

## **SPEAKING NOTES**

### **ALTERNATIVES NORTH FINAL ARGUMENT FOR THE NATIONAL ENERGY BOARD ON THE MACKENZIE GAS PROJECT**

#### **Introduction**

Thank NEB Panel for opportunity to present. Here is an outline of the final argument by Alternatives North:

- Background on Alternatives North and our participation in the Joint Review Panel (JRP) and National Energy Board (NEB) processes;
- Economic feasibility of the Mackenzie Gas Project (MGP);
- JRP recommendations and the NEB response;
- Comments on the NEB's Draft Terms and Conditions;
- Process observations;
- Reply to written submissions on final argument;
- Summary

Our reply to Imperial's final argument yesterday has been woven into our final argument.

#### **Alternatives North Background and Participation in the JRP and NEB Processes**

Alternatives North est une coalition de justice sociale et un organisme à buts non-lucratifs opérant aux Territoires du Nord-Ouest. Dans nos rangs nous comptons des représentants de groupes religieux, de syndicats, d'organisations environnementales, des regroupements de femmes, de personnes âgées et des groupes de lutte contre la pauvreté. Alternatives North est gérée uniquement par des bénévoles. Nous n'avons pas d'employés payés. Notre participation à la Commission d'examen conjoint a été soutenue par une contribution de l'Agence canadienne d'évaluation environnementale (cent vingt huit mille dollars), l'Initiative boréale canadienne, la Fédération du travail des Territoires du Nord-Ouest, ainsi que d'autres organismes qui nous ont fournis de petites contributions. Aucun financement n'a été mis à notre disposition pour notre participation aux audiences de l'Office national de l'énergie.

[Alternatives North is a social justice coalition and non-profit society operating in the Northwest Territories. Within our ranks are representatives of churches, labour unions, environmental organizations, women and family advocates, seniors, and anti-poverty groups. Alternatives North is a volunteer-driven organization. We have no paid staff. Our participation in the Joint Review Panel process was supported through funding provided by the Canadian Environmental Assessment Agency (\$128,400), the Canadian Boreal Initiative, the Northern Territories Federation of Labour, and a few other organizations that provided small grants. No public funding was available for our participation in this NEB proceeding.]

At the beginning of the JRP process, Alternatives North did not take a position on the proposed MGP or identify any specific terms and conditions should the development proceed.

The role Alternatives North played during the hearings was to bring forward a series of independent experts on various topics. The evidence brought forward by these experts, the questions we posed, the evidence submitted by others, and what we heard at the hearings, was used to formulate our final position and recommendations.

We pushed government and the proponents to answer critical questions. Sometimes we were reassured, but more often we were disappointed. Throughout the JRP process we felt that we were taking on the role that governments are mandated to play in order to properly serve their citizens

Having access to limited resources, we felt it best to focus our efforts on areas where we had some internal expertise, topics that we believed would not receive attention from other intervenors, and areas where we believed governments would not actively participate. These subjects included:

- Economic rent regime for the MGP and its adequacy in relation to fairness and sustainability;
- Retention of benefits in the NWT, including education, training and employment;
- Prevention and mitigation of negative social impacts;
- Environmental management including an assessment of the current regime, closure and reclamation, and independent oversight; and
- Alternatives to the MGP and alternative means for carrying out the MGP that will increase its contribution to long-term sustainability.

Alternatives North participated in the JRP process by submitting information requests, making written submissions, making presentations at the hearings and asking questions at the hearings. We made more than 80 submissions and they are found on the JRP public registry.

Alternatives North participation in the NEB proceeding as an intervenor has included 28 filings and the following:

- Information requests to the applicants on environmental and socio-economic matters, including the pace of development, the need for the project and potential markets;
- Filing of evidence on the economic feasibility of the MGP;
- Cross-examination of the applicants on economic feasibility; and
- Cross-examination of other intervenors.

