enge</td>
<td>March 2009</td>
<td>North Slave Métis Alliance</td>
</tr>
<tr>
<td>Laura Johnston</td>
<td>December 2006</td>
<td>BHP Billiton, GNWT and Government of Canada (in consultation with the Aboriginal governments)</td>
</tr>
<tr>
<td>Tony Pearse</td>
<td>March 1997</td>
<td>Tłı̨chǫ Government</td>
</tr>
<tr>
<td>Kim Poole</td>
<td>December 2006</td>
<td>BHP Billiton, GNWT and Government of Canada (in consultation with the Aboriginal governments)</td>
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Article V of the Environmental Agreement establishing IEMA provides a mandate that includes “an integrated approach to achieve the purposes [of the agreement]” and serving “as a public watchdog of the regulatory process and the implementation of the Agreement” (Canada et al., 1997) (see Appendix XI for full Article V). Despite what the name suggests, IEMA does not actually carry out
monitoring directly. Rather, the Agency “is more of an oversight or audit mechanism” (O’Reilly, 1998). Other components of IEMA’s mandate under Article V include:

- compiling and analyzing relevant environmental quality data in order to review, report, or make recommendations on environmental effects monitoring, cumulative impacts, reports, environmental plans and “the integration of traditional knowledge and experience of the Aboriginal Peoples into Environmental Plans and Programs”;

- participating as an intervenor in regulatory and other legal processes respecting environmental matters;

- providing an accessible public repository of environmental data, studies and reports relevant to the Agency’s responsibilities;

- providing “programs for the effective dissemination of information to the Aboriginal Peoples and the general public on matters pertaining to the Monitoring Agency’s mandate”;

- providing “an effective means to bring to BHP and governments the concerns of Aboriginal Peoples and the general public about the Project and the monitoring and regulation of the Project”; and

- to participate as an intervenor in dispute resolution processes under the Environmental Agreement (Canada et al., 1997).

In sum, the primary work of the Agency’s directors is to work together reviewing BHP Billiton's environmental reports and plans while listening to community concerns. In meeting its mandate, IEMA maintains a resource library and website, meets and corresponds regularly with Society Members, which includes hosting an annual general meeting, publishes newsletters, a website and issues annual plain language and technical
reports with recommendations that require the response of BHP Billiton and/or other Society Members.

IEMA held its first Board of Directors meeting on 28 May 1997 and the inaugural Annual General Meeting one year later in Yellowknife where it released its first annual report. Funding for the first two years of IEMA’s operation amounted to $450,000 each year with BHP Billiton contributing $350,000 and the remaining amount split between the federal and territorial governments (O'Reilly, 1998). The Agency now receives 99 percent of its funding from the mine operator. For 2011-2012, BHP Billiton will contribute approximately $638,000 to the Agency’s budget (IEMA, 2010, p. 51). IEMA maintains a permanent office in Yellowknife with two staff members, including an Executive Director and a recently appointed Communications and Environmental Specialist.

Arising out of the negotiations surrounding the BHP proposal, the innovative independent monitoring agency and the requirement to incorporate traditional knowledge provided an important basis for public participation in environmental management of Ekati. This was guaranteed in the Environmental Agreement, which “provides a basis for ongoing Aboriginal involvement in project monitoring and input into regulatory processes and project management” (CIRL, 1997, p. 18). Another main facet for ongoing public participation is in the renewal of water licences, now dealt with by the Wek’eezhii Land and Water Board co-management board, which has mechanisms for public hearings and consultation. BHP’s own, self-directed community engagement

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21 In addition to water use and waste disposal planning, closure and reclamation planning falls under the water licence.
strategies provide the final pathway for public participation in environmental planning and management at Ekati.

For its part, IEMA acts as both a promoter of public participation and a forum for deliberation. Since its establishment in 1997, the Agency has been an integral player in ongoing adaptive environmental management and planning, EIA follow-up, and new regulatory approvals for Ekati through its recommendations, reporting and interventions. Often, these recommendations to BHP Billiton have been regarding the incorporation of TK and for improvements in the involvement of Aboriginal peoples in ongoing management. In addition, the Agency itself acts as an important information conduit between the community, BHP Billiton and government regulators by visiting communities on request, delivering plain language annual summary reports and holding an annual meeting with all Society members.

There is evidence that IEMA has had a major positive impact in promoting effective EIA follow-up and adaptive management (O'Faircheallaigh, 2007; Ross, 2004). The Annual Reports of BHP Diamonds Inc. and of IEMA document numerous initiatives designed to address specific environmental issues and improve environmental management systems. They show the development over time of a very extensive body of environmental data that represents a critical knowledge base for EIA follow-up and adaptive management. They also cite many examples of adaptive management in practice (O'Faircheallaigh, 2007: 330). In the table below is a summary of the type and frequency of recommendations IEMA has made to its Society members, to which there is generally a good record of responsiveness (O’Faircheallaigh, 2006, p. 18).
Table 4. IEMA recommendation themes 1997-2010

<table>
<thead>
<tr>
<th>Themes:</th>
<th>Frequency of Recommendations:</th>
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<tr>
<td>Environmental management, planning and reporting</td>
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<tr>
<td>Traditional Knowledge and Aboriginal involvement</td>
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<tr>
<td>Closure and reclamation</td>
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<tr>
<td>Aquatic monitoring and fisheries</td>
<td></td>
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<tr>
<td>Waste rock management, seepage and characterization</td>
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<tr>
<td>Kodiak Lake monitoring</td>
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<tr>
<td>Wildlife monitoring</td>
<td></td>
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<tr>
<td>Regional monitoring and cumulative effects</td>
<td></td>
</tr>
<tr>
<td>Role of government in environmental management</td>
<td></td>
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</tbody>
</table>

Recommendation Recipient  | Frequency of Recommendations |
--------------------------|------------------------------|
BHPB                      | 83                           |
Government (GNWT, GN, Government of Canada) | 12 |
Water Boards (NWT Water Board, MVLWB, WLWB) | 8 |
Environmental Agreement signatories | 3 |
Aboriginal Society Members and BHPB | 3 |
Aboriginal Society Members | 1 |
All Agency Society Members  | 1 |
Total                      | 112                          |

Source: IEMA 2010, p. 2

Two external reviews of IEMA provide the best independent evaluation of the agency’s performance (Macleod Institute, 2000; SENES, 2009). Both reports are based on document analysis and interviews with representatives from each of the seven Society Member organisations as well as current and former Agency Directors and current and
former Agency Staff. Both reports found a generally high degree of satisfaction with IEMA, highlighting the strength of the Agency’s technical (scientific) contributions.

However, IEMA was criticised for deficiencies in its own community outreach as well as the poor uptake at BHP of IEMA’s recommendations relating to community consultation and integration of TK. The Macleod Institute report (2000) describes IEMA as “an innovation created for the purpose of responding to community concerns” about Ekati (p. iii), but found that the Agency has not been very successful “in providing a conduit of information to and from the public and aboriginal communities” (p. ii). The Agency’s public and Aboriginal involvement program “overall registered low on the customer satisfaction scale” (p. 9). In the SENES evaluation conducted nine years later, the verdict was very much the same: community stakeholders “recognised the technical competence of the Directors and staff and said that the Agency is doing a good job of holding BHPB accountable”, but “that the weak area lies with community outreach and communications, and the integration of traditional knowledge” (SENES, 2009, p. i; see also O'Faircheallaigh, 2007, p. 334).

Although IEMA represents an institutional arrangement with deliberative potential, these evaluations of its community engagement reveal that it remains an example of what Dyzek (1990) refers to as “incipient discursive designs”. These are institutions that represent imperfect approximations of deliberative ideals. The following section explores why this potentially deliberative arrangement was created and why the result been less than satisfactory. The analysis examines how the political opportunity structure impacted on public participation in EIA and EIA follow-up for the project. First, major realignments that hold the potential to bring new groups to power are
explored. Next, limitations of IEMA’s institutional structure are considered. Following this, the provision or absence of new alliances and external resources for community stakeholders is discussed. Taken together, these dimensions of political opportunity structure contribute to explaining IEMA’s shortcomings as a deliberative institution.

**Realignments**

Realignments can bring new groups to power. Political process theorists include factors such as regulatory changes or major political upheavals and events, which can impact upon citizen mobilization. New opportunities for deliberation do not arise in a vacuum and are often a result of the wider parallel or outside political processes at work. Alternatively, major political realignments can act as a constraint upon the efficacy of deliberative public participation. In the case of Canada’s Northwest Territories, realignments such as the evolving structure of environmental assessment regulation in the region, devolution and decentralization, and the intertwined and ongoing negotiation of Aboriginal land claims agreements can all be identified as central components in the emergence of potential new political opportunities for public participation in environmental decision-making. It was the Aboriginal land claims situation that provided the major opportunity for expanded public participation in the case study. In fact, the statutory EA process described above acted more as a constraint to effective deliberative participation, according to many of its critics. The strengthening legal and political position of Aboriginal groups, dissatisfaction with the mandated regulatory process, and the concomitant emergence of a separate negotiated Environmental Agreement and IBAs were the most important realignments that brought new groups to power in the Ekati EA process.
Although described by Wood (2003, p. 75) as the best available opportunity for public participation in environmental decision-making in Canada, the response of Aboriginal peoples to the official Ekati EA process and the Panel’s work “was disappointment and fear of co-optation” (Deleon & Ventriss, 2010, p. 115). Environmental intervenors expressed similar frustrations. Although this assessment was not echoed by all of the participants (CIRL, 1997), it does raise an important criticism of the EA process from the perspective of deliberative public participation.

However, by the end of the process, some of the concerns of Aboriginal and non-governmental participants had been addressed. Despite his critical assessment of the first stage of the EA process, in a later piece, O’Reilly (1998) concluded that overall “significant gains were made in the public interest as a result of the direct participation of the Aboriginal organizations”. An independent review of the entire process found, “most participants are generally satisfied with the end result, if not necessarily with all aspects of the process relied upon to get there” (CIRL, 1997, p. 44). Considering the levels of participant frustration, it was obviously not the new EA legislative framework and the Panel review process that provided the opportunity for effective participation. The real opportunity for deliberative participation came instead during the 60-day period of intense negotiations immediately following the release of the Panel’s report. For many participants, the need for an ad hoc, project-specific agreement “reflected deficiencies in the legal and regulatory regime for mineral development in the Northwest Territories” (CIRL, 1997, p. 17). The 60-day period included the negotiation of the Environmental Agreement, a socio-economic agreement and the IBAs, all of which were ad hoc in
nature and “without explicit statutory basis” (CIRL, 1997, p. 54), providing a unique mechanism for Aboriginal involvement and an opportunity to develop consensus.

Ministerial discretion and the imposition of that 60-day time limit spurred the process of negotiation and provided the opportunity for more effective participation. The WWF even withdrew its lawsuit with the initiation of the Minister’s negotiation phase as it felt its concerns would be “rolled into” that process (CIRL, 1997, p. 50). There are a number of rationales for this innovative negotiation approach (CIRL, 1997, p. 17-18), but an important political factor was certainly the wider power realignments surrounding the Aboriginal land claims situation. This was “manifestly central to the BHP process” (CIRL, 1997, p. 59). “Aboriginal organizations did not want to be simply consulted, but demanded direct participation in all the negotiations” (O’Reilly, 1998) and they used every stage of the process to “voice concerns about the impacts of the project on Aboriginal lands and peoples, and to remind the regulators that approval of mining developments was prejudicial to the land claims negotiation process” (CIRL, 1997, p. 57). It was a powerful bargaining chip. Although the issue of unsettled claims was not dealt with directly by the Panel, many of these land and resource ownership and jurisdictional issues were dealt with in the ad hoc mechanisms created out of the negotiation period. As a Canadian Institute of Resources Law (CIRL) independent review found:

The linking of progress on impact and benefits agreements (IBAs) to project approval helped to ensure the provision of social and economic benefits to Aboriginal communities that had unsettled land claims or areas of traditional land use in the vicinity of the project. Similarly, the requirement to negotiate an Environmental Agreement, and the participation of the Aboriginal groups in the
negotiation of this agreement, provided a mechanism for their direct involvement in the design and implementation of environmental controls (CIRL, 1997, p. 58).

This two-phase process, the required environmental assessment followed by non-statutory parallel negotiated agreements, went on to set a new precedent for the review and approval process of the other diamond mines that opened in the region (Couch, 2002). These sorts of negotiated agreements address two well documented shortcomings in the official EIA process: (1) the historical exclusion of Aboriginal peoples from environmental management of resource projects located on their traditional lands, and (2) ensuring effective EIA follow-up (O’Faircheallaigh, 2007; Galbraith, Bradshaw, & Rutherford, 2007). The Ekati negotiation process is an important example of this (O’Faircheallaigh, 2007; Ross, 2004). The requirements of the Agreement became a guide for ongoing public participation in environmental management for the mine. The central and most innovative institution arising from these negotiations, acting as an ongoing guarantor of the gains made, is the independent public watchdog group, IEMA.

Institutions

The Independent Environmental Monitoring Agency was established to ensure “independent, ongoing, and rigorous and adequately resourced” monitoring of the negotiated Environmental Agreement (Couch, 2002, p. 277). It constituted an innovative institutional provision for ongoing public participation and was a manifestation of the macro-political realignments discussed above. This section explores the evolution of IEMA as an institutional avenue for participation, describing how the unique character of the Agency offered opportunities for, but also constraints upon stakeholder engagement with Ekati.
The impetus for an independent watchdog came from a shared concern amongst Aboriginal, environmental and other non-governmental intervenors in the EA process that BHP and the government could not be entirely trusted to carry out monitoring programs and publicly report the results. Furthermore, they did not trust government regulators to ensure that BHP Billiton would abide by commitments it made in its EIS, verbally in the Panel hearings, and later in negotiations for the Environmental Agreement (CIRL, 1997; O’Faircheallaigh, 2006; O’Reilly, 1998). This led directly to the push for an independent agency that would take a holistic view of environmental impacts, oversee the monitoring and project management activities of both the company and government, and in which Aboriginal groups themselves would play a major role. The political strength of Aboriginal negotiators described in the previous section explains how this initiative became part of the final Environmental Agreement despite initial opposition from BHP and tepid support from the EA Review Panel. The resulting watchdog agency, IEMA, is a key component of the Ekati regulatory package and the most significant institutional provision for ongoing public participation that arose from the negotiation process. The Agency continues to promote and provide an important forum for public participation in environmental decision-making for the mining project. As Bill Ross, chairperson of the Agency, describes their work, “our effort is to try to facilitate effective communication”, to act as a “conduit” for communication between all parties (B. Ross, personal communication, December 1, 2009). This work supplements and in some cases guides the communication efforts of BHP itself.22

22 For instance, at IEMA’s suggestion, BHP conducted environmental workshops on an annual basis from 1998 to 2003 to present their ongoing monitoring work to communities and regulators. However, despite positive community feedback and IEMA’s recommendation that BHP continue this practice, the company
Of the many recommendations IEMA has made over the years, the ones occurring in the second-highest frequency relate to TK and Aboriginal involvement. However, these have had the least uptake by BHP and regulators. This shortcoming can be explained by the fact that although BHP must respond to all of IEMA’s recommendations, they are free to refuse such guidance. As Bill Ross stated, “I think in the TK/community consultation side of things, our recommendations have been pretty consistent over the years and not terribly effective” (B. Ross, personal communication, December 1, 2009). This sentiment is echoed by Kevin O’Reilly, Executive Director of IEMA since 2005 and one of the organization’s permanent staffers in Yellowknife:

In our annual report over the years where we’ve made suggestions on how we feel they [BHP Billiton] could improve their communications and consultation. And sometimes it’s listened to and sometimes it’s not… We can only give refuseable advice. And establish a track record for that, an accountability track for that. But we can’t force or order the company to do things (K. O’Reilly, personal communication, November 6, 2009).

