

October 4, 2010

Ms. France Pégeot
Assistant Deputy Minister
Mackenzie Gas Project Office
Industry Canada
Room 824C, 235 Queen Street
Ottawa, Ontario
K1A 0H5

Dear Ms. Pégeot:

By letter dated August 13, 2010 from the Mackenzie Gas Project Office (“MGPO”), addressed to the Chair of the Joint Review Panel for the Mackenzie Gas Project (“JRP” or “Panel”), the Panel was invited by the Government of Canada and the Government of the Northwest Territories (“GNWT”) “to engage in a consult to modify process on the Governments’ Interim Response to the ‘Foundation for a Sustainable Northern Future: Report of the Joint Review Panel for the Mackenzie Gas Project’” (“Panel Report”). The Governments’ letter was not received by all Panel members until August 26 and therefore the Panel was not able to consider the “consult to modify” request until that date.

The Governments’ letter enclosed a six-page Overview and a 154-page document entitled “Governments of Canada & of the Northwest Territories Interim Response to the Joint Review Panel Report for the Proposed Mackenzie Gas Project” (“IGR”). The Governments’ letter also requested that “the Review Panel respect the legislation and keep the enclosed Governments’ Response and the Review Panel’s comments thereto in the strictest of confidence.”

On August 30, 2010, the Panel Chair wrote to the MGPO advising that the Panel “declines to engage in a ‘consult to modify’ or ‘clarification’ process that is based on a confidential document.” The Panel stated that, in its view, “to do so would be a fundamental breach of the basic principles that the Panel’s process is to be open and transparent and that the Panel is to be accountable to the public at large and in particular the parties to its review.” The Panel also noted that there is no requirement in the *Mackenzie Valley Resource Management Act* (“MVRMA”) or the *Canadian Environmental Assessment Act* (“CEA Act”) that the “consult to modify” or “clarification” processes be conducted in confidence.

On September 23, 2010 the Panel Chair was advised by letter from the MGPO that the “confidential” classification/label found on the IGR document attached to the Governments’ letter of August 13 was lifted. The Panel agreed at that time to use its best efforts to provide its’ comments on the IGR by the close of business on Monday, October 4. The MGPO advised that the Panel’s comments on the IGR would be posted to the MGPO website in both official languages on or before the close of business on Tuesday, October 12, 2010.

This letter constitutes the Panel's comments in reply to the Governments' invitation dated August 13, 2010.

1. The Panel's Approach

The JRP has carefully examined the IGR's responses to the Panel's Recommendations, and the rationale for these responses. In this document, the Panel provides, first, some general comments on the overarching rationales for the Government's rejection, or qualified acceptance ("accept the intent"), of certain of the Panel's Recommendations. Next, the Panel comments on the Governments' responses in key subject areas of the Panel's Report. Finally, the Panel provides comments, where warranted, on the Governments' response to individual Recommendations, and also responds to the Governments' proposed clarification of certain Recommendations. The JRP has made no further comment concerning the ten Recommendations accepted by the Governments.

2. The Panel's General Comments on the IGR

The Panel's Recommendations to governments are crucial in the Panel determination of the Project's contribution to sustainability and the management of significant cumulative impacts. The Governments' assertion that many of the Panel's Recommendations fall outside the scope of the Panel's Mandate largely applies to those Recommendations that are the responsibility of the governments alone. Many of these Recommendations are with regard to planning for and management of the cumulative impacts of future developments that would likely be induced by or occur in combination with the MGP. The effective management of these impacts by governments is central to the Panel's determination that the MGP could make a positive overall contribution to sustainability and could establish a sound foundation for a sustainable northern future. The proposed rejection of these Recommendations effectively removes the grounds for the Panel's judgment and undermines the Panel's confidence in the likelihood that such a foundation would be established and significant adverse cumulative impacts avoided.

The Panel notes that many of its Recommendations deal with tasks already committed to by the Governments, but not yet fully implemented. These include the NWT Protected Areas Strategy, the land use plans, protection of species at risk, reduction of greenhouse gas emissions, the Cumulative Impacts Monitoring Program (CIMP) and, in the case of the GNWT, sufficient resources to address ongoing health, social and policing service and program needs. In the Panel's view, its Recommendations set specific achievable measures and deadlines for advancing the full implementation of these commitments.

Section 135 (1)(b) of the *Mackenzie Valley Resource Management Act* requires the responsible Ministers, after consulting the Panel to "adopt the recommendation with modifications or reject it." Although the IGR indicates that the Governments propose to accept, or accept the intent of, 87 of the 115 Recommendations within their respective jurisdictions, the Panel notes that the Governments have qualified their acceptance of some Recommendations to such an extent that the difference between "accept the intent" and outright rejection is not easy to discern. This is especially so because the Governments have provided no alternative wording to the

Recommendations they have accepted in intent. The Panel cannot identify how the Governments propose to “modify” the Recommendations they have not accepted in full.

