Alternatives North

A Response to the

"Road to Improvement" Report

by Neil McCrank

on

Regulatory Systems Across the North

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Background on Alternatives North

Alternatives North is a Northwest Territories (NWT) based coalition of groups and individuals committed to building, strengthening, and defending social and economic justice. We began in 1992 when NWT labour, church, and women's groups came together to work on local, national, and international issues. We now have links with environmental and anti-poverty groups, and community-minded small businesses. We are a volunteer, non-profit NWT registered society.

Many Alternatives North volunteers are long-term residents of the NWT. The expertise our volunteers bring to the organization has been developed from their work – often at a high level - within the territorial, Aboriginal and federal governments, the labour and environmental movements, and the volunteer sector. We have been recognized for our solid participation as an intervenor before the Joint Review Panel and National Energy Board on the Mackenzie Gas Project. Much of this submission is based on that work and on years of involvement in various northern regulatory proceedings.

Comments on the Report

Alternatives North has reviewed the report by the Minister's Special Representative, Neil McCrank, "Road to Improvement". It purports to be a review of regulatory systems across the North. We note that the report contains no substantive analysis, statistics, case studies, examples or actual references. Several unsubstantiated concerns articulated by the private sector regarding the complexity, unpredictability and timeliness of the current system are repeated by Mr. McCrank with limited evidence or analysis. Mr. McCrank's recommendations are often imprecise, without timelines or clearly outlining responsibilities for responses or implementation. The report contains no indications of associated costs, financial or otherwise.

Concerns with the Basis of the McCrank Review

The basis of the McCrank review and the review process itself is left to conjecture. We still cannot locate any written terms of reference or timelines. We had thought that such information would be made available in a timely and transparent fashion, through the Department of Indian Affairs and Northern Development. The most substantive publicly available information on the review is to be found on the website of the Mackenzie Valley Environmental Impact Review Board, for which we commend that body.

Submissions made to Mr. McCrank do not appear to be publicly available or listed in any comprehensive manner in his report. Submissions made to Mr. McCrank

by non-governmental organizations are not referenced or listed in the bibliography. We also note that the written submissions of the Northern Board Forum and the Mackenzie Valley Environmental Impact Review Board are not listed in the report yet several industry submissions are cited, as well as reports by the Conference Board of Canada and the Fraser Institute, well known promoters of unfettered resource development.

We are of the opinion that Mr. McCrank's review appears to be motivated largely in reaction to the recent Ur Energy drill program environmental assessment and in dissatisfaction on the part of some parties regarding the timeliness of the Joint Review Panel for the Mackenzie Gas Project.

On its face, Mr. McCrank's review seems to be based in the unreasonable, yet persistently held views of some private sector developers that refuse to recognize and adapt to the governance and regulatory system that has evolved in the Northwest Territories as a result of constitutionally entrenched land claims agreements. In the regime rejected by these players, communities, Aboriginal governments, and the public hold too much power (even in the absence of devolution and revenue-sharing arrangements). Presently, local people have a voice in the scale and pace of resource development and in overall economic development. This is not a negative. While we acknowledge that there may be some areas of the environmental management system that require real improvement (as outlined below), Mr. McCrank's assignment appears to be one of attempting to tip the balance of power in favour of the corporate sector.

We think that the efforts expended on Mr. McCrank's review would have been much more wisely invested in responding to and acting upon the findings of the 2005 Northwest Territories Environmental Audit. The Audit is the legitimate and legally-required process for improving the integrated resource management system that was supposed to be established pursuant to the *Mackenzie Valley Resource Management Act (MVRMA)*. The federal government has yet to officially respond to the Audit, and we urge that its response to the Audit should take precedence over any response to Mr. McCrank's review.

