

Form "A"

2016

IN THE MATTER OF: Section 137 of Chapter 1 of the Acts of 1994-95, the *Environment Act*

-AND-

TAKE NOTICE that the Sipekne'katik pursuant to Section 137 of the *Environment Act* appeals to the Minister the following decision: January 20, 2016 approval decision of Brad Skinner.

NOTICE OF APPEAL FORM

To:

The Honourable Margaret Miller
Minister of Environment
Nova Scotia Environment
PO Box 442
Halifax, NS B3J 2P8

PART I: INTRODUCTION

1. Sipekne'katik appeals a decision of administrator Brad Skinner, dated January 20, 2016, granting Alton Gas Natural Gas Storage Limited Partnership ("Alton Gas") approval to operate a brine storage pond.
2. The Province failed to fulfill its legal obligations of consultation and accommodation before granting the necessary approval for the operation of the Alton Gas Brine Storage Pond Project ("project") in Sipekne'katik traditional territory.

PART II: STATEMENT OF FACTS

3. On August 30, 2006, the Province met with Alton Gas regarding its proposal of developing an underground hydrocarbon storage facility in a series of engineered salt caverns near Alton. The key project features included buried pipelines from the area overlapping the salt formation to the Shubenacadie Estuary, at a distance of approximately 12 km, where water will be drawn to the facility near Alton with diluted brine returned to the Estuary during the cavern development process; and an underground natural gas storage facility.
4. Membertou Geomatics Consultants undertook a Mi'kmaq Ecological Knowledge Study ("MEKS") on behalf of Alton Gas in December 2006, for the purpose of identifying Mi'kmaq land and resource use activities that have or continue to be pursued by Mi'kmaq in the geographical areas being considered for development activities with regards to the Alton Gas storage project. The MEKS was attached as Appendix J to the Final Report – Environmental Registration for the Proposed Alton Natural Gas Storage Project, which was submitted to NSE.
5. The MEKS found that Mi'kmaq continue to undertake traditional activities throughout the study area, in a most significant manner. Such activities occur not only on much of the lands in the study area, but also throughout the waters found here as well. Specifically, the Shubenacadie and Stewiacke rivers play a key role in being the source of the resources that Mi'kmaq harvest, specifically all of the resources upon which the Mi'kmaq depend for food, social and ceremonial purposes.
6. Based on the amount of Mi'kmaq traditional use activity that is occurring in the study area, specifically on the Stewiacke and Shubenacadie Rivers, and in consideration of the activities that the company proposes to undertake with regards to these rivers, such as the withdrawal of water from the Shubenacadie and Stewiacke Rivers and putting the salted water or brine back into the rivers, the MEKS highly recommended that Alton Gas and the government meet with Mi'kmaq leadership to discuss the activities of the project in relation to the rivers, as the likelihood of infringements on Mi'kmaq use activities is highly possible.

7. On July 6, 2007 Alton Natural Gas registered an underground hydrocarbon storage facility project for environmental assessment.
8. On December 18, 2007, the Minister of Environment and Labour approved the Alton Gas project with certain terms and conditions that required for monitoring, plan development modifications, review, surveys, mitigation plans, and procedure development, which related to possible and unacceptable environmental affects as a result of the proposed project.
9. This approval was granted without any meaningful consultation with Sipekne'katik, formally known as the Shubenacadie Band.
10. One of the conditions required by the Minister was that construction for the project was to begin within two years of approval; there remains conflicting information whether Alton Gas did begin construction as required within the two years.
11. On July 10, 2012, Alton Gas registered the Alton Natural Gas Pipeline Project for environmental assessment.
12. From December 18, 2007 to March 5, 2013, Sipekne'katik participated in the Made in Nova Scotia process administered by Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMKNO"), wherein there was no consultation whatsoever regarding the location of the brine discharge into the Shubenacadie River.
13. On March 5, 2013, Sipekne'katik withdrew from the Made in Nova Scotia Process administered by KMKNO.
14. In a letter dated July 31, 2014, for the first time, the Nova Scotia Department of Environment ("NSE") wrote to Sipekne'katik claiming to "continue consultation" regarding the proposed Alton Natural Gas Storage and Pipeline project.
15. In a letter dated August 25, 2014, the NSE wrote to Sipekne'katik requesting an opportunity to discuss the concerns of the Sipekne'katik and to provide an update on the provincial permitting process.
16. On September 17, 2014, Sipekne'katik representatives met with provincial regulators (Office of Aboriginal Affairs, Department Natural Resources, NSE, Department Communities, Culture and Heritage and the Department of Agriculture) to discuss general concerns of the Alton Gas project.
17. There was no consultation whatsoever between Sipekne'katik and the Province between March 5, 2013 and September 17, 2014.

