

IN THE MATTER OF

ENBRIDGE NORTHERN GATEWAY PROJECT JOINT REVIEW PANEL

OH-4-2011

NORTHERN GATEWAY PIPELINES INC.

ENBRIDGE NORTHERN GATEWAY PROJECT

Swan River First Nation - Final Argument

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I. Introduction

1. Swan River First Nation (“Swan River”) is a Woodland Cree community with reserves located on the south, central shore of Lesser Slave Lake and at Assineau River in Alberta. In 2009 our registered population was 1101 individuals,¹ today that number is 1242.²
2. Swan River is one of the original negotiators and signatories to Treaty No. 8. Pursuant to the Treaty, the Crown promised, among other things, that Swan River’s way of life - how we use the land and relate to the land - would be protected. We were told that government would not interfere with our spirituality and religious practices. We were promised that we could hunt, trap, gather, fish, gather plants;³ that we could carry out our practices as we had always done – “as long as the sun shines and the rivers flow.”⁴ We agreed to share the land and its natural resources with the newcomers, but we never agreed that the Crown could take up so much land that we could not continue to exercise our ways.⁵
3. The survival of our culture depends upon the survival of our lands and our ability to use those lands and maintain our deep and spiritual connection to them. Canada tried to destroy our culture once before with residential schools. We have worked hard to recover from that, but now industrial development on our lands is reaching genocidal proportions.⁶
4. The Crown has taken up and allowed the pollution of so much land that our ability to exercise our Aboriginal and Treaty rights in our core Territory has been seriously compromised. We can no longer exercise our Treaty 8 Right to hunt some of our traditional resources, like the woodland caribou.⁷ We are finding it increasingly difficult to exercise our ways at all in accessible and preferred areas, and to find places where we can teach our youth their culture and heritage.⁸ Development has already reached a critical threshold within our Territory.⁹ We are running out of places to go.¹⁰

¹ Exhibit D197-4-3 Aboriginal Traditional Knowledge Community Report: Swan River First Nation, at page 3-1 [ATK].

² Aboriginal Affairs and Northern Development Canada, “Registered Population: Swan River First Nation”, March, 2013. Online: http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=457&lang=eng.

³ This has been confirmed in various cases, including *Dene Tha’ First Nation v. Canada (Minister of Environment)* 2006 FC 1354 at para. 11.

⁴ The Supreme Court of Canada cites evidence of this oral promise in *R. v. Horseman*, [1990] 1 S.C.R. 901 at para. 13.

⁵ Chief Chalifoux, Volume 16, 26 January, lines 9044-9048.

⁶ Chief Chalifoux, Volume 16, 26 January, lines 9062-9064; Doris Courtoreille lines 9165 – 9175.

⁷ Chief Chalifoux, Volume 16, 26 January, lines 9119-9121.

⁸ Chief Chalifoux, Volume 16, 26 January, lines 9051, 9053-9056; 9062-9066; 9085; Ryan Davis, lines 9236, 9239.

5. The Northern Gateway Project (the “Project”) would destroy part of the Little Smoky range, further jeopardizing the survival of this boreal caribou herd, as well as parts of the ranges of a number of woodland caribou herds in Alberta and British Columbia. The pipeline would cut through some of our preferred remaining hunting and plant gathering areas, including an area we rely upon to teach our youth our traditional way of life.¹¹ The Project threatens to increase the already serious problems of water, plant, fish and wildlife contamination in our core Territory. It would reduce our ability to find quiet on the land, to connect with the land and our spirituality as all of our ancestors could do. The Proponent’s proposed mitigations have not addressed these issues.¹²
6. Therefore, Swan River objects to and opposes the Project. This Project will have serious adverse impacts on our First Nation, other First Nations, and the environment. It will compound serious existing adverse impacts on our Aboriginal and Treaty 8 rights, and interfere with the rights of other First Nations as well. As such, the Project is not in the public interest.
7. Swan River asks that the Panel recommend to the federal Minister of the Environment that the Project be denied because the Project will result in significant adverse environmental effects in general, and in particular upon:
 - i. the health and socio-economic conditions of Swan River First Nation members;
 - ii. the current use of lands and resources for traditional purposes by Swan River First Nation members including those factors listed in paragraph 5 above; and
 - iii. the measurable and/or perceived quality and safety of traditional foods.

II. **Outline of Submissions**

8. Although Swan River wished to study and make submissions on the entire Project, the Proponent decided that they only needed to consult us about a limited section of the pipeline. As a result, our submissions on the Project are limited by a lack of resources.

⁹ Chief Chalifoux, Volume 16, 26 January, lines 9069, 9088. Exhibit D197-4-2 Effects of Industrial Disturbance on the Traditional Resources of the Swan River First Nation in its entirety, but in particular pages 6-10 [Effects on Traditional Resources].

¹⁰ Kevin Twin, Volume 16, 26 January, line 9196; Ryan Davis, lines 9239, 9245.

¹¹ Chief Chalifoux, Volume 16, 26 January, lines 9148, 9088, 9209; Ryan Davis, lines 9234-9235; Exhibit D197-4-3, ATK at Figure 7-1, pp. 7-2, 8-2.

¹² Exhibit D197-8-1 Swan River First Nation to Panel re: Comments on the mitigation measures proposed by Northern Gateway to purportedly address concerns raised by Swan River regarding potential Project impacts.

This submission addresses several topics from the Hearing Order OH-4-2011 Appendix 1 List of Issues (“List of Issues”).

9. While this submission is organized by some of the topics described in the List of Issues, our overarching concern is this: our traditional way of life is already in serious jeopardy, our ability to exercise our s. 35 rights is already seriously compromised by the high level of development and contamination in our core Territory, and if this Project is approved, both the Project itself and the further oil sands development that it will spur stand to render our constitutional rights meaningless and destroy our identity as Swan River people.
10. Finally, we have provided comments on several of the Panel’s draft conditions and proposed additional conditions, in the event that the Panel recommends, over our objection, that the Project be approved.

III. **Topic 2.1.3 Potential impacts on Aboriginal interests including Treaty Rights:
Suggested Approach to Assessing Impacts to Swan River’s Treaty 8 Rights**

11. We respectfully request that the Panel adopt the following approach to assessing the impacts of the Project on our Treaty 8 Rights for the purpose of informing its decisions and recommendations under s. 52 *NEBA*, its decisions and recommendations to the Minister under *CEAA 2012*, and in order to discharge its mandate in accordance with section 35 of the *Constitution Act, 1982*.
12. As explained by Chief Justice Finch of the British Columbia Court of Appeal in *West Moberly First Nation v. British Columbia*, Treaty rights must be understood as the Aboriginal signatories and the Crown’s treaty makers would have understood them at the time of treaty-making.¹³ Justice Finch emphasized the following in his analysis of an exploration program’s impacts upon West Moberly First Nation’s Treaty 8 right to hunt caribou:

[130] The Treaty 8 right to hunt is not merely a right to hunt for food. The Crown’s promises included representations that:

- (a) the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;
- (b) they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and
- (c) the Treaty would not lead to “forced interference with their mode of life” (see *R. v. Badger*... [1996] 1 S.C.R. 771 at para. 39).

