

September 8, 2005

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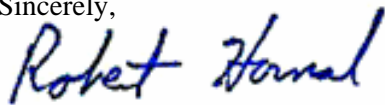
Re: Joint Review Panel Ruling on the DAS and DTFN Motions

Please find attached the Ruling of the Joint Review Panel (the “Panel” or the “JRP”) on the Motions filed by the Dehgha Alliance Society (DAS) and the Dene Tha' First Nation (DTFN) on June 10, and June 27, 2005 respectively. The Panel has made a determination in relation to each of the Information Requests subject of the Motions. In its Ruling the Panel is directing Parties to respond to specified Information Requests (IRs) as set out below. Please submit these responses to the Panel, the DAS and the DTFN by **September 30, 2005**.

The Panel directs that the following Information Requests be answered by the Responding Party as follows:

IR to be answered	Responding Party
IR DAS JRP 2.06 (a), (b), (c) and (d)	Indian and Northern Affairs Canada
IR DAS JRP 2.12 (d)	Indian and Northern Affairs Canada
IR DTFN R2-13 (b)	Environment Canada
IR DTFN R2-17 (a) and (b)	Fisheries and Oceans Canada
IR DTFN R2-19 (c) and (d)	Fisheries and Oceans Canada
IR DTFN R2-20 (a) and (b)	Indian and Northern Affairs Canada
IR DTFN R2-23 (a) and (b)	Natural Resources Canada

Sincerely,



Robert Hornal
Chair, Joint Review Panel Manager

Attachment

Cc: All Parties to the Environmental Impact Review of the proposed Mackenzie Gas Project

**September 8, 2005 Ruling
of the Joint Review Panel
on Motions filed by:**

- ◆ Dehguh Alliance Society on June 20, 2005; and
- ◆ Dene Tha' First Nation on June 27, 2005

RULING
DEHGAH ALLIANCE SOCIETY AND DENE THA' FIRST NATION MOTIONS

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1.0 BACKGROUND INFORMATION

By way of letters to the Joint Review Panel (the Panel or JRP) of June 10 and 20, 2005, the Dehghah Alliance Society (DAS) brought motions for Rulings from the Panel compelling the federal departments to respond in a full and complete fashion to specified Information Requests (IRs) filed by the DAS in the IR Round 2 process. On June 26th the JRP set out a process and a timetable for Parties to respond to the Motion. That procedure included: an opportunity for government departments to provide their rationale for the positions taken in responding to IRs noted in the DAS Motion; the filing of submissions in support of the DAS Motion; the filing of submissions in support of the government submissions; and the opportunity for reply by the DAS.

On June 27, 2005 the Dene Tha' First Nation (DTFN) filed a separate Motion that was similar to that filed by the DAS. By way of letter dated June 30th, the Department of Indian Affairs and Northern Development (INAC) requested on behalf of the federal government departments named in the DAS Motion that the two Motions be consolidated such that the departments be allowed to file one written submission applicable to both. In a letter dated July 5th, the JRP concurred with the request to hear the two Motions together and dealt with two other Motions requested by the DTFN. By way of that letter, the JRP also set a single procedure and timetable for Parties wishing to make submissions with respect to the DAS and DTFN Motions (together referred to as "the Motions"). The submissions from Parties have been received in accordance with that timetable and procedure and the JRP ruling follows.

2.0 INFORMATION REQUESTS FOR WHICH THE DEHGAH ALLIANCE SOCIETY AND THE DENE THA' FIRST NATION SEEK TO COMPEL GOVERNMENT DEPARTMENTS TO ANSWER

The IRs in relation to which the DAS and the DTFN requested orders compelling government responses and the issues raised in those Information Requests are set out in the table below. Although the DTFN asked for a ruling on only IRs which it had submitted, the DAS requested relief on some IRs it had submitted as well as some IRs filed by the DTFN and the NWT Literacy Council. In some cases an IR was originally addressed to more than one level of government or government department but the Motion in relation to that IR requested the Panel to compel only the department(s) identified in the table below as the "Responding Department" to reply.

Issue	IRs to which DAS requested a response	IRs to which DTFN requested a response	Responding Department
Government opinion on benefits to northerners	DAS JRP 2.06		Indian and Northern Affairs Canada
How JRP recommendations will be handled / Enforcement	DAS JRP 2.12		Indian and Northern Affairs Canada
Acceptance of recommendations from other project reviews (Paramount re: Moose and Caribou monitoring)	DAS JRP 2.15		Indian and Northern Affairs Canada
Acceptance of recommendations from other project reviews (Government position on Blackwater River sites)	DAS JRP 2.16		Indian and Northern Affairs Canada

Issue	IRs to which DAS requested a response	IRs to which DTFN requested a response	Responding Department
Enforcement	DTFN-R2-13	DTFN-R2-13	Environment Canada
Departmental interaction with Alberta or Alberta Energy and Utilities Board	DTFN-R2-14	DTFN-R2-14	Environment Canada
Funding for First Nations	DTFN-R2-15		Environment Canada
Funding for First Nations		DTFN-R2-16	Environment Canada
Commitments to enforce JRP recommendations	DTFN-R2-17	DTFN-R2-17	Fisheries and Oceans Canada
Departmental interaction with Alberta or AEUB	DTFN-R2-18	DTFN-R2-18	Fisheries and Oceans Canada
How will DFO handle JRP recommendations in Alberta	DTFN-R2-19 (c and d)	DTFN-R2-19	Fisheries and Oceans Canada
(a & b) Enforcement in Alberta (c) Departmental interaction with Alberta or AEUB	DTFN-R2-20 (a and b)	DTFN-R2-20	Indian and Northern Affairs Canada
Departmental interaction with Alberta or AEUB	DTFN-R2-21	DTFN-R2-21	Indian and Northern Affairs Canada
(a) Acknowledgement of aboriginal rights of Dene Tha' (b & c) Funding	DTFN-R2-22	DTFN-R2-22	Indian and Northern Affairs Canada
Enforcement in Alberta	DTFN-R2-23	DTFN-R2-23	Natural Resources Canada
Departmental interaction with Alberta or AEUB	DTFN-R2-24	DTFN-R2-24	Natural Resources Canada
Departmental interaction with Alberta or AEUB	DTFN-R2-25	DTFN-R2-25	Transport Canada
First Nation Consultation		DTFN-R2-28(e)	Government of the Northwest Territories
(a) Acknowledgement of aboriginal rights of Dene Tha' First Nation (b) Funding		DTFN-R2-29	Government of the Northwest Territories
Human Rights record of Proponent	NWTLC R2-28		Indian and Northern Affairs Canada
Full cost energy analysis	NWTLC R2-29		Indian and Northern Affairs Canada Natural Resources Canada

As many of these IRs and the corresponding responses are similar, INAC, as the lead department for the federal government, addressed a number of themes that were embedded in several of these IRs. INAC took the position that the issues represented by these themes were not within the

jurisdiction of the JRP to consider and therefore should not be considered by the Panel. As such, asserted INAC, the “applicants in this motion bear the onus of demonstrating that the issues raised in the IRs are relevant to [the JRP’s] proceedings and that they are in fact within the JRP’s jurisdiction as set out in the Agreement”. INAC’s written submission of July 27, 2005 addressed each of these themes individually then applied the federal responses on these themes to the particular IRs. As this approach seems reasonable and the DAS and DTFN responded to this approach in their respective reply arguments, the JRP Ruling follows this format.

This Ruling addresses each of the IRs. Where the issue raised in the IR has been addressed by one of the themes, reference will be made to the Panel’s ruling on the theme and its applicability to the specific IR.

3.0 THEME ISSUES PRESENTED IN THE INFORMATION REQUESTS

The Panel has identified the following issues that are raised throughout a number of the IRs.

- a) Implementation of Panel recommendations by government departments and regulators (including enforcement)
- b) Interaction of federal and territorial government departments with the Government of Alberta or the Alberta Energy and Utilities Board (AEUB)
- c) Aboriginal Rights
 - i) Acknowledgement
 - ii) Consultation
- d) Funding for First Nations

a) Implementation of Panel recommendations by government departments and regulators (including enforcement)

IRs numbered DAS JRP 2.12, DTFN-R2-13, 17, 20 and 23 raise the general question of how various government departments and regulators “will handle the JRP’s report including the acceptance and enforcement of the JRP’s recommendations”. [see DAS JRP 2.12 part (a)]

Government Views

In its response to IR DAS JRP 2.12, INAC set out the procedure that would be followed once the JRP issued its report. INAC stated at paragraph 19 in its submission of July 27, 2005, that, whether in relation to the Mackenzie Valley Land and Water Board (MVLWB), National Energy Board (NEB), or Department of Fisheries and Oceans Canada (DFO) in the Northwest Territories or Alberta, “...any mitigation measures that are recommended by the JRP and accepted by the federal authorities will be implemented as part of the process of issuing federal authorizations.”

This corresponds with paragraph 5.3 of the *Agreement for Coordination of the Regulatory Review of the Mackenzie Gas Project*, which states that, where “... their respective legislation provides, the Parties are obliged to act in conformity with those recommendations of the Joint Review Panel that are relevant to their mandate and are accepted by Government.”

INAC’s reasons for not providing further comment on how the Panel’s recommendations would be implemented are based on INAC’s characterization of the jurisdiction of the Panel and the timeframe within which pertinent information would come forward.

In its submission of July 27, 2005, INAC expressed the view that “it is outside the mandate of the JRP to consider or comment on the manner in which the mitigation measures it recommends may be implemented” in that the Panel’s mandate is prescribed by the Schedule to the Agreement for an Environmental Impact Review of the Mackenzie Gas Project (JRP Agreement) and its sole responsibility is to prepare and provide “a report that includes rationale, conclusions, and

recommendations regarding the nature and significance of impacts on the environment, including any mitigation measures and follow-up program.” At paragraph 18 of that letter, INAC states:

There is nothing in the Schedule to the Agreement that requires or enables the JRP to consider or comment on the manner in which the mitigation measures it recommends may be implemented. Nor does the JRP’s obligation to recommend mitigation measures infer an obligation to consider how those mitigation measures will be implemented. The JRP’s obligation pertains solely to assessing the environmental effects of a project, not the statutory and/or constitutional jurisdiction that the federal government has with respect to implementing those recommendations.

Paragraph 19 goes on to state that it is “the responsible federal authorities [that] will determine how any mitigation measures that are recommended by the JRP and accepted by the federal authorities will be implemented as part of the process of issuing federal authorizations.”

INAC makes the point in its submission that the precise location and nature of required authorizations under the *Fisheries Act* and the *Navigable Waters Protection Act* are not known at this time; nor are the mitigative measures that will be recommended by the JRP. As a consequence, they submit, “the information request regarding enforcement of mitigation measures cannot be answered at this time by the federal authorities.”

DAS Views

In its reply, the DAS states that it was not arguing that it was the JRP’s mandate to consider or comment on the manner in which the mitigation measures it recommends may be implemented. Rather, it had in mind the ability of the Panel “to put forward recommendations on a follow-up program for mitigative measures that it recommends because the follow-up program is essentially the implementation of the measures.” It references the definition of the terms “mitigative or remedial measure” and “follow-up program” in the *Mackenzie Valley Resource Management Act (MVRMA)* and goes on to reference a recommended measure of the Mackenzie Valley Environmental Impact Review Board (MVEIRB) that includes implementation directives in its mitigative measure and was accepted by the Minister of INAC.

The DAS reply also asserts that the JRP mandate is broader than just the Annex 2 list of factors for the review. It argues that the scope of the review must include the requirements of the *MVRMA*, just as the DTFN argues that the review should ultimately be governed by the *Canadian Environmental Assessment Act (CEAA)*.

The DAS asserts on page 2 of its June 20, 2005 Motion for Ruling that the Terms of Reference require the JRP to include within the environmental impact review (EIR) a consideration of “the roles to be played by the Proponent, regulatory agencies, Aboriginal people and others in such a program”.

DTFN Views

The DTFN is of the view that the questions posed by it to the government department Respondents

... with respect to the enforcement of JRP recommendations (if accepted by the Respondents) within the Connecting Facilities in Alberta is directly related to the issues of mitigation and Treaty 8 rights, both of which are included in the [EIS] Terms of Reference. ... Moreover, the role of Alberta (or lack thereof) within the JRP process, and questions related to discussions that the Respondents have had with Alberta in relation to the environmental assessment of the MGP, relate to how the recommendations of the JRP will be enforced within the Connecting Facilities, and to the question of how issues such as mitigation and

Treaty 8 rights will be meaningfully considered and accommodated in respect of the MGP. [see paragraphs 24 and 25 of the DTFN's June 27, 2005 Notice of Motion]

In its Reply Argument of August 3, 2005 (paras. 12 and 13), DTFN submits that:

... section 16 of CEEA (sic) requires the JRP to consider whether the Responsible authorities have the ability to implement mitigation and follow-up measures within the Connecting Facilities, either on the basis that this is an issue of technical feasibility pursuant to section 16 or on the basis that this is "any other matter relevant" to the work being done by the JRP. The wording of section 16(1)(e) gives the JRP the discretion to consider other matters that it considers relevant, and the question of whether its own recommendations can be implemented within the Connecting Facilities is clearly relevant to the work being done by the JRP and will provided guidance in terms of how the JRP formulates those recommendations.

