

**ASSEMBLY OF  
NOVA SCOTIA  
MI'KMAQ CHIEFS**



**Kwilmu'kw Maw-klusuaqn Negotiation Office  
Mi'kmaq Rights Initiative**

Our Rights. Our Future.

**Assembly of Nova Scotia Mi'kmaq Chiefs &  
Kwilmu'kw Maw-klusuaqn Negotiation Office  
Submission to the National Advisory Panel  
on Marine Protected Area Standards**



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Please accept this as the submission of the Assembly of Nova Scotia Mi'kmaq Chiefs and the Kwilmu'kw Maw-klusuaqn Negotiation Office on Marine Protected Areas (MPAs). This submission will address six issues:

- a. who we are and our interest in MPAs;
- b. responses to the questions asked by the Panel in the Written Submission guidelines;
- c. concerns regarding Consultation and MPAs already and to be designated;
- d. concerns about the potential effects of MPAs on Mi'kmaw Food Social and Ceremonial (FSC), commercial and treaty-based fisheries;
- e. concerns regarding the proposed National Advisory Committee on MPAs and ensuring local and regional and Mi'kmaw representation and input; and,
- f. recommendations for going forward.

## **Who We Are and Our Interest in MPAs**

The Mi'kmaq of Nova Scotia have a general interest in all lands and resources in Nova Scotia and in the offshore as we have never surrendered, ceded, or sold our Aboriginal title to any of our lands and waters. We are traditionally a people of the water and we continue to rely on fish for Food, Social and Ceremonial (FSC) purposes and to provide us with the moderate livelihood promised in the Treaties of 1760-1761 — as yet unimplemented 19 years after the decision in *R. v. Marshall*.<sup>1</sup> We engage in commercial fisheries through Aboriginal communal commercial licences to support our families and communities. Consequently, any legislation, regulation, policy or guideline which affects marine areas, fish, fish habitat, or the fisheries is of grave concern to us. Nova Scotia and Canada are aware of and acknowledge the title and rights claims of the Mi'kmaq and that any potential impacts to rights and title are subject to the duty to consult.<sup>2</sup>

The Assembly of Nova Scotia Chiefs is an unincorporated association consisting of all 13 Chiefs of the 13 Mi'kmaw First Nations in Nova Scotia. It meets on a monthly basis to deliberate on issues common to all 13 Mi'kmaw communities and is the guiding body for all such issues affecting the Mi'kmaq in the Province. This includes providing direction in the “Made-in-Nova Scotia” negotiation process concerning Mi'kmaw Aboriginal and treaty rights and Mi'kmaw title governed by the Framework Agreement entered into by Canada, Nova Scotia and the Mi'kmaq on February 23, 2007. The Assembly also has delegated authority from 11 Chiefs and Councils to conduct formal consultation with the Crowns under the Terms of Reference for a Consultation Process.

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<sup>1</sup> [1999] 3 SCR 456, 1999 CanLII 665 (SCC).

<sup>2</sup> On 31 August 2010, the Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process were signed by the three levels of government. Available <http://mikmaqrights.com/consultation/tordocument/>.

Two communities, Millbrook First Nation and Sipekne'katik First Nation, have opted to conduct their own consultations.

The Kwilmu'kw Maw-klusuaqn Negotiating Office (KMKNO) is also known as the Mi'kmaq Rights Initiative. Kwilmu'kw Maw-klusuaqn means 'we are seeking consensus'. Our role is to support the ANSMC and the Mi'kmaw Negotiating Team in the negotiating process. Our mission is to address the historic and current imbalances in the relationship between Mi'kmaq and non-Mi'kmaw people in Nova Scotia and secure the basis for an improved quality of Mi'kmaw life. We also administer consultation activities on behalf of the Assembly and the 11 participating Mi'kmaw First Nation communities.

## **Responses to the Questions asked by the Panel in the Written Submission Guidelines**

Question 1: Experience around the world indicates that well-managed marine protected areas can help safeguard ecosystems and wildlife, rebuild fish stocks, and generate increased economic opportunities. What practical recommendations do you have for creating standards for marine protected areas?

- a. On what do you base these suggestions? Best available science, indigenous knowledge, ecosystem approach, local knowledge or something else?

Answer: Given the uniqueness of each MPA and the potential uses, our recommendations is that Canada develop processes for the co-development of standards and management objectives which prioritize Aboriginal rights and title; secure resources and habitat for Food, Social and Ceremonial and moderate livelihood fisheries; and, maintain sustainable commercial fisheries.