Where the intent of a recommendation has been accepted, the Panel notes certain generic wording in the Governments’ response that does not amount to a demonstrable commitment to implement even the intent of the Recommendation. One example is the wording of Canada’s response with respect to funding the implementation of the Panel’s Recommendations (further explained in section 2.2). Another is Canada’s frequently stated intention to “consider the implementation of its portion of [the] recommendation as the Project proceeds”. **In the absence of certainty about the Government of Canada’s commitment, the Panel is of the view there would be no demonstrable means of predicting the significance of Project effects.**

The Panel therefore continues to be firmly of the view that a mechanism independent of government, to monitor the performance of governments, is essential. The declaration made by the Governments in the IGR of an intention to “endeavour to track” (emphasis added) the fulfillment of their responsibilities only serves to reinforce the Panel’s concerns that led it to make Recommendations 19-1 and 19-2.

Based on the IGR, the Panel cannot reaffirm its previous conclusion on the likely significance of the adverse impacts of the Mackenzie Gas Project and the Northwest Alberta Facilities and their contribution towards a sustainable Northern future.

2.1 Panel Recommendations that the Governments Propose to Reject

The Governments propose to reject 28 of the Panel Recommendations within their jurisdiction, “21 of which were determined to be outside the scope of the JRP’s Mandate as per the Environmental Impact Statement Terms of Reference for the MGP.” [Recommendations 8-8, 8-9, 8-10, 9-15, 10-6, 10-15, 11-7, 11-8, 11-9, 11-10, 11-13, 11-14, 11-15, 11-16, 11-17, 11-18, 12-2, 12-3, 12-4, 12-5, 15-11, 15-12, 15-13, 16-13, 16-26, 18-21, 19-1, 19-2]

The reasons stated for the determination “outside the scope” in the IGR generally fall into one or more of three categories: certain Recommendations deal with issues or matters that, in the Governments’ view, are “broader than the MGP”; some are not limited to the geographic area of the MGP; and some deal with future developments that, in the Governments’ view, go beyond developments that might reasonably be considered as induced by the MGP.

In the Panel’s view, the Governments’ conclusions fail to recognize the likely longer term cumulative impacts resulting from a range of possible future developments that are likely and reasonably foreseeable, and (as explained on p.567 of the Panel Report) that are implicit in the Project proposal and the Project design. In addition, the Governments have taken a project-based approach to the treatment of cumulative impacts wherein the spatial scale of overlapping project impacts defines and narrows the scope of the analysis and the identification of future developments. An approach that focused on the conditions of valued components and the impact of the Project on those conditions would have resulted in consideration of a broader range of spatial boundaries.

Many of the impacts will clearly extend beyond the Project's immediate geographic area. In some cases, such as impacts on caribou and polar bear ranges, it would be impossible to deal with the immediate impacts of the Project in isolation.

With respect to future developments that may be induced by the Project, the Panel believes that the Governments' conclusions fail to fully recognize the potential cumulative impacts of the Project and its potential contribution as a "Foundation for a Sustainable Northern Future".

The Panel has reconsidered all of the Recommendations that the Governments are proposing to reject on the ground that they were "outside the scope of the JRP's mandate" and in each case disagrees with the Governments' conclusions in this regard. The Panel sees no reason to withdraw or modify any of these Recommendations.

2.2 Panel Recommendations that the Governments Propose to Qualify ("accept the intent")

In the absence of specific information on how the Governments would implement the Recommendations whose intent they accept, and given a commitment in most cases to only **consider** their implementation as the Project proceeds, the Panel is not able to reach a conclusion on whether the response would adequately address the concerns at which each Recommendation was directed.

With respect to the 77 Recommendations in relation to which the Governments accept the intent but not the specific JRP Recommendation as written, one or more of four general rationales are given as set out below:

- the recommendation would fetter the discretion of future decision-makers
- the recommendation would constrain future development in the North
- the recommendation would require incremental financial resources to implement
- the recommendation has timing requirements that Governments could not meet in order to implement it as written.

The Panel's general observations on these reasons follow.

Fettering Discretion

The Governments state that they "cannot accept aspects of a recommendation that fetter the discretion of regulators in respect of future applications." As an example, the Overview refers to "several recommendations regarding approval for the application for the Northwest Alberta Facilities which has yet to be filed."

The Panel notes, firstly, that such Recommendations were not directed to the Governments, but to the respective regulatory authorities from which future approvals would be required, such as the National Energy Board (NEB). The Panel never intended that the Governments would purport to bind such agencies. In the Panel's view, its Recommendations with respect to future regulatory decision-making are in no way different from the Recommendations it made directly to the NEB

with respect to the applications that are currently before that Board. The Panel would expect the respective regulatory authorities to consider its Recommendations at the appropriate time in precisely the same way as the NEB has done to date with respect to matters within the scope of the current NEB applications.