...
It is also notable that section 20(1.1) of CEEA says that mitigation measures which may be taken into account by a responsible authority are not limited to measures within the jurisdiction of Parliament and may include "(a) any mitigation measures whose implementation the responsible authority can ensure." (emphasis added) There is also similar language in s. 37 (1.1) (a) of CEEA. ... (emphasis in original)

Panel Views

Section 2 of the JRP Agreement states that the "...purpose of this Agreement is to establish an Environmental Impact Review that meets the requirements of the *CEAA*, the *MVRMA* and the IFA."

Subsection 4 (b) states the "... Joint Review Panel will carry out its duties and conduct the Environmental Impact Review according to the mandate set out in the Schedule to this Agreement", which Schedule states in clause 2.0:

In carrying out the review, the Joint Review Panel will address the factors outlined in the Annex 2 to this Schedule. The Environmental Impact Review shall have regard to the protection of the environment from the significant adverse impacts of proposed developments, and to the protection of the existing and future social, cultural and economic well-being of residents and communities.

The factors listed in Annex 2 to the JRP Agreement Schedule as factors to be considered during the review include, among other things: any comments from the public that are received during the EIR; measures that are technically and economically feasible and that would mitigate any significant adverse impact of the Project on the environment; and the need for any follow-up program in respect of the Project, and the requirements of such a program.

The term "mitigation" is defined in the Schedule to the JRP Agreement, *CEAA* and the *MVRMA*. The Schedule to the JRP Agreement defines mitigation to mean:

... action for the control, reduction, or elimination of an adverse impact of the Project on the environment and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation, remedial measures or other means.

CEAA defines mitigation to mean:

... in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means...

The *MVRMA* defines “mitigative or remedial measure” to mean “a measure for the control, reduction or elimination of an adverse impact of a development on the environment, including a restorative measure”.

As the JRP Agreement does not contain a definition of the term “follow-up program”, the Panel refers to the definition of this term included in the *MVRMA* and the *CEAA*.

A “follow-up program” is defined in *CEAA* 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”. That same phrase is defined in the *MVRMA* to mean “a program for evaluating the effectiveness of mitigative or remedial measures imposed as conditions of approval of the proposal”.

The Panel agrees with INAC that the manner in which those Panel recommendations that are accepted by government are implemented will be up to those federal agencies with jurisdiction. The Panel is also of the view, however, that the INAC response is narrowly focused on a technical notion of “enforcement”. It is essential that the Panel consider and understand the effectiveness of proposed mitigation in the broader context of the likelihood of a measure’s success, rather than in the narrow sense of strict compliance with licence or permit conditions. The Panel would also distinguish between regulatory enforcement for compliance with a provision of a licence or permit, and ensuring that monitoring and follow-up programs that may involve several stake-holders are effectively implemented.

The Panel must be confident that whatever mitigation and follow-up measures it may recommend have a strong likelihood of successfully eliminating or minimizing whatever predicted adverse impact they were designed to mitigate. The record of and capacity for enforcement by government, and the means by which government can implement mitigation and follow-up measures are, therefore highly relevant to the Panel’s review and assessment of that question. If predicted adverse effects are not successfully mitigated, then there may be adverse residual impacts. The Panel must consider the possibility and significance of residual impacts in drawing conclusions about the environmental acceptability of the Project.

The Panel therefore welcomes submissions at hearings from Interveners and the public on appropriate mitigative measures and follow-up programs, including information relating to enforcement.

In light of the foregoing, the Panel does not find it necessary to express a view on the DAS and DTFN submission regarding the scope of the JRP mandate vis-à-vis the factors in Annex 2 to the JRP Agreement, *CEAA* or the *MVRMA*.

With respect to the issue of timing, the Panel notes that under two pieces of legislation (*Fisheries Act* and *Navigable Waters Protection Act*) application for an authorization need not be made if a proposed activity is not predicted to result in a harmful alteration, disruption or destruction of fish habitat. The Panel notes the concerns of the DTFN with respect to fisheries issues expressed at paragraph 26 of its reply argument of August 3, 2005 that

The question of the enforceability of the JRP’s recommendations cannot be deferred to some unknown date in the future. The ability of the Dene Tha’ to protect its rights and interests requires knowing now, and not at some undetermined point in the future (such as after the JRP conducts its Public Hearings), whether mechanisms are in place to ensure that the JRP’s recommendations can be implemented with the Connecting Facilities if they are accepted.

The JRP would also note that it has asked the Proponent for information related to categories/classes of river crossings. To the extent that the substance of the site-specific water crossings are still a concern to the DAS or DTFN in the context of the Mackenzie Gas Project (MGP) application, they may submit as part of their evidence during the public hearings phase information on those concerns and their recommendation to the Panel about what the Panel should recommend to the Minister.

b) Interaction of federal and territorial government departments with the Government of Alberta or the Alberta Energy and Utilities Board

IRs DTFN-R2-14, 18, 21, 24 and 25 enquire about the interactions between federal and territorial government departments and the Government of Alberta and the Alberta Energy Utilities Board. Alberta is not a signatory to the JRP Agreement or any of its predecessor multi-jurisdictional agreements. The concern expressed in the preamble to these IRs is related to how the Alberta portion of the MGP will be assessed, how the environmental and regulatory review will be done in a coordinated fashion and how the Panel's recommendations as well as commitments made pursuant to Section 6 of the Terms of Reference could be enforced in Alberta. The specific request is for documentation relating to any correspondence or meetings with Alberta officials.

Government Views

The federal governments are of the view that the questions raised in these IRs were not relevant and in order to be relevant to the JRP proceedings, questions submitted by way of IRs should pertain to the factors set out in Annex 2 to the Schedule of the JRP Agreement. In their view, questions related to intergovernmental interaction are not listed in those factors and are therefore not relevant to the Panel's review.

DAS Views

The DAS disagreed with the federal government's views and indicated in their letter of June 20, 2005 that the:

... JRP's recommendations will at least in part be included in the follow-up program for the project. According to Annex 2, Section 9: "The Environmental Impact Review will include a consideration of ... the need for any follow-up program in respect of the Project, and the requirements of such a program."

Furthermore, in Section 25 of the TOR, the JRP is clearly required to include within the Environmental Impact Review (EIR) a consideration of: "the roles to be played by the Proponent, **regulatory agencies**, Aboriginal people and others in such a program." (*emphasis added*)

The role that the MVLWB, the NEB and the Alberta regulatory agencies will have in the acceptance and enforcement of the JRP's recommendations, recommendations which will form part of the follow-up program for the project, clearly is included in Section 25 as a subject of the EIR.

In its comments of August 5 on the July 27, 2005 arguments of the federal government departments, the DAS indicated that they "...support and agree with the reply submission filed by the DTFN ..." and provided no further comment on the above-noted IRs.

DTFN Views

In their written argument dated July 7, 2005, the Dene Tha' do not set out a specific argument in support of their request for documentation between the two levels of government and their respective departments or regulatory agencies. Rather they argue that the information related to a

number of substantive matters is “needed for the JRP to fulfill its mandate and to ensure the integrity of the entire JRP process, including the Public Hearings”. [para 30]

The Dene Tha’ state that parties to the various agreements leading up to and culminating in the JRP Agreement “contemplate that Crown departments ... will consider adopting recommendations made by the JRP in respect of mitigation and other measures related to the MGP”. [para.8] They point out sections in the TOR that require the Proponent to describe its proposed mitigation measures with respect to environmental and socio-economic impacts including “measures within access or benefit agreements with the Inuvialuit and First Nations, or socio-economic agreements and environmental agreements with the federal and territorial governments...”. [para. 7] DTFN states that in posing the above-noted Round 2 IRs, it

... asked questions to elicit, among other things, the following information:

- (a) The commitments that the Respondents will make if they accept JRP recommendations concerning the MGP, such as in relation to mitigation measures;
- (b) The legal or regulatory means that are available to the Respondents to enforce those commitments within the Connecting Facilities;
- (c) The involvement of the Government of Alberta within the environmental review of the MGP;
- (d) The provision of funding to other NWT-based First Nations in respect of the Project, to enable those First Nations to participate meaningfully in the environmental review of the MGP and whether the Respondents are prepared to make such funding available to DTFN; and
- (e) The consultation obligations of the Respondents, including the Government of the Northwest Territories. (emphasis in original)

The DTFN states that because “the Respondents will be required to determine whether they will accept the recommendation made by the JRP in respect of the MGP”, the DTFN need to know “what steps the Respondents themselves will take if they accept some or all of the recommendation made by the JRP in respect of mitigation and other measures.” DTFN asks for information about the mechanisms available to implement JRP recommendations in Alberta and the role the Respondent departments will play in enforcing recommended measures for mitigation because, it states, “the viability of such recommendations, if accepted by the Respondents, is dependent on how the Respondents answer questions related to the enforceability of those recommendations themselves”. [para. 23] The DTFN feels that this information is relevant and will be helpful to the Panel in structuring its recommendations. DTFN states at paragraph 24:

...one of the purposes of the environmental hearings is to ensure that the JRP (and for that matter, the Respondents) is fully informed about the concerns of First Nations such as DTFN, and that the JRP has the best information possible on how to deal with those concerns, through mitigation, follow-up and other measures. It is not enough for the JRP or the Respondents to simply know that DTFN has concerns. It is also important that the Respondents work with DTFN on what legal and regulatory means are available to deal with those concerns.

The DTFN states that the questions in the IRs posed by it relate to the role and involvement of the Respondents in respect of the issues raised. At paragraph 16 of their July 7, 2005 written argument, the DTFN states:

Through their role as Responsible Authorities, through the requirement that they consider accepting and adopting the recommendations of the JRP, and/or because the Respondents will be asked to issue various licenses, permits and other approvals which have the potential

to infringe the Aboriginal and Treaty rights of DTFN, the role of the Respondents is directly engaged in respect of several of the issues raised in the Terms of Reference.

Panel Views

To the extent that correspondence between levels of government and governmental agencies has taken place to address matters related to the co-ordination and administration of processing a multi-jurisdictional application – especially communication that pre-dates establishment of the Joint Review Panel – this is not relevant to the Panel's review.

The Panel notes that, if the DAS or DTFN want to obtain copies of correspondence between government departments and agencies, there are avenues available to it under access to information legislation.

The Panel is of the view that it is not necessary to rule on the federal government's assertion that IRs should pertain only to the factors set out in Annex 2 to the Schedule of the JRP Agreement.

The JRP will not compel the government departments to provide the documentation requested. It will however, direct the federal departments to describe how they will implement the Panel's recommendations regarding the MGP in Alberta for the same reasons discussed under 3.0 a) above with respect to the issue of enforcement.

c) Aboriginal Rights

Two aspects related to aboriginal rights were raised in the Motions filed by the DAS and the DTFN. The first was acknowledgement of aboriginal and treaty rights and the second was consultation in relation to constitutionally protected rights. Each was addressed by the Government of the Northwest Territories (GNWT) and INAC.

i) Acknowledgement

IR DTFN-R2-15 (a), IR DTFN-R2-22 (a) and IR DTFN-R2-29 (a) ask Environment Canada (EC), INAC and GNWT respectively whether they acknowledge that the Dene Tha' First Nation has or asserts rights and title to a portion of the Northwest Territories.

Environment Canada, INAC and GNWT took the position that this question was not relevant to the JRP process and therefore provided a response of "not relevant".

DAS Views

The DAS view, as represented in its Motion filed on June 20, 2005, was that the issue of aboriginal and treaty rights is:

... directly relevant to the review as EC cannot properly assess this project without being able to answer this question. The mandate of the JRP is to assess the impacts on the environment. The definition of "impact on the environment" in the *Agreement* includes the "current use of lands and resources for traditional purposes by aboriginal peoples". These uses of land are aboriginal and treaty rights. If EC cannot properly identify where the DTFN have aboriginal and treaty rights, then EC cannot properly assess the impacts on the environment of this project, including the impacts upon the aboriginal and treaty rights of the DTFN.

DTFN Views

In setting out the basis for its Motion, paragraphs 16 – 18 of the DTFN Notice of Motion dated June 27, 2005 states:

16. ... the Terms of Reference make it clear that issues such as Traditional Knowledge, mitigation, and the impact of the MGP on Treaty 8 rights are issues and factors to be included in the environmental assessment of the MGP. Ultimately, the Respondents will be required to determine whether they will accept the recommendations made by the JRP in respect of the MGP.
17. Through their role as Responsible Authorities, through the requirement that they consider accepting and adopting the recommendations of the JRP, and/or because the Respondents will be asked to issue various licenses, permits and other approvals which have the potential to infringe the Aboriginal and Treaty rights of DTFN, the role of the Respondents is directly engaged in respect of several of the issues raised in the Terms of Reference.
18. The questions posed by DTFN in the above-mentioned Information Requests relate to the role and involvement of the Respondents in respect of those issues. They are issues that will be considered by the JRP in the Public Hearings concerning the environmental impact of the MGP.”

