



WOLASTOQEY NATION IN NEW BRUNSWICK

Matawaskiye • Neqotkuk • Wotstak • Pilick • Sitansisk • Welamoktok

[SUBMITTED VIA EMAIL]

Ref: WNNB [013-20]

February 21, 2019

Re: Comment on Draft Regional Assessment Report

The Wolastoqey Nation in New Brunswick (“**WNNB**”) represents the six Wolastoqey communities in New Brunswick (Madawaska Maliseet, Tobique, Kingsclear, Woodstock, St. Mary’s and Oromocto First Nations). WNNB is not the rights holder, nor are we the body to which the Duty to Consult is owed. WNNB provides technical advice to Wolastoqey leadership and their respective Resource Development Consultation Coordinators (“**RDCCs**”) on resource development matters that relate to our Wolastoqey constitutionally protected rights. WNNB also acts to protect and promote traditional lands, ceremony, cultural practices and language.

General Summary

The impetus for the proposed Regional Assessment (“**RA**”) was to “facilitate a more effective and efficient assessment process for exploratory drilling projects in the defined offshore Study Area, while also ensuring that the highest levels of environmental protection continued to be applied and maintained”.

With several new exploration projects and with forecasts of doubling oil and gas production and 100 new exploration wells by 2030,¹ serious concerns surround compounding and cumulative effects for all environmental resources in offshore Newfoundland. The comments within this document represent a technical review of the draft RA report and the potential impacts of the RA on Wolastoqey Aboriginal and Treaty rights.

¹ <https://www.releases.gov.nl.ca/releases/2018/exec/0219n01.aspx>

Comments in response to draft RA report

Duty to Consult and Accommodate

The RA report explicitly acknowledges the concerns shared by Indigenous groups regarding potential infringement of Aboriginal and Treaty rights, for example, if impacts were to occur to species of which food, social and ceremonial (“FSC”) access has been granted. However, it falls short of recognizing any responsibility of the RA process in facilitating the legal obligations associated with the Duty to Consult and Accommodate with respect to the continued and sustained rights’ infringements as a result of exploratory drilling. The wording is as such where it suggests that the Indigenous organizations and communities are the sole bodies concerned about this with no recognition of culpability for project proponents. While WNNB has repeatedly requested that the Impact Assessment Agency of Canada (“IAAC”) include within their project-specific conditions a provision relating to the infringement of constitutionally protected Aboriginal and Treaty rights, this has yet to be implemented. As the RA process may deem certain projects exempt from Impact Assessment (“IA”) requirements, we feel that it would: 1) be particularly timely for the agency to acknowledge the real potential for recurring infringement of Aboriginal and Treaty rights; 2) a requirement be created as part of the Ministerial Regulation that the infringement of Aboriginal and Treaty rights through routine operations and/or extreme incidents will be compensated for; and 3) include a separate mechanism or update the current compensation framework within *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity*, because it fails to adequately address Aboriginal and Treaty rights based infringements and focuses solely on commercial compensation. Work on how to adequately address these infringements should be Indigenous led, but will need to be partnered with the existing boards.

Section 2.3 of the RA report, Summary of Questions/Issues Raised, states that there will be “[c]ompensation for damages to fishing equipment and other effects on commercial, FSC and communal commercial fisheries”. However, the only mention of compensation in the Recommendations Relevant to the Ministerial Regulation (Recommended Requirements for Future Projects-Section 8.1.1) is in reference to the incorporation of mitigation measures included in previous EA conditions. The only one that mentions compensation is Mitigation Measure # 23: “Establishment, communication and implementation of a fishing gear damage or loss compensation program as per the applicable C-NLOPB Guidelines”.



The C-NLOPB guidelines titled *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity*, make only passing reference to infringement of rights and offer only lip service to Indigenous peoples within the document. As part of this process, the onus is also placed on the claimant to describe the extent of their loss, who to blame, and ensure that they are adequately compensated. This requires the ability to understand the extent of the impact, which should entirely be placed on the proponent, the respective boards, and/or federal agencies associated with mitigation and compliance.