Faulty Regulatory Model

The analysis in the report, such that it is, is based on comparison of northern environmental management systems to an "ideal" model. The ideal model conceived by Mr. McCrank does not even mention public participation as an objective, despite s. 9.1 of the *MVRMA* that states

> *"the purpose of the establishment of boards by this Act is to enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians."*

Mr. McCrank also believes that a model regulatory system "must remain neutral with respect to development" (pg. 5 'Objectives of a Model Regulatory System'). This is precisely the approach to environmental regulation in Alberta, a model that has resulted in uncontrolled and unsustainable development. This approach is not the basis for the integrated resource management system established pursuant to land claims settlements and the *MVRMA*. The *MVRMA* provides the following general guidance and principles (emphasis added) to require a sustainability focus and approach to resource management, as articulated in the comprehensive land claims agreements:

- **Land Use Planning** Land use planning for a settlement area shall be guided by the following principles:

  (*a*) the purpose of land use planning is to **protect and promote the social, cultural and economic well-being of residents and communities** in the settlement area, having regard to the interests of all Canadians;

  (*b*) **special attention shall be devoted to the rights of the Gwich'in and Sahtu First Nations** under their land claim agreements, to protecting and promoting their social, cultural and economic well-being and to the lands used by them for wildlife harvesting and other resource uses; and

  (*c*) land use planning **must involve the participation of the first nation** and of residents and communities in the settlement area. (*MVRMA* s. 35)

- **Environmental Assessment** The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to:

  (a) the **protection of the environment** from the significant adverse impacts of proposed developments;

  (b) the **protection of the social, cultural and economic well-being of residents and communities** in the Mackenzie Valley; and

  (c) the importance of **conservation** to the well-being and **way of life of the aboriginal peoples** of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

  In exercising its powers, the Review Board shall consider any traditional knowledge and scientific information that is made available to it. (*MVRMA* s. 115)

- **Land and Water Regulation** The Gwich'in Land and Water Board and the Sahtu Land and Water Board shall regulate the use of land and

waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will **provide the optimum benefit for residents** of their respective management areas and of the Mackenzie Valley and for all Canadians.

The Wekeezhii Land and Water Board shall regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of its management area. (*MVRMA* s. 58 and 58.1)

- **Cumulative Impact Monitoring and Audit** The responsible authority shall, subject to the regulations, analyze data collected by it, scientific data, traditional knowledge and other pertinent information for the purpose of monitoring the cumulative impact on the environment of concurrent and sequential uses of land and water and deposits of waste in the Mackenzie Valley.

  An environmental audit shall include:

  (*a*) an evaluation of information, including information collected or analyzed under section 146, in order to determine trends in environmental quality, potential contributing factors to changes in the environment and the significance of those trends;

  (*b*) a review of the effectiveness of methods used for carrying out the functions referred to in section 146;

  (*c*) a review of the effectiveness of the regulation of uses of land and water and deposits of waste on the protection of the key components of the environment from significant adverse impact; and

  (*d*) a review of the response to any recommendations of previous environmental audits. (*MVRMA* s. 146 and 148(3))

Clearly the *MVRMA* was not meant to establish a 'neutral' regulatory regime. Any particular development or activity must comply with land use plans where they have been approved, have impacts that can be mitigated, prove to be of net benefit to residents of the Mackenzie Valley, and be regulated in a manner to promote balanced development. The *MVRMA* institutes principles of sustainable development, not the uncontrolled and unsustainable development that characterizes Alberta.

Faulty Analysis

After formulating this faulty regulatory model, Mr. McCrank goes on to compare the NWT environmental management regime against it. We present our views on

this comparison below but it is important to point out that Mr. McCrank did not understand (or chose to ignore) the political context in the NWT. At this moment the NWT is evolving constitutionally with regional Aboriginal self-governments based in land claims agreements (and some still subject to final definition through further self-government negotiations) and with a public government at the territorial level. The report contains almost no reference to the Government of the NWT and the role it may play in future environmental management or let alone in the current system.

Mr. McCrank's assessment of the current system is that it is not neutral because "the orientation and training to eliminate that bias has been inadequate" (pg. 10). He does not identify the bodies or members to which he is referring or the basis for this conclusion. We do not know whether the "bias" to which he refers is the simple and appropriate application of the purposes and guiding principles detailed in the *MVRMA* and quoted above.

