

December 6, 2019

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Re: Mekap'sk Mi'kmaq Band Comments on the Draft Environmental Assessment Report and Potential Conditions for the Proposed Newfoundland Orphan Basin Exploration Drilling Project

Preamble

The Impact Assessment Agency of Canada (the Agency; IAAC; formerly IAAC) has initiated a public comment period on the Draft Environmental Assessment Report (the EA Report) and Potential Conditions for the BP Canada Energy Group ULC ("the Proponent) Newfoundland Orphan Basin Exploration Drilling Project ("the Project"). The Northern Peninsula (Mekap'sk) Mi'kmaq Band is committed to representing the approximately 1,200 Mi'kmaq people of the Northern Peninsula with a united voice and to have the rights and interests of our people represented fairly in any process where the Crown considers a decision that stands to affecting our rights and our way of life.

Mekap'sk Mi'kmaq Band Aboriginal Rights and Interests

Canada, as the Crown, has a legal obligation to consult with Aboriginal peoples where it contemplates decisions or actions that may adversely impact asserted or established Aboriginal or treaty rights. The Mekap'sk Mi'kmaq Band asserts Aboriginal and inherent rights which our peoples have practiced and enjoyed since before European contact. Mekap'sk Mi'kmaq Band rights include, but are not limited to, rights to the land and waters, rights to resources and activities, the right to self-determination and self-government, and the right to practice our culture and customs. Mekap'sk Mi'kmaq Band Aboriginal rights have not been granted from external sources but are a result of our peoples' occupation of their home territories and waters, as well as our ongoing political and legal systems. As such, Mekap'sk Mi'kmaq Band rights Aboriginal rights are separate from rights afforded to non-Aboriginal Canadian citizens under Canadian common law.

The duty to consult, and where appropriate accommodate, is rooted in:

- the Honour of the Crown (a legal principle that commits government to act with integrity)
- the protection of Aboriginal and treaty rights under section 35 of the Constitution Act, 1982

As should be evident from our comments, to-date, the Crown has failed to adequately consult and accommodate the Mekap'sk Mi'kmaq Band with respect to the Project, and the Crown's attempt to delegate procedural aspects of consultation to the Proponent has also failed. Please accept the following comments outlining the issues, recommendations and concerns of the Mekap'sk Mi'kmaq Band with respect to the Environmental Assessment Report and Potential Conditions.

Given the lack of participant and capacity funding provided to date by the Agency, representing the Crown, and the Proponent's lack of undertaking procedural aspects of consultation on behalf of the Crown, these comments should not be considered comprehensive or representative of the scope of outstanding questions, concerns, issues and recommendations held by the Mekap'sk Mi'kmaq Band related to the project and its potential effects. The Mekap'sk Mi'kmaq Band has been forced to use its minimal financial resources to retain a modest level of technical and legal support to support, but we remain unable to meaningfully participate in the environmental assessment process.

In order to work towards resolving the deficiencies in the EA Report this document identifies, we require that the Agency, and where applicable, BP Canada, provide written responses to each of the issues identified together with commitments to adopt recommendations or provide substantial rationale for alternative solutions.

Sincerely,

Chief Mildred Lavers

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1	Section 4.1 Crown Consultation with Indigenous Peoples; Appendix C Summary of Indigenous Concerns	<p>Section 2.3 of the Project's EIS Guidelines provide the following explanation of the outcomes of consultation and engagement with Indigenous groups: "The information gathered by the proponent during its engagement with groups helps to contribute to the Crown's understanding of any potential adverse impacts on potential or established Aboriginal or treaty rights protected under section 35 of the Constitution Act, 1982 ("section 35 Aboriginal rights") including title and related interests, and the effectiveness of measures proposed to avoid or minimize those impacts." It is Mekap'sk's understanding that the Agency needs this information to arrive at an accurate, informed assessment of the effects of the Project on Aboriginal peoples and impacts on potential and established Treaty and Title rights, which the Minister also requires in order to come to a conclusion on the EA.</p> <p>In Section 4.1 and Appendix C of the EA Report, IAAC summarizes issues that have been raised by Indigenous groups throughout the process and provide a response to the comments or concerns raised to date related to the potential for Project activities (including potential accidental events) to affect Indigenous peoples and acknowledges the importance of engaging Indigenous groups to communicate Project details and obtain their views on potential effects of the Project on asserted or established Aboriginal and/or Treaty rights. However, none of Mekap'sk Mi'kmaq Band's comments or concerns that were raised in our review of the EIS</p>	<p>As a result of our issues being wholly ignored in the EA Report, we wish to carry forward the following recommendation from our review of the EIS Summary:</p> <p>To uphold the honour of the Crown and ensure meaningful consultation, the Mekap'sk Mi'kmaq Band must be provided the opportunity and the necessary resources to carry out an independent and comprehensive Traditional Knowledge and Land/Water Use Study & Impact Assessment (TKLWU).</p> <p>The Study will contribute to the assessment of the potential adverse impacts of the project on the Aboriginal rights of the Mi'kmaq peoples living on the Northern Peninsula the Mekap'sk Mi'kmaq Band represents and the impacts of the Project on the potential Title rights of the Mekap'sk Mi'kmaq Band. Any follow up plans and measures by the Proponent must incorporate the results of the Study and the Mekap'sk Mi'kmaq Band should be provided an opportunity to validate the incorporation of results prior to the Proponent incorporating the</p>

