

Proclamation of Amendments to the Electrical
Power Control Act 1994 and Promulgation of
Regulations

NR2008-0

Title: Proclamation of Amendments to the *Electrical Power Control Act 1994* and Promulgation of Regulations

ISSUE:

In the spring 2007 session of the House of Assembly, government passed Bill 32, *An Act to amend the Electrical Power Control Act 1994*. To-date, Bill 32 has not been proclaimed. Regulations provided for under Bill 32 have been drafted and are provided herein for approval. These regulations provide clarity and guidance as it pertains to water management agreements for hydroelectric power producers and the Board of Commissioners of Public Utilities (PUB). This Memorandum seeks approval for the Lieutenant Governor in Council to proclaim the 2007 amendments and to promulgate the regulations.

Recommendation:

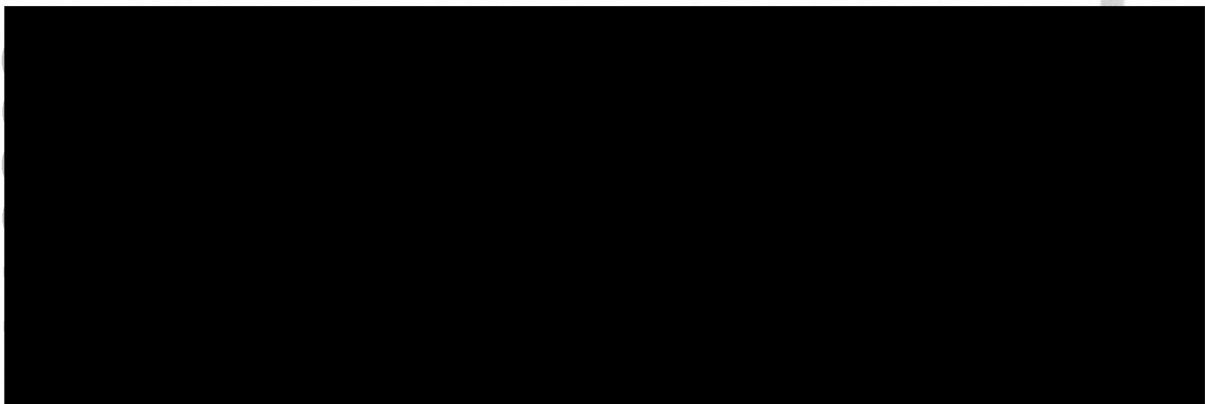
It is recommended that:

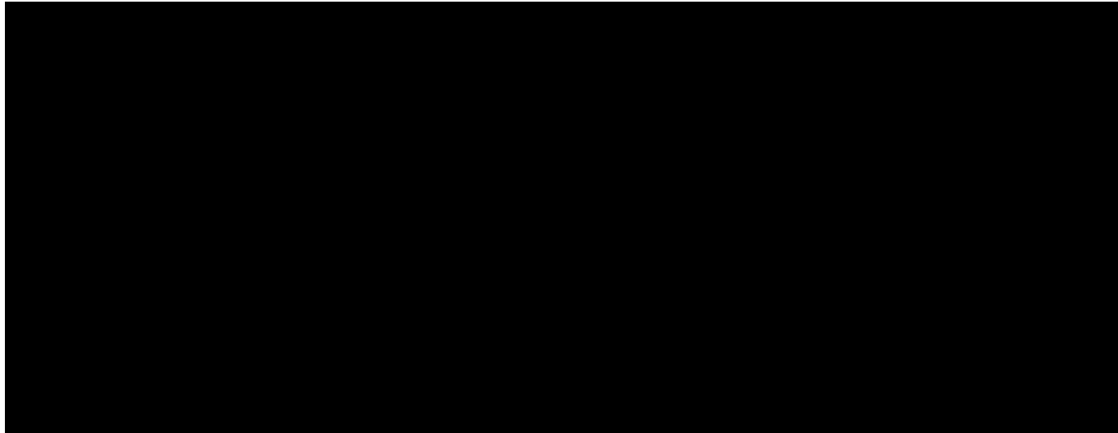
- (i) The Lieutenant Governor in Council direct the Clerk of the Executive Council to issue an Order in Council proclaiming *An Act to Amend the Electrical Power Control Act 1994*;
- (ii) The Lieutenant Governor in Council approve regulations substantially similar in form to the draft attached as Annex 1;
- (iii) The Lieutenant Governor in Council direct the Clerk of the Executive Council to issue an Order in Council promulgating these regulations and,
- (iv) The regulations be Gazetted at the earliest opportunity.

Background:

In 2007, the Energy Corporation of Newfoundland and Labrador (ECNL) advised Government that it will be necessary for the operator of Lower Churchill facilities to have a production coordination or water management agreement in place with Churchill Falls (Labrador) Corporation (CF(L)Co), the operator of Churchill Falls hydroelectric facilities. A water management agreement would require the coordination of energy production at both facilities to ensure that the delivery schedules for both Lower Churchill and CF(L)Co are satisfied. The agreement would also facilitate the exchange of power generation and energy production, if necessary. Such an agreement is critical to obtaining project financing for Lower Churchill as it will allow the operator to maximize the number of contracts for firm power and provide the flexibility to export as much short-term power as possible at times of highest prices.

