



Conseil des Innu de Ekuanitshit

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Mr. Scott Tessier
Chair and Chief Executive Officer
Canada-Newfoundland and Labrador Offshore Petroleum Board
5th Floor, TD Place, 140 Water Street
St. John's, NL A1C 6H6

Re: Public Review of Draft Western Newfoundland and Labrador Strategic
Environmental Assessment (SEA) Update Report

Dear Sir,

Introduction

This is further to the above-mentioned draft update report on the strategic environmental assessment (SEA) for the possibility of issuing exploration licences for oil and gas in the eastern part of the Gulf of St. Lawrence. The draft refers to this area as "the western Newfoundland and Labrador offshore area."

Aboriginal rights and the Crown's duty of consultation and accommodation

Since time immemorial, the waters and shores of the Gulf of St. Lawrence have been used and occupied by the Innu to the north and the Mi'gmaq to the south, for purposes including fishing, hunting, and travel. Our two peoples were the first trading partners of the French from the time that Champlain sailed into the Gulf's waters 310 years ago.

The tiny reserves the federal government set aside for the Innu and the Mi'gmaq out of their vast territory are now found around the Gulf, located in Québec, Labrador, on the Island of Newfoundland, in Prince Edward Island, Nova Scotia and New Brunswick. Beyond those lands, however, our two peoples continue to use and occupy the waters of the Gulf, exercising their Aboriginal and treaty rights and the title that they have never surrendered.

These facts mean that we have rights that are recognized and affirmed by section 35 of the *Constitution Act, 1982*. Among other things, these rights mean that the federal and provincial governments are obliged to consult and accommodate us in order to avoid any irreparable harm to the exercise of our rights. Serious infringements of our rights require our consent.¹

The Innu, the Mi'gmaq and the sea: The possibility of irreparable harm

These submissions are on behalf of Innu and Mi'gmaq communities whose reserves are located within the boundaries of the province of Québec.

Out of all the resources the Gulf of St. Lawrence has given our peoples, the one that has sustained them the most is the salmon and the Innu and the Mi'gmaq harvest and rely on Atlantic salmon for food to this day.

Out of the 114 salmon rivers in Québec, the salmon in 111 of those rivers use the Gulf of St. Lawrence as a migration route. The salmon fished by the Innu on the Lower North Shore and by the Mi'gmaq in the Gaspé swim through the "Western Newfoundland Offshore" area identified by your Board.²

The Innu and Mi'gmaq harvest other marine resources in the Gulf for subsistence, social and ceremonial purposes. They also hold licences that allow them to engage in commercial fishing in the Gulf that has become an important source of income and employment.

¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, para. 47, 24.

² *Évaluation environnementale stratégique sur la mise en valeur des hydrocarbures dans les bassins d'Anticosti, de Madeleine et de la baie des Chaleurs (EES2)*, présentée au Ministère des Ressources naturelles par GENIVAR inc., septembre 2013, p. 207 and Carte 3.5. (http://hydrocarburesmarins.gouv.qc.ca/documents/091-51078-00_EES2_VF_130910_authentifiee.pdf)

We are disturbed by the fact that your draft update report describes the possibility of spills or a blowout as “an unlikely, although unfortunately possible, occurrence during an offshore petroleum exploration or production project”: 5.1.2.

Québec’s strategic environmental assessment (EES2) of September 2013 concerning oil and gas development in the western part of the Gulf of St. Lawrence states that a catastrophe on the scale of the Deepwater Horizon in the Gulf of Mexico, which had been viewed as unlikely before it actually happened, must now be viewed as “plausible”: p. 540.

Any spill or blowout would cause potentially irreparable harm to the salmon and endanger the exercise of our constitutionally-protected fishing rights, which both the federal and provincial governments are obliged to protect.

