

Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO)

Review of the Canadian Environmental Assessment Agency EA Report and Potential Conditions for the Jeanne D'Arc Basin Drilling Project

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January 14, 2020

Mr. Derek Peters
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Via Email: dpeters@mikmaqrights.com

Dear Mr. Peters:

Project No: 60565441

Regarding: Review of the Canadian Environmental Assessment Agency EA Report and Potential Conditions for the Jeanne D'Arc Basin Drilling Project – Final Report

AECOM Canada Ltd. (AECOM) is pleased to provide Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO) with this final report on AECOM's review of the Environmental Assessment Report and potential EA Conditions prepared by the Canadian Environmental Assessment Agency for the Jeanne D'Arc Basin Drilling Project.

Thank you for the opportunity to assist KMKNO with this work.

Sincerely,

AECOM Canada Ltd.

<original signed by>

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Nd:lm
Encl.
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1. Introduction

1.1 AECOM's Mandate

Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO), on behalf of the Assembly of Nova Scotia Mi'kmaq Chiefs (ANSMC), retained AECOM Canada Ltd. (AECOM) as an Independent Consultant to review the federal environmental assessment (EA) of exploration / delineation / appraisal drilling programs and associated activities, proposed to be conducted in the eastern portion of the Canada-Newfoundland and Labrador (NL) Offshore Area.

AECOM's mandate consists of supporting the ANSMC in the review of the Environmental Impact Statement (EIS) and the draft EA Report in order to evaluate the scientific and technical information for completeness, to identify information gaps, and environmental risks to the Mi'kmaq of Nova Scotia, and to propose actions to address any outstanding information gaps.

In accordance with AECOM's proposal from January 2018, "*Review of Environmental Impact Statements (EIS) & Environmental Assessments (EAs) for Four Exploration Drilling Projects*" and scope change dated November 8, 2018, AECOM has been retained to conduct reviews of the environmental impact statements and environmental assessment of the following projects within the Newfoundland offshore area:

- Flemish Pass Exploration Drilling Project (Equinor Canada Ltd);
- Eastern Newfoundland Offshore Exploration Drilling Project (ExxonMobil Canada Ltd.);
- CNOOC International Flemish Pass Exploration Drilling Project (CNOOC International);
- Jeanne D'Arc Basin Exploration Drilling Project (Husky Energy Exploration Drilling Project); and
- Newfoundland Orphan Basin Exploration Drilling Program (BP Canada Ltd.).

This report summarizes AECOM's review of the Canadian Environmental Assessment Agency (the Agency) draft EA Report and potential EA Conditions for the Jeanne D'Arc Basin Exploration Drilling Project (formerly known as the Husky Energy Exploration Drilling Project); (CEAR 80130) (the Project).

The Project includes drilling up to 10 exploration wells on EL 1151, EL 1152, and EL 1155 between 2019 and 2027. On June 19, 2019, EL 1151 was subdivided into EL 1151A and EL 1151B following the transfer of ownership of a portion of EL 1151 to ExxonMobil Canada Ltd. (ExxonMobil). On October 15, 2019 the Agency required information from Husky Oil Operations Ltd (Husky) and ExxonMobil Canada Ltd (ExxonMobil) to verify ExxonMobil's proposed activities in exploration licence 1151A. On October 30, 2019, ExxonMobil submitted responses to the required information; Husky confirmed agreement with information provided by Exxon in separate correspondence dated October 25, 2019.

Husky Energy and ExxonMobil Canada are referred to collectively herein as "the Proponents," and the projects as "the Projects."

A previous report was prepared for KMKNO which summarized AECOM's review of Husky's EIS and EIS Summary (AECOM 2018).

1.2 Project Description

To determine the potential presence of hydrocarbons, the Proponents plan to conduct a program of petroleum exploration drilling and associated activities within a Project area that includes exploration licences (ELs) on the Grand Banks, located approximately 350 km east of St. John's, Newfoundland and Labrador (NL), in the Northwest Atlantic Ocean. The Project includes drilling up to 10 exploration wells on EL 1151 (now, EL1151A and EL 1151B), EL 1152, and EL 1155 between 2019 and 2027. More than one well may be drilled concurrently. Activities associated with a drilling program may include:

- exploration drilling using a mobile offshore drilling unit (MODU) (either a semi-submersible, drillship or jack-up rig);
- vertical seismic profiling (VSP), wellsite surveys, well testing, well completions, workovers/datalogging and geohazard/environmental surveys; and
- decommissioning and abandonment of wells.

The Project activities are standard components of an offshore drilling program; however, not all details surrounding the Projects have been finalized, such as drilling platform type, selection of service and supply contractors, and location of wells. The Proponents will utilize existing infrastructure to support Project activities, including Harvey's Marine Base, offshore support vessels (OSVs), and helicopters. OSVs and helicopters will continue to use established travel routes to and from the Project Area, as has been done since 2002.

The Project Area, a total area of approximately 19,366 km², is intended to encompass all activities associated with the exploration drilling, in water depths ranging from 87 to 211 m. The southern boundary of the Project Area is approximately 180 km long; the northern boundary is approximately 270 km long; and each side is approximately 95 km long, with a corridor extending approximately 226 km from the western boundary back to St. John's, NL. The proposed Study Area has been determined by recent oil spill modelling originating within the Project Area, with model boundaries determined by a worst-case blowout scenario lasting 120 days.

A Mobile Offshore Drilling Unit (MODU) will be used to carry out exploration drilling activities. Husky will establish a safety zone around all exploration drilling operations, per the Newfoundland Offshore Petroleum Drilling and Production Regulations. The safety zone typically extends to 500 m beyond the outermost physical footprint of a DP MODU or jack-up rig, or 50 m around the anchors for a semi-submersible. The specific MODU to be used for each well has not yet been selected and will depend on suitability and availability; alternatives to be considered include a semi-submersible, drillship and jack-up rig. All logistical support components (e.g., shore base) associated with the Projects are the same as those used for past and/or ongoing offshore oil and gas projects for Husky and other operators.

