Imperial Oil Resources Ventures Limited (IORVL)

Application for an Extension to the Sunset Clause for the Mackenzie Gas Project

June 2, 2016

OA-2015-001

Office of the Regulator of Oil and Gas Operations

File No. OA-2015-001: Imperial Oil Resources Ventures Limited Application for an Extension to the Sunset Clause for the Mackenzie Gas Project

June 2, 2016

In THE MATTER of an application by Imperial Oil Resources Ventures Limited made pursuant to section 10(6) of the Oil and Gas Operations Act S.N.W.T. 2014 c.14.

SUMMARY OF THE PROCEEDING

In March 2011, the National Energy Board (NEB) issued the proponents of the Mackenzie Gas Project (MGP) a number of authorizations under the *National Energy Board Act* (NEBA)[1] and *Canada Oil and Gas Operations Act* (COGOA)[2] necessary for the proponents to proceed with the proposed project. Each of the authorizations contained a condition that would result in the expiration of that authorization if construction of the project had not commenced by December 31, 2015.

On April 1, 2014 the Government of Canada devolved much of the legislative and regulatory authority applicable to the proposed MGP to the Government of the Northwest Territories.

In a letter dated October 29, 2015, Imperial Oil Resources Ventures Limited (IORVL), applying on its own behalf and on behalf of all proponents of the MGP, requested that the Government of the Northwest Territories Regulator of Oil and Gas Operations (the Regulator) "vary the authorization previously granted by the National Energy Board by extending the Sunset Clause to December 31, 2022.

On November 10, 2015, the Regulator's delegate, the Chief Conservation Officer (CCO), issued a direction to extend the expiration date of the sunset clause for an interim period ending September 30, 2016, during which the application for a variation could be decided.

The purpose of this proceeding is to decide:

- whether the variation sought by the MGP proponents should be granted by the CCO for the portion of the MGP over which the Regulator holds jurisdiction; and,
- if a variation is granted, whether that variation should be accompanied by any additional terms and conditions.

INTRODUCTION

The MGP is a proposal to produce and transport natural gas and natural gas liquids from the three largest discovered onshore natural gas fields in the Mackenzie Delta area of the onshore Northwest Territories. Natural gas from the Niglintgak, Taglu and Parsons Lake anchor fields would travel through the proposed Mackenzie Valley Pipeline (MVP) from Inuvik, Northwest Territories, to markets in southern Canada.

As part of the MGP, it is proposed that natural gas liquids collected from the anchor fields would be separated from the natural gas at a gas processing facility near Inuvik (the Inuvik Area Facility or IAF) and transported via a smaller pipeline to Norman Wells that would interconnect with the existing Enbridge Pipelines (NW) Inc. Norman Wells Pipeline.

[1] R.S.C., 1985, c. N-7
[2] R.S.C. 1985, c. O-7

The MGP proponents made applications to the NEB in October 2004 for the necessary authorizations under the NEBA and COGOA to proceed with the project. The application for the Mackenzie Gathering System (MGS) component of the project was made by IORVL under paragraph 5(1)(b) of COGOA, on behalf of itself and the other project proponents: Shell Canada Limited, ConocoPhillips Canada North Limited and ExxonMobil Canada Properties.

After a total of 58 hearing days by the NEB in communities within the project area inside and outside of the Northwest Territories, and an integrated and concurrent environmental impact review process under the *Mackenzie Valley Resource Management Act* and *Canadian Environmental Assessment Act*, the NEB decision-making panel issued its written reasons for decision and accompanying conditions in December 2010. Several of the approved conditions arose from the environmental impact review process and were included in the list of conditions applicable to the authorization for the MGS.

The NEB arrived at the following disposition in relation to the MGS:

> *We find that the Mackenzie Gathering System promotes safety, environmental protection and conservation of oil and gas resources. Accordingly, we will issue an authorization for the Mackenzie Gas System under paragraph 5(1)(b) of the Canada Oil and Gas Operations Act. This authorization will be issued once the proponents have complied with the necessary provisions of the Canada Oil and Gas Operations Act. This authorization will be subject to the conditions outlined in Appendix M. We have also made an Order setting toll principles for the Mackenzie Gathering System that are contained in Appendix N.*[3]

APPLICATION

In a brief letter dated October 29, 2015, IORVL, applying on behalf of itself and on behalf of all proponents of the Mackenzie Gas Project, requested that the Regulator "vary the authorization previously granted by the National Energy Board by extending the Sunset Clause to December 31, 2022"[4].

The "Sunset Clause" referred to by the Applicant is the condition found at section 74 of the conditions applicable to the MGS:

> **Sunset Clause**
>
> 74. Unless the NEB otherwise directs, this Certificate shall expire on 31 December 2015 unless construction in respect of the Mackenzie Gas Project has commenced by that date[5].

[3] NEB Reasons for Decision in GH-1-2004, Volume 2, page 216.
[4] Bart Cahir, Senior Vice President, Upstream, Imperial Oil Limited letter to the Office of the Regulator of Oil and Gas Operations, October 29, 2015.
[5] Appendix M – Conditions for the Mackenzie Gathering System, NEB Reasons for Decision in GH-1-2004, Volume 2, pp.268-284

Although the letter does not expressly state so, IORVL appears to requesting that the Regulator employ its power to vary the terms of an authorization, as permitted by subsection 10(6) of the *Oil and Gas Operations Act* (OGOA)[6].