In June, 2007, the House of Assembly passed Bill 32 *An Act to amend the Electrical Power Control Act 1994 (EPCA Amendment Act)*. This piece of legislation requires that, in circumstances where there are two or more proponents and/or operators of hydroelectric plants on the same water course, that these proponents and/or operators enter into a water management agreement so that they may both fulfill the objectives of provincial power policy as set out in s3 of the *EPCA*. To ensure that these objectives are met, completed water management agreements must be submitted to the PUB for approval. In instances where parties cannot reach an agreement in a timely fashion, one or both parties may refer the issue to the PUB, which has the authority to impose an agreement. Bill 32 also provides authority for the Lieutenant Governor in Council to make regulations regarding the criteria and required terms and conditions for such agreements.





Before ECNL can initiate negotiation of a water management agreement with CF(L)Co, the *EPCA Amendment Act* must be proclaimed and ECNL must be issued water rights for the Lower Churchill River. The issuance of water rights has been addressed by the passage of the *Energy Corporation of Newfoundland and Labrador Water Rights Act* in 2008. Currently, water rights are held under an option with the Lower Churchill Development Corporation (LCDC) (See [REDACTED]). Once the LCDC Option Agreement expires on November 24, 2008, ECNL can apply for water rights and the Lieutenant Governor in Council can issue them. The issuance of water rights to ECNL for the Lower Churchill River will be addressed in a separate submission.

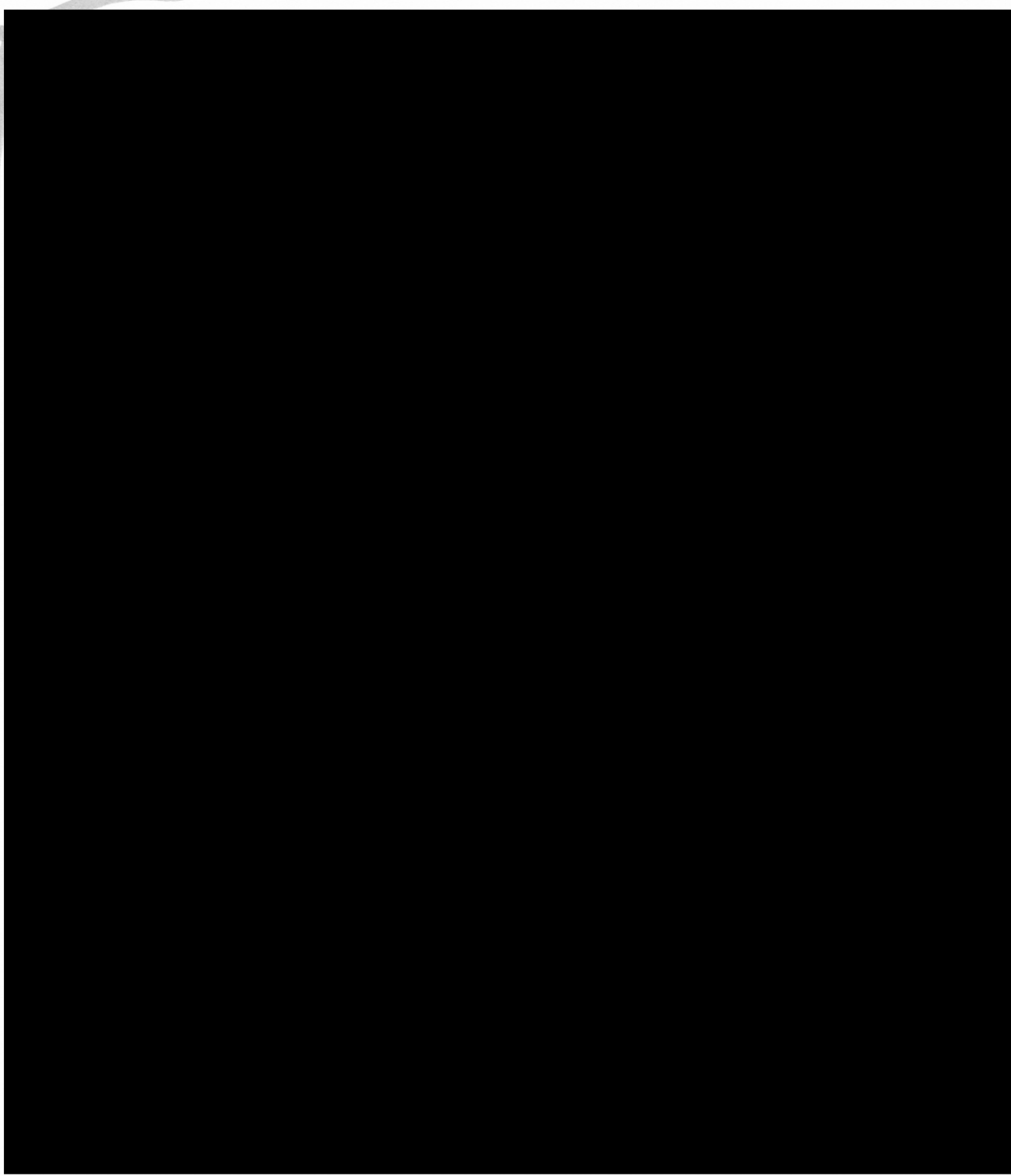
Alternatives:

1. Proclaim Bill 32, approve draft regulations and authorize promulgation of the regulations. This will allow ECNL to approach CF(L)Co to complete a water management agreement as soon as water rights have been granted. This action also provides clarification and guidance to the Board of Commissioners of Public Utilities as it implements the legislation. **This is the recommended alternative.**
2. Take no action. ECNL advises it would be delayed in pursuing the Lower Churchill Project until such time as water management agreements are required. **This alternative is not recommended.**