Mr. McCrank's report also states "there are serious allegations that the regulatory bodies are tempted to act outside of their mandates," again without any details, and repeating industry hearsay.

Mr. McCrank's restructuring proposals do not reflect the political reality of the NWT and are not necessary. Virtually all of his recommendations and areas of concern were more than adequately addressed in the NWT Environmental Audit, without any recommendations for a fundamental overhaul of the environmental management system.

The proposal to disband or otherwise reduce the authority and jurisdiction of the regional land and water boards does not recognize the on-going efforts of these boards to better coordinate their activities, processes and decisions. The proposal also flies in the face of hard fought efforts and negotiations towards regional Aboriginal self-government.

Alternatives North strongly holds that we need a consistent implementation of the comprehensive environmental management system required by the *MVRMA* and land claims agreements, including full funding to build the capacity of the Boards and public to participate in the processes. It is our view that Northerners would vigorously object to Mr. McCrank's proposals to simply extend the Alberta model of resource development and regulation over that province's northern border into the Northwest Territories.

Faulty Recommendations

Specific comments on Mr. McCrank's NWT recommendations follow.

> *Recommendation 1 – Land Use Plans*
> *A priority should be given to completing the Land Use Plans in all areas, and obtaining their approval from the federal government.*

Alternatives North agrees with this recommendation but would add that the land use planning process be properly resourced and that the territorial government must also approve land use plans (as is required under the *MVRMA)* in a timely manner. We note that the recommendation does not deal with the lack of land use planning for Crown lands covered by the Tlicho Agreement.

> *Recommendation 2 - Consultation*
> *The federal government should give the highest priority to developing and implementing a policy that will clarify its own role, the role of proponents and the role of the regulatory boards, in relation to responding to the requirement for Aboriginal consultation and accommodation.*

While Alternatives North recognizes the evolving nature of Aboriginal rights and consultation requirements, we do not believe that this is the highest priority for improvements to the regulatory process. Successive federal governments have failed to deal fairly or adequately with Aboriginal rights, whether or not the *MVRMA* was in existence. The federal government needs to abide by the mounting number of court rulings that have found that Aboriginal peoples are entitled to meaningful pre-development consultation and to have their interests accommodated.

> *Recommendation 3 – Impact Benefit Agreements*
> *The federal government should give priority to developing an official policy on the purpose, scope and nature of Impact Benefit Agreements in the North.*

Since the federal government has been developing a policy on these agreements for at least five years, this would better be framed: 'A priority should be given to completing…". In the absence of recognized and settled Aboriginal rights or other arrangements that ensure northern communities get a fairer share of the benefits from development, these agreements serve as a tool to secure such benefits.

> *Recommendation 4 – Environmental Agreements*
> *The federal government should identify the gaps in existing legislation and regulations that should be filled in order to protect all elements of the natural environment, to the extent required by the principles of sustainable development, and give priority to the development of the necessary statutes and regulations in order to progressively eliminate the need for* ad hoc *environmental agreements on a project-by-project basis.*

The major gaps in the existing environmental management regime were already identified in the NWT Environmental Audit so no funds or effort need be spent on this recommendation. We agree with the Audit findings: there should be some form of air quality regulation and wildlife monitoring and management plan requirements should have some legislative base. We would also suggest that there are very significant gaps with regard to closure and reclamation requirements for both mineral and hydrocarbon development in the NWT.

> *Recommendation 5 – NWT Cumulative Impact Monitoring Program (CIMP)*
> *The federal government should commit to the NWT Cumulative Impact Monitoring Program (CIMP) and commit funds for that purpose.*

No serious analysis of CIMP implementation activities was undertaken. The many deficiencies in cumulative impact assessment, let alone monitoring, have not been analysed. There is no recognition of the need for a regulation to implement CIMP or of the fact that the CIMP and Audit requirements found in Part 6 of the MVRMA serve as the 'glue' that is supposed to hold together the integrated environmental management regime. The CIMP and Audit are the feedback mechanism that is supposed to guide land use planning, environmental assessment, and land and water regulation to ensure that the health of the Mackenzie Valley ecosystem, including the well-being of its residents. Mr. McCrank's review does not recognize the critical role for CIMP and the Audit or that the failure to implement these provisions is amongst the most serious failures to honour the commitments made in land claims agreements and the *MVRMA*.