We are disturbed that your draft update report does not address the possibility of simply refraining from allowing exploration and development in the eastern Gulf of St. Lawrence. There has been a standing moratorium on any offshore exploration and drilling activities off the Georges Bank in the Atlantic since 1988 and in the Pacific Ocean waters off British Columbia since 1959, except between 1967 and 1969.³ There is also a moratorium on oil and gas development in the St. Lawrence River estuary and the part of the Gulf of St. Lawrence west of Anticosti Island as of 2011: 2.2.

The need for a similar moratorium in the eastern Gulf must be addressed by your Board.

No consultation, no accommodation

Your draft update report contains less than two pages on Aboriginal use and occupation, a significant part of which is irrelevant to the issue of use and occupation of the waters and shores of the Gulf (for instance, the paragraph on membership and governance rules of the Qalipu Mi’kmaq First Nation): 4.3.5.5. The draft also contains an appendix describing so-called “consultation and engagement,” but it merely summarizes what our communities told your representatives during meetings: Consultation Report (Draft), pp. 51, 56.

By contrast, Québec’s EES2 resulted in a report that includes a dozen single-spaced pages on the Aboriginal use of the marine and coastal environment. It cites more than a dozen scholarly works on the subject, in addition to government reports: EES2, 3.4.8. Nevertheless, the EES2 still identifies Aboriginal fishing as one of the continuing “gaps” in the state of knowledge that requires further research: Tableau 8.1.

³ Offshore Oil and Gas Research Group, School of Resource and Environmental Management, Simon Fraser University, *Review of Offshore Oil and Gas Development in British Columbia*, Study prepared for the Coastal First Nations, 11 May 2004, 4.4. (<http://research.rem.sfu.ca/papers/gunton/CoastalFirstNationsOOGReport.pdf>)

Your draft update report does not propose any further research, nor does it propose any further “engagement” with our nations, despite our constitutionally-protected rights in these waters.

While your report refers to the “Aboriginal engagement” that took place as “an important and integral component of the SEA Update” (p. 1), that process did not constitute a meaningful consultation: it was mere information gathering.

The letters you cite as “engagement” invited Innu and Mi’gmaq communities to public information sessions, the notice was no longer than 30 days and only one of the towns where they were held was near a Québec reserve (Havre St-Pierre, near Ekuanitshit): Consultation Report (Draft), Attachment C. When the Innu of Ekuanitshit took you up on your offer of a meeting, your staff needed an interpreter in order to deal effectively with a community whose second language is French.

In *Canada’s Oceans Strategy*, the federal government promised in 2002 that integrated management planning to implement the ecosystem approach would include “Aboriginal traditional ecological knowledge” as “an important component of increasing understanding of the complex marine environment.”⁴ However, half-day information sessions are totally inadequate to collect traditional knowledge.

Moreover, by coming to the meetings with our communities with an inadequate knowledge base, you placed a limit on the scope of any discussions that could be held.

For example, your draft update report fails to note that the ecologically and biologically significant areas (EBSAs) identified for the Gulf of St. Lawrence by the Department of Fisheries and Oceans Canada (DFO) are directly adjacent to our reserves, such as Listuguj and Gesgapegiag on the south-western coast of the Gulf or Ekuanitshit across from Anticosti Island: Figure 4.2.5.

This is no coincidence: most of our reserves are at sites where we traditionally gathered during certain seasons to fish or hunt sea mammals and migratory birds. Your draft update report makes no recommendations on how to protect these ecologically and biologically significant areas upon which we have always relied, which would be a crucial element in accommodation.

Even when our communities expressed their concerns very specifically and clearly, your draft update report does not show that you considered the need for changes to the rules governing oil and gas exploration based on the information you obtained from us.