The innovative effort to improve participation through the creation of an independent monitor has fallen short in part because monitoring has not resulted in a mandatory process. The voice of the public as expressed through IEMA can ultimately be ignored. At best, IEMA has created a forum for continuous community consultation, but not necessarily a form of multi-stakeholder deliberation and joint decision-making. Features of the final set of political opportunity factors, resources and alliances, can help explain the reasons behind some of the strengths and weaknesses in IEMA’s deliberative potential.

now only conducts workshops every three years in conjunction with the release of their Environmental Impact Report (B. Ross, personal communication, December 1, 2009).
Alliances and Resources

The availability or absence of new resources for actors that lack internal ones and the role of alliances that enable more effective participation are characteristics of the evolving political opportunity structure. For instance, during the original EA and subsequent negotiations, many questions arose about the resources required by Aboriginal organizations for their involvement in the processes, “including their capacity to review documents produced by BHP, ability to retain independent expertise to assist with technical matters and similar activities” (O’Reilly, 1998). For ongoing regulatory matters, such as in the renewal of water licenses and closure and reclamation planning, there are new opportunities for public participation. However, “The participation has been underwhelming,” according to Bill Ross, chairperson of IEMA, “and the reason so far as I can make out is a lack of participant funding; a complete lack of participant funding” (B. Ross, personal communication, December 1, 2009). Because of this lack of participant funding, “it’s never a level playing field” (K. O’Reilly, personal communication, November 6, 2009).

One of the most important strengths of IEMA, and a central rationale for its creation in the first place, was its role in providing an elite ally for Aboriginal communities. The board of IEMA is largely composed of individuals with a technical background who are trusted with interpreting the technical output from BHP’s monitoring programs. Communities have confidence that IEMA is keeping a lookout while regulators seem to appreciate the extra level of oversight. Gavin More, manager of Environmental Assessment for the GNWT, said of IEMA, “I think it’s useful because the variety of things government has to do, we don’t necessarily have the time to focus on the
mines in great detail” (G. More, personal communication, December 1, 2009). This sentiment was echoed by Bruce Hanna, fish habitat biologist with DFO (B. Hanna, personal communication, December 4, 2009), while Kathleen Racher, Regulatory Director at the WLWB, felt that IEMA was “very helpful, because it’s nice to know that these people are – and largely a lot of technical people – that they are there and are keeping an eye on things” (K. Racher, personal communication, November 30, 2009).

In the same way, IEMA acts to “take a little of the pressure off of the communities” (G. More, personal communication, December 1, 2009). For instance, a representative of the Łutselk’e First Nation has stated that, “We continue to rely heavily on IEMA’s comments and recommendations, especially in regards to the technical reports, and trust them to represent our interests well” (quoted in IEMA, 2004, p. 5). On the whole, the 2009 external review found that

Generally, it was clear from our review that there is a high degree of satisfaction with the Agency. In no one instance did we hear concern raised that IEMA is not fulfilling its mandate as set out in the Environmental Agreement. Overall, respondents identified the technical contributions of the Agency as especially strong and said that IEMA is doing a good job of holding BHPB accountable. The Directors and staff are seen as very competent and we heard from several of the community representatives that there is a sense of trust and confidence in the Agency (SENES, 2009, p. 6).

The characterization of IEMA as an ally of the communities only goes so far, however. The Environmental Agreement dictates IEMA’s relationship with the communities and this limits the capacity of the alliance. This has been a source of dissatisfaction among some stakeholders. Article V of the 1997 Environmental Agreement, which established IEMA, clearly states that the board of the Monitoring
Agency “shall not act in a representative capacity” (Article V, 5.4(a)). All board members interviewed for the present study stressed the Agency’s “independence”. Bill Ross, chairperson of IEMA, made certain to emphasize that,

Our mandate is to convey views from Aboriginal people to the government and to the company and to convey information about the project from the government and the company to the Aboriginal people and to the public at large. There is no suggestion that we represent them (B. Ross, personal communication, December 1, 2009).

The nature of this alliance can be contrasted with IEMA’s equivalent for the Diavik diamond mine, the Environmental Monitoring Advisory Board (EMAB) created in 2000. EMAB’s board members do act as representatives of the signatories to the project’s Environmental Agreement (which includes the Aboriginal communities), rather than independent individuals nominated by those parties. In general, their experience and skills are in community liaison and public engagement work rather than in technical aspects of environmental management (O'Faircheallaigh, 2006, p. 32). As IEMA’s chair describes it, “EMAB plays a much more aggressive community role than we do” (B. Ross, personal communication, December 1, 2009). In 2000, the Macleod Institute evaluation found that Aboriginal groups were often looking for more than “a mere facilitator” (p. 18) in areas such as the integration of TK into environmental management and that “Many interviewees expressed a preference for the Diavik model” (p. 15).

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23 EMAB, similar to IEMA, was created as a requirement of the Environmental Agreement for the Diavik Diamond Project. The Agreement’s signatories include the Government of Canada, the GNWT, Diavik, Dogrib Treaty 11 Council, Lutselk’e Dene Band, Yellowknife Dene First Nation, North Slave Métis Alliance, and the Kitikmeot Inuit Association. Each of these signatories appoints one “representative” (Canada, et al., 2000).

24 See Terra Firma Consultants (2004, p. 48-53) for a full comparison of the Ekati and Diavik Environmental Agreements and of IEMA and EMAB.
The non-representational structure of the IEMA board partly explains shortfalls in the Agency’s ability to act as a community ally. However, the Agency also struggles as an effective vehicle for Aboriginal participation because of communications difficulties. The Macleod Institute evaluation (2000, p. iv) cautioned that IEMA’s independence “must not result in isolation from stakeholders”, but the Agency has faced difficulties in providing an effective means of communicating technical information to Aboriginal groups and, in turn, communicating community concerns to BHP and government regulators. That review found that IEMA also has low or no visibility in the larger community (Macleod Institute, 2000). Stakeholders identified personal contact as important for the Agency’s liaison function, although this is crippled by the fact that all but one of the current board members lives outside of the NWT.25 The Agency does endeavour to meet with Society Members whenever requested and tries to hold one of their board meetings in a stakeholder community each year (K. O’Reilly, personal communication, November 6, 2009). Still, the most recent external review also found that “there is room for improvement, primarily in the areas of community outreach, communications, and traditional knowledge integration” (SENES, 2009, p. 6). The result is that Aboriginal groups are left in a situation “where they continue to depend on non-Aboriginal outsiders to address technical aspects of Ekati’s environmental impacts” (O'Faircheallaigh, 2006, p. 23).

Ongoing communication deficiencies and the ability to correct them can also be explained by resource challenges. Both IEMA and the Aboriginal communities are hampered by resource shortfalls. The 2009 SENES external review found a “lack of

25 That board member, Audrey Enge, is also the only one without a technical background in natural resources.
capacity within departments and organisations of the Aboriginal Society members to keep up with all the various projects and issues they are expected to track day to day” (p. 8-9). Meanwhile, limited community contact between IEMA and the Aboriginal communities “is related to [the Agency’s] available budget” (p. 9).

Finally, corporate funding of what is supposed to be an independent monitoring review agency raises major issues (O’Faircheallaigh, 2007). As O’Faircheallaigh writes, “it is hardly surprising that a company would be less than enthusiastic about funding an independent, public and vocal critic” (O’Faircheallaigh, 2007, p. 332). And from IEMA’s perspective, Kevin O’Reilly stated in an interview that it is “a difficult arrangement where you’re supposed to serve as the watchdog for them [BHP] but then you have to try to negotiate your budget with them” (K. O’Reilly, personal communication, November 6, 2009). The situation raises “significant issues” in relation to IEMA’s much-vaunted independence as there is a danger that BHP might attempt “to use the leverage provided by its funding role to influence the Agency’s activities or findings” (O’Faircheallaigh, 2006, p. 20). This has actually happened in the past. According to IEMA Chairman, Bill Ross: “The Agency has had problems with BHPB because the company has several times tried to interfere with the Agency’s independence. BHPB denied funding requests from the Agency because it does not agree with some of our activities” (IEMA, 2005, p. 1). These difficulties have triggered a mediation process on two occasions related to IEMA’s budget level, budget allocation, mandate and work plan.26 Although these disputes were resolved without the need for arbitration, their

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occurrence does highlight the dilemma created when “the watchdog asks the watched for funding” (Macleod Institute, 2000, p. 14).27

Summary

An examination of the historical and contextual factors for the Ekati case study reveals several opportunities and constraints for public participation as flagged by political process theory. The major “realignment bringing new groups to power” in the macro-political environment has been the increasing legal and political power of the region’s Aboriginal groups and the associated ongoing land claims process coupled with “a new willingness by mining companies to engage with Aboriginal groups” (O’Faircheallaigh, 2008, p. 67). This has spurred the rise of negotiated or “privatized” (Noble & Birk, 2011) environmental agreements and IBAs, which provide opportunities for increased participation of Aboriginal communities in the environmental management of projects “in ways that do not occur under existing regulatory regimes, which the agreements supplement rather than replace” (O’Faircheallaigh, 2007, p. 320). A major product of this negotiated agreement was the emergence of IEMA, an innovative “institutional provision for participation”.

Despite the watchdog group’s many successes in its technical functions, aspects of its institutional structure have affected the nature of its alliance with communities. In addition, the funding and capacity of the Agency itself has limited its potential as a deliberative institutional forum for environmental management. Finally, the technical and financial resources available to the Aboriginal communities are limited. Often

27 Indeed, EMAB, IEMA’s equivalent for the Diavik mine, is currently in dispute with the mine operator regarding funding (EMAB, 2010, p. 16-18).
communities turn to IEMA for direct representation; a function that the Agency is not mandated to fulfil. The combination of these factors has resulted in an institutional arrangement that fails to achieve the deliberative potential that appeared to be generated in 1996 when IEMA was created. While macro-political realignments supported the creation of a new institution with the potential for deliberative management, the details of that arrangement and the resources made available to IEMA and the Aboriginal communities have constrained that potential in significant ways. In many instances, the communities continue to struggle to be heard by the company.
Chapter 5: Richards Bay Minerals

This chapter presents the second case study, the Richards Bay Minerals titanium mine located on the coastal dunes of KwaZulu-Natal in South Africa. The first section contains a description of the mining project, some important contextual factors and a discussion of the evolving South African EIA regulatory regime. Next, in the section on environmental management at RBM, there is an account of the most significant EIA and public participation process undergone during the mine’s history: the St. Lucia proposal. Indeed, the St. Lucia EIA was the largest ever undertaken in South Africa garnering the most significant levels of public participation to that date. Included here is a discussion of more recent environmental management processes for the mine’s operations. Following the case study description is a critical analysis of how political opportunities and constraints have affected public participation and the deliberative potential of the project.

Case Study

Everyone has the right: to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development (The Constitution of the Republic of South Africa, Republic of South Africa, 1996, section 24).

The Richards Bay Minerals heavy mineral sands mining project, located on the eastern shores of South Africa, has been operating throughout the entire evolution of EIA in the country and throughout the massive political upheavals that marked South Africa’s
transition to democratic rule. Established in 1976 through a union of the Industrial Development Corporation, a Canadian producer of slag (QIT) and Union Corporation (later Gencor then Billiton), RBM gained rights to mine for heavy minerals in coastal dunes that extend 17 km in a 2 km-wide strip from just north of Richards Bay, an industrial harbour city on the subtropical Indian Ocean north of Durban in KwaZulu-Natal province. In 1985, the company acquired mining rights to additional ore reserves both north and south of the original lease deposit. The original lease is referred to as the Tisand lease area, while reserves acquired in 1985 are referred to as Zulti North and Zulti South. Today, RBM has grown to become the world’s largest titanium mine and is a significant economic force in the region, representing 50 percent of KwaZulu-Natal’s gross mining output and 3.5 percent of gross mining output nationally (Parliament of the Republic of South Africa, 2010). The company, operated by Rio Tinto plc (jointly owned by Rio Tinto and BHP Billiton), is one of the largest single mining operations in South Africa. Mining reserves are estimated to last around 20 additional years at current production rates (DME, 2008), with remaining ore reserves estimated to be in excess of 1.75 billion tonnes (November 2009 estimate) (Golder Associates, 2010). A current proposal to extend operations, if approved, will increase the life of the mine by about ten years (ibid.). The company employs some 1700 permanent staff, 80 percent of whom come from the local municipalities, and an average of 2000 contractors (RBM, 2007; Parliament of the Republic of South Africa, 2010). RBM is in fact the trading name for two registered companies: Tisand, responsible for the dune mining and mineral

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28 The RBM mining operation recovers heavy minerals ilmenite, rutile and zircon. Ilmenite is beneficiated at the RBM smelter to produce titania slag (1,040,000 tonnes per annum) and pig iron (550,000 tonnes per annum). The smelter also produces 250,000 tonnes of zircon and 100,000 tonnes of rutile each year. RBM’s share of the known world reserves of ilmenite, zircon and rutile are estimated to be 23.8%, 24.5% and 16.8% respectively (Golder Associates, 2010).
separation operations, and Richards Bay Iron & Titanium (RBIT), which is responsible for the smelting and beneficiation process at a nearby plant to produce titanium dioxide feedstock and pig iron.

All of RBM’s operations are located around Richards Bay in uThungulu District Municipality in the predominately Zulu province of KwaZulu-Natal (see Figure 4). Archaeological evidence indicates that people settled on the coastal dune cordon here as early as 300 to 400AD (Golder Associates, 2010). Today, RBM’s lease areas are located on the lands of four traditional authorities or rural “host communities”, as the company terms them (RBM, 2007) (see Figure 5). All of RBM’s four active dredge-mining plants are currently operating in the 37-km-long Zulti North lease area in Mbonambi Local Municipality where the rural communities of Sokhulu and Mbonambi are located. Also near Mbonambi is RBM’s large smelting operation. Only smaller-scale dry mining has commenced in the Zulti South lease area, which lies south of Richards Bay harbour in uMhlathuze Local Municipality where the Dube and Mkhwanazi traditional authorities are located. Full-scale dredge mining is not expected to commence there until 2015, although community development programs were first initiated in 1998. Much of the Tisand lease area is currently undergoing reclamation with some land “ready to hand back to the community” (M. Boshoff, personal communication, May 5, 2010). Figure 5 shows the locations of the four host communities in uThungulu District Municipality.

The Tisand and Zulti North lands are currently leased from South Africa’s Department of Land Affairs. However, the communities of Sokhulu and Mbonambi have validated land claims there in terms of South Africa’s Restitution Act. They are currently undergoing resolution, completion of which will see the transfer of land ownership. Zulti
South is leased from the Ingonyama Trust, which owns land throughout the province under the trusteeship of the Zulu king. This mining lease is not subject to land claims.

Figure 4. KwaZulu-Natal and uThungulu District Municipality, South Africa

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**Figure 5.** uThungulu District Municipality and local municipalities, South Africa

*Source:* Created by author.