¹³ *West Moberly First Nation v. British Columbia*, 2011 BCCA 247 at para. 128.

[134] Just as the right to hunt must be understood as the treaty makers would have understood it, so too must “taking up” and “mining” be understood in the same way...

The Commissioners. . . indicated that “it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap”. The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians’ hunting rights. For example, one commissioner, cited in René Fumoleau, O.M.I., *As Long as this Land Shall Last*, at p. 90, stated: We are just making peace between Whites and Indians -- for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone. [Emphasis added by the Court.]

[135] I interject to point out that “some white prospectors [who] might stake claims”, to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools. That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures. . . .

[137] It is clear from the above passages that, while specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a “continuity in traditional patterns of economic activity” and respect for “traditional patterns of activity and occupation”. The focus of the analysis then is those traditional patterns.¹⁴ [emphasis added]

13. Chief Justice Finch’s understanding of Treaty 8 as promising continuity in the Aboriginal signatories’ way of life was also adopted as early as 1998 by then-Indian Claims Commissioner Jim Prentice.

. . .we make the following conclusions regarding the nature and content of the First Nation’s treaty rights. . . the federal Crown agreed to protect the Indian economies and ways of life, which were based upon hunting, trapping and fishing in their traditional areas. Second, the reason the First Nation adhered to Treaty 8 was to protect its rights to hunt, trap and fish. . . . these rights were fundamental to the First Nation’s culture, community, economy, and way of life. The Treaty Commissioners’ strong assurances and guarantees that these rights would continue, and the promise of other benefits, were the inducements that ultimately persuaded the leaders of the day to sign the treaties. . . . In our view, no reasonable interpretation of Treaty 8 could allow either the government of Canada

¹⁴ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.

or a provincial government to destroy the ability of a First Nation to exercise its treaty harvesting rights or to alter fundamentally the environment upon which those activities were based. Nor do we believe that a reasonable interpretation of Treaty 8 would allow any government to effectively destroy the very economies upon which the Indians' signature of Treaty 8 was premised. . . . the Crown has received the benefits of that treaty in the form of lands and resources worth millions of dollars. Yet the consideration received by the First Nation under Treaty 8, namely the right to hunt, trap, and fish. . . . have been rendered almost entirely valueless because of the ecological destruction of those lands. . . .¹⁵

14. Swan River submits that the *West Moberly* and *WAC Bennett Dam* decisions provide a suitable framework to guide this Panel in its analysis of Project impacts, including cumulative impacts, on our Treaty 8 Rights.
15. Swan River's Aboriginal and Treaty 8 harvesting rights are already heavily compromised because of the heavy development and contamination of our core Territory (in particular the Swan Hills area). In particular, our right to hunt caribou is currently a hollow right, since we cannot hunt them at all. If approved, the Project would make it even harder for us to exercise our rights, including by worsening the prospects of recovery of the Little Smoky caribou herd and the other herds who will lose habitat to the resulting upstream oil sands development.

IV. **Topic 2.1.3 Potential impacts on Aboriginal interests including Treaty Rights**
Topic 3.10 Cumulative effects

Tar Sands

16. The potential adverse effects of the Project on our Aboriginal and Treaty 8 rights, already significant on their own, cannot be viewed in isolation from the impacts we suffer from residential schools, the imposition of the trapline system, and the legacy contamination, forestry and existing hydrocarbon development, including the effects of the tar sands.
17. We understand that the Panel will consider the impacts of some upstream hydrocarbon development in its cumulative environmental effects analysis,¹⁶ and trust that this inclusion will also involve considering the cumulative impacts of upstream hydrocarbon development upon our s. 35 rights.

¹⁵ Indian Claims Commission, Athabasca Chipewyan First Nation Inquiry, WAC Bennett Dam and Damage to Indian Reserve 201 at 102-103.

¹⁶ Exhibit A22-3 Panel Session Results and Decision at 4, 13.

18. For Swan River, this Project cannot be separated from the tar sands. The Proponent clearly links the Project to increased tar sands production.¹⁷ For example, the Proponent's evidence is that:

“Historically, shortages of condensate supply have created risks and additional costs for Canadian oil sands producers. NEB forecasts for condensate requirements suggest that there might be future shortages of condensate import capacity. The Project’s condensate line is capable of meeting this forecast need.”¹⁸

“Figure 1-3 shows large oil sands supply volumes through 2018 because of significant global demand for oil and steadily rising oil prices. New markets and pipeline capacity to supply them will be needed to support this growth. The Project will create access for a large volume of oil sands products to very large, rapidly increasing, offshore markets that can readily absorb the expanding Canadian supply.”¹⁹

“As early as 2002, Enbridge recognized the need for additional pipeline capacity to access new markets to meet the needs for the long-term growth of new oil sands production and provide Canadian producers with access to alternative markets.”²⁰ [Emphasis added by Swan River].

19. Alberta's evidence is clear: the purpose for constructing the Project is to service and benefit tar sands producers.²¹
20. The Project therefore appears to be integral to the expansion of the tar sands. Swan River's Territory extends into the Athabasca Oil Sands area,²² and further development in that area will likely eliminate what little remaining opportunity we have to exercise our rights there. Our traditional knowledge links the tar sands to sickness and disease. We know that climate change is a reality, and further tar sands expansion will only fuel that problem. Too much water is being extracted to support that industry. The damage from the tar sands this Project would enable, to human life and to air, water, soil and to the fish, birds, animals and the ecosystems that support them, is too great.
21. It doesn't make sense, from our perspective, to consider the impacts of this Project on our rights without considering the impacts of the upstream development it enables on the wider ecosystems. As I told the Panel last January, we are a landscape based and

¹⁷ Exhibits B1-2, B1-3 Application, Volume 1, pp. 1-1, 1-3, 3-1, 7-1. Kevin Twin, Volume 16, 26 January, lines 9194-9195.

¹⁸ Exhibit B1-2 Application, Volume 1, p. 1-3.

¹⁹ Exhibit B1-4 Application, Volume 2, p. 1-5.

²⁰ Exhibit B1-3 Application, Volume 1, p. 7-1.

²¹ Exhibit E8-3-2 Wood Mackenzie - West Coast Export Capacity Netback Impact Analysis at 2.

²² Exhibit D197-4-3, ATK at Figure 5-2.

ecosystem based people. Whole ecosystems are connected to our spirituality and use of the land.²³

22. Our ability to use our lands, and the resources that support the exercise of our Aboriginal and Treaty rights, are at a tipping point.