In paragraph 30 of its August 3, 2005 Reply Argument, DTFN argues that:

... the entire process of seeking to accommodate Dene Tha's rights, and to ensure that there is adequate mitigation and follow-up (which are clearly issues within the mandate of the JRP) depend on the Respondent's answers to questions related to whether they recognize Dene Tha's rights in the NWT. If Dene Tha's concerns are to be addressed, and given effect, including the development of effective mitigation and follow-up measures, Dene Tha' needs to be a full participant in developing those measures, just as other First Nations whose rights may be infringed by the Project have been full participants, The failure of the Respondents to even answer the initial question of whether they acknowledge Dene Tha's rights is a cause of great concern to Dene Tha' in respect of their ability to play any meaningful role within the environmental assessment process.

Federal Views

In its July 27, 2005 submission on the Motions, INAC did not respond directly to the DTFN question about whether it acknowledged that “the Dene Tha' First Nation has or asserts rights and title to a portion of the Northwest Territories.” INAC did however state in paragraph 7 that there are a number of Aboriginal groups along the proposed MGP route with existing s. 35 rights that range from those with settled comprehensive land claims and treaties to those “Aboriginal groups who assert claims of aboriginal rights and title to areas potentially impacted by the MGP”. At paragraph 11 INAC submits that “the JRP has neither the legal capacity nor the mandate to determine whether s. 35 rights exist or the scope of those potential rights.”

GNWT Views

In its written submission to the Motions dated July 26, 2005, the GNWT states at paragraph 5 that the

...role of the JRP is to address the factors set out in Annex 2 to the Schedule having regard “to the protection of the environment from the significant adverse impacts of proposed developments, and to the protection of the existing and future social, cultural and economic well-being of residents and communities.”

GNWT goes on to make the point that rather than “considering the nature and significance of impacts on the environment” through the IR process, the questions posed in DTFN-R2-28(e) and DTFN-R2-29(a) “seek admissions with respect to the nature and extent of the DTFN's treaty rights and the adequacy of consultation.”

In its view, the GNWT submits at paragraph 8, “the JRP does not have the jurisdiction to make these determinations. The mandate of the JRP, as outlined above, does not extend authority to the JRP to determine the nature and extent of aboriginal or treaty rights, nor to determine the adequacy of consultation.”

Panel Views

The Panel notes that, by way of these Motions and several pieces of correspondence from the DTFN that have been placed on the Public Registry, the DTFN has brought to the attention of the Panel and the Crown its assertion of treaty rights to territory the Dene Tha’ claim as their traditional territory in the NWT.

The Panel agrees with both the GNWT and federal government that the Panel has no jurisdiction or mandate to determine the nature and extent of aboriginal or treaty rights. The Panel also acknowledges that DTFN is not asking the JRP to affirm the existence of its rights “but is asking whether the Respondents, themselves, acknowledge those rights.” (emphasis in original) [see paragraph 27 of the DTFN August 3, 2005 reply argument]

If there are unresolved aboriginal or treaty claims in the Project area, the Panel may consider whether negotiations to settle those claims might be adversely affected if the Project were authorized to proceed prior to a settlement. The Panel notes that such a consideration would not constitute a legal determination of rights. It would involve a factual determination of whether the claimant group might be adversely affected based on the definition of “impact on the environment”, one of the factors the Panel must consider.

The term “impact on the environment” is defined in Section 1.0 of the JRP Agreement Schedule to mean:

Impact on the environment includes cumulative impacts and means, in respect of a project (emphasis in original)

- a) any change that the project may cause on the environment, and includes
 - (i) any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, **on the current use of lands and resources for traditional purposes by Aboriginal persons**, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; (*emphasis added*)
 - (ii) any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*;
 - (iii) any change to present or future wildlife harvesting;
 - (iv) any change to the social and cultural environment or to heritage resources;
- and
- b) any change to the project that may be caused by the environment.

The determination by the Panel of whether “current use of lands and resources for traditional purposes by aboriginal persons” occurs in the Project area would be a factual one, not a legal one, and it would be based on factual evidence provided to the Panel by the DTFN. Such use must thus be documented, not simply asserted.

If such use is demonstrated, the Panel will then consider whether the Project would have adverse impacts on those uses. Further, the Panel may consider whether there might be any adverse impacts on the negotiation of a claim based on those uses, as a consequence of proceeding with the Project prior to the resolution of such a claim. The determination of such adverse impacts would similarly be one of a factual nature, not a legal one. Whether or not the

Crown acknowledges the DTFN's claimed rights is not related to, and will have no effect on, how the Panel might make such determinations of fact or any recommendations based on those findings.

The Panel's mandate is set out in the JRP Agreement – particularly in Annex 2 to the Schedule and in the definition of "Impact on the Environment". The purpose of the JRP Agreement, as set out in Section 2 of the JRP Agreement, is "to establish an Environmental Impact Review that meets the requirements of the CEAA, the MVRMA and the IFA." Section 4 (b) states the "Joint Review Panel will carry out its duties and conduct the Environmental Impact Review according to the mandate set out in the Schedule to this Agreement."

Annex 2 to the Schedule to the JRP Agreement states that the "Environmental Impact Review will have regard to the protection of the existing and future social, cultural and economic well-being of residents and communities and will include a consideration of the following factors: the impact of the Project on the environment" (see definition above). The Panel expects to receive evidence in the form of traditional knowledge or scientific knowledge from the DTFN that includes identification of potential impacts the proposed MGP might have on the environment as defined in the JRP Agreement schedule. The Panel will also give careful consideration to any recommendations the Dene Tha' might have as to how project-related impacts could be mitigated and on the necessity and design of follow-up programs.

The Panel expects that, if there is a potential MGP-related impact on an activity protected by a treaty or aboriginal right, the DTFN will bring this to the attention of the Panel in sufficient detail that the Panel can consider whether there will be an adverse impact on any of the factors for which the Panel has a mandate. The Panel process including the public hearings will provide the DTFN with one venue to convey its views, via the Panel, to the Proponent and government agencies. Any concerns brought to the attention of the JRP will be recorded on the Public Registry and reflected in the Panel's report.

ii) Consultation

IR DTFN-R2-20 (c) refers to a 2003 internal INAC memo between the Regional Directors General of the NWT Region and the Alberta Region whereby the NWT RDG is seeking guidance on "how to effectively engage Alberta Treaty 8 First Nations in [the MGP] EIA and regulatory review process." Subsections (ii) and (iii) of this same IR request information about discussions INAC has had and any related documentation concerning how Alberta First Nations would be consulted in respect of the MGP. DTFN in its Motion requested the Panel to compel INAC to answer the entirety of IR DTFN-R2-20 whereas DAS required a response to only IR DTFN-R2-20 (a) and (b).

IR DTFN-R2-28 (e) asks the GNWT to identify the steps it has taken or intends to take "to ensure that there is proper consultation with the Dene Tha' and accommodation of Dene Tha's rights and interests with respect to the portion of the Project being constructed in the NWT...".

Response from INAC and GNWT

Both INAC and GNWT responded that these IRs are not relevant to the JRP process.

DTFN Views

The DTFN makes the point that an obligation on the Crown to consult the DTFN flows from acknowledgement of Dene Tha' rights. Their written submission and Reply Argument seek to secure confirmation from the Crown that the Crown has indeed taken this first step. DTFN views this acknowledgement as "a pre-requisite to determining the steps the Respondents may

have to take to address Dene Tha's concerns in the NWT" [see paragraph 29 in the DTFN August 3, 2005 Reply Argument]. Once this pre-requisite has been met, the DTFN seeks information about the role of the federal, provincial and territorial Crown in carrying out issues such as mitigation and follow-up. The DTFN submissions refer heavily to decisions made by the courts involving environmental assessment processes and aboriginal and treaty rights. It argues that the Crown has a constitutional duty to consult with the Dene Tha' to "engage early with First Nations with the intention of seeking to avoid infringements of those rights." Further, in rebuttal to the GNWT statement that the DTFN are seeking "admissions" from GNWT, DTFN states that the "duty to consult as set out in *Haida* does not require actual proof of rights", DTFN goes on to state that:

GNWT acknowledges in its application to intervene in the JRP process, it will be issuing various permits and licences, and it is submitted that this will directly engage the issue of consultation and accommodation with First Nations such as Dene Tha'. It is therefore important for both Dene Tha' and the JRP to know whether or not GNWT acknowledges Dene Tha's rights and the obligations flowing therefrom. If they do, this engages the role of the GNWT on issues such as mitigation and follow-up. The issue is not whether the JRP can determine the existence of Dene Tha's rights, but whether the GNWT may owe duties to Dene Tha' that need to be met on issues relevant to the MGP, particularly in relation to authorizations that GNWT will have to issue.

The DTFN identifies those steps it would like to see the Crown take in relation to its rights in the NWT. Those steps begin with rights recognition and continue to include full participation in the environmental assessment process, including such things as financial assistance to take part in meetings and positive responses to First Nation requests for studies; early engagement to avoid infringement of aboriginal and treaty rights; accommodation including such things as funding, mitigation, follow-up, and changes to the Proponent's proposed plans based on consultations; and the ongoing provision of information. [see para 28-32 of the DTFN August 3, 2005 Reply Argument]

INAC Views

In its July 27, 2005 submission to the motions, INAC identified the issue of First Nation consultation as an issue for which the onus for proving and establishing relevance to the Panel mandate was on the DAS or DTFN. Its submission sets out the process the federal Crown would follow in respect of consultation of First Nations and the potential effects a project such as the MGP might have on them and their constitutionally protected rights. It states:

A. Crown Consultation - DTFN 2-20 (c)(ii)(iii) and DTFN 2-22(a).

...

6. The Supreme Court of Canada held in the *Taku*¹ and *Haida*² decisions that the honour of the Crown requires Canada to consult where it has knowledge, real or constructive, of the potential existence of Aboriginal rights and contemplates conduct that might adversely affect them.

7. There are a number of Aboriginal groups along the proposed MGP route with existing s. 35 rights. These range from groups with rights outlined in comprehensive land claims agreements protected by s. 35(3) of the *Constitution Act, 1982*; to Aboriginal groups who are signatories to Treaty 8 or Treaty 11. In addition, there are Aboriginal groups who assert claims of aboriginal rights and title to areas potentially impacted by the MGP. **Canada acknowledges that it has a legal obligation to consult and, where appropriate, accommodate Aboriginal groups where it has knowledge of the potential existence of Aboriginal rights and contemplates conduct that might adversely impact on those**

¹ Taku River Tlingit First Nation v. British Columbia 2004 S.C.C. 74

² Haida Nation v. British Columbia 2004 S.C.C. 73

rights. Canada intends to fulfill its legal obligations and further the ongoing goal of reconciliation with Aboriginal peoples. [emphasis added]

8. Consultation, and where appropriate, accommodation requires the following of the Crown: information sharing, listening to concerns, seriously considering the concerns, trying to address the concerns, and where appropriate, accommodating those concerns. An effective and meaningful consultation process will, by necessity, involve Aboriginal groups outlining their claims with clarity, focusing on the nature and scope of their claimed or established s. 35 rights and on any potential infringements of those rights.

9. Where established rights are concerned and the Crown has infringed a right established under s. 35 of the *Constitution Act*, 1982, the Supreme Court of Canada has held that the Crown must demonstrate that it has acted honourably by justifying any such infringements (*Sparrow*³, *Badger*⁴ and *Delgamuukw*⁵). Appropriate consultation is one element that a court would consider as part of justifying such infringement.

10. The JRP is a seven-member, independent body that will evaluate the potential impacts of the Mackenzie Gas Project (the MGP) on the environment and lives of the people in the project area and may make recommendations to federal decision-makers regarding mitigative and other measures within its mandate. The Panel was appointed on August 18, 2004 by the Minister of the Environment, in agreement with the Chairs of both the Mackenzie Valley Environmental Impact Review Board (MVEIRB) and the Inuvialuit Game Council (IGC), the parties with legislated environmental assessment responsibilities along the proposed project route. The Panel will work to fulfill the environmental impact assessment responsibilities of the land claims agreements, as well as federal legislation. The combined knowledge and experience of the Panel members will ensure a rigorous review of all issues of concern to northern communities and Canadians.

11. Within the framework of its mandate, as set out in the Agreement, the JRP may hear and receive evidence from Aboriginal groups with respect to the environmental assessment, but INAC submits that the JRP has neither the legal capacity nor the mandate to determine whether s. 35 rights exist or the scope of those potential rights.

12. The JRP process provides a forum whereby Aboriginal groups can identify and provide evidence of their concerns on environmental issues which are within the jurisdiction of the JRP. The JRP will then prepare and provide to the responsible authorities a report which contains a summary of any comments and recommendations received from the public, including the Aboriginal groups.

13. The JRP will consider all of the submissions, including the submissions from Aboriginal groups when it provides its report to the Minister of the Environment, the Minister of INAC, Responsible Ministers, the National Energy Board (NEB), the MVEIRB, the Inuvialuit and the Responsible Authorities. This report will include, but is not limited to, the following:

- * a description of the public review process
- * a summary of any comments and recommendations received from the public
- * a rationale, conclusions and recommendations regarding the nature and significance of impacts on the environment including any mitigation measures and follow-up program, and
- * any other matter as required under the CEAA, the MVRMA and the IFA.

