

THE MALISEET NATION OF NEW BRUNSWICK

Submission to the Expert Panel for the Review of Environmental Assessment Processes

December 23, 2016

Introduction

It is our understanding that the objective for the current review of federal environmental assessment (“EA”) processes (the “Review”) is to re-build public trust in these processes.

We, the Maliseet Nation, have decided to undertake this Review in unity. The Maliseet Nation of New Brunswick (the “MNNB”) consists of Kingsclear First Nation, Madawaska Maliseet First Nation, Oromocto First Nation, St. Mary’s First Nation, Tobique First Nation and Woodstock First Nation. Our communities and members share a common territory, history, culture, language, as well as Aboriginal and treaty rights. We share a deep relationship with our traditional territory and have embraced the duty of protecting it and ensuring that its use is in keeping with the values and beliefs of our ancestors and in the best interest of future generations.

Concerns with the Review Process

While we acknowledge that the schedule for the Review is being fast tracked to ensure that the legislation and regulations are amended quickly, we are very concerned with how this process has unfolded. The Review, overall, is a positive step. However, the schedule for the Review has been extremely accelerated and unclear, with delayed funding decisions and poor communication. While we acknowledge that this aspect of the Review is pre-consultation and that it will be decided at a later date how Aboriginal people will be engaged on the recommendations in the Expert Panel’s Report, at this point we are not even sure if consultation on the specifics of any draft legislation will happen. We are concerned that the way in which this Review is unfolding does not meet the legal standards of consultation as laid down in case law, or the principles of the *United Nations Declaration on the Rights of*

Indigenous Peoples.¹ If the Government of Canada is truly committed to engaging with Aboriginal people and to renewing the nation-to-nation relationship with Aboriginal people based on recognition of rights, respect, co-operation and partnership, then it needs to both ensure its legislation fully protects section 35² rights and the rights guaranteed by UNDRIP and it needs to undertake such amendments properly and in accordance with the expanding law in support of respectful relationships with Aboriginal people.

Background: The Maliseet Nation, Our Lands, Waters, and Resources

The Maliseet, or Wolastoqiyik (people of the Beautiful or Bountiful River), have occupied the lands and waters of what is now called New Brunswick since time immemorial. The Saint John River basin, or the Wolastoq (Beautiful or Bountiful River), specifically, has long been, and continues to be, of central significance to our people. It is a key part of our traditional homeland and culture. We are physically and culturally connected to it. Our name, Wolastoqiyik, expresses this connection at the heart of our identity: we are the people of the Beautiful River.

In New Brunswick, Peace and Friendship Treaties were entered into with the Maliseet, Mi'kmaq and Passamaquoddy prior to 1779. Specifically, the Maliseet entered into the 1749, 1752, 1760/61 Treaties. These Peace and Friendship Treaties encouraged peaceful relations between the parties. Their sole purpose was to end hostilities and encourage cooperation between the British and First Nations. Our Treaties did not involve or purport to involve the ceding or surrendering of our rights to lands, waters or resources that were traditionally used or occupied.

¹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, A/RES/61/295 (“UNDRIP”)

² **Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on April 17, 1982 (“Constitution”)**

These rights are constitutionally guaranteed through section 35 of the *Constitution* and have been strengthened by the Supreme Court of Canada's decision in *Tsilhqot'in Nation v British Columbia*.³

But, in the past century, our lands, water and resources have been increasingly exploited to the point that they are in serious danger. We have experienced considerable loss in our livelihood through this exploitation. Our lands, waters and resources have been and continue to be heavily impacted through settlement, resource extraction such as forestry, fishing and agriculture, environmental degradation, and highly restrictive government regulations. As a result of the cumulative effects of these projects and activities in our traditional territory, there are few accessible areas remaining for traditional uses and valued resources, which has caused significant challenges to the Maliseet people, our economy and our culture. If these resource pressures continue, we will no longer be able to viably exercise our Aboriginal and treaty rights.

Despite these challenges, we Maliseet people are a strong and resilient people and our culture, traditions and way of life, have persisted into the present. We continue to have a deep spiritual connection to our territory and continue to hunt, trap, fish, and engage in other harvesting and traditional practices in our traditional territory. But, rather than protect our rights, the *Canadian Environmental Assessment Act*⁴ only appears to make our problems worse.

We never gave up our rights to our lands, waters and resources. We continue to have a deep relationship with our lands, waters and resources. Our culture, traditions and way of life have persisted into the present and we continue to exercise our Aboriginal and treaty rights over and engage in traditional practices on our traditional territory. However, the exercise of our Aboriginal and treaty rights and the persistence of our culture, traditions and way of life into the future depends on the continued existence of an intact land base that we can access. Our lands, water and resources have experienced considerable impacts and are in serious danger. We are being left with less and less territory over which to exercise and assert our Aboriginal and treaty rights. Without protections for the lands, waters and resources that we depend on

³ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 ("*Tsilhqot'in*")

⁴ S.C. 2012, c. 19, s. 52 (the "*Act*")

to exercise and assert our Aboriginal and treaty rights will continue to diminish until we are eventually left with nothing.

The *Act* needs to be completely overhauled. It needs to be amended to better protect our Aboriginal and treaty rights. The *Act* needs to reflect the importance and strength of our Aboriginal and treaty rights and the significance of potential impacts of further development on these rights.

Given the limit of time and funding we were provided to review and provide written submissions on the *Act*, we cannot focus on every amendment that is needed. Instead, we have chosen to focus on those amendments that are most important to the MNNB, such as we can identify them now. Below are our recommended amendments to improve the protection of the physical environment throughout our traditional territory, as well as our socio-economic environment and health, which are outlined at a high level.

Recommendations

Consideration of Aboriginal and Treaty Rights

- **The *Act* needs to explicitly require the consideration and protection of Aboriginal and treaty rights as an overall purpose of the *Act*.**

The protection of Aboriginal and treaty rights in the *Act* is wholly inadequate. Section 4(1)(d) states that one of the purposes of the *Act* is to *promote* communication and cooperation with Aboriginal people with respect to EAs, while section 5(1)(c) states EAs will take into account effects on Aboriginal people. These provisions do not direct that the exercise of discretion be executed in a manner that gives due consideration and allows for full expression of Aboriginal and treaty rights. As a result, Aboriginal and treaty rights are largely excluded from consideration and vulnerable to infringement.

Aboriginal Decision-Making

- **We recommend that the *Act* be amended to provide for co-management and collaborative decision-making with Aboriginal people. Both the federal Minister and affected Aboriginal nations must have an opportunity to approve and consent to any**

project affecting Maliseet lands, waters, resources, economy, traditional use (“TU”), health, society and culture.⁵

- The definition of “jurisdiction” should be amended to include non-land claim Aboriginal governments and agencies.
- Instead of the Minister having discretion to substitute the federal EA process of the jurisdiction of Aboriginal governments and agencies, they should be *required* to substitute the federal EA process when a request is received from Aboriginal government and agencies and are convinced that it would be an appropriate substitution, similar to when a province requests a substitution.
- *All* Aboriginal governments and agencies should have the ability to enter into agreements and arrangements for the establishment of a review panel and the conduct of the EAs. Where Aboriginal groups stand to be significantly affected, Aboriginal governments *must* have a say in the composition of the Panel and the conduct of the EA.