18. On September 23, 2014, Alton Gas met with Sipekne'katik and showed a presentation about the Alton Gas project.
19. On October 9, 2014, a Sipekne'katik representative visited the Alton Gas project site and observed that virtually all of the construction required for the operation of the brine pond had been completed.
20. On October 17, 2014, Sipekne'katik representatives met with NSE, Office of Aboriginal Affairs, Department of Fisheries Oceans and Alton Gas to discuss the project concerns relating specifically to fish and fish habitat.
21. On October 23, 2014, Sipekne'katik wrote to NSE expressing concerns about the environmental assessment, raising the following specific concerns:
 - Within the brine that is proposed to be released into the Shubenacadie River systems, there would be salt, sediment and potentially other chemicals used during the drilling process.
 - How will the temperature of this brine release impact the river systems?
 - How will the brine release impact the bank of the river?
 - Will a residue form along the river banks?
 - How far both upstream and downstream will the residue extend?
 - What impact will the residue have on fish and fish habitat?
 - What is the overall impact to the ecosystem this project as a whole may have, taking into account the brine holding pond, brine release to river, all pipeline construction and 3 underground natural gas storage caverns?
 - Both MEKS conclude the project area has both current and historic use. What weight is given to a MEKS? Loss of traditional fishing, hunting, and gathering and use sites is a concern.
 - What is the overall impact to the marine ecosystem this project as a whole may have, taking into account the brine holding pond, brine release to river, all pipeline construction and 3 (or 18) underground natural gas storage caverns?
 - What is the potential impact/toxicity to microorganisms/food for fish (Plankton)?
 - Regarding Atlantic Sturgeon, do raising salinity levels in the Minas Basin put recovery potential in jeopardy?
 - Regarding Striped Bass, Alton studies have found that variation in temperature, rainfall and wind all influence recruitment and survival. What is the impact from the water intake and brine release? Will reproduction be impacted by raised/different salinity levels?
 - There is concern for other species besides Striped Bass like Atlantic salmon, American eel, Atlantic sturgeon that are at risk. Are there studies for these other species?
 - Within the brine that is proposed to be released into the Shubenacadie River System, there would be salt, sediment and potentially other chemicals used

(drilling muds) during the drilling process. Is the chemical makeup of the salt formation known? What other minerals/chemicals may be found within?

- How will the brine release impact the bank of the river? Will a residue (buildup of salt, other chemicals) form along the river banks? What impact will the residue have on fish, fish food and fish habitat? How far both upstream and downstream will the residue extend?
- What is the impact of fine sediment and their influence on the hydro dynamics of the river?
- Is there certainty that the tide will 'wash' the brine 'away'?
- During construction, does sediment entering the river fall under Section 25 of the *Fisheries Act*?
- Does water pumped by hose into the river fall under Section 36(3) of the *Fisheries Act*?
- Who is responsible for the monitoring during construction? Which department is on the ground ensuring conditions are being met by the proponent? Has monitoring been done to date?
- What is the potential cumulated effect of this project in relation to other projects that exist in the Bay of Fundy?
- Is there a 3D model for brine discharge scenarios or emergency scenarios?