MPAs must incorporate Aboriginal knowledge and any standards must require that Aboriginal knowledge be part of the decision-making process. Mi'kmaw Conservation Group ([www.mikmawconservation.ca](http://www.mikmawconservation.ca)) has been gathering information from Mi'kmaw Elders and Knowledge Holders to identify a Mi'kmaw perspective on the proposed MPA Network for the Scotian Shelf and the Estuary and Gulf of St. Lawrence. The study will identify impacts on Mi'kmaw rights and title, specifically our Food, Social and Ceremonial fisheries, Moderate Livelihood fishery (as yet unimplemented) and our Mi'kmaw Commercial fishery. When complete, the information gathered can provide a Mi'kmaw perspective to inform the MPA decision-making process.

We take issue with the wording of "a." above. Your request suggests that Indigenous knowledge is

not the “best available science” or an “ecosystem approach”. With respect, Mi’kmaq have been protecting the environment and engaging in sustainable fisheries for thousands of years. Our knowledge is part of the best available knowledge which includes people (physically, culturally, spiritually) as part of sustainability. We have always exercised an “ecosystem approach” to our harvesting and ecosystem management.

**Question 2:** What role do indigenous approaches play in shaping your suggestions? What kinds of guidelines will help Canada to honour its commitments to reconciliation and new relationships with Indigenous peoples?

Answer: As Mi’kmaq, our teaching and worldview can be described through the concept of Netukulimk:

a complex cultural concept that encompasses Mi’kmaq sovereign law ways and guides individual and collective beliefs and behaviours in resource protection, procurement, and management to ensure and honour sustainability and prosperity for the ancestor, present and future generations.<sup>3</sup>

Netukulimk ensures that people obtain nutritious food and our communities achieve economic well-being “without jeopardizing the integrity, diversity, or productivity of our environment.”<sup>4</sup> For Mi’kmaq, the natural world is all linked together and if we ignore or permit the degradation or destruction of one element of the complex web linking the world together we fail to protect all

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<sup>3</sup> Prosper, K. , McMillan, L. J. , Davis, A. A. , Moffitt, M. (2011). “Returning to Netukulimk: Mi’kmaq cultural and spiritual connections with resource stewardship and self-governance.” *The International Indigenous Policy Journal*, 2(4), p.1. Retrieved from: <http://ir.lib.uwo.ca/iipj/vol2/iss4/7>, accessed 2018-07-18.

... the root “**ntuk**” refers to “provisions” in the broad sense of food, fuel, clothing, shelter and this would also include good health. Netukulit is the act of gathering these provisions by hunting, fishing, picking plants and berries and cultivation. Interestingly, the closest homophone is nutqw-(insufficiency) rather than pukw-(abundance); thus Netukulimk sounds more like “avoiding not having enough” rather than like obtaining plenty.

From: Anthony Davis, L. Jane McMillan and Kerry Prosper, “Seeking Netukulimk: Mi’kmaq Knowledge, Culture and Empowerment,” Powerpoint Presentation, 2010, available:

[http://www.msvu.ca/en/home/programsdepartments/BA/sociologyanthropology/meetus/anthonydavis/SRSF/mikmaq\\_knowledge/outcomes/presentations.aspx](http://www.msvu.ca/en/home/programsdepartments/BA/sociologyanthropology/meetus/anthonydavis/SRSF/mikmaq_knowledge/outcomes/presentations.aspx), accessed 2018-07-17.

<sup>4</sup> Unama’ki Institute of Natural Resources, “Netukulimk”, <http://www.uinr.ca/programs/netukulimk/> , accessed 2018-07-18.

resources. MPAs are a tool for conserving marine species and habitat. Conservation, as opposed to preservation, implies a balanced long term sustainable approach to harvesting and natural resource protection, which is consistent with the concept of Netukulimk. We believe that this review of Marine Protected Areas presents an ideal opportunity for the Panel and the Government to embrace Netukulimk and to ensure that going forward marine protection is grounded on principles of sustainability and prosperity for the present and future generations.

Only guidelines which respect and promote our constitutionally protected Aboriginal and treaty rights and Aboriginal title, including the rights of self-governance and to a moderate livelihood fishery, will ensure Canada honours its commitments to reconciliation and new relationships with Indigenous peoples. Mi'kmaw rights to an FSC and moderate livelihood fisheries are constitutionally protected and supersede any other statutory or international commitments. Any restrictions on our rights must be justified by Canada. To that point, total prohibition on their exercise rather than limited restrictions on our rights such as prescribing permitted harvesting techniques or imposing quotas cannot be justified. Our rights to both our FSC and treaty right moderate livelihood and our right to self-govern those fisheries must be respected.