The Project would require authorization under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and may require authorization under the *Fisheries Act*. A permit under the *Species at Risk Act* may be required for effects on species that are listed as endangered or threatened on Schedule 1 of that act.

1.3 Environmental Assessment Process

The Agency conducted a federal EA of the Projects based on the requirements of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), as it was determined that the Projects constituted a “designated project” under Section 10 of the Regulations Designating Physical Activities. The Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) also requires that Project-specific EAs be conducted pursuant to the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* and the *Canada-Newfoundland Atlantic Accord Implementation Act* (“the Accord Acts”).

The EA review of the Projects under CEAA 2012 commenced in September 2016, when Husky submitted a Project Description and associated Summary Documents to the Agency. Following government and public review, the Agency determined that a federal EA was required for the Project (October 28, 2016). Notices of EA Determination and EA Commencement, as well as the Draft EIS Guidelines were posted on October 28, 2016, and the EIS Guidelines were finalized and issued to Husky on December 9, 2016. These were further updated on March 27, 2017 to reflect the approval of Husky's request for additional exploration licenses (EL1151 and EL1152) to be added the scope of the Husky Energy Exploration Drilling Project.

On April 13, 2017, the Agency issued a determination that the information provided by Husky Energy at that time did not fully conform with the requirements outlined in the EIS Guidelines including in relation to accidents and malfunctions, impacts to Species at Risk and baseline data. Husky submitted the revised EIS and EIS Summary to the Agency on September 7, 2018. Following a conformity review, the Agency issued a letter to Husky on October 11, 2018 indicating that the documents conformed to the EIS Guidelines. The EIS and EIS Summary were posted for public comment from October 11, 2018 to November 10, 2018. AECOM conducted a review of the EIS and EIS Summary on behalf of KMKNO, as summarized in AECOM (2018).

Following completion of the Proponent's EIS documents and subsequent information request (IR) responses and clarifications, the Agency prepared a summary of the main findings of the federal EA process. During preparation of the EA Report, the Agency considered input from Indigenous consultation, public and stakeholder comments, regulatory input, the Proponent's EIS, and other information received during the EA process. The EA Report was prepared in consultation with the C-NLOPB, Fisheries and Oceans Canada (DFO), Environment and Climate Change Canada (ECCC), Health Canada, Natural Resources Canada, Transport Canada, the Parks Canada Agency, the Department of National Defence, and Indigenous and Northern Affairs Canada. The EA Report will inform a Decision Statement to be made by the federal Minister of Environment.

The draft EA Report and potential EA Conditions that may be included in the Decision Statement were issued for public comment from November 25, 2019 to January 3, 2020. It should be noted that while the draft EA Report addresses both the Projects, separate potential EA Condition documents were issued for Husky Energy (CEA Agency 2019 g) and ExxonMobil (CEA Agency 2019 h). If the Minister decides that the Projects are unlikely to cause significant adverse environmental effects as defined under subsections 5(1) and 5(2) of the CEAA (2012), or if the Minister decides that the Project is likely to cause significant adverse environmental effects and the Governor in Council decides such effects are justified in the circumstances, the Projects would be allowed to proceed (pending applicable additional regulatory authorizations), and any conditions established by the Minister under CEAA 2012 would become legally binding.

2. Method

AECOM's team of senior environmental and social specialists performed the review of the draft EA Report and potential EA Conditions. The team is well versed in best practices for offshore oil and gas projects, have extensive expertise in environmental and social impact assessment, and have work experience in offshore oil and projects in Atlantic Canada. Various additional documents were referenced (see References section) to contextualize the information, data and conclusions. The Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process and the Mi'kmaq Ecological Knowledge Study Protocol (MEKSP) were referenced to consider the extent to which they were adhered to during the EA process.

As noted earlier, AECOM has been retained by KMKNO on behalf of the ANSMC to conduct review of EIS and EA Report documents for a total of five (5) projects within the Newfoundland offshore area. This work was initiated in February 2018 and is ongoing. Given AECOM's involvement in the review of multiple EIS and EA documents for within the Newfoundland offshore, where applicable this review references AECOM/KMKNO comments and recommendations made during EIS and EA Report reviews of the other projects.

Given that AECOM had previously reviewed the Proponent's EIS and responses to Information Requests, AECOM's review focused on the Agency's analysis and conclusions, including how views expressed were incorporated in the draft EA Report and potential EA Conditions. Areas considered to have the most potential to affect Mi'kmaq rights and interests, notably environmental effects to traditional activities and the quality of life of the Mi'kmaq people, were of highest priority for the review.

3. Review Results

The results of AECOM's review are provided herein, with sections following the structure of the Agency's draft EA Report. The potential EA Conditions were reviewed, with comments incorporated in the applicable report section. The report sections align with the sections of the EA Report that are considered to be of greatest potential impact to KMKNO. **Section 3.1** addresses consultation activities; **Section 3.2** considers the Agency's assessment, conclusions and conditions related to predicted effects on valued components; **Section 3.3** relates to the effects of accidents and malfunctions; **Section 3.4** discusses impacts on potential or established Aboriginal or treaty rights; and **Section 3.5** highlights key review comments.

3.1 Consultation Activities

3.1.1 *Indigenous Consultation led by the Agency*

Depth of Consultation Determination

The draft EA Report states:

"The Agency served as Crown Consultation Coordinator for a whole-of-government approach to consultation. The Agency consulted communities and groups that hold communal commercial fishing licences in Northwest Atlantic Fisheries Organization (NAFO) areas that overlap the project area and study area, or portions of them, or hold licences for species that migrate through the project area such as Swordfish. In addition, the Agency consulted communities that fish for and have an interest in Atlantic Salmon populations, a species which could potentially be affected by the Project."