22. On October 24, 2014, a Sipekne'katik representative met with NSE to explain the concerns stated in the letter of October 23, 2014.
23. On November 10, 2014, Sipekne'katik representatives met with the Minister of Energy, KMKNO, Alton Gas and NSE regarding interests and concerns; at this meeting it was understood that KMKNO did not speak for Sipekne'katik and that consultation by the Province with Sipekne'katik was required.
24. At the meeting on November 10, 2014 Sipekne'katik representatives stressed that they had limited capacity to assess the scientific and technical aspects of the project and expressed the need for an independent study of the entire project.
25. In a letter dated April 23, 2015, Sipekne'katik wrote to NSE identifying specific concerns, questions and comments, with the intention of revising its letter of October 23, 2014.
26. KMNKO, without any involvement of Sipekne'katik, retained Conestoga-Rovers & Associates ("CRA" later "GHD") to review the Environmental Assessment Registration report and associated documentation for the proposed Alton Gas project, with funding provided by Alton Gas. The CRA produced the Alton Gas Third Party Literature Review in July of 2015. Sipekne'katik was not provided with an opportunity to have any say

whatsoever regarding the terms of reference for the independent review, the selection of the independent reviewer, or the mandate of the independent review.

27. In two separate letters, both dated June 29, 2015, the NSE responded to the Sipekne'katik letters of October 23, 2014 and April 23, 2015.
28. Based on comments made by an Alton Gas representative at the community meeting in Millbrook, Nova Scotia, it is suspected that in July 2015, Alton Gas drilled a fourth cavern because one of the previous three caverns had failed.
29. Further, in 2014 a dyke constructed for the purpose of the extraction of water from the Shubenacadie River and the discharge of brine into the river was compromised as a result of work conducted by Alton Gas without a permit.
30. In neither of these two circumstances was Sipekne'katik officially informed or consulted.
31. On July 31, 2015, Sipekne'katik received a copy of the independent third party review undertaken by CRA. This was the first time serious attention was given to the concerns regarding the location and the discharge of the brine discharge into the Shubenacadie River system.
32. The project sample studies of Alton Gas would not find Tommy Cod eggs or larvae at the project site because they spawn in winter months and therefore were not present during the project sampling which took place during the spring and summer.
33. In two separate letters, both dated September 29, 2015, NSE wrote to Sipekne'katik further to the questions and concerns raised regarding the Alton Gas project and the Alton Gas Pipeline project further to the NSE letter of June 29, 2015.
34. Sipekne'katik representatives attended and participated as observers at the Alton Gas Technical Science meetings on September 9, 2015, October 2, 2015, October 14, 2015, October 26, 2015, November 10, 2015, November 20, 2015, and December 3, 2015.
35. In letters to the Province in January 2016, Sipekne'katik Chief Copage has raised a concern regarding the mitigation measure of refining the brine, or desalinization, which has not been accepted by Alton due to the cost.
36. In this correspondence, Chief Copage stressed that before any final decision regarding approval of the operation of this project, that both Sipekne'katik and the Millbrook First Nations demanded substantial, ongoing and satisfactory communication with their memberships and extensive engagement by Alton Gas and the appropriate regulatory bodies with the respective communities affected by this proposed project in order to uphold the Honour of the Crown.

37. These concerns of Chief Copage have been ignored.
38. On January 20, 2016, administrator Brad Skinner granted the approval to operate the brine storage pond project to Alton Gas.
39. On January 21, 2016, the Province of Nova Scotia announced that it would grant the permit to operate a brine storage pond under the *Environment Act* and that certain submerged Crown Lands would be leased to complete a dispersion channel and permission was granted to complete a dyke on Crown Land.

PART III: ISSUES

40. The issue to be determined in this appeal is as follows:
 - a. Whether the Province granted the approval to operate the brine storage pond pursuant to section 56(1) of the *Environment Act* contrary to section 35(1) of the *Constitution Act*, by failing to consult with and accommodate Sipekne'katik prior to granting the approval to Alton Gas.