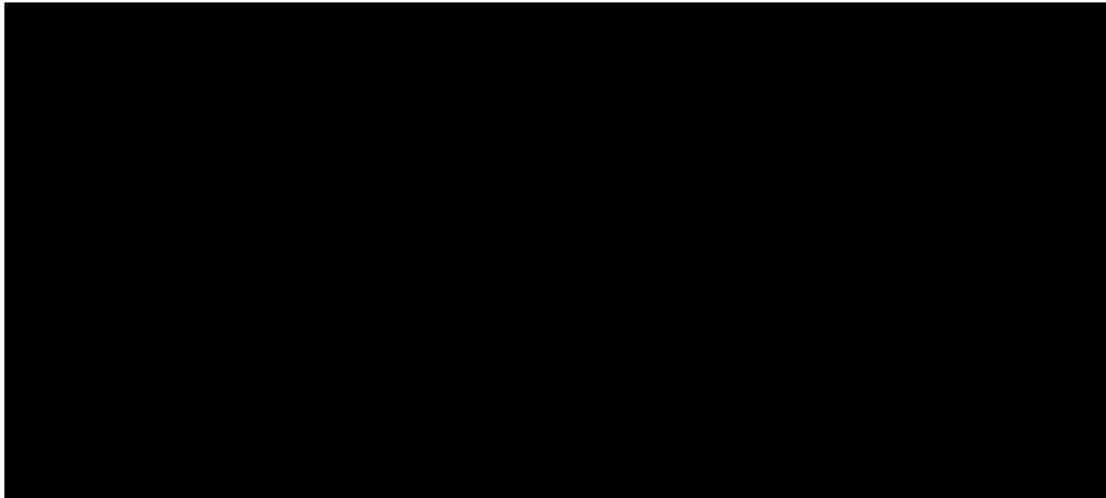
LEGISLATIVE / REGULATORY CONSIDERATIONS:

When the amending legislation, is proclaimed, section 32 of the *EPCA* will give the Lieutenant Governor in Council authority to make the regulations. These regulations are attached as Annex 1 for approval.

A Regulatory Impact Analysis is attached as Annex 2.





**FINANCIAL CONSIDERATIONS:**

There are no direct financial considerations for Government

INTERDEPARTMENTAL CONSIDERATIONS:

There are no interdepartmental considerations.

LABRADOR OR ABORIGINAL CONSIDERATIONS:

There are no specific Labrador or Aboriginal considerations. However, the main focus of the consequences of the legislation and regulations is likely to be the Churchill River.

INTERGOVERNMENTAL CONSIDERATIONS:

The Government of Quebec owns Hydro Quebec, and may be the initiator of any legal challenge that arises.

OTHER JURISDICTIONS:

There is very little Canadian jurisprudence of relevance.

CONSULTATIONS:

A working group consisting of representatives of the Departments of Natural Resources, and Justice, and technical experts from Newfoundland and Labrador Hydro was engaged with Legislative Counsel in the drafting of the regulations.

During the drafting process, the Department of Natural Resources consulted with the parties that will be immediately affected by the proclamation of the amending legislation and promulgation of the regulations, including: Energy Corporation of Newfoundland and Labrador, Newfoundland and Labrador Hydro, Churchill Falls (Labrador) Corporation, AbitibiBowater Inc., ENEL, Corner Brook Pulp and Paper (Deer Lake Power), Fortis Properties, and Newfoundland Power. To the extent possible, comments from the parties were taken into account in the drafting of the regulations.

ENVIRONMENTAL CONSIDERATIONS:

The purpose of the amending legislation and draft regulations is to ensure that power production from provincial rivers which supply more than one power plant is optimized. The proposed regulations specify that any existing environmental constraints must be taken into account in water management agreements. The Lower Churchill project is undergoing a full environmental assessment through a federal-provincial Panel Review.

COMMUNICATIONS AND CONSULTATION SYNOPSIS:

A Communications Synopsis is attached as Annex 3.

KATHY DUNDERDALE

Minister of Natural Resources

Date: November 24, 2008

Annexes

1. Draft Regulations
2. Regulatory Impact Analysis
3. Communications Plan

Annex 1: Draft Regulations

November 18, 2008

Water Management Regulations

Under the Authority of section 32 of the *Electrical Power Control Act (1994)*, (“the Act”) the Lieutenant-Governor in Council makes the following Regulations:

1. These regulations may be cited as the *Water Management Regulations*.
2. In these regulations
 - (a) “Board” means the Board of Commissioners of Public Utilities for Newfoundland and Labrador;
 - (b) “deficiency” means a failure to satisfy the power generation and energy production requirements prescribed by an Independent Coordinator;
 - (c) “good utility practice” means those practices, methods or acts, including but not limited to the practices, methods or acts engaged in or approved by a significant portion of the electric utility industry in Canada, that at a particular time, in the exercise of reasonable judgment, and in light of the facts known at the time a decision is made, would be expected to accomplish the desired result in a manner which is consistent with laws and regulations and with due consideration for reliability, safety, environmental protection, and economic and efficient operations.
 - (d) “Minister” means the minister appointed under the *Executive Council Act* to administer the Act;
 - (e) “Independent Coordinator” means a person appointed under a water management agreement to determine suppliers’ power and energy production levels;
 - (f) “production facilities” means all components of a hydro-electric generating facility including any transmission facilities associated therewith;
 - (g) “supplier” means a person owning rights to produce power from hydro-electric facilities on a body of water;