The communities included Labrador Inuit, Labrador Innu, Nova Scotia Mi'kmaq First Nations, New Brunswick Wolastoqiyik (Maliseet First Nations), New Brunswick Mi'gmaq First Nations, New Brunswick Peskotomuhkati Nation at Skutik (Passamaquoddy), Prince Edward Island Mi'kmaq First Nations, Quebec Mi'gmaq, Quebec Innu. Subsequent engagement, based on good governance reasons, was also conducted with Qalipu First Nation and Miawpukek First Nation (MFN).

The Agency determined that the depth of consultation required was on the low end of the consultation spectrum based on the assessment of potential adverse effects of the Project on the Section 35 potential or established Aboriginal or treaty rights of the above noted Indigenous Groups. Apart from Qalipu First Nation and Miawpukek First Nation (MFN) (who were contacted with engagement opportunities for the purpose of good governance), the Agency provided the depth of consultation analysis and draft consultation plans to Indigenous groups and requested their feedback on the plans.

Consultation was limited to communities and groups that hold communal commercial fishing licences in NAFO areas, those that hold licences for species that migrate through the Project areas or those with an interest in "certain" Atlantic Salmon populations. KMKNO is of the opinion that the consultation should be triggered on all FSC fisheries that may be impacted (i.e., not just Atlantic Salmon but also other species such as American Eel, as an example) and that the Agency has focused primarily on potential adverse effects to Atlantic salmon given its status as a Species at Risk.

The draft EA Report indicates that comments were received on the depth of consultation and the consultation plan provided but does not provide details on the communication received and how the Agency considered the feedback into their final depth of consultation analysis and consultation plan.

- The Agency should provide details on feedback received and how that feedback was considered in the development of the consultation plan and final determination of the depth of consultation.

Consultation Opportunities

The Agency invited Indigenous groups to review and comment on the EA process documents, namely: Summary of the Project Description; Draft EIA Guidelines; EIS Summary; and Draft EA Report and Potential EA Conditions. The Agency noted that it considered comments received from the review of the EIS and Indigenous groups and requested additional information from Husky Oil Operations Limited on a number of subjects. The additional information was provided to Indigenous groups to review and comment, as applicable.

The Agency noted that it organized four information sessions in October 2017 regarding the Projects and three other proposed offshore exploration drilling projects subject to a federal EA. During those sessions, the Agency invited feedback on how it could facilitate participation in the EA, on the potential environmental effects of the Projects and potential impacts to Section 35 rights. The Agency also organized three (3) workshops in April 2018 to continue building relationships between Indigenous groups, the Agency and Proponents of several offshore projects.

AECOM notes that both the October 2017 and April 2018 workshops were conducted about a variety of offshore projects and were not project-specific. As these workshops were not held with the intention of discussing individual Indigenous group potential concerns and adverse impacts to Aboriginal or treaty rights, they would not constitute government-to-government consultation. Further, little information is provided in the EA Report as to how input received from the EIS and additional information requests were considered and whether there were any changes to the Project resulting from the input.

The Agency notes that it maintained contact with Indigenous groups throughout the EA with general meetings with Indigenous Consultation Coordinators and periodic emails meant to verify the EA process, respond to questions and discuss comments.

The EA Report summarizes the areas of concern raised by Indigenous groups as the following:

- Salmon and potential interactions from routine operations and potential accidents or malfunctions;
- Effects on fish and fish habitat;
- Effects on fishing for communal commercial and food, social or ceremonial purposes, including related socioeconomic and health effects;
- Effects of accidents and malfunctions, including the use of dispersants in oil spill response;
- Effects on migratory birds;
- Compensation in the event of – and damages from normal operation or due to accidents and malfunctions;
- Jurisdiction beyond the 200 nautical mile exclusive economic zone limit;
- Consideration of Indigenous knowledge and the potential involvement of Indigenous groups in Fisheries Communication Plan development;
- Monitoring and follow-up programs;
- Waste management, and
- Cumulative effects.

Appendix C of the EA Report documents the summary of feedback received from Indigenous groups along with the Proponent's response and the Agency's response, as well as the where the information cited in the response can be found in the report (Section 6, 7 and Appendix A).

Follow-Up Consultation Opportunities

While the Agency deemed the depth of consultation to discharge the Crown's legal Duty to Consult with Indigenous groups to be on the low end of the consultation spectrum, the Agency did acknowledge that the potential effects on the current use of lands and resources for traditional purposes and the health and socio-economic conditions of Indigenous peoples could be significant from a major Project-related accident or malfunction. They noted that the potential effects of a "*worst-case accident or malfunction from the Project (i.e. unmitigated subsea release)*" on migratory birds, special areas, fish and fish habitat, marine mammals and sea turtles, and by extension on current (or future, as it pertains to at-risk Atlantic Salmon populations) use of lands and resources for traditional purposes and the health and socioeconomic conditions of Indigenous peoples could be significant.

While DFO confirmed there is uncertainty regarding at-sea migration patterns and habitat use of Atlantic Salmon, the Agency acknowledged that in the unlikely event of a major oil spill, "*...there is potential for more serious effects on these species, particularly species at risk, and therefore potential impacts on the potential or established Aboriginal or treaty rights of Indigenous groups*". However, the Agency stated that mitigation measures and follow-up identified for fish and fish habitat, marine mammal and sea turtles, migratory birds, commercial fisheries and accidents and malfunctions would act as accommodation to minimize or avoid potential significant and residual adverse effects to Aboriginal or treaty rights from the Project.

As noted in the EA Report, the regulatory approval phase, where federal permits or authorizations are considered following the completion of the EA, may require further consultation with Indigenous communities, as appropriate, prior to regulatory decisions. The Agency noted that the consultation record for the EA would be used to support a decision to undertake additional Crown consultation.

It is further noted in the EA Report that based on the concerns raised by Indigenous groups on the potential for cumulative environmental effects in the eastern Newfoundland offshore area based on the number of potential projects that could occur, the Government of Canada, Province of Newfoundland and Labrador and the C-NLOPB are working on a Regional Assessment. The goal of the Regional Assessment is to examine the effects of current and future offshore oil and gas exploratory drilling, including cumulative effects. The EA Report notes that operators are working together to engage Indigenous groups and identify research needs, in advance of the Regional Assessment.