We therefore recommend:

- Prior to any exclusion of offshore oil and gas explorations from the IAAC process, an adequate mechanism for compensation for Aboriginal and Treaty rights infringements be implemented, that is not associated solely with commercial interests

Fish and Fish Habitat

There must also be a process developed by which damage to the environment is compensated. Mechanisms should be further explored such as Fisheries Act Authorizations to address the destruction of habitat and biodiversity features when accidents occur.

WNNB has been dismayed to repeatedly see the lack of consideration of several of its' project-specific comments regarding potential impacts from drilling and the complete lack of assessment of risk from routine operations. We were expecting a much more robust risk assessment as part of the RA process, as it is establishing the fabric for all future exploratory project assessments. However, it feels as though the project assessment process has now been streamlined for proponents without building any stronger safeguards for the environment. The fact that the required science expertise of the federal government "was not available or accessible to support the work of the Committee" and has 'seriously hampered the efforts of the Regional Assessment Committee' should have immediately halted the process and triggered a review.

While the RA report provides some written detail as to the finfish species which occur in the Study area, it does not include any figures with fisheries-independent data/surveys within the Study Area on occurrence of marine fish and SARA-listed fish species (eg. designated critical habitat). This would greatly enhance our understanding of the spatial extent/effort of past research surveys and the distribution/abundance of fish species within the Study Area. The RA report also maintains the same



viewpoint as previous project-specific assessments in its response to the potential presence of Atlantic Salmon, wherein it repeatedly cites data gaps on salmon migration and extent of occurrence within the project area. Yet, due to a lack of resources, they were unable to assess risk of drilling activities on salmon and other species. The recommendation to expedite research into Atlantic Salmon is certainly one shared by WNNB and the Wolastoqey Communities, and we are unhappy with the rejection of our collaborative proposal to access the ESRF to address several of these existing data gaps. However, an interim strategy must be put in place until we fully understand the gravity of routine drilling operations and incidental hydrocarbon release on Atlantic Salmon. Given existing evidence of salmon within the project area (albeit limited in breadth and scope), and the potential for feeding or overwintering, mitigation and monitoring measures must be implemented even as more comprehensive research partnerships and programs are being solidified. IAAC has stated that it feels the mitigations for operations, preventative and minimizing efforts of spills is sufficient for accommodation as a means to dealing with the Duty to Consult. WNNB disagrees, and principally on the grounds that while there is a mechanism for research and addressing information gaps specific to Atlantic Salmon, at present, there is not one for altering projects based on this research.

With regards to compensation, we want to explicitly state that no amount of compensation will adequately account for the loss of a population so vitally intertwined with Wolastoqey existence and culture. We also want to point out that the proposed compensation is only in response to a significant unexpected event and does not consider impacts from routine drilling operations. We still have very little indication of how these operations affect Atlantic Salmon and therefore this may indeed be more harmful than previously believed to the point of potentially higher rates of injury and/or mortality than a spill depending on the magnitude and timing. Considering the extremely low populations and salmon returns for the OBoF designatable unit (2017 estimated wild returns of 813²), additional or cumulative effects associated with offshore oil and gas could contribute to their extinction. In this case, however low the probability, the assertion that mitigation or spill prevention and response is adequate as a means to accommodate within the Duty to Consult is asinine.

² DFO. 2018. [Status of Atlantic Salmon in Salmon Fishing Areas \(SFAs\) 19-21 and 23](#). DFO Can. Sci. Advis. Sec. Sci. Resp. 2018/038.



Finally, we feel that further research needs to be conducted on another species that may be present within the project area, the American eel. Given that this is a panmictic population, declines in abundance are felt across the entire range of the species and in turn across the range of eel fisheries. Eel represents another a crucial cultural resource and food source for the Wolastoqey. They are also subject of ongoing fisheries negotiations for the Wolastoqey, and given the strong consideration for conservation of this species in response to growing commercial interests, any increase in potential threats for this species should be accompanied by comprehensive studies on potential impacts to various life stages and/or a species-specific mitigation/monitoring strategy. Proposed mitigation measures in the RA report are inadequate to address questions surrounding impacts on this species as well. Literature should be cited on how the proposed mitigation measures will truly be effective for each species but most importantly those that are “At-Risk” and essential to Indigenous existence and livelihood.