14. The Government of Canada has established the Mackenzie Gas Project Crown Consultation Unit (MGP-CCU) to provide Aboriginal groups, who believe their Aboriginal and treaty rights pursuant to section 35 of the *Constitution Act*, 1982 may be adversely affected by the MGP with a mechanism to communicate those concerns to the federal government.

³ R. v. Sparrow, [1990] 1 S.C.R. 1075

⁴ R. v. Badger [1996] 1. S.C.R. 777

⁵ Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010

The MGP-CCU will facilitate the fulfillment of the federal government's consultation obligations. The MGP-CCU has commenced the process of engaging Aboriginal groups along the pipeline route or those groups who feel they may otherwise be affected by the MGP.

15. The MGP-CCU will provide a report of the federal Crown's consultation activities to date as an intervener before National Energy Board (NEB). This report of the Crown's consultation activities will also be provided to other federal responsible authorities making regulatory decisions with respect to the MGP, including those decisions to be made by federal authorities in Alberta.

16. In order to ensure that the Crown's consultation, and where appropriate, accommodation obligations will be met, federal decision makers will seriously consider the information provided through the recommendations of the JRP and the information of (sic) concerns provided to the MGP-CCU and other means in making their decisions. In INAC's respectful submission, these issues are for the consideration of the federal decision makers and are outside of the jurisdiction of the JRP."

GNWT Views

GNWT states in its written submission of July 26, 2005 that it is of the view that the Panel does not have the mandate to determine the adequacy of consultation (para. 8). GNWT makes the point that the JRP process will involve consultation with the DTFN through the exchange of IRs and through the JRP's public hearing process. The GNWT submission states at paragraphs 9 through 11:

9. ... DTFN will have the opportunity to identify and address potential impacts of the MGP on the future social, cultural and economic well-being of DTFN members. More specifically, the DTFN will have the opportunity to present evidence and make submissions on those matters identified in the Terms of Reference, including (but not limited to) harvesting, land use, heritage resources, health and wellness and socio-cultural patterns.

- **Joint Panel Agreement, Schedule: JRP Mandate, art. 4.2**
- **Terms of Reference, arts. 1.2, 5.1, 5.1, 5.3, 10, 11.5.**

10. The JRP process will involve consultation with the DTFN. Whether or not this consultation satisfies any government obligations to consult and accommodate where appropriate is not for the JRP to determine. Ultimately, the JRP will submit a Panel Report to the Federal Minister and Responsible Ministers who must then consider the findings, recommendations and public comments contained in the report in reaching a decision.

- **Terms of Reference, arts. 1.2**
- **CEAA, S.C. 1992, c 37, s. 37**
- **MVRMA, S.C. 1998, c. 25, ss. 135-137**

11. To conduct its environmental assessment of the MGP, the JRP does not require, nor does it have the mandate to consider, the responses sought by the DTFN.

Panel Views

The Panel is of the view that INAC's response clearly sets out the intentions of the federal Crown in relation to consultation of First Nations whose constitutionally protected rights might be affected by an action the Crown might take.

The JRP agrees with the view expressed by the GNWT that the Panel does not have the jurisdiction or mandate to determine the adequacy of consultation between the Crown and First Nations in relation to First Nations rights.

Whether the Crown does or does not acknowledge DTFN treaty rights in the NWT will not affect how the Panel fulfills its mandate to receive evidence on a broad number of factors relevant to the current and future social, cultural and economic well being of the DTFN.

The Panel understands that the Dene Tha' perceive acknowledgement of their rights as a pre-requisite to a number of other procedures. The Panel is aware that there is a complex array of negotiations taking place throughout the Mackenzie Valley. To the extent that they are not settled, those negotiations do not affect the conduct of the JRP process or the ability of the DTFN to participate in the JRP process.

The JRP is not charged with the responsibility of carrying out the constitutional duty of the Crown to consult affected First Nations on the potential impacts to their treaty and aboriginal rights. While the JRP public hearings and subsequent report may be a venue for communication and a source of information, it is not the only opportunity for communication between the Crown and the DTFN nor is it the only source of information available to the Crown in relation to the treaty and aboriginal rights of the Dene Tha'.

DTFN states at paragraph 32 of its August 3, 2005 Reply Argument that "Dene Tha' would like to play a direct role in engaging the Crown and the Proponents in issues related to funding, benefits, mitigation and follow-up." The Panel is of the view that there is nothing in its mandate that would prevent the Dene Tha' from engaging in such a direct role or that would entitle the Panel to compel the Crown to answer questions about the nature or timing of that engagement.

d) Funding for participation in the environmental impact review

IRs DTFN-R2-15, 16, 22 and 29 (b) and (c) request information about the amounts of funding government has issued to Aboriginal organizations to enable participation in the MGP environmental and regulatory reviews.

GNWT and federal departments have stated that the provision of funding is not within the mandate of the JRP and that announcements related to the provision of capacity funding to various parties have been publicly announced and information on various government programs through which funds can be accessed is publicly available.

DAS Views

The DAS requested the Panel to compel government departments to answer the above-noted IRs that had been asked by the DTFN. It stated that if "...the DTFN are not properly funded and cannot participate fully in this review process then the DTFN, and the JRP, will not be able to accurately and completely assess the impacts of this project." It indicates that this is also a concern because they "...rely on the DTFN to ensure appropriate environmental protection measures are applied in their territory. The protection of the environment in the Dehcho region cannot be achieved without protecting the environment in neighboring areas." (see page 5 of DAS July 15, 2005 letter)

In its comments of August 5, 2005 on the July 27, 2005 Arguments of the federal government departments, the DAS indicated that they "...support and agree with the reply submission filed by the DTFN ..." and provided no further comment on the above-noted IRs.

DTFN Views

The DTFN states in its written argument of July 7, 2005 at paragraph 19 that the "... issue of funding is also directly related to various of the issues (sic) raised in the Terms of Reference, including the ability of DTFN to participate meaningfully in all aspects of the review, including, but not limited to, work related to TUS and Traditional Knowledge Studies."

Panel Views

The Panel is aware that participant funding is available from the federal government through the Canadian Environmental Assessment Agency and that the guidelines for accessing this funding are available through the Northern Gas Project Secretariat (NGPS). Funding is also available through a variety of government programs.

The Panel agrees that it is important for all people, including Aboriginal peoples, who might be affected by the MGP to have access to funds that will enable them to assess the project's impacts and participate in the Panel's review. By way of correspondence that is available through either the Canadian Environmental Assessment Agency or the NGPS and recently reported articles in the press, the Panel is aware that funds have been made available to potentially affected Aboriginal groups who have sought funds to participate in the Panel's review.

The Panel agrees with the GNWT and the federal departments that the provision of funding is not within the Panel's mandate.

The Panel has stated previously that it is not involved in the funding of those who wish to participate in its review and that funding applications as well as enquiries about funding levels should be directed to the appropriate agencies.

4.0 RULINGS ON SPECIFIC INFORMATION REQUESTS

For each of the following IR specific rulings, the first three sections – Preamble to IR, Information Request, and Response from Government Department – are direct quotes from documentation filed with the Panel.

a) IR DAS JRP 2.06

IR directed to

Government of Canada, Government of the Northwest Territories and Government of Alberta.

Preamble to IR

Understanding the full economic impacts of this project requires understanding the impact that MGP natural gas will have on shippers in the existing downstream pipeline network. The addition of gas from the MGP to the existing pipeline system in southern Canada will produce substantial financial benefits for shippers on those existing pipelines and for the governments of Alberta and Canada.

Information Request

- a) *Do you agree that the addition of gas from the MGP to the existing pipeline system in southern Canada will produce financial benefits for shippers on those existing pipelines and for the governments of Alberta and Canada? If no, please explain why not. If yes, please provide an estimate of the amount of these benefits and identify the recipients.*
- b) *Do you agree that it is fair to try to return some of those financial benefits to the aboriginal communities in the Northwest Territories whose land and communities will be impacted and used by the MGP? If no, please explain why not.*
- c) *Has your organization had any discussions with other parties on returning some of the downstream financial benefits of the MGP back to the communities and governments of the Northwest Territories? If yes, please describe these discussions and their current status. If no, is your organization willing to enter into such discussions? If no, please explain why not.*
- d) *Does your organization have any ideas as to how to return some of the downstream financial benefits of the MGP back to the communities and governments of the Northwest Territories? If yes, please explain these ideas.*

Response from Government of Canada

It is the Government of Canada's view that this request is beyond the Environmental Impact Statement Terms of Reference (TOR) for the Joint Panel Review (JRP).

Although the IR was directed to more than one party, the DAS Motion requested a response only from the Government of Canada.

DAS Views

DAS was of the view that this IR was directed to the Government of Canada as a whole and should not be limited to the authority of the Minister of INAC. It was their view that “the Government of Canada expressing an opinion on the potential financial benefits of this project on the national pipeline system is not beyond the ability or responsibility of the Government of Canada” and that “the Government of Canada contains the expertise necessary within the various departments, and within its agent, the National Energy Board (NEB), to provide full and complete responses to the questions that were asked.”

In its submission of July 15, 2005, the DAS stated:

The JRP is mandated according to Section 15.2 of the ToR to evaluate the "... potential impacts of the Project on local, regional, provincial and territorial economies...". The title of Section 15.2 also includes the national economy ...

The environmental impact review (EIR) is an opportunity for a higher-level review that is broader and more holistic than the detailed review that the MGP will undergo at the regulatory stage. It is from this perspective that these questions were asked and that we expect them to be answered.

Panel Considerations

The Panel notes that the Alberta Department of Energy and the GNWT have each responded to the questions in this IR. The Panel is of the view that, in a general way, information responding to the issues raised in these questions, particularly the assessment of impacts to the national economy and financial benefits for governments, is within the mandate of the Panel.

Panel Ruling

Insofar as it relates to the Government of Canada, the Panel directs that INAC provide a response to parts (a), (b), (c) and (d) of IR DAS JRP 2.06.

b) IR DAS JRP 2.12

IR Directed to

Government of Canada

Preamble to IR

It is not clear how the JRP's conclusions and recommendations will be accepted and enforced by the federal government and its agents such as the NEB and the MVLWB. It is also not clear how the JRP's recommendations will be enforced on the Alberta portions of this project given that the Alberta Energy and Utilities Board (AEUB) is not involved in this review process. This uncertainty will make it difficult for interveners such as DAS to write our recommendations in the most effective manner.

Information Request

Please provide the following information. If necessary, please distinguish between socio-economic recommendations and environmental recommendations in preparing your responses.

- a) *Please explain how the Government of Canada will handle the JRP's report, including the acceptance and enforcement of the JRP's recommendations.*
- b) *Please explain how the MVLWB, as an agent of the federal government, will handle the JRP's report, including the acceptance and enforcement of the JRP's recommendations.*
- c) *Please explain how the NEB, as an agent of the federal government, will handle the JRP's report, including the acceptance and enforcement of the JRP's recommendations. Specifically, please explain the process that will be used by the NEB's appointee to the JRP, Rowland Harrison, to report back to the NEB after the JRP has issued its final report.*
- d) *Please explain how JRP's report, including the acceptance and enforcement of the JRP's recommendations, will apply to the Alberta portions of the MGP.*

Response from Government of Canada

The Government of Canada takes the position that most of these questions are not relevant to the JRP process and has therefore, in most cases, provided a response of "Not relevant". The JRP is responsible for the conduct of the environmental impact review of the proposed Mackenzie Gas Project. The factors that it must consider are identified in Annex 2 of Schedule to the Agreement for the Environmental Impact Review of the Mackenzie Gas Project. As such, in order to be relevant to

the JRP proceedings, any questions submitted by way of Information Requests should pertain to the factors contained in the aforementioned Annex 2. The JRP is not mandated with the enforcement of its recommendations. The Government of Canada will not be responding in these proceedings to questions that are not relevant to the mandate of the JRP.

a) The Joint Review Panel (JRP) will submit its report to the responsible federal and territorial ministers and the NEB pursuant to Sections 135 and 137 of the MVRMA and to the Minister of the Environment and Responsible Authorities pursuant to Section 37(1.1) of the CEEA. The Report will also be provided to the Mackenzie Valley Environmental Impact Review Board (MVERIB) and the Inuvialuit as set out in the Agreement for an Environmental Impact Review of the MGP. The federal and territorial ministers and the NEB pursuant to the MVRMA and the responsible authorities with the approval of the Governor in Council pursuant to CEEA will determine its response to the recommendations of the Joint Review Panel.

b), c) and d) Not Relevant

Note: The original INAC submission used numbers when re-stating the IR rather than the letters used in the original IR. To avoid confusion, the Panel has used letters to correspond with the information requested in the original IR.

The views of the Parties and the Panel on the relevancy to the environmental review of the MGP of IRs on the issue of acceptance and enforcement of its recommendations are set out under theme issue 3.0 a) above in this Ruling.