- KMKNO requests consultation with Mi'kmaq of Nova Scotia on further regulatory approvals and the Regional Assessment.

3.1.2 Proponent's Indigenous Engagement Activities

The draft EA Report states:

"Husky Oil Operations Limited engaged with a total of 41 Indigenous groups located in Newfoundland and Labrador, Nova Scotia, New Brunswick, Prince Edward Island and Quebec. Early engagement began in June 2016 with the Nunatsiavut Government, the Labrador Innu Nation, the NunatuKavut Community Council, Qalipu Mi'kmaq Nation Band and Miawpukek First Nation. Engagement methods included phone

calls, emails, written letters and reports. The Proponent stated that they would continue their engagement efforts throughout the Project.”

The main body of the EA Report does not document whether the Proponent attended the information sessions organized by the Agency as a means of building relationships with Indigenous groups and providing information on the Project. Further, this section does not summarize the areas of concern expressed by Indigenous groups during the Proponent-led consultation.

- The EA Report should indicate the concerns expressed by Indigenous groups during Proponent-led consultation.
- The EA Report should also document the Proponent's efforts to organize and attend workshops.
- The Agency should also ensure that future engagement follows the *Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process* (2006).

Follow-up Engagement Activities

The Proponent has committed to ongoing engagement of the 41 Indigenous groups as the Projects progress and will continue to provide information and solicit feedback. AECOM recommends the Agency consider revising the existing EA Conditions to include the following:

- Indicate how EA Conditions 2.3 and 2.4 will be approved, monitored and enforced
- Condition 2.5: Consult with interested Indigenous groups to participate in the development and execution of follow-up programs.
- Condition 2.6: Include consultation with Indigenous groups with “relevant authorities”.
- Condition 2.8: Reporting should include how Indigenous groups were consulted and how their input was considered.
- Condition 2.10: Add that the regulator should consult with interested Indigenous groups to participate in the development of the plans set out in the EA Conditions. Further, notify Indigenous groups of the final plans prior to the commencement of the drilling program.
- Condition 3.7: Add “communication with Indigenous groups” along with the Board and Fisheries and Oceans Canada prior to commencing drilling, if moving the location of a well is deemed not technically feasible.
- Condition 5.4: Reporting should include how Indigenous groups were consulted and what mitigation, accommodation or compensation was enacted. Reports should be provided to Indigenous groups.
- Condition 6.7: Add communication and notification procedures for Indigenous groups.

Given the potential significant adverse effects that could impact Aboriginal or treaty rights, in addition to the above-noted revisions to existing EA Conditions, AECOM recommends that, in the final EA Conditions, the Agency:

- Identify specific compliance and enforcement processes to ensure the Proponent undertakes meaningful consultation and engagement;
- Identifies how Mi'kmaq concerns were considered and addressed; and,
- Indicate how future consultation and engagement on the Project should be undertaken specific to follow-up programs and the Regional Assessment.

3.2 Predicted Effects on Valued Components

3.2.1 Fish and Fish Habitat

Potential EA Condition 3.13 states the following:

“The Proponent shall submit to the Board a letter, prior to drilling, confirming its intent to participate in research pertaining to the presence of Atlantic salmon (Salmo salar) in the Eastern Canadian offshore areas and update the Board and Indigenous groups annually on related research activities”. AECOM recommends the following addition to the final EA Condition:

- Condition 3.13 should also reference traditionally-harvested fish like species (e.g., American Eel, Atlantic Cod).

Potential EA Condition 3.9 states the following:

“The Proponent shall develop, in consultation with Fisheries and Oceans Canada and the Board, a marine mammal monitoring plan that shall be submitted to the Board at least 30 days prior to the commencement of any vertical seismic survey. The Proponent shall implement the plan during the conduct of vertical seismic surveys:

- *develop and implement marine mammal observation requirements, including the use of passive acoustic monitoring, or equivalent technology, and visual monitoring by marine mammal observers throughout vertical seismic surveys”.*

AECOM recommends the following additions to the final EA Condition:

- Condition 3.9 should also require the Proponent, jointly with the MMO, to clearly specify adverse weather conditions in which marine mammal observation is impossible.
- Condition 3.9 should also require the Proponent, jointly with the MMO, to minimize drilling while adverse weather conditions are in effect.

3.2.2 Marine Mammals and Sea Turtles

AECOM did not identify any specific concerns in the proposed mitigation measures, follow-up programs and EA conditions that relate to marine mammals and sea turtles.

3.2.3 Migratory Birds

Potential EA Condition 4.3.1 states the following:

“The Proponent shall develop, prior to the start of the drilling program and in consultation with Environment and Climate Change Canada and the Board, follow-up requirements, pursuant to condition 2.4, to verify the accuracy of the environmental assessment as it pertains to migratory birds and to determine the effectiveness of the mitigation measures implemented by the Proponent to avoid harm to migratory birds, their eggs and nests, including the mitigation measures used to comply with conditions 4.1 and 4.2. The Proponent shall implement these follow-up requirements for the duration of the drilling program. As part of the follow-up, the Proponent shall:

- *Monitor daily for the presence of marine birds from the drilling installation using a trained observer following Environment and Climate Change Canada's Eastern Canada Seabirds at Sea Standardized Protocol for Pelagic Seabird Surveys from Moving and Stationary Platforms."*

AECOM recommends the following additions to the final EA Condition:

- The Agency should also require the Proponents, jointly with the trained observer, to clearly specify adverse weather conditions in which marine bird monitoring is impossible.
- The Agency should also require the Proponents, jointly with the trained observer, to minimize flaring while adverse weather conditions are in effect.

3.2.4 Special Areas

AECOM did not identify any specific concerns in the proposed mitigation measures, follow-up programs and EA conditions that relate to special areas.