The NEB clearly understood this when it wrote in its letter to the Panel of 9 March 2010:

Some JRP recommendations relate to future activities for which applications have not yet been made to the NEB. Although some of these facilities were within the scope of the JRP's environmental review, they are not within the scope of the applications the NEB is currently considering. The NEB is considering not including conditions that relate to future applications in the decisions it must make in the GH-1-2004 proceeding. These recommendations will be available for consideration by the NEB when applications for future facilities come before it. (Emphasis added.)

Secondly, the Panel notes that it was directed to review the Northwest Alberta Facilities (and future MVP compressor stations for which no application has been made). The Project Description in the Panel's Mandate expressly included several facilities that are not the subject of the applications currently before the NEB. The Panel could not have complied with this explicit direction in its Mandate without making Recommendations, addressed to the relevant regulators, on conditions that should be attached to any approvals for such future facilities.

In the Panel's view, the argument that certain of the Panel's Recommendations would fetter the discretion of future decision-makers is groundless. The Panel reaffirms its Recommendations directed to regulators with responsibilities for reviewing future facilities applications.

Constraining Northern Development

The Overview states, as a reason for not accepting several Recommendations as written, that they would "constrain future development in the North..." In the Panel's view, any regulatory requirement, whether or not based on a Panel Recommendation, would "constrain" development. The Panel does not, therefore, understand the concept that a constraint on future development could alone be a ground for refusing to accept a Recommendation. **The Panel rejects any suggestion that there should be no constraint on future developments.**

The Overview states, as an example that "the JRP recommends that a separate approval process be undertaken if the Proponents want to ship more than .83 billion cubic feet of gas per day, even though the capacity of the pipeline is 1.2 billion cubic feet of gas per day." The Panel made no such Recommendation. The Panel reviewed the MGP as filed, including the three Anchor Fields, the gathering system and the pipeline with three compressor stations. However, throughput on the pipeline above .83 Bcf/d would require the future development of additional gas fields beyond the three Anchor Fields. The Panel emphasizes that it did not review any such developments, as their location, magnitude and potential impacts are unknown. The Panel's Recommendations in this regard were directed at the regulatory process that the Panel assumed such future developments,

beyond those included in the Project as filed, would be required to follow. The Panel did not recommend a separate approval process for any developments or facilities that are included in the applications currently before the NEB, including the Mackenzie Valley Pipeline with a capacity of 1.2 Bcf/d.

The statements in the Overview on constraining future development could imply that the development of any further gas fields beyond the three Anchor Fields, to support an increase in throughput on the Mackenzie Valley Pipeline, should not be subject to any approval process.

In the absence of further regulatory review of future developments that are not the subject of current applications, but that would be required to support throughput on the Mackenzie Valley Pipeline at a level of 1.2 Bcf/d and above, the Panel is of the view that the adverse environmental and socio-economic impacts of such developments could be significant.

Incremental Financial Resources Required to Implement

One of the reasons the Government of Canada offers for “accepting the intent” of the JRP’s Recommendations, but not as written by the JRP, is that “Federal departments will require incremental resources to implement”, and that “in light of the current status of the Project, including recently announced delays, it was determined by the Government of Canada that it was premature to commit to implementing this recommendation”. The Government stated with respect to each of these Recommendations that it would “consider the implementation [of this recommendation] as the Mackenzie Gas Project proceeds.”

The Panel notes that Parliament provides the ultimate authority for federal government expenditures. Nonetheless if the Government of Canada truly intends to implement a Recommendation, it could respond to the effect that it is committed to seek parliamentary approval for the expenditures necessary to implement that Recommendation, or that it will ensure that the necessary measures will take priority within departmental budgeting and not be cut in the course of strategic reviews that may be required for internal spending limitations or reductions.

Some of the Panel’s Recommendations are contingent on the Project proceeding, and therefore need be implemented only if it does. Where this is the case, the Panel agrees that the expenditures required to implement those Recommendations need only be committed if and when it is necessary to implement the Recommendation. The Panel made certain assumptions about when its Recommendations should be implemented. The Panel agrees that, so long as the intent of any particular Recommendation is accepted, it will be up to the governments of the day to determine the appropriate timing for action. However, if Governments accept the intent of a Recommendation that need not be implemented immediately, then they should clearly state that they are committed to implementing the Recommendation, and to seeking approval for the necessary funds at the appropriate time.