Attachment 2 submitted by IORVL sets out an "Updated MGP Schedule (2022 Start of Construction)", should the applied-for extension be granted.[7] Imperial states that "2022 is expected to be the earliest possible construction start date"[8]. For a mid-2022 construction date, Attachment 2 shows that considerable pre-construction activity would need to be completed, including re-staffing, engineering, field programs and the obtaining of other permits. This would culminate in the "Owner's Final Decision to Construct" in the final quarter of 2021. Construction would then begin in the second quarter of 2022.

It is worth noting that the "Owner's Final Decision to Construct" in IORVL's best-case scenario would occur approximately six months prior to the start of work on the anchor field and pipeline site and facilities development.[9]

LEGISLATIVE FRAMEWORK AND EFFECT OF DEVOLUTION

Devolution resulted in changes to how oil and gas works and activities are regulated in the onshore Northwest Territories. A devolution of legislative authority from the Government of Canada to the Government of the Northwest Territories (GNWT) occurred on April 1, 2014. As part of that devolution, the Legislative Assembly of the Northwest Territories passed legislation that substantially "mirrored" the federal legislation in place immediately prior to April 1, 2014. The federal legislation included COGOA, which was mirrored as OGOA. Under this piece of territorial legislation, the regulation of oil and gas works and activities is carried out in a substantially similar way after devolution as prior to devolution, except that the identity of some of the decision-makers has now changed.

To facilitate continuity, federal and territorial legislation each included transitional provisions that govern how authorizations granted under the previous federal regime are dealt with under the successor territorial regulatory regime. In particular, section 123(3) of OGOA contains the following transitional provision:

> (3) An authorization in respect of the exploration and drilling for and the production, conservation, processing and transportation of oil and gas in the onshore that had been issued or made under the *Canada Oil and Gas Operations Act* before the coming into force of this Act continues in effect as an authorization issued or made in accordance with this Act.

---

[6] S.N.W.T. 2014, c. 14
[7] Bart Cahir, Senior Vice President, Upstream, Imperial Oil Limited letter to the NEB, dated August 20, 2015, and later resent to the Office of the Regulator of Oil and Gas Operations, under cover of a letter dated October 29, 2015.
[8] *Supra*, note 7.
[9] *Supra*, note 7.

Provisions in the federal *Northwest Territories Act*[10] implementing the devolution provide for a similar continuity of authorizations issued under federal legislation prior to April 1, 2014.

OGOA also provides for two different provincial-type upstream oil and gas regulators in the onshore Northwest Territories. In the onshore Northwest Territories outside of the Inuvialuit Settlement Region (ISR)[11] and federal areas, an oil and gas regulator was established under section 121 of OGOA. That regulator (the Regulator) is designated by the Commissioner-in-Executive Council.

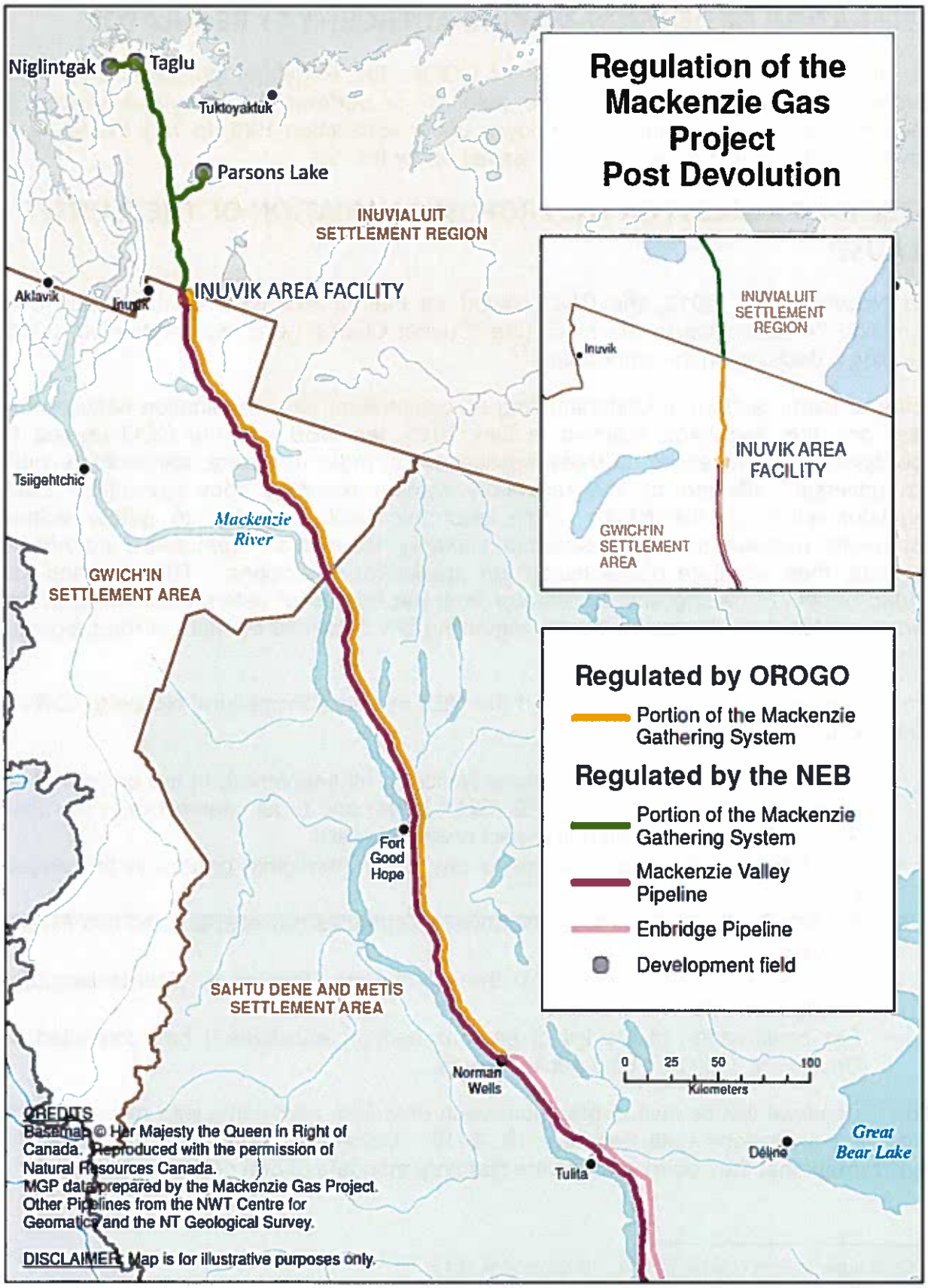
In the onshore portion of the ISR in the Northwest Territories, the NEB remains the oil and gas regulator under the territorial OGOA. The NEB also retains its regulatory authority for federal areas in the onshore under COGOA (most notably, the oil field of the Norman Wells proven area), and its interprovincial pipeline regulatory role under the NEBA. The MGP is a linear project that begins with the anchor fields in the ISR and extends south from that region into the Mackenzie Valley, and further, it contains elements regulated under both the NEBA and OGOA. Therefore, the two oil and gas regulators now share regulatory authority for the project.