- (h) “transmission provider” means any entity that owns, operates or controls facilities used for the transmission of electric energy between or amongst production facilities on the same body of water;
 - (i) “water management agreement” means an agreement made under section 5.4 of the Act or imposed by the Board under section 5.5 of the Act, in accordance with these regulations.
- 3. (1) The objective of a water management agreement shall be the coordination of the power generation, and energy production in the aggregate for all production facilities on a body of water to satisfy the delivery schedules for all suppliers on the body of water, in a manner that provides for the maximization of the long term energy-generating potential of a body of water, while ensuring that:
 - (a) supplier delivery requirements for power and energy under contracts for the supply of power governed by section 5.7 of the Act are satisfied; and
 - (b) supplier delivery requirements for power and energy under contracts for the supply of power other than those governed by section 5.7 of the Act are satisfied to the greatest extent possible.
- (2) To obtain the objectives in (1) a water management agreement shall:
 - (a) require:
 - (i) the appointment of an Independent Coordinator, who shall not be an exclusive employee of a supplier; and
 - (ii) that suppliers jointly and sufficiently fund the administration of the Independent Coordinator in proportion to the energy benefits obtained by each supplier from the administration of the water management agreement or according to such other methodology as may be agreed upon by suppliers and approved by the Board, or in the absence of supplier agreement, imposed by the Board, as the case may be;
 - (b) require that suppliers provide the Independent Coordinator with:
 - (i) demand requirements of contracts for the supply of power;
 - (ii) the power and energy generation capacity of each of the supplier’s production facilities;
 - (iii) equipment maintenance requirements;
 - (iv) short and long term supplier forecast requirements;

- (v) copies of a licence, lease or other instrument granting water rights;
- (vi) plans and requirements respecting suppliers' construction or commissioning activities;
- (vii) transmission availabilities; and
- (viii) the forecast of inflows;

and regularly update any changes thereto, all prepared in a manner consistent with good utility practices.

- (c) require the Independent Coordinator, based on the information received in paragraph (b) and in the exercise of reasonable judgment, to establish short and long term production schedules for all production facilities on a body of water, through the coordination of production scheduling of the suppliers on the body of water based upon the use of the aggregate generating capacity, storage and transmission facilities of any supplier on the respective body of water, in accordance with the objectives of these Regulations and with the water management agreement;
- (d) require that suppliers adhere to the production schedules set by the Independent Coordinator in (c),
- (e) provide that in no event shall:
 - (i) the energy and power requests made to the Independent Coordinator by a supplier exceed the maximum power and energy generating capability of the production facilities of that supplier for the period requested; and
 - (ii) the generating capacity, storage capacity, or transmission capability available to a supplier from all facilities on the body of water be less than the generating capacity, storage capacity, or transmission capability of the production facilities owned by that supplier on the body of water.
- (f) require that such information and data be shared between suppliers and by suppliers with the Independent Coordinator as is necessary for the Independent Coordinator to perform its functions under the Agreement, including records, data, models, as well as physical and computer access to such facilities as are required to obtain and verify such information;

- (g) require suppliers and the Independent Coordinator to maintain, for a period of not less than 7 years, records required of them to undertake their responsibilities under the agreement and these Regulations which shall be available, upon request, to the Board or Minister;
- (h) require an Independent Coordinator to
 - (i) provide suppliers with reports on its activities at regular intervals to be established in consultation with the suppliers;
 - (ii) provide to the Minister, and, on request, the Board, with an annual report summarizing its activities and the energy benefits achieved by coordinated operation in a form acceptable to the Minister;
- (i) require that when a deficiency occurs, or is projected to occur:
 - (i) appropriate adjustments shall be made to the power and energy production levels and schedules of all production facilities on that body of water to the extent practicable to remedy the deficiency or anticipated deficiency; and
 - (ii) where a deficiency occurs despite (i), and as a result of that deficiency, a supplier incurs damages under a provision of a contract for the supply of power entered into by a person bound by the water management agreement and a third party where that contract was entered into before the water management agreement, those costs shall be paid by the supplier who caused the deficiency.
- (j) include mechanisms to appropriately assign energy storage amounts to each supplier for water stored in the body of water's reservoirs and, if water spillage occurs, to assign the lost energy fairly to each supplier;
- (k) require that the amount of energy in storage shall be determined based upon average water to energy conversion rates for the respective production facilities calculated based upon the longest record available, or, in the absence of available records, based upon the best data source available as tested in accordance with good utility practice;

- (l) include an appropriate method that ensures that, at regular intervals not less frequently than annually, adjustments are made to a supplier's available energy for subsequent intervals for energy losses incurred in the previous period by each supplier as a result of changes to its energy capability caused by the application of the water management agreement;
 - (m) be governed by the laws of Newfoundland and Labrador; and
 - (n) include such other provisions that the Board determines are necessary or useful in achieving the objectives of the Act.
- (3) Where suppliers agree and the Board determines that the degree or amount of efficiencies to be gained through a water management agreement that complies with subsection 3(2) do not justify the costs of its implementation and administration, the Board may approve or establish a water management agreement that does not comply with all of the elements of subsection 3(2), provided that the Board is satisfied that the water management agreement it approves or establishes shall achieve the objectives of the Act.
- (4) Each supplier, in complying with the requirements of 3(2), shall:
 - (a) maintain its production facilities in serviceable and good repair and
 - (b) and operate its facilities in a manner not inconsistent with principles of good utility practice,

but notwithstanding any other provision of these regulations, nothing herein shall require a supplier to operate or maintain facilities or portions of facilities which, but for the water management agreement, that supplier, acting reasonably, would no longer operate or maintain.
- 4. For the purpose of subsection 5.5(1) of the Act, "a reasonable time" means 60 days.
- 5. The *Board of Commissioners of Public Utilities Regulations, 1996* shall apply to the referral to the Board of a proposed water management agreement under section 5.4 of the Act, or the filing of an application under subsection 5.5(1) of the Act, except to the extent these Regulations deviate there from, or the Board believes the process under such regulations are not necessary or useful, or would unnecessarily delay, the establishment of a water management agreement.