⁴ Fisheries and Oceans Canada, Oceans Directorate, *Canada’s Ocean Strategy: Our Oceans, Our Future; Policy and Operational Framework for Integrated Management of Estuarine, Coastal and Marine Environments In Canada*, 2002.
(<http://www.dfo-mpo.gc.ca/oceans/publications/cos-soc/pdf/cos-soc-eng.pdf>)

For instance, your draft Consultation Report indicates that the Mi'gmawei Mawiomi Secretariat (representing the Mi'gmaq of Gesgapegiag, Gespeg, and Listuguj) told you that the commercial fishery in the Gaspé alone "is worth \$1.5 billion" and that "should an accident occur, there are concerns that the reputation of the commercial fishery would be damaged to the point at which no amount of compensation would allow it to recover": Consultation Report (Draft), p. 56.

But the draft update report itself simply states that that "the operator of the activity from which the spill emanated is absolutely liable up to \$30 million for all actual loss or damage incurred by any person as a result of the spill": 3.2.6.3. The implication is that this amount would be enough "to compensate fishers and others for losses or damages related to offshore petroleum activity": 5.5.2. However, the Board was told that from the Mi'gmaq point of view, this covers two per cent of the possible loss at best.

Finally, your draft update report takes the existing rules for oil and gas exploration in the eastern Gulf of St. Lawrence as its premise, such as when it states that "it is assumed that there could be a certain number of wells drilled in the region during the period of any future licences as well as several seismic surveys conducted annually over the next few years in the region": 5.1.4.

A truly strategic environmental assessment would have examined your Board's options, especially in light of the Crown's obligation to consult and accommodate Aboriginal peoples.

More particularly, your Board has the power simply to prohibit the issuance of exploration or production permits or licences in specific portions of the offshore area.⁵ The draft update report fails to address whether the eastern Gulf of St. Lawrence is an area where development should be prohibited in order to protect the environment and the exercise of Innu and Mi'gmaq Aboriginal and treaty rights.

It is not enough for the draft update report simply to assert that potential adverse environmental impacts can be avoided or reduced later, "through the analysis and consideration of environmental components and issues in the planning, regulatory review, and (if approved) conduct of such exploration and development projects and activities": 5.6.

Deferring significant environmental issues to the permitting stage does not constitute proper consultation and accommodation because when the normal rules are applied, an exploration licence that leads to a significant discovery will also result in your Board giving the licence-holder "the exclusive right to develop those portions of the offshore area in order to produce petroleum."⁶

⁵ *Canada-Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3, s. 54(1).

⁶ *Canada-Newfoundland Atlantic Accord Implementation Act*, ss. 66, 71, 72(b).

Last year, the Yukon Court of Appeal held that “the honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land” through exploration permits and the mining claims to which they lead. As a result, the court held that the territorial government will need “to make statutory and regulatory changes in order to provide for appropriate consultation” before exploration.⁷

Exploration permits therefore cannot be issued before the Innu and Mi'gmaq have been meaningfully consulted and accommodated, regardless of the provisions of the *Canada-Newfoundland Atlantic Accord Implementation Act*.

The absence of a precautionary approach or an ecosystem approach

The Gulf of St. Lawrence is part of the internal waters of Canada under federal jurisdiction.⁸ However, your draft update report does not address the need for “conservation, based on an ecosystem approach,” nor “the wide application of the precautionary approach,” which Parliament declared in the *Oceans Act* should be the basis for managing Canada’s internal waters.⁹

A precautionary approach, under international and Canadian law, means that: “Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”¹⁰

An ecosystem approach, according to the United Nations, means “management should be focused on managing human activities in order to maintain and, where needed, restore ecosystem health... and conserve marine biodiversity.” It must “be based on best available knowledge, including traditional, indigenous and scientific information and be adaptable to new knowledge and experience.”¹¹

First, your draft update report starts from the premise that exploration could take place in the eastern Gulf of St. Lawrence, with the inevitable goal of production if a significant discovery is made. Given the plausible risk of a blowout like Deepwater Horizon, taking exploration for granted and only addressing mitigation measures is not consistent with the precautionary approach.

⁷ *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, para. 38, 57; leave to appeal to the Supreme Court of Canada refused, file no. 35236.

⁸ *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp), s. 2; *Environmental Studies Research Fund Regions Regulations*, SOR/87-641, Sched., Part I, Item 15.