Tipping Point

23. The uncontroverted evidence before you is that Swan River has already been largely driven out of its core Territory due to contamination concerns, oil and gas development, and logging.²⁴ Swan River members are already harvesting moose, fish, and other resources with clearly visible growths, abnormalities, and diseases that we attribute to the ongoing contamination of our core Territory by the Swan River Waste Treatment Plant, as well as oil and gas development. Swan River members testified to these problems in the Panel hearings:

I shot a moose. . . in the Swan Hills area and the liver was white, just totally white. And the lungs, I don't know, they were growing up into the ribs. They were mush. . . And another one I shot there. . . inside the heart it was just pus all the way around the sac of the heart. That's two I've shot up there like that. . . . I've worked in the oil field pretty well all my life and I've seen the -- like the damage that is being done out there. . . They're not practicing what they're supposed to [to] keep the pollution from the soil and air.²⁵

The berries we once picked in the Swan Hill areas is not good; they are small and when you pick them, they just squish. . . We can't consume them berries.²⁶

. . . we go fishing in the Lesser Slave Lake. . . you go out there and you catch a fish and you find like a ward or whatever on the side of the body, a big boil or whatever and how many more fish are out there like that, and what's in it, what's causing it. Pollution.²⁷

I seen mostly streams and grayling fish that ... now have growths that were never there. Moose that have formalities [deformaties] that are just

²³ Chief Chalifoux, Volume 16, 26 January, lines 9324-9326.

²⁴ Exhibit D197-4-3, ATK at section 7; Chief Chalifoux, Volume 16, 26 January, lines 9052, 9076, 9082-9084.

²⁵ Kevin Twin, Volume 16, 26 January, lines 9189-9190, 9192.

²⁶ Doris Courtoreille, Volume 16, 26 January, line 9163.

²⁷ Kevin Twin, Volume 16, 26 January, line 9206.

protruding their bodies, like big, big, growths. . . And never was like that when I was a kid.²⁸

. . . it got so bad with the industry and forestry, we can't even find some of the old camps that we used to stay at because of all the development, all the clear cutting...²⁹

24. Because of the development and contamination of our core Territory, and in particular the Swan Hills area, Swan River members are increasingly relying upon lands within the Project area to exercise our Aboriginal and Treaty 8 rights. Swan River members confirmed this in the Panel hearings:³⁰

We show that all the industry and forestry that went into that territory why—and that's the reason why we're pushing further out. And our prime hunting spots now are on this pipeline. . . there's not that much industry and forestry up there where the pipeline is expected to go.³¹

Where this pipeline is proposed to go through, on a monthly basis we have our members probably cross there to go hunting in the Berland River area. . . it's fearful to be in our community when we see another – one of the largest pipelines in the history of Canada, to go through the heart of our area where we are already hunting and fishing.³²

. . . we can no longer harvest our medicinal roots in the Swan Hill areas because of the pollution...And that place where we pick our medicines, that is where the intended pipeline is to be.³³

. . . now, I go to Fox Creek area. . . take an Elder where he can pick something that is fresh and what they want and the Elder wants for the community, and that's probably the only place and some other places that we can go to get healthy food and medicines.³⁴

²⁸ Lee Twinn, Volume 16, 26 January, line 9265.

²⁹ Darryel Sowan, Volume 16, 26 January, line 9242.

³⁰ Exhibit D197-4-3, ATK at section 7.2.1, 7.2.3; Chief Chalifoux, Volume 16, 26 January, lines 9075-9084; Ave Dersch, line 9283.

³¹ Ryan Davis, Volume 16, 26 January, lines 9234-9235.

³² Darryel Sowan, Volume 16, 26 January, lines 9254-9255.

³³ Doris Courtoreille, Volume 16, 26 January, line 9162.

³⁴ Lee Twinn, Volume 16, 26 January, line 9266.

25. The Proponent's EIA in general, and especially the cumulative effects assessment, does not consider impacts to our land use and the exercise of our Aboriginal and Treaty 8 rights in light of the existing reductions to our land base and the already declining health and abundance of plants, fish and wildlife. The impacts of the pipeline and associated infrastructure are very serious given that we have already lost much of our land base to the Swan Hills Waste Treatment Plant, industrial forestry, oil and gas activity, and tar sands in the north east of our Territory.
26. Even though it is a ways from our community, the Project area is becoming increasingly critical for the meaningful exercise of our rights: the Project cuts through some of the last 'clean' hunting and gathering places that Swan River members can consistently access,³⁵ through some of the last areas where we can still drink the water³⁶, where we can still hold culture camps for our youth, and where we can connect with the land and our spirituality in peace.³⁷ Moreover, the impacts of the upstream development that will be spurred on by the Project stand to be completely devastating for our rights and traditional way of life.
27. The Proponent's EIA does not use an appropriate definition of significance. For example, we consider the loss of traditional resources and opportunities to practice traditional activities along the Project right of way over multiple generations to be significant.³⁸
28. The MSES report that we submitted to the Panel confirms that the cumulative effects study area for that report (centered on Swan Hills) was already 65% disturbed in 2009. If our scientists' most conservative projections are correct, only 25% of that study area will be more than 250 metres away from a disturbance by the year 2035.³⁹ Our scientists tell us that the landscape disturbance process in the study area has reached an asymptote of maximum fragmentation. Further development, such as this Project, is almost certain to push the ecosystem into a substantial and long-term reorganization, an ecosystem shift.⁴⁰

³⁵ Darryel Sowan, Volume 16, 26 January, line 9254.

³⁶ Ryan Davis, Volume 16, 26 January, line 9235.

³⁷ Chief Chalifoux, Volume 16, 26 January, lines 9065-9073.

³⁸ Exhibit D197-4-4 High Level Review of the Enbridge Northern Gateway Pipeline Environmental Impact Assessment – Whitecourt to Fox Creek Alberta at iv, points 2, 5; page 12 at 2.2.1.5 [EIA Review].

³⁹ Exhibit D197-4-3, ATK at 1, 7-8.

⁴⁰ Exhibit D197-4-2, Effects on Traditional Resources at iii and 9.

29. We are an ecosystem based people. It's pretty hard to kill the Indian in us because our spirit is very strong, but an ecosystem shift is also powerful – it's a shift in everything we depend on. We are very concerned about whether we will be able to pass our culture on to our children and grandchildren, and remain who we are as a Nation.⁴¹
30. The Project must be considered in the context of cumulative impacts to our way of life and to the ecosystems that support that way of life, as were guaranteed to us with the signing of Treaty 8. If approved, the Project will cause unacceptable, and largely unmitigable damage to our culture and way of life, with no plan in place to protect other reasonably accessible and healthy areas where our children and our future generations can still be on the land as Cree people, harvesting its resources and remaining connected with their Territory, spirituality and identity.⁴² If limits are not placed on development now, to keep the healthy areas healthy, it's going to be too late.⁴³
31. Already we can no longer hunt woodland caribou in our Territory.⁴⁴ Most if not all of the herds within our Territory have been classified as "not self-sustaining".⁴⁵ We are on the verge of losing this important traditional resource forever, and yet this Panel is being asked to consider a Project that will destroy some of the last 5% of Little Smoky herd critical habitat and almost certainly foster more oil sands development and habitat destruction in three other woodland caribou ranges within our Territory (which overlay bitumen): the ranges of the West Side Athabasca River herd, the East Side Athabasca River herd, and the Red Earth herd.