6. Within 30 days of the referral to the Board of a proposed water management agreement under section 5.4 of the Act, or the filing of an application under subsection 5.5(1) of the Act, the applicant and each affected supplier shall file a written submission with the Board setting out:
 - (a) the names of all suppliers on the body of water and all affected transmission providers;
 - (b) a summary of the facts and the issues in dispute;
 - (c) a proposed water management agreement;
 - (d) copies of existing power contracts to which affected suppliers are a party;
 - (e) any other matter considered relevant.
7. Notwithstanding section 5, the Board shall approve or establish a water management agreement within 120 days of the referral to the Board of a proposed water management agreement under section 5.4 of the Act, or the filing of an application under subsection 5.5(1) of the Act.
8. Disputes between suppliers arising from the operation of a water management agreement or involving the interpretation or application of a water management agreement may be determined by the Board upon application of one of the suppliers.
9. Upon an application pursuant to section 8, where the Board determines that a supplier has failed to comply with a water management agreement, the Board may issue such orders as are necessary to ensure compliance therewith.

Annex 2: Regulatory Impact Analysis

Regulatory Impact Analysis Checklist

Title of Legislation / Regulation Water Management Regulations

**If Regulation, Title of Authorizing Legislation* EPCA Amendment Act

Purpose of Proposal Creation of regulations

**This checklist must be accompanied by a
Summary Report on Regulatory Impact Analysis**

Regulatory Criteria		Criteria Met	
		Yes	No
Cost-benefit analysis	Completed?		
	<i>Not required</i>	✓	
	If not required, Impacts have been analyzed	✓	
Competitive analysis		✓	
Eliminate duplication or overlap with other jurisdictions		✓	
Plain language			✓
Timeliness of regulatory response		✓	
Transparent development of regulatory requirements		✓	
Regulatory design is results-based		✓	
Reverse onus- need for regulation is justified?		✓	
Sunset Provisions:	Sunset review provision		✓
	Sunset expiry provision		✓
Removal : Replacement principle applied			✓

Number of regulatory requirements to be added: _____
 Number of regulatory requirements to be eliminated: _____
Net Change: _____

Responsible Minister or Head of Regulatory Authority

Date

REGULATORY IMPACT ANALYSIS**COST- BENEFIT ANALYSIS**

- A water management agreement would facilitate the exchange of power generation and thus energy production.
- Such an agreement is critical to obtaining project financing (eg. Lower Churchill) as it will allow the operator to maximize the number of contracts for firm power and provide the flexibility to export as much short-term power as possible at times of highest prices.

COMPETITIVE ANALYSIS

- The Departments of Natural Resources and Justice, as well the Energy Corporation, support the amendment.
- A clarification of the water management scheme is a means of ensuring our competitiveness through the use of identified best practices.

HARMONIZATION WITH OTHER JURISDICTIONS

- There is very little Canadian jurisprudence of relevance.

PLAIN LANGUAGE

- The new regulations will be a legislative document so the wording will be in line with the rest of the Province's legislation.

TIMELINESS OF REGULATORY RESPONSE

- Time is of the essence as these regulations will allow ECNL to approach CF(L)Co as soon as water rights have been granted, and provide clarification and guidance for the Board of Commissioners of Public Utilities if and when it has to act as required by the legislation.

TRANSPARENT DEVELOPMENT OF REGULATORY REQUIREMENTS

- A working group consisting of representatives of the Departments of Natural Resources and Justice, and ECNL, was engaged with Legislative Counsel in drafting of the regulations. During this process, DNR consulted with parties which will be immediately affected (eg. ECNL, NLH, Churchill Falls (Labrador) Corporation).
- To the extent possible, comments from various parties were taken in to account.

RESULTS-BASED REGULATORY DESIGN
<ul style="list-style-type: none">• Yes, as these regulations are designed to clarify requirements which in turn makes NL more publically accountable as well as competitive globally.
REVERSE ONUS-NEED FOR REGULATION
<ul style="list-style-type: none">• All groups consulted agreed that the creation of regulations would be the preferred method.
SUNSET PROVISIONS
<ul style="list-style-type: none">• None to be done as this is a one-time change that has been discussed and accepted.
REMOVAL : REPLACEMENT PRINCIPLE
<ul style="list-style-type: none">• This is newly created regulations to provide clarification and guidance.• Most of the regulatory requirements place the burden on the Energy Corporation with very modest changes for Government and the subsidiaries.