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RBM extracts heavy minerals from coastal sand dunes through a dredge mining process. After vegetation and topsoil are removed, a large artificial pond is created in the dunes with water drawn from nearby Lake Nhlabane and the Umfolozi and Mposa rivers. A dredger and concentrator plant float on the pond, cutting into the dune face, which can range in height from 50 to 120 metres. The operation advances north along the coast at a rate of two to three metres per day. The slurry formed in the pond by the advancing mining plant is sucked up and pumped to the floating concentrator where the heavy minerals are separated from the sand using a gravity process before they are stockpiled for road transportation to the smelter site. On the shores of the Indian Ocean east of the mining operation and along Lake Nhlabane to the west, an “eco-strip” area where no mining occurs is left to protect marine and estuarine habitat and to stimulate rehabilitation. Behind the mining plant, sand tailings are shaped and contoured to resemble the original topography. The land is then concurrently rehabilitated or revegetated according to the mine’s Environmental Management Plan (EMP), based on land uses that existed at the commencement of mining operations. One third of the mined area is rehabilitated to natural coastal dune forest while the rest is revegetated mainly with exotic beefwood (*Casuarina equisetifolia*) plantations to support the local timber and charcoal industries (DME, 2008; M. Boshoff, personal communication, May 5, 2010; Williams & Steenkamp, 2006). The oldest rehabilitated areas are now 30 years old.

The RBM dune rehabilitation program for the regeneration of natural dune forests after mining has been extensively studied and is generally well regarded in the scientific literature (Wassenaar, van Aarde, Pimm, & Ferreira, 2005). With the support of RBM, the Conservation Ecology Research Unit (CERU) at the University of Pretoria has been
monitoring RBM’s dune rehabilitation program since 1991. Through dozens of independent research studies, the CERU Ecological Monitoring Program and the Ecological Restoration Research Program have found that RBM’s dune forest rehabilitation program has been largely successful in ecological terms (CERU, n.d.; Wassenaar & van Aarde, 2005). RBM is also working with the Council for Scientific and Industrial Research in partnership with local communities to identify a range of sustainable land uses for rehabilitated land prior to it being returned to communities after closure and reclamation (S. Bhengu, personal communication, May 7, 2010). The five-year program involves the establishment of an experimental farming area on previously mined dunes to test agriculture and forestry alternatives.

Despite the proximity to the city of Richards Bay, one of South Africa’s key industrial centres and the largest port by freight volume in Africa (Nel, Hill, & Goodenough, 2007), the region surrounding RBM’s operations is home to some of the poorest communities in the country. In a nation that already has one of the highest rates of measured inequality in the world, KwaZulu-Natal has South Africa’s highest HIV/AIDS rate while a third of the province’s population are living below the US$2 a day poverty line, two-fifths of the workforce are unemployed and there exists a legacy of extreme political violence, most recently in the run-up to the 1994 elections (Adato, Lund, & Mhlongo, 2007; May, Woolard, & Klasen, 2000; Thurlow, Gow, & George, 2009). Subsistence farming represents the main land use in the rural districts near RBM’s mining leases. Although much of the surrounding land is used for non-indigenous commercial timber production, little economic benefit from these plantations has accrued to the local population. Rather, industrial tree farms have been labeled
“green deserts” for their negative impact on local biodiversity and traditional land use practices (Karumbidza, 2006; Tewari, 2001).

Against this backdrop, RBM has become well known for its community investment and black economic empowerment initiatives. The company has been involved in local community development for the last 30 years focusing on agriculture, business development and job creation, arts and culture, education, health, HIV/AIDS, infrastructure development, sports and recreation, and safety and security (RBM, 2008). Some of these programs have included building and assisting rural schools (Figure 6); sponsoring adult literacy classes and skills development courses; constructing a computer training centre; supporting HIV/AIDS awareness programs; building rural clinics and providing health worker salaries; sponsoring agricultural shows and farmer training; and supporting community gardens. The company has become the primary agent of development in its rural operational regions (Kapelus, 2002).
In 2008, RBM became fully compliant with black empowerment targets in the South African Mining Industry Charter\textsuperscript{29} five years ahead of the 2014 deadline by signing a Broad-Based Black Economic Empowerment (BBBEE) agreement in which it agreed to sell a 26 percent stake to black investors and employees. The host communities of Dube, Mbonambi, Mkhwanazi and Sokhulu (with a combined population of 140,000 people) will each gain a 2.7 percent stake in joining seven separate business consortiums. Together they will acquire a 24 percent equity interest while about 1750 permanent RBM

\textsuperscript{29} The new Mining Charter for South Africa, approved October 2002, calls for 15 percent in five years and 26 percent in ten years of the mining industry to be turned over to black business, the contribution of black-owned companies in supply of goods and services, and equity employment in the appointment of management.
employees will hold 2 percent of the equity through an employee share participation scheme. Local communities are to earn 3 million Rand ($440,500 CDN) per year in dividends and corporate social investment spending, while RBM will also make one-off payments of 17.5 million Rand ($260,000 CDN) to each community’s trust on completion of the transaction. The deal represents the largest BBBEE transaction in KwaZulu-Natal to date. In addition, Nozalela Mineral Sands was established in 2004 as part of a shareholding agreement signed between Tisand (the mining operation of RBM) and the Dube and Mkhwanazi traditional authorities to mine the Zulti South lease area. The two traditional authorities were given an initial joint 5 percent ownership in the new company with an option to purchase a further 10 percent when the project reaches full production levels.

**EIA in South Africa**

Environmental rights and environmental justice, supported by the principles of accountability and transparency in governance, are enshrined in South Africa’s democratic Constitution (Republic of South Africa, 1996). The evolution of EIA in South Africa can be seen as part of the system of governance that emerged with constitutional democracy and signalled a shift from the centralized, technocratic approach of the apartheid era \(^30\) (Rossouw & Wiseman, 2004). This section outlines the conceptual origins and legislative evolution of EIA in South Africa from its early emergence as a voluntary procedure to the latest regulatory developments as recent as August 2010. This includes a focus on the separate development of environmental assessment for the country’s mining sector and current attempts to integrate the individual EIA processes.

\(^{30}\) 1948-1989.
In South Africa, voluntary undertaking of EIA commenced as early as 1971 (Wood, 2003), not long after the concept itself was first legislated in the United States. However, South Africa was slow to develop and institute formal procedures for environmental assessment (DEAT, 2004, p. 7). Despite numerous publications in the late 1970s and early 1980s on the subject of assessment procedures in South Africa (Beaumont, 1984; Blight, 1980; Boden, 1980; Cowen, 1980; Fuggle, 1979, 1980; Fuggle & Rabie, 1983; Glavovic, 1984; Hall, Cowen, Watson, Fulton, & Clarke, 1980; Patricios & Fuggle, 1975; Rabie, 1976, 1986; Refief & Bosman, 1984; Stauth, 1983; Zakrewski, 1984), as well as reference to EIA as a valuable aid to decision-making in a 1980 White Paper (Sowman, Fuggle, & Preston, 1995), mandatory formal requirements enforcing EIA only came into effect in September 1997 (Republic of South Africa, 1997). These formal requirements came in the form of EIA Regulations under the former Environmental Conservation Act (ECA) (Act 73) (Republic of South Africa, 1989). The earlier ECA did actually contain provisions to give EIA the force of law, but these had remained dormant until the institution of the 1997 regulations.

The basis for South Africa’s EIA system is the concept of Integrated Environmental Management (IEM), an approach that integrates environmental considerations into all stages of the planning and development process for policies, programmes, plans and projects, including post-impact assessment monitoring and management (Sowman et al., 1995). The concept, which built upon international experience with the application of EIA, first emerged in South Africa out of a 1989 procedural document from the Council for the Environment, an advisory committee to the minister of Environmental Affairs. A revised formulation of IEM was later widely
communicated in a series of six documents published by the Department of Environmental Affairs in 1992 (DEA, 1992). These guideline documents formed the basis of the increasing number of voluntary EIAs in the early 1990s (Avis, 1994) and were extensively used in South Africa into the next decade (Wood, 2003, p. 86).

IEM was considered an environmental evaluation procedure appropriate to the nation’s circumstances and grew, in part, out of the perceived failure of the expert/elitist approach to planning and decision-making in the apartheid era as well as the wider move toward participatory democracy ongoing in South Africa (Sowman et al., 1995). According to the Department of Environmental Affairs and Tourism (DEAT), “IEM provides an holistic framework that can be embraced by all sectors of society for the assessment and management of environmental impacts and aspects associated with each stage of the activity life cycle, taking into consideration a broad definition of environment and with the overall aim of promoting sustainable development” (DEAT, 2004, p. 2).

The term IEM sometimes refers to the stand-alone process of environmental impact assessment, although IEM is better understood in its more literal sense of providing a broader “way of thinking”, which has evolved into a set of underlying principles and a whole suite of environmental assessment and management tools that are aimed at promoting sustainable development (DEAT, 2004).31

Shortly after the government gazetted EIA regulations in 1997, the National Environmental Management Act (NEMA) (Act 107 of 1998) was published (Republic of

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31 EIA is but one of a number of IEM tools in South Africa. Other tools include: life cycle assessment, environmental auditing, environmental accounting, technology assessment, cumulative effects assessment, cost-benefit analysis, environmental economics, ecological and environmental footprinting, risk assessment, state of the environment reporting, indicators, sustainability analysis, strategic environmental assessment, eco-labelling, scenario analysis, sustainability reporting, environmental management systems, environmental policy, and environmental management plans (DEAT, 2004).
South Africa, 1998) and commenced on 29 January 1999. Rossouw and Wiseman (2004, p. 135) describe NEMA as “a framework law providing overarching principles for sustainable development that apply to all activities of the state”. The crafting of NEMA immediately followed the country’s first democratic elections and involved an elaborate national multi-stakeholder process from 1994-1997 known as the Consultative National Environmental Policy Process (CONNEPP). The result was new legislative and administrative requirements in NEMA based on democratic and participative principles (Rossouw & Wiseman, 2004).

The Act provides for “co-operative governance structures and networks, as well as integrated environmental management (IEM) and EIA procedures” (p. 135). Chapter 5, Section 23 of NEMA, 1998 provided the general objectives of IEM, while Section 24 outlined the specific assessment procedures to be implemented to give effect to these general objectives. According to this section, activities with a potential impact on the environment, socio-economic conditions, and cultural heritage that require authorization or permission by law and which may significantly affect the environment, “must be considered, investigated and assessed prior to their implementation” (Republic of South Africa, 1998, Section 24(1)). Procedures for this assessment had to “as a minimum” ensure the investigation of alternatives, cumulative effects, a “no implementation” option, public information and participation, and other factors.

The problem with the evolution of EIA procedure in South Africa to this point was, as Rossouw and Wiseman (2004, p. 138) point out, “the regulation and administration of EIA in South Africa preceded the national environmental policy process. The EIA regulations were promulgated in 1997 and enforced before the national
environmental law (for instance, NEMA) was enacted in 1998”. The concern was that the EIA system was then driven by administrative needs and “not by the principles for sustainable development, which emerged in NEMA” (ibid.). Perhaps in response to this type of critique, a review of the South Africa EIA system that commenced in 2000 resulted in the promulgation in 2006 of the new Regulations in Terms of Chapter 5 of NEMA, 1998 (DEAT, 2006a). When these new regulations came into effect on 3 July 2006, they replaced the EIA regulations that were promulgated in 1997 in terms of the Environment Conservation Act, 1989 and introduced new EIA provisions for all activities except those related to mining permits, licenses and permissions (more on this below).

These new provisions addressed some of the inadequacies of the 1997 regulations, including inefficiencies and inadequate provisions for public participation. In support of these new regulations, and expanding its Integrated Environmental Management Guideline Series, DEAT published a new series of guidelines (DEAT, 2005a, 2005b, 2006a, 2006b). In sum, July 2006 marks the beginning of the “new” NEMA EIA system, which replaced the “old” ECA system that ran from 1997-2006. Before 1997, EIAs were carried out on a voluntary basis. The subsequent National Environmental Management Amendment Act, 2008 (“NEM Amendment Act”) (Act 62) (Republic of South Africa, 2008a),

which was promulgated on 9 January 2009, came into operation on 1 May 2009 and made further amendments to some of the new NEMA EIA provisions.

The very latest EIA regulations came into effect on 2 August 2010, which signals the start of the official implementation process of a new regime. According to DEAT,

32 Other NEM Amendment Acts have been promulgated in 2002 (Act No. 56), 2003 (Act No. 46), and 2004 (Act No. 8). These Acts variously inserted or substituted definitions, provided for textual alterations, made further provisions to sections of the act, provided for the administration and enforcement of certain national environmental management law, and provided for the registration of environmental assessment practitioners.
now the Department of Water and Environmental Affairs (DWEA), the new revised regulations are the result of a “substantial consultative process” (DWEA, 2010). The new NEMA EIA 2010 regulations and listing notices, which were published by the Minister of Water and Environmental Affairs on 18 June 2010, replace the NEMA EIA regulations of 2006 and its associated listing notices. The new regulations, according to a DEAT (2010) press release, “signify an important step towards a more efficient and effective EIA system” and seek to “streamline the EIA process”.

EIA in South Africa, one of the tools of IEM, “Aims to predict both positive and negative environmental impacts of a proposed project and find ways to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers. This tool is designed to be project specific and site-specific, and not to be focused on strategic issues” (DEAT, 2004, p. 11). In terms of NEMA, EIA is meant to “provide the competent authority with adequate information to make decisions which ensure that activities which may impact negatively on the environment to an unacceptable degree are not authorized, and that activities which are authorized are undertaken in such a manner that the environmental impacts are managed to acceptable levels” (DEAT, 2005a, p. 2). Specifically, EIA Regulations in terms of NEMA are intended to ensure that:

- a developer/applicant is required to subject a listed activity to either the Basic Assessment or the Scoping and EIA\textsuperscript{33} process, depending on the nature of the listed activity;

\textsuperscript{33} In terms of the 2010 EIA regulations, the “full” EIA is now referred to as the Scoping and Environmental Impact Report (S&EIR) process.
- the applicant considers the environmental impacts of the proposed activity and considers alternatives and mitigation measures that will reduce those environmental impacts in an “objective manner”;

- the public is provided with a meaningful opportunity to understand and comment on the proposed activity;

- Interested and Affected Parties (I&APs) have the legal right to participate “effectively” in the EIA process; and

- the requirements for the management of impacts over the life cycle of activities are considered (DEAT, 2005a; EWT, n.d.).

Listed activities require Environmental Authorization from the Competent Authority (CA) before commencement. The CA for administration of EIA is the Minister for the Department of Environmental Affairs and Tourism (as of 2009, the Department of Water and Environmental Affairs (DWEA)) and the nine provincial departments of environmental affairs, although in most cases these powers are delegated to an official in the relevant department (DEAT, 2005a). If the Applicant is proposing a listed activity, they will be required to subject the proposed activity to an EIA. Depending on the type and scope of the activity, it will either be subjected to a Basic Assessment (Listing 1 activities) or to the more thorough Scoping and EIA Process (Listing 2 activities). See Appendices XII and XIII for outlines of the Basic Assessment and Scoping and EIA procedures.