3.2.5 Species at Risk

In the Species at Risk section and in Appendix D of the EA Report, the Agency has not provided information or comments regarding marine invertebrate Species at Risk. While sea sponges and corals are addressed in the EIS review and the EA Report, and while no Indigenous groups raised related concerns, AECOM notes a lack of consideration for benthic fauna, sea mussels and other invertebrate Species at Risk in this EA Report. AECOM recommends the following addition as an EA Condition:

- The Agency should address marine invertebrate Species at Risk, indicate how the Proponents should present this information, and provide the Agency's conclusion on this matter.

3.2.6 Commercial Fisheries

The EA Report notes that within the study area commercial species harvested are predominately Northern Shrimp and Snow Crab (Queen Crab) at approximately 92% of all landings by weight, since the collapse of groundfish stocks. The remaining commercially harvested fisheries are groundfish such as flounder or Greenland Turbot and small amounts of large pelagics such as Swordfish and tunas and some deepsea clams and bivalves. Further, it was noted that there has not been a commercial fishery for Northern Shrimp in the Project areas since 2015 due to the closure of the commercial shrimp fishery for conservation reasons in NAFO Divisions 3L.

The potential effects to commercial fishing from the Projects include restricted access to fishing areas by the safety exclusion zone established for exploration drilling, potential damage to fishing gear, vessels or equipment and potential effects on fish and fish habitat. Further, as noted in the EA Report Section 7.1.3, "*Indigenous and non-indigenous fishers with commercial and communal fishing licences could also be affected by accidental spills.*" An accidental spill could lead to further closures of fishing areas, damage to fishing gear or vessels, effects on fish or fish habitat as well as a potential impact to the marketability of the commercial fish products.

The Proponents are required to develop and implement a Fisheries Communication Plan (Condition 5.1) and the Agency noted that the views of Indigenous groups would be considered in the development of a Spill Response Plan (Condition 6.7). Condition 5.1 indicates that a Fisheries Communication Plan (FCP) is to be developed in consultation with the Board, Indigenous groups and commercial fishers. However, while the EA Conditions list the items that should be contained in the FCP.

AECOM recommends the following additions to the final EA Conditions:

- Expand Condition 5.4 to include development of a Fishing Gear Damage or Loss Compensation Program in consultation with Indigenous groups who hold communal fishing licenses or fish for food, social and ceremonial (FSC) purposes; and,
- Add notification to Indigenous groups and commercial fishers of the report submitted to the Board on incidents of lost or damaged fishing gear (Condition 5.4).

3.2.7 Current Use of Lands and Resources for Traditional Purposes and Health and Socio-Economic Condition of Indigenous Peoples

The draft EA Report indicates that the Agency acknowledges that the potential effects to the current use of lands and resources for traditional purposes and health and socio-economic condition of Indigenous peoples, “*from a worst-case accident or malfunction (i.e., an unmitigated subsea blowout event) would be more severe.*” Given that the potential effect would be from a potential accident and malfunction and not normal operating conditions, the Agency deemed that the overall adverse residual environmental effects of the Project on current use of lands and resources for traditional purposes and health and socio-economic conditions of Indigenous peoples would be negligible in magnitude.

As noted above, an accidental spill could lead to further fisheries closures, damage fishing gear and vessels, impact fish and fish habitat and potentially impact the marketability of commercial fish. In addition to the potential impacts to the commercial or communal fishery, Indigenous people may be affected by a spill if it affects species, such as Atlantic Salmon or American Eel, that migrate through the Project areas or potential spill dispersion zones to areas where they harvest for food, social or ceremonial reasons. The Agency acknowledged that even with measures that the Proponents would utilize to prevent or respond to a spill, there is a potential, under worst-case scenario and conditions, to have individual and population level effects on fish and fish habitat, marine mammals and sea turtles, migratory birds and Species at Risk such as the North Atlantic Right Whale, Atlantic Salmon. Further, there could be impacts to the Slopes of Flemish Cap and Grand Banks special areas located within 27 kilometres from exploratory licences.

Given the potential for spill to impact Indigenous people and the current use of lands and resources for traditional purposes, the Agency indicated that the key mitigation measures to mitigate the associated effects include develop a Spill Response Plan considering the views of Indigenous groups, compensate or any damages including the loss of food, social and ceremonial fisheries and include a procedure in the FCP to communicate with fishers in the event of an accident or malfunction. While the EA Conditions indicate the requirement to provide a draft Spill Response plan and consider the comments of Indigenous groups, there is no link to the consultation requirement (Condition 2.3) noted.

- KMKNO requests consultation (Condition 2.3) with Mi'kmaq of Nova Scotia in the development of the Spill Response Plan and FCP as well as a commitment to engage with Indigenous groups on the inclusion of Indigenous knowledge in the development of these plans.
- The Agency should specify requirements for post-spill sampling and monitoring program, the engagement process and the inclusion of Indigenous knowledge in EA Conditions 6.7 and 6.11.

3.3 Effects of Accidents and Malfunctions

3.3.1 Capping Stack and Deployment Vessel Availability

Potential EA Condition 6.6 states the following:

“The Proponent shall develop and implement procedures to provide up-to-date information to the Board on the availability of capping stack(s), vessels capable of deploying the capping stack(s), and drilling rigs capable of drilling a relief well at the Project site prior to and during the drilling of each well. The Proponent shall communicate this information to the Board and update the Board, when any of this information changes, prior to and during the drilling of each well.”

In potential EA Conditions issued for other exploratory drilling projects offshore Newfoundland (AECOM 2019 a, b and c), KMKNO had recommended that the Agency specify the frequency of updates. KMKNO acknowledges that, for the Jean D'Arc Basin Exploration Drilling Project, the Agency has added the underlined text (above) to potential Condition 6.6.

- While the availability of capping stack(s) is unlikely to change during execution of the Projects, the availability of capable vessels and drilling rigs and their distance from the Project site is likely to change weekly, if not daily; therefore, this requirement may not be practicable nor useful. It is recommended that an appropriate frequency be determined in consultation with the C-NLOPB and specified in the Final EA Conditions.