IR DAS JRP 2.12 (a)

Panel Considerations

INAC provided a response to part (a) of IR DAS JRP 2.12.

Refer to Section 3.0 (a) of this Ruling for a more detailed discussion of the Panel's considerations and views regarding enforcement.

Panel Ruling

The Panel does not compel the Government of Canada to provide a further response to part (a) of IR DAS JRP 2.12.

IR DAS JRP 2.12 (b)

Panel Considerations

Government can not speak on behalf of the MVLWB and it would be inappropriate for the MVLWB to be called by the JRP to respond to this question. Presumably the MVLWB will follow the MVRMA in the same way that it would for any other panel or joint review panel struck under the MVRMA and that will be in accordance with direction provided by the Minister of INAC in a response to an MVEIRB or panel report.

Please refer to section 3.0 of this Ruling for a more detailed discussion of the Panel's considerations and views regarding enforcement.

Panel Ruling

The Panel does not compel the Government of Canada to provide a further response to part (b) of IR DAS JRP 2.12.

IR DAS JRP 2.12 (c)

Panel Considerations

Government can not speak on behalf of the NEB and it would be inappropriate for the NEB to be called by the JRP to respond to this question. Presumably the NEB will follow the *NEB Act* and *CEAA* in the same way that it would for any other panel or joint review panel struck under the *CEAA*. The Panel notes that, contrary to the statement of the DAS, Mr. Harrison was appointed to the JRP by the Minister of Environment, not the NEB.

Please refer to section 3.0 of this Ruling for a more detailed discussion of the Panel's considerations and views regarding enforcement.

Panel Ruling

The Panel does not compel the Government of Canada to provide a further response to part (c) of IR DAS JRP 2.12.

IR DAS JRP 2.12 (d)

Panel Considerations

Please refer to Section 3 (a) of this Ruling for a detailed discussion of the Panel's considerations and views regarding enforcement.

Panel Ruling

The Panel directs INAC on behalf of the Government of Canada to provide a further response to part (d) of IR DAS JRP 2.12.

c) IR DAS JRP 2.15

IR Directed to

Government of Canada and Government of the Northwest Territories

Preamble to IR

On Mar. 15th, 2005, the Mackenzie Valley Environmental Impact Review Board released its revised recommendations for the Paramount Cameron Hills Expansion EA. One of the recommendations was the creation of a Dehcho Boreal Caribou Working Group (DCBCWG). The recommendation is:

The Review Board recommends that RWED will, within the next six months, initiate the formation of a Deh Cho Boreal Caribou Working Group (DCBCWG). RWED shall lead the DCBCWG in the development of a Boreal Caribou Management plan for boreal caribou populations in the southern Deh Cho (south of the Mackenzie River and east of the Liard River) within 18 months. In developing the Boreal Caribou Management Plan, RWED shall ensure that the DCBCWG considers, among other things: habitat identification, range plan development, thresholds, monitoring systems, adaptive mitigation, research programs and cumulative effects models. RWED shall also coordinate the DCBCWG's activities with similar working groups in Alberta and British Columbia; and operate within the framework of recovery planning for Boreal Caribou in the NWT, and develop a Range Plan within the overall Boreal Caribou Management Plan specifically for the Cameron Hills area. RWED shall provide applicable thresholds for the Project to the MVLWB over time based on the outcomes of future research and natural changes to the boreal caribou habitat.

On Feb. 18th, 2005, the MVEIRB released its environmental assessment decision on Imperial Oil's Dehcho geotechnical program.

During this EA, the DAS had recommended that the mandate of the Dehcho Boreal Caribou Working Group (DCBCWG) be expanded to include the proposed MGP pipeline right-of-way and to include moose. In response to the DAS recommendations, the MVEIRB applied the following 2 recommendations:

Measure 7

In order to prevent significant adverse cumulative impacts on boreal (woodland) caribou from the Imperial Deh Cho Geotechnical Program in combination with reasonably foreseeable future developments, the range area of boreal caribou examined by the Deh Cho Boreal Caribou Working Group (DCBCWG) is to be expanded by RWED to include an area, to be determined by the DCBCWG, centered on the route of the Imperial Deh Cho Geotechnical Program (and proposed Mackenzie Gas Project corridor) from the Sahtu Settlement Area's boundary in the north to the Alberta border in the south. The DCBCWG will develop a Boreal Caribou Management Plan for this same area within 18 months of the acceptance of this Report of Environmental Assessment by the federal Minister.

Measure 8

In order to prevent significant adverse cumulative impacts on moose from the Imperial Deh Cho Geotechnical Program in combination with reasonably foreseeable future developments, RWED will review the existing baseline information on moose populations, trends, and habitat usage along the Mackenzie Gas Project development corridor in the Deh Cho region. This review will include consultation with affected Deh Cho communities to identify both existing knowledge and concerns about moose populations. RWED will determine if it has the information it needs to manage cumulative impacts on the moose population from past, present and reasonably foreseeable future developments along the route of the Imperial Deh Cho Geotechnical Program. RWED will, within three years, develop a Moose Management Plan for the Deh Cho region portion of the Mackenzie Gas Project development corridor.

Canada and the GNWT have still not officially accepted the recommendations from these 2 EAs. The DAS needs to know the positions of Canada and the GNWT to allow us to develop our position on mitigation required for the MGP's impacts on caribou and moose.

Information Request

Please provide the following information.

- a) Will Canada and the GNWT be accepting these 3 recommendations from the MVEIRB? If yes, please explain when this acceptance will be made official and identify the target date for completion of the required management plans. If no, please explain why not.*
- b) Will Canada and the GNWT make the enforcement of the recommendations in these management plans binding upon the regulators (MVLWB and the NEB) of the MGP and other projects in this corridor? If no, please explain why not.*
- c) As a precautionary measure, will Canada and the GNWT impose, through the MVLWB and the NEB, interim protective conditions upon the development of the MGP until the management plans have been completed?*

- d) *Assuming that the Sahtu communities agree, will Canada and the GNWT agree to expanding the geographical range of the DCBCWG to include the entire Pehdzeh Ki Deh candidate protected area, including that portion that is within the Sahtu land claim area.*

Response from Government of Canada

- a) *The Responsible Ministers are still considering the Reports of Environmental Assessment (EA) for the Paramount Cameron Hills Extension project and the Imperial Oil Deh Cho Geotechnical project pursuant to Section 130 of the MVRMA. Once a decision has been reached, the Minister of INAC, on behalf of the Responsible Ministers will distribute the decision to the MVEIRB for placement on its public registry. The MVEIRB's recommendations relate specifically to the Paramount Cameron Hills Extension project and the Imperial Oil Deh Cho Geotechnical project and are not applicable to the current application.*
- b) *Any potential management plan has yet to be developed.*
- c) *Not applicable.*
- d) *The Government of Canada will consider the Joint Review Panel's Report, including any mitigative measures within its mandate, that are recommended by the Joint Review Panel to address the environmental impacts of this Project on caribou and moose.*
- e) *The Government of Canada will consider the Joint Review Panel's Report, including any mitigative measures within its mandate that are recommended by the Joint Review Panel to address the environmental impacts of this Project.*

Note: The original INAC submission used numbers when re-stating the IR rather than the letters used in the original IR. To avoid confusion, the Panel has used letters to correspond with the information requested in the original IR. Also, INAC provided two responses, (b) and (c) to the original question (b).

Although the IR was directed to more than one party, the DAS Motion requested a response only from the Government of Canada.

INAC Views

In its July 4, 2005 submission on the Motions, INAC stated that it

... is not appropriate for the Government of Canada to comment on the decision-making process in another environmental assessment hearing nor is it relevant to this proceeding. The recommendations made by the Mackenzie Valley Environmental Impact Review Board (MVEIRB) were project-specific and apply only to the Paramount Hills Extension project and the Deh Cho Geotechnical project. Those recommendations are not applicable to the current project. The Government of Canada will consider the Joint Review Panel's Report including any mitigative measures within its mandate, that are recommended by the Joint Review Panel to address the environmental impacts of the MGP on caribou and moose.

DAS Views

DAS argues that the decisions made by the Crown in relation to these two IRs – the caribou and moose management plans that would be developed – would apply to all projects including the MGP and are therefore directly applicable to the MGP and need to be considered as part of this review.

Panel Considerations

The Panel notes that there are two aspects to this IR. Under the *Mackenzie Valley Resource Management Act*, the Minister has the discretion to make an application-specific decision and to make it within his own timeframe. It would not be appropriate for the Panel to compel the Minister

to provide the response to a particular licence application, prior to making that information publicly available in the context of that application.

The second aspect of this IR relates to the substantive information referred to in the preamble of this IR. The Panel regards the information referred to as being directly within the mandate of the Panel and looks forward to receiving updates on the establishment of the Deh Cho working groups on caribou and moose and their respective management plans. The Panel anticipates that this information will be provided to the Panel as evidence from Parties during the course of the public hearings. To the extent that the substance of the MVEIRB recommendations is still a concern to the DAS in the context of the MGP application, the DAS may submit as part of its evidence during the public hearings phase, information on those initiatives, an explanation of how each will affect or be affected by the MGP, and its recommendation to the Panel about what the Panel should recommend.

The Panel notes that the INAC Minister has, subsequent to submission of the DAS Motion and by way of letter dated July 5, 2005, issued a response to the Paramount Resources Limited Cameron Hills Extension Project. This response may address some of the questions in part (a) of this IR.

INAC has provided a response to both parts of (b) that seems reasonable: that it is unable to respond until such time as a management plan is generated and favourably reviewed by all Parties. INAC has also responded to parts (c) and (d) of this IR.

Panel Ruling

The Panel does not compel the Government of Canada to provide a further response to IR DAS JRP 2.15.

d) IR DAS JRP 2.16

IR Directed to

Government of Canada and Government of the Northwest Territories

Preamble to IR

On Feb. 18th, 2005, the MVEIRB released its environmental assessment decision on Imperial Oil's Dehcho geotechnical program.

During this EA, the Pehdzeh Ki First Nation had recommended that no development be allowed to occur within a 15 km buffer zone on either side of the Blackwater River. The MVEIRB placed the following condition on the project in response to the PKFN's recommendation.

Measure 13

In order to prevent significant adverse social and cultural impacts on the people of the Pehdzeh Ki First Nation, no land use activities for geotechnical sites within 3 km of either bank of the Blackwater River and within 15 linear kilometers upstream (east) of where the Blackwater River meets the Highway 1 winter road are to be authorized by the MVLWB. The sole exception to this is the proposed Blackwater River pipeline crossing site, which may only be investigated without new access.

Canada and the GNWT have still not officially accepted this recommendation. The DAS needs to know the positions of Canada and the GNWT so that we can react appropriately.

Information Request

Will Canada and the GNWT be accepting this recommendation from the MVEIRB? If yes, please explain when this acceptance will be made official. If no, please explain why not.

Response from Government of Canada

The Responsible Ministers are still considering the Report of Environmental Assessment (EA) for the Imperial Oil Deh Cho Geotechnical project pursuant to Section 130 of the MVRMA. Once a decision has been reached, the Minister of INAC, on behalf of the Responsible Ministers will distribute the decision to the MVEIRB for placement on its public registry. The MVEIRB's recommendations relate specifically to the Imperial Oil Deh Cho Geotechnical project and are not applicable to the current application.

Although the IR was addressed to more than one party, the DAS Motion requested a response from only the Government of Canada.

DAS Views

In its submission of June 20, 2005, the DAS states the following:

The DAS believes that INAC is incorrect. Although the Imperial Geotechnical project was the catalyst for this MVEIRB recommendation, the recommended buffer zone would affect the MGP and the JRP's review of the project. In its response to IR DAS JRP 2.17 a), Imperial Oil Resources Ventures Ltd. (IORVL) acknowledged that: "If the MVEIRB Measure 13 is accepted as is by the Minister this will lead to increased uncertainty for related pipeline, infrastructure and facility designs, until such time as the investigation can be completed.

In its submission of August 5, 2005 the DAS reiterated the above and added:

Additionally, in its June 3rd, 2005 letter to the Minister of INAC, Imperial stated "... Imperial is concerned with the prospect of the Minister's approval of a report containing Measure #13 ..., which if adopted, would have significant adverse impacts on the Mackenzie Gas Project."

Clearly, Measure #13, if accepted, would have a direct and significant effect upon the MGP and the JRP's review of the project, up to and including the requirement that key elements of the MGP will need to be relocated.

If INAC is unwilling to comment on this issue until it has finished its review of the MVEIRB's report, then INAC should have simply identified a date when it would be willing to provide the response requested. Instead INAC chose to try to deflect the questions with baseless arguments about mandate and relevance. Such action is not indicative of good faith participation in the JRP process or a desire by INAC to be responsive to community concerns.

Panel Considerations

The Panel notes that there are two aspects to this IR.

The first is with respect to procedure. Under the *Mackenzie Valley Resource Management Act*, the Minister has the discretion to make the decision and to make it within his own timeframe. It would not be appropriate for the Panel to compel the Minister to provide the response to a particular licence application, prior to making that information publicly available in the context of that application.