The right to self-government, or sovereignty, is an inherent right that is part of our identity as peoples. Before the coming of Europeans, we were organized as self-governing societies. We did not give up our right to self-government.

In order to have the respectful relationships necessary for the ongoing project of reconciliation, and to reflect the principle of free, prior and informed consent found in UNDRIP, Aboriginal people need to be partners with Canada in the decision-making stage of projects. A framework that promotes reconciliation is one that will explicitly allow for jurisdiction to be shared over the protection of lands, waters and resources with Aboriginal people. This can be done through co-management and collaborative decision-making with Aboriginal people. This needs to be based on nation-to-nation relationship, reconciliation and free, prior and informed consent.

This is particularly true for the Maliseet, who assert Aboriginal title. The Supreme Court of Canada in *Tsilhqot'in*⁶ has stated that the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain consent of Aboriginal title holders and that projects begun without such consent risk being cancelled. This needs to be recognized by Canada, and not just for those Aboriginal groups that have proven their right through court, as this would narrow the application of this principle in a way that is contrary to

⁵ See definitions of traditional use (“TU”) and traditional ecological knowledge (“TEK”) below.

⁶ *Tsilhqot'in*, *supra* note 3

reconciliation, section 35 and UNDRIP. Those working with the Maliseet need to understand how the Maliseet engage in decision-making that will impact future generations.

One way to promote collaboration through the *Act* would be through sections 2(1), 18, 32 and 34. Section 2(1) of the *Act* defines “jurisdiction” so as to include the recognition of federal authorities, provincial governments, provincial and federal authorities that can undertake EAs, and bodies established under land claim agreements or self-government legislation that can undertake EAs. Under the *Act*, the responsible authority is required to cooperate with a jurisdiction if that jurisdiction has powers, duties or functions in relation to an EA.⁷ The Minister can also approve of a substitution of the federal EA with that of other jurisdictions, including those of bodies established under land claim agreements or self-government legislation.⁸ Finally, the Minister *may* enter into agreements or arrangements with jurisdictions that can undertake EAs respecting the joint establishment of a review panel and the manner in which EAs are conducted by the Panel.⁹ While governments and other bodies established under land claim agreements are recognized under the *Act*, non-land claim agencies and governments are largely ignored and not recognized as a “jurisdiction” under the *Act* to allow for meaningful participation in decision-making.

Duty to Consult and Accommodate

- **The process for consultation under the *Act* should be explicit. The process should be flexible and allow for input from Aboriginal people who may be potentially affected by a project, but at a minimum require: flexible timelines; consultation as early as possible, such as in the scoping stage; the decision-maker to show how Aboriginal concerns were taken into account; and the duty to be discharged before approval is given.**
- **Consultation steps outside of EAs should be clearly laid out and should be flexible and involve the input of affected Aboriginal people.**

The Crown has been increasingly relying on regulatory bodies such as the Canadian Environmental Assessment Agency (“CEAA”) to fulfill its constitutional duty to consult. However, the *Act* is completely silent on the protection of section 35 rights except for the

⁷ *Act, supra* note 4 at section 18

⁸ *Act, supra* note 4 at section 32(2)

⁹ *Act, supra* note 4 at section 40(1)

statement that it will *promote* communication and cooperation with Aboriginal people with respect to EAs. If EAs are going to be relied on to fulfill portions of the constitutional duty to consult, then this process needs to be explicit in the *Act*. Further, if the EA is a component of the duty to consult, then Aboriginal participation should be as early as possible and not be rushed. Incorporation of Maliseet input has not matched the pace at which EAs have been completed or project applications have been approved. The input of the Maliseet should be gathered and incorporated at each stage of the EA process. The duty should be discharged before approval is given and the decision-maker should be required to show how concerns of Aboriginal people were taken into account. It is critical that the underlying decision-making be communicated to the Maliseet and other affected communities, and that the reasons be based on scientific *and* TEK. Finally, while hearing processes for EAs are important and can be relied on to fulfill *portions* of the duty to consult, they should not be relied on to fulfill the entirety of the duty. Simply put, hearing processes for EAs are not enough—merely sending in comments to a decision-maker and making presentations is not enough to meet the high standard that is required. Frequently, the Crown relies on steps taken outside of EAs to supplement the EA process. However, these further steps in consultation are often not clear. There should be a requirement for all consultation steps, including those in the EA, to be outlined prior to the commencement of the EA. The consultations steps outside of EAs should be flexible and Aboriginal groups that have the potential to be affected should also have a say in what form this process takes.

Capacity

- **In addition to intervener funding, on-going program funding should be provided to build capacity in Aboriginal communities.**

Robust EAs must involve meaningful and effective participation for Aboriginal people, including adequate funding for legal and technical expertise to assist with the different stages of the EA process.

Currently, funding is made available to Aboriginal people through the Participant Funding Program. The process to apply for such funding is cumbersome and the amounts awarded are typically meager and only in the context of a specific project. The funding often does not take

into account in any real way the capacity limitation that most Aboriginal groups face in engaging with and responding to projects. We are facing multiple projects in Maliseet territory and the administrative burdens of just dealing with the basic correspondence, meeting requests, etc. can be challenging. We frequently do not have the capacity to properly participate in processes. Much more effort needs to be put in to building capacity for Aboriginal people to be able to participate effectively in the many projects we face.

Compensation Fund for Impacts to Aboriginal and Treaty Rights

- **A fund should be established to compensate Aboriginal people when Aboriginal and treaty rights are affected.**

Clear and Explicit Decision-Making Criteria

- **There needs to be clear and explicit decision-making criteria in the *Act*. Specifically, there needs to be clear and explicit decision-making criteria for the “significance” and “justification” determinations. At a minimum, the decision-maker should be required to consider whether the project is likely to cause significant adverse effects on Aboriginal and treaty rights. The decision-maker should be required to take into account the concerns of Aboriginal groups in this assessment and should be required to demonstrate how the Aboriginal concerns were taken into account in this assessment. If the effects on Aboriginal and treaty rights are determined to be significant but justified in the circumstances, the Governor in Council should be required to show how the decision was made that significant effects to Aboriginal and treaty rights are justified.**
- **Project rejection should be a bona fide possibility in EAs.**

Under the current *Act* there is no clear criteria for making decisions about whether the project is likely to cause *significant adverse environmental effects*, or whether those effects are *justified in the circumstances*.¹⁰ Further, EA processes often seem like an insignificant procedural step—that approval is an inevitable conclusion and the EA process is done as expediently and haphazardly as possible to fulfill the bare minimum legislative requirements.

¹⁰ see sections 52(2) and 52(4) of the *Act*, *supra* note 4

Better Coordination and Management of Equivalent and Substitution Processes

- **There needs to be more expansive conditions for substitution and equivalency that provide clearer and more explicit decision-making criteria. Specifically, there needs to be more consideration of Aboriginal and treaty rights in the decision.**
- **The Minister and Governor in Council should be required to consider: the views of Aboriginal people on the substitution and equivalency; the opportunities for participation of Aboriginal people in the provincial EA and whether it is adequate; funding for Aboriginal participation and whether it is adequate; and whether the provincial EA will adequately consider and protect Aboriginal and treaty rights, including TEK.**

The Minister can substitute a provincial EA for the federal EA if of opinion that a provincial EA would be an appropriate substitute (and in fact is required to do so if requested by the province and satisfied of the appropriateness of the substitution). In making the decision of whether a provincial EA process should be substituted for the federal EA process, the Minister must consider the factors set out in section 19(1) of the *Act*; whether the provincial EA process allows public opportunities for participation and public access to records; and whether a report will go to the responsible authority and be made available to the public.¹¹ When the Minister approves of substitutions, the Governor in Council may exempt designated projects for the *Act* if satisfied that the provincial EA will determine whether the project is likely to cause significant adverse effects and will ensure implementation of mitigation measures, along with any other conditions the Minister may require.¹² While section 19(1) of the *Act* requires the Minister to consider certain effects on Aboriginal people, consideration of Aboriginal and treaty rights in making a decision on substitution and equivalency is largely absent.