⁹ *Oceans Act*, SC 1996, c 31, preamble.

¹⁰ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, para. 31.

¹¹ *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its 7th meeting*, A/61/156, 17 July 2006, para. 4, sub-para. 6(g). (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/432/90/PDF/N0643290.pdf?OpenElement>)

Second, it is clear from the draft update report that this SEA is not “based on best available knowledge.”

For the western Gulf of St. Lawrence, the EES2 includes a list of 34 gaps (“lacunes”) in the state of knowledge: EES2, Tableau 8.1. The report states clearly that these gaps must be taken into account in the decision-making process and in the establishment of environmental management measures: Constat n° 8. Moreover, the EES2 recommends that in the short term, the data gaps should be the subject of further research by public institutions and scientific organizations: 8.2.

Unlike the EES2, your draft update report does not draw any conclusions about the effects of the data gaps on future decision-making, nor does it recommend further research, despite the fact that it promises an evaluation of “any relevant data gaps and requirements”: 5.

Your draft update report also does not list the “relevant data gaps,” as the EES2 did, though a review of the contents reveals over two dozen such gaps, which we have attempted to enumerate in the appendix to these submissions.

Finally, your draft report does not address the issue that the EES2 has raised directly, which is the need for decision-making and planning to consider the Gulf of St. Lawrence and Maoi Pôgtapei (which it refers to as Baie des Chaleurs) as one single ecosystem: EES2, Recommendation 3.

The Conference of the Parties to the *Convention on Biological Diversity* has asked governments “to take into account the special characteristics of enclosed and semi-enclosed seas, which are affected by multiple direct and indirect anthropogenic influences originating from the watershed area, and where the biodiversity issues require an integrated holistic approach aiming to improve the water quality and restore the health and functioning of marine and coastal ecosystems to ensure the provision of ecosystem services that are provided by these ecosystems.”¹²

Your draft update report acknowledges that the Gulf of St. Lawrence “is a semi-enclosed Sea”: 4.1.4. Unfortunately, however, Parliament has not taken “an integrated holistic approach” to its management. Instead, jurisdiction over the Gulf has been arbitrarily split between three different joint federal-provincial bodies, formed with Newfoundland, Nova Scotia and soon Québec.¹³

¹² COP 10 Decision X/29, Marine and coastal biodiversity (2010), para. 71 (<http://www.cbd.int/decision/cop/?id=12295>)

¹³ *Canada-Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28; *Accord between the Government of Canada and the Government of Quebec for the shared management of petroleum resources in the Gulf of St. Lawrence*, 24 March 2011 (<http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/media/newcom/2011/201149a-eng.pdf>)

When the provinces asked for jurisdiction over the fisheries during the discussions that preceded the adoption of the *Constitution Act, 1982*, former Prime Minister Pierre Trudeau refused because, as he pointed out: “Fish swim and do not respect provincial boundaries.”

Whatever new bodies the federal government has since created, fish still swim and they will not respect the arbitrary line drawn through the Gulf of St. Lawrence as the boundary for the “Western Newfoundland and Labrador Offshore.”

The Innu and the Mi’gmaq have Aboriginal and treaty rights and title throughout the Gulf and irrespective of the provincial boundaries that Europeans imposed. They have a right to see an ecosystem approach applied to the waters they rely on for the exercise of their rights.

It is urgent for your Board to respond to the issue raised by Québec’s EES2 and determine the means by which the Gulf can be managed as a single ecosystem.

General comments

Unfortunately, your draft update report is also a disappointing document for reasons other than those set out above.

It frequently makes statements that are either so obvious or so general as to be of no practical use, such as the following:

- “The physical environmental setting of an area is also an important consideration in the planning, review and conduct of oil and gas exploration and development activities”: 5.6;
- “Additional and/or refined measures may therefore also be appropriate and required for particular projects, depending on their specific characteristics, location, timing, environmental settings, and possible effects”: 5.1.2.