In each scenario, the applicant is to appoint an independent Environmental Assessment Practitioner (EAP) (consultant) to manage the Application for Environmental Authorization on his or her behalf. The EAP determines which process to follow, which can include a request for exemption. Basic Assessments are applied to activities
considered less likely to have significant environmental impacts. The Basic Assessment Report is more concise, although these assessments still require public notice and participation, consideration of the potential environmental impacts of the activity, assessment of possible mitigation measures, and an assessment of whether there are any significant issues or impacts that might require further investigation. The more thorough Scoping and EIA Process is required for activities that are likely to have significant impacts that cannot be easily predicted. This process requires a Scoping Report and an EIA Plan of Study. The process culminates in the preparation and submission of a full EIA report including a draft Environmental Management Plan (EMP) to the CA. The final decision is made by the CA to either grant or refuse Environmental Authorization. This decision may be appealed by any affected person for consideration by the Appellant Authority, which may appoint an independent appeals panel. If the affected person is dissatisfied with the ruling of the Appellant Authority, the final avenue for appeal is the submission of a Review Application to the High Court. Many of the individual decision processes outlined above are subject to specific time limits.

When South Africa adopted mandatory EIA in 1997 in terms of the ECA, the list of activities requiring EIA notably excluded mining activities. The Department of Minerals and Energy (DME) had introduced their own set of environmental legislation in 1991 while voluntary EIAs were being conducted in various other sectors. A 1993 amendment of the Minerals Act included a set of guidelines for the creation of Environmental Management Programme Reports (EMPR) (Sandham, Hoffmann, & Retief, 2008, p. 702). EMPRs were to be prepared by each new mine for approval by the government and were to cover environmental impacts of a mine through to the granting
of a closure certificate by the government. Although supporters of the EMPR, including the DME, maintained that the system included full impact assessment and public consultation, critics argued that a system that allowed mining companies to draw up their own EMPRs and prescribe their own solutions for management of adverse ecological impacts was highly inferior to EIA procedure (Madihlaba, 2002). Companies could also determine the level of finance to be set aside for rehabilitation and closure and hide some of this information from public scrutiny while the DME could outright exempt an application from the obligation to submit an EMPR (Whyte, 1995). Bond (2002, p. 43) argues the “highly-constrained, self-regulatory” EMPR system was a “diluted form of EIA” that was “largely ineffective because the legal requirements at the time were less stringent than is currently the case, and were rarely enforced”.

EIA in the mining industry only became mandatory in 2004 when sections of the 2002 (Act 28) Minerals and Petroleum Resources Development Act (MPRDA) (Republic of South Africa, 2002) providing specific guidelines for the practice of EIA in the mining industry came into force. The MPRDA supersedes the 1992 Minerals Act. Although the 2006 Regulations in Terms of Chapter 5 of NEMA also excluded mining activities, NEMA does act as a framework for the new legislation. This has allowed other government departments, such as the Department of Minerals and Energy (DME), to promulgate separate sets of sectoral specific legislation, such as the MPRDA, which subjects mining and related activities to the environmental principles and the IEM objectives of NEMA (Du Pisani & Sandham, 2006). The MPRDA is “the primary statute regulating prospecting and mining in South Africa”. It includes multiple legislative objectives, such as equitable development, the expansion of opportunities for historically
disadvantaged persons and ensuring that the holders of mining rights contribute to the socio-economic development of their operating region, just as it has “strongly emphasized the need to give effect to the environmental right by ensuring that mineral resources are developed in an orderly and ecologically sustainable manner” (Humby, 2010). The regulations contained in the legislation are a vast improvement over the old EMPR system for mining and the EIA procedures mandated in terms of the MPRDA are “much closer to international norms for best practice EIA” (Sandham et al., 2008, p. 702). Under the MPRDA, all applicants for, or holders of mining rights must submit an Environmental Management Plan (EMP). The EMP must be based on an EIA report.

The evolution of a divided system has resulted in a situation where the EIA process is administered by DEAT (now DWEA) for all sectors except the mining industry, for which the DME (now the DMR) acts as the competent authority. Because the ministry also has traditionally been mandated to develop the mineral resources for the benefit of the national economy, the situation has resulted in the criticism that the department is acting as both “referee and player” within the mining context (Sandham et al., 2008, p. 702). The result has been a power struggle of sorts between the DMR and DEAT over the environmental authorization of mining activities. Under the current system, the DMR must approve the EMP (under the MPRDA) while DEAT approves the EIA (under NEMA).

Recent amendments to NEMA and the MPRDA have sought to bring this divided legislative system under one roof by incorporating mining into the mainstream NEMA EIA framework, while at the same time addressing concerns about the Department of Energy.

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34 In 2009, the DME split into the Department of Mineral Resources (DMR) and the Department of Energy.
Mineral Resources acting as the authorizing agency for mining projects. The NEM Amendment Act of 2008 seeks “to align environmental requirements in the Mineral and Petroleum Resources Development Act, 2002, with the National Environmental Management Act, 1998” (Republic of South Africa, 2008a), while the Mineral and Petroleum Resources Development Amendment Act, 2008 (“MPRD Amendment Act”) amended the MPRDA to also “align the Mineral and Petroleum Resources Development Act with the National Environmental Management Act, 1998 in order to provide for one environmental management system” (Republic of South Africa, 2008b).

A three-year process established for this transition by the NEM Amendment Act stipulates that 18 months after both amendment acts have been commenced, the Minister of Mineral Resources would be empowered to approve mining operations as the competent authority in terms of the NEMA EIA regulations. After another 18-month period, all mining authorizations would be ultimately transferred to the Minister of Water and Environmental Affairs. This arrangement would solve any apparent conflict of interest in the DME surrounding environmental authorizations. However, although the environment minister has commenced the Act she is responsible for, the Minister of Mineral Resources has yet to commence the MPRD Amendment Act. Therefore, the status quo remains in place, meaning that both the NEMA and MPRDA will continue to be implemented separately. As Michelle Boshoff, ecologist for RBM, explains it:

“We’ve got now two governing bodies. One is your Department of Mineral Resources and one is your Department of Environmental Affairs. So whenever we do an activity on the mine now, you have to look at both sets of legislation and you need to get authorization by both regulators. And each regulator’s got its own process… So for us now at this stage, we are reporting to two main regulators [to] make sure that everything is in line. Which is time consuming…
You’re sitting with two government departments that don’t want to share responsibility (M. Boshoff, personal communication, May 5, 2010).

News reports suggest that the mining industry is opposed to the transfer of regulatory powers to the DWEA (Burger, 2010; Wait, 2009), while the opposition Democratic Alliance has accused the Minister of Mineral Resources with deliberately holding up the process (Morgan, 2010). Perhaps, as Rossouw and Wiseman charged in 2004 (p. 136), the Department of Minerals and Energy (now DMR) is continuing to resist integration and co-operation created by NEMA by protecting its core functions of both regulating and monitoring mining activities from interference by DEAT (now DWEA).

Environmental Management of the RBM Mine

Richards Bay Minerals has been in operation since the earliest developments of voluntary EIA in South Africa in the 1970s. However, the focus of this case history begins with the first major non-voluntary EIA that the project was subjected to in the early 1990s, around the same time that EIA was becoming institutionalized in the country and during the tumultuous transition to democracy. Unlike the original Ekati EIA, the St. Lucia proposal ended with a rare rejection of the mining project by the responsible authority. Operations continued on RBM’s other lease areas nearby, but the EIA is significant for the levels of public participation it generated. Moreover, the experience had an important impact on the way RBM engaged with the public going into the future. More recent EIAs and other ongoing environmental management programs are also discussed here.

In August 1989, RBM operator QIT submitted an application to mine the dunes of a wildlife reserve on the eastern shores of Lake St. Lucia, Africa’s largest estuarine
system situated 240 km north of Durban and just north of the company’s existing operations. The move sparked what became a highly contentious and protracted EIA, the largest of its kind ever in South Africa (Walker, 2008) and one of the largest on the continent (Kruger et al., 1997). Public reaction to the mining proposal rapidly grew into the Save St. Lucia Campaign, what became the largest, longest running and ultimately most successful environmental campaign ever seen in the country (Walker, 2008, p. 121). The campaign and the eventual blockage of the RBM mining proposal was a key component in the creation of the iSimangaliso Wetland Park (formerly Greater St. Lucia Wetland Park) in 1999, South Africa’s first UNESCO World Heritage Site and a nature reserve covering 324,441 ha of marine and non-marine areas and stretching 190 kilometres along the country’s east coast from south of St. Lucia town north to the Mozambique border (iSimangaliso Wetland Park Authority, 2008). The conservation area is the largest remaining wetland on the continent, home to a number of endangered species and contains the highest vegetated dunes in the world, including some of the last indigenous forests in South Africa (Briggs, 2008).

Between 1969 and 1976, despite growing conservation interest in the Lake St. Lucia area, the Department of Mineral and Energy Affairs granted several mining companies, including RBM, prospecting rights in three lease areas on the lake’s eastern shores (CSIR, 1993b). Competing land uses in the region, including exotic species forest plantations, conservation management by the Natal Parks Board as well as missile testing by the military, had already contributed to forced indigenous population removals under apartheid law that began in the 1950s and would continue through to the early 1980s (Walker, 2008). By the time of the 1989 RBM proposal to mine a portion of the reserve,
Lake St. Lucia had already been proclaimed a “wetland of international importance” in terms of the international Ramsar Convention.\(^{35}\) It took little time before vociferous nation-wide opposition to the proposal and RBM’s initial self-directed environmental impact report (under the controversial EMRP procedure outlined earlier) forced the de Klerk government to institute a full EIA with public participation beginning in September 1989. Before the end of the year the controversy drew global attention and a petition to halt the project had gathered more than 250,000 signatures from around the country. Eventually garnering 500,000 signatures, including Nelson Mandela’s, the petition to stop the mining of St. Lucia was later described as the largest ever compiled in South Africa (iSimangaliso Wetland Park Authority, 2008). A broad alliance of some 200 environmental organizations united under the Save St. Lucia Campaign in what became, as one media article labelled, “South Africa’s most heated ecology controversy ever” (Koch, 1989).

The St. Lucia EIA process examined two proposed land use alternatives, an ecotourism-only option and RBM’s mining with nature-based tourism option. It was an EIA “designed to fit international norms” and was “the first occasion on which a comprehensive implementation of the draft policy for IEM was followed in South Africa” (Kruger et al., 1997, p. 24). The process involved the assembly of an EIR with a series of expert technical studies, involvement of the public through representative institutions as well as direct participation, and a recommendation by a Review Panel with a final decision delivered by the new democratic government of South Africa (Kruger et al.,

\(^{35}\) The Ramsar Convention on Wetlands is an inter-governmental treaty that provides the framework for the conservation and sustainable use of wetlands and associated resources. South Africa is a founder member of the convention, which was signed in the Iranian town of Ramsar in 1971. The St. Lucia Estuary System was proclaimed a Ramsar Wetland in 1986 (Briggs, 2008, p. 13-14).
After the EIA was initiated in September 1989, specialist reports were compiled and circulated to leading interested and affected parties (I&APs) during August and September 1991 with their comments compiled and addressed in a 1992 report (CES, 1992). A draft environmental impact report (EIR) was then released for a 14-week public review period in March 1993. The Final Report of the EIR along with a comment response report was issued in August (CSIR, 1993a, 1993b, 1993c). A Guardian (London) news article concluded that the assessment report “comes to no clear conclusion whether mining of heavy metals should be allowed, but it is likely to be seen as favouring mining” (Beresford, 1993). However, after reviewing the EIR and holding public hearings during November 1993, the Review Panel concluded in their December 1993 report that no mining should be allowed in the Greater St. Lucia area. In an environmentally progressive decision, among the reasons the government-appointed Panel ruled against the mining option was the unacceptable damage mineral development would cause to the area’s “unique and special sense of place” (Review Panel, 1993). The recommendation came shortly before the country’s first democratic elections and it was not until March 1996 that the final cabinet committee decision by the new ANC government confirmed that no mining should be allowed and the ecotourism-only option should be pursued.

In the end, the St. Lucia EIA “was arguably the largest and most expensive EIA” ever undertaken in South Africa at the time (Weaver et al., 1996, p. 105). It included the publication of four volumes of EIA reports amounting to 3,349 pages of text (CES, 1992; CSIR, 1993a, 1993b, 1993c), what one reporter described as “by far the biggest and most controversial work ever carried out in South Africa” (Koch, 1993). The entire process
“became the first EIA in Africa which involved a significant level of public participation” (Kruger et al., 1997, p. 24) including the identification of 135 interested and affected parties, 331 public submissions and the publication of 1,155 media articles over the three-year procedure (Weaver et al., 1996, p. 105-106).

Despite the size and scope of the St. Lucia EIA, the lengthy process by and large “ignored the local communities affected, which were consulted in only a very cursory way toward the end of the process” (Whyte, 1995). Only one of the 14 “lead interested and affected parties” had a black membership.36 This was the National Union of Mineworkers (NUM), which was chosen to represent RBM mineworkers and did not participate actively in the EIA (Walker, 2008, p. 122). It was not until late 1992 that the Review Panel requested that the public participation process for the EIA be extended to include a “Rural Liaison Programme” to facilitate the involvement of “rural communities” (Walker, 2008, p. 124). However, this program was weighted towards already defined constituencies, namely black employees of RBM, and problematic in terms of its representativeness (ibid.).

After the final decision to ban mining was made, “while green groups around the country [were] popping champagne corks, rural villagers living near the proposed mining site on the outskirts of St. Lucia [were] outraged” (Koch, 1996). As one local village resident stated:

We don’t know if we would have benefited from mining. We don’t know if we would benefit from tourism and conservation. All we know is that nobody has

36 The other lead I&APs were the Chamber of Mines, Department of Environmental Affairs, Department of Mineral and Energy Affairs, Natal Parks Board, Natal Provincial Administration, Regional Development Advisory Committee (Region E), Richards Bay Minerals, KwaZulu Bureau of Natural Resources, Wildlife Society, Zululand Environmental Alliance, Department of Water Affairs and Forestry, Pinechem (Pty) Limited, and St Lucia Town Board (CSIR, 1993c).
spoken to us. Now that we have applied to get our land back, they are telling us what to do with it (Raymond Nkuni, quoted in Koch, 1996).

More recent EIAs for RBM’s ongoing expansion and operations have been significantly less controversial garnering nowhere near the same sort of public attention or participation seen during the St. Lucia assessment. RBM is in possession of an approved EIA and EMP for its current mining operations. Four recent proposals by RBM requiring additional EIAs in terms of NEMA and the MPRDA have included the construction of a tailings treatment plant; a proposed electricity cogeneration facility at the smelter complex; the construction of servitudes for new Zulti South mining operations; and an application to amend the existing EMP, increase the mining surface area and introduce dry mining methods at the northern lease areas.

The public participation process for these applications is a statutory requirement in terms of Section 56 of the NEMA EIA regulations, which outlines the requirements for the notification and involvement of all potential stakeholders and I&APs (see Appendix XIV). These processes are in support of the NEMA principle whereby

The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation and participation by vulnerable and disadvantaged persons must be ensured. Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge, including traditional and ordinary knowledge (Republic of South Africa, 1998, Section 2(1)(f-g)).

RBM’s environmental assessment practitioner (EAP) for the application to amend the EMP describes the public participation process as
not only a statutory requirement, but a process that should lead to a joint effort by stakeholders. Stakeholders should represent all relevant interests and sectors of society, technical specialists and the various relevant organs of state who work together to produce better decisions than if they had acted independently, and better implementation of decisions through stakeholders “owning” the process (Golder Associates, 2010, p. 55).