Sustainability as a Requirement

- **Sustainability should be a requirement of the *Act* as opposed to merely being “encouraged”. Sustainability refers to the biophysical environment including the animal, fish and plant habitats that sustain the various species upon which Maliseet TU depends. Sustainability also refers to socio-economic sustainability related, for example, to the community infrastructure, services, personal and community well-being that must be sustained when projects are terminated.¹³**

¹¹ *Act*, *supra* note 4 at section 34(1)

¹² *Act*, *supra* note 4 at section 37(1)

¹³ The EA of the proposed Voisey’s Bay Mine and Mill project in northern Labrador had an explicit socio-economic sustainability mandate. “The impact statement guidelines developed for VBNC identified the sustainability

Scientific Rigour and Independence

- **A policy for the preparation of Environmental Impact Assessments (“EIAs”) should be developed. This policy should be equivalent to the CEEA’s policies on Follow-up and Adaptive Management, explicitly requiring the scientific testing of hypotheses and the collection and analysis of baseline data. For example, the Terms of Reference, Approval Conditions and Guidelines for the preparation of EIAs should be developed to explicitly require the collection and analysis of scientifically robust data. These data analyses should support the impact predictions.**
- **The policy should clearly describe how it will be implemented and enforced.**
- **The policy should include a requirement that the proponent provide scientifically credible evidence of the effectiveness of any mitigation measures to be used to minimize or reduce the impacts of a project.**
- **The policy should also require the proponent to demonstrate, through power analyses or other statistical means, that the data collected and analyzed are sufficiently robust to serve as baseline data in future monitoring programs that have the objective to measure environmental change.**
- **If the proponent is unable to collect and analyze data with sufficient rigour during the EIA and the decision-making process, the proponent should be required to demonstrate that they will be able, prior to construction, to collect and analyze data with sufficient rigour to serve as baseline data for future monitoring.**
- **Finally, the policy should clearly describe how Aboriginal communities would be given the option and capacity to partake in the scientific testing of hypotheses and the collection and analysis of baseline data.**

The Maliseet have serious concerns about the quality of science in EAs as it often falls short of providing decision-makers with the quality of data and analysis needed to evaluate projects.

To have a “*robust oversight*” requires that data and, more generally, empirical evidence are used in assessments. Having a robust oversight implies that the predictions made in an EIA can be tested in the future, but also that evidence must be provided to demonstrate that any proposed mitigation measure has been proven to be effective elsewhere. This is particularly important in the context of the concerns voiced by the Maliseet because we need to be assured that the proponent is held accountable for the predicted impacts on our lands, waters, resources, economy, TU, health, society and culture. Being accountable means that

criterion as a guiding principle for project development, noting that EIA should go beyond minimizing damage and require a project to maximize long-term, durable net gains” (see Bram F. Nobel and Jackie E. Bronson. 2005. “Integrating Human Health into Environmental Impact Assessment: Case Studies of Canada’s Northern Mining Resource Centre. *Arctic*. 58(4):401. (“Nobel and Bronson”))

environmental change caused by a project can be measured, and that the effectiveness of proposed mitigation can be tested.

The lack of explicit requirements for scientific analysis in the current EA process is true for both the project specific and the cumulative effects analyses.

In many cases, rigorous biophysical, socio-economic and health baseline data are never collected because it is not included as an explicit condition of either the EIA or the Approval. In essence, the regulatory guidelines and expectations are not clear and often lack prescriptions for how data should be collected and analyzed. As a result, proponents rebut the requests for better data and analyses.

One example is the rebuttal by Sisson Mines Ltd. for their Project No. 121810356, on March 27, 2014, when they provided responses to the Information Requests developed by the Maliseet:

[a] recurring theme in the MSES document is the opinion that the scientific methods employed in undertaking the EIA were not sufficiently comprehensive, robust, replicable, and verifiable. Again, both Northcliff and Stantec disagree with this premise, as is explained in response to many of the specific MSES concerns and comments. The methods employed in preparing an EIA, including the Sisson EIA, are intended to predict the potential environmental effects of a project as well as cumulative environmental effects; to identify mitigation to avoid or reduce those effects; to determine whether or not the residual effects are significant; and to establish follow-up, monitoring and management measures to ensure that a project will not cause significant adverse environmental effects. EIA methods are problem oriented, and are not intended to satisfy the demands of pure scientific research.¹⁴

This example response from a proponent is typical for many other projects we have been involved in, including the recent application for the Energy East Pipeline. In that project, the proponents essentially state that there are no regulatory requirements to provide better

¹⁴ Stantec Consulting Ltd. March 27, 2014. Sisson Project: Responses to Information Requests (IRs) Received on the Environmental Impact Assessment (EIA) Report, July 2013. Responses to Information Requests from Federal Government Agencies, Representatives of New Brunswick First Nations, and the General Public. Prepared for Sisson Mines Ltd. Project No. 121810356

scientific analysis, so they do not have to go into such details. For that reason, Terms of Reference, EIA guidelines, and regulatory approval terms and conditions need to provide clear expectations for scientifically credible analyses. On Assessing Cumulative Environmental Effects of Oil Sands Projects the Auditor General stated:

Fisheries and Oceans Canada, Environment Canada, and the [CEAA] did not adapt the terms of reference for subsequent [EAs] as a means of reducing gaps in the information needed to fully consider changing environmental conditions.¹⁵

Clearly, the Auditor General recognized the need for being more explicit when providing requirements and guidelines on how to develop more rigorous information in EIAs. While the CEAA produced a draft guideline for assessing cumulative effects,¹⁶ this draft guideline still lacks explicit expectations for the collection of robust baseline data and for scientifically credible analysis.