**V. Topic 3.2 Potential effects on the environment including wildlife and wildlife habitat
Topic 9 Routing: general route of the pipeline (including the proposed 1 km wide general route corridor) and route selection criteria**

32. Treaty 8 protects our right to hunt caribou. However, our members choose not to hunt them at this time because of their declining numbers.⁴⁶ The Crown-authorized development that left the caribou in this precarious state has rendered hollow our Treaty right to hunt caribou.⁴⁷
33. Habitat disturbance represents a significant threat to the survival of woodland caribou local populations. Alberta Sustainable Resource Development advised the proponent to

⁴¹ Chief Chalifoux, Volume 16, 26 January, lines 9063, 9324; Darryel Sowan, line 9257. Ryan Davis, line 9239.

⁴² Chief Chalifoux, Volume 16, 26 January, line 9109.

⁴³ Kevin Twin, Volume 16, 26 January, line 9210.

⁴⁴ Chief Chalifoux, Volume 16, 26 January, line 9119.

⁴⁵ See Exhibit D197-4-3, ATK at Figure 5-2, against Exhibit E6-2-2 at Figure 3.

⁴⁶ Chief Chalifoux, Volume 16, 26 January, line 9119.

⁴⁷ Chief Chalifoux, Volume 16, 26 January, lines 9119-9121.

- route the Project through the northern end of the Little Smoky caribou range, which will disturb their habitat and could prevent caribou from accessing critical habitat to the north of the Project.⁴⁸
34. The Little Smoky caribou herd is already in dire shape. In 2010, the herd counted only 78 individual caribou, and Environment Canada estimated that 95% of their required habitat was already disturbed.⁴⁹ Environment Canada has concluded in its *Recovery Strategy for the Woodland Caribou (Rangifer trandus caribou), Boreal Population, in Canada* (“Recovery Strategy”) that this herd can recover but is currently not self-sustaining, and cannot become self-sustaining without habitat restoration (let alone if further development occurs). This is because the caribou need 65% undisturbed habitat to make their survival likely. Moreover, the Recovery Strategy deems recovery of all of the boreal population herds to be technologically and biologically feasible and desirable to assist in the recovery of the overall woodland caribou population.⁵⁰
 35. Approving a pipeline route through the Little Smoky herd range would completely disregard Environment Canada’s Recovery Strategy and would amount to accepting the disappearance of the Little Smoky herd.
 36. The Proponent acknowledges that the Little Smoky herd is currently not self-sustaining; that the recovery goal for boreal caribou is to achieve self-sustaining local populations in all boreal caribou ranges throughout their current distribution in Canada, to the extent possible; and that the recovery of all local boreal caribou populations is technically and biologically feasible.⁵¹ The Proponent was and remains willing to re-route the Project to the north of the Little Smoky range, and only proposed to cut through the range at the insistence of Alberta.⁵²
 37. In our view, Alberta has been an incredibly incompetent manager of caribou. Alberta has “managed” at risk caribou populations for decades, but on Alberta’s watch, the numbers of caribou in Alberta have plummeted.⁵³ Now government is trying to compensate by extensive wolf kills within our lands: this “management” action offends our ecosystem-based culture.⁵⁴ If the Project is approved, Alberta’s plan to route the pipeline through the Little Smoky herd range cannot stand.

⁴⁸ Exhibit E6-2-2 at 14; Exhibit E6-2-2 at 12.

⁴⁹ Exhibit E6-2-2, Appendix F at 98.

⁵⁰ Exhibit E6-2-2 at vii, 8, 11.

⁵¹ Michael Preston, Volume 103, 7 November, lines 28761-28768.

⁵² Paul Anderson, Volume 103, 7 November, lines 28782-28790, 28807-28809, 28825.

⁵³ Exhibit E6-2-2, Appendix F: Alberta herd fact sheets, at 94-105.

⁵⁴ Exhibit E6-2-2 at 30; Chief Chalifoux, Volume 16, 26 January, lines 9324-9325.

38. It is no answer for the Proponent or Alberta to say that the preferred Project route through the Little Smoky range is in low quality habitat.⁵⁵ All currently undisturbed habitat within the Little Smoky range has been designated as critical habitat by Environment Canada. Environmental Canada strongly advises against any further critical habitat destruction and identifies avoidance of habitat destruction as a top priority.⁵⁶
39. Caribou may use degraded habitat in highly disturbed ranges where opportunities for movement to suitable undisturbed habitat are limited.⁵⁷ Moreover, Canada's Recovery Strategy clearly requires that disturbed habitat for herds that are not currently self-sustaining be returned to a useable state.⁵⁸ It is illogical for the Proponent and/or Alberta to rely upon deteriorated conditions at the north end of the Little Smoky range as the rationale for more destruction. It is no answer to say that because the route parallels the Alliance Pipeline, the impact and risk to Little Smoky are not great. As discussed below, there are other linear disturbance routes to the immediate north of the herd range that could be paralleled instead, should the Project be approved over our objections.
40. In short, if this Project is approved, the Little Smoky herd range and the range of any other non-self-sustaining woodland caribou herds must be completely off-limits in the pipeline routing. This should be a condition of approval for this Project.
41. Finally, we caution that the Panel should not rely upon the Proponent's assessment of the impact of the Project upon the Little Smoky herd, which is flawed. For example, it assumes that woodland caribou will forage along the pipeline right-of-way during operations. This is unlikely as woodland caribou are known to avoid linear disturbances.⁵⁹ The EIA is also predicated upon a linear density threshold for caribou of 1.8 km/km², based upon non-peer reviewed research of caribou in the Yukon. Current peer-reviewed studies conducted in Alberta and north-eastern British Columbia clearly indicate that the threshold range at which caribou are considered to remain viable in the landscape is much lower at 0.75-0.8 km/km².⁶⁰ The Proponent acknowledges that the density of linear disturbance within its REAA is already 1.66km/km² and will increase to 1.7 km/km² if this Project is constructed (Exhibit B3-7, Volume 6A, Section 9, Table 9-73.) This represents an unacceptable risk to the survival of the Little Smoky herd.

⁵⁵ Paul Anderson, Volume 103, 7 November, lines 28783, 28809.

⁵⁶ Exhibit E9-6-32 at paras. 154, 156, and 173. (EC Written evidence, submitted December 2011).

⁵⁷ Exhibit E6-2-2 at 14.

⁵⁸ Exhibit E6-2-2 at 23.

⁵⁹ Exhibit D197-4-4 EIA Review at 22.

⁶⁰ Exhibit D197-4-4 EIA Review at 24.