## **Economic Feasibility**

### NEB authority and duty

The NEB mandate in relation to the Mackenzie Valley pipeline as part of the overall MGP is found in s. 52 and 54 of the *National Energy Board Act* as follows:

s. 52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline **if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity** and, in considering an application for a certificate, **the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:**

(a) **the availability of oil, gas or any other commodity to the pipeline;**

(b) **the existence of markets, actual or potential;**

(c) **the economic feasibility of the pipeline;**

(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and

(e) **any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.**

s. 54. (1) The Board may issue a certificate **subject to such terms and conditions as the Board considers necessary or desirable in the public interest.** [emphasis added]

The list of issues to be considered by the NEB Panel for the MGP include the following:

1. The need for the proposed project
2. The economic feasibility of the proposed project
3. The potential commercial impacts of the proposed project

In its notice to all parties, dated December 23, 2004 the NEB Panel provided additional clarification on the inclusion of economic feasibility for the MGP as follows:

Economic feasibility is one of the enumerated factors in section 52 of the *National Energy Board Act* that the NEB Panel may have regard to, when considering whether a pipeline is in the public convenience and necessity. The NEB Panel's assessment of economic feasibility for new natural gas pipeline facilities will be based on determining the likelihood of the facilities being used at a reasonable level over the economic life of the project and the likelihood of demand charges being paid. This assessment includes an evaluation of:

- the availability of long-term gas supply;
- the long-term outlook for gas markets;
- the contractual commitments underpinning the proposal; and
- project financing.

Clearly the mandate of the NEB Panel with regard to the MGP is broader than the simple economic feasibility of the Mackenzie Valley pipeline and includes a consideration of the energy

needs of current and future generations, overall supply of natural gas and demand for natural gas that could influence the economic feasibility of the MGP.

Alternatives North also submits that the NEB's public interest mandate allows consideration of the risks involved in building a project that is not needed, as these risks extend beyond the financial interest of the applicants including IORVL. The public risks associated with this basin-opening project are well described in the Joint Review Panel's report where some environmental and socio-economic effects could not be assessed even for a pipeline with a capacity to handle only the output of the three anchor fields, let alone the proposed capacity up to 1.2 Bcf/d.

#### AN Position on Economic Feasibility

To be clear, AN does not condone or support the use of special measures or subsidies, whether deferred taxes or royalties, to some of the wealthiest transnational corporations in the world, to make the MGP anchor fields and ultimately the MVP, economically feasible. There may be a case made to provide such subsidies in the interest of regional economic development but that argument has not been made. There should be no need for a fiscal package from the federal government if the MGP is truly economically feasible. We note that such a deal would be subjected to public scrutiny and a vote of elected representatives if proposed in US but such is not the case in Canada where a deal is being negotiated in secret and will not likely be made public until after an agreement is reached and after this final argument hearing.

To date only agreements covering the anchor fields have been reached with companies wishing to use the MVP to transport gas south, despite an open season held almost eight years ago in 2002 and the intervening time. No others have made any commitment to ship gas and there are no firm service transportation agreements.

The NEB Filing Manual s. 4.2.1 filing requirements—economic feasibility states, *“In general, the greater the potential impact an application may have on third parties, the greater the detail on economic feasibility will be required.”* AN submits that the MGP is exactly the kind of development that has a high potential impact on third parties and that greater detail on economic feasibility should have been forthcoming from the applicants.

The most recent cost data for the MGP are now over three years old and the applicants made no effort to update these figures during the recent submission on its updated evidence or during cross-examination by AN.

Imperial's expert witness, Dr. Angevine, could not conclude that Mackenzie Delta natural gas would be competitive with other suppliers if the MGP actually proceeds (see lines 12792-12793, NEB MGP Hearing Transcript for March 29, 2010). Given the large increases in natural gas supply in North America and Canada due to shale gas and LNG, those sources could likely deliver the same or more gas than the MGP more quickly and at a fraction of the cost. It is not good enough to say that the decision on economic viability lies with the applicants alone as the costs and impacts will be borne by taxpayers through the fiscal package or subsidies, and by Northerners who will bear the burden of the environmental and socio-economic costs.