Regional Land Use Planning

- **Regional Land Use Plans should be developed regionally in collaboration with the federal and provincial Crowns and Aboriginal people in the region. They should aim to balance the development of lands, waters and resources with the protection of Aboriginal and treaty rights.**
- **Aboriginal people should be funded to participate in the development of these plans.**
- **All potential projects should be required under the Act to consider Regional Land Use Plans and how the project would fit within the Plan. If the project does not fit into the Plan, then it should not be approved.**

Cumulative Effects

- **There needs to be stronger requirements in the Act to consider cumulative effects, such as triggers that would require a cumulative effects assessment. Specifically, cumulative effects analyses should be required in areas which are known to have experienced considerable impacts and exploitation.**

¹⁵ Auditor General 2011. Chapter 2, Report of the Commissioner of the Environment and Sustainable Development; Office of the Auditor General Publications; Cat. No. FA1-2/2011-2E-PDF; ISBN 978-1-100-18520-0; ISSN 1495-0782 (“Auditor General 2011”)

¹⁶ Canadian Environmental Assessment Agency 2014. Technical Guidance for Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012; Catalogue No. En106-116/1-2014E-PDF; ISBN: 978-1-100-25181-3 (“CEAA 2014”)

- **An Agreement to scope the cumulative effects assessment can and must be developed with the affected Aboriginal group(s) that details how a cumulative effects assessment should be done very early in the conceptual stages of a proposed project. It must be done in a social-ecological approach. The Agreement needs to resolve, at a minimum:**
 - **how the Aboriginal group(s) needs to be involved;**
 - **what the ecological and social (including cultural and spiritual) parameters need to be;**
 - **how these parameters need to be addressed and measured;**
 - **what the temporal and spatial boundaries should be;**
 - **how the significance of environmental and social change will be defined; and**
 - **what the significance thresholds should be and whether or not the surpassing of thresholds can be mitigated.**
- **For this involvement to occur, Aboriginal people must first be granted funding and access to technical support. Then, as part of the Agreement, the required funding must be determined that would allow for continued participation of the affected community.**
- **The approach to cumulative effects assessment in Canada needs to be revamped and modernized as we now have tools that are readily available to measure environmental change over large areas and long timespans. The current guidelines for conducting a cumulative effects assessment are still largely based on Hegmann et al. (1999),¹⁷ which must be replaced to provide guidance on:**
 - **scientifically quantifying cumulative effects and calculating rates of environmental change from the past to the present, and into the future.**
 - **calculating trajectories of environmental change and relating them to any applicable sustainability thresholds (i.e. the level at which the renewable resource no longer meets the needs of future generations of Aboriginal people who engage in TU activities).**
 - **meaningful involvement of Aboriginal communities including the development of Agreements with affected communities for scoping cumulative effects assessments and determining sustainability thresholds.**

Assessment of cumulative effects is extremely important. Not only do project-level concerns of individual works need to be looked at, but the bigger picture also needs to be looked at. As already mentioned, the Maliseet never ceded or surrendered any of our rights to lands, waters or resources. But, due to the cumulative effects of projects and activities in our traditional territory, there are few accessible areas remaining for traditional uses and valued resources. This has caused significant challenges to the Maliseet people, our economy and our culture. Our

¹⁷ Hegmann, G., C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling and D. Stalker and AXYS Environmental Consulting Ltd. 1999. Cumulative Effects Assessment Practitioners' Guide. Prepared for: Canadian Environmental Assessment Agency. Prepared by: The Cumulative Effects Assessment Working Group. February 1999 ("Hegmann et al.")

use of lands, waters and resources, as well as our culture, traditions and way of life, continues to be threatened due to highly fragmented land uses and impacts. However, despite our Aboriginal title and the continual threats to our lands, waters and resources, cumulative effects are rarely assessed, and not assessed adequately. Proponents often do not assess the effects of projects that already have been carried out and there is often no meaningful information provided on how much and at what pace ecological degradation has progressed to the present date. By not taking cumulative effects more seriously, decisions are being made without acknowledging overall project impacts. This is allowing piecemeal infringement and ultimately, extinguishment of our Aboriginal and treaty rights.

Agreements on *how* cumulative effects assessments should be accomplished must be done very early in the conceptual stages of a proposed project. The scoping of a cumulative effects assessment is critically important and it must be done in a social-ecological approach and with the input from Aboriginal people. Aboriginal people must be asked how they need to be involved and must be involved in determining what ecological and social (including cultural and spiritual) parameters need to be addressed and measured as part of the design of a cumulative effects assessment. They need to determine the temporal and spatial boundaries, and they need to determine how the significance of environmental and social change is defined. They should also have a say in what the significance thresholds are and whether or not the surpassing of thresholds can be mitigated. For this involvement to occur, Aboriginal people must first be granted funding and access to technical support. Then, as part of the Agreement, the required funding must be determined that would allow for continued participation of the affected Aboriginal group.

The current guidelines for conducting a cumulative effects assessment are still largely based on an outdated guide that is devoid of any guidance for scientifically quantifying cumulative effects and calculating rates of environmental change from the past to the present, and projecting to the future.¹⁸ It also does not provide any meaningful guidance on involvement of Aboriginal communities. While we are aware that the CEAA produced a draft guideline for the preparation

¹⁸ See Hegmann et al., *supra* note 17

of cumulative effects assessments in 2014,¹⁹ this guideline fails the scientific process in that it still follows the outdated guide and the proponents do not appear to accept that the draft guideline is a document that is required to be followed. Further, the date for implementation, let alone enforcement, of this CEAA draft guideline is still open ended. Finally, the guideline is not explicit on the application of scientifically rigorous methods so the proponent often reads it as a suggestion that may or may not need to be followed. The approach to cumulative effects assessment in Canada needs to be revamped and modernized as we now have tools that are readily available to measure environmental change over large areas and long timespans.

Baseline Data

- **The Maliseet are currently developing our own institutional capacity to manage data that would result from such baseline research. This capacity will be applied to future land use planning, EA, and other purposes. The CEAA should endorse and support this capacity development and work with the Maliseet to fund and organize baseline data collection.**
- **Future EAs in Maliseet territory should be based on a thorough consideration of the comparative social science literature related to the impacts of industrial development on Aboriginal household economies, TU and other aspects of our societies and cultures.**

Baseline data are usually too poor in EAs to be useful in testing the predictions made, and in measuring environmental change. The authors of EAs usually argue that developing sufficiently rigorous baseline data requires funding, and that such funding can only be made available after the project is approved and the approval terms and conditions are known. However, typically the time between regulatory approval issuance and the start of construction does not allow for the collection of baseline data which would be rigorous enough to allow for adequate statistical analyses. No policy exists for the preparation of scientifically robust EAs that would inform the decision-making process.

Overall, the Maliseet would benefit from a number of baseline surveys that would prepare us better for future EAs. The Maliseet have only recently generated a regionally focused TU

¹⁹ CEAA 2014, *supra* note 16

dataset in the context of the EA of the proposed Energy East Pipeline project.²⁰

As noted by Elias,²¹ “Aboriginal communities in Canada have for decades been the object of research aimed at describing and defining the effects of industrial development on local culture.” However, in the vast majority of proponent-generated EA documents, the literature resulting from this research has not been referenced or used in impact prediction and the design of mitigation and monitoring programs.

Regional Data

- **Regional data should be available to the proponent and the affected communities so as to support empirical, scientifically rigorous analyses of environmental change in the region surrounding a proposed project.²² In making regional data available, at minimum, the following should be considered:**
 - **improve the management and warehousing of regional data.**
 - **coordinate data collections regionally, ideally provincially.**
 - **make data available to the public online.**
 - **include regional data on incidents and malfunctions to understand what the past effects were in any given study area, how they were mitigated, and what the risks are in the future.**

For a quantitative cumulative effects assessment to be possible, regional data must be available. Proponents are rarely willing or able to develop regional data, which they would need to calculate the cumulative changes on the landscape, in the water, or underground. For informative empirical cumulative effects analyses to be done, regional data should be available to the proponent and the affected communities so as to support analyses of environmental change from the past to the present to the future. For the analysis of impacts to TU it is fundamental to have empirical evidence on how traditional resources, access, travel routes, sacred areas etc. have been affected to date, and how they will be affected in the future. On *Assessing Cumulative Environmental Effects of Oil Sands Projects*, the Auditor General stated:

²⁰ Maliseet First Nations of Madawaska, Tobique, Woodstock, Kingsclear, St. Mary’s and Oromocto. 2016. Maliseet Traditional Use Study. Fredericton: St. Mary’s First Nation. Report to Energy East Pipeline Ltd. November (“Maliseet First Nations 2016”)

²¹ Elias, Peter Douglas. 2013. Review of the Sisson Northcliff Tungsten/Molybdenum Application: Socio-economics. Prepared for Third Party Reviewers, Management and Solutions in Environmental Science. August. (“Elias”)

²² Socio-economic (household economy, TU, TEK, etc.) data generated in Maliseet communities will be managed (warehoused, etc.) by the Maliseet alone. See below.