In some cases, the Panel has recommended that a particular course of action be undertaken in advance of construction (or immediately, or as soon as practical). These Recommendations pertain chiefly to the need to undertake research, or establish a monitoring program, that would be necessary for effects monitoring of Project or related activities. The planning for and design of such programs must be undertaken well in advance to ensure effective and efficient

implementation. In these cases, the Panel considers it inappropriate to delay the expenditure for the reasons specified in the Governments' response. If the Governments truly accept the intent of the Panel's Recommendation, then the appropriate response is to commit to its implementation, that is, to accept the Recommendation without qualification. This is particularly relevant to the implementation of Recommendation 18-3, which applies to the elements to be included in research and monitoring programs. The Governments state their acceptance of the intent of these Recommendations, but then (usually Canada) in effect undermine that acceptance by not committing to implement (and thus necessarily fund) these initiatives well in advance of the Project proceeding.

It would appear that the "incremental resources" required to implement many Panel Recommendations accepted in intent only are nothing more than staff time required to provide advice or to consult. This can be allocated within ordinary internal departmental planning and budgeting processes without recourse to Parliament or even Treasury Board. It is not clear to the Panel why Canada would need to have qualified its response in the manner that it has if there is truly an intent to implement a Recommendation.

In the Panel's view, the generic wording of the Governments' response with respect to funding is non-committal and provides no certainty that, where the intent of a Recommendation has been accepted, there is any demonstrable commitment to implement it. In the absence of that certainty, the Panel is of the view there would be no demonstrable means of predicting the significance of Project effects.

Timing Constraints

The Panel recognizes that some of its Recommendations require consultation with and in some cases the agreement of other jurisdictions or parties. The Panel accepts that in some cases (as noted specifically in the next section), it may not be possible to achieve implementation within the recommended time frame. Where the Governments have accepted the intent of the Recommendation in question, the Panel assumes that they will commit to making make best efforts to achieve timely implementation.

In the Panel's view, however, for the Governments to avoid commitment now to any particular time frame (e.g. using wording such as "extent possible", "expeditiously as possible") means there is no basis for ensuring that the required work will actually be done or be done any faster than it is being done now.

The Panel provided precise timelines for the implementation of each of its Recommendations to ensure that the performance of the party responsible for implementing the Recommendation could be independently and objectively monitored.

3. Effect of the IGR on Key Themes in the Panel's Report

The Panel identified three major areas in which the objectives of minimizing adverse effects, realizing durable benefits, and building a sustainable future for the North would depend on the

actions of Governments. These were: the anticipation of and planning for adverse cumulative impacts, the minimizing of adverse social impacts by capturing economic benefits within the NWT, and the effective implementation of Recommendations to governments. The Panel examines the overall effect of the IGR on these general areas before commenting on the Governments' responses to certain specific Recommendations in the next section.

3.1 Project Monitoring and Follow-up, and Cumulative Impacts Monitoring and Management

The Panel made Recommendations relating to the monitoring and management of cumulative impacts, and to Project monitoring and follow-up, mainly in Chapters 11 (Conservation Management and Protected Areas) and 18 (Monitoring, Follow-up and Management Plans), with some additional specific Recommendations relating to terrain and wildlife in other chapters.

The Governments provided an overarching rationale for their response to all of the Chapter 18 Recommendations on monitoring and follow-up (IGR p.136-138). The Panel's summary of this rationale follows.

The Governments "agree with the intent of the Joint Review Panel on the need to fully implement the principles and mandate of the NWT CIMP (Recommendations 18-12, 18-15, 18-16, 18-17), and to establish strong linkages to the project-related monitoring, mitigation and follow-up requirements of the Mackenzie Gas Project (Recommendations 18-2, 18-3, 18-5, 18-10, 18-19, 18-22)." They also regard monitoring initiatives with respect to subsidence and flooding, and permafrost and terrain monitoring (Recommendations 6-10, 6-11) as part of an integrated monitoring program. Canada states that its "broad-based responsibilities to implement the CIMP" received funding in Budget 2010. The Governments also confirm their stated support for including Aboriginal groups and communities in monitoring and follow-up processes (Recommendation 18-6), and note that the scope and nature of this involvement would need to be defined.

The Governments indicated that INAC's role as 'lead Responsible Authority' under CIMP would continue, and that it would also assume responsibilities as a 'lead Responsible Authority' for "project-related coordination and oversight for monitoring, mitigation and follow-up requirements of the Mackenzie Gas Project (Recommendations 18-1, 18-4, 18-12, 18-18, 18-20). Governments do not agree "that it is necessary at this time, to implement a 'corporate entity' consisting of a Board in order to fully implement the CIMP" (IGR p.137), although they accept the intent of Recommendation 18-13 which calls for this, and stated that they would consider options for a management structure including a secretariat and a technical advisory committee.