ELEMENTS OF THE MGS WITHIN THE TERRITORIAL REGULATOR'S JURISDICTION

The Regulator's jurisdiction over the proposed MGP is limited to elements of the MGS. These elements are all subject to regulation under OGOA and are located outside of the ISR. The components subject to jurisdiction of the Regulator include:

- The IAF, approximately 20 km southeast of the town of Inuvik, that would process production from the three development fields;
- A natural gas liquids pipeline consisting of approximately 457.2 km of 10 inch diameter pipeline from the IAF to interconnect with the existing Enbridge pipeline at the town of Norman Wells; and
- A relatively short length of two-phase pipeline from the boundary between the ISR and the Gwich'in Settlement Area, supplying the IAF.

[10] S.C. 2014, c.2 s.2, section 69.
[11] Inuvialuit Settlement Region means that portion of the Northwest Territories shown in Annex A and described in Annex A-1 of the Inuvialuit Final Agreement between the Inuvialuit and the Government of Canada, dated June 5, 1984, excluding any area in Yukon or in the adjoining area as defined in section 2 of the *Yukon Act* (Canada).


Regulation of the Mackenzie Gas Project Post Devolution
Niglintgak
Taglu
Tuktoyaktuk
Parsons Lake
INUVIALUIT SETTLEMENT REGION
INUVIK AREA FACILITY
Aklavik
Inuvik
Tsiigehtchic
Mackenzie River
GWICH'IN SETTLEMENT AREA
Fort Good Hope
SAHTU DENE AND METIS SETTLEMENT AREA
Norman Wells
Tulita
Déline
Great Bear Lake
INUVIALUIT SETTLEMENT REGION
Inuvik
INUVIK AREA FACILITY
GWICH'IN SETTLEMENT AREA
Regulated by OROGO
Portion of the Mackenzie Gathering System
Regulated by the NEB
Portion of the Mackenzie Gathering System
Mackenzie Valley Pipeline
Enbridge Pipeline
Development field
0 25 50 100
Kilometers
CREDITS
Basemap © Her Majesty the Queen in Right of Canada. Reproduced with the permission of Natural Resources Canada.
MGP data prepared by the Mackenzie Gas Project.
Other Pipelines from the NWT Centre for Geomatics and the NT Geological Survey.
DISCLAIMER: Map is for illustrative purposes only.

DELEGATION OF DECISION-MAKING AUTHORITY BY REGULATOR

On June 16, 2014, under section 8 of OGOA, the Regulator delegated the Chief Conservation Officer (CCO) with the authority to perform the powers described in section 10 of that Act, including the power under subsection 10(6) to vary the terms of any operating licence or authorization issued under the Act.

DECISION PROCESS FOR THE PROPOSED VARIATION OF THE "SUNSET CLAUSE"

On November 10, 2015, the CCO issued an interim extension to the deadline in condition 74 applicable to the MGS (the "Sunset Clause") until September 30, 2016, pending a decision on this application.[12]

Under a Memorandum of Understanding on cooperation and coordination between the NEB and the Regulator, reached in July 2015, the NEB and the CCO agreed to coordinate their processes on these applications in order to ensure stakeholders were not adversely affected by the regulatory system resulting from devolution. Each regulator relied on the NEB's single electronic public registry "to gather written comments *relevant to their respective statutory mandates*"[13] *[emphasis added],* in reaching their separate decisions on the applied-for extensions. This provided the added benefit of freeing any commenter from the burden of determining which of the two regulators is now responsible for regulating any particular element of the proposed project.