Question 3: The IUCN has developed an existing structure to categorize marine protected areas. What do you see as the strengths and weaknesses of the IUCN Guidelines?

Answer: The Guidelines do not recognize the constitutionally protected Aboriginal and treaty rights of First Nations, Métis and Inuit, including our respective rights to self-governance.

Question 4: Overall, do the Guidelines developed by the IUCN work well in the Canadian context?

Answer: As we noted above any Guidelines which do not respect and implement our rights will not work. If Canada determines it wishes to adopt the IUCN Guidelines, then, if necessary, those Guidelines must be modified to explicitly recognize and provide for implementation of our rights.

Question 5: Are there specific circumstances unique to Canada that pose challenges or present opportunities for the use of the IUCN guidelines? What might these be? How should these circumstances be addressed?

Answer: Yes. There are specific circumstances unique to Canada. For Mi'kmaq and other First Nations, Métis and Inuit peoples, many have recognized or asserted but as yet unrecognized

Aboriginal title and rights, including title and rights in the offshore. Any Canadian guidelines must recognize and defer to the Aboriginal and treaty rights of the Aboriginal peoples of Canada as per s.35 of the *Constitution Act, 1982*.

To partially address these circumstances, we recommend that Canada commit to designating MPAs which are selected in partnership with Aboriginal peoples and which are developed and managed equally by the First Nation, Métis or Inuit partner and Canada. In the Atlantic, we recommend that Canada work with the Mi'kmaq of Nova Scotia to identify, develop and manage marine areas of significance to the Mi'kmaq of Nova Scotia.

### **Concerns About Consultation with the Mi'kmaq of Nova Scotia**

The current Liberal Government is fulfilling an election promise by meeting international obligations to conserve 10% of coastal and marine areas by 2020. The designation of MPAs may restrict activities, including fishing, in the selected areas. Our constitutionally protected Food, Social and Ceremonial fishery may be affected as well as the implementation of our treaty right to a livelihood fishery in designating further Marine Protected Areas. The Mi'kmaq need processes to ensure they are involved in the development of objectives for MPAs.

As early as 2010 we expressed concern about the Crown's approach to constitutionally mandated consultation in relation to MPAs. (While consultation is the first step, we seek full implementation of co-management of MPAs to ensure full protection of our rights and title.)

In July 2016, DFO led a regional peer review session to develop criteria for identifying candidate areas for MPAs. The criteria were to be based on current DFO data and no new studies were completed. Feedback from scientists indicated that the data is suspect in some areas but it was all DFO had. We submit that the criteria to develop and design the MPAs is therefore problematic.

In November 2016, KMKNO, Unama'ki Institute of Natural Resources, Membertou First Nation, and the Atlantic Policy Congress of First Nation Chiefs met with DFO to discuss MPAs. By then, DFO had finalized the selection criteria and was exploring areas for designation as MPAs. At the meeting, DFO tabled a draft letter to be sent to each community providing information and seeking traditional knowledge from interested community members. In December 2016, DFO provided KMKNO with a meeting record and extended the timeline to June 2017 for review of the MPA network document.

DFO met with us again on 2 May 2017 at which time we discussed, *inter alia*, data used by DFO to determine ecological values and conservation requirements; a plan to assess potential effects on Mi'kmaw rights and title when determining whether or not to declare an area as an MPA; developing a strategy for MPA management which identifies potential opportunities for the Mi'kmaq of Nova Scotia to collaborate and be integrated into the MPA planning process; and, examining science and technology to identify potential opportunities for the Mi'kmaq of Nova Scotia to collaborate and be integrated into the study and monitoring of MPAs.

In a further meeting with DFO in May of this year, we reiterated our concerns and our concerns with the consultation process with respect to the MPA Network Plan, both for the draft network design and the site specific consultations on the three areas proposed for 2020. It is critical that DFO work collaboratively with our office on behalf of our Mi'kmaw communities on the implementation of the MPA final design and designation, particularly with respect to the activities that will be permitted within these designated areas. DFO has made no attempt to respectfully discuss Mi'kmaw traditional knowledge and how it can inform the MPA designation process, despite its public assertions to the contrary.

We understand that DFO and the Nova Scotia Department of Energy and Mines, tasked as the lead department for MPAs, are presently engaged in senior level discussions. The ANSMC and Mi'kmaw groups have not been included in these meetings. The Mi'kmaq have an elevated legal position because of our constitutionally protected rights and title. Therefore our concerns and our input should have a greater weight in the decision making process than those of, for example, non-Mi'kmaw commercial fishers. If the senior level discussions are not inclusive then all levels of government will not have an opportunity to provide equal input and contribute knowledge to the MPA process. The finalized plans for the Marine Protected Area Networks cannot have any unjustified impacts on current and future rights holders. Without participation in the senior level discussions, there is a clear danger that our rights and title will be affected without our knowledge.