42. Caribou are not the only wildlife species of importance that are threatened by the Project. The Proponent has identified several sensitive areas for wildlife in Alberta which may be impacted by the Project including several ungulate winter ranges, the Swan Hills Bear Management Area, and the Grande Cache Bear Management Area. The mitigation measures and conceptual compensation plans that are presented to offset these impacts offer us little confidence that the Proponent is prepared to, capable of and willing to resolve the complex wildlife-related issues associated with the Project.⁶¹
43. The Project would cross through some of the last remaining viable moose habitat areas where our members hunt moose pursuant to their Treaty 8 rights.⁶² We are already experiencing severe difficulties harvesting moose in our traditional lands.⁶³ Moose are very important to us for subsistence and ceremonial reasons.⁶⁴
44. At the current rate of disturbance of our Territory, the population of moose could cease to be viable as early as the 2030's.⁶⁵ Linear disturbances such as this proposed pipeline have real impacts upon moose. By 2009, the linear disturbance density within our study area was 1.11 km/km². To put this into perspective, our western scientists tell us that density thresholds of seismic lines as low as .3 to 0.8 km/km², depending on the ecological context, have been shown to keep moose away. Even if moose are able to hang on in highly disturbed areas, they can likely only persist at very low densities.⁶⁶ So any additional linear disturbance, such as would result from the Project, is bound to hurt moose populations and reduce our ability to successfully hunt moose.
45. The Proponent acknowledges that the density of linear disturbance within its REAA is 1.66km/km² and will increase to 1.7 km/km² if this Project is constructed (Exhibit B3-7, Volume 6A, Section 9, Table 9-73.) While we believe the Proponent has underrepresented the density of linear disturbance by excluding disturbances like seismic lines, which have a demonstrated impact on woodland caribou,⁶⁷ the numbers presented are still alarming. The addition of the Project may lead to the disappearance of wildlife species from the landscape, including grizzly bears, moose and caribou as well as changes in the ecosystem services such as water retention and filtration, and carbon

⁶¹ Exhibit D197-4-4 EIA Review at v, point 7, and 19-20.

⁶² Exhibit D197-4-2 Effects on Traditional Resources at Figure 3.2-3, third panel and at Supplement: Gateway Pipeline Figures.

⁶³ Chief Chalifoux, Volume 16, 26 January, lines 9055-9056, 9082.

⁶⁴ Darryel Sowen, Volume 16, 26 January, lines 9237-9238; Dr. Ave Dersch, lines 9285-9287, Roderick Twin, lines 9300-9301.

⁶⁵ Exhibit D197-4-2 Effects on Traditional Resources at 14.

⁶⁶ Exhibit D197-4-2 Effects on Traditional Resources at 4.

⁶⁷ Exhibit D197-4-4 EIA Review at 20.

storage.⁶⁸ Current levels of linear disturbance in the REAA are already above the threshold for maintaining viable populations of large mammals such as caribou and moose.⁶⁹

46. The Project will also interfere with beaver and waterfowl habitat, both important traditional resources.⁷⁰ The impacts that flow from the loss of this habitat must be understood in context: Swan River's Territory has already experienced a significant decline in both the quality and quantity of traditional resources such as water, moose, rabbits, ducks, fish, berries and medicines.⁷¹

VI. Topic 2.1.2 Potential impacts on asserted and proven Aboriginal rights Topic 3.5 Vegetation Topic 4.3 Traditional Land and Resource Use

47. The proposed Project route would destroy several preferred medicinal plant gathering areas, located at or around KP240, KP 230 and KP 210. The Project would also destroy rare medicinal plant areas at or near KP 280, and between KP 230 and 240 along the pipeline route.⁷² As with hunting, Swan River gatherers have been largely driven out of the core traditional lands by contamination, making those remaining areas accessible within several hours of our reserves even more important to members.⁷³
48. Swan River also stands to be impacted by the type of vegetation used to "reclaim" the various work sites associated with the pipeline, as well as the pipeline right-of-way itself.
49. In Swan River's experience, once the native vegetation is gone, it is never replaced. Industry usually seeds or plants the areas with something that is not from the habitat.⁷⁴
50. There is little or no scientific evidence of areas subject to industrial disturbances going back to their natural state.⁷⁵ We know from being out on the land that, despite what the companies tell us, everything is not fine. They are not re-vegetating back to a natural state with the native species that were initially there. We know what a natural

⁶⁸ Exhibit D197-4-4 EIA Review at 5, s. 2.1.1.1.

⁶⁹ Exhibit D197-4-4 EIA Review at 7.

⁷⁰ Exhibit D197-4-2 Effects on Traditional Resources at Figures 3.2-5, 3.2-6 and Supplement: Gateway Pipeline figures.

⁷¹ Dr. Ave Dersch, Volume 16, 26 January, line 9278.

⁷² Exhibit D197-4-3, ATK at Figure 7-1. Roderick Twin, Volume 16, 26 January, line 9302.

⁷³ Doris Courtoreille, Volume 16, 26 January, line 9162. Exhibit D197-4-3 ATK at 7-7, 7-8.

⁷⁴ Gordon Courtoreille, Volume 16, 26 January, line 9225.

⁷⁵ Exhibit D197-4-2, Effects on Traditional Resources at 23-25. Exhibit D197-4-4 EIA Review at iv-v, point 6.

state is – we would not plant alfalfa or timothy out in the middle of the bush. First Nations people need to be involved in reclamation: we know what should be growing there.⁷⁶

VII. Topic 4.4 social and cultural well-being Topic 4.5 human health

51. Swan River's position is that the Project impacts described in this section are direct, adverse impacts upon Swan River's Aboriginal and Treaty 8 rights, including the Treaty 8 promise that although we would be sharing our land with the settlers, we could maintain our way of life.
52. The use of traditional medicines and consumption of traditional foods is essential to the social and physical well being of Swan River people.
53. We've always eaten traditional foods. Because we can no longer harvest enough traditional foods, we are no forced to buy more foods from stores, foods that are not really appropriate for the physiologies of our bodies. Now we have many health problems. We have high rates of diabetes, cancers, aneurysms and so many new diseases coming to our Nation.⁷⁷
54. We have had spills and releases that have affected our ability to use our traditional resources around the Swan Hills Waste Treatment Plant. The 1996 incident released unknown quantities of PCBs, dioxins and furans into the airshed. This was followed by a series of food advisories limiting consumption of wildlife and fish in a 30 km radius of the facility. Many unusual health problems such as severe miscarriages, chest infections, and high rates of cancers were observed. There is still an advisory in and around the Swan Hills area. We have a lot of fear of contamination, and there is scientific evidence that supports this fear.⁷⁸
55. The forestry activities and thousands of kilometres of pipelines in our Territory have already forced us to go further away from our reserves, to the area in and around where the pipeline would be built. Members have to travel farther and farther to harvest resources. For members who are harvesting regularly, gas expenses climb into the thousands per year. Travelling these further distances takes time, which limits our

⁷⁶ Chief Chalifoux, Volume 16, 26 January, lines 9312-9313, 9318-9319, and 9330-9332.

⁷⁷ Chief Chalifoux, Volume 16, 26 January, lines 9058-9059; 9091.