In describing the return on equity issue in relation to tolling, Imperial had this to say yesterday about its MVP:

So here we have this project which has incurred over \$800 million in total project development costs, which has been bogged down in the regulatory process for years, which would rely on a single untested supply basin, which would be constructed in a cold, remote region and which would face competition from pipelines delivering gas that is produced much closer to the markets. (NEB Transcript April 12, 2010, paragraph 13888)

This sounds like a very risky venture, an economically uncertain project.

In our view, IORVL has failed to prove the need for and the economic feasibility of the MGP and its pipeline and therefore the NEB should not issue a certificate for the pipeline.

If the NEB is of the view that a certificate is indeed in the public interest, then we would ask that it be limited to a capacity of 0.83 Bcf/day as this is the amount that can be produced from the anchor fields.

### **JRP Recommendations and NEB Modifications**

AN supports the JRP's sustainability framework for assessing the MGP. This approach represents the state of the art for environmental assessment and is precisely what the NEB itself professes in its recent focus on sustainability. The sustainability framework represents a well thought out public interest test, an approach that we hope the NEB itself should adopt and endorse.

It is necessary to set the context for the JRP's development and use of its sustainability framework. Northerners have fought long and hard for an integrated resource management system. This system is based in Aboriginal values of sharing and looking after the land and water, long before sustainability became fashionable. The *Mackenzie Valley Resource Management Act* is an attempt to put together an integrated system of land use planning, environmental assessment, land and water regulation, state of the environment reporting and an audit function based on the negotiated provisions of constitutionally protected Aboriginal land claims agreements.

The problem is that the system has not been fully implemented or funded for a whole variety of reasons. Many of the JRP's recommendations are aimed at completing the proper implementation of this system, which is required to adequately manage the scale and pace of development that will come with the basin-opening MGP. Most northerners, including AN, do not want to follow the path of Alberta where there has been uncontrolled and unmanaged cumulative effects. We reject this model of resource development and so did the JRP.

In our view the JRP took a reasoned and thoughtful approach to the MGP. We believe the MGP applications present serious challenges to public policy given the scale and pace of development, the basin-opening potential and the inherent uncertainty in the applications. The JRP struggled

with a development based on three anchor fields with production of 0.83 Bcf/day but built to accommodate 1.2 Bcf/day and then expandable to 1.8 Bcf/day.

The JRP itself stated it was unable to fully assess the environmental and socio-economic effects of the MGP at the 0.83 Bcf/day capacity, particularly for *Species at Risk Act* listed species (i.e. woodland caribou, wood bison and peregrine falcons). For example, the JRP stated:

However, in the absence of a national recovery strategy, action plans and the identification of critical habitat for woodland caribou, the Panel is unable to reach a view on the significance of the environmental impacts on woodland caribou that are likely to result from the Project as Filed. (JRP report page 294)

NEB condition 29 in the draft terms and conditions for the MVP certificate requires “updated impact assessments for Listed species in consideration of the *Species at Risk Act*”. We submit that this work should have been done by the federal government well in advance of the JRP concluding its process and that the NEB should not issue a certificate until this legal obligation is met under both the *SARA* and *NEB Act* as part of the public interest. Given the delays in the applicants making a decision on whether to proceed or not, there should be adequate time to get this important work done now before irrevocable decisions are made.

The JRP was unable to fully assess the environmental and socio-economic effects of the MGP for a capacity up to 1.2 Bcf/day for many valued biophysical and human environmental components. For biophysical components, it is difficult if not impossible to adequately assess the MGP effects or the cumulative effects up to 1.2 Bcf/day without knowing the location of the additional exploration and production activities to fill the pipeline to that capacity.

This inability to adequately predict, assess and manage effects of the MGP beyond 0.83 Bcf/day is precisely why the JRP concluded that all of its recommendations need to be implemented as a package to ensure a net positive contribution to sustainability. This uncertainty is why the JRP made many recommendations to governments to put in place measures to properly manage change and cumulative effects with future expansion of the MGP beyond the 0.83 Bcf/day.