The Governments also express reservations about the full application of the Panel's Recommendations on socio-economic monitoring (e.g. Recommendations 18-3, 18-5, 18-6, 18-16). The Governments also observe that "certain components of the JRP Recommendations may require clarification in order to ensure consistency and appropriate linkages with the conditions of the Socio-Economic Agreement between the GNWT and the Mackenzie Gas Project (SEA), although they do not specify which components require clarification, or who should be responsible for such clarification.

The Government of Canada also notes reservations about its ability to implement Recommendations 18-12, 18-14, and 18-15 within the recommended time frame.

The Panel offers the following general comments on the Governments' Response to the Chapter 18 Recommendations.

The GNWT states that it is "committed to implementing ... [recommendations 18-1, 18-3, 18-4, 18-5, 18-6] as outlined in the response, to the extent of its authority." The Panel understands that, with the exception of its reservations regarding consistency with the SEA, the GNWT fully endorses the Panel's Chapter 18 Recommendations that apply to it and is committed to implementing them. The Panel infers that the GNWT's concerns about the consistency of these Recommendations with the SEA relates to the extent to which they might involve the determination of thresholds for adaptive responses.

Canada's qualifications on the Recommendations it accepts in intent appear to the Panel to substantially negate or diminish their effectiveness.

With respect to the timing of implementation, the Panel was fully aware of the need to involve other parties, which is why, for example, Recommendation 18-14 simply called upon the Minister of INAC to "take all reasonable steps" to achieve the Recommendation's objective. The Recommendation does not call for completion of these steps within the six-month time frame specified. The Panel therefore does not understand why this Recommendation is not simply accepted without qualification. Canada also indicated that it could not implement Recommendations 18-12 and 18-15 within the recommended time frame. The Panel acknowledges that these times may not be achievable, but expects Canada will commit to making best efforts.

With respect to the Government of Canada's statement that Budget 2010 provided for CIMP implementation funding, insufficient information was provided to the Panel for it to conclude whether those funds served to implement the Panel's Recommendations.

The Panel notes that Canada "will consider the implementation of its portion of ... Recommendation[s] 18-1, 18-3, 18-4, 18-5, 18-6, 18-9, 18-10, 18-12, 18-13, 18-15, 18-16, 18-17, 18-19, 18-20, 18-22] as the Project proceeds." The Panel interprets, from the rationale stated in the IGR for Chapter 18 Recommendations (p.138), that this phraseology is based in the "incremental resources required" rationale which the Panel has considered above in section 2.2.

While the need to implement the Panel's suite of Recommendations on monitoring and follow up is clearly contingent upon the Project proceeding, the Panel regards Canada's response as inappropriate for two reasons. First, if Canada truly intends to implement the Recommendations that it accepts in intent, then the Government should state that it is committed to seeking the necessary funding at the appropriate time. Secondly, some of the Panel's Recommendations address the lack of progress or non-implementation of programs to which the Government of Canada is already committed, in particular the CIMP. This problem should be addressed regardless of whether and when the Proponents are authorized, or choose, to proceed with the Project.

In view of the Governments' acceptance of the key elements of the Panel's suite of Recommendations relating to monitoring and follow-up, it is the Panel's view that Canada should express a much stronger and more evident commitment to implement them. Simply being committed to considering these Recommendations as time goes on, but failing to commit the necessary resources to implement them, either now or in the future, will not, for the reasons explained in Chapter 18 of the Report, result in effective monitoring and follow-up, and will not contribute to a sustainable future.

As a basis for Project effects monitoring, the Panel made several Recommendations in other chapters which the Governments (chiefly Canada) have accepted in intent only. These merit further Panel comment.

Although the Project is the occasion for Recommendation 6-10, implementing that Recommendation will be required in advance of any major developments in the Kendall Island Bird Sanctuary (KIBS), and is not strictly contingent upon the Project proceeding. It calls for the establishment of a monitoring program that must be developed prior to commencement of Anchor Field development. It is essential to start developing this monitoring program as early as possible, and not wait until the Project or any other development in the KIBS is actually approved. While Recommendation 6-11 is strictly speaking part of a follow-up program, the Panel has recommended that design and development of the research and monitoring program occur in advance of construction. For the same reasons it is essential to begin as soon as possible, and not wait.

Similarly, the Panel does not consider it appropriate to defer commitment to funding the implementation of Recommendations 9-5, 9-6, 9-12, 9-13, 10-10, 10-12, 10-13, 10-21 and 11-12. Recommendations in chapter 9 address the development of federal strategies or policies regarding: habitat compensation measures that benefit users of local fisheries (9-5); inspecting and enforcing protection of fish, fish habitat and the aquatic and marine environments (9-6); shipping in the Beaufort Sea (9-12); and increasing the knowledge base regarding beluga and bowhead whale populations in the Beaufort Sea. Recommendation 10-10 relates to the establishment of development thresholds, 10-12 to the development of a range management plan, 10-13 to baseline research, and 10-21 to a habitat offset program that would be of general application. Recommendation 11-12 would see establishment of the greater Mackenzie Delta as a special management area prior to authorization of any activity or facility that would enable the throughput of the Mackenzie Valley Pipeline to be increased above 1.2 Bcf/d. The MGP provides the occasion and basis for these Recommendations, but their implementation should not be solely contingent upon the MGP. Their implementation should begin as soon as possible, and therefore if the Government of Canada truly accepts the intent of these Recommendations, it should commit now to fund them.