On November 17, 2015, the CCO and the NEB issued a Procedural Notice to IORVL, directing it to:

- Circulate a copy of the Procedural Notice to all intervenors in the original MGP hearing process before the NEB (GH-1-2004) and to all intervenors in the Joint Review Panel environmental impact review process;
- Circulate the Procedural Notice to any other Aboriginal groups in the project area;
- Publish English notices in six Northwest Territories newspapers and two Alberta Newspapers;
- Publish a French notice in the Northwest Territories' French-language newspaper; and
- File confirmation of the list of persons and organizations it had contacted by December 8, 2015 on the public registry.

The Procedural Notice invited the submission of written comments with respect to the proposed extensions until February 16, 2016. Comments were limited only by the requirement that they be relevant to the statutory mandate of one of the regulators.

[12] CCO letter to Rick Gallant, IORVL, 10 November 2015.
[13] NEB and CCO Joint Procedural Notice, November 17, 2015.

Comments Received

The following individuals and organizations submitted written comments by the deadline set out in the procedural notice:

- Alternatives North (submissions of September 28, 2015 and February 11, 2016)
- Ecology North
- Environment and Climate Change Canada
- Fort Simpson Chamber of Commerce
- Government of the Northwest Territories
- Government of Yukon, Minister of Energy, Mines and Resources
- Greg Mcmeekin
- Gwich'in Tribal Council
- Inuvialuit Regional Corporation
- Mackenzie Valley Aboriginal Pipeline LP
- NWT Chamber of Commerce
- Russ Duncan, Sky Hunter Corporation
- Tulita District Land Corporation
- World Wildlife Fund Canada

In addition, the Canadian Northern Economic Development Agency submitted a copy of a letter that it sent to Aboriginal organizations within the project area inviting them to bring forward concerns with respect to whether the extension would have any adverse impacts on established or asserted Aboriginal or treaty rights.

A majority of the comments submitted expressed support for an extension. Most of those comments cited a desire to preserve the economic benefits associated with the MGP should it proceed. One commenter supported the extension on the condition that the proponents are required to build additional facilities "to provide for the energy requirements of the area".

Several commenters opposed the extension or opposed it without a public hearing to re-evaluate issues that were considered in the earlier hearing process for the project, including its environmental impacts and whether it remains in the public interest. One commenter argued against the extension on the basis that the opportunity to build the project should be given to another company.

IORVL's Reply to Comments

In a letter dated March 7, 2016 IORVL replied to the written comments on the public registry.

IORVL's reply to the written comments can be summarized as follows:

- The proponents need a rebound in the natural gas market to "warrant a resumption in the MGP work" (paragraph 3)

- It submits that the comments suggest that most northerners are in favour of the submission (paragraph 4)
- An extension will preserve the opportunity for realization of benefits associated with the project (paragraph 5)

In support of the requested extension, IORVL submits that:

> *...it would be in the best interests of Northerners and other Canadians to approve the requested Sunset Clause extension. The extension would preserve benefits that have already been negotiated by Northerners and would preserve the opportunity for future benefits that would be realized by Northerners and other Canadians were the construction of the MGP to proceed. The extension would not necessitate a new environmental assessment or another public hearing, because the conditions attached to existing approvals ensure that any changes to the environment that might occur prior to construction would be reflected in the final project designs and mitigation measures, and because the extension would not affect the ability of the NEB, OROGO and other regulators to ensure that environmental impacts of the project are minimized. Nor would the extension tie up resource development in the North.*

IORVL takes the view that the comments of the parties provide "no basis to reject the requested extension to the Sunset Clauses (paragraph 7).

IORVL closes by reiterating its request for an extension of the Sunset Clauses in the MVP and MGS approvals to December 31, 2022, arguing that "[t]his extension would be in the public interest".

ANALYSIS

The Purpose of Regulation under the *Oil and Gas Operations Act*

Oil and gas regulation under OGOA (and its predecessor, COGOA), has a different focus than regulation under the NEBA, which governs what the proponents have described as the Mackenzie Valley Pipeline component (MVP) of the MGP. The decision-maker is faced with different questions under each piece of legislation and can only base its decision on those criteria it is permitted to consider in the applicable legislation. The purpose of OGOA is set out in section 2 of that Act:

> 2. The purpose of this Act is to promote, in respect of the exploration for and exploitation of oil and gas,
> (a) safety, particularly by encouraging persons exploring for and exploiting oil or gas to maintain a prudent regime for achieving safety;
> (b) the protection of the environment;
> (c) the conservation of oil and gas resources;
> (d) joint production arrangements; and
> (e) economically efficient infrastructures.

In contrast, the NEBA requires the NEB to have regard to a much broader set of factors when issuing a certificate for the MVP aspect of the MGP under section 52(2) of that Act:

> (2)
>
> (a) the availability of oil, gas or any other commodity to the pipeline;
> (b) the existence of markets, actual or potential;
> (c) the economic feasibility of the pipeline;
> (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
> (e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

It is my opinion that it would be improper for me to apply the factors listed in subsection 52(2) of the NEBA in reaching a decision on the current application for an extension under OGOA. The law is clear that statutory bodies must respect the confines of their jurisdiction and cannot trespass in areas where the legislature has not assigned them jurisdiction.[14] The purposes of OGOA listed in section 2 are given effect in part by the issuance of authorizations to conduct "any work or activity related to the exploration or drilling for or the production, conservation, processing or transportation of oil or gas"[15]. The condition that the applicant seeks to vary is attached to one such authorization.