The second aspect of this IR relates to the substantive information referred to in the preamble of this IR. The Panel is of the view that the information referred to might be directly within the mandate of the Panel and looks forward to receiving information on the creation of buffer zones in the Blackwater River area that might affect or be affected by the MGP as evidence from Parties during the course of the public hearings. To the extent that the substance of the MVEIRB recommendations is still a concern to the DAS in the context of the MGP application the DAS may submit as part of itsr evidence during the public hearings phase, information on those initiatives, an explanation of how each will affect or be affected by the MGP and its recommendation to the Panel about what the Panel should recommend to the Minister.

Panel Ruling

The Panel does not compel the Government of Canada to provide a further response to IR DAS JRP 2.16.

e) IR DTFN-R2-13

IR Directed to

Environment Canada

Preamble to IR

The Terms of Reference for the EIS include the Dickins Lake, Vardie River and the interconnect facility as part of the Project Description. The Terms of Reference require, among other things, “the preparation of a Commitment Table that summarizes the proposed mitigation and other company commitments with cross-references to environmental issues or potential impacts.”

The various agreements setting out the regulatory process for the review of the Mackenzie Gas Project (the “Project”) contemplate that the Joint Review Panel will make recommendations on issues such as the construction, operation, and decommissioning phases of the Project including mitigation measures related thereto.

There is a need to ensure that the recommendations of the JRP can be enforced within the Alberta portion of the Project.

Information Request

- (a) *If the Joint Review Panel makes recommendations on mitigation and other measures related to the Project, and if those recommendations are accepted by the various responsible authorities, regulators, or signatories to the various agreements establishing the environmental review scheme for the Project, could you please describe what commitments you will make to ensure that such recommendations can be enforced in the northwestern Alberta portion of the Project.*
- (b) *Could you please describe what legal or regulatory means are available for you to ensure that any commitments that you make are enforceable in Alberta.*

Response from Environment Canada

Environment Canada takes the position that these questions are not relevant to the JRP process and has therefore provided a response of “not relevant”. The JRP is responsible for the conduct of an environmental impact review of the proposed Mackenzie Gas Pipeline project. The factors that it must consider are identified in Annex 2 of the Schedule to the Joint Review Panel Agreement. As such, in order to be relevant to the JRP proceedings, any questions submitted by way of Information Requests should pertain to the factors contained in the aforementioned Annex 2. The JRP is not mandated with the enforcement of its recommendations. In addition, the JRP is not mandated with

determining aboriginal and treaty rights nor with any matters pertaining to participant funding for these proceedings.

- a) *Environment Canada is not answering this question because it is not relevant to the JRP mandate.*
- b) *Environment Canada is not answering this question because it is not relevant to the JRP mandate.*

DAS Views

In its submissions of both June 20 and July 15, 2005, the DAS stated: "The issues with this IR (the acceptance and enforceability of the JRP's recommendations in Alberta) and the response are among the issues for IR DAS JRP 2.12 and so the arguments won't be repeated here."

In its comments of August 5 on the July 27 Arguments of the federal government departments, the DAS indicated that they "...support and agree with the reply submission filed by the DTFN ..." and provided no further comment on the above-noted IRs.

DTFN Views

In its written argument of July 7, 2005, DTFN states that the Terms of Reference for the Proponent "require a focus on mitigation measures". In particular it quotes two segments from Section 12.4 of the TOR as follows:

"Describe proposed measures to mitigate adverse impacts of the Project to create or enhance beneficial impacts over the lifespan of the Project. Also, identify proposed methods to mitigate changes to the Project caused by the environment...Identify and describe any policies, guidelines, applicable codes of practice and/or best management practices that are proposed to be followed with respect to Project activities....For specific VECs, identify any relevant objectives, policies, guidelines, management plans, timing restrictions proposed to be followed when carrying out the Project..." (p. 37)

"Where measures within access or benefit agreements with the Inuvialuit and First Nations, or socio-economic agreements and environmental agreements with the federal and territorial governments will be relied upon as a mitigative measure, provide the following information..."
(p. 37) (emphasis in original)

DTFN goes on to state that the federal Crown, including the Respondents, has a constitutional and fiduciary duty to consult with first Nations and to seek to accommodate their rights and interests.

In its view, enforcement of JRP recommendations is directly related to the issues of mitigation and to the treaty rights of DTFN [para. 18] and

23. ...the viability of such recommendations ... is dependent on how the Respondents answer questions related to the enforceability of those recommendations by the Respondents, themselves. Furthermore the source of information on recommendations, mitigation, follow-up, and the general impact of the MGP on DTFN will flow, in part, from the Crown/DTFN consultation process.

24. ...one of the purposes of the environmental hearings is to ensure that the JRP (and for that matter, the Respondents) is fully informed about the concerns of First Nations such as DTFN, and that the JRP has the best information possible on how to deal with those concerns, through mitigation, follow-up and other measures. It is not enough for the JRP or the Respondents to simply know that DTFN has concerns. It is also important that the Respondents work with DTFN on what legal and regulatory means are available to deal with those concerns.

Panel Considerations

This IR is similar to IR DAS 2.12 and identical to DTFN-R2-17 (directed to Fisheries and Oceans Canada), DTFN-R2-23 (directed to Natural Resources Canada) and parts (a) and (b) of DTFN-R2-20 (directed to Indian and Northern Affairs Canada).

In principle the Panel is of the view that the issue of mitigation, and the means of ensuring recommended mitigation is effective, is within the Panel's mandate (see Panel consideration on the theme of enforcement in Section 3.0 (a) in this Ruling).

Panel Ruling

The Panel does not compel Environment Canada to provide a further response to part (a) of IR DTFN-R2-13.

The Panel directs Environment Canada to respond to part (b) of IR DTFN-R2-13.

f) IR DTFN-R2-14

IR Directed to
Environment Canada

Preamble to IR

Various agreements have been entered into between governments, regulators and governmental departments concerning the establishment of a coordinated review process for the environmental assessment and regulatory review of the Mackenzie Gas Project (the "Project").

Appendix 1 of the Terms of Reference includes the Dickins Lake and Vardie River and other facilities to be constructed in northwestern Alberta as part of the description of the Project.

Although certain portions of the Project will be constructed in Alberta, neither the Alberta Energy and Utilities Board ("AEUB"), nor any other department or ministry within the Alberta government is a signatory to any of these agreements.

There is a need to ensure that recommendations of the JRP and commitments made by the proponent pursuant to s. 6 of the TOR can be enforced in Alberta, and there is a need for the environmental and regulatory review of the entire Project to be done in a coordinated fashion.

The Traditional Territory of Dene Tha' is located in both the NWT and Alberta.

Information Request

- (a) *Could you please describe whether you have had any meetings or discussions with either the AEUB or with any department or ministry of the government of Alberta concerning the participation of the Government of Alberta and its agencies within the review of the Project.*
- (b) *If the answer to this question is "no", did you approach or otherwise ask any department or ministry of the government of Alberta or the AEUB to be involved in such discussions?*
- (c) *Could you please provide any other documentation in which any discussions were held within your department or ministry concerning whether or not Alberta should be involved in the coordinated review of the Project.*
- (d) *Could you provide any other material related generally to the question of how the Alberta portions of the Project will be assessed, given that the Terms of Reference include those sections within the overall description of the Project, but also given that NGTL, rather than the Proponent, will be applying to construct the Alberta portions of the Project.*

Response from Environment Canada

Environment Canada takes the position that these questions are not relevant to the JRP process and has therefore provided a response of “not relevant”. The JRP is responsible for the conduct of an environmental impact review of the proposed Mackenzie Gas Pipeline project. The factors that it must consider are identified in Annex 2 of the Schedule to the Joint Review Panel Agreement. As such, in order to be relevant to the JRP proceedings, any questions submitted by way of Information Requests should pertain to the factors contained in the aforementioned Annex 2. The JRP is not mandated with the enforcement of its recommendations. In addition, the JRP is not mandated with determining aboriginal and treaty rights nor with any matters pertaining to participant funding for these proceedings.

- a) Environment Canada is not answering this question because it is not relevant to the JRP mandate.*
- b) Environment Canada is not answering this question because it is not relevant to the JRP mandate.*
- c) Environment Canada is not answering this question because it is not relevant to the JRP mandate.*
- d) Environment Canada is not answering this question because it is not relevant to the JRP mandate.*

DAS Views

In its submissions of both June 20 and July 15, 2005, the DAS stated: “The issues with this IR (the acceptance and enforceability of the JRP’s recommendations in Alberta) and the response are among the issues for IR DAS JRP 2.12 and so the arguments won’t be repeated here.”

In its comments of August 5, 2005 on the July 27, 2005 arguments of the federal government departments, the DAS indicated that they “...support and agree with the reply submission filed by the DTFN ...” and provided no further comment on the above-noted IRs.

DTFN Views

As was stated in the Section 3.0 (a) of this Ruling dealing with the theme issue of implementation of Panel recommendations by government departments and regulators, the DTFN stated in paragraph 25 of their June 27, 2005 Motion,

... the role of Alberta (or lack thereof) within the JRP process, and questions related to discussions that the Respondents have had with Alberta in relation to the environmental assessment of the MGP, relate to how the recommendations of the JRP will be enforced within the Connecting Facilities, and to the question of how issues such as mitigation and Treaty 8 rights will be meaningfully considered and accommodated in respect of the MGP.

In its Reply Argument of August 3, 2005 (paragraphs 12 and 13), DTFN submits that:

... section 16 of CEEA (sic) requires the JRP to consider whether the Responsible authorities have the ability to implement mitigation and follow-up measures within the Connecting Facilities, either on the basis that this is an issue of technical feasibility pursuant to section 16 or on the basis that this is “any other matter relevant” to the work being done by the JRP. The wording of section 16(1)(e) gives the JRP the discretion to consider other matters that it considers relevant, and the question of whether its own recommendations can be implemented within the Connecting Facilities is clearly relevant to the work being done by the JRP and will provide guidance in terms of how the JRP formulates those recommendations.

It is also notable that section 20(1.1) of CEEA says that mitigation measures which may be taken into account by a responsible authority are not limited to measures within the

jurisdiction of Parliament and may include “(a) any mitigation measures whose implementation the responsible authority can ensure.” (emphasis added) There is also similar language in s. 37 (1.1) (a) of CEEA. (emphasis in original)

Panel Considerations

Please refer to Section 3.0 (b) of this Ruling for the Panel’s views on the theme issue “Interaction of federal and territorial government departments and regulators”.

To the extent that correspondence between levels of government and governmental agencies has taken place to address matters related to the co-ordination and administration of processing a multi-jurisdictional application – especially communication that pre-dates establishment of the Joint Review Panel – it is not relevant to the Panel’s review.

Panel Ruling

The Panel does not compel Environment Canada to answer IR DTFN-R2-14.

g) IR DTFN-R2-15

IR Directed to

Environment Canada

Preamble to IR

Various kinds of funding has been made available to First Nations “north of 60” with respect to the Mackenzie Gas Project (the “Project) and for oil and gas training and development generally. As an example, the Federal government announced on October 1, 2004, that Federal funding of up to \$9.9 million would be made available for the Northwest Territories Oil and Gas Aboriginal Skills Development Strategy.

Other government funding programs have enabled First Nations “north of 60” to prepare for and participate in the regulatory and environmental review of the Mackenzie Gas Pipeline. Northern First Nations have also been invited to observe and participate in the various steps concerning the design of the environmental and regulatory review of the Project.

The traditional territory of the Dene Tha’ First Nation extends into the southern portion of the Northwest Territories.

Information Request

- (a) *Do you acknowledge the fact that the Dene Tha’ First Nation has or asserts rights and title to a portion of the Northwest Territories?*
- (b) *Could you please set out what sources of funding have been made available to First Nations “north of 60” to enable such First Nations to prepare for and participate in the regulatory and environmental review of the Project including, but not limited to:*
 - (i) *hiring of technical or other experts;*
 - (ii) *allowing for community consultation, including the preparation of traditional use studies;*
 - (iii) *negotiation of impact benefit or other agreements related to the Project.*
- (c) *Are you prepared to make available to the Dene Tha’ First Nation any additional funding from any programs that have been made available to other First Nations “north of 60” related either to the Project or for oil and gas training, development, etc.*

Response from Environment Canada

Environment Canada takes the position that most of these questions are not relevant to the JRP process and has therefore in most cases, provided a response of “not relevant”. The JRP is responsible for the conduct of an environmental impact review of the proposed Mackenzie Gas Pipeline project. The factors that it must consider are identified in Annex 2 of the Schedule to the Joint Review Panel Agreement. As such, in order to be relevant to the JRP proceedings, any questions submitted by way of Information Requests should pertain to the factors contained in the aforementioned Annex 2. The JRP is not mandated with the enforcement of its recommendations. In addition, the JRP is not mandated with determining aboriginal and treaty rights nor with any matters pertaining to participant funding for these proceedings.

a) Environment Canada is not answering this question because it is not relevant to the JRP mandate.

b) Environment Canada is not answering this question because it is not relevant to the JRP mandate

c) Environment Canada does not administer any funding programs as described in this IR.