Annex 3: [REDACTED]
[REDACTED]
[REDACTED]

Consulted with: Charles Bown, ADM, Energy Policy	Date Drafted: November 14, 2008	Anticipated Announcement: Upon Gazetting.
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Communications Objectives

- To communicate that the 2007 amendments to the *Electrical Power Control Act* (EPCA) and accompanying regulations related to the regulation of coordination of water management on provincial rivers are now in force.
- To demonstrate that the EPCA amendments and regulations are to ensure a mechanism exists to resolve possible impasses in reaching water management agreements between two or more operators on a provincial river.
- To demonstrate that the Public Utilities Board (PUB) is the appropriate body to regulate the coordination of water management on provincial rivers, given its mandate under the Act already in regulating the electricity industry.
- To demonstrate that the amendments and regulations are good provincial policy that ensures fairness for all operators and maximum benefit from our water resources for the people of the province.
- To reinforce that these changes in no way infringe upon the 1969 Power Contract with Hydro Quebec.

Target AudiencesInternal

Premiers Office
 Department of Natural Resources
 Department of Justice
 Executive Council
 Energy Corporation Board of Directors
 Senior Leadership Team, Newfoundland and Labrador Hydro

External

Potential customers of the Lower Churchill Project
 Churchill Falls customers
 Potential investors of the Lower Churchill development
 Hydro Quebec
 Federal Government
 Public
 Media

Anticipated Media Attention:**Medium**

The amendments were originally announced and explained during a media availability by the Minister of Natural Resources when they were introduced in the House of Assembly in the spring of 2007. Questions were asked by the media at the time how these changes impacted the Lower Churchill Project and the 1969 power contract and the media understood the rationale behind the amendments. The reporting indicated this was another step towards the development of the Lower Churchill project and no controversy was raised at the time. The media will report on the fact that the amendments and regulations are now in force, and will likely use the opportunity to provide an update on the status of the Lower Churchill Project and where we go from here.

Anticipated Reaction**Medium**

The Opposition parties are aware of the amendments and rationale through the debate in the House of Assembly in the spring of 2007, as are those with an interest in following these developments, including Hydro Quebec. Once the amendments and the Regulations come into effect, Hydro Quebec or CF(L)Co might attempt to challenge their validity. This could be done immediately upon passage, or at such time in the future that the PUB exercises its authority to impose a water management agreement.

Possible Headlines:

Positive: Province Moving Forward with the Development of the Lower Churchill

Negative: Premier Steamrolls over Proper Process and Uses Legislature to Trump Hydro Quebec's Negotiating Powers

Strategic Consideration:

It is important that any communications materials and public statements clearly reiterate that these changes are in no way related to the Power Contract. As such, it is important that the number of people who speak to this issue publicly is limited.

Key Messages

- The PUB is the appropriate body to regulate the coordination of water management on provincial rivers, given its mandate under the Act already in regulating the electricity industry.
- We are ensuring that hydroelectric facilities operating on the same river work together to optimize the value of this resource, and therefore the benefit to the province and to the power generators.
- We want to optimize production on a river to ensure maximum benefits for all parties. We do this, for example, by avoiding spills of water and enabling production sharing between facilities.

- We have developed a framework for the PUB to regulate the coordination of water management agreements between two or more parties on the same river. Under this arrangement, the parties must enter into an agreement for the water management of the river, which will be referred to the PUB. The PUB will be able to approve the agreement, approve it with changes or reject it.
- If the parties can't reach an agreement in a reasonable time, one can apply to the PUB to establish an agreement that is binding on both of them. The PUB will also have the authority to monitor and enforce the agreements.
- This is about moving forward with a legislative framework that is appropriate to provide hydroelectric operators sharing a river system, as will be the case on the Churchill River with the Lower Churchill Project, with certainty over the coordination of water flow.
- This applies to any provincial river where more than one hydroelectric development could occur. Other rivers where the amendment could apply include the Exploits River and Hinds Lake and Deer Lake.
- The amendment will ensure that delivery commitments under existing power contracts are honored, including the 1969 power contract for the Upper Churchill. This protection is explicitly written into the amendment.
- Water management agreements are a standard on rivers with more than one operator. This is good business to ensure any development maximizes the value of the resource for the people of the province and the power generators.
- Through this amendment, the needs of both the Churchill Falls facility and the Lower Churchill Project will be accommodated, as will the needs of any other hydroelectric developments in the province.
- The Provincial Government is ensuring that operators on the same watercourse work together to reach an arrangement that is in the best interest of both facilities and the province.
- We believe that a legislative framework is appropriate to provide a process for all hydroelectric operators and developers in this province as it relates to water management.
- We are committed to the development of our resources for the benefit of the people of the province. This is about ensuring we have the appropriate tools to get the most out of our energy developments.
- These rivers belong to the people of the province. As government, we are stewards of these resources and it is our responsibility to ensure we maintain control of our valuable resources.

- Although we are given the PUB the authority to regulate the coordination of water management agreements, the parties will have an opportunity to reach an agreement on their own.
- This type of legislation gives the financiers and potential customers of hydroelectric developments that share a river system the certainty they need to finance projects and enter into power purchase agreements.
- We believe the amendment is good provincial policy that ensures fairness for all operators. It will provide for optimal production on our watercourses and will result in the most efficient production, transmission and distribution of power.

Secondary Messages

- This legislation ensures potential consumers of Lower Churchill power will have equitable access to an adequate power supply.
- It is important that all facility operators have reasonable certainty that their water supply will not be impacted negatively by another operator or developer – the legislation will provide certainty to both CF(L)Co and Hydro.
- Aside from the operators and developers, the legislation also gives stakeholders and investors' confidence that their power supply will not be interrupted.
- The PUB is a credible and independent entity of the province and is the best body to impose an agreement if one cannot be reached.
- The intent of this legislation is to optimize production and mitigate negative impacts through cooperation by the parties on the Churchill River. If the parties do not agree, then we foresee the PUB imposing an arrangement that respects the rights and needs of both parties to operate and develop facilities on the Churchill River.