Yet it is precisely these future-oriented JRP recommendations that the NEB appears poised to reject in its draft terms and conditions. The NEB can fetter its discretion into the future for any expansions of the MGP beyond the 0.83 Bcf/day production capacity of the anchor fields based on the legislative provisions of *MVRMA* (s. 137(3)). If the NEB is not persuaded to adopt the future-oriented JRP recommendations, we would ask that the certificate be limited to 0.83 Bcf/day capacity for the pipeline and that the NEB agree that it will make any further expansions precedent on the full implementation of the JRP recommendations by governments and the applicants.

We are surprised that IORVL is using final argument to attack the JRP’s cumulative effects assessment and sustainability framework. IORVL also dismissed related recommendations to control the pace and scale of development from the basin-opening MGP. IORVL had earlier opportunities to comment on the JRP recommendations as requested by the NEB and in reply to intervenor comments.

In reply to IORVL's characterization of the JRP's cumulative effects assessment, as including hypothetical and fanciful induced development, why has it applied for approvals for a pipeline capacity of 1.2 Bcf/day when there is nothing committed above 0.83 Bcf/day? Where is the rest of the production coming from? Why did IORVL spend time yesterday dismissing Suncor's design for a gas plant in the Colville Hills, or Apache's tolling concerns for further development in the Colville Hills?

These projects are indeed reasonably foreseeable and not hypothetical or fanciful. This kind of induced development does not just happen. It is not acceptable that each of these developments be assessed separately at different times without adequate consideration of cumulative effects. It is the pattern of hydrocarbon development throughout Alberta. Northerners have seen this and most do not want to go there. We can and must do better. If not for ourselves, then for our children and grandchildren.

The JRP recognized that public concern around the basin-opening nature of the MGP and its potential for cumulative effects and induced development was one of the driving forces during its review:

What has not changed since the mid-1970s is that the public still regards the Project not simply as another industrial development, but as a force that would irrevocably change the life of the region, whether for better or worse. Many participants expected the Panel to consider what those larger, longer-term changes would bring, i.e. what the cumulative impacts of the Project might be, not just the impacts of the Project itself. What has indeed changed is the variety of views about the Project that reflect the greater diversity and complexity of life in the region today. (JRP Report page 8)

The JRP struggled with the bigger picture, the concerns of Northerners as expressed in years of public hearings, and responded by developing a creative and sophisticated analysis using a sustainability framework to make recommendations to control the scale and pace of development. Imperial's attempts yesterday to trash the JRP cumulative effects assessment and sustainability framework dismisses and trivializes the aspirations and apprehensions of Northerners. These hopes and fears around this project have been raised for more than 30 years. This company just doesn't get it. You can shoot the messenger but these concerns and issues are not going to go away.

## **Comments on the NEB Draft Terms and Conditions**

### General Comments

AN supports the approach in the JRP recommendations where third parties would need to approve some plans and submissions by the applicants. We recognize that the NEB has rejected this approach and indicated that the applicants would have to submit evidence of consultation with third parties in some cases.

This raises issues of just what consultation really means. We recommend that there be a full definition of “consultation” in all the MGP approvals, should the NEB decide in favour of proceeding. The *MVRMA*, section 3 provides a clear and helpful definition of consultation that the NEB should adopt in any MGP approvals:

Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

- (a) by providing, to the party to be consulted,
  - (i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,
  - (ii) a reasonable period for the party to prepare those views, and
  - (iii) an opportunity to present those views to the party having the power or duty to consult; and
- (b) by considering, fully and impartially, any views so presented.

Capacity of the pipeline is not specified in the draft terms and conditions. As stated earlier, if the NEB finds it necessary to issue a certificate, please limit the capacity of the pipeline to the three anchor fields for the reasons outlined earlier.

Lastly, the expiry date for MGP approvals in the draft terms and conditions is set at December 31, 2013. While AN does not believe that a certificate should be issued, if it is, a relatively short window should be provided. Use it or lose it. We do not accept the applicants revised schedule as a reasonable estimation of the time needed for a decision to construct. We believe that the NEB should keep the proposed expiry date of December 31, 2013. We would however ask that the sunset clauses be amended to specify “pre-construction” by December 31, 2013 as “construction” has no definition. For the record, we came up with this idea independent of IORVL but nice to know that occasionally we are on the same wavelength.