3.3.2 Indigenous Groups' Involvement in Spill Response Planning

For BP's Newfoundland Orphan Basin Exploration Drilling Project (2019 f), potential EA Condition 6.7 stated the following:

“After considering the views of Indigenous groups, the Proponent shall prepare and submit a Spill Response Plan to the Board for acceptance prior to drilling.”

As reported in AECOM (2019 c), KMKNO requested that, in the BP final EA Conditions, the Agency:

“...provide the Proponent with additional information regarding requirements for Indigenous groups' involvement in the Spill Response Plan (e.g., method/form of engagement, timeframe, degree of involvement). KMKNO also made this recommendation during review of the CNOOC potential EA Conditions as reported in AECOM (2019 b) and anticipated that it would have been incorporated in the BP potential EA Conditions by the Agency.”

KMKNO had also requested previously (AECOM 2019 c) that proponents be required to engage with the Mi'kmaq of Nova Scotia during development of spill response plans. The Agency has considered and incorporated aspects of these request for the Husky and ExxonMobil Projects, as the Proponents are required to provide a draft of the Spill Response Plan to Indigenous groups for comment, per potential EA Condition 6.7 which states the following:

“The Proponent shall prepare a Spill Response Plan and provide a draft of the plan to Indigenous groups for comment, taking into consideration these comments prior to submitting the plan to the Board for acceptance.”

3.3.3 Compensation Guidelines

Potential EA Condition 6.15 states the following:

“In the event of an accident or malfunction, the Proponent shall comply with the requirements of the Accord Acts and the Canada-Newfoundland and Labrador Offshore Financial Requirement Regulations and the requirements described in the Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity.”

For previous projects (AECOM 2019 b and c), KMKNO had requested that Condition 6.15 state clearly that compensation also applies to the loss of commercial or food, social and ceremonial fisheries; however, this remained unchanged in the Husky and ExxonMobil potential EA Conditions.

- KMKNO reiterates that Condition 6.15 should state that compensation also applies to the loss of commercial or food, social and ceremonial fisheries. KMKNO also made this recommendation during review of the CNOOC and BP potential EA Conditions (AECOM 2019 b and c) and anticipated that it would have been incorporated in the Husky and ExxonMobil potential EA Conditions.

3.3.4 Perceived Contamination

Section 7.1.3 of the draft EA Report states the following:

“The Agency agrees with comments from Indigenous groups that, even if effects on these species are relatively minor, perceived contamination may discourage individuals from engaging in certain traditional practices or consuming certain species which may have interacted with a spill.”

Yet the Agency also states that it, *“considers that mitigation measures identified for fish and fish habitat, accidents and malfunctions, commercial fishing (e.g., development of the Fisheries Communication Plan and compensation for any damages, including loss of food, social, and ceremonial fisheries), would also mitigate potential effects on the current use and health and socioeconomic conditions of Indigenous peoples.”*

Although the Agency has stated that it agrees that perceived contamination may affect health and socioeconomic conditions of Indigenous groups, it did not require the Proponent to assess this potential adverse effect.

- KMKNO reiterates its request that, in EIS guidelines for future projects, the Agency include the requirement to assess potential effects of perceived contamination.

3.3.5 Environmental Incident Reporting

For BP's Newfoundland Orphan Basin Exploration Drilling Project (2019 f), potential EA Condition 6.10 stated the following:

“In the event of a spill or unplanned release of oil or any other substance that may cause adverse environmental effects, the Proponent shall notify the Board and any other relevant authorities as soon as possible, and implement its Spill Response Plan, including procedures for notification of Indigenous groups and commercial fishers.”

As reported in AECOM (2019 c), KMKNO requested that the Agency specify a maximum timeframe in which environmental incidents must be reported to the Board and any other relevant authorities. Potential condition 6.10 for Husky and ExxonMobil has not incorporated this request, as it states the following:

"In the event of a spill or unplanned release of oil or any other substance that may cause adverse environmental effects, the Proponent shall notify the Board and any other relevant authorities as soon as possible, and implement its Spill Response Plan, including procedures for notification of Indigenous groups and commercial fishers, developed in condition 5.1.3."

KMKNO acknowledges the addition of the underlined (above) text to potential Condition 6.10. The previous version of Condition 5.1.3 (CEA Agency 2019 f) only required proponents to communicate the results of monitoring and associated potential health risks, by including the following in the Fisheries Communication Plan:

"Procedures to communicate with Indigenous groups and commercial fishers, in the event of an accident or malfunction, the results of the monitoring and any associated potential health risks referred to in condition 6.10"

Whereas, potential Condition 5.1.3 for Husky and Exxon Mobil require the Proponents to include the following in the Fisheries Communication Plan:

"Procedures to notify Indigenous groups and commercial fishers in the event of a spill or unplanned release of oil or any other substance, and communicate the results of the monitoring and any associated potential health risks referred to in condition 6.10"

Furthermore, the Agency has added the following to the information to be included in the Fisheries Communication Plan (potential Condition 5.1.4):

"Procedures to engage in two-way communication with Indigenous groups and commercial fishers in the event of a spill requiring a tier 2 or tier 3 response over the duration of the spill response"

- In addition to requiring that notification of environmental incidents should be provided, "as soon as possible," the condition should specify a maximum timeframe in which environmental incidents must be reported to the Board and any other relevant authorities. KMKNO also made this recommendation during review of the CNOOC and BP potential EA Conditions (AECOM 2019 b and c) and anticipated that it would have been incorporated in the Husky and ExxonMobil potential EA Conditions.

3.3.6 Measuring Levels of Contamination

Post-spill monitoring requirements for the Project are not detailed in the potential EA Conditions, which state that it may include the following:

"6.10.3 monitoring marine mammals, sea turtles and birds for signs of contamination or oiling and reporting results to the Board, Fisheries and Oceans Canada, and Environment and Climate Change Canada; and

6.10.4 monitoring benthic organisms and habitats in the event of a spill or other event that could result in smothering or localized effects to the benthic environment."