⁷⁸ Chief Chalifoux, Volume 16, 26 January, lines 9076-9077, 9081, 9082; Dr. Ave Dersch, line 9266; Doris Courtoreille, lines 9154-9156.

opportunities to go harvesting for those of us who have kids in school or other work commitments. Plus we now need to bring water with us on some of our harvesting expeditions, where the streams are contaminated.⁷⁹

56. Overall, these obstacles to harvesting have reduced our traditional food consumption. The impacts of that can be physical, due to a decline in the lean and nutrient rich traditional foods such as moose and blueberries. There has been an increase in heart disease and Type 2 diabetes. The impacts can also be social – sharing moose meat strengthens family bonds. If people aren't harvesting as much, there can be social breakdown. Witnessing the destruction of well used, well loved places causes deep sadness and grief. Cultural impacts include the inability for youth to learn and observe how to harvest and process traditional resources, or obtain the proper resources for ceremonies, feasts, smudges and medicines.⁸⁰
57. We have a successful program of teaching our culture to our youth through boys camps, hunting camps. This has been going on for 40 years. We learn our ways out on the land, our Treaty protected that.⁸¹ We have a boys camp in the area of the Project. Already, those teaching the camps today can no longer return to some of the old camps where they used to stay when they were boys, because of all the development.⁸² As our member Ryan Davis testified in the Panel hearings, we are concerned about our ability to teach our culture to our children and grandchildren.⁸³

I'm really worried about the future for our young people, for their hunting... I find myself taking my young son out there; he's eight years old, and trying to get him his first moose so he can experience what I experienced. . . I've still have the eagle feather that the elder gave me because it's a ceremony that took place for that life – for that animal that gave me my first moose, which I want to present to my son. . . I'm worried he might not be able to get to do that with his kids. There's not much land left as there is, and if it keeps going and going, there's not going to be nothing left for us.⁸⁴

⁷⁹ Chief Chalifoux, Volume 16, 26 January, lines 9083-9085; Dr. Ave Dersch, lines 9281-9282.

⁸⁰ Dr. Ave Dersch, Volume 16, 26 January, lines 9285-9287; Kevin Twin, lines 9144, 9188.

⁸¹ Chief Chalifoux, Volume 16, 26 January, line 9065.

⁸² Ryan Davis, Volume 16, 26 January, lines 9241-9242.

⁸³ Kevin Twin, Volume 16, 26 January, line 9197; Darryel Sowan, line 9257.

⁸⁴ Ryan Davis, Volume 16, 26 January, lines 9237-9139.

58. It's also important for us to be able to find quiet and peace on the land when we are harvesting, and especially to pray and conduct ceremonies. Now there's absolutely nowhere where we can go without trucks and rigs etc. driving past us. Now it seems like we cannot go 200 yards without being on a pipeline or a lease.⁸⁵ These developments usually bring more non-traditional land users into an area, because access becomes easier.⁸⁶
59. We are concerned about the safety of our traditional foods. You can see that many of our waterways are not clean, and you can see the discolouration of plants out on our Territory and deformities in some of the moose, game and fish.
60. We are concerned about the declining quality of our water. We already often have to take water with us when we go harvesting because our streams are contaminated.⁸⁷ We have been monitoring them and we know that most are not safe to drink. For example, last year's study from the creeks and rivers in the Swan Hills and Lesser Slave Lake showed in every sample the presence of the bacterias *coliform* and *e. coli*.⁸⁸
61. Enbridge proposes to cross several more important waterways in our Territory such as the Athabasca River, the Berland River, Little Smoky River and the Upper Athabasca. These waterways will soon no longer even have the protection of the *Navigable Waters Protection Act*. Swan River was not consulted on their removal from statutory protection, and has not even been advised regarding all of the waterways that will be impacted in its traditional lands. There is no guarantee that the pipeline will not break at one of the water crossings. This is an unacceptable risk to Swan River.⁸⁹

VIII. **Topic 5 Consultation with Aboriginal groups on the Project**

62. Consultation with Swan River has not been adequate. We are encouraged by Enbridge's commitment to work with Swan River in the development of its priority area sub plan for the Little Smoky range.⁹⁰ However, the Panel should consider this commitment in the context of Enbridge's and the Crown's engagement to date, when making decisions and recommendations, and drafting conditions regarding the Project.

⁸⁵ Chief Chalifoux, Volume 16, 26 January, line 9073; Lee Twinn, line 9264.

⁸⁶ Exhibit D197-4-4 EIA Review at 11, s 2.2.1.4 and 12, s. 2.2.1.5.

⁸⁷ Chief Chalifoux, Volume 16, 26 January, lines 9052, 9085; Doris Courtoreille, line 9164; Kevin Twin, line 9202.

⁸⁸ Chief Chalifoux, Volume 16, 26 January, lines 9080, 9085; Dr. Ave Dersch, lines 9279-9280.

⁸⁹ Gordon Courtoreille, Volume 16, 26 January, line 9224; Kevin Twin, lines 9203-9205.

⁹⁰ Paul Anderson, Volume 103, 7 November, lines 28863-28870.

63. Swan River initially heard from Enbridge that we were so far away that we didn't matter, that there wouldn't be an impact on us. We challenged them on that and they eventually decided to consult with us. But in that process, a lot of information we requested is not coming back.⁹¹ We did get some funding from CEAA, but our capacity to participate has been very limited.⁹²
64. In our experience, Alberta cannot be counted on to require any significant Project modifications to protect our rights: we cannot expect meaningful consultation or any sort of accommodation from them. We have repeatedly told Alberta that there are grave, worsening problems on the land: no caribou for us to hunt, declining moose populations; clear cutting; flooding, run off and siltation problems; contaminated game, especially ungulates; the lack of air monitoring and water monitoring. But we have no control. The Crown and its representatives are in full control of the land and development, and all we have is a consultation process that, for the most part, just allows us to blow off steam.⁹³
65. On top of that, we lack the capacity to consult meaningfully on most projects. We are overwhelmed with project referrals; we received 421 last year.⁹⁴ But Alberta cut our consultation capacity funding by 16 percent, at a time when our consultation workload tripled.⁹⁵
66. Given the Crown, and particularly Alberta's, poor track record for protecting our rights, it is essential that if the Panel recommends or approves this Project over our objection, it recommend specific conditions and mitigation measures to help minimize the impacts on our rights, rather than leave these to the Crown and the proponent's discretion. The Panel should also recommend that the proponent and/or the Crown provide us with more capacity funding to engage on the development of any mitigation measures that remain to be developed.

⁹¹ Chief Chalifoux, Volume 16, 26 January, lines 9093-9096.

⁹² Chief Chalifoux, Volume 16, 26 January, lines 9097-9104.

⁹³ Chief Chalifoux, Volume 16, 26 January, lines 9056, 9060, 9078.

⁹⁴ Chief Chalifoux, Volume 16, 26 January, line 9110.

⁹⁵ Chief Chalifoux, Volume 16, 26 January, line 9110.