The draft update report is mostly descriptive, rather than analytical, so that it fails to provide an assessment that is actually strategic.

For instance, the draft update report admits that it has simply listed “some examples of typical environmental protection measures which may be implemented to avoid or reduce adverse effects on fish and fish habitat,” but that the list “is not intended to be necessarily comprehensive or prescriptive”: 5.1.2.

It is difficult to understand what use can be derived from a list of measures that may not be complete, when those compiling the list admit the measures may also not be effective.

Even when the draft update report is merely descriptive, that description is sometimes incomplete, so that it fails to provide a meaningful assessment of the environment at issue.

For instance, the draft update report states that the North Atlantic Right Whale is “considered to be the most endangered large whale in the world with approximately 300-350 individuals remaining”: Table 4.60. However, it does not add an important point with respect to oil and gas exploration, which is that this marine mammal is particularly vulnerable to collisions with ships: EES2, p. 222.

Finally, your update report simply leaves out important topics, without explanation. For instance, it does not include any discussion of archaeological sites, while Québec’s EES2 devotes several pages to it and admits that the location of sub-aquatic archaeological sites remains a gap in the state of knowledge: EES2, 3.4.9, Tableau 8.1.

Conclusion

The Innu and the Mi’gmaq agree with the Board’s goal for the SEA, which is “the identification, analysis and incorporation of environmental considerations at the earliest stages of planning and decisionmaking”: 1.1.

However, we are concerned that the issue of our Aboriginal and treaty rights in the eastern Gulf of St. Lawrence has not been properly identified in your draft update report, that the effect of your future decisions on our use and occupation of the waters has not been properly analyzed and that as a result, our concerns are not incorporated into the decision-making process.

According to the Supreme Court of Canada, is precisely when a “decision reflects the strategic planning for utilization of the resource” that the Crown’s obligation to consult and accommodate Aboriginal peoples is engaged.¹⁴

Unfortunately, your Board has not actually consulted the Innu or the Mi’gmaq with respect to the possibility of issuing exploration licences for oil and gas in the eastern part of the Gulf of St. Lawrence: it has held a single meeting with each of our two organizations, at which you gathered and provided some information. Without meaningful consultation, no accommodation of our rights is possible.

Before your SEA update report can be finalized, we believe that the Board must:

- conduct a survey and analysis of the literature on Innu and Mi’gmaq use and occupancy of the Gulf of St. Lawrence at least as comprehensive as in EES2 and also determine a means by which to collect and apply traditional indigenous knowledge;
- set out a realistic schedule for meeting with as many of the Innu and Mi’gmaq communities as possible, in all five provinces, in order to identify our concerns

¹⁴ *Haida Nation*, para. 76.


about the possibility of oil and gas exploration, including providing capacity for our participation;

- apply the precautionary principle to this SEA, particularly by addressing the issue of whether your Board should allow exploration in the eastern Gulf of St. Lawrence at all, before addressing how that could take place;
- apply the ecosystem approach and more particularly, determine how your Board's decision-making and planning will consider the entire Gulf of St. Lawrence and Maoi Pôgtapei (Baie des Chaleurs) in an integrated holistic manner;
- complete the identification of data gaps, in addition to those concerning Innu and Mi'gmaq use and occupancy, and set out a schedule and priorities for conducting additional research, especially with respect to the biophysical environment.

Yours,



Chief Jean-Charles Piétacho
Conseil des Innu de Ekuanitshit



Chief Claude Jeannotte
Chairperson
Mi'gmawei Mawiomi

encl.