To assess the cumulative effects of a project, federal authorities need environmental data and scientific information regarding potentially affected ecosystems—for example, baseline data and information on carrying capacity. The departments need to be able to review and analyze a project proponent’s environmental impact statement, and to contribute to assessment reports produced by either the responsible authority or a joint review panel.²³

There is also an urgent need to improve the management and warehousing of regional data. The data needs to be regionally, ideally provincially, coordinated and made available to the public. A typical example of the failure to coordinate land-cover disturbance data is shown in New Brunswick’s data for crown land versus freeholder and private land. The level of detail is different and often held by separate parties which can be labour intensive to collect the information. Overall, this makes an analysis of cumulative effects in a region that spans both types of land virtually impossible. Land-cover data sets should contain, at a minimum, data on vegetation cover, hydrology, and anthropogenic footprints.

Once land-cover and anthropogenic disturbance data are made available, the analysis should include ecologically meaningful zones of influence (“ZOI”) around anthropogenic disturbances. These ZOIs should be included in calculations of effects on vegetation communities and wildlife habitat, but also the effects on Aboriginal people who engage in TU activities who may avoid industrial features from some distance.

Traditional Use²⁴

- **To develop the information on whether or not Aboriginal people can go elsewhere to practice their right, the proponent must engage with the Aboriginal communities**

²³ Auditor General 2011, *supra* note 15

²⁴ TU is a label of convenience for what is also referred to as “use-and-occupancy” (UO). TU/UO studies document resource use and landscape occupancy often using a map biography methodology. With respect to resource use this may include locations where Aboriginal harvesters killed big game such as moose or deer, small game such as snowshoe hare, birds such as Canada geese and ducks, fish such as Atlantic salmon and striped bass, and where they harvested berries, fiddleheads, medicine plants, firewood, fir boughs, and other earth resources. With respect to landscape occupancy this may include sites where Aboriginal people stayed overnight in cabins, tents, vehicles and other shelters, burial and gathering places, sacred sites, and other locations that are important for cultural, historical, spiritual or personal reasons.

closely because it is the rights holder, not the proponent or their consultant, who can determine the feasibility of practicing their Aboriginal and treaty rights elsewhere in light of past, present, and future developments in the region. We recommend:

- o the cumulative effects assessment should define areas that are open to TU;**
- o describe how the Aboriginal people engaged in TU activities can access areas that are open to TU in the baseline case;**
- o do the same for these areas in the future case; and**
- o discuss, if they were to shift the location of their practices, whether or not they might encroach on terrain used and occupied by another family or members of another Aboriginal community.**

TU is very much a regional cumulative effects issue. Regional land-use planning must involve the impact criteria definitions and significance determination by the affected Aboriginal communities. This is especially informative for understanding how much any given resource or TU activity has already been eroded, and whether or not a threshold has been reached. Proponents often believe, based on the professional opinion of their consultants, that the region surrounding the proposed project is large and that Aboriginal people engaged in TU activities can go elsewhere to practice their Aboriginal and treaty rights.

The proponents almost never show how much of the TU resources and livelihoods derived from them have been altered to date. This is a fundamental gap in the current cumulative effects assessment process that is required to understand the effects of any incremental alterations of traditional resources and livelihoods. We suggest that TU areas could be overlaid with vegetation and wildlife habitat quality mapping to understand how the places and resources used directly by land users would be impacted by a project (this should be done separate from the overall assessment of impacts on vegetation and wildlife resources).

To develop the information on whether or not Aboriginal people can go elsewhere to practice their Aboriginal and treaty rights, the proponent must engage with the Aboriginal communities closely because it is the rights holder, not the proponent or their consultant, who can determine the feasibility of practicing their rights elsewhere in light of past, present, and future developments in the region.

Traditional Ecological Knowledge²⁵

- **Aboriginal TEK should be a requirement of EAs, not just a recommendation or suggestion. This could be done by listing TEK as a factor that *must* be taken into account in EAs as opposed to a factor that *may* be taken into account.**

Traditional Ecological Knowledge and Environmental Assessments

- **While there are no best practices for the conduct of most aspects of TEK research, there are methodological and community engagement guidelines as well as guiding principles for TEK research in Aboriginal communities that should be followed.**²⁶
- **TEK research in Maliseet territory should involve competent (qualified) social science researchers who are familiar with TEK methodologies and relevant TEK literature.**
- **EA in Maliseet territory should avoid shotgun approaches where EA-related TEK research attempts to do too much, with too little time, human and financial resources, and with lack of clear scope, goals, and objectives. In order to improve the quality of EA-related TEK research and its integration with the science of EA, proponents, the CEAA, assessment panels and other relevant parties should work closely with Aboriginal groups such as the Maliseet to carefully develop the scope, goals, objectives, and to identify likely limitations of the TEK research.**
- **In order to ensure that TU and TEK research is conducted in a manner that documents our TU and TEK in an accurate and thorough manner, the Maliseet will undertake our own studies under the terms of protocol agreements or memoranda of understanding negotiated with proponents. Such studies will be financed by proponents, federal or provincial governments, and will be conducted according to best social science practices.**
- **Capacity building for Maliseet people with respect to the conduct of TEK research, and long-term data management to assist future land use planning and EA is a priority for the Maliseet people. The Government of Canada should work with the Maliseet on a plan to develop and finance this capacity.**

²⁵ The knowledge required for, and acquired in the process of, TU is known as “Traditional Ecological Knowledge” (TEK), which goes by a variety of other names including Traditional Knowledge (TK), Indigenous Knowledge (IK), Local Ecological Knowledge (LEK), Customary Ecological Knowledge (CEK), Inuit *Qaujimaqatuqangit* (IQ), and Aboriginal Traditional Knowledge (ATK). All of these are labels of convenience for practical, craft knowledge acquired through direct experience and by watching, listening to, travelling, and harvesting with more experienced people on the land and water (see Peter Armitage and Stephen Kilburn (2015. *Conduct of Traditional Knowledge Research—A Reference Guide*. Whitehorse, YT: Wildlife Management Advisory Council, North Slope) (“Armitage and Kilburn”); Peter J. Usher. 2000. “Traditional Ecological Knowledge in Environmental Assessment and Management.” *Arctic*. 53(2): 183-93 at 187 (“Usher”).