In the meetings and discussions on MPAs being conducted by the Mi'kmaw Conservation Group, Mi'kmaw right holders have expressed concern about the role of industry in MPAs. The Province of Nova Scotia has the authority to engage with industry and license holders. The mandate of the newly created Department of Energy and Mines, according to its website, "will also provide opportunities for the energy and mining files to explore collaborative opportunities to better

promote the province's energy and mineral resources.”<sup>5</sup> The economic ties between industry and the Province, raise concerns that the relationship between industry and the Province will take precedence over the relationship between the Mi'kmaq and the Province. From a reconciliation perspective, the Federal Government may need to step in to ensure Aboriginal and treaty rights and Aboriginal title are not ignored.

Mi'kmaw communities, fisheries officers, technicians and scientists have repeatedly advised DFO that while protecting the marine environment is a good thing, there are details that need to be discussed to ensure there are no impacts on Mi'kmaw rights and title. Many of our concerns have been ignored. All fish and fisheries decisions, including habitat protection, have the potential to affect Mi'kmaw rights triggering the Crown's duty to consult and thus the Crown must fulfill its duty to consult throughout the MPA planning and designation process.

It is our expectation that consultation will continue on MPAs and further marine management, including but not limited to conservation, co-management, research, species at risk, archaeology, commercial fisheries, FSC fisheries and the Mi'kmaw right to a livelihood fishery. We will continue to work with DFO collaboratively.

## **Concerns About Mi'kmaw Fisheries – FSC, Moderate Livelihood and Commercial**

While we generally support the concept of MPAs and the conservation and protection of our marine environment, it is critical that this Panel and DFO be reminded that the Mi'kmaq of Nova Scotia have both established and asserted Aboriginal and Treaty Rights and title. We have established rights and should be able to access waters where we have historically and traditionally harvested. To be clear, DFO should not impose restrictions or limitations on what the Mi'kmaq of Nova Scotia can harvest in MPAs. The Mi'kmaq of Nova Scotia will design and implement a process to determine how and what to fish in MPAs. We have repeatedly demonstrated that Mi'kmaq do not fish where conservation is at issue. We will collaborate with Canada in designing our fisheries regime.

If the designation and management of an MPA will restrict our access to fisheries, then accommodations must be explored in advance to address our loss of the ability to exercise our rights. Any restriction to our fisheries must be justified by the Crown.

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<sup>5</sup> See <https://energy.novascotia.ca/>.

In addition to our constitutionally protected FSC and moderate livelihood fisheries, Mi'kmaq of Nova Scotia also engage in Aboriginal commercial communal fisheries. At present there are two MPAs off Nova Scotia: "The Gully," with an area of 2,364 km<sup>2</sup> lying about 200 km off the coast of Nova Scotia, east of Sable Island and St. Anns Bank Marine Protected Area with an area 4,364 km<sup>2</sup>. Commercial fishing will be restricted in Zone 1 of the St. Anns Bank MPA, which comprises approximately 75% of the Area. Research and scientific study and "Aboriginal" (FSC) fishing will be permitted in Zone 1.<sup>6</sup> Two other areas designated as Areas of Interest – Fundian Channel-Browns Bank and Eastern Shore Islands<sup>7</sup> – are also areas of importance for Mi'kmaw fisheries. DFO studies have identified the Cape Breton Trough, part of the Gulf of St. Lawrence Bioregion, which encompasses Area 19 Snow Crab Fishing grounds, as a potential area of interest.<sup>8</sup> A number of Mi'kmaw communities rely heavily on the snow crab fishery in the Trough area. We urge that Site 48, the Cape Breton Trough, be removed from the map and that DFO not pursue Site 48 as an AOI. DFO must work to address the socio-economic impact on the Mi'kmaq in the triage process. In the event this area is currently being considered for protection for other purposes, we trust the Mi'kmaq will be consulted well in advance of any decision.

## **Concerns Regarding the Proposed National Advisory Committee on MPAs and Ensuring Local and Regional and Mi'kmaw Representation and Input**

While the concept of a National Advisory Committee is helpful to ensure a national perspective on the creation and management of MPAs, we are concerned that without strong regional and Aboriginal representation on the Committee, local knowledge and concerns will be lost in the effort to create a pan-Canadian approach to MPAs. We recommend that any National Advisory Committee ensure broad representation from each of the areas – Atlantic, Pacific, and Arctic – on the National Committee. We further recommend that regional and Aboriginal committees be established which provide advice and support for the National Committee.