Section 7.1.3 of the draft EA Report states general measures that would be included in a follow-up program in the event of a spill but does not specify any scientific or technical requirements associated with these measures, and Section 7.1.1 of the draft EA Report states the following:

“The proponents stated that in the event of an accidental event, specific monitoring programs may be required. In such cases, these programs would be developed and implemented in consultation with the appropriate regulatory bodies.”

The Agency states that details of a post-spill monitoring program will be included in the Spill Response Plan, which is required as part of the C-NLOPB's authorization process; however, it is not clear that applicable regulators will provide input and approval of the proposed Spill Response Plan.

- The Agency should consider establishing and specifying, in consultation with ECCC, DFO and other applicable regulators and consultation with the Mi'kmaq of Nova Scotia, the minimum scientific and technical requirements for a post-spill monitoring program, either for inclusion in EA conditions or as an overall guidance document for offshore drilling programs generally.

3.3.7 Significance Determination

The draft EA Report concludes that potential effects resulting from a worst-case accident or malfunction may be significant on migratory birds and special areas. Furthermore, the Agency states the following:

“By extension, and particularly considering potential effects on Atlantic Salmon and their recovery, as well as the context provided by Indigenous groups, the Agency concludes that the potential effects on the current (or future, as it pertains to at-risk Atlantic Salmon populations) use of lands and resources for traditional purposes and the health and socioeconomic conditions of Indigenous peoples could be significant.”

The Agency concludes the following:

“However, the Agency recognizes that the probability of occurrence for a major event is very low and thus these effects are unlikely to occur. Taking into account the implementation of key mitigation measures, the Agency concludes that the Project is not likely to cause significant adverse environmental effects as a result of accidents and malfunctions.”

- The Agency should ensure that it is clearly stated in the relevant sections of the EA Report that their conclusion that the Project is not likely to cause significant adverse environmental effects as a result of accidents and malfunctions is not necessarily based on mitigation measures being sufficient; rather, on the very low likelihood of occurrence.
- The Agency should ensure that it is clearly stated in the relevant sections of the EA Report that, in the event of a major subsea blowout, the identified mitigation measures may not be sufficient to result in non-significant adverse environmental effects to migratory birds, special areas, the current use of lands and resources for traditional purposes, and the health and socioeconomic conditions of Indigenous peoples.

3.4 Impacts on Potential or Established Aboriginal or Treaty Rights

The draft EA Report indicates that the Agency relied on the information from the Proponents and Indigenous groups when making its determination of the Project's impacts on potential or established Aboriginal or treaty rights.

With regards to the fishing species that may migrate through the Project areas within traditional territories, the Agency determined that *"because project activities would likely have limited effects on these fish species (Section 6) it would also likely have a low impact on the potential or established Aboriginal or treaty rights of Indigenous groups with food, social and ceremonial licences to harvest migratory species"*. Further, the Agency relied on DFO's determination that the potential effects of the Project on Atlantic Salmon is expected to be negligible to low. However, the Agency did acknowledge that in an "unlikely event of a major spill" there was a potential for more serious impacts to these species, and particularly Species at Risk, thereby having a potential to impact potential or established Aboriginal or treaty rights of Indigenous groups.

While the Agency acknowledged the potential consequences to Indigenous fishers and communities as well as a potential for impacts to potential or established Aboriginal or treaty rights from an accident or malfunction, it was determined that the probability of a major subsea blowout was extremely low. Further, the Agency noted that the Proponents *"...would be required to take all reasonable measures to reduce the probability of an accidental event and ensure it is prepared to respond effectively if an accidental event does occur"*.

With regards to compensation for damages incurred by Indigenous fishers, including the loss of commercial or food, social and ceremonial fisheries, this would be required under the *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity*. Lastly, with regards to spill response, the FCP would include, *"procedures to communicate with fishers in the event of routine operations and accidental events"*. The Proponents are also required to consider the views of Indigenous groups in the development of a Spill Response Plan.

With regards to the Spill Response Plan, the EA Report states that the plan will include sharing results of environmental monitoring and appropriate feedback mechanisms for the concerns of Indigenous groups, fishers and other ocean users. However, Condition 6.7 does not include these requirements.

As stated above, the Agency has considered that mitigation measures and follow-up identified for fish and fish habitat, marine mammal and sea turtles, migratory birds, commercial fisheries and accidents and malfunctions would serve as accommodation measures for potential or established Aboriginal or treaty rights by avoiding or minimizing potential impacts on those rights.

Please refer to sections specific to the migratory species of concern for comments related to proposed mitigation measures, follow-up programs and EA conditions that relate to that species.

- As noted above, KMKNO requests consultation (as per Condition 2.3) with Mi'kmaq of Nova Scotia in the development of the Spill Response Plan and Fisheries Communication Plan and a commitment to engage with Indigenous groups on the inclusion of Indigenous knowledge in the development of these plans.
- The Agency should specify requirements for post-spill sampling and monitoring program, the engagement process and the inclusion of Indigenous knowledge in the EA Conditions 6.7 and 6.11.

4. Conclusions and Recommendations

KMKNO requests that the Agency address the below in the final EA Report and EA Conditions. Note that while this section summarizes key recommendations, KMKNO requests that the Agency address all the issues and concerns provided in this document.

i. Agency Follow-up Consultation

Issue: As noted in the EA Report, following the EA approval, the regulatory approval phase will consider the consultation record for the EA in determining further consultation requirements. Additionally, based on concerns raised by Indigenous groups on the potential for cumulative environmental effects from the number of potential offshore projects that could occur, a Regional Assessment is being undertaken. Both the regulatory approval process and the Regional Assessment outcomes have the potential to issue approvals or set a plan in place for future projects and therefore should trigger the Crown's Duty to Consult.