Public participation, however, has been minimal in these recent assessment processes. For example, during a public meeting held on 20 November 2008 by the project’s EAP to introduce the proposal and the EIA process to I&APs, only four members of the public attended (Arcus GIBB, 2009).

Instead, the bulk of ongoing community engagement and consultation happens through RBM’s Public and Community Relations Department. In its interactions with local communities, RBM focuses on local participation, a “bottom-up” approach to development and the notion of “partnership” in its consultations (Kapelus, 2002, p. 289). The company’s “stakeholder engagement guiding principle” reads as follows:

RBM is committed to systematically identifying and engaging with stakeholders to achieve sustainable and lasting relationships. This takes the form of integrating stakeholder relations with business value planning to enhance corporate reputation through ongoing and regular communication, information sharing and capacity building (RBM, 2008, p. 8).

RBM has aligned its efforts with municipal and regional Local Economic Development and Integrated Development Plans. Recently, the company has “intensified its efforts to engage with key stakeholders, in particular its host communities” (ibid.). The main feature of this engagement has been community participation in the BBBEE transactions described earlier. Regular stakeholder participation also occurs through “structured community engagement” programs. These include bi-weekly or monthly meetings.
between the Public and Community Relations Department’s “community liaison specialists” and local municipalities, the Traditional Councils of the four host communities, as well as committees representing unemployed youths from Mbonambi and Sokhulu. Sicelo Bhengu, manager in the Community Relations department, describes the work of the community liaison specialists to “communicate, consult [and] engage with the communities as issues arise”:

They go and table the issues that we would be doing or projects that we would be doing. They ensure that they get the buy-in, they ensure that they clarify the matters and they ensure that there’s enough adequate information. They ensure that the local leadership also communicates to the subjects… But sometimes there are areas where you’re just not informing; you consult them. You ask them to give you input. There [are] as well areas where you not only need the input of the community, you actually engage them. Because they really have to give you directed advice and guidance in a specific matter… [And] part of the community liaison specialist [work] is actually to go and give feedback on some of the issues that would have been raised by the community (S. Bhengu, personal communication, May 7, 2010).

In this way, the most significant point of ongoing interaction and community stakeholder participation happens through RBM’s CSR programs and the work of its Public and Community Relations Department. However, local media and even RBM’s own non-independent sustainable development reports allude to “strained relations” and other difficulties experienced with local host communities near active mine lease areas. In 2005, RBM reported, “Instances of intimidation and damage to company property have hampered ongoing discussions” (RBM, 2005, p. 10, 2006, p. 20, 2008, p. 8; D. Savides, personal communication, May 3, 2010). In November 2009, a national government committee visited uThungulu district municipality focusing in part on
“determining the socio-economic and social responsibility commitment of Richards Bay Minerals” as well as nearby Exxaro mine (Parliament of the Republic of South Africa, 2010, p. 1449). They found that the local communities were “aggrieved” about a number of issues, including strained company-community relations, water resource pollution and depletion, the lack of meaningful local business procurement, dissatisfaction with BBBEE deals, as well as “a lack of consultation by the company” (p. 1456) (see Appendix XV for a full outline of community concerns). The dissatisfaction has culminated in recent years in protest marches, demonstrations, road blockades by members of Mbonambi and Sokhulu communities, and a “subsequent breakdown in engagement” (RBM, 2008, p. 8).

What led RBM’s community affairs CSR program to emerge today as the most significant site of public participation in the mine’s operations, especially in contrast to the massive public engagement that characterized the St. Lucia EIA process? And despite the promise of cooperation, partnership and a deliberative forum, why is there a “breakdown in engagement”? Macro-political realignments, new institutions, resources and alliances can explain the political processes that have impacted on public participation in EIA and EIA follow-up for the project. First, the case is explained in terms of major realignments that, at least temporarily, brought new groups to power. Next, the analysis moves toward new institutional provisions for participation with a focus on the evolution of CSR as an institution for public participation in environmental decision-making. Finally, the nature of alliances and availability of resources for participation are explored, which helps explain the problematic nature of stakeholder engagement through CSR initiatives.
Realignments

Major socio-political realignments all occurring around the same time had an enormous impact on RBM, its engagement with the public and citizen participation in environmental decision-making for the mine. Around the early 1990s, the major relevant forces at work included South Africa’s tumultuous transition to democracy and the related paradigm shift in conceptions of the environment and environmental management. These forces coalesced around the time of RBM’s proposal to mine on the eastern shores of Lake St. Lucia and led to the surge in public participation during that EIA. The experience would have a lasting impact on RBM’s community engagement strategies. However, the period of invigorated public involvement in environmental decision-making in South Africa proved short-lived as the government’s commitment to neoliberalism gave rise to the dominance of private sector interests. Voluntary, industry-directed corporate social and environmental responsibility initiatives have since become the principal forum for stakeholder involvement in environmental management at RBM and throughout the country.

RBM operator QIT made an application to mine the dunes on the eastern shore of Lake St. Lucia in August 1989, around the same time massive socio-political changes were ushering in the post-apartheid transition period. By February of the next year, President F.W. de Klerk had unbanned extra-parliamentary organizations such as the African National Congress (ANC) and the South African Communist Party and Nelson Mandela was released from prison. All the while the conservation campaign for St. Lucia was growing. Closely related to the democratic transition was a paradigm shift in environmental principles in South Africa toward sustainability as well as a more
participatory approach to environmental management guided by principles of environmental justice (Acutt, 2003; McDonald, 2002). By the dawn of the democratic era, this shift was manifest in the multi-stakeholder crafting of NEMA during the CONNEPP process and embodied in the 1996 Constitution, as quoted at the beginning of this chapter. During the transition period, the new Minerals Act (50 of 1991) was also introduced that better addressed environmental considerations.

These forces were coalescing around the time RBM submitted its proposal and initial EIA for mining at St. Lucia. A “hitherto embryonic environmental movement” (Cock & Fig, 2001, p. 1) that was gaining confidence and expertise turned its significant attentions to that proposal. The vociferous opposition forced government to institute the comprehensive EIA process, which garnered massive attention and participation. Jim Phelps is the former chairperson of the Zululand Environmental Alliance (ZEAL), the principal environmental group involved in the EIA. He described the feeling of the time in this way:

In retrospect, looking at the passion I and others threw into the St Lucia struggle related to a moment in [South Africa’s] history. There was so much excitement and hope for the future in transition from 1989-1996. People really believed they could make a difference (J. Phelps, personal communication, May 18, 2010).

The land claims and land restitution processes of the time described by Walker (2008, p. 122-127) even opened up an avenue for participation of some rural residents in the EIA process although black communities were still effectively shut out of the process.

Despite early signs of hope during the St. Lucia EIA process, the democratic era has been characterized by inadequate realization of the participatory clauses of NEMA and an erosion of the spirit of CONNEPP. Additional realignments that have led to this
disappointment include the widespread demobilization of a previously strong and vibrant civil society post-apartheid, a lack of political will to implement a participatory environmental approach and the associated enhanced influence of the private sector over the state. Key activists in environmental initiatives have withdrawn after a peak between 1990 and 1994 (Cock & Fig, 2001; J. Phelps, personal communication, May 18, 2010). Meanwhile, the adoption of neoliberal policies by the post-apartheid government “has increasingly left the allocation of resources to the market and eroded the tradition of mass political participation” (Cock & Fig, 2001, p. 1). The result, as Wood (2003, p. 86) describes it, is the EIA system legislated by the 1997 NEMA Regulations has become little more than “a pastiche” of the uniquely South African guiding concept of IEM. Despite numerous regulatory enhancements that have vastly improved the legislative framework since that time, the risk remains that implementation challenges will continue to render these regulations “really poetry more than anything else” (Cock & Fig, 2001, p. 7). According to Fig (2005, p. 616):

While pious principles are embodied in the democratic constitution and elaborated in...NEMA, in practice it is still extremely difficult for citizens and communities to exercise their rights... Politically, the environment is still something of a Cinderella sector, given very little attention by the ruling party, and there is a general failure to integrate environmental concerns into mainstream planning, development and macroeconomic policy.

With the growing pre-eminence of neoliberalism from the mid-1990s onward, weak government implementation and the demobilization of civil society, corporate-led initiatives for community engagement would become the primary institutional forum for public participation. This new reality coupled with the St. Lucia experience had an
important effect on RBM, the development of its CSR strategy and how they would engage local stakeholders going forward.

Institutions

CSR\textsuperscript{37}, or corporate social investment, as it is more commonly referred to in South Africa (Fig, 2005), has long been a part of RBM’s mandate. However, the macro-level political realignments described above explain how these corporate initiatives have grown so predominant in post-apartheid South Africa. This section outlines the evolution of CSR as it grew into the primary institution for public participation in RBM’s operations.

There are three stages in the evolution of RBM’s social investment programs as an institutional provision for public participation. First, early community involvement was limited, ad hoc and/or symbolic in nature. Investment in the local community began during the apartheid years out of necessity. Black employees living in poorly serviced townships or on rural reserves required housing, health services and educational facilities that the government was not about to provide. Also, RBM had to comply with international requirements such as the Sullivan Code, which was launched in 1977 and was aimed at improving human rights practices of American companies\textsuperscript{38} operating in South Africa (Hamann, 2004; Mangaliso, 1997).

\textsuperscript{37} CSR is a broad concept, open to a wide variety of interpretations, which can restrict its usefulness as an analytic tool. However, following Blowfield and Frynas (2005, p. 503), it is useful to think of CSR as an umbrella terms for a variety of theories and practices all of which recognize: “(a) that companies have a responsibility for their impact on society and the natural environment, sometimes beyond legal compliance and the liability of individuals; (b) that companies have a responsibility for the behaviour of others with whom they do business (e.g. within supply chains); and (c) that business needs to manage its relationship with wider society, whether for reasons of commercial viability or to add value to society”.

\textsuperscript{38} At the time, Quebec-based RBM shareholder QIT was a fully owned subsidiary of Kennicott and later of Standard Oil of Ohio, both American companies.
In the second stage in RBM’s CSR agenda, community investment became more systematic with the establishment of the company’s specialist Government and Public Affairs Department (now Public and Community Relations Department) in 1986. The department’s mandate was “walking a tightrope between government (both national and regional), the American/Canadian shareholders, the South African shareholders and the local communities” (O’Brien, 1998, p. 164). There was a spike in the budget for CSR programs at this time (O’Brien, 1998) and when British mining company RTZ (later RTZ-CRA, then Rio Tinto) purchased a 50 percent stake in the company in 1989, they brought their own corporate commitment to CSR. The practice became firmly entrenched in RBM’s corporate identity and operations. However, little or no public consultation in the company’s CSR activities took place up to this stage and development initiatives were by and large implemented in a top-down fashion.

In an era of international sanctions against South Africa, RBM believed that “the less people heard about the company the better” (O’Brien, 1998, p. 190). Despite the growth in community investment in the waning years of apartheid, the company kept a decidedly low profile, including in its CSR activities. All of this changed with St. Lucia, which represents a turning point in RBM’s CSR strategy and the third stage in its evolution. As demonstrated by O’Brien (1998, p. 190):

When the company tried to convince its detractors of the fact that RBM would invest in the underprivileged St. Lucia communities...as it had done in the Richards Bay area, few people were aware of what had been done. Once a Public Relations Department was established and an advertising and publicity campaign launched it was too late. The tide of public opinion had swung firmly against RBM and ultimately the battle for St. Lucia was lost by RBM.
As Kapelus (2002, p. 288) writes, the reaction surrounding the St. Lucia proposal and the international attention it garnered “demonstrated to the company that undertaking community social investment was good for business and reputation management”. The company began to pay more “systematic attention” to CSR, recognizing the necessity in professionalizing and marketing its community initiatives.

The experience, as some key informants have validated, also had a significant effect on the manner in which RBM engaged the public going forward. When asked about the influence of the St. Lucia process on the company, Dave Savides, editor of the largest local newspaper and long-time observer of EIA processes in the region, responded

I think in retrospect, they learnt that they were stupid to make a fight of it; that their confrontational approach was not good at all and I think today they would do it totally different (D. Savides, personal communication, May 3, 2010).

Post-St. Lucia, the company began to work more closely with the local community through cooperation and participation (Kapelu, 2002).

Major initiatives have included early compliance with BBBEE requirements and local community development initiatives described above. In addition, public participation in environmental management occurs largely through the company’s Community Relations department and CSR strategies. RBM’s approach to CSR is very much consistent with recent iterations of the CSR concept, which includes a “combination of social concerns, such as individual and collective employee rights; local community rights; and environmental concerns, within the ‘sustainable development’ theme” (Ong, 2008, p. 188). As such, CSR has acted as the most significant driver of ongoing public participation in the project’s environmental planning and management. In addition to macro-political realignments that gave rise to CSR, resource and alliance
factors can further explain its predominance. Moreover, the reasons why this arrangement can prove problematic can also be attributed to the nature of, or lack of, alliances with rural communities in the case study as well as where resource opportunities and constraints are located.

**Alliances and Resources**

Rio Tinto and its subsidiaries such as RBM have expressed their commitment to social and environmental responsibility “primarily in the language of relationships with and responsibilities to local communities” (Kapelus, 2002, p. 290). Through RBM’s Community Relations office and the work of their community liaison specialists, CSR initiatives provide the most significant potential site of public participation and deliberation regarding ongoing environmental matters at the mine. This development, and why it might be problematic, can be further explained in terms of the nature of that engagement, inadequate resources at the state level, weak capacity in the communities, and the dearth of independent elite allies for rural black stakeholders.

When a community’s best forum for engaging a corporation is through CSR programs and their most important “ally” in stakeholder negotiations is that corporation’s community liaison officer, a number of problematic tensions arise. These potential shortfalls of CSR programs as they relate to community stakeholders and environmental responsibility are well known. Kapelus’ (2002) research has related them specifically to RBM. First, there is the basic tension between maximizing shareholder value and a company’s obligations to stakeholder groups. Kapelus (2002, p. 290) argues that Rio Tinto and RBM “seem to make assumptions that deny the existence of any tension”:
At the moral theoretical level…they tend to assume a harmony between good ethics and good business. At the practical level, they also seem to assume that the company is committed to the values that it expresses and that their managers can act upon them. [However,] these assumptions contrast with those of their detractors (ibid.).

There is also the complex and controversial task of defining the notion of community and who to engage. Kapelus (2002, p. 291) goes on to argue that, “In the case of RBM…we have seen how a Rio Tinto subsidiary adopts a notion of community that tends to restrict the firm’s obligations”. There are related tensions surrounding the question of representation in the community. According to Kapelus, RBM supposes a “limited and undifferentiated concept of community and the legitimacy of local elites”, which enables the company to claim that their projects “are promoting the form of development that the local community wants and that they are fulfilling their responsibilities” (p. 291). Although RBM’s detractors may have a different story to tell, the company “can always point to its support from the community (as Rio Tinto/RBM has defined it)” (ibid.).