As the National Committee continues its work and if it determines that an area no longer requires a MPA designation, the Committee's mandate should include a provision that stipulates Mi'kmaq

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<sup>6</sup> Elizabeth McMillan, "DFO finalizes marine protected area off Cape Breton," CBC, 8 June 2017, <http://www.cbc.ca/news/canada/nova-scotia/st-anns-bank-protected-area-cape-breton-1.4151602>

<sup>7</sup> See: <http://www.dfo-mpo.gc.ca/oceans/aoi-si/index-eng.html>.

<sup>8</sup> Andrea Gunn, "Proposed marine park raises crabbers hackles," *Chronicle Herald*, 6 February 2017, <http://thechronicleherald.ca/novascotia/1439479-proposed-marine-park-raises-crabbers-hackles>.

or other Aboriginal groups will be the sole managers of the MPAs within their respective traditional territories that no longer meet the objectives for which these MPAs originally intended. For example, if an MPA was designated to protect a specific species or region and that species dies out within the MPA or moves away, then there is reason for creating the MPA no longer exists. At that point Aboriginal groups should become the sole managers of that formerly protected area for exclusive use of Mi'kmaq or other Aboriginal group pursuant to our or their proven or asserted aboriginal title or rights.

## **Recommendations:**

We urge this Panel to recommend to the Crown that:

1. Canada develop processes for the co-development of standards and management objectives which prioritize Aboriginal rights and title; secure resources and habitat for Food, Social and Ceremonial and moderate livelihood fisheries; and, maintain sustainable commercial fisheries.
2. MPAs must incorporate Aboriginal knowledge and any standards must require that Aboriginal knowledge be part of the co-development process.
3. Canada embrace Netukulimk and to ensure that going forward marine protection is grounded on principles of sustainability and prosperity for the present and future generations.
4. Canada respect and implement our treaty right to a moderate livelihood fishery and incorporate consideration of all our Aboriginal and treaty rights and title in the planning for and management of Marine Protected Areas. MPAs should permit the Mi'kmaq of Nova Scotia to exercise their right to fish for food, social and ceremonial purposes. MPAs should permit the Mi'kmaq of Nova Scotia to fish for a moderate livelihood where conservation is not an issue.
5. Canada engage in meaningful consultation on MPAs under the Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference (TOR) as ratified on August 30, 2010.
6. Remove all limitations or restrictions for the Mi'kmaw rights-based fisheries.
7. Canada ensure the Mi'kmaq of Nova Scotia are meaningfully involved in the science related to MPA's by committing resources to the KMKNO Consultation Department, and Mi'kmaw

science bodies such as the Mi'kmaw Conservation Group and the Unama'ki Institute of Natural Resources to permit these groups to undertake the necessary research to fully participate in discussions with DFO and other government departments. Continued resources must be provided to the Mi'kmaq of Nova Scotia for mapping, monitoring, research and data collection, planning and implementation.

8. Canada work with the Mi'kmaq of Nova Scotia to ensure that Mi'kmaw traditional knowledge informs the site selection and management objectives for Marine Protected Areas. Canada must embrace *Etuaptmumk* or Two-Eyed Seeing — seeing from one eye with the strengths of Indigenous knowledge and ways of knowing, and from the other eye with the strengths of Western knowledge and ways of knowing and learning to use both eyes together for the benefit of all.
9. Canada commit to designating MPAs which are selected in partnership with Aboriginal peoples and which are developed and managed equally by the First Nation, Métis or Inuit partner and Canada. In the Atlantic, we recommend that Canada work with the Mi'kmaq of Nova Scotia to identify, develop and manage marine areas of significance to the Mi'kmaq of Nova Scotia.
10. Site 48, the Cape Breton Trough, be removed from the map and that DFO not pursue Site 48 as an AOI.
11. Where the designation and management of an MPA will restrict our access to fisheries, then accommodations must be explored in advance to address our loss of the ability to exercise our rights.
12. Any National Advisory Committee include broad representation from each of the areas – Atlantic, Pacific, and Arctic – on the National Committee.
13. Regional and Aboriginal committees be established to provide advice and support for the National Advisory Committee.
14. That the Crown stipulate that Mi'kmaq or other Aboriginal groups will be the sole managers of the MPAs within their respective traditional territories that no longer meet the objectives for which these MPAs originally intended.