We therefore recommend:

- Fisheries Act Authorizations or some similar mechanism be in place as a condition of exploration

Indigenous Knowledge

The RA Committee did work to include Indigenous Knowledge (“IK”) in the RA report, but offers no clear pathway for the future incorporation of IK or how it is weighted when evaluating future projects. How IK studies will be considered in decision-making has also not been clearly addressed. This is concerning as there are no assurances that this will be Indigenous-led or employ consensus-based decision making.

A paper published by Eckert et al. (2020)³ articulates many of the concerns regarding IK and its use and significance within the federal EA process: “[t]he embedded, fundamental nature of many obstacles (e.g., histories of colonization, underlying political power structures) and their inherent inflexibility to change, casts doubt on whether Canadian federal EA can ever appropriately and equitably engage IK while informed solely by western cultural assumptions and values, or when the decision-making power conferred upon Indigenous Nations is left to the discretion of the Minister”.

³ Eckert LE, Claxton NX, Owens C, Johnston A, Ban NC, Moola F, and Darimont CT. 2020. Indigenous knowledge and federal environmental assessments in Canada: applying past lessons to the 2019 impact assessment act. FACETS 5: 67–90. doi:10.1139/facets-2019-0039



It is encouraging to see Recommendation 18 regarding the establishment of an Oversight Committee with Indigenous representation. While it offers little in the way of specific details on the roles, representation, or responsibilities of such a Committee, it has the potential to fulfill a recommendation from the Indigenous Knowledge section of the report, Section 6.3.1.1, regarding the creation of “a multi-stakeholder-/rights-holder research group to integrate research and shift away from research being conducted in silos”. The Oversight Committee should likely involve sub-committees and/or working groups to address specific topics/areas of study within the RA. The questions of whether such a Committee could be a meaningful exercise, lies with its abilities to alter/adapt projects upon the discovery of new information.

We therefore recommend:

- Clarity on the process of IK within this framework be established prior to exclusions from IAAC processes

Climate Change

While proponents will continually downplay the significance of effects to the environment, even small residuals can accumulate and produce incremental, but damaging, cumulative impacts. This necessitates added recommendations to explore the cumulative impacts specific to Green House Gases (“GHGs”) and sustainability as well as the potential effects for both routine and unexpected impacts to fish and mammals, effects of avoidance during migration and feeding, as well as look at the statistics surrounding spills. However, the RA report does not consider the climate impacts of decades of increased oil extraction and burning by limiting the scope of the assessment to exploratory drilling.

Conclusion

Currently there is little recompense for lost ecosystem functionality when it comes to extreme events, and when it comes to regular operations. There should be a mechanism by which in either scenario there is an effective mechanism for proponents to offset for ecosystem effects, such as a Fisheries Act Authorization, which has recently updated its definition to include harmful alteration, disruption and destruction for fish and their associated habitat. Further, since the current compensation does not effectively account for Indigenous rights-based infringements there should be a mechanism in place to account for this as well. These should be a requirement before an RA can excuse offshore oil and gas



exploration projects from the IAAC process and may be included as a condition within the Ministerial regulation.

This RA process has now chronically assumed the flaws of project-specific assessments without any indication that they will be addressed in the next phase(s) of the process. It is deeply concerning to read that the Regional Assessment committee felt as though the resources needed to conduct proper risk assessments were not available. If a RA can not offer any further insight into the risk of activities associated with exploratory drilling, then this begs the question of the utility of the exercise. As alluded to within the RA report, the process was severely hindered by lack of direct contributions of scientific expertise. Again, this alone should elicit great pause in considering this process as the standard for approving exploratory projects moving forward. The committee feels that they will be judged on the 'extent to which it heard concerns and acted on what they were told in the form of findings and recommendations'. The recommendations of the RA report fall well short of improving upon any existing EA conditions that were set out in previous project decisions, and while the GIS decision support tool offers great promise, that alone cannot make up for the shortcomings of the process.

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