PART IV: REASONS FOR APPEAL

a. Aboriginal Rights

41. Sipekne'katik claim, without prejudice to future claims, that the Mi'kmaq of Nova Scotia has an interest in all lands in Nova Scotia as the Mi'kmaq have never surrendered, ceded or sold Aboriginal Title to any lands and resources, and therefore have an interest in all the lands, waters and air in the Province.
42. The Mi'kmaq people continue to undertake traditional activities within the project area in a significant manner, and specifically in the Stewiacke and Shubenacadie Rivers. The traditional activities include relying on land and fishing for sustenance, medicinal, ceremonial and/or conservation purposes. Additionally, there is a right to commercial fishing, hunting, and gathering for a moderate livelihood.
43. Sipekne'katik is the second largest Mi'kmaq band in Nova Scotia, with more than 2,500 band members.

b. Crown has a Duty to Consult with and Accommodate Sipekne'katik

44. Section 35(1) of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK), 1982*, c11, affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. Section 35(1) has been interpreted as requiring that the Crown act honourably in its dealings with aboriginal peoples: *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
45. The Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honour of the Crown and must be understood generously. The Honour of the Crown requires that the Crown act in good faith to provide meaningful consultations with aboriginal peoples when the Crown has knowledge of the potential existence of an aboriginal right and conduct that might adversely affect it: *Haida Nation*.
46. The duty to consult and accommodate is part of the process of fair dealing and reconciliation: *Haida Nation* at para 32.
47. In making a decision to grant approval under the *Environment Act*, the Crown is required to respect legal and constitutional limits, which includes the Honour of the Crown and the duty to consult and accommodate.

c. The Duty to Consult with and Accommodate Sipekne'katik arose in 2006

48. A duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right and contemplates conduct that might adversely affect it": *Haida Nation*.
49. In *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, the Supreme Court of Canada broke down this test into three elements, as follows:
 - (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;
 - (2) contemplated Crown conduct; and
 - (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.
50. In the instant appeal, the duty to consult arose in 2006 because at that time the Province had actual knowledge of Sipekne'katik members aboriginal and treaty rights to hunt, fish and gather resources; Alton Gas proposed a project located on Sipekne'katik traditional territory, which required permits from the Province; and the Alton Gas project proposal may adversely affect the Sipekne'katik aboriginal and treaty rights to fish in the Shubenacadie River as the brine will be discharged in the primary spawning area of the striped bass.

d. The Content and Scope of the Duty of Consultation and Accommodation Owed to Sipekne'katik was Significant because Sipekne'katik has Established Rights at Stake

51. As was explained by the Supreme Court of Canada at paragraph 43-44 of *Haida Nation*, the content of the duty to consult and the kinds of duties that may arise in different situations varies and depends on the strength of the claim and the potential level of impact on the asserted right:

...the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice...

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required...the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.

52. In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, the Court considered the duty to consult and accommodate in the context of an established claim:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when the provinces enact hunting and fishing regulations in relation to aboriginal lands.

(Emphasis added)

53. The aboriginal and treaty rights of the Mi'kmaq people to continue to obtain necessities through fishing was confirmed by the Supreme Court of Canada in *Simon v the Queen*, [1985] 2 SCR 387. The breadth of the aboriginal and treaty rights of the Mi'kmaq people to fish was confirmed and extended by the Supreme Court of Canada in *R v Marshall*, [1999] 3 SCR 456.

54. At page 405 of the *Simon* decision, the Supreme Court recognized that the Treaty of 1752 was entered into for the benefit of the Crown and the Mi'kmaq people "to maintain peace and order as well as recognize and confirm existing hunting and fishing rights" of the

Mi'kmaq people. The Supreme Court also recognized that the Treaty of 1752 continues to be in force and effect, and hunting and fishing rights protected by the Treaty have not been extinguished: *Simon* at para 36.