Data gaps identified in the draft SEA update

- uncertainty “about seismic activity, associated sound levels, and effects on fish distributions and potential longer-term effects on fish populations and fisheries... due to noted variation in local observations and also within the scientific research”: 2.4.5.2
- “the commercial resource potential of the area is unknown”: 3.2.5
- “the likelihood, characteristics, location and timing of any possible oil and gas development (production) activity in the region is unknown and cannot currently be predicted or defined”: 3.4
- “For the Estuary and Gulf of St. Lawrence (EGSL), analyses leading to the identification of the ten potential EBSAs [ecologically and biologically significant areas] were based on the best scientific data available. However, several data sets were not available at the time of the analysis (because of lack of geo-referencing or suitable electronic versions) and several large areas of the Gulf were poorly sampled, leaving data gaps. So, at least for the EGSL, the EBSAs do not necessarily cover all the areas or species that contribute in a significant way to the system.”: 4.2.1.1
- for the Cusk finfish, “Reproductive biology not widely known for the northwest Atlantic”: Table 4.3.8
- for the Atlantic argentine, “little information on the time of spawning on the North American side of the Atlantic Ocean”: Table 4.3.8
- for the Atlantic sturgeon, “Little is known of the spawning grounds or breeding behaviour in Canadian waters”: Table 4.3.9
- “Little is known about wolffish spawning in the Gulf ”: Table 4.40
- “Alligatorfish are a species for which very little is known about their ecology, including the population that is found within the SEA Update Area”: p. 185
- for the North Atlantic Right Whale, the “gestation period is unknown”: Table 4.60
- “the number of Kemp's Ridley Turtles that visit the SEA Update Area is unknown”: 4.2.3.5
- “insufficient data to estimate Sabine ’s Gull population trends”: Table 4.50

- “complex oceanographic processes have made it difficult to determine the current and future distribution of spilled and dispersant materials from the surface to the sea floor and the duration of their persistence in the marine environment”: Table 5.1
- “Information on the specific nature and spatial and temporal distribution of potential offshore exploration (seismic and drilling) activities and possible production projects in the SEA Update Area and their environmental effects is not currently available”: 5.1.4
- “Other important marine taxa, such as deep sea corals and Atlantic salmon, have unique life histories and occupy habitats that often make their study somewhat challenging, leading to relatively less available information and understanding”: 5.1.5
- “the life history and spawning times of the three wolffish species in the Gulf remain somewhat unclear”: 5.1.5
- “there is limited information on the distribution of some important fish and invertebrate eggs and larvae”: 5.1.5
- “There are several areas within the Gulf in which there is limited information on critical elements of the food chain such as zooplankton (Locke 2002 DFO 2007). There is also a lack of research on the bacterioplankton community, despite the fact that in some areas the heterotrophic food web is largely based on bacterial production”: 5.1.5
- “A lack of specific information and knowledge regarding the distribution and behaviours of some species (in the Gulf of St. Lawrence and in general)”: 5.1.5
- “an incomplete understanding of the specific effects of certain activities and disturbances (such as seismic energy) on marine animals”: 5.1.5
- “There is relatively little research that has investigated the effects of seismic activity on water birds”: Table 5.2
- “the nature, degree, timing and extent of any associated mortality” for the association of birds with oil platforms “is generally unknown”: Table 5.2
- “detailed information on the occurrence, abundance and distribution of Water Birds and particular species is not available for all locations and times throughout the SEA Update Area”: 5.2.5
- “there continues to be a relatively limited amount of specific and up to date information available on the number and spatial and temporal distribution of avifauna offshore Newfoundland and Labrador and elsewhere in Eastern

Canada. This is particularly the case for Western Newfoundland, where much of the available data... may... not always represent the current conditions of species distribution, abundance and seasonality”: 5.2.5

- “A lack of specific information and knowledge regarding biologically essential behaviour for marine mammals (in the Gulf of St. Lawrence and in general) and associated areas and times”: 5.3.5
- “an incomplete understanding of the specific effects of certain activities and disturbances (such as seismic energy)” on marine mammals: 5.3.5
- a need for “the effectiveness of all such mitigation measures” on marine mammals “to be further evaluated and documented”: 5.3.5
- “a need for further consultation and discussion with interested and potentially affected communities, individuals and organizations regarding hydraulic fracturing and its potential (and perceived) effects”: 5.4.2