In this arrangement, prevailing resource imbalances between the company and rural communities are not addressed. Those imbalances continue to exacerbate tensions inherent in CSR initiatives. Resource and capacity limitations at the state level also contribute to these tensions, hampering the implementation of participatory environmental management principles contained in NEMA. Although NEMA was meant

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39 In one example, a local newspaper story on a 200-person protest march against RBM reports on this sort of tension. In the article, a spokesperson for protest organizers claimed RBM had not adhered to local employment commitments. He identified a rift between the job seekers and local community leadership and alleged that although RBM had worked through the Traditional Authority, “this has been undermined by unfair tactics and ‘bribery’” (quoted in Savides, n.d.).
to be a driver for participatory democracy in environmental decision-making, its integrative EIA process requires the sort of strong institutions and institutional cooperation that has eluded South African authorities. As Rossouw and Wiseman (2004, p. 135) state, “the NEMA principles provide a ‘Rolls Royce’ model of participative democracy that has been difficult to achieve in practice”. Although new environmental laws and policies implemented since 1998 “have been globally praised as progressive and socially just, there is little experience or capacity to implement the principles contained therein” (Oelofse, Scott, Oelofse, & Houghton, 2006). There are persistent capacity shortages in provincial government departments who are designated responsible authorities and in local governments responsible for integrating environmental management tools into planning and development (D. Cyrus, personal communication, May 18, 2010; Duthie, 2001; Fig, 2005, p. 606; Rossouw & Wiseman, 2004). This problem is aggravated in the mining industry as the DMR actively resists forms of integration and cooperation created by NEMA (although there is hope of change here). Power and resources continue to reside with the corporations and, as Fig’s (2005, p. 616) evidence suggests, “there are few grounds for confidence that firms will carry out a more equitable post-apartheid transformation voluntarily”.

As a result of community and civil society resource constraints, weak policy implementation and inadequate government capacity, the practice of EIA and follow-up monitoring in South Africa and at RBM remains a largely closed, technical pursuit. Despite the opportunities policy innovations were meant to produce, environmental management in the country continues to reflect “weak ecological modernization” (Oelofse et al., 2006). In interactions with RBM, communities have few technical allies
in this process beyond company-appointed environmental assessment practitioners (consultants), who are coordinated by RBM’s community liaison officers. The mining project is not a major concern of the more influential environmental activists and nongovernmental organizations in the nearby suburbs of more affluent Richards Bay. Many seem satisfied with the community social investment work and dune rehabilitation program that RBM does so well to advertise (S. Camminga, personal communication, May 4, 2010; D. Savides, personal communication, May 3, 2010). As David Savides puts it, “Richards Bay Minerals is kind of out of town… They’re out of town so they don’t have a lot of effect on the populations” (referring to the populations in Richards Bay’s more affluent suburbs) (D. Savides, personal communication, May 3, 2010).

Summary

This historical narrative of the case of Richards Bay Minerals and analysis of political processes surrounding the mine reveals a few of the multitudinous external factors that influence public participation in EIA and parallel processes for the project. A number of important realignments have altered the political landscape over time, offering new opportunities for public participation. These include the transition to democracy, regulatory changes and the emergence of CSR. As South Africa transitioned to the post-apartheid era, the entrenchment of neoliberal policies cemented CSR as the most significant driver of corporate-community relations. At RBM, the major EIA at St. Lucia further developed the company’s notion of CSR and its brand of cooperation and partnership with local communities. These company-led initiatives remain the primary forum for engagement between the mine and local citizen stakeholders due in part to resource and capacity constraints faced by government regulators. The nature of RBM’s
relationship with rural communities coupled with these political constraints has resulted in company-community relationships that now fall far short of any deliberative arrangement. The significant mobilization around the St. Lucia EIA in the 1990s has not resulted in the emergence of any long-term commitment to more deliberative environmental decision-making.
Chapter 6: Comparisons and Conclusions

In the opening chapters I outlined how deliberative democratic norms have become the new normative standard for public participation in EIA and decision-making in other policy spheres. These standards have, however, been criticized on a number of fronts. Questions have been raised about the lack of empirical evidence supporting deliberative democratic claims while many theorists have challenged the approach’s insufficient treatment of power, politics and the value conflicts that are an inevitable part of environment and society dilemmas. Simply creating new deliberative institutions and practices for EIA will not solve these tensions. Furthermore, inclusion in procedures of consultation and participation can conceal the way real world structural inequalities bias deliberative procedures in favour of more powerful agents (Young, 2001, p. 671). Therefore, if we are interested in the actual potential of what Dryzek calls “incipient discursive designs”, our analyses must be fully cognizant of the real and unavoidable political context within which such processes unfold. This requires detailed, historical explorations of actual cases of environmental decision making that account for “radical uncertainty, pluralism, complexity, and social inequality” (Chilvers, 2008, p. 157).

The case studies presented here represent such an attempt. The analysis avoided a prescriptive, evaluative approach to the study of potentially deliberative arrangements, instead focusing attention on the myriad of complex political factors that can impact upon public participation and the emergence of any form of deliberative environmental decision-making. The focus is on “what happened” in each case study, exploring the historical, regulatory, social, political and other contexts at work in EIA and parallel
processes. Utilizing a framework for analysis borrowed from social movement theory, some of the important contextual factors impacting public participation were highlighted. The result in each case study is a critical narrative that demonstrates the role of political opportunities and constraints in raising or lowering the influence of public participation on decision-making in potentially deliberative processes. This concluding chapter highlights some points of confluence between the two case studies that reveal the difficulties and complexities that must be addressed if we are interested in achieving deliberative inclusive processes for EIA and natural resource management.

Macro-level political realignments, institutional provisions for participation, the availability of elite allies and the nature of those alliances, access to external resources, relative strengths and weaknesses in capacity; all of these exogenous factors combine and impact upon what can be referred to as stakeholder “power”. The story revealed in each case study shows how macro-level political realignments gave rise to new institutional provisions for participation. These institutional innovations offered the potential for deliberative decision-making, but additional factors such as the distribution of resources and the formation of alliances have impinged upon this potential. In both case studies, although to varying degrees, the sort of power and resource imbalances that characterize market relations are not overcome through EIA and other environmental public participation processes. Although there have been more opportunities offered by the political processes, particularly in the Ekati case study, both projects have failed to produce the kind of public engagement that would satisfy the hopes or live up to the promises of deliberative process. Why has this been the case?
Political process theory first points our analysis toward macro-political realignments throughout a project’s history that can provide opportunities for or constrain public participation. In Canada’s Northwest Territories, the ongoing process of Aboriginal land claims and growing recognition of the political and legal rights of the country’s First Nations peoples empowered the bargaining and negotiation position of community stakeholders involved in the original Ekati EIA. In South Africa, an important window for extended public participation opened up during the democratic transition period at the same time RBM was instituting a major EIA for the St. Lucia project. However, the major socio-political realignments that created a context favouring significant public mobilization around the environment were scaled back in the post-apartheid era.

Unique institutional arrangements for public participation can be seen as a product of these macro political realignments. In the Ekati case, realignments resulted in the establishment of innovative institutional provisions (a negotiated Environmental Agreement and an independent watchdog agency) that were to facilitate ongoing participation in environmental management at the mine and act as a guarantor of the gains made during negotiations. In South Africa, the realignments that brought new groups to power quickly faded giving rise to the predominance of voluntary corporate-led strategies under the banner of CSR. The main institutional innovation in the RBM case, therefore, was the creation of a Community Affairs Department within the mining company. Although in Canada, IEMA represents a much more progressive and independent provision for public participation, in both cases the institutions fall well short of the normative ideals of deliberative democracy.
This inadequacy can be further explained in terms of the nature of the alliances built by these institutions, the availability of resources and the relative capacity of their community partners as well as government regulators. In the Canadian case, the specific rules governing the operation of IEMA affect the ability of the Agency to act as a community ally. Compounding this limitation, resource and capacity issues for both the Agency and Aboriginal communities affects the prospects for deliberative decision-making. In South Africa, the rules of public engagement are primarily dictated by RBM. Although the primary vehicle for democratic environmental decision-making should have been the country’s promising new regulatory framework, resource and capacity constraints in government (and the lack of political will) have made implementation and enforcement inadequate.

In both Canada and South Africa, these narratives tell the story of the persistent power imbalance between mining companies and rural communities. As such, the deliberative potential of institutional responses is circumscribed in both case studies. There is evidence of incremental improvement, but “power” by and large remains with the companies who in many cases can refuse to act or continue to dictate the terms of their response to the concerns of communities. The result is an ongoing process of bargaining and negotiation between unequal partners. Ekati’s independent monitoring agency provides an arena for deliberative decision-making, but not the redistribution of community resources necessary to level the playing field. The primacy of CSR initiatives in South Africa allows the firm itself to dictate the arenas for deliberation and make its own choices on whether or not to redistribute power. The key moment of community strength came early in the process for both cases. In the NWT, the initial EIA for Ekati
saw significant public mobilization and gains made. In South Africa, the moment of expanded public participation came around the time of the democratic transition and the St. Lucia EIA. However, moving forward, the nature of alliances and the inadequacy of resources in the EIA follow-up period have meant that communities and companies are not placed on an equal footing.

In both cases, macro-political events created moments for innovations. However, the institutional responses generated structures that only partially realigned conventional relationships. For Ekati, the potential of IEMA as a vehicle for participation was perhaps overestimated, although the institution continues to seek improvement. In South Africa, the realignment proved temporary. In the end, these incipient discursive designs remain inchoate, failing to transcend the resource and power differentials between parties. The primacy of economic development and neoliberal rationality has been reinscribed on these processes. Despite some gains, powerful companies continue to set the agenda and communities still negotiate from positions of relative weakness.

**Limitations of the Study**

Although I am attempting to answer Michel Foucault’s “little question” of “what happened”, Foucault’s research method required “the space and possibilities of a full-scale monograph to unfold his materials” (Flyvbjerg, 1996, p. 388). By choosing a few areas of focus through casing, due in a large part to time and space limitations, this analysis obviously cannot fully capture the multitude of complex political processes at work in the case studies. Instead, the hope has been to provide a modest broadening of the scope of inquiry into EIA in order to provide an overview of some of the important political opportunities and constraints for public participation in actual case studies.
Another intention was to demonstrate the utility of the political opportunity framework, which could be used in future inquiries to illuminate many additional factors in the political context of public participation in EIA.

A study of this nature would have benefited greatly from in-depth interviews with a much wider range of stakeholders, particularly with members of the communities impacted by the mining projects. Unfortunately, due to time and resource constraints as well as the difficulty obtaining information from actors involved in some processes that took place upwards of 20 years ago, more firsthand accounts of public involvement with the EIA process and other negotiations were not possible to elicit. However, this is often the case in studies of political opportunity and it is not necessarily seen as a crippling limitation for the findings of the study. As Kriesi (2004, p. 68) outlines, “information about the beliefs of the actors involved in episodes of contentious politics tend to be difficult to come by, which induces the practitioners of the political process approach to make some simplifying heuristic assumptions about the behavior of the actors involved”. This often means assuming the rationality principle: “that political actors do what they think will allow them to attain their goals under the given opportunity set”. If the researcher has a good idea of the actors’ goals and has uncovered their opportunity set, scientific observers can predict what the actors will do by “vicarious problem solving” – “by putting themselves ‘vicariously’ in the same situation and figuring out what they would do if they were there” (ibid.). For processes that have unfolded over a period of roughly two decades, reconstruction of events must always be partial. More time and more resources would certainly unearth greater detail, although the major lines of analysis would not be significantly altered.
Bibliography


Kennett, S. (2000). Meeting the intergovernmental challenge of environmental assessment. In P. C. Fafard, & K. Harrison (Eds.), *Managing the environmental union: Intergovernmental relations and environmental policy in Canada* (pp. 107-131). Kingston, ON: School of Policy Studies, Queen’s University.


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Appendices

Appendix I: Request to Participate in Research

REQUEST TO PARTICIPATE IN RESEARCH

Participation, Negotiation and Contention in Environmental Assessment: Comparative Studies from the North and South

You are asked to participate in a research study conducted by Morgan Boyce a Masters student working under the supervision of Dr. John Devlin and Dr. Nonita Yap, from the School of Environmental Design and Rural Development at the University of Guelph in Canada. This research is being supported financially through the Canadian Social Science and Humanities research Council (SSHRC).

PURPOSE OF THE STUDY
We are seeking to understand the impact of public participation in environmental assessment (EA) processes. Studies of EA implementation have often been critical of the degree and effectiveness of public participation. It is suggested that EA often fails to effectively involve the public. But what of cases where the public has been systematically involved in the EA process? Does public involvement result in more environmentally and socially benign outcomes and how are those impacts brought about? The impact of public participation in EA can be judged on two distinct grounds. First, on the basis of the modifications made in the project design as the project moves from the initial proposal to final approval and second, on the basis of the outcomes of the project during and after implementation. Project design changes can only be judged effective if the changes are actually implemented.

This research project will be examining examples of public participation in environmental assessment processes in three countries: Canada, Brazil, and South Africa. For South Africa we have selected the Richards Bay Minerals mine for our study.

PROCEDURES
We would like to ask you about your involvement with the environmental assessment and follow-up of the Richards Bay Minerals mine project and about the consequences you have observed. The interview will take no more than one hour. We can meet at any place of your choosing and at a time that is convenient for you.

POTENTIAL BENEFITS TO PARTICIPANTS AND/OR TO SOCIETY
Participants in this study will receive a copy of the final study report in electronic format (if requested). Also, this report may be used in policy-making that may improve public participation in Environmental Assessment.

This research will contribute to the on-going debate over the importance of public participation to EA and to the articulation of the emerging concept of environmental governance. It will be of interest to EA practitioners, to political scientists and political sociologists interested in contentious politics, to interested publics concerned that all voices be heard in the EA process, and to policy makers concerned to maximize social and environmental benefits from resource extraction projects.

Your participation in the research is completely voluntary. There will be no payment or other compensation for your participation.

CONFIDENTIALITY
You have the right to complete confidentiality. Participants who request confidentiality will not be identified by name in any report(s). Only the members of the research team will have access to your identifying information and information provided during the interview will only be identified by a number. It may be helpful to mention some identifying information (such as gender, age, occupation, ethnic background, and your role/religion/interest to the project) in the reports. If you request confidentiality but are willing to permit these to be mentioned in
study documentation and report(s) please check the appropriate box below:

☐ I waive confidentiality and agree that my name may be used in public reports.
☐ I request confidentiality but agree that the following information may be mentioned
  ☐ Age
  ☐ Occupation
  ☐ Ethnic Background
  ☐ Gender
  ☐ Role/Relation/Interest in the project under study
☐ I request complete confidentiality

We would like to tape record our interview with you. The interview will be transcribed and then the recording will be erased. We will retain the transcript of your interview for future comparison with other cases but all identifying information will be removed.

PARTICIPATION AND WITHDRAWAL
You are completely free to choose whether to participate in this interview or not. If you agree to be interviewed you may withdraw at any time without consequences of any kind. If your request at any time we will not include your interview data in any reports. You may also refuse to answer any questions you don’t want to answer.

RIGHTS OF RESEARCH PARTICIPANTS
You may withdraw your consent at any time and discontinue participation without penalty. You are not waiving any legal claims, rights or remedies because of your participation in this research study. This study has been reviewed and received ethics clearance through the University of Guelph Research Ethics Board. If you have questions regarding your rights as a research participant, contact:

Dr. John Devlin, School of Environmental Design and Rural Development, University of Guelph, N1G 2W1, CANADA Telephone: +1.519.824.4120 ext. 52575; Email: jdevlin@uoguelph.ca Fax: 519-766-1686

Or

Research Ethics Coordinator, University of Guelph, 437 University Centre, Guelph, ON N1G 2W1, CANADA Telephone: +1.519.824.4120 ext. 56605; Email: saudd@uoguelph.ca; Fax: +1.519.821.5236

SIGNATURE OF RESEARCH PARTICIPANT
I have read the information provided for the study “Participation, Negotiation and Contention in Environmental Assessment: Comparative Studies from the North and South” as described herein. My questions have been answered to my satisfaction, and I agree to participate in this study. I have been given a copy of this form.