The Panel notes, in particular, that the implementation of Recommendation 10-14 (to develop a range management plan for polar bears in the south Beaufort Sea), which the Governments accept, is contingent upon the implementation of Recommendation 10-13 (to develop research, impact assessment and monitoring programs in relation to the south Beaufort Sea polar bear population), which the two Governments accept in intent only. Canada considers it premature to commit to the

incremental resources required, citing lower than previously expected levels of exploration and development activity in the region. These circumstances would indeed allow more time to implement Recommendation 10-14, but that in turn requires timely implementation of Recommendation 10-13, which Canada proposes to delay. The Panel therefore does not consider that Canada has fully accepted Recommendation 10-14, nor even fully accepted the intent of Recommendation 10-13. .

With respect to socio-economic monitoring, the Panel reaffirms its views on the inability of the Socio-Economic Advisory Board as presently constituted to undertake socio-economic effects monitoring (in contrast to compliance monitoring), and consequently that socio-economic effects monitoring should be done through the CIMP (Recommendation 18-16).

Finally, as discussed in Chapter 11 and referenced in Chapter 18, the completion and implementation of land use plans, revisions to community conservation plans to establish thresholds for cumulative impacts, and the completion of a system of protected areas in the Mackenzie Valley, are critical instruments for the management of cumulative impacts that would likely result from developments induced by the Project or occurring in combination with it. Many of the Panel Recommendations (11-7 to 11-10, 11-13 to 11-18) that address these matters and establish their completion and implementation as preconditions for future expansions of the Project beyond 1.2 Bcf/d have been rejected by the Governments as outside the scope of the Panel's Mandate. The Panel maintains that these planning initiatives fall within its Mandate.

There is little, if any, evidence to indicate that cumulative impacts on areas of ecological and cultural importance can be effectively mitigated as they occur. Best practices applied on a project-specific piecemeal basis may not be adequate tools for managing cumulative impacts. The IGR asserts, with regard to regional land use plans, that the Panel's Recommendations go beyond the Mandate because they "[deal] with more than the pipeline corridor and the Mackenzie Gas Project facilities." Again, this logic reflects a narrow understanding of the spatial scope of the Project's potential cumulative impacts beyond the Project's footprint. But, perhaps more importantly, it fails to recognize that the cumulative impacts that may result from future developments induced by the Project or occur in combination with it are likely the most pervasive and extensive ones that all regional land use plans and community conservation plans will need to anticipate and address.

3.2 Economic and Social Impacts

The Governments propose to reject Panel Recommendation 15-11 that calls for revenue resource sharing between the Government of Canada and the GNWT. They assert that it is beyond the Panel's Mandate because it deals with an NWT-based resource revenue sharing agreement, "which includes non-renewable resources beyond the Mackenzie Gas Project." In the Panel's view, a revenue-sharing agreement that deals only with the MGP would not generate significant additional revenues to the GNWT for many years after operations commenced, and so could not provide a source of funds needed to address additional Project impacts, or to provide for transition planning and funding.

The GNWT also proposes to reject Recommendations 15-12 and 15-13 as out of scope because they deal with future developments "beyond the [MGP] or reasonably induced development

associated with the Project” in that they call for the GNWT to begin establishing mechanisms for transition planning and implementation and to allocate a share of resource revenue for these purposes. The GNWT cites its establishment of “a strategic planning function within the Department of Executive ... to coordinate longer term planning across government departments”, but the Panel is unable to determine, on the basis of the information provided, whether this would achieve the objectives of its Recommendations.

The GNWT provides a common rationale for accepting the intent of Panel Recommendations 16-5, 16-7, 16-9, 16-10, 16-12, 16-18, 16-19, 16-20, 16-21, and 16-22. The GNWT states that it will in each case prepare the requested plan. If, however, additional funds are required, the GNWT expects that the regional organizations would seek them from the Mackenzie Gas Project Impacts Fund (MGPIF). If aligned with existing government programs, the GNWT will work to coordinate such projects with its own services, and minimize duplication. The GNWT will not provide additional Project-specific funding from its own resources. The Panel understands from this response that the Governments (chiefly GNWT) consider that, between the MGPIF and the SEA, all potential impacts will be addressed, within available or already contemplated budgets.