Activities


- A news release will be issued by the Department of Natural Resources to announce that the amendments and accompanying regulations are now in force, and to reiterate messaging around the necessity to regulate water management on provincial rivers.
- A letter will be sent by ECNL to CF(L)Co stating that it wishes to enter into a production coordination agreement with CF(L)Co and, if one can not be reached, then the PUB will be requested to intervene.

Follow-up Activities

Response will be monitored by reviewing media coverage, correspondence, and inquiries. Particular attention will be paid to any public/formal response from Hydro Quebec, as well as to how this decision is portrayed in out-of-province media.

Drafted by: Tracy Barron, Communications, 729-5282

Approved by: Charles Bown, ADM, Energy Policy

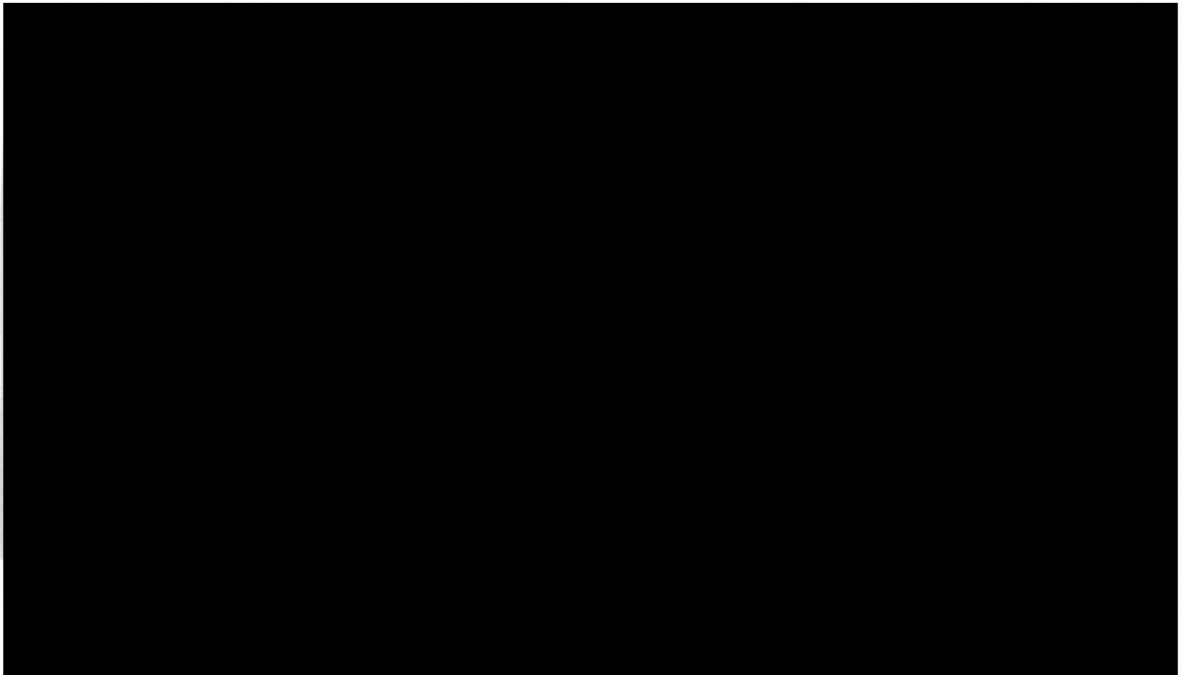
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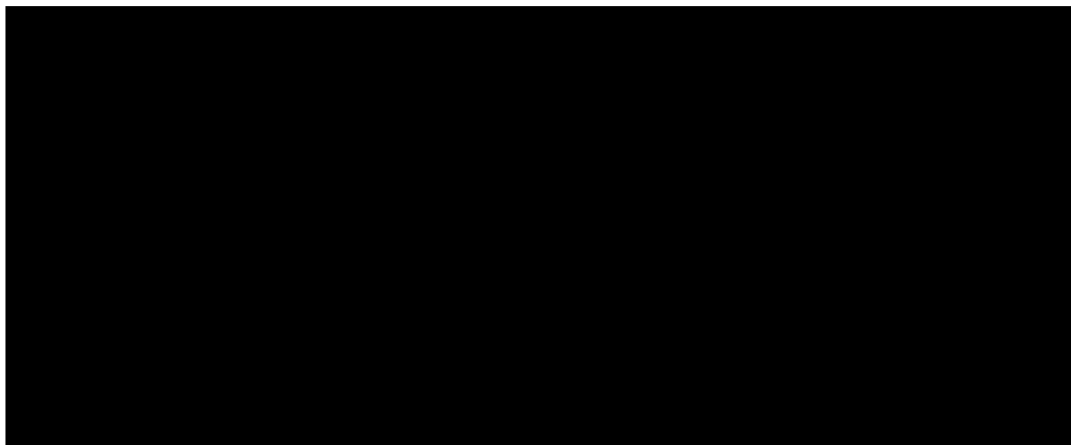
Title	<u>Proclamation of Amendments to the Electrical Power Control Act, 1994 and promulgation of Regulations.</u>
Summary of Proposal	The Submission seeks authority to: proclaim <i>An Act to Amend the Electrical Power Control Act 1994</i> ; approve and subsequently promulgate regulations drafted pursuant to that Act as attached to the Submission in Annex 1; with the Regulations to be gazetted at the earliest opportunity.
Secretariat Comment	<ol style="list-style-type: none">1. In the Spring 2007 session of the House of Assembly, Bill 32, <i>An Act to Amend the Electrical Power Control Act, 1994</i> was passed for the purpose of providing that where two or more interests had water rights on the same water course for the purposes of generating power, the parties are required to enter into a water management agreement (WMA). The Act also established the role of the Board of Commissioners of Public Utilities for Newfoundland and Labrador (PUB) in that agreements entered into by two suppliers are to be approved, amended and approved, or rejected by the PUB (Section 5.4) or application can be made to the PUB by a supplier to have the PUB determine an agreement where two suppliers have been unable to reach an agreement in a reasonable time (defined in the attached Regulations as 60 days) (Section 5.5). Other elements of the Regulations are discussed in more detail later in this analysis.2. Such WMAs aim to fulfill the objectives of the provincial power policy as set out in section 3 of the <i>Electrical Power Control Act</i>. This policy pertains to the considerations in the setting of rates, the management and operation of the sources and facilities for the production, transmission and distribution of power, and emergency situations with respect to power supply.3. WMAs will allow the coordination of energy production at the facilities of both suppliers and ensure that the actions of one party does not negatively impact the other facility, and vice versa. This would ensure the delivery schedules of both facilities are satisfied and facilitate the exchange of power generation and energy production, if necessary.4. While these agreements will apply to other areas in the province where such a situation exists (i.e two or more parties with power-generating rights on same water body), the impetus for the change is to enable the Energy Corporation, the lead developer of the Lower Churchill hydroelectric resource, to enter into a water management agreement with CF(L)Co., the operator of the Churchill Falls hydroelectric facility. Such agreement is a critical path item in the project schedule. The Submission notes that other examples where two or more parties have water rights on the same water course includes Hinds Lake – Deer Lake (Newfoundland and Labrador Hydro and Deer Lake Power – owned by Kruger) and the Exploits River (ENEL and AbitibiBowater at Star Lake and AbitibiBowater and Fortis Properties at Bishops Falls and Grand Falls).5. The water management agreement with respect to the Churchill River (Upper and Lower), in tandem with the issuance of the water rights to the Lower Churchill to the