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		<p>Summary have been included or responded to within the EA Report.</p> <p>Given that our issues and concerns have not been responded to any manner within the EA Report, Mekap'sk maintains our position that the Crown does not have sufficient information to make an accurate, informed assessment of the Project's effects on the potential Title rights of the Mekap'sk Mi'kmaq Band, and the Aboriginal rights of the Mi'kmaq peoples living on the Northern Peninsula the Mekap'sk Mi'kmaq Band represents.</p>	<p>information into follow up plans and other measures.</p> <p>Mekap'sk requires that the Agency revise conclusions regarding the effects of the Project on Aboriginal peoples, impacts on potential and established Treaty and Title rights, and potential follow-up programs, until the results of a formal TKLWU Study & Impact Assessment are provided by Mekap'sk Mi'kmaq.</p>
2	Section 4.1 Crown Consultation with Indigenous Peoples	<p>Section 2.3 of IAAC's EIS Guidelines provides the following direction to the Proponent with respect to communication and cooperation with Aboriginal peoples: "The proponent is strongly encouraged to work with Aboriginal groups in establishing an engagement approach."</p> <p>The Mekap'sk Mi'kmaq Band asserts that it has not been meaningfully engaged in any way by the Proponent or the Agency with respect to the Project. Further to that point, within the EA Report released by the Agency, the Mekap'sk Mi'kmaq Band is not even mentioned in the groups consulted or contacted regarding the Project. As a result, we assert that both the Proponent and the Agency have failed to work with the Mekap'sk Mi'kmaq Band to establish a mutually agreed upon approach for meaningful consultation and engagement. This is despite requests from the Mekap'sk Mi'kmaq Band of the same dating back to the beginning of the Environmental Assessment process.</p>	<p>In fulfilling the procedural aspects of consultation delegated to it by the Crown and ensuring meaningful engagement throughout the life of the Project, Mekap'sk requires that the Proponent and Canada (through the IAAC) work with our leadership to develop a "process agreement" to establish an approach for meaningful engagement activities throughout the life of the Project. The agreement should include mutually acceptable protocols, plans and timelines, as well as the overall objectives and scope of engagement activities. This includes establishing a forum for hearing and responding to issues and concerns raised by Mekap'sk.</p>

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3	Section 7.3 Cumulative Environmental Effects	<p>Section 5 of the EIS Guidelines provides the following direction to the Proponent with respect to the assessment of cumulative effects as it relates to Indigenous Peoples in the EA process:</p> <p><i>“With respect to the effects of changes to the environment on Aboriginal peoples, the assessment requirements are outlined in Part 2, sections 6.1.8 and 6.3.8 of these guidelines. With respect to potential adverse impacts of the project on potential or established section 35 rights, including title and related interests, the EIS will document for each group identified in Part 2, Section 5.1 of these guidelines (or in subsequent correspondence from the Agency):</i></p> <p><i>potential adverse impacts on potential or established section 35 rights, including title and related interests that have not been fully mitigated or accommodated as part of the EA and associated engagement with Indigenous groups. The proponent will also take into account the potential adverse impacts that may result from the residual and cumulative environmental effects. Include the perspectives of potentially affected groups where these were provided to the proponent by the groups.”</i></p> <p>While the EIS guidelines specify these parameters, in the Proponent’s assessment of cumulative effects on Indigenous Peoples, including section 35 rights it was concluded that “there would be a very low likelihood of interactions that could translate into a negative effect on traditional activities.”</p>	<p>The Mekap’sk Mi’kmaq Band must be provided the opportunity and the necessary resources to share concerns related to cumulative impacts, including the ability to carry out a TKLWU Study & Impact Assessment.</p> <p>The study will contribute to the development of appropriate mitigation measures for limiting the impacts of cumulative effects. Specifically, mitigation measures that take into account the Aboriginal traditional knowledge of Mi’kmaq people living on the Northern Peninsula of Newfoundland, as well as their current traditional land/waters and resource use and other ecological, technical and social and cultural considerations.</p> <p>Any follow up plans and provisions must incorporate the results of the Study and the Mekan’sk Mi’kmaq Band should be provided an opportunity to validate the incorporation of results prior to the Proponent using this information for EA follow up and decision-making purposes.</p>