55. The Mi'kmaq signatories of the Treaty of 1752 were described as inhabiting the eastern coast of Nova Scotia, and the Treaty applied to members of the Shubenacadie Indian Brook Band: *Simon* at para 43.
56. The MEKS shows intensive aboriginal use of the Shubenacadie River and indicates that the Shubenacadie River is culturally, historically and spiritually connected to Sipekne'katik members.
57. Therefore, deep and meaningful consultation, as well as accommodation, was owed to Sipekne'katik starting in 2006, prior to the approval decision of January 20, 2016.
- e. The Province has Failed to Accommodate and Engage in Deep and Meaningful Consultation with Sipekne'katik**
58. In *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204, the Federal Court held that if consultation is to be meaningful, it "cannot be postponed until the last and final point in a series of decisions."
59. As stated above, the Province's duty to consult and accommodate Sipekne'katik arose in 2006, when the Alton Gas project was proposed. Sipekne'katik was not engaged in consultation until July 31, 2014. Meaningful consultation requires early consultation.
60. The fundamental concerns of Sipekne'katik relate to the location of and the release of brine discharge in the Shubenacadie River and its impact on its aboriginal and treaty rights to fish for food, ceremonial and social purposes as well as any commercial fishing, hunting, and gathering for a moderate livelihood have never been addressed.
61. The Crown is required to engage in consultation from the earliest phases of a project: *Squamish Nation et al v The Minister of Sustainable Resource Management et al*, 2014 BCSC 1320.
62. Although NSE was aware of the potential environmental impact of the Alton Gas project in 2007, the Province did not seek to engage the Sipekne'katik until the third party independent literature review, when most of the project was completed and there was no serious consideration of the Sipekne'katik concerns.
63. Sipekne'katik was not appropriately consulted with or accommodated through the third-party independent literature review by CRA. The review was completed in 2015. The Province was aware that it had an obligation to consult with Sipekne'katik independently of KMNKO in March of 2013. The Province was required to consult with both Sipekne'katik

and KMNKO, and perhaps more so with Sipekne'katik because they are the Mi'kmaq group that is most affected by the Alton Gas project. Sipekne'katik was not permitted to have any input regarding the third party independent review, such as the terms of reference, the selection of the independent third-party reviewer, or the mandate of the independent third-party review.

64. No meaningful consultation about the project with Sipekne'katik was ever conducted by the Province about the choice of the striped bass spawning grounds as the location for the discharge of brine into the Shubenacadie River.
65. The Province engaged with Sipekne'katik about the operation of the brine pond and discharge of brine into the Shubenacadie River only in the fall of 2015 when the project was far advanced in approvals and actual construction, including construction of the brine pond itself.
66. Although the Province recognized its duty to consult Sipekne'katik in 2013, the only serious effort to consult after that time was in technical meetings in the fall of 2015 which were based entirely on the third party literature review and Alton's response to it despite the objections and concerns of Sipekne'katik about the failure of the Province to consult Sipekne'katik on the terms of reference, funding and the limited mandate of the third party review to not include new independent science.
67. The Province treated consultation with Sipekne'katik as a one way process of providing information gathered from Alton Gas and the third party without ever adequately considering the importance of the Shubenacadie River to the aboriginal and treaty rights of the members of Sipekne'katik specifically.
68. The timing and the nature of the consultations by the Province with Sipekne'katik about the discharge of brine from the brine pond into the Shubenacadie River rendered those consultations virtually meaningless and inadequate to meet the duty of the Crown to consult with Sipekne'katik over the impact of the discharge of brine into the River on the aboriginal and treaty rights of Sipekne'katik. The Province therefore acted contrary to section 35(1) of the *Constitution Act*, by failing to act honorably in its dealings with Sipekne'katik.

PART V – CONCLUSION

69. Sipekne'katik submits that the Province failed to fulfill its legal obligations of consultation and accommodation before granting any necessary approval for the operation of the Alton Gas brine storage pond project ("project") in Sipekne'katik traditional territory.

70. Sipekne'katik respectfully requests that the Minister set aside the approval decision of Brad Skinner dated January 20, 2016, and engage in the appropriate consultation and accommodation of the Sipekne'katik interests and concerns relating to the Alton Gas project.

PART VI – RELIEF SOUGHT

71. A stay of the approval decision until the final resolution of the appeal.
72. In paragraph 47 of the *Haida Nation* decision, the Supreme Court held that accommodating aboriginal interests may require the government to take steps to avoid irreparable harm:

Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.

73. The principle was also stated in *Sambaa K'e Dene First Nation*, where the Federal Court held that "meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringements of Aboriginal interests pending their final resolution."
74. The approval decision of Brad Skinner dated January 20, 2016 should be set aside.

All of which is respectfully submitted this 18 day of February, 2016.

original signed

Counsel for the Appellant
Sipekne'katik
James Michael