Energy Corporation, is necessary for project financing, as these actions will allow the operator to maximize the number of contracts for firm power and provide the flexibility to export as much short-term power as possible at times of highest prices.

6. Cabinet Secretariat notes that the issuance of water rights to Energy Corporation is being addressed through a separate Submission from Natural Resources (NR2008-053) and that, as this Submission notes, the Minister of Natural Resources has notified Lower Churchill Development Corporation (LCDC) that the Province will not be renewing the Option Agreement (which provides an option to these water rights to LCDC) upon its expiry on November 24, 2008, thereby enabling their issuance to Energy Corporation. The legislative mechanism to enable the issuance of the water rights is the *Energy Corporation of Newfoundland and Labrador Water Rights Act*, as passed in the Spring 2008 sitting of the House of Assembly. This Act also extinguished any existing water rights over the Lower Churchill.
7. Beyond the proclamation of the *Act to Amend the Electrical Power Control Act, 1994*, the Submission also seeks authority to promulgate and gazette the Water Management Regulations, drafted pursuant to section 32 of the Act. The Regulations are attached to the Submission at Annex 1. The purpose of these Regulations is to set out the parameters of water management agreements, with said parameters to guide the PUB.
8. The Regulations set out the purpose of water management agreements, as stated earlier in this analysis, require the appointment of an Independent Coordinator (IC), to be funded by the suppliers (parties with water rights for purpose of power generation) based on the benefits achieved by each supplier from the agreement, or as determined by some other methodology agreed by the suppliers and approved by the PUB, or as imposed by the PUB in the case of a disagreement. The information required by the IC, from the suppliers, is also specified (i.e. demand requirements; generation capacity; maintenance requirements; forecast requirements; copies of the instrument granting water rights; transmission availability, etc.). Utilizing this information the IC must determine short and long term production schedules.
9. The suppliers are required to abide by these schedules and not make power requests to the IC above the maximum generation capacity of the relevant facilities. A supplier can also not have less generating, storage, or transmission capacity available to it than provided by the facilities owned by that supplier on the body of water.
10. The regulations also set out the requirements of the IC in terms of reports to suppliers on his/her activities (regular intervals as determined in consultation with the suppliers) and an annual report to the Minister and upon request, the PUB.
11. Finally the Regulations determine the mechanism for attempting to rectify anticipated deficiencies in power production levels and where same cannot be rectified provides that the supplier who incurred damages shall be paid by the supplier that caused the deficiency.
12. The PUB's role in WMAs is further refined in the Regulations. Upon receipt of a proposed water management agreement or an application under the Act, within 30 days the applicant and each affected supplier shall file a written Submission including the names of all suppliers and transmission providers, summary of facts and issues of dispute, a proposed water management agreement, copies of existing power contracts, and any other material considered relevant. The PUB is then

responsible for approving or establishing a water management agreement within 120 days. Throughout the operation of said agreement, disputes between suppliers may be determined by the PUB upon application by a supplier, and if it is determined that a supplier is non-compliant with said agreement, the PUB may issue orders necessary to ensure compliance.

13. The Submission notes that the Department consulted with impacted parties and specifically references Energy Corporation, Hydro, CF(L) Co., AbitibiBowater Inc, Corner Brook