IX. Topic 13 Risks of potential hydrocarbon releases related to the Project including 13.1 likelihood of failures, accidents and malfunctions

67. We have already suffered many spills and accidents from industrial activity within our traditional lands, and in particular within the Swan Hills area.⁹⁶
68. In our experience, pipelines bring spills and the risk of a hydrocarbon release is very high. We were notified of at least four spills in the Swan Hills area alone between January 2011 and January 2012. We believe that there are many spills occurring that are not brought to our attention.⁹⁷
69. In our experience, companies in the oil patch are generally not doing what they are supposed to to keep the pollution from the soil and air. Swan River member Kevin Twin, who has worked in the oil fields for most of his life, told the Panel about all of the spills – oil, antifreeze, fuel – that he has witnessed, and some companies’ practice of leaving contaminated garbage behind in the field.⁹⁸ Guidelines, the predominant policy tool used in Alberta, have not proven effective in preventing spills and leaks - there is no assurance that mere guidelines will be followed.⁹⁹
70. We also understand that Enbridge has had many spills and hydrocarbon releases – at least 11 of those releases were greater than 1,000 barrels in a 10 year period.¹⁰⁰ Our scientists advise us that in 2009, Enbridge’s self-reported total for Canada and the USA was 89 spills. In 2010, three large spills from Enbridge pipelines were publicly detected and reported and have resulted in significant environmental damages. The same risks can be expected for this Project.¹⁰¹ That is too great a risk for our traditional lands, they cannot support further spills.

X. Topic 13.3 consequences of any release, including geographical extent

71. There are several potential impacts to Swan River from the release of hydrocarbons. They cause us serious psychological stress: we are concerned that if we live our way of life on the land we are now poisoning ourselves.¹⁰² This fear grows as development and

⁹⁶ Chief Chalifoux, Volume 16, 26 January, lines 9076-9077.

⁹⁷ Darryel Sowan, Volume 16, 26 January, lines 9252-9253.

⁹⁸ Kevin Twin, Volume 16, 26 January, lines 9192-9193.

⁹⁹ Kevin Twin, Volume 16, 26 January, line 9203.

¹⁰⁰ Barry Callele, Volume 97, 3 October, lines, 20416-20419.

¹⁰¹ Exhibit D197-4-4 EIA Review at 10, s. 2.2.1.2.

¹⁰² Chief Chalifoux, Volume 16, 26 January, line 9077.

the resulting contamination increase. Some members stop consuming our traditional foods when they are afraid of contamination, and that can have serious health effects, as described above.

72. Contamination, including from releases, reduces the effectiveness of our harvesting efforts: we can spend time, energy and money to go hunting only to discover abnormalities and have to abandon the animal because it is inedible.¹⁰³ If an area becomes too contaminated, we are forced to abandon it, which often means travelling even further than we already do to find healthy game, fish and plants. This too increases our already high harvesting costs, or discourages members from harvesting as much.
73. Finally, where the animal does not show visible signs of contamination, we unknowingly eat contaminated food.¹⁰⁴ This must be harmful to our health.

XI. **Topic 1.1 Need for the Project as proposed by the applicant: supply and markets for the oil and condensate to be transported by the Project**

74. The Proponent has failed to prove that there is a need for this Project. Its analysis rests upon the landlocked status of Canada's bitumen reserves, the needs of Canada's oil sands industry for condensate and access to Asian markets, and past global demand for oil to support its position that there is a "need" for this Project.¹⁰⁵ The Proponent has provided the Panel with a portrait of supply and demand for bitumen that, at best, fails to demonstrate a clear need for the Project. In fact, the evidence before you suggests that approval of this Project risks creating surplus capacity.¹⁰⁶
75. The needs of the oil sands industry do not represent the needs of Canadians, nor are they an appropriate proxy for public convenience and necessity. The needs of the oil sands industry are irrelevant to the question of what Crown actions are required to uphold Treaty 8 in relation to the Project. In fact, the "need" for this Project has been explicitly established from the perspective of Northern Gateway¹⁰⁷ and the Panel has

¹⁰³ Kevin Twin, Volume 16, 26 January, lines 9188-9189.

¹⁰⁴ Darryel Sowan, Volume 16, 26 January, line 9253.

¹⁰⁵ Exhibits B1-2, B1-3 Application Volume 1, at 1-1, 1-3, 3-1, 7-1. Kevin Twin, Volume 16, 26 January, lines 9194-9195.

¹⁰⁶ Dr. Tom Guinton, Volume 84, 28 September, lines 3888-3092, 4004-4028, 4064, 4073. See also generally Exhibit D35-14-2, A Public Interest Analysis of the Enbridge Northern Gateway Project.

¹⁰⁷ Canadian Environmental Assessment Agency. November 2007. Operational Policy Statement – Addressing "Need for", "Purpose of", "Alternatives to", and "Alternative Means" under the Canadian Environmental Assessment Act. Retrieved online: <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=5C072E13-1>

stated that the focus of its assessment under both CEAA 2012 and the NEB Act public interest determination will remain on the Project as described in the Terms of Reference and the Application.¹⁰⁸

XII. Topic 18 Follow up and monitoring plans for the project – move to recommendations

- 76. Monitoring and follow-up programs should be designed to test predictions, test the effectiveness of proposed mitigation measures, including with specific reference to impacts on Swan River's Aboriginal and Treaty rights, culture and well being.
- 77. For example, milestones and targets that are relevant to the successful practice of Aboriginal and Treaty Rights should be included in order to test the validity of EIA predictions and the effectiveness of mitigation measures.
- 78. All possible areas of impact must be monitored, even if the predicted impacts are not significant. A predicted result is not the same as an actual result: without an appropriate monitoring strategy, the actual impacts cannot be known.¹⁰⁹
- 79. Monitoring and follow up programs should include the explicit goal of returning land to its natural pre-disturbance state, with success to be determined by traditional land users, including Swan River elders and other traditional knowledge holders.
- 80. Swan River should be actively involved, with adequate capacity funding, in the design and execution of follow up and monitoring plans.

**XIII. Topic 19 Recommendations to be included in the panel report
Topic 20 terms and conditions to be included in any decision the panel may issue**

- 81. Swan River's primary recommendation is that the Project not proceed, due to the serious adverse effects that it can be reasonably expected to have on Swan River's Aboriginal and Treaty 8 rights, and due to the significant residual adverse impacts upon Swan River's culture, social well being, community, and traditional use and occupancy.
- 82. Should the Project proceed over our objections, we submit that the following recommendations, terms and conditions be included in the Panel's report and decisions.
- 83. Swan River proposes that the Project be re-routed to avoid the Little Smoky caribou range. We do not believe that there are any mitigations that can bring the impact of this

¹⁰⁸ Exhibit A22-3 Panel Session Results and Decision at 10-11.

¹⁰⁹ Exhibit D197-4-4, EIA Review at 12, s. 2.3.

Project on the Little Smoky herd below significant. Alberta has been employing project-specific mitigation plans to “manage” for caribou for decades: the result is that most, if not all of the caribou herds within our Territory are on the brink of extirpation. As the Panel members may be aware, disturbance has increased to the north of the range since Alberta Environment told the Proponent to use the Alliance Pipeline right of way. There are currently existing linear disturbances from a point at 18-63-22-W5 extending northwest to a point at 7-64-23-W5, then extending south west to a point at 5-63-25-W5, which appears to intersect the Alliance route. These linear disturbances could be paralleled by the Project to effectively skirt the northern edge of the Little Smoky herds range, rather than further disturbing this critical habitat. Alberta’s justification for favouring a route through the Little Smoky range – land to the north was undisturbed – no longer reflects reality.