> *Recommendation 6 – Security Deposits*
> *The federal government should initiate a review of its current practices for requiring financial security for mining operations in the North, with a view to establishing these requirements in a more orderly fashion and to eliminate duplication.*

No analysis or solution is suggested for dealing with the issue of financial security. Mr. McCrank limited his recommendation to mining operations without any reference to the confused and inadequate provisions regarding hydrocarbon development as identified in the submission by Alternatives North (see our Joint Review Panel environmental management submission also provided to Mr. McCrank, at http://www.alternativesnorth.ca/pdf/070412_ANCEnvironmentalManagmentIssues.pdf).

No recommendation addresses the fact that there is little, if any, coordination of land and water security or reclamation planning (see http://www.carc.org/2005/mining49.NWTMiningReclam%20final%20-21Jan05.pdf). There is no mention of the lack of a coordinated or systematic approach to liability, to closure and reclamation, or to financial security for hydrocarbon or mineral development in the NWT. There is very little regulatory guidance for

closure and reclamation of oil and gas facilities in the NWT or for mining. Detailed expectations or closure standards do not exist. Existing provisions for closure and reclamation do not require that ecological diversity and productivity be restored or that agreed upon end uses do not compromise future generations. Further, there are no clear, mandatory requirements for closure plans before operations begin, or for financial security to cover approved closure plans to ensure that the public purse is adequately protected. These are serious deficiencies in a report that purports to review the regulatory process.

Recommendation 7 – Capacity
The federal government should ensure that each regulatory body has a structured plan for:
a) orientation;
b) training; and
c) continuing education for each new member that is appointed.

We have very serious concerns with Mr. McCrank's analysis and recommendation on the capacity issue in the NWT. He states that the issue "can be remedied to some extent by simplifying the regulatory system…thereby allowing Aboriginal leaders who serve on regulatory boards to provide much needed leadership and assistance to the residents of the potentially impacted areas." This simplistic and condescending solution fails to deal with or recognize the real bases of the problem of capacity, namely, the failure of the federal government to adequately fund the co-management bodies and the absence of a participant funding program. These issues were clearly raised in written submissions Mr. McCrank and we do not understand how he could fail to acknowledge them as the real capacity problems for the co-management bodies and NGOs.

We cannot understand the inertia of the federal government in establishing a proper and adequate participant funding program for all phases of the environmental management system. We are quite frankly astounded that there has not yet been a constitutional challenge to the federal government's failure to institute participant funding for environmental assessments under the *MVRMA* (at a bare minimum). Participant funding is required for environmental assessment and for all of the management functions specified in the *MVRMA*—land use planning, environmental assessment, land and water regulation, cumulative impact monitoring and environmental audit. While we recognize that the needs may vary over time or by function, there is little to be gained by short-changing public and community involvement at various stages of the environmental management system. Northerners have for too long been excluded from decision-making about our resources and the pace of development. With meaningful participation, there will be more effective and efficient decision-making processes.

The federal government's chronic underfunding of *MVRMA* implementation and public participation has been compounded by a failure to promote or educate the

public and developers in particular. If you want a system to fail, what better way to create frustration and calls for so-called reform than to starve it of the resources it needs to properly perform its function? There is a special government responsibility to build long-term capacity through education and training. The systematic underfunding of *MVRMA* implementation has only compounded this problem. Due to this chronic underfunding northerners are at great risk of losing the integrated environmental management system that was so hard fought for at the negotiating table. The federal government must live up to its legal obligations negotiated in the land claims agreements and provide adequate and stable funding for the operation of the NWT environmental management system.

Recommendation 8 – Free Entry System
The federal government should consult with all interested stakeholders and develop a policy on the free entry system.