DAS Views

The DAS stated the following in its submissions of both June 20 and July 15, 2005:

The issue (aboriginal and treaty rights) in Part a) of this IR is directly relevant to the review as EC cannot properly assess this project without being able to answer this question. The mandate of the JRP is to assess the impacts on the environment. The definition of “impact on the environment” in the *Agreement* includes the “current use of lands and resources for traditional purposes by aboriginal peoples”. These uses of land are aboriginal and treaty rights. If EC cannot properly identify where the DTFN have aboriginal and treaty rights, then EC cannot properly assess the impacts on the environment of this project, including the impacts upon the aboriginal and treaty rights of the DTFN.

The issue (funding for the DTFN) in Parts b) and c) should be a concern for the JRP. If the DTFN are not properly funded and cannot participate fully in this review process then the DTFN, and the JRP, will not be able to accurately and completely assess the impacts of this project. This issue is a concern for the DAS as we rely on the DTFN to ensure appropriate environmental protection measures are applied in their territory. The protection of the environment in the Dehcho region cannot be achieved without protecting the environment in neighboring areas.

In its comments of August 5, 2005 on the July 27, 2005 arguments of the federal government departments, the DAS indicated that they “...support and agree with the reply submission filed by the DTFN ...” and provided no further comment on the above-noted IRs.

DTFN Views

Although IR DTFN-R2-15 did not form part of the DTFN Motion, IR DTFN-R2-16, which addressed the same issue and is identical to DTFN-R2-15, was part of the DTFN Motion.

In its written argument of July 7, 2005, the DTFN states that:

... the issue of funding is also directly related to various of the issues raised in the Terms of Reference, including the ability of DTFN to participate meaningfully in all aspects of the review, including but not limited to, work related to TUS and Traditional Knowledge Studies.

Panel Considerations

With respect to the issue of aboriginal rights, please see Section 3.0 (c) (i) of this Ruling that addressed “Aboriginal Rights – Acknowledgement” as a theme issue.

With respect to the issue of funding, please refer to section 3.0 (d) of this Ruling that address the theme issue of “funding” .

Panel Ruling

The Panel does not compel Environment Canada to provide a further response to IR DTFN-R2-15.

h) IR DTFN-R2-16

This IR is a duplicate of IR DTFN-R2-15.

Panel Ruling

The Panel does not compel Environment Canada to provide a further response to IR DTFN-R2-15.

i) IR DTFN-R2-17

This IR is identical to IR DTFN-R2-13 except that it is directed to Fisheries and Oceans Canada rather than Environment Canada.

Please see the details of this IR, responses to same and Panel considerations set out under DTFN-R2-13 in Section 4 (e) of this Ruling.

Panel Ruling

The Panel directs Fisheries and Oceans Canada to respond to parts (a) and (b) of IR DTFN-R2-17.

j) IR DTFN-R2-18

This IR is identical to DTFN-R2-14 except that it is directed to Fisheries and Oceans Canada rather than Environment Canada.

Please see details of this IR, response to same and Panel considerations under DTFN-R2-14 in Section 4 (f) of this Ruling.

Panel Ruling

The Panel does not compel Fisheries and Oceans Canada to answer IR DTFN-R2-18.

k) IR DTFN-R2-19

IR Directed to

Fisheries and Oceans Canada

Preamble to IR

There is a need to ensure that the outcomes of the EIS and Supp. EIS, including the Proponent's commitments and any JPR recommendations are fully complied with and applied to the Alberta section of the Mackenzie Gas Project (the "Project") and that the Department of Fisheries and Oceans applies a consistent approach to fulfilling its responsibilities under the Fisheries Act to the several fish bearing streams and tributaries flowing into the Hay and Liard Rivers.

Information Request

- (a) *Based on the information in the EIS and Supplemental EIS for Alberta about potential destruction of fish habitat from water crossings, will DFO be issuing s. 35 authorizations for the destruction of fish habitat for the Alberta portion of the pipeline?*
- (b) *If it does so, will DFO require the Proponent, as part of the JRP process, to prepare a conceptual Compensation Plan?*
- (c) *If DFO will be requiring a s. 35(2) authorization under the Fisheries Act, will it attach as conditions all the Proponent's commitments and applicable (to the Alberta portion of the*

- Project) JRP Recommendations to their authorizations of the Alberta portion of the pipeline?*
- (d) *If DFO will not be requiring a s. 35(2) authorization under the Fisheries Act, will it be issuing Letters of Advice? If so, will it include the Proponent commitments, and applicable JRP Recommendations for the Alberta portion of the pipeline?*

Response from Fisheries and Oceans Canada

Fisheries & Oceans Canada takes the position that several of these questions are not relevant to the JRP process and has therefore provided a response of "Not relevant". The JRP is responsible for the conduct of the environmental impact review of the proposed Mackenzie Gas Pipeline project. The factors that it must consider are identified in Annex 2 of the Schedule to the Agreement for an Environmental Impact Review of the Mackenzie Gas Project. As such, in order to be relevant to the JRP proceedings, any questions submitted by way of Information Requests should pertain to the factors contained in the aforementioned Annex 2.

The JRP is not mandated with the enforcement of its recommendations. In addition, the JRP is not mandated with determining aboriginal and treaty rights nor with any matters pertaining to participant funding for these proceedings. The Government of Canada will not be responding in these proceedings to questions that are not relevant to the mandate of the JRP.

- (a) *Where the harmful alteration, disruption or destruction (HADD) of fish habitat occurs as a result of the project, the DFO may issue appropriate authorizations, including the Alberta portion of the pipeline.*
- (b) *For works and or undertakings where s. 35(2) authorization is required, the DFO typically requires the proponent to demonstrate there is no net loss of fish habitat. Compensation may be required to attain no net loss of fish habitat. DFO has advised the proponent that compensation plans should be provided, and has asked an IR to this effect (DFO_R1_57).*
- (c) *It is DFO's position that the question contained in this request is irrelevant to the Joint Review Panel Process.*
- (d) *It is DFO's position that the question contained in this request is irrelevant to the Joint Review Panel Process.*

DAS Views on parts (c) and (d)

Note: the DAS Motion requested that only parts (c) and (d) be answered in greater detail.

In its submissions of both June 20 and July 15, 2005, the DAS stated: "The issues with this IR (the acceptance and enforceability of the JRP's recommendations in Alberta) and the response are among the issues for IR DAS JRP 2.12 and so the arguments won't be repeated here."

In its comments of August 5, 2005 on the July 27, 2005 arguments of the federal government departments, the DAS indicated that they "...support and agree with the reply submission filed by the DTFN ..." and provided no further comment on the above-noted IRs.

DTFN Views

In its written arguments and reply, DTFN makes no specific references to the IRs it was addressing. This was particularly the case for DTFN R2-19.

Panel Considerations

To the extent that the supporting arguments made by the DTFN with respect to the need for consultation; the need for input from the DTFN on mitigation measures; queries regarding commitments by the Crown to enforce Panel recommendations; and the mechanisms by which

those recommendations would be enforced, please refer to the comments set out under section 3.0 of this Ruling on theme issues.

The Panel understands that, under the *Fisheries Act* and the *Navigable Waters Protection Act*, an application for a Section 35(2) authorization need not be filed until a proponent determines that its proposed activity might result in a harmful alteration, disruption or destruction of fish habitat. The Panel also understands from responses provided by DFO that applications for s. 35(2) authorizations have not yet been filed by the Proponent in either the NWT or Alberta. DFO has provided responses to (a) and (b) in this IR.

The Panel is of the view that DAS and DTFN are requesting a response based on principle to the questions in (c) and (d). While the Panel understands it is the responsibility of government departments and regulatory agencies to enforce provisions relating to permits and licences issued by them, the Panel has the mandate to make recommendations, inclusive of implementation and enforcement, to ensure the recommended mitigation measures are effective.

Panel Ruling

The Panel does not compel Fisheries and Oceans Canada to answer parts (a) and (b) of IR DTFN-R2-19.

The Panel directs Fisheries and Oceans Canada to respond to parts (c) and (d) of IR DTFN-R2-19.

l) IR DTFN-R2-20 (a) and (b)

These two parts are identical to IR DTFN-R2-13 except that they are directed to Indian and Northern Affairs Canada.

Please see details of this IR, responses to same and the Panel considerations set out under IR Request DTFN-R2-13 in Section 4 (e) of this Ruling.

Panel Ruling

The Panel directs Indian and Northern Affairs Canada to respond to parts (a) and (b) of IR DTFN-R2-20.

m) IR DTFN-R2-20 (c)

IR Directed to

Indian and Northern Affairs Canada

Preamble to IR

The Terms of Reference for the EIS include the Dickins Lake, Vardie River and the interconnect facility as part of the Project Description. The Terms of Reference require, among other things, “the preparation of a Commitment Table that summarizes the proposed mitigation and other company commitments with cross-references to environmental issues or potential impacts.”

The various agreements setting out the regulatory process for the review of the Mackenzie Gas Project (the “Project”) contemplate that the Joint Review Panel will make recommendations on issues such as the construction, operation, and decommissioning phases of the Project including mitigation measures related thereto.

There is a need to ensure that recommendations of the JRP and commitments made by the proponent pursuant to s. 6 of the TOR can be enforced in Alberta, and there is a need for the environmental and regulatory review of the entire Project to be done in a coordinated fashion.

The Traditional Territory of Dene Tha' is located in both the NWT and Alberta.

Information Request

- (c) *In a memorandum dated July 9, 2003, sent from Robert Overvold, RDG – NWT Region to Barrie Robb, RDG – Alberta Region, [attached to this information request] it is noted, under “Summary”, that “[a]t this time, it is expected that northern Alberta will be involved in the National Energy Board and Joint Review Panel’s public hearings.” The document goes on to state that “NEB public hearings will be held in northern Alberta” and there is a reference to guidance being needed on “how to effectively engage Alberta Treaty 8 First Nations in this EIA and regulatory review process.” In light of the foregoing:*
- (i) *Please describe what was meant by “northern Alberta will be involved in the National Energy Board and Joint Review Panel’s public hearings.”*
 - (ii) *Please describe what discussions, if any, INAC had with the Proponent or any regulatory bodies with respect to how Alberta Treaty 8 First Nations would be involved in the regulatory review of the MGP, including how those First Nations would be consulted, and by whom.*
 - (iii) *Please detail any discussions that INAC has had since 2000, and please provide any documents related thereto, concerning how Alberta First Nations will/would be consulted in respect of the MGP.*
 - (iv) *Please describe the reason, if known, and please provide copies of any related correspondence, minutes of meetings, etc., for why the MGP was split into two Projects for purposes of regulatory review, between the date of the above-mentioned memorandum in July, 2003, and the Proponent’s filing of its application to the NEB in October, 2004.*
 - (v) *Please detail any discussions, and please provide any related documentation, concerning the request in (iv) above, in which INAC participated in discussions, or was in attendance at any meetings, or telephone meetings, where the issue of regulatory jurisdiction over the MGP was discussed.*

Response from Indian and Northern Affairs Canada

Response to (c) i:

Please refer to:

- *the NEB Hearing Order GH-1-2004 for the Mackenzie Gas Project which states “the proposed MGP includes the 1220 km (758 mile) Mackenzie Valley Pipeline to transport gas from the Inuvik area to a point of interconnection with the NOVA Gas Transmission Ltd. System in northern Alberta.”; and*
- *the EIS Terms of Reference (Appendix 1 - Project Description) which states the MGP includes “approximately 1300 km of natural gas transmission pipeline from the outlet of the NGP facility near Inuvik to a connection with NOVA Gas Transmission Ltd (NGTL) pipeline facilities approximately 15 metres south of the Northwest Territories-Alberta boarder.”*

In addition, the JRP announcement of March 14, 2005 indicates that it will be holding hearings in communities affected by the project in Northwest Alberta and specifies hearings venues for Alberta.

Response to (c) ii, iii, iv, v:

Not Relevant

DTFN Views

As was stated in Section 3.0 (a) of this Ruling regarding the theme issue of implementation of Panel recommendations by government departments and regulators, the DTFN stated in paragraph 25 of its June 27, 2005 Motion,

... the role of Alberta (or lack thereof) within the JRP process, and questions related to discussions that the Respondents have had with Alberta in relation to the environmental assessment of the MGP, relate to how the recommendations of the JRP will be enforced within the Connecting Facilities, and to the question of how issues such as mitigation and Treaty 8 rights will be meaningfully considered and accommodated in respect of the MGP.

In its Reply Argument of August 3, 2005 (paragraphs 12 and 13), DTFN submits that:

... section 16 of CEEA (Sic) requires the JRP to consider whether the Responsible authorities have the ability to implement mitigation and follow-up measures within the Connecting Facilities, either on the basis that this is an issue of technical feasibility pursuant to section 16 or on the basis that this is “any other matter relevant” to the work being done by the JRP. The wording of section 16(1)(e) gives the JRP the discretion to consider other matters that it considers relevant, and the question of whether its own recommendations can be implemented within the Connecting Facilities is clearly relevant to the work being done by the JRP and will provided guidance in terms of how the JRP formulates those recommendations.

It is also notable that section 20(1.1) of CEEA says that mitigation measures which may be taken into account by a responsible authority are not limited to measures within the jurisdiction of Parliament and may include “(a) any mitigation measures whose implementation the responsible authority can ensure.” (emphasis added) There is also similar language in s. 37 (1.1) (a) of CEEA.

Panel Considerations

To the extent that correspondence between levels of government and governmental agencies has taken place to address matters related to the co-ordination and administration of processing a multi-jurisdictional application – especially communication that pre-dates establishment of the Joint Review Panel – it is not relevant to the Panel’s review.

Panel Ruling

The Panel does not compel Indian and Northern Affairs Canada to provide a further response to part (c) of IR DTFN-R2-20.

n) IR DTFN-R2-21

This IR is identical to IR DTFN-R2-14 except that it is directed to Indian and Northern Affairs Canada rather than Environment Canada.

Please see details of this IR, responses to same and Panel considerations set out under DTFN R2-14 in Section 4 (f) of this Ruling.

Panel Ruling

The Panel does not compel Indian and Northern Affairs Canada to provide a further response to IR DTFN-R2-21.

o) IR DTFN-R2-22

This IR is identical to IR DTFN-R2-15 except that it is directed to Indian and Northern Affairs Canada rather than Environment Canada.

Please see IR DTFN-R2-15 in Section 4 (g) of this Ruling for the IR, responses to same and Panel considerations.

Panel Ruling

The Panel does not compel Indian and Northern Affairs Canada to answer IR DTFN-R2-22.

p) IR DTFN-R2-23

This IR is identical to IR DTFN-R2-13 with the exception that it is directed to Natural Resources Canada.

Please see IR DTFN-R2-13 in Section 4 (e) of this Ruling for the IR, responses to same and Panel considerations.

Panel Ruling

The Panel directs Natural Resources Canada to respond to parts (a) and (b) of IR DTFN-R2-23.

q) IR DTFN-R2-24

This IR is identical to IR DTFN-R2-14 except that it is directed to Natural Resources Canada rather than Environment Canada.

Please see details of this IR, responses to same and Panel considerations set out under DTFN-R2-14 in Section 4 (f) of this Ruling.

Panel Ruling

The Panel does not compel Natural Resources Canada to answer IR DTFN-R2-24.

r) IR DTFN-R2-25

This IR is identical to IR DTFN-R2-14 except that it is directed to Transport Canada rather than Environment Canada.

Please see details of this IR, responses to same and Panel considerations set out under DTFN-R2-14 in Section 4 (f) of this Ruling.

Panel Ruling

The Panel does not compel Transport Canada to provide a further response to IR DTFN-R2-25.

s) IR DTFN-R2-28 (e)

IR Directed to

Government of the Northwest Territories

Preamble to IR

Various agreements have been entered into between governments, regulators and governmental departments concerning the establishment of a coordinated review process for the environmental assessment and regulatory review of the Mackenzie Gas Project (the “Project”).

Appendix 1 of the Terms of Reference includes the Dickins Lake and Vardie River and other facilities to be constructed in northwestern Alberta as part of the description of the Project.

Although certain portions of the Project will be constructed in Alberta, neither the Alberta Energy and Utilities Board (“AEUB”), nor any other department or ministry within the Alberta government is a signatory to any of these agreements.

There is a need to ensure that recommendations of the JRP and commitments made by the proponent pursuant to s. 6 of the TOR can be enforced in Alberta, and there is a need for the environmental and regulatory review of the entire Project to be done in a coordinated fashion.

The Traditional Territory of Dene Tha’ is located in both the NWT and Alberta.

Information Request

(e) What steps have you taken or do you intend to take to ensure that there is proper consultation with the Dene Tha’ and accommodation of Dene Tha’s rights and interests with respect to the portion of the Project being constructed in the NWT?

Response from Government of the Northwest Territories

e) The question posed is not relevant to the mandate of the Joint Review Panel and its Terms of Reference.

DTFN Views

The views of the DTFN on this issue are set out under Section 3.0 (c) of this Ruling under the theme issue Aboriginal Rights.

Panel Considerations

See the Panel’s consideration and views on the issue of “Aboriginal Rights – Consultation” in Section 3 (c) (ii) herein.

Panel Ruling

The Panel does not compel the Government of the Northwest Territories to provide a further response to IR DTFN-R2-28 (e).

t) IR DTFN-R2-29

This IR is identical to IR DTFN-R2-15 except that it is directed to the Government of the Northwest Territories rather than Environment Canada.

Please see IR DTFN-R2-15 in Section 4 (g) of this Ruling for the IR, responses from Parties and Panel considerations.

Panel Ruling

The Panel does not compel the Government of the Northwest Territories to answer IR DTFN-R2-29.

u) IR NWTLC R2-28

IR Directed to

Indian and Northern Affairs Canada (on behalf of Government of Canada)

Preamble to IR

The terms of reference indicate a need to consider the environmental performance of the proponent in conducting similar projects in northern environments. The EIS interprets the term environment broadly, to include human impact and socio economic conditions. Corporations involved in the MGP operate in various developing countries. Their conduct in these places is relevant to the peoples of the NWT and the rest of Canada.

Information Request

Please provide the following information:

- i) Is the federal government concerned about the human rights record of any of the corporations involved in the MGP, in relation to their operations in other countries?*
- ii) If so, what measures has the federal government taken to bring this to the attention of the corporation(s) involved?*
- iii) Do any of the international conventions that Canada is signatory to, oblige Canada to restrict corporations with records of human rights abuses from operating in Canada?*
- iv) Do any of the North American Free Trade provisions prevent the Government of Canada from exercising any censure, up to the point of restricting participation, of corporations involved in the MGP for human rights abuses in other countries?*

Response from Indian and Northern Affairs Canada

Response to i), ii), iii), and iv): The Joint Review Panel is responsible for the conduct of the environmental impact review of the proposed Mackenzie Gas Project. The information request does not address the environmental impacts of the MGP and is therefore not relevant to the mandate of the JRP.

DAS Views

The DAS stated the following in its submissions of both June 20 and July 15, 2005:

It is DAS' view that INAC is incorrect in stating that this issue is outside the terms of reference for the JRP. The historical record of the proponents in conducting projects such as this is directly relevant to this review and is explicitly included in the TOR. Section 8.1 of the TOR is clear that the EIR will include an assessment of the "... record of the environmental performance of the Proponents in conducting this type of project..."

The definition of "impact on the environment" includes impacts upon the social environment, which would include human rights issues and abuses. Therefore, the "environmental performance" referred to in Section 8 of the TOR would include the social environment which requires examining the human rights record of the Proponents.

In its submission of August 5, 2005, the DAS reiterated the above and added the following:

In Paragraph 35 of it's Argument, INAC suggests that the IR should have been directed to the proponent instead of to INAC. While information on human rights issues can certainly be obtained from the proponent, there is no reason for INAC to refuse to answer an IR on this valid subject and, hopefully, INAC would provide a more objective reply on this issue than would the proponents.

INAC is also better suited to reply to questions regarding Canada's international obligations on human rights. In Paragraph 35, INAC seems to unjustifiably be implying that its

international commitments on the issue of human rights is somehow not a valid topic for this review process, which is somewhat surprising given that Canada's international environmental commitments such as the Kyoto Protocol are freely discussed in the JRP's review with no objection from Canada.

Government Views

In its written submission of July 27, 2005, INAC stated:

34. The JRP is responsible only for the conduct of an environmental impact review of the proposed MGP. This information request on alleged human rights abuses in other countries does not address the environmental impacts of the MGP. As a result, it is outside the terms of reference of the MGP.

35. The DAS in their submission noted that Section 8.1 of the Terms of Reference for the MGP allows for an assessment of the "...record of the environmental performance of the Proponents in conducting this type of project". However, this information request is not directed to the Proponent and does not address their environmental performance in conducting a similar pipeline project. This information request is directed to the Government of Canada and addresses International conventions regarding human rights abuses in other countries.

36. While human rights is an important subject, this information request is clearly outside the mandate of the JRP and the Terms of Reference for the MGP.

Panel Considerations

Section 8.1 of the TOR requires the Proponent to introduce readers "to the Proponent, its consultants, and any contractors engaged for the Project." It goes on to require that the Environmental Impact Statement:

Identify the ownership arrangements for various portions of the Project Specifically, provide details on ownership of rights, operational arrangements, corporate and management structures, and relevant experience with similar large-scale operations in Canada and in other countries with similar regulatory and social policy regimes.

Identify key personnel, contractors, and/or sub-contractors responsible for preparing the EIS.

Provide a record of the environmental performance of the Proponents in conducting this type of project **and** in northern environments." (*emphasis added*)

The Panel's understanding of section 8.1 of the TOR is that it does not restrict the Panel's consideration of the environmental performance of the Proponents to just the northern environment.

To the extent that the Proponents operate in other countries, the human rights record of the Proponents in other countries could be relevant to the Panel's mandate. Evidence on these matters could be presented during the review proceedings.

If such evidence were presented to the Panel, the Panel would then expect to hear the views of the Government of Canada (and others) on any implications that evidence might have for the environmental impact review of the MGP.

Panel Ruling

The Panel does not compel the Government of Canada to answer IR NWTLC R2-28.

v) IR NWTLC R2-29

IR Directed to

Proponent, Government of the Northwest Territories, Natural Resources Canada and Indian and Northern Affairs Canada

Preamble to IR

The MGP is a large-scale industrial project that will consume considerable energy to construct and operate. Required energy includes the direct use of fossil fuel such as diesel, energy to make the materials needed to build the pipeline and related infrastructure, also required energy to be made and transported on site.

One stated purpose of the MGP is to increase the availability of natural gas and natural gas liquids as an energy source. The TOR is concerned with the project's overall contribution to sustainability. There should be a comparison of the amount of energy required to build the project and the amount of energy produced by the project.

Information Request

Please provide the following information:

- i) How much energy will be required to construct the MGP, based on a full-cost energy analysis (broken down by estimates of renewable and non-renewable sources) of all materials (e.g. iron ore mining and steel production for pipe and all other materials required for related infrastructure), transportation (of all materials and people), and employee servicing (e.g. shelter, food, water)? Please provide full details of any analysis or models used in this calculation.*
- ii) Compare the amount of energy from the above question to how much energy the MGP will produce?*
- iii) How many years of operation will be required to replace the amount of energy used to construct and operate the MGP? When does the break-even point occur in terms of energy input into the project vs. net energy output at:
 - a) the proposed rate of flow in the EIS? and*
 - b) the expanded capacity scenario rate of flow as described in the additional information submitted by the proponent?**
- iv) What is the total amount of Greenhouse Gases emissions created using the full-cost energy analysis requested in question #1 above? Please provide an annual breakdown for the construction and operational phases, and please provide full details or any analysis or models used in this calculation.*

Response from Natural Resources Canada

The Terms of Reference for this review outline the scope of the project and the scope of the assessment for the Mackenzie Gas Project. The TOR for the EIS requests that the proponent provide: - the capital cost of the Project by phase and location, and – any other costs that may be incurred”.

The TOR do not require a full cost energy analysis as requested in this IR.

Response from Indian and Northern Affairs

Response to i), ii), iii), and iv):

The Terms of Reference for the EIS outlines the scope of the project and the scope of the assessment for the Mackenzie Gas Project. The TOR for the EIS requests that the proponent provide:

- the capital costs of the project by phase and location, and*
- any other costs that may be incurred.*

The TOR for the EIS does not require a full cost energy analysis and therefore this request is not relevant.

Although the IR was directed to several parties, the DAS Motion requested a response from only NRCan and INAC.

DAS Views

The DAS stated the following in its submissions of June 20, July 15 and August 5, 2005:

This response displays a fundamental lack of understanding by these two departments of the role of the *TOR* in an environmental review process. The *TOR* is an inclusive, not exclusive, document. It is not possible when preparing a *TOR* to include every possible issue that might arise during the course of the review process. While a *TOR* explicitly states what must be assessed within the review process, the omission of an issue from the *TOR* does not mean that the issue is excluded from the review process. Valid issues that are brought forward during a review can and should be assessed, even if they are not explicitly included in the *TOR*.

It is DAS' view that questions related to a full cost energy analysis of the MGP are valid questions that deserve full and complete answers.

Government Views

INAC stated at paragraph 37 in its written submission of July 27, 2005

INAC submits that this IR is both outside the mandate of the JRP, and it requests information which is only within the knowledge and purview of the Proponent. Consequently, INAC is not able to answer this IR which should have been more properly addressed to the Proponent.

By way of letter dated July 27, 2005, Natural Resources Canada stated that it concurred with the written submission of INAC and that it "is also not in (sic) position to be able to answer this IR".

Panel Considerations

Both INAC and Natural Resources Canada have stated that they are not in a position to answer this IR because, they state, the information is "only within the knowledge and purview of the Proponent." The Panel notes that the questions in this IR were directed to the Proponent and that the Proponent provided a response.

The Panel is of the view that the subject matter of this IR is within the Panel's mandate with respect to the proposed project's overall contribution to sustainability.

Panel Ruling

The Panel does not compel either Indian and Northern Affairs Canada or Natural Resources Canada to respond to IR NWTLC R2-29.