84. In any event, although Swan River agrees with the general principle that new projects should parallel existing disturbances, this principle does not apply where a severely threatened caribou population cannot tolerate any more disturbance to its habitat. Thus, pipeline should be routed outside the Little Smoky herd range regardless of whether there are linear disturbances that the pipeline can feasibly parallel outside of that range.
85. The Proponent has demonstrated a willingness to reclaim ‘set off’ areas for caribou habitat it disturbs at a ratio of 4:1.¹¹⁰ While we do not support the disturbance of any further caribou habitat, we do support the idea of habitat offsets. We suggest a condition that the Proponent must reclaim, remediate and restore habitat areas for our traditional resources to their pre-disturbance natural state or a state we believe capable of supporting our Treaty Rights, at a ratio of 4:1 of reclaimed habitat to habitat disturbed by the Project within our Primary Livelihood Area as depicted on Figure 5-2 of Exhibit D197-4-3 (FMA TUS). An associated condition must be that Swan River is funded to be actively involved in implementing and evaluating the success of reclamation efforts – for example choosing appropriate locations for restoration, remediation and reclamation, and setting targets and benchmarks for evaluating success that are relevant to the exercise of our rights and way of life. Those terms included as part of potential conditions 148-150 could be extrapolated to other traditional resource habitat offsets. Moreover, both Swan River and the Proponent, should provide the summary of the proponent’s consultation efforts with us (i.e. reporting should not be left to the proponent alone).

¹¹⁰ Jeffrey Green, Volume 103, 07 November, lines 28840–28843.

86. Regarding proposed conditions 71-73, it must be a firm condition of any approval that the Proponent fund our meaningful involvement in the development of both the Linear Feature and Removal Plan, as well as the priority sub-plans under the Linear Feature and Removal Plan, from Phase 1 onwards. A bald commitment to engage with us at some undefined point is not enough given the history of consultation between Swan River and the Proponent. The Proponent should fund Swan River to provide a summary of its consultation efforts with Swan River, any issues or concerns raised by Swan River, and the manner in which Northern Gateway responded to same. The condition should set a consequence for the proponent if it fails to meaningfully involve Swan River in the development of the Plan and sub-plans: e.g. the suspension of the six month clock to construction until the situation is rectified.¹¹¹
87. Similarly, with reference to the Panel's potential conditions 16-18 "Pipeline environmental Effects Monitoring Program: pre-construction survey framework", more is required than vague language requiring the Proponent to provide "a summary of its collaboration ... with participating Aboriginal groups", and "a description of how available and applicable Aboriginal Traditional Knowledge and TLU studies have been taken into consideration in developing the framework". The proponent should be required to provide consultation funding, Swan River should have the opportunity to report to the relevant authorities on the proponent's consultation efforts, and there must be a consequence if meaningful collaboration does not occur.
88. With respect to the Panel's potential conditions 19-21, the requirement to file the pre-construction surveys must have a foreseeable purpose, i.e. the Panel should make clear that certain survey results will trigger requirements for the Proponent to undertake certain adaptive management actions, including minor adjustments to routing, adjustments to the timing of construction, and the level and timing of reclamation required. If the Proponent chooses not to conduct further monitoring for certain species or habitats, the Proponent should be obliged to fund Swan River to review the Proponent's justification and make submissions to the Board on the appropriateness of the decision. It should be clear that the Proponent's proposal for future monitoring activities will be subject to approval by the Board, and that in making its decision, the Board will consider any submission made by Swan River.
89. With respect to proposed conditions 63-64, as mentioned earlier, the Proponent has failed to assess the impacts of access management on Swan River's ability to exercise its Aboriginal and Treaty rights. Swan River proposes that any approval of the Project be

¹¹¹ See Exhibit B46-36 at Adobe page 5; Paul Anderson, Volume 103, 7 November, lines 28854-28871.

made conditional upon the Proponent funding Swan River's meaningful involvement in the development of an access management plan that will apply within Swan River's Territory. The Proponent should fund Swan River to provide a summary of Northern Gateway's consultation with it regarding the Access Management Plan, including issues or concerns raised by Swan River and how and whether Northern Gateway has responded to those issues or concerns. There must be consequences for a failure to meaningfully involve Swan River in the development of the Access Management Plan.

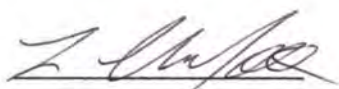
90. Regarding proposed conditions 65-67, Swan River proposes that the terms of reference and the pre-construction caribou habitat assessment be prepared by a neutral third party agreed to by Swan River and the Proponent for those caribou ranges within Swan River's Territory. Benchmarks for the assessment must include the habitat and population requirements that would enable an Aboriginal harvest of the caribou herds within the Territory. The Proponent should be required to fund Swan River to provide a description of how Swan River's ATK and TLU have been taken into consideration in the assessment.
91. Regarding proposed conditions 68-70, the Proponent should fund the collection of our traditional knowledge regarding woodland caribou, for inclusion in the restoration plan. Swan River proposes that any approval of the Project be made conditional upon the Proponent funding Swan River's meaningful involvement in the development of the Caribou Habitat Restoration Plan that will apply within Swan River's Territory. The Proponent should fund Swan River to provide a summary of Northern Gateway's consultation with it regarding the Caribou Habitat Restoration Plan, including issues or concerns raised by Swan River and how and whether Northern Gateway has responded to those issues or concerns. There must be consequences for a failure to meaningfully involve Swan River in the development of the Plan.

XIV. **Conclusion**

92. The Project would compound already serious interferences with Swan River's Aboriginal and Treaty rights, and consultation has not been adequate. It would damage and compromise our ability to use some of our few remaining and culturally important harvesting locations. Our options for where to go to maintain our traditional way of life are rapidly diminishing and it is therefore not acceptable for the Crown and proponents to simply expect us to go elsewhere. Soon there will be nowhere left to go.

93. As you have heard throughout the hearings, the Project will also have major adverse effects on many other First Nations in Canada. The Project (particularly in the event of any major spill) and the upstream development that it is designed to accommodate, would place our environment at risk. By extension, it would put First Nations' traditional ways of life, which are supposed to be constitutionally protected by section 35 of the *Constitution Act, 1982*, in jeopardy. As such, the Project cannot be in the public interest.
94. Moreover, this Panel is being asked to approve the Project on the heels of secret meetings between Canada, AANDC and CEPA that have gutted many federal environmental protections. You are being asked to consider an application from a Proponent that we know has experienced many major releases from its other pipelines. There are no benefits from this Project flowing to Swan River First Nation, and in our respectful submission, the risks to our way of life, to the resources we and other First Nations traditionally depend upon, including woodland caribou, and to the environment, are not outweighed by any benefits from the Project that would accrue to Canadians.

These are my submissions on behalf of Swan River First Nation



Chief Leon Chalifoux

Date: May 30, 2013