Alternatives North agrees with the need to review the free entry disposition system for mineral rights in the NWT but this would best be accomplished by an independent and public review. Such a review must be a legislative review, not a policy review. The free entry system will be modified in Ontario in the near future and has already been significantly changed in other parts of Canada and the world. When the Canadian Arctic Resources Committee, a sustainability NGO, challenged the free entry system over ten years ago, the response from DIAND was defensive and put off any serious changes due to devolution (see http://www.carc.org/resource/petition.html and http://www.carc.org/resource/petresp.html). DIAND mineral resource staff view the mining industry as their 'clients' so such a review must be carried out by an independent party. DIAND does not use free entry for disposition of hydrocarbon rights. A review of free entry for mining in the NWT should be delayed no longer.

Recommendation 9 – Performance Measures – Timelines
The federal government and the appropriate regulatory authorities should develop performance measures that result in effective timelines from the receipt of the application to disposition. This may involve different timelines, depending on the scope and complexity of the application.

There is no evidence presented regarding the need for quicker resource development approvals. The first step would be to recommend consistent tracking and public reporting but even this was not recommended by Mr. McCrank. Alternatives North is not opposed to tracking and public reporting but does not support mandatory timelines at this point. Certainty would be increased if there were completed land use plans, a fully funded environmental assessment process (with participant funding), and a functioning cumulative impacts monitoring program.

Recommendation 10 – Water Quality Standards and Effluent Standards

The federal government should, as a priority, in consultation with the Boards under the Mackenzie Valley Resource Management Act, develop standards for water and effluent and the Minister should direct the boards to use those standards.

Alternatives North supports this recommendation and understands that the land and water boards are moving towards a common approach on effluent discharge criteria. It would be helpful if the federal government would exercise its discretion under the *NWT Waters Act* to regulate water quality in the public interest to protect aquatic life and ensure potable water for all communities.

Recommendation 11 – Triggers for Environmental Assessment
The federal government should address the issue of the Environmental Review process and consider providing legislative amendments to the MVRMA that set out the criteria that triggers more extensive review levels.

No evidence is presented that there are an unwarranted number of environmental assessment referrals. No examples or case studies are presented. Mr. McCrank does not acknowledge the guidance documents already developed and distributed by the Mackenzie Valley Environmental Impact Review Board that provide assistance to those conducting preliminary screenings (see http://www.mveirb.nt.ca/upload/ref_library/1195078754_MVE%20EIA%20Guidelines.pdf). Alternatives North does not believe that this issue is a problem and would not recommend changes at this point.

Recommendation 12 – Enforcement
The federal government and the appropriate regulatory bodies should develop an understanding (MOU) concerning the issue of implementation and enforcement of recommended and accepted conditions.

Mr. McCrank recognizes that there is a problem with enforcement but does not suggest that there be more resources devoted to the function or that creative solutions be examined, such as delegating enforcement responsibilities to other federal departments, such as Environment Canada, or to the Government of the NWT. Greater accountability with inspections and enforcement through tracking and public reporting would also assist with improved environmental management.

Recommendation 13 – Mackenzie Valley Resource Management Act
The Minister of INAC should commission a second environmental audit of the Northwest Territories in accordance with S.148(1) of the MVRMA and / or order a specific review of the MVRMA.

Mr. McCrank stated in his report that the first environmental audit "made a number of recommendations, which are in various stages of implementation as

noted earlier" (see page 28). While some recommendations may have been acted upon, there has not yet been a formal response to the audit even though it was conducted more than two and a half years ago. While we agree a second audit should proceed as required under the *MVRMA,* a comprehensive written response to the first audit should have been recommended by Mr. McCrank.

Recommendation 14 – Surface Rights Legislation
The federal government should consider some legislative solution to resolve the current difficulty of surface access to land.

No details on the number or extent of surface rights disputes are provided by Mr. McCrank. In the absence of such evidence, it is hard to believe that this is a significant issue that deserves any more attention than the many other aspects of land claims settlements or the *MVRMA* that the federal government has failed to implement. Alternatives North does not consider this matter a high priority.