²⁶ Regarding TU (Use and Occupancy) research see Terry Tobias’ guidelines regarding the map biography survey method (2009. *Living Proof: The Essential Data-collection Guide for Indigenous Use-and-Occupancy Map Surveys*. Vancouver: Ecotrust Canada; Union of B.C. Indian Chiefs). While they are focused on TU, these guidelines can be adapted readily to the documentation of the spatial components of TEK as well. For useful methodological guidance concerning TEK research, see Armitage and Kilburn, *supra* note 25

- **All data generated in the context of TU and TEK research and EA is the Intellectual Property (“IP”) of the Maliseet people, as represented by our respective governments. Federal and provincial governments and proponents should recognize the status of Maliseet IP.**
- **All parties should be careful not to impose unreasonable expectations on Aboriginal communities with respect to what their TEK can provide in EA, while at the same time recognizing its potential for numerous relevant contributions.²⁷**

Across Canada, current TEK research standards vary greatly from one project to the next, and a significant amount of TEK research does not meet minimal data quality standards.²⁸

As noted by Armitage and Kilburn,²⁹ TEK research must be “governed by a statement of the overall area of inquiry, or scope (what will be studied) and constraints or limitations (elements in the area of inquiry that cannot or will not be covered). Once scope has been established, research usually is guided by a single aim or goal, and a series of objectives that more specifically define how the goal is to be achieved.” This is extremely important, because too often EA related research attempts to do too much, with too little time, human and financial resources. “Shotgun approaches” like this “result in poor quality data that do not satisfy the research objective or fail subsequent scrutiny. Research that is well designed has an appropriate research scope with methods tailored to a clear goal and objectives, in particular practical uses of the information, such as environmental monitoring, impact assessment and other co-management purposes”.³⁰ All too often, proponents dabble in TEK research in the most superficial manner simply to meet the minimal requirements of EA guidelines and their duty to consult with Aboriginal people. TEK data may be “cut and paste” into EIAs and other EA documents for the purpose of demonstrating attention to EA and consultation requirements. However, the data and their presentation in this manner may not be directly relevant to impact prediction, mitigation and monitoring.

One of the major issues of TU and TEK research in EAs is that it assumes that such research will be undertaken by proponents, or consultants hired by proponents. The issue, of course is

²⁷ For a quick summary of spatial and non-spatial components of TEK that may be relevant in EA, see Armitage and Kilburn, *supra* note 25 at 21

²⁸ Armitage and Kilburn *supra* note 25

²⁹ *supra* note 25 at 1

³⁰ Armitage and Kilburn, *supra* note 25 at 1

proponents are not trusted to prepare quality studies and effects assessment related to Maliseet TU and TEK.

All parties should be mindful of the fact that TEK, like science, has limits, and that there are knowledge domains where TEK has little if anything to contribute.³¹ Furthermore, as noted by Usher repeated observations of the environment over time are key to good quality TEK. “The circumstances that foster TEK are neither uniformly distributed nor permanent among [A]boriginal communities. In places where, for whatever reason, few if any members of the community have recent or current experience of a particular area or phenomenon, there may not be much TEK that will be useful to [EA].”³²

Aboriginal Guidelines on Traditional Ecological Knowledge

- **Proponents and their consultants and other parties involved in research related to Maliseet people must also commit to these ethics principles and best practices.**

The Maliseet are fully committed to doing research in an ethical manner consistent with the principles and best practices presented in *Draft Maliseet Ethics Guidelines, Ethical Principles for the Conduct of Research in the North* by the Association of Canadian Universities for Northern Studies, and the Tri-Council Policy Statement regarding *Ethical Conduct for Research Involving Humans*.³³

³¹ For example, see Cameron, Sydney A., Haw Chuan Lim, Jeffrey D. Lozier, Michelle A. Duennes, and Robbin Thorp. 2016. “Test of the Invasive Pathogen Hypothesis of Bumble Bee Decline in North America.” *PNAS Early Edition*. www.pnas.org/cgi/doi/10.1073/pnas.1525266113 (Accessed 9 Dec. 2016).

³² Usher, *supra* note 25

³³ See Association of Canadian Universities for Northern Studies. 2003. *Ethical Principles for the Conduct of Research in the North*. Ottawa: Association of Canadian Universities for Northern Studies. <http://acuns.ca/wp-content/uploads/2010/09/EthicsEnglishmarch2003.pdf> (Accessed 8 Dec. 2016); Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada. 2014. *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*. Ottawa: Secretariat on Responsible Conduct of Research, Government of Canada. December. http://www.pre.ethics.gc.ca/pdf/eng/tcps2-2014/TCPS_2_FINAL_Web.pdf (Accessed 8 Dec. 2016); Maliseet Nation Conservation Council Traditional Knowledge Working Group. 2009. Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol) including the Draft Maliseet Ethics Guidelines (Appendix 2). September. http://maliseetnationconservation.ca/wp-content/uploads/2014/05/FINAL-MTK-Protocol_20091.pdf (Accessed 8 Dec. 2016)

Intellectual Property

- **Provisions should be included in the Act or policies developed that require that all data generated in the context of TU research and EAs is the IP of the Maliseet people, as represented by our respective governments.**³⁴

Recognition of Aboriginal Worldviews

- **Aboriginal worldviews must be recognized and documented in EA processes because they are relevant to the way in which Aboriginal people conceptualize the risks associated with project impacts. They also provide the foundation for important ethical considerations related to these impacts, that is, the “moral or ethical statements about how to behave with respect to animals and the environment, and about human health and well-being in a holistic sense”**.³⁵

The CEAA Reference Guide Considering Aboriginal TEK in EA notes that “[i]n many situations, Western and traditional knowledge systems will be complementary in the insights that they can provide to EA practitioners, and thus they can be reconciled with one another in the EA. Where they cannot be reconciled, EA practitioners should juxtapose what is suggested by each knowledge system in their EA report and demonstrate how each type of knowledge has been considered in the EA”.³⁶ Empirical observations and causal explanations may or may not differ depending on whether they are derived from TEK or scientific methods. However, science and TEK are most likely to be irreconcilable in contexts where TEK-based observations and explanations are premised on the personhood or other-than-human status of animals and other

³⁴ See Weinstein’s discussion about First Nations’ concerns about IP and data sharing in B.C. Martin S. Weinstein. 1998. Sharing Information or Captured Heritage: Access to Community Geographic Knowledge and the State’s Responsibility to Protect Aboriginal Rights in British Columbia. Paper prepared for *Crossing Boundaries*, the Seventh Conference of the International Association for the Study of Common Property, Vancouver, British Columbia. 9-14 June 1998. <http://www.nativemaps.org/node/1421> (Accessed 23 Nov. 2016) (“Weinstein”)

³⁵ Usher, *supra* note 25 at 186; see also Fienup-Riordan, Ann. 2007. “Compassion and Restraint : the Moral Foundations of Yup’ik Eskimo Hunting Tradition. ” In *La nature des esprits dans les cosmologies autochtones*, edited by F.B. Laugrand and J. G. Oosten, 239-253. Quebec: Les Presses de l’Université Laval; Armitage, Peter. 2007. Innu Kaishitshissenitak Mishta-shipu: Innu Environmental Knowledge of the Mishta-shipu (Churchill River) Area of Labrador in Relation to the Proposed Lower Churchill Project. Report of the work of the Innu Traditional Knowledge Committee. Report to Innu Nation, Sheshatshiu. June. http://ceaa.gc.ca/050/documents_staticpost/26178/31993/se-ch-02.pdf (Accessed 9 Dec. 2016); see Maliseet First Nations, *supra* note 18 156-179

³⁶ Canadian Environmental Assessment Agency (CEAA). 2015a. Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the Canadian Environmental Assessment Act, 2012. March. <https://www.ceaa-acee.gc.ca/Content/C/3/C/C3C7E0D3-8DB1-47D0-AFC2-A8D4D1EFAAB3/ATK%20Reference%20Guide%20-%20EN%20-%20March%202015.pdf> (Accessed 7 Dec. 2016) (“CEAA 2015a”) at 6

non-human entities in the environment. Traditionally, Aboriginal people have “ensouled” animals, plants, and other entities, even inanimate ones such as rocks, and have granted them human if not superhuman physical and sentient powers. These other-than-human beings must be granted respect because humans maintain social relations of reciprocity with them, and because disrespect may endanger human well-being. This personhood premise amounts to a significant difference with science-based approaches which do not recognize any kind of ensoulment, be it human or otherwise.