The Panel noted in its Report that both the MGPIF and the SEA would indeed contribute substantially to the mitigation of adverse impacts on GNWT programs and services. Nonetheless the Panel reaffirms its view (p.495) that currently “the NWT’s health, social service and policing institutions are understaffed and overburdened. Without advance preparation, the Project could overwhelm these services.”

The Panel is aware that the fiscal measures available to the GNWT to increase its expenditures are constrained. The Panel found that during the construction phase, when most of the additional burden would occur, Project impact on GNWT revenues would be positive, but small (p.477). The GNWT filed a report with the Panel that indicated that “forced growth” costs during construction could exceed those revenues (p.478). The GNWT submitted that “the fair sharing of resource revenues is an important mechanism to ensure Northerners are the primary beneficiaries of Northern resource development” (Melhorn, cited on p.476). This was a key basis on which the Panel made its Recommendation 15-11, which if implemented in a timely manner could provide additional revenues to the GNWT during the construction phase.

If the Panel’s Recommendations 15-11, 15-12, and 15-13 are not implemented, then the Panel cannot be assured that the GNWT will be able to fund its health, social and policing services and programs to address Project impacts sufficiently, or to plan for or fund a transition to a sustainable future.

3.3 Implementation of Panel Recommendations

The IGR proposes to reject Recommendations 19-1 and 19-2 on the ground that they are “outside the scope of the Joint Review Panel’s mandate...”

The Panel notes, firstly, that Recommendation 19-1 was not directed to the Governments, but to the Commissioner of the Environment and Sustainable Development. In addition to the specific words of the Recommendation itself to this effect, the Panel’s intention is clear from the

introductory words of Recommendation 19-2: “In the event that the **Commissioner...does not accept Panel Recommendation 19-1**...” (Emphasis added.) The Panel is aware that the Commissioner’s office is, as stated in the IGR, independent of the Government of Canada. Indeed, it was the Commissioner’s independent status that led the Panel to direct this Recommendation to that office. The Panel never intended that the Government would purport to bind the Commissioner.

Secondly, the Panel rejects the view that either Recommendation 19-1 or 19-2 is outside the scope of its Mandate. **These two Recommendations address directly the implementation of the Panel’s Recommendations**; as such, they are fundamental to the Panel’s overall conclusion on the impacts of the Project.

Thirdly, the Panel was expressly directed in item 9 in the Annex to the Schedule of the Joint Panel Agreement to consider “the need for any follow-up program in respect of the Project, and the requirements of such a program.” The Panel notes that the CEA Act defines “follow-up program” to mean “a program for evaluating (a) the soundness of an environmental assessment or environmental impact review of a proposal for a development; and (b) the effectiveness of the mitigative or remedial measures imposed”. Similarly, the MVRMA defines “follow-up program” to mean “a program for (a) verifying the accuracy of the environmental assessment of a project, and (b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project.” In the Panel’s view the requirement for independent review is an important element of the follow-up program for evaluating the effectiveness of the mitigative measures imposed in relation to the Project.

The Panel’s Recommendations that there be independent oversight of the implementation of its Recommendations and of the efficacy of mitigation measures applied to the Project are squarely within the Panel’s Mandate.

The Panel is not reassured by the Governments’ statement that they “will endeavour to track the fulfillment of responsibilities resulting from the Governments’ Response to the... Panel’s Report...” In Chapter 19 of its Report, the Panel referenced the conclusions of several participants to the Panel’s review that governments have frequently not acted on their commitments in the areas of environmental monitoring and producing sustainable development strategies. As noted in section 2 of these comments, the Panel came to the same conclusion for itself.

In light of this record, the Panel continues to be firmly of the view that a mechanism **independent** of government, to monitor the performance of governments, is essential. The declaration of an intention to “**endeavour** to track” (emphasis added) the fulfillment of their responsibilities only serves to reinforce the Panel’s concerns that led it to make Recommendations 19-1 and 19-2 in the first place.

4. The Panel's Comments on the Governments' Responses to Selected Recommendations

Canada proposes to reject Recommendation 10-15 “as it is inconsistent with the *Canada Petroleum Resources Act*” (“CPRA”). The IGR states that “[o]nce an interest holder has been issued an exploration license (*sic*) or already holds a significant discovery license (*sic*) for an offshore oil and gas discovery, the Act obliges the Minister to issue a subsequent or successor right should the applicant fulfill the requirements of the legislation.” This rationale misinterprets the Recommendation, which is that **no new rights** be issued under the CPRA. The Recommendation expressly states that it is “subject to any existing commitments”, thus recognizing that once rights have been issued the Minister is obliged to issue certain subsequent or successor rights. The Panel notes that the IGR response to Recommendation 10-22 acknowledges that Indian and Northern Affairs Canada is able to withhold the issuance of exploration or subsurface rights in offshore areas. The Panel therefore rejects the view that Recommendation 10-15 is inconsistent with the CPRA.