In reply to IORVL’s proposal to extend the expiry date another three years, we cannot accept this. We have all burned up a tremendous amount of effort and resources dealing with the MGP that could have been devoted to building a sustainable and diversified economy in the NWT. I’ll admit that I am a hearing junky but I do not want to be left hanging for another six years waiting for the proponents to make up their mind while governments ignore the JRP’s recommendations. Most of those recommendations should be implemented whether or not this project goes ahead. There would need to be some very significant progress on implementing the JRP recommendations between now and 2013 or 2016 for a further extension of the sunset clause.

#### Specific Comments on NEB Responses to JRP Recommendations and Proposed Terms and Conditions

##### *JRP Recommendation 6-1 Baseline, NEB Condition 37*

The NEB condition should contain a requirement to provide information to other regulators for review consistent with the JRP recommendation. Nothing in the proposed NEB condition specifies what the desired end result should be and this should be defined in some way.

*JRP Recommendation 6-3 Impacts of Climate Change, NEB Conditions 6, N8, T7, P8*  
Information should be filed for approval of NEB.

*JRP Recommendation 6-4 KIBS/Fish Island, NEB Conditions N26, T25, P25*  
EPPs for the anchor field Development Plans should be filed for NEB approval.

*JRP Recommendation 8-6 GHG Targets, NEB Conditions 59, N11, T10, P10*  
NEB conditions specify ‘reduction strategies’ and not ‘targets’ as recommended by the JRP. AN recommends the use of ‘targets’ as a more meaningful approach that can be measured.

*JRP Recommendation 15-9 Diversity Plans, NEB Conditions 23, N29, T28, P28*  
Requirement for communications plans have been dropped in the NEB conditions compared to the JRP recommendation but should be reinstated.

*JRP Recommendation 17-1 and 17-2 Coordination of Decommissioning and Abandonment Principles and Approvals, NEB Conditions 77, 78, 79, N5, N6, T5, T6, P6, P7*  
AN understands that the Land Matters Consultation Initiative process and outcomes, including RH-2-2008 do not apply to *COGOA* facilities such as the development plans for the anchor fields. Principles for decommissioning and abandonment for all MGP facilities should be spelled out in NEB conditions along with a requirement for decommissioning and abandonment plans for all MGP facilities. Further detail on how the NEB intends to coordinate its decommissioning and abandonment requirements with other regulators should be covered in the Reasons for Decision for this proceeding, if the MGP is approved.

*JRP Recommendation 18-7 Local NEB Office, No NEB Condition*  
While AN appreciates that a local NEB office may be an operational issue, there should be a commitment by the NEB to open an office in the NWT if the MGP proceeds.

*JRP Recommendation 18-8 NEB Reports, No NEB Condition*  
While AN appreciates that a collaborative approach on monitoring and inspections may develop if the MGP proceeds, the NEB should commit to a full public registry for all MGP applications and follow-up to ensure transparency and accountability. The public registries for the MVEIRB and MVLWB serve as good models for the NEB to adopt for the MGP and its northern and frontier operations.

## **Process Observations**

AN is of the view that the MGP regulatory review should have been a true joint review to meet the *NEB Act*, *MVRMA*, *IFA* and the *CEAA*. Having two separate processes was not helpful and resulted in duplication and overlap, aside from stretching the inadequate resources of many intervenors.

The NEB has had the need for participant funding brought to its attention many times before. As a volunteer group, Alternatives North found it very difficult to meaningfully participate in this proceeding. We did not have access to independent technical advice or to legal counsel. Please take up the issue of participant funding again if you want to truly engage the public and NGOs.

That being said, AN has found the NEB process more accessible than the JRP in several ways. We were able to participate in cross-examinations by teleconference, and to set the time we anticipated for presentations and questioning. We wish to recognize the assistance of your staff and the Northern Gas Project Secretariat in helping us to better understand your process and in facilitating our participation. Thank you.

Much has been said and written about the MGP regulatory process. This is not the best time or place for a full analysis but we cannot let one important observation go unnoticed. During our cross-examination on the updated economic feasibility evidence on March 29, 2010, IORVL accepted no responsibility for delays in its MGP scheduling. We are of the view that the applicants were the cause of many delays and extensions, both during the JRP process and this NEB proceeding.