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		<p>In the EA report the Agency provided no analysis, guidance, or mitigation measures related to the impact of cumulative environmental effects on Indigenous Peoples, specifically as it relates to exercising section 35 rights through traditional land, water, and resource use. Failure to provide this analysis and subsequent mitigation measures undoubtedly increases the risk of cumulative effects impacting the ability of Mepak'sk Mi'kmaq members from harvesting species that may interact with the Project area.</p>	
4	Section 8.0 Impacts on Potential or Established Aboriginal or Treaty Rights	<p>Section 8.0 of the EA Report provides an analysis of the impacts on potential or established Aboriginal or Treaty Rights. Within the EIS guidelines Aboriginal Rights are defined as, "practices, traditions and customs integral to the distinctive culture of the Aboriginal group claiming the right that existed prior to contact with the Europeans (Van de Peet)." Despite this definition of Aboriginal rights combined with the Agency claiming to have assessed both potential and established Aboriginal rights, the rights of Mepak'sk Mi'kmaq Band have gone wholly unassessed within the EA report. This is despite the fact that Mepak'sk Mi'kmaq have a land claim in process and represent the 1,200 Mi'kmaq of the Northern Peninsula in Newfoundland.</p> <p>Although the Agency has outlined potential mitigation measures for protecting impacts to Aboriginal rights, the rights of Mepak'sk Mi'kmaq are wholly ignored and excluded from the assessment of impacts to rights. As a result, it is very difficult, if not impossible, to determine if the mitigation measures put forward by the Agency</p>	<p>As a result of our issues being wholly ignored in the EA Report, we wish to carry forward the following recommendation from our review of the EIS Summary,</p> <p>To uphold the honour of the Crown and ensure meaningful consultation, the Mepak'sk Mi'kmaq Band must be provided the opportunity and the necessary resources to carry out an independent and comprehensive Traditional Knowledge and Land/Water Use Study & Impact Assessment (TKLWU).</p> <p>The Study will contribute to the assessment of the potential adverse impacts of the project on the Aboriginal rights of the Mi'kmaq peoples living on the Northern</p>

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		will sufficiently address the concerns of the Mekap'sk Mi'kmaq Band.	<p>Peninsula the Mekap'sk Mi'kmaq Band represents and the impacts of the Project on the potential Title rights of the Mekap'sk Mi'kmaq Band. Any follow up plans and measures by the Proponent must incorporate the results of the Study and the Mekap'sk Mi'kmaq Band should be provided an opportunity to validate the incorporation of results prior to the Proponent incorporating the information into follow up plans and other measures.</p> <p>Mekap'sk requires that the Agency revise conclusions regarding the effects of the Project on Aboriginal peoples, impacts on potential and established Treaty and Title rights, and potential follow-up programs, until the results of a formal TKLWU Study & Impact Assessment are provided by Mekap'sk Mi'kmaq.</p>
5	Section 7.1 Accidents and Malfunctions	Section 2.4.3 of the EIS suggests that response barriers used by BP include standardized practices for the preparation and response to crises and emergency events that have the potential to cause harm to BP employees, contractors or the public, the environment, company assets, or interruption to business operations. The EIS further suggests that a Project-specific Incident Management Plan (IMP) will be developed that outlines	The Mekap'sk Mi'kmaq Band must be provided the opportunity and the necessary resources to carry out an independent and comprehensive Traditional Knowledge and Land/Water Use Study & Impact Assessment. The Study will contribute to a comprehensive understanding of

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		<p>the emergency response processes to be implemented during actual or potential emergency incidents, regardless of size, complexity, or type. It will describe the facilities, notification and reporting procedures, response organization, and specific roles and responsibilities to provide a comprehensive, efficient, and timely response. It will also contain checklists and guidance for initial actions for specific response scenarios, including potential spill or well control events.</p> <p>The EIS also suggests that only “applicable regulatory authorities” will be consulted on the finalization of the Spill Response Plan (SRP).</p> <p>In the Agency’s conclusions within the EA Report there was general agreement with the above measures and additional requirements for “the proponent [to] also be required to develop and implement a Fisheries Communication Plan, which would include procedures to communicate with fishers in the event of an accident or malfunction. Views provided by Indigenous groups would be considered in the development of the Spill Response Plans, and groups would be provided the approved version.”</p> <p>However, it is unclear if Mekap’sk Mi’kmaq Band will be provided the opportunity to provide input given that our comments to date have been excluded from the EA Report.</p> <p>Further to the above, due to the lack of meaningful engagement with the Mekap’sk Mi’kmaq Band and the lack of comprehensive Traditional Knowledge and</p>	<p>the project setting and baseline conditions related to Indigenous Peoples and Community Values and an accurate characterization of all attributes of activity that can be affected by environmental change, including accidents, spills and malfunctions.</p> <p>The Spill Response Plan and any associated documents must incorporate the results of the Study where appropriate and the Mekap’sk Mi’kmaq Band should be provided an opportunity to validate the incorporation of results prior to SRPs being finalized and implemented.</p> <p>In addition, Mekap’sk requires that the Proponent work with our leadership to develop a “process agreement” to establish an approach to meaningful engagement throughout the life of the Project. This includes an approach to meaningful engagement activities related to accidents, spills and malfunctions and related plans, <i>and</i> potential Mekap’sk support and engagement in responses to accidents, spills and malfunctions.</p>

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		land/water use information obtained from the Mi'kmaq peoples living on the Northern Peninsula, the EA report fails to include the potential to cause harm to Indigenous peoples and their rights and interests, including the Mekap'sk Mi'kmaq Band.	