The Panel further notes, with respect to Recommendation 10-15, that the new information provided on p.153 of the IGR, that cites lower than previously expected levels of exploration activity in the Beaufort Sea, neither negates nor reduces the need to implement this Recommendation as specified.

Although the Government of Canada accepts the intent of Recommendation 10-22 (requiring Canada to give force and effect to Environment Canada's habitat offset plan for the Kendall Island Bird Sanctuary), Canada seeks a three year time-frame instead of two, and rejects the need to complete the process before the National Energy Board grants Leave to Open. The Panel acknowledges that the process might require three years, but notes that even three years would be well within any likely grant of Leave to Open. A firm time frame is required to monitor Government implementation objectively.

The Governments propose to reject Recommendation 11-13 which requested funding to support the development of the Mackenzie Delta as a special management area. Governments did however accept the intent of Recommendation 11-12 which suggests that the Mackenzie Delta become such an area. This rejection of funding while accepting the intent of Recommendation 11-12 is, in the Panel's view, inconsistent.

With respect to Panel Recommendations 12-1, 12-2, and 12-3 (harvester compensation arrangements), the Panel reaffirms that these were intended to apply to **all** harvesters, including those without Aboriginal status or who are not covered by a particular land claim agreement or an access or benefits agreement.

The GNWT states that Recommendation 16-13 is inconsistent with its Territorial Integrated Service Delivery Model, and that developing “a specific coordinated health care plan related solely to the Mackenzie Gas Project is inappropriate”. The Panel accepts that the development of “a specific plan” may not be necessary but believes the elements of the Recommendation should guide the inputs to the Territorial Integrated Service Delivery Model.

The Panel notes that the Government of Canada proposes to reject Recommendation 16-26 dealing with criteria for the release of funds from the Mackenzie Gas Project Impacts Fund. The Panel notes this Recommendation is directed to the Corporation, not to the Governments.

The Panel accepts the Governments' clarification of terminology in Recommendations 7-11, 9-3, 9-11, 10-3, 10-26, and 16-17.

5. Panel Conclusion

The Panel concluded (at p. 585 of its Report) that, assuming full implementation of its Recommendations, the Mackenzie Gas Project (MGP) and the Northwest Alberta Facilities are likely to make a positive contribution to sustainability. The Project is likely to:

- make a positive contribution to the human environment, with implementation of measures to support effective capture of benefits, equitable distribution of risks and adverse impacts, and equitable opportunities for participation;
- lead to improved protection of the biophysical environment through strengthened conservation measures, with adverse Project impacts mitigated to an acceptable degree; and
- provide an opportunity to invest in building a positive Project legacy through Project enhancements, and through transition planning and funding.

Achieving a net positive contribution would depend on the preparedness of governments and other institutions to undertake the monitoring, anticipatory planning, adaptive management and enforcement needed to ensure that the cumulative impacts of the Project and future developments are positive. The Panel's findings were contingent upon the timely adoption and successful implementation of its Recommendations.

The Panel concluded that, in the absence of implementation of its recommended actions, and commitments by the Proponents and governments, supported by the necessary resources and funding, the Project's impact on the environment would likely be significant and adverse.

The Panel notes that the Proponents' commitments, as modified by the NEB's Proposed Conditions, would largely satisfy the Panel's tests for acceptable impact and positive contribution.

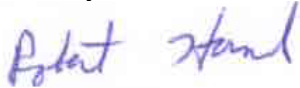
Therefore, it is the Governments of Canada and the Northwest Territories to which the Panel looks for evidence of preparedness for and commitment to the measures required to undertake monitoring, anticipatory planning, adaptive management, and enforcement in relation to the Project and its related activities. However, it is the Panel's understanding that the IGR proposes to reject, or take no comprehensive action on, key Recommendations for:

- measures to support the capture of benefits;

- dealing with cumulative effects of the Project that would mitigate adverse impacts beyond 0.83 Bcf/d; and
- transition planning and funding.

The Panel reaffirms its overall conclusion that the adverse impacts of the Mackenzie Gas Project and the Northwest Alberta Facilities would likely not be significant and that the Project and those Facilities would likely make a positive contribution towards a sustainable northern future, “subject to the full implementation of the Panel’s Recommendations.” The Panel has concluded that, in the absence of implementation of its Recommendations, and in particular those Recommendations directed to the Governments, the adverse impacts of the Project could be significant and its contribution towards sustainability could be negative. In that event, the opportunity for the Project to provide a foundation for a sustainable northern future would be lost.

Sincerely,



Robert Hornal
Joint Review Panel Chair