Finally, the change in order of the timing of this final argument hearing to a point before the filing of the government response to JRP recommendations has left us and other intervenors at a distinct disadvantage. The best we can hope for is that governments will fully implement the JRP recommendations leaving the NEB to sort out the rest. In the interest of procedural fairness we therefore request an opportunity to make comments to the NEB after the filing of the government response to the JRP recommendations. This opportunity should be open to the applicants and all intervenors and need not delay your work in any substantive way.

### **Reply to Written Final Argument**

Alberta Department of Environment

- disagree completely that the JRP did not have mandate to make recommendations regarding the effects of the MGP including end-use emissions and overall GHG policy
- AN is of the view that the NEB and Government of Canada have a public interest mandate that requires consideration of GHG emissions and the JRP recommendation 8-9 represents a reasonable approach to begin to achieve a sustainable energy future for Canada

Apache Canada Limited

- AN takes no position on the proposed volume-distance tolling methodology other than it appears to be a reasonable approach and should be applied to any northern communities that wish to draw off natural gas for local use, along with other incentives to promote local replacement of diesel and heating fuel should the MGP proceed

Acho Dene Koe First Nation

- AN takes no position on whether the NEB should require the proponents to issue a four percent interest to ADKN in the APG as a condition of MGP approval

- We support the position of ADKFN on the terms and conditions of any MGP approvals that relate to the use of the Liard Highway, employment and retention of resource revenues for NWT governments

#### Chevron Canada Resources

- AN supports orderly development of the Niglintgak field as long as the Kendall Island Bird Sanctuary is protected and the relevant JRP recommendations are fully implemented, but AN takes no position on Chevron's claims

#### North Slave Metis Alliance

- AN takes no position on any of the claims made by NSMA but share some of the concerns expressed regarding the MGP Socio-Economic Agreement, including the lack of consultation, the need for land use planning in the Mackenzie Valley, the need for independent monitoring of the MGP should it proceed, adoption of a full-cost accounting approach, and a requirement for secure long-term funding for the Cumulative Impact Monitoring Program under the *Mackenzie Valley Resource Management Act*

#### Suncor Energy Inc.

- AN takes no position on the proposed distance sensitive tolling methodology other than it appears to be a reasonable approach and should be applied to any northern communities that wish to draw off natural gas for local use, along with other incentives to promote local replacement of diesel and heating fuel should the MGP proceed
- AN takes no position on the other tolling concerns raised by Suncor

#### Summary

- NEB not issue a certificate for the MVP as the applicants have not proven the economic feasibility of the MGP
- If the NEB issues a certificate, the capacity should be limited to the three anchor fields (0.83 Bcf/day)
- Any expansion beyond 0.83 Bcf/day for MGP facilities be contingent upon full implementation of the JRP recommendations by government and the applicants in the interests of sustainability and a net positive contribution from the MGP—the public interest
- Define 'consultation' in any MGP approvals
- Retain expiry date of December 31, 2013 for any MGP approvals
- Specific improvements to NEB conditions are suggested, particularly an explicit statement of decommissioning and abandonment principles and a requirement for a decommissioning and abandonment plan for all MGP facilities
- If the MGP proceeds, the NEB should clearly commit to a northern office and a full public registry for all MGP applications and follow-up
- The NEB should develop and implement a participant funding program

- There should be an opportunity to provide comments to the NEB once the government responses to the JRP recommendations are filed

Once again, mahsi, merci, thank you for the opportunity to make final argument in this very important proceeding. We wish you well in your deliberations.

Prepared by: Kevin O'Reilly

Date: April 13, 2010

Link to the Actual Transcript of the National Energy Board Final Argument Hearing for April 13, 2010:

<https://www.neb-one.gc.ca/l-eng/livelink.exe/fetch/2000/90464/90550/338535/338661/395552/612857/A1S4X3 - Vol.51-MonApr12.10?nodeid=612644&vernum=0>

[Note that there are some small differences in the Transcript vs. the Speaking Notes]al