Recommendation: KMKNO requests consultation with Mi'kmaq of Nova Scotia on regulatory approvals necessary for this Project and for the Regional Assessment on cumulative effects of current and future projects.

ii. Proponent's Follow-up Engagement

Issue: The Proponent has committed to ongoing engagement with Indigenous groups throughout the Project. There are several areas where notification to or engagement with Indigenous and key stakeholders would provide greater certainty that the Proponent will follow through with commitments and work to build trust that areas of concern have appropriate follow-up programs and monitoring for potential effects. Further, inclusion of Indigenous groups and stakeholders in the development of follow up programs or plans should be considered a priority.

Recommendation: The Agency should add the following to Condition 2.5: "*Consultation with Indigenous groups in the development of follow-up programs*" and specify that Condition 2.3 applies to the development of plans and follow-up programs. Furthermore, given the potential significant adverse effects that could impact Aboriginal or treaty rights, AECOM recommends that, in the final EA Conditions, the Agency identify specific compliance and enforcement processes to ensure the Proponent undertakes meaningful consultation and seeks opportunities to incorporate or modify plans based on what mitigation, accommodation or compensation was enacted, and indicate how EA Conditions 2.3 and 2.4 will be approved, monitored and enforced. The Agency should also indicate how future consultation and engagement on the Projects will be undertaken specific to follow up programs.

iii. Commercial Fisheries

Issue: The EA Report notes that the damages incurred by Indigenous fishers, including the loss of commercial or food, social and ceremonial fisheries would require compensation in accordance with the *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity*, however, it is noted that there is no specific condition associated with this commitment. It is preferable to have a program in place prior to the commencement of drilling.

Recommendation: The Agency should consider adding a condition that requires the Proponent to develop a Fishing Gear Damage or Loss Compensation Program that includes rights-based fisheries. Indigenous

groups and commercial fishers should be notified of the report submitted to the Board on incidents of lost or damaged fishing gear. .

iv. Current Use of Lands and Resources for Traditional Purposes and Health and Socio-Economic Condition of Indigenous Peoples

Issue: Given the potential for spill to impact Indigenous people and the current use of lands and resources for traditional purposes, the Agency indicated that the key mitigation measures to mitigate the associated effects include develop a Spill Response Plan considering the views of Indigenous groups, compensate or any damages including the loss of food, social and ceremonial fisheries and include a procedure in the FCP to communicate with fishers in the event of an accident or malfunction. While the EA Conditions indicate the requirement to provide a draft Spill Response plan and consider the comments of Indigenous groups, there is no link to the consultation requirement (Condition 2.3) noted.

Recommendation: KMKNO requests consultation, as per Condition 2.3, with Mi'kmaq of Nova Scotia in the development of the Spill Response Plan and Fisheries Communication Plan and a commitment to engage with Indigenous groups on the inclusion of Indigenous knowledge in the development of these plans. Furthermore, the Agency should specify requirements for post-spill sampling and monitoring program, the engagement process and the inclusion of Indigenous knowledge to EA Conditions 6.7 and 6.11.

v. Compensation Guidelines

Issue: The EA Report specifies that, *"compensation to fishers would be required for any damages, including the loss of income and future income. In the case of Indigenous fishers, this would also include any loss of hunting, fishing and gathering opportunities (e.g., food, social, or ceremonial fisheries)."* However, the associated potential EA Condition does not provide the same degree of clarity.

Recommendation: Condition 6.15 should state clearly that compensation also applies to the loss of commercial or food, social and ceremonial fisheries.

vi. Environmental Incident Reporting

Issue: The Agency does not indicate a maximum timeframe within which the Proponent must notify relevant authorities of an environmental incident.

Recommendation: The final EA Conditions should specify a maximum timeframe in which environmental incidents must be reported to the Board and any other relevant authorities.

vii. Measuring Levels of Contamination

Issue: The Agency states that details of a post-spill monitoring program will be included in the Spill Response Plan, which is required as part of the C-NLOPB's authorization process; however, it is not clear that applicable regulators will provide input and approval of the proposed Spill Response Plan.

Recommendation: In discussion with ECCC, DFO and other applicable regulators and consultation with the Mi'kmaq of Nova Scotia, the Agency should consider establishing and specifying minimum scientific and technical requirements for a post-spill monitoring program either in the EA Conditions or as an overall guidance document for offshore drilling programs generally.

viii. Impacts on Potential or Established Aboriginal or Treaty Rights

Issue: The Agency has considered that mitigation measures and follow-up identified for fish and fish habitat, marine mammal and sea turtles, migratory birds, commercial fisheries and accidents and malfunctions would

serve as accommodation measures for potential or established Aboriginal or treaty rights by avoiding or minimizing potential adverse impacts on those rights.

Recommendation: The Agency should add the following to Condition 2.5: "*Consultation with Indigenous groups in the development of follow-up programs.*" The Agency should also specify requirements for post-spill sampling and monitoring program, the engagement process and the inclusion of Indigenous knowledge in EA Conditions 6.7 and 6.11. Further, KMKNO requests consultation (Condition 2.3) with Mi'kmaq of Nova Scotia in the development of the Spill Response Plan and Indigenous FCP and FCP as well as a commitment to engage with Indigenous groups on the inclusion of Indigenous knowledge in the development of these plans. KMKNO also requests that the additional detail from the EA Report related to the contents of the Spill Response Plan be reflected in Condition 6.7.

5. Review Limitations

AECOM relied upon publicly available information as referenced in the report. This report is intended solely for the Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO) and the Assembly of Nova Scotia Mi'kmaq Chiefs (ANSMC). The information herein reflects our best judgement in consideration of information available at the time of preparation. No portion of this report should be used as separate entity, as it is written to be read in its entirety, and in conjunction with the previous reviews conducted for the Projects (EIS review and IR reviews).

Any use which a third party makes of this report, or any reliance on or decisions to be made based on it, is the responsibility of such third parties. Please refer to the Statement of Qualifications at the beginning of the Report.

6. References

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