Recommendation 15 – Appointments
The Office of the Minister of INAC should establish a process that would anticipate board appointments and ensure that the appointments are timely.

Mr. McCrank states that "there seems to be satisfaction with the actual appointments [to co-management boards]" (see page 30 of his report). Our view is that it is healthy and desirable to have a range of experiences and skills appointed to co-management bodies. Membership should demonstrate greater gender equity and be more representative of our general population while always recognizing the special rights of Aboriginal peoples. Appointments should be as free as possible from political interference unlike recent examples of appointments of Board chairpersons that have gone against Board recommendations. Appointments should be based on variety of interests, skills and experiences to ensure balance and sound recommendations or decisions.

Recommendation 16 – Minister's Directives
The federal Minister should clarify some issues involving the regulatory boards or the regulatory process by exercising his/her authority under the MVRMA.

While it may be desirable to have the Minister exercise the authority of providing policy direction, it must always be used in a manner that promotes and protects the public interest. For example, the Minister could have instructed the land and water boards that all water licences must provide for full financial security to guard against public liabilities.

Recommendation 17 – Ministerial Review under s.130 of the MVRMA
The federal Minister (INAC) should develop a protocol on the review and disposition relating to S.130 (MVRMA) decisions.

It is our view that this is a sound recommendation as it may help to reduce the significant delays that occur with the controversial 'consult to modify' provision of the MVRMA (s. 130(1)(b)(ii)). Governments have used this process to significantly weaken recommendations from the Mackenzie Valley Environmental Impact Review Board in a manner that is not transparent or accountable. If a protocol serves to instill some transparency and accountability and thereby opens up this process to the public, or if it places severe limitations on the use of the process, Alternatives North could support it.

> *Recommendation 18 – Coordination of Federal Responsibilities*
> *The federal government should explore a made-in-the-North equivalent of the MPMO that would be a single point of entry and assist in coordinating federal departments and the GNWT, as well as liaise with the regulatory bodies for all projects, major and minor.*

We do not see a meaningful role for a major projects management office. Departmental differences and expertise will likely be 'resolved' behind closed doors rather than as part of public processes. The MPMO would likely begin to function as an advocate for development rather than as a coordinating body. Small projects that could easily be dealt with solely at the regional level would then be forced through a centralized process, quite contradictory to the intent of signed claims agreements. Instead of such an office, why not devote the resources towards building longer term capacity and meaningful public participation?

The bulk of the problems with the regulatory process do not stem from government *coordination,* but rather from a marked, steady and massive erosion of *meaningful* government *participation*. The decline has been seen in environmental assessment and in overall involvement in environmental management. Surely further coordination of government departments is meaningless when the actual participation of the many government employees who have substantive professional expertise in the field is being actively hindered.

Conclusion

We would not define the current state of affairs in the NWT as resembling "responsible resource development," a benchmark that Mr. McCrank uses often in his report. Given the critical failure of the federal government to implement key aspects in the *MVRMA*, such as land use planning and cumulative impact monitoring, northerners (nor Canadians) do not even have the ability to make a reasonable assessment of whether the current level of resource development activity is ecologically sustainable, let alone within limits of acceptable change for communities. Decision-makers and governance systems have yet to recognize ecological and social limits, or to develop thresholds that ensure some margin of safety in the interest of sustainability.

Mr. McCrank's review took place outside of the *MVRMA* and legitimate processes designed to improve environmental management. The model he presents is not a one that most northerners would willingly embrace.

The analysis that Mr. McCrank undertakes is faulty and superficial, with few details, statistics, case studies or evidence. The recommendations in his report too often reflect the interests of outside resource developers at the expense of the interests of northerners.

Real solutions to improve the regulatory system are to be found within the comprehensive and valid NWT Environmental Audit. We can sum up our recommendation to DIAND very easily.

> **To improve the NWT environmental management system, all effort should be focused on responding to and implementing the findings of the 2005 NWT Environmental Audit.**
>
> **The McCrank Report is not a blueprint. It offers few, if any, solutions.**