<table>
<thead>
<tr>
<th>Name of Participant (please print)</th>
<th>Signature of Participant</th>
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Appendix II: Key Informant Interviews

The following interviewees waived confidentiality.

**Ekati Case Study**

John Bekale  
Senior Aboriginal Affairs Advisor, BHP Billiton

Helen Butler  
Senior Advisor, Closure and Reclamation, BHP Billiton

Tim Byers  
Vice-Chairperson, Independent Environmental Monitoring Agency, Appointed by Akaitcho Treaty 8 (Łutselk’e First Nation and Yellowknife Dene First Nation).

Ryan Fequet  
Regulatory Mining Specialist, Wek’eezhii Land and Water Board

Bruce Hanna  
Fish Habitat Biologist, Department of Fisheries and Oceans Canada

Gavin More  
Manager, Environmental Assessment, GNWT Environmental and Natural Resources

Kevin O’Reilly  
Executive Director, Independent Environmental Monitoring Agency; Former Research Director of the Canadian Arctic Resources Council (CARC)

Kim Poole  
Board of Directors, Independent Environmental Monitoring Agency, Appointed by BHP Billiton, Government of the Northwest Territories and Government of Canada (in consultation with the Aboriginal governments)

Kathy Racher  
Regulatory Director (Mining), Wek’eezhii Land and Water Board

Bill Ross  
Chairperson, Independent Environmental Monitoring Agency, Appointed by BHP Billiton, Government of the Northwest Territories and Government of Canada (in consultation with the Aboriginal governments)

**RBM Case Study**

Sicelo Bhengu  
Manager, Public and Community Relations, Richards Bay Minerals

Michelle Boshoff  
Ecologist, Richards Bay Minerals

Sandy Camminga  
Chairperson, EIA Subcommittee and Founding Member, Richards Bay Clean Air Association (RBCAA)

Digby Cyrus  
Head, Department of Zoology and Director, Coastal Research Unit of Zululand, University of Zululand

Andrew Denton  
General Manager, Strategy and Business Development, Richards Bay Minerals

James Phelps  
Former Chairman, Zululand Environmental Alliance (ZEAL)

Dave Savides  
Editor, Zululand Observer
## Appendix III: Four Types of EA Under the CEAA

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
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| **Self-Directed EAs**                         | **Screening** - used for a wide range of projects, will vary in time, length and depth of analysis, depending on the circumstances of the proposed project, the existing environment, and the likely environmental effects. May require only a brief analysis and report, or can be more rigorous.  
**Class Screening** - a special type of streamlined EA for projects not likely to cause significant adverse environmental effects.  
There are two types of class screenings, which provide a generic assessment of all projects within a class.  
**Model class screening** - RA uses information contained in a model report and prepares individual screening reports for projects within the class to account for location-specific or project-specific information.  
**Replacement class screening** - No location-specific or project-specific information is needed.  

1. **Screening** - (including class screening) accounts for the vast majority of federal EAs.  

2. **Comprehensive Study** - for large projects having the potential for significant adverse environmental effects or that may also generate public concerns. Can be referred to a mediator or review panel by the MoE early in the process.  

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<th>Category</th>
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| **Independent EAs**                          | **Mediation** - a voluntary process of negotiation in which an independent and impartial mediator, appointed by the MoE, helps interested parties resolve their issues. Can be used to address all aspects of an EA or in combination with an assessment by a review panel.  
**Review Panel** - appointed by the MoE to review and assess a project with likely significant environmental effects or where public concerns warrant it.  

*The responsible authority (RA) is the federal authority whose actions or powers trigger the environmental assessment of a particular project. Most federal departments or agencies have decision-making authority for projects and have developed their own EA procedural guidance. Coordination regulations clarify the nature of the necessary cooperation between RAs.*

Compiled by the author. *Source: CEAA, 2003*
Appendix IV: Mackenzie Valley Regulatory Agencies

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<th>Preliminary screening and the regulation of land and water</th>
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<td>- Sahtu Land and Water Board</td>
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<td>- Wek’éezhii Land and Water Board</td>
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<td>- Mackenzie Valley Land and Water Board</td>
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<td>- Government of the Northwest Territories</td>
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<td>- Indian and Northern Affairs Canada</td>
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<td>- Independent panels established by the Mackenzie Valley</td>
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<td>Environmental Impact Review Board</td>
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<td>- Wek’éezhii Renewable Resource Board</td>
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<th>Land Use Planning</th>
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<td>- Gwich’in Land Use Planning Board</td>
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<td>- Sahtu Land Use Planning Board</td>
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Appendix V: Preliminary Screening Steps Under the MVRMA

Early Consultation [sec. 5.2]

Developer Submits Application [sec. 5.3], If an authorization is required, is the development:

• required for national security?
• a response to an emergency?

Notify Other Agencies and MVEIRB [sec. 5.5]

• Other preliminary screeners
• First Nations
• Governments
• NGOs

List potential impacts [sec. 5.6]

• ecological, social, and economic measures
• potential biophysical effects
• related permits
• waste disposal methods
• equipment to be used
• fuels and spill contingency plan
• potential socio-economic effects
• restoration plan
• purpose
• period of operation
• application identification

Determine Completeness of Application [sec. 5.4]

• Yes
• No

Complete

Incomplete

No Referral

Perform Might Test [sec. 5.7]

• Might development have a significant adverse impact on the environment?
• Might the development cause public concern?
• Preliminary Screening Decision [sec. 5.8]

Other Referrals [sec. 5.9]

• to Review Board by local government, GTC, SSI, or federal/territorial government or MVEIRB orders environmental assessment "notwithstanding"
• Proceed to authorizations
• Refer to MVEIRB for environmental assessment

Coordination with other screeners [sec. 5.5.1]

Source: MVEIRB, 2004, p. 9
Appendix VI: Major Steps in EA Under the MVRMA

Development is referred by preliminary screener or other party

Environmental Assessment Start-Up [sec. 3.5]
- Public is notified of Environmental Assessment
- Participants identified
- Public registry is opened [sec. 3.7]
- Transboundary issues identified [sec. 3.6]

Review Board conducts:
- Development scoping [sec. 3.8] (defining the limits of the development); and
- Issues scoping [sec. 3.9] (identifying important issues on which to focus the Environmental Assessment)

Terms of Reference and Work Plan are produced [sec. 3.10]

Developer produces Developer’s Assessment Report [sec. 3.11] according to the Terms of Reference, including:
- Description of development and setting
- Summary of consultations
- Impact predictions and mitigations
- Significance

Environmental Impact Review

Conformity Check [sec. 3.12]

Deficiency statement issued

Developer responds

Technical Review [3.13]
- Coordinated by Review Board Staff
- Reviewers submit comments in prescribed format

Information requests [3.14] issued

Response
- Information provided

Pre-hearing Conference [3.15] held

Review Board holds hearings [3.15]

Review Board deliberates and produces Report of Environmental Assessment [3.17]

Consultations

Minister of INAC (and responsible ministers/NEB if necessary) issues decision [3.18]

Development proceeds to permitting without mitigations

Development proceeds to permitting with mitigations

Joint review under CEAA

Development proposal is rejected

Source: MVEIRB, 2004, p. 23

Note: Section numbers in square brackets “[ ]” correlate to sections in the EIA Guidelines and not the MVRMA
Appendix VII: Major Steps in the EIR Process Under the MVRMA

Development is referred by Review Board

1. Environmental Impact Review Start-Up [sec. 4.4]
   - Public is notified of EIR
   - Transboundary issues identified
   - Board appoints panel members, Chair and manager
   - Public participation process
   - Participant Funding
   - Public registry is opened

2. Board prepares Panel’s Terms of Reference (including overall scope) [4.5]

3. Review Panel conducts further scoping (within its Terms of Reference) [4.6]

4. Panel produces developer’s Terms of Reference and Work Plan [4.6]

5. Developer produces Environmental Impact Statement [sec. 4.6] according to the Terms of Reference including:
   - Description of development and setting
   - Summary of consultations
   - Impact predictions and mitigations
   - Environmental consequences

Conformity Check [sec. 4.6]

Deficiency statement issued

Developer responds

Technical Review [4.6]
   - Coordinated by staff
   - Reviewers submit comments in prescribed format

Information requests issued

Information provided

Pre-hearing Conference [4.6] held

Review Panel holds hearings [4.6]


Consultations

Minister of INAC (and responsible ministers/NEB if necessary) issues decision [4.7]

Development proceeds to permitting without mitigations

Development proceeds to permitting with mitigations

Development proposal is rejected

Note: Section numbers in square brackets “[ ]” correlate to sections in the EIA Guidelines and not the MVRMA.
Appendix VIII: Principal Steps in the Initial Ekati EA Process

<table>
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<tr>
<th>Date</th>
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<tbody>
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<td>9 December 1994</td>
<td>Environmental Assessment Review Panel appointed</td>
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<tr>
<td>9 December 1994</td>
<td>Project description issued by BHP</td>
</tr>
<tr>
<td>23 January 1995</td>
<td>Operational procedures issued by the Panel</td>
</tr>
<tr>
<td>31 January 1995</td>
<td>Draft guidelines for the preparation of an EIS issued by the Panel</td>
</tr>
<tr>
<td>14 March - 8 April 1995</td>
<td>Scoping meetings held in eight NWT communities to obtain comments on draft EIS guidelines</td>
</tr>
<tr>
<td>23 May 1995</td>
<td>Panel issued final guideline for the preparation of the EIA and requested specific information from government</td>
</tr>
<tr>
<td>7 July 1995</td>
<td>Intervenor funding decision announced by the CEAA</td>
</tr>
<tr>
<td>24 July 1995</td>
<td>EIS submitted by BHP and the 90-day review period commenced</td>
</tr>
<tr>
<td>1 August 1995</td>
<td>Responses to the panel’s government information request received from the federal government and the GNWT</td>
</tr>
<tr>
<td>23 October 1995</td>
<td>EIS public review period concluded (written submissions received from 26 parties)</td>
</tr>
<tr>
<td>27 October 1995</td>
<td>Panel issued draft procedures for public hearings for public comment</td>
</tr>
<tr>
<td>22 November 1995</td>
<td>Panel announced that the EIS was sufficient to commence planning for the public hearings, but also requested additional information from BHP on specific issues</td>
</tr>
<tr>
<td>13 December 1995</td>
<td>Panel announced the schedule for public hearings and issued the final hearing procedures</td>
</tr>
<tr>
<td>19 December 1995</td>
<td>Additional information received from BHP</td>
</tr>
<tr>
<td>22 January - 23 February 1996</td>
<td>Eighteen days of public hearings held in nine NWT communities (75 written submissions and approximately 260 presentations)</td>
</tr>
<tr>
<td>21 June 1996</td>
<td>Panel report issued</td>
</tr>
<tr>
<td>8 August 1996</td>
<td>Government of Canada accepts virtually all of the Panel’s recommendations, clearing the way for the project to enter the final regulatory processes</td>
</tr>
</tbody>
</table>

Source: CIRL, 1997, p. 11-12
Appendix IX: The Ekati Environmental Management Framework

Environmental Impact Report – 3 Years

<table>
<thead>
<tr>
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<th>Environmental Agreement</th>
<th>Fisheries Authorization (Five)</th>
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<td>Air Quality Monitoring (AQMP)</td>
<td>Panda Diversion Channel Monitoring</td>
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<td></td>
<td>Surveillance Network Monitoring (SNP)</td>
<td>Land Use Monitoring - Reclamation</td>
<td>Nero-Nema Monitoring</td>
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<td>Waste Rock and WRSA Seepage Monitoring</td>
<td>Land Use Monitoring - Archaeology</td>
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<td></td>
<td>Aquatic Effects Monitoring (AEMP)</td>
<td>Wildlife Effects Monitoring (WEMP)</td>
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<td></td>
<td>Traditional Knowledge Monitoring</td>
<td>Environmental Baseline Monitoring</td>
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<td>Environmental Management Plans:</td>
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<tr>
<td></td>
<td>- Interim Closure and Reclamation Plan</td>
<td>- Air Quality Management and Monitoring Plan</td>
<td>- Sable, Pigeon and Beartooth Compensation Plan</td>
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<td></td>
<td>- Reclamation Research Plan</td>
<td>- Materials Management Plan</td>
<td>- Desperation Carrie Compensation Plan</td>
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<td>- Drawdown Plans</td>
<td>- Traffic Management Plan</td>
<td>- Panda, Koala, Misery, Fox 1, Alexis and Leslie Compensation Plan</td>
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<td></td>
<td>- Wastewater and Processed Kimberlite Management Plan</td>
<td>- Aquatic Life Management Plan</td>
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<td>- ARD Geochemical Characterization Plan</td>
<td>- Adaptive Management Plan</td>
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<td>- Waste Rock and Ore Storage Management Plan</td>
<td>- Quarry Management Plan</td>
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<td>- Closure and Reclamation Plan</td>
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<td>- Archaeology Management Plan</td>
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<td>- Environmental Awareness Plan</td>
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<td>- Construction Phase Management Plan</td>
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<td></td>
<td>- Operating Environmental Management Plan</td>
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Source: BHP Billiton, 2009a, p. 4-2
Appendix X: Article II of the Ekati Environmental Agreement

ARTICLE II
STATEMENT OF PURPOSE

2.1 Purpose This Environmental Agreement is intended to be a legally binding agreement which provides for Project-related environmental matters additional to such matters governed by legislation, regulations and Regulatory Instruments and for the establishment of and the identification of roles of the Monitoring Agency, in order to achieve the following purposes:

(a) to respect and protect land, water and wildlife and the land-based economy, essential to the way of life and well-being of the Aboriginal Peoples;

(b) to facilitate the use of holistic and ecosystem-based approaches for the monitoring, management and regulation of the Project;

(c) to provide advice to BHP to assist BHP in managing the Project consistent with these purposes;

(d) to maximize the effectiveness and co-ordination of environmental monitoring and regulation of the Project; and

(e) to facilitate effective participation of the Aboriginal Peoples and the general public in the achievement of the above purposes.

2.2 Consistency with Purpose The Parties agree to carry out their responsibilities under this Agreement and the Regulatory Instruments consistent with the purposes in Section 1.1 and in ways which:

(a) fully consider both traditional knowledge and other scientific information;

(b) apply adaptive management principles making use of the best available information and technology;

(c) promote the development and implementation of Environmental Protection Measures designed to maximize Environmental Quality to the extent reasonably practicable; and

(d) apply the Precautionary Principle.

(Source: Canada, et al., 1997, Article II)
Appendix XI: Article V of the Ekati Environmental Agreement

ARTICLE V
INDEPENDENT ENVIRONMENTAL MONITORING AGENCY

5.1 Establishment Canada, the GNWT and BHP agree that there shall be established, within ninety (90) days of the date of this Agreement and in accordance with Section 4.7 of this Agreement, a body to be called the Independent Environmental Monitoring Agency (the “Monitoring Agency”). The Monitoring Agency shall be established as a non-profit organization under the Societies Act, R.S.N.W.T. 1988, c. S-11, and operate at arms length from, and independent from, BHP, Canada and the GNWT.