Aboriginal Economy and Environmental Assessment

- **EAs must consider a far broader range of Aboriginal economic activities of which TU is an important part if impact predictions are to be accurate, and effects mitigation and monitoring are to be effective. A household (domestic, subsistence) economy model is the best conceptual framework for the study of Aboriginal economies because it focuses on household reproduction and the documentation of all factors that enter into this.³⁷**
- **In the same way that the CEAA has previously developed technical or reference guides/guidelines for the documentation and inclusion of TU and TEK in EAs under the Act,³⁸ the CEAA should also develop guidelines for the documentation and inclusion of household (domestic, subsistence) economy in EA. The CEAA should be assisted in this work by properly qualified social scientists with experience in research related to Aboriginal household economies.**
- **Future EAs in Maliseet territory should clearly identify the household (domestic, subsistence) economy as a valued component, and require its consideration in EA-related research, impact assessment, mitigation and monitoring.**
- **Future EAs involving Maliseet communities should require the generation of accurate, age and gender structured demographic data.**

³⁷ See: Berman, M.D. 1998. Sustainability and Subsistence in Arctic Communities. Presentation to the Western Regional Science Association annual meeting, Monterey, California.

<http://www.taiga.net/sustain/lib/models/synthesis/sld001.htm> (Accessed 7 Dec. 2016); Frederick H. Weihs Consulting and Sinaaq Enterprises Inc. 1993. A Review and Assessment of the Economic Utilisation and Potential of Country Food in the Northern Economy. A Paper Prepared for the Royal Commission on Aboriginal People. <http://data2.archives.ca/rcap/pdf/rcap-179.pdf> (Accessed 7 Dec. 2016); Usher, Peter J., Gérard Duhaime, and Edmund Searles. 2003. “The Household as an Economic Unit in Arctic Aboriginal Communities, and its Measurement by Means of a Comprehensive Survey.” *Social Indicators Research*, 61: 175-202

³⁸ CEAA 2015a, *supra* note 36; Canadian Environmental Assessment Agency (CEAA). 2015b. Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under the Canadian Environmental Assessment Act, 2012. Draft for public comment, December. https://www.ceaa-acee.gc.ca/Content/0/C/F/OCF7E820-8D50-41CE-B5EB-85284095FDC5/Current_use_Final_draft-eng.pdf (Accessed 7 Dec. 2016) (“CEAA 2016b”)

- **The CEAA processes and review panel guidelines should fully incorporate gender difference and require gender-based assessments of project impacts.**

EA research and assessment analysis related to Aboriginal economies is so limited in its scope and quality. Significant components of these economies are simply ignored in most EAs. For example, the Final Guidelines to the proponent in the joint federal-provincial EA of the proposed Sisson mine project in New Brunswick³⁹ state that the description of the existing environmental in the study area for the mine should consider *inter alia*:

Socio-economic environmental components, including demographic data (e.g., population and labour force), local economy, local services, past, current and foreseeable land use (including agriculture), zoning restrictions, the seasonal variations of fishing activities, archaeological and heritage resources, transportation and associated infrastructure. With specific reference to fisheries, the description must include a socio-economic profile of each identified fishery.⁴⁰

Henceforth, the proponent defined “labour and economy” in reference to:

the labour market and availability, employment, employment income and business income, and their aggregate environmental effects on taxes and such indicators as the provincial gross domestic product (GDP). Labour and Economy is a valued environmental component (VEC) because the Project will generate benefits to local, regional, and provincial economies during Construction and Operation through expenditures, employment, taxation, royalties, and other direct, indirect, and induced benefits to the local, regional, and provincial economies. These benefits will also result in potential adverse environmental effects from employment and spending that may require management to optimize overall benefit.⁴¹

This is typical of the way in which economy is conceived in contemporary federal and provincial EA, where the primary focus is on the wage-labour market, labour-force characteristics, the

³⁹ See Elias, *supra* note 21

⁴⁰ Government of New Brunswick. 2009. Final Guidelines for an Environmental Impact Assessment: Geodex Sisson Brook Project (Open Pit Mine). Issued by the Minister of Environment for the Province of New Brunswick to Geodex, 1 March 2009 at 14

⁴¹ Stantec Consulting Ltd. 2015. Sisson Project: Final Environmental Impact Assessment Report. Report to Sisson Mines Ltd. February

project's contribution to GDP, potential impacts on commercial fishery and other commercial activities that may interact with the project, monetary inputs to the local economy from construction and operations phases, taxation and royalty payments. The economies of Aboriginal communities within the project study area are treated in an extremely cursory manner, with little if any study, and a heavy reliance on data of highly questionable accuracy and completeness from Statistics Canada and provincial governments.

As far as the Maliseet are concerned, no in-depth, comprehensive study of our household, mixed subsistence-based economy has been undertaken in any context including EA, academic research, etc. With the exception of TU data which are heavily spatial in nature, data describing this economy are not available, nor are data that would elucidate the contribution of subsistence TU production to household reproduction.

Aboriginal Health

- **Health should be an integral part of any EA processes involving the Maliseet. It requires a consideration of both physical and social health impacts, “based on the recognition that human health and social and environmental well-being are inextricably linked”.⁴² No project should be approved in Maliseet territory unless it makes a positive contribution to our health conditions;⁴³**
- **Proponents and governments should commit to monitoring social health, quality of life, and other health issues during the operation phase once the EA is completed and project sanctioned.⁴⁴**
- **Health related data are currently distributed across a number of entities including Maliseet community health services, Health Canada and the Government of New Brunswick. In designing health related EA, all entities involved in Maliseet health would be consulted carefully and involved directly in research design. This is particularly important with respect to baseline health data, against which possible project impacts would be measured. EA practitioners would likely not be involved in effects mitigation and monitoring; rather this would fall to front-line agencies such as the Maliseet community health services and Health Canada. Useful baseline data would have to be established that would service long-term mitigation and monitoring needs.**

⁴² Noble and Bronson, *supra* note 13 at 401

⁴³ Noble and Bronson, *supra* note 13 at 401

⁴⁴ Noble and Bronson, *supra* note 13 at 402

Conduct of Studies

- **Agreements should be made with Aboriginal people to ensure their collaboration in studies required in EAs.**
- **A policy for the preparation of Agreements for collaboration with Aboriginal people on the conduct of studies should be developed. This policy should address:**
 - **the process of how and when Agreements would be developed,**
 - **how the Agreements would guide the roles and responsibilities of each party,**
 - **how the issues of capacity funding should be addressed, and how technical support for communities should be ensured.**