As CCO, I am required to decide whether I will extend the "sunset clause" as it applies to the portions of the MGS that are outside of the Inuvialuit Settlement Region, all of which are subject to regulation under OGOA, and not the NEBA. While, in practical terms, the elements of the MGS may not be built without the existence of a trans-boundary pipeline such as the MVP to take the oil and gas from the anchor fields to market, that does not empower me to import the consideration of matters that are enumerated in the NEBA, such as whether the MGS is broadly in the public interest, or whether markets exist to justify the project. Similarly, the fact that the purposes set out in section 2 of OGOA happen to include aspects of the public interest does not empower me to make a broad determination of whether elements of the MGS are in the public interest.

Under OGOA, the central question I am required to answer on this application is whether or not an extension of the sunset clause applicable to the authorization for the MGS is consistent with the values the act was established to protect. Accordingly, while I have reviewed the submissions in their entirety, I am only permitted to weigh and consider the aspects of those submissions that speak to matters within my statutory jurisdiction.

---

[14] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, para. 2 (S.C.C.).
[15] OGOA, sections 6 and 10.

Aboriginal Rights Considerations

Should the MGP be constructed, it would be the NWT's largest piece of energy infrastructure. It was the subject of extensive consultations during the initial hearings and environmental impact assessment processes and the initial authorization was not successfully challenged on the basis on inadequate consultation. I must consider whether the proposed variation of the sunset clause that is the subject of this application to the Regulator has the potential to adversely affect any asserted or existing Aboriginal or treaty rights, and if so, whether any additional potential adverse effects have been consulted upon and, where appropriate, accommodated.

As set out in the *Rio Tinto Alcan* decision, the Supreme Court of Canada has established that the trigger for consultation is if the "...present decision has the potential of causing a novel adverse impact on a present claim or existing right".[16] While it is not apparent to me that the extension has the potential to cause a "novel" adverse impact I will nevertheless review the adequacy of opportunities for Aboriginal rights-holding and asserting bodies to bring forward any new concern.

I note that specific efforts have been made to bring the application to the attention of Aboriginal rights-holding and asserting bodies in the project area. A number of bodies representing Aboriginal rights holders in the project area were intervenors with direct involvement in the NEB and Joint Review Panel processes. The Applicant, as a requirement of the Procedural Directive issued by the NEB and CCO, was required to provide a copy of the procedural notice to "all intervenors in the MGP hearing process (GH-1-2004) and the Joint Review Panel process, as well as any other Aboriginal groups in the project area"[17]. The proponents were further required to publish a notice in eight English newspapers (six of these in the Northwest Territories), and in L'Aquilon, the French-language newspaper of the Northwest Territories.

In addition, the Canadian Northern Economic Development Agency submitted to the public registry copies of letters that it sent to Aboriginal organizations representing Aboriginal rights holders in the project area advising them of the application and inviting them to provide specific input on whether the proposed extension of the sunset clause might cause any adverse impacts "on [their] established or asserted Aboriginal or treaty rights"[18]. These letters included Aboriginal representative organizations in the Gwich'in Settlement Area and Sahtu Settlement Area, where the portions of the MGS subject to this authorization are proposed to be built.

It is worth noting that the project will only be constructed if a host of other authorizations, including site-specific land use permits and water licences are obtained from the relevant regulators. Each of these authorizations brings with it a potential need to consult and where appropriate, to accommodate Aboriginal interests made known to the decision-maker.

---

[16] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, para. 49 (S.C.C.).
[17] NEB and CCO Joint Procedural Notice, November 17, 2015.
[18] Canadian Northern Economic Development Agency letter to various Aboriginal governments and organizations, December 15, 2015.

I also note that the wording of condition 74, the "Sunset Clause", was reached after an extensive process and submissions during the original proceedings and that the wording of the condition itself has always contemplated the possibility that the NEB (or in a post-devolution context, another decision maker), might "otherwise direct".

DECISION

Having reviewed all of the submissions on the jointly-established pubic registry in the context of the Regulator's specific statutory jurisdiction over elements of the MGS under OGOA, I determine that:

- The existing process for obtaining views on the proposed extension is adequate given the nature of the decision;
- Opportunity for Aboriginal consultation on the proposed extension has been adequate; and
- The submissions do not disclose a basis for denying the applied for extension.

I have also concluded that the requested extension should again be accompanied by a "Planning Clause", similar in purpose to the clause that accompanied the original "Sunset Clause".

The details of my reasoning are set out in the following sections.

Process

Two submissions urged the necessity of a public hearing to hear submissions on the application. Alternatives North, in its submission to the NEB and the CCO, requested that "...If the NEB does not choose to say no to the extension request... that [it] hold a public hearing in the NWT to further consider the request and its implications"[19].

In addition, Ecology North submitted that:

> *Extending the sunset clause by seven years has significant implications and should not be made based on written submissions alone. The NWT public should be given the opportunity to participate through a public hearing, held in the NWT. Ecology North* believes that the onus should be on the proponent to demonstrate that the conditions under which the project was approved have not changed.[20] [emphasis in original]

IORVL submits that there is no need for a public hearing to re-assess the need for the project or to determine whether it is still in the public interest.[21]

I agree with Ecology North's submission that the applied-for extension has significant implications for the NWT and NWT residents. However, I do not agree that the commenting process put in place under the joint Procedural Notice to gather views on

[19] Alternatives North letter to NEB andCCO, February 11, 2016.
[20] Ecology North letter to CCO, December 22, 2015.
[21] Reply Comments of Imperial Oil Resources Ventures Limited, March 7, 2016, paragraphs 10-12.

the proposed extension was inadequate for the purpose. The Procedural Notice established a commenting period of almost three months for interested parties and members of the public to prepare and submit their views on the application. Newspaper advertisements notifying the public were placed in local newspapers in the Northwest Territories. In the circumstances, I find that the chosen process afforded fair opportunity for interested parties and the public to make their views known and to respond to IORVL's application for an extension of the "sunset clause".

Aboriginal Consultation

Given that the application was for the temporal extension of a previously authorized activity without any changes to the project or the impact mitigations associated with the project, I find that the efforts to obtain the views of bodies representing section 35 Aboriginal rights holders in the project area were adequate.

I have been provided with no submission or evidence that the proposed variation of the "sunset clause", by itself, would have the potential to adversely affect any asserted or existing Aboriginal or treaty rights within the area of the MGS portion of the MGP, for which the Regulator holds regulatory authority.

Those bodies representative of Aboriginal rights holders that submitted comments in this matter have expressed support or qualified support of the extension.

Extension

Many submissions, both in favour of and opposed to the extension, refer to considerations not contemplated in OGOA.

For example:

- WWF-Canada urges the Regulator to consider the current economics and lack of markets for the petroleum produced and transported by the project;[22]
- Ecology North points to the lack of "investment in the NWT economy" during the period in which the authorization was not acted on as a consideration[23];
- Alternatives North asks for a hearing to determine "whether [the MGP] remains in the public interest;[24]
- The Aboriginal Pipeline Group states that "[without] the Project the opportunities for economic and social improvement would be missed";[25]
- The Government of Yukon refers to the "nation building" nature of the infrastructure[26]; and
- The Government of the Northwest Territories refers to the potential for the MGP to contribute to "NWT employment, business, revenue and overall GDP"[27].

[22] WWF-Canada letter to NEB and CCO, February 15, 2016
[23] Ecology North letter to CCO, December 22, 2015.
[24] Alternatives North letter to NEB and CCO, February 11, 2016.
[25] Aboriginal Pipeline Group letter to NEB and CCO, February 1, 2016.
[26] Government of Yukon letter to IORVL, September 30, 2015.

While many of these matters might be subject to consideration under section 52 of NEB, they are not matters for consideration under OGOA. I would also note that OGOA specifically assigns the role of capturing the economic benefits of a project to the Minister responsible for that Act, in the form of the power to approve a "benefits plan". The Regulator or his delegate is required only to confirm that a benefits plan has been approved or that the requirement for a benefits plan has been waived. In a letter received by the NEB on November 23, 2010, Acting Assistant Deputy Minister of Indian and Northern Affairs Canada, Danielle Labonté, confirmed that the Minister of Indian Affairs and Northern Development had approved a "Mackenzie Gathering System Benefits Plan"[28].

I will now address the key themes of the comments as they relate to the Regulator's mandate to ensure human safety and the protection of the environment.

Safety

Neither the application, nor any of the submissions specifically addressed whether the proposed extension had any impact on the safety of the project, despite safety being a primary focus of the Regulator under OGOA as set out in section 2 of OGOA.

I conclude that the proposed extension will not have negative implications for the safety of the proposed project, and in particular, the "maintenance of a prudent regime for achieving safety" cited in section 2 of OGOA. Many conditions require the proponent to make additional safety-related filings with the Regulator, including the filing of Construction Safety Manuals for each phase of the project, and the filing of Emergency Response Plans. All of the existing conditions related to safety will continue to operate and must be satisfied at various stages throughout the pre-construction, construction and operation of the proposed project.

Protection of the Environment

Several submissions raise the prospect that the environmental impact assessment conducted for the MGP (including the MGS), that informed a number of the conditions of the authorizations, has now been rendered insufficient or "stale" by the passage of time. In this regard, Ecology North's submission states as follows:

> *There have been significant changes, both in the NWT and globally in the past five years, which will have a bearing on this project. These changes include: devolution, a continuing decline in caribou populations, the new Tuktoyaktuk road, record low water levels in the Mackenzie River, changes to the baseline data, energy prices, and strong global consensus that significant non-renewable fuel reserves must stay in the ground to keep the world from reaching 2 °C climate change.*[29]

---

[27] Government of Northwest Territories letter to NEB and CCO, February 15, 2016.
[28] Danielle Labonté, Acting Assistant Deputy Minister, Northern Affairs Organization, Indian and Northern Affairs Canada letter to to NEB Secretary Anne-Marie Erickson, November 23, 2010.
[29] Ecology North letter to CCO, December 22, 2015.

Similarly, Alternatives North's submission states as follows:

> *... the operating context has changed dramatically, internationally, in Canada, and here in the Northwest Territories. In the NWT, devolution of jurisdictional authority over lands and resources from the federal government to the Government of the Northwest Territories is a major change. Nationally, the perspective of the new federal government towards climate change and energy policy is quite different from the one under which the MGP was reviewed. Around the world, energy prices and technologies have changed dramatically, and the seriousness of the significant negative impacts of climate change and its consequences are broadly acknowledged.*[30]

Finally, WWF-Canada summarizes:

> *An assessment carried out in the early 2000's can no longer suffice as the basis for understanding the impacts of a project that might be built in the early 2020's. A new assessment will be required to reflect material changes in the environment, the social and economic context.*[31]

On the question of whether the passage of time necessitates a new environmental impact assessment for the portion of the MGS under the Regulator's jurisdiction, federal Parliament, in the form of the *Mackenzie Valley Resource Management Act*[32] (MVRMA) and its regulations, sets out the framework.

The applicant's letter to the NEB dated August 20, 2015, and later sent to OROGO, states at page 2 that:

> *Other than timing, the MGP proponents do not envision any material changes to the proposed project. Anticipated socio-economic, environmental and cultural impacts are expected to be consistent with those identified in the 2004 application and subsequent hearings and reviews.*[33]

It should be noted that, contrary to the assertion of WWF-Canada that the assessment was carried out in the early 2000's, in this matter the report of the Joint Review Panel for the Mackenzie Gas Project was issued in December 2009[34]. It was then subject to further review under "consult-to-modify" processes at the hands of the NEB in March 2010[35] and the Governments of Canada and the Northwest Territories later that year[36].

---

[30] Alternatives North letter to NEB and CCO, February 11, 2016.
[31] WWF-Canada letter to NEB and CCO, February 15, 2015.
[32] S.C. 1998, c. 25.
[33] *Supra.*, note 7.
[34] *Foundation for a Sustainable Northern Future: Report of the Joint Review Panel for the Mackenzie Gas Project* Letter of Transmittal dated December 30, 2009.
[35] Joint Review Panel for the Mackenzie Gas Project letter to NEB. March 29, 2010.

In summary, the conditions arising from the assessment were still being formulated and finalized during 2010, prior to being issued in 2011.

The Regulator is required under section 124 of the MVRMA and the *Preliminary Screening Requirement Regulations*[37] to conduct a preliminary screening of any application for an authorization issued under section 10(1)(b) of the *Oil and Gas Operations Act*. In the case of the MGP as a whole, a full environmental impact assessment of the project has been conducted under Part V of the MVRMA and its results informed a number of the conditions that have been incorporated into the authorization that is the subject of this application.

The MVRMA and its regulations do not state any expiry date for past environmental impact assessments.

The *Exemption List Regulations*[38] under the MVRMA set out those developments that are exempt from preliminary screening. Notably, section 2.1 of Schedule 1 to those regulations exempts the following development from a preliminary screening:

> 2.1 A development, or a part thereof, for which a permit, licence or authorization is requested that
> (a) was part of a development that fulfilled the requirements of the environmental assessment process established by the *Mackenzie Valley Resource Management Act*; and
> (b) has not been modified since the development referred to in paragraph (a) fulfilled the requirements of the environmental assessment process established by the *Mackenzie Valley Resource Management Act*.

While some parties have indicated that the surrounding context for the project has changed due to the passage of time, no party has indicated the view that any part of the MGS has been modified since it fulfilled the requirements of Part V of the MVRMA. To the contrary, the submission of IORVL is that "the MGP proponents do not envision any material changes to the proposed project"[39]. Accordingly, I find that the portion of the MGS for which the Regulator holds jurisdiction is therefore exempt from further preliminary screening by the Regulator at this time.

Should the proponent decide to "modify" the project within the meaning of the *Exemption List Regulations*, it could result in the need for a new preliminary screening and subsequent further levels of environmental assessment or impact review, as the case may be. Any number of subsequent authorizations, such as land use permits and water licenses yet to be applied for could trigger further screening and assessment if they bring about a modification of the project.

---

[36] John Duncan, Minister of Indian Affairs and Northern Development letter to NEB Chair Gaétan Caron, received by NEB November 18, 2010.
[37] SOR/99-12, amended April 1, 2014.
[38] SOR/99-13, amended April 1, 2014.
[39] *Supra*, note 7.

I now turn to the question of whether it could be concluded that the 81 conditions of the authorization itself have become "stale". The conditions are grouped into several categories related to the state of development of the project: General, Prior to Pre-Construction Activities, Prior to Pipe-Laying Operations, During Construction, Prior to Operation, and During Operation.

The overwhelming majority of these conditions require further filings to be made with the Regulator[40]. Of those further filings, fourteen conditions require further approvals to be obtained from the Regulator.[41] These include, but are not limited to, further approvals of:

- Environmental Protection Plan for pre-construction activities (Condition 3)
- Air Quality Monitoring Program (Condition 15)
- Waste Management Plan (Condition 16)
- Wildlife Protection and Management Plan (Condition 29)
- Environmental Protection Plan for pipe-laying operations (Condition 38)
- Report outlining details of an effects monitoring program for the project (Condition 39)
- Construction Safety Manual (Condition 40)
- Air testing measures for leak detection (Condition 57)
- Environmental Protection Plan for project operation (Condition 59).

Further, condition 11 (relating to minimizing emissions of particulate matter and ozone precursors) and condition 13 (relating to minimization of methane leakage and venting) each incorporate the concepts of "best available technology" (BAT). BAT is defined to mean:

> ...technology with superior emissions performance which is commercially available at reasonable cost *at the time it is required for the project* which meets the goals of pollution prevention and energy efficiency[42] [emphasis added]

I infer from the manner in which the NEB crafted the conditions applicable to the MGS that it was mindful of the possibility that construction of the project might not be initiated for a considerable period of time. I am reinforced in this view by the wording of the "Sunset Clause" itself, which expressly contemplates the possibility that the expiry date of December 31, 2015 could change. In my view, the conditions for the MGS were crafted so as to require the filing of up-to-date information, responsive to new technological developments and best practices. I am not persuaded by arguments that the mere passage of time has undermined the conditions in the existing authorization for the MGS. The conditions themselves ensure that much of the Regulator's decision-making will occur in the future and much closer in time to the construction and operation of the proposed MGS.

---

[40] Appendix M - Conditions for the Mackenzie Gathering System, NEB Reasons for Decision in GH-1-2004, Volume 2, pp.268-284.
[41] *Ibid.*
[42] *Ibid.*

It is again worth noting that there are many other permits and authorizations that the proponents will require from other regulators before commencement of construction on the MGS. IORVL recognizes this in Attachment 2 to its application setting out a revised timeline for construction. This was also recognized by Environment and Climate Change Canada in its comments, when it stated the following:

> *The extension of the Sunset Clauses does not impede ECCC from performing its regulatory duties. The regulatory role that falls under ECCC's mandate remains the same with regards to this project. In accordance with its present approval, the Proponent is still required to consult extensively with ECCC and others, and submit applications, with updated information, for all appropriate permits for ECCC consideration prior to any project activities.*
>
> *Furthermore, the Proponent is still required to comply with any obligations under relevant legislation, including the* Canadian Environmental Protection Act, *the pollution prevention provisions of the* Fisheries Act, *the* Migratory Birds Convention Act, *and the* Species at Risk Act.[43]

I concur with this assessment, and would add that the MGS may potentially be required to comply with any *additional* applicable legal requirements that might be brought into effect prior to construction.

Planning Considerations

The original approval contained a condition, number 73, entitled "Planning Clause"[44]. That clause required the Proponents to file updated cost estimates in support of the NEB's NEBA decision making role and to report on their decision to construct by December 31, 2013. The proponents satisfied this condition with a letter to the NEB dated December 17, 2013.

I am convinced that the Legislative Assembly (and Parliament of Canada before it) cannot have intended a project approval of this nature to have an indeterminate end-date that may be extended indefinitely. Governments, regulators, rights-holders and the public have a right to know whether a project that has been authorized may ultimately be built, so as to order and plan their businesses and lives. The Government of the Northwest Territories too, has recognized the practicalities of "ramping up" for a project of this scale should the proponents ultimately decide to proceed with construction and has requested that:

> *...the proponent provide GNWT 6-12 months advance notice of the intent to re-initiate regulatory and associated work on the project to allow time for*

[43] Environment and Climate Change Canada letter to NEB and CCO, February 16, 2016.
[44] Appendix M - Conditions for the Mackenzie Gathering System, NEB Reasons for Decision in GH-1-2004, Volume 2, pp.268-284.

> *GNWT to review previous funding projections required for the management of a project of this scale.*[45]

IORVL, in its reply comments, did not argue against the need for such advanced notice and also appears to recognize the significance and unique nature of its request:

> *IORVL recognizes that requests for extensions to sunset clauses in regulatory approvals should not be made lightly and IORVL does not expect that the NEB or OROGO would grant such requests simply as a matter of course. Each situation needs to be examined based on its own circumstances.*

IORVL's "Updated Construction Schedule", Attachment 2 to its application for the extension that is the subject of these reasons, has the "Final Decision to Construct" occurring in the last quarter of 2021. What that means is that the construction activity authorized by this authorization will not, even in IORVL's best case scenario, commence until 2022, the final year of the proposed extension.

While no commenter has expressly requested a variation of the "Planning Clause" at condition 73, in my view it has a purpose linked with that of the "Sunset Clause". Condition 73 was satisfied by IORVL in 2013 and, without a variation of condition 73, there will be no condition in an extended authorization that achieves the same purpose. The reasons for the requirement to report on the decision to construct continue to exist: they allow governments, regulators, rights-holders and the public to plan for the future. Given that anything other than IORVL's best-case scenario implies a need for a further extension of the authorization in the future and, further, that IORVL has outlined substantial work that must occur prior to a decision to construct, I believe it to be appropriate for IORVL to report on its progress toward a decision to construct in a periodic and more detailed manner that is useful for the Regulator and stakeholders.

Accordingly, I have also decided to vary the "Planning Clause" applicable to the conditions for the MGS.

DISPOSITION

For the preceding reasons, I vary the terms of the authorization applicable to that portion of the MGS that falls within the jurisdiction of the Regulator[46], as follows:

1) I vary Condition 73, referred to as the "Planning Clause", as follows:

> **The Proponents shall file an Annual Report with the Regulator by December 31st of each year beginning in December 2017. The report will describe any steps the Proponents have taken to advance activities or decisions that are preconditions to the**

[45] Government of the Northwest Territories letter to NEB and CCO, February 15, 2016.
[46] Appendix M – Conditions for the Mackenzie Gathering System, NEB Reasons for Decision in GH-1-2004, Volume 2, pp.268-284.

Proponents' "Final Decision to Construct" the MGS, including but not limited to:

- **Re-staffing**
- **Engineering**
- **Field programs**
- **Initiating applications for site-specific permits from other regulators**
- **The timing of a "Final Decision to Construct" and whether construction of the MGS can reasonably be expected to commence prior to 31 December 2022.**

The Annual Report will be published on OROGO's website.

2) I vary Condition 74, referred to as the "Sunset Clause", in relation to that portion of the project that falls within the jurisdiction of the Regulator, as follows:

Unless the Regulator or his delegate otherwise directs, this authorization shall expire on 31 December 2022 unless construction in respect of the Mackenzie Gas Project has commenced by that date.

The Proponents will notify the Regulator no later than 31 December 2021 of any intention to apply for a further extension of the 31 December 2022 expiration date, and seek procedural direction from the Regulator on the process for any such application.

I wish to offer my sincere thanks to all of those individuals and organizations who took the time to make submissions to aid me in this decision-making process.

James Fulford
Chief Conservation Officer