5.2 Mandate The mandate of the Monitoring Agency shall be, in respect of the Project:
(a) to provide an integrated approach to achieve the purposes in Article I;
(b) to serve as a public watchdog of the regulatory process and the implementation of this Agreement;
(c) to compile and analyze available relevant Environmental Quality data, in order to review, report, or make recommendations concerning:
   (i) the environmental effects monitoring program respecting short-term, long-term and cumulative impacts, carried out by BHP pursuant to this Agreement;
   (ii) government compliance monitoring reports and BHP self-assessment reports pursuant to Regulatory Instruments and this Agreement;
   (iii) Environmental Plans and Programs;
   (iv) Annual Reports and Environmental Impact Reports;
   (v) monitoring, regulatory and related management programs and activities of Canada and the GNWT; and
   (vi) the integration of traditional knowledge and experience of the Aboriginal Peoples into Environmental Plans and Programs;
(d) to participate as an intervenor in regulatory and other legal processes respecting environmental matters;
(e) to provide an accessible and public repository of environmental data, studies and reports relevant to the Monitoring Agency’s responsibilities;
(f) to provide programs for the effective dissemination of information to the Aboriginal Peoples and the general public on matters pertaining to the Monitoring Agency’s mandate;
(g) to provide an effective means to bring to BHP and governments the concerns of Aboriginal Peoples and the general public about the Project and the monitoring and regulation of the Project; and
(h) to participate as an intervenor, as appropriate, in the dispute resolution process under this Agreement.

5.3 Term The Monitoring Agency shall exist until full and final reclamation of the Project site is completed in accordance with the requirements of all Regulatory Instruments and the terms of this Agreement and completion of any and all post-closure monitoring and maintenance required in connection with the Project.

5.4 Composition
(a) The board of the Monitoring Agency shall consist of seven (7) members and the members, who shall not act in representative capacity, shall be appointed as follows:
   (i) the Aboriginal Peoples shall each appoint a member for a total of four (4) members, and
   (ii) BHP, Canada and the GNWT shall jointly and in Consultation with the Aboriginal Peoples, appoint three (3) members who shall not be employees of any of the parties.
(b) The members shall appoint a chairperson and a vice-chairperson from among the members.
(c) Terms of appointment and selection of officials and similar matters such as remuneration and conflict of interest shall be governed by the Monitoring Agency's by-laws.

5.5 Reporting and Accountability

(a) The Monitoring Agency shall report annually and, as appropriate, shall submit other reports on its findings and recommendations to BHP, the Minister and the GNWT. All reports of the Monitoring Agency shall be available to the Aboriginal Peoples and the general public.

(b) Each of Canada, the GNWT and/or BHP, as the case may be, shall:
   (i) give full and serious consideration to the reports and recommendations of the Monitoring Agency;
   (ii) implement those recommendations of the Monitoring Agency that it or they consider appropriate; and
   (iii) respond to the Monitoring Agency with its or their written reasons for not accepting the recommendations that are not deemed appropriate.

5.6 Funding

(a) BHP shall during the term of this Agreement (irrespective of whether the Core Budget shall have been established in accordance with Section 4.6(c)) provide adequate financial resources to the Monitoring Agency to carry out its responsibilities.

(b) For each of the first two (2) years after establishment of the Monitoring Agency the Core Budget shall be four hundred and fifty thousand ($450,000) dollars, which shall be funded as follows:
   (i) for each of the first two years after establishment of the Monitoring Agency, BHP shall provide three hundred and fifty thousand ($350,000) dollars to fund the Monitoring Agency;
   (ii) for the first year after establishment of the Monitoring Agency, Canada shall provide one hundred thousand ($100,000) dollars to fund the Monitoring Agency and thereafter Canada shall have no further obligation to provide funding to the Monitoring Agency; and
   (iii) for the second year after establishment of the Monitoring Agency, the GNWT shall provide one hundred thousand ($100,000) dollars to fund the Monitoring Agency and thereafter the GNWT shall have no further obligation to provide funding to the Monitoring Agency.

(c) For the third (3rd) year and for each subsequent year the following provisions shall apply to the establishment of the Core Budget:
   (i) The Monitoring Agency shall prepare a work plan for each year which will include a Core Budget and a review of the prior year's expenditures;
   (ii) BHP and the Monitoring Agency shall meet to discuss such work plan and recommended Core Budget and shall establish a Core Budget based on the work plan;
   (iii) In the event that BHP and the Monitoring Agency cannot agree on a Core Budget they shall consult with Canada and the GNWT; and
   (iv) In the event that Canada, the GNWT, BHP and the Monitoring Agency cannot agree on the Core Budget, the matter shall be referred to the dispute resolution process provided for in Article XIV of this Agreement.

(d) Once determined, the Core Budget shall be established for 2 years unless the Monitoring Agency requests and Canada, the GNWT and BHP agree to a shorter or longer term.

(e) In addition to the Core Budget, BHP may provide additional funding to the Monitoring Agency for research and monitoring activities based on proposals submitted to BHP by the Monitoring Agency for which funding is not available in the Core Budget. BHP shall in good faith review and consider proposals submitted by the Monitoring Agency for additional funding and shall provide written reasons to the Monitoring Agency, Canada and the GNWT if any request for funding is not accepted by BHP.

5.7 Transitional Provisions BHP, Canada and the GNWT and the Aboriginal Peoples shall
establish the constitution and by-laws of the Monitoring Agency in accordance with the terms of the Protocol Agreement.

5.8 **Information and Cooperation** Each of Canada, the GNWT and BHP shall co-operate with the Monitoring Agency and provide the Monitoring Agency with such information and assistance that such parties are reasonably able to provide and which is required for the Monitoring Agency to carry out its mandate.

(*Source: Canada, et al., 1997, Article V*)
Appendix XII: Basic Assessment Procedure in South Africa

Compiled by the author. Sources: M. Boshoff (Ecologist, Richards Bay Minerals) (personal communication, May 5, 2010); DEAT (2006a); and EWT (n.d.).
Appendix XIII: Full Scoping and EIA Procedure in South Africa

Full Scoping & EIA

EAP submits completed Application form and relevant documents to the CA

Steps taken after submission Application form

EAP submits Scoping Report as well as all relevant documentation to CA

CA receives and considers Scoping Report and EIA Plan of Study

Steps in preparation of full EIA Report and Draft EMP

The Report is either accepted, referred for specialist review, or amendments are requested

CA decision on the Application

EAP must conduct basic public participation process

EAP must give written notice of the proposed application/project to any organ of state which has jurisdiction in respect of any aspect of the activity

EAP must open and maintain a register of all I&APs

EAP must consider all objections and representations received from I&APs during the public participation process

Subject the application/project to scoping

Prepare a Scoping Report, including a Plan of Study for the EIA

Give all registered I&APs an opportunity to comment on the Scoping Report and Plan of Study

Accept Scoping Report and advise EAP to proceed with the tasks contemplated in the Plan of Study

Request the EAP to amend Scoping Report or Plan of Study

Reject the Scoping Report of Plan of Study. Opportunity to amend and resubmit

EAP prepares EIA Report and Draft EMP for proposed activity

EAP gives all I&APs an opportunity to comment on the EIA Report

EAP submits EIA Report and I&APs comments to CA

Grant Authorization in respect of all or part of the activity

Refuse Authorization in respect of all or part of the activity

Notify Applicant of the decision as well as provide written reasons for the decision

Compiled by the author. Sources: M. Boshoff (Ecologist, Richards Bay Minerals) (personal communication, May 5, 2010); DEAT (2006a); and EWT (n.d.).
Appendix XIV: Regulations in terms of Chapter 5 of NEMA

Public participation process

56. (1) This regulation only applies where specifically required by a provision of these Regulations.

(2) The person conducting a public participation process must take into account any guidelines applicable to public participation and must give notice to all potential interested and affected parties of the application which is subjected to public participation by –

(a) fixing a notice board at a place conspicuous to the public at the boundary or on the fence of –
   (i) the site where the activity to which the application relates is or is to be undertaken; and
   (ii) any alternative site mentioned in the application;

(b) giving written notice to –
   (i) the owners and occupiers of land adjacent to the site where the activity is or is to be undertaken or to any alternative site;
   (ii) the owners and occupiers of land within 100 metres of the boundary of the site or alternative site who are or may be directly affected by the activity;
   (iii) the municipal councillor of the ward in which the site or alternative site is situated and any organisation of ratepayers that represents the community in the area;
   (iv) the municipality which has jurisdiction in the area; and
   (v) any organ of state having jurisdiction in respect of any aspect of the activity;

(c) placing an advertisement in –
   (i) one local newspaper; or
   (ii) any official Gazette that is published specifically for the purpose of providing public notice of applications or other submissions made in terms of these Regulations; and

(d) placing an advertisement in at least one provincial newspaper or national newspaper, if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or local municipality in which it is or will be undertaken: Provided that this paragraph need not be complied with if an advertisement has been placed in an official Gazette referred to in subregulation (c)(ii).

(3) A notice, notice board or advertisement referred to in subregulation (2) must –

(a) give details of the application which is subjected to public participation; and

(b) state –
   (i) that the application has been or is to be submitted to the competent authority in terms of these Regulations, as the case may be;
   (ii) whether basic assessment or scoping procedures are being applied to the application, in the case of an application for environmental authorisation;
   (iii) the nature and location of the activity to which the application relates;
   (iv) where further information on the application or activity can be obtained; and
   (v) the manner in which and the person to whom representations in respect of the application may be made.

(4) A notice board referred to in subregulation (2) must –

(a) be of a size at least 60cm by 42cm; and

(b) display the required information in lettering and in a format as may be determined by the competent authority.

(5) If an application is for a linear or ocean-based activity and strict compliance with subregulation (2) is inappropriate, the person conducting the public participation process may deviate from the requirements of that subregulation to the extent and in the manner as may be agreed to by the competent authority.

(6) When complying with this regulation, the person conducting the public participation process must ensure that –
(a) information containing all relevant facts in respect of the application is made available to potential interested and affected parties; and

(b) participation by potential interested and affected parties is facilitated in such a manner that all potential interested and affected parties are provided with a reasonable opportunity to comment on the application.

Register of interested and affected parties

57. (1) An applicant or EAP managing an application must open and maintain a register which contains the names and addresses of—

(a) all persons who, as a consequence of the public participation process conducted in respect of that application in terms of regulation 56, have submitted written comments or attended meetings with the applicant or EAP;

(b) all persons who, after completion of the public participation process referred to in paragraph (a), have requested the applicant or the EAP managing the application, in writing, for their names to be placed on the register; and

(c) all organs of state which have jurisdiction in respect of the activity to which the application relates.

(2) An applicant or EAP managing an application must give access to the register to any person who submits a request for access to the register in writing.

Registered interested and affected parties entitled to comment on submissions

58. (1) A registered interested and affected party is entitled to comment, in writing, on all written submissions made to the competent authority by the applicant or the EAP managing an application, and to bring to the attention of the competent authority any issues which that party believes may be of significance to the consideration of the application, provided that—

(a) comments are submitted within—

(i) the timeframes that have been approved or set by the competent authority; or

(ii) any extension of a timeframe agreed to by the applicant or EAP;

(b) a copy of comments submitted directly to the competent authority is served on the applicant or EAP; and

(c) the interested and affected party discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application.

(2) Before the EAP managing an application for environmental authorisation submits a report compiled in terms of these Regulations to the competent authority, the EAP must give registered interested and affected parties access to, and an opportunity to comment on the report in writing.

(3) Reports referred to in subregulation (2) include—

(a) basic assessment reports;

(b) basic assessment reports amended and resubmitted in terms of regulation 25 (4);

(c) scoping reports;

(d) scoping reports amended and resubmitted in terms of regulation 31 (3);

(e) specialist reports and reports on specialised processes compiled in terms of regulation 33;

(f) environmental impact assessment reports submitted in terms of regulation 32; and

(g) draft environmental management plans compiled in terms of regulation 34.

(4) Any written comments received by the EAP from a registered interested and affected party must accompany the report when the report is submitted to the competent authority.

(5) A registered interested and affected party may comment on any final report that is submitted by a specialist reviewer for the purposes of these Regulations where the report contains substantive information which has not previously been made available to a registered interested and affected party.
Comments of interested and affected parties to be recorded in reports submitted to competent authority

59. The EAP managing an application for environmental authorisation must ensure that the comments of interested and affected parties are recorded in reports submitted to the competent authority in terms of these Regulations: Provided that any comments by interested and affected parties on a report which is to be submitted to the competent authority may be attached to the report without recording those comments in the report itself.

(Source: DEAT, 2006c, Ch. 6)
Appendix XV: Results of a Government Committee Investigation of RBM

The following are excerpts from Parliament of the Republic of South Africa committee report (2010, p. 1456-1458) outlining local community concerns regarding RBM:

The Provincial Regional Director [of the Department of Mineral Resources], Ms N Njoko, briefed the Committee on the issues affecting the two mines that have been in the media and have been part of the discourse of many forums for many years (Exxaro and Richards Bay Mine). It was indicated that the communities were aggrieved about the following issues:

- Participation of communities in the shareholding of companies;
- Lack of a procurement strategy that focuses on the development of local businesses and the companies’ lack of commitment thereof;
- Reconstruction and compensation of households that were affected or damaged by mining operations and companies’ historical reluctance to remedy;
- Lack of developmental initiatives by companies in the areas affected by mining in terms of their social and labour plans;
- Strained relations between the company and the community;
- Pollution of water resources and depletion of the rivers that have been part of the communities’ heritage…

Ms Njoko also briefed the Committee about the concerns raised by the communities of Mbonambi and Sokhulu. Currently the mine has a heavy mineral sand operation affecting two communities of Mbonambi and Sokhulu. The operations will in future extend to the Dube and Mkhwanazi communities. RBM engaged with the four communities to participate in their equity allocation for communities and this has not been met in an equal manner by the communities. The concerns also related to the reluctance of the company in affording local businesses the opportunities to have meaningful shareholding in the mine. In addition the following concerns were noted:

- There is suspicion that businessmen outside Mbonambi are involved in the BEE deal with the mine hence the Government’s reluctance to act decisively against RBM in trying to resolve the historical problems that the communities have;
- The community has been calling for the Department to suspend the mining rights until such time that the issues are resolved;
- There is a lack of consultation by the company;
- These are the communities that staged a march, barricaded roads, blocked trucks in demonstration of their anger. RBM took the identified community members to court and the court found the community members guilty and ordered them to pay compensation for loss of income. This judgement further placed additional strain on the relations with the community…

The communities of KwaMbonambi and Mandlankala noted the following:

- RBM built schools without installing the equipment (what specifically);
- RBM should consult and respect the Amakhosi and the community with regard to all the activities that have an impact on communities;
- The community wants to be involved in the business opportunities at RBM;
- In 2009, employees from KwaMbonambi and surroundings were fired because they participated in a march, and RBM took a decision to employ people from outside the community;
- The communities made recommendations that the Government should not renew the license for RBM when it expired;
- The chemicals used by RBM have poisoned their land and as a result their plantations do not grow;
• The communities also raised a concern that RBM appeared to interfere with their projects and delayed them;
• Out of the four communities surrounding RBM, only two communities are accommodated and this is very divisive in the communities;
• Communities felt that RBM is more powerful than the Department of Mineral Resources.