Three regulatory bodies (the CEAA, National Energy Board and the Canadian Nuclear Safety Commission) are responsible for conducting project EAs. They provide scoping guidance to the proponent when developing an EIA which assesses the potential impacts from a proposed project and concludes the significance of those effects following mitigation. The responsible regulatory authority then reviews all the information provided, including input from the public and Aboriginal communities, and prepares an EA Report.⁴⁵

Specific to the question surrounding who should conduct EIA research and author EIA reports, it is evident that the current system in which the proponent hires and oversees a consultant to conduct the EIA does not provide the information required by the Maliseet to understand and prepare for the impacts a proposed development would have on our lands, resources, communities and livelihoods. Specifically, proponents are not trusted to prepare quality studies and effects assessment related to Maliseet TU and TEK.⁴⁶ EA documents prepared by proponents are not objective scientific documents; they are the proponents' statements of potential project effects, and proposed mitigation and monitoring measures. Furthermore, given their contractual relationships with proponents and lack of experience with Aboriginal

⁴⁵ Government of Canada (GoC). 2016. Expert Panel Review of Environmental Assessment Processes: Submissions Guide. <http://eareview-examenee.ca/submissions-guide/>. Accessed December 2016

⁴⁶ See Weinstein's, *supra* note 34, discussion about First Nations' concerns about IP and data sharing in B.C. "From the point of view of First Nations, there are many difficulties with the information sharing process devised by the provincial government. The most obvious one is that it requires trusting the very agencies with which there has been a long record of conflict. In the lengthy history of powerlessness with government resource agencies, aboriginal communities frequently relied on the uniqueness of their knowledge for empowerment. For people with this history, the significance of transfer of knowledge outside of the oral traditional should not be taken lightly, let alone depositing it within the databanks of the other camp."

people, proponent consultants are not able to establish the kind of rapport required to undertake research in Maliseet communities.

An Agreement for collaboration would seal the roles and responsibilities of all parties involved (i.e. community, proponent, and regulator) at the early conceptual stages of a proposed project. Under such an Agreement, the community could do assessments of concerns specific to their needs, have input in the scoping and the methods applied in the EIA, and review the adequacy of the EIA. This approach would be the most practical because it would likely address the questions and requirements by all parties. Moreover, since the Agreement would be specific to each project, then the degree of involvement, the financial and technical requirements, and the process of overseeing the development of the EIA would be agreed to on a project by project basis. However, in order to ensure that a fair Agreement be developed, the CEAA would need to develop a policy and framework on the process of developing such agreements.

Assessment of Impacts on Aboriginal People

- **A policy for the assessment of impacts on Aboriginal peoples' livelihoods should be developed. This policy should require the proponent to ask the affected Aboriginal communities for their views on impact significance and to collaborate in the definitions of significance criteria. The policy should be explicit regarding how the proponent should use the assessment of impacts to biophysical parameters to inform the assessment of impacts to traditional livelihoods. This policy should include guidelines for proponents on integrating input from Aboriginal communities at each stage of the EA process, as well as guidance on how to communicate issue resolution (e.g. demonstrating how this input was or was not considered in an EIA).**

Impact significance needs to be defined by the affected Aboriginal communities. There is a lack of integration of the assessment in biophysical disciplines with the assessment of impacts to traditional livelihoods. For example, any given impact on an ecological parameter, even if it had the scientific merit we request, is not normally linked to the assessment of impacts to culture or TU. Normally, the authors of an EIA provide different volumes, one on the biophysical parameters and one on the human environment (including socio-economics and culture) without asking the affected Aboriginal communities "What does the biophysical impact mean to you?". The integration of the two volumes is often poor and typically does not involve the

input and the impact definitions from affected Aboriginal communities. This step is rarely done to the satisfaction of the Maliseet, because the proponent uses qualitative assessments that are often based on professional opinions, as opposed to data. The opinions are typically those of the professionals hired by the proponent, and do not reflect the view points, values and culture of the affected Aboriginal communities.

Project Monitoring

- **A policy for the preparation of EIAs should be developed. This policy should explicitly require that proponents be required to provide in the EIA a scientifically defensible monitoring program.**
- **Monitoring and enforcement under the Act needs to be strengthened. One way of doing this is allocating more monitoring and enforcement powers to Aboriginal groups along with resources/capacity support needed for Aboriginal people to effectively participate in monitoring and enforcing the Act.**
- **To assist with compliance, the participation and auditing of the follow-up and monitoring programs should be done under a co-management process. The process for participation and implementation of follow-up programs should be guided by the CEAA policies:**
 - **The currently existing policies on Follow-up and Adaptive Management.**
 - **The recommended policy herein for the assessment of impacts to Aboriginal Peoples' livelihoods, which needs to be developed.**
 - **The recommended policy herein for the preparation of Agreements, which needs to be developed.**
- **Compliance must be auditable. Government inspectors and Aboriginal community members engaged as rangers and various combinations of committees, government agencies, and community groups that would monitor and enforce compliance should be developed on a project-by-project basis because the environmental, logistical, and socio-economic conditions vary. Compliance and enforcement should be guided, at least in part, by the recommended policies herein for the assessment of impacts to Aboriginal Peoples' livelihoods, and for the preparation of Agreements, which need to be developed.**

Most proponents provide so few details of their monitoring plan that it is not possible to determine how effective the program will be in evaluating its success. Basic information is often lacking (e.g. sampling regime, data analysis, definition of success) and information provided is often vague. When asked for more details, the typical response from the proponent is that the monitoring plan is a conception document and more details will be provided after the project is approved. There seems to be no requirement that the proponent provide enough details such that the Maliseet can evaluate a monitoring plan's effectiveness prior to the project being

approved. Without more detailed information in advance of the project approval, it is not possible for the Maliseet to determine whether the monitoring program is adequate. Proponents should be required to provide in the EIA, a scientifically defensible monitoring program. These should be developed in co-operation with affected Aboriginal communities.

Section 53(1) of the *Act* states that if a decision-maker decides there are no significant adverse effects or the Governor in Council decides that significant adverse effects are justified, the decision-maker must establish conditions in relation to environmental effects. Per section 53(4), the conditions must include the implementation of mitigation measures that were taken into account in making the decision and the implementation of a follow-up program. Sections 89-102 of the *Act* also provide for administration and enforcement of the *Act*. Despite these provisions, the monitoring and enforcement under the *Act* is wholly inadequate.

The EA process requires the collection and analysis of empirical information that can be reviewed, reproduced, and audited. This is to satisfy the current CEAA policies on follow-up and monitoring which require that scientifically rigorous testing be done with the purpose to measure environmental change and to test the effectiveness of mitigation.⁴⁷ To date such scientifically rigorous testing has rarely been done, and it appears as though there is no mechanism to enforce the compliance with the CEAA's policies.

Public Database

- **There should be a public database for the status and result of follow-up measures and the proponent's compliance with conditions post-approval.**
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⁴⁷ CEA Agency (Canadian Environmental Assessment Agency). 2011. Operational Policy Statement; Follow-up Programs under the Canadian Environmental Assessment Act; Original: October 2002; Update: December 2011; Her Majesty the Queen in Right of Canada, 2011. Catalogue No.: En106-78/2011E; ISBN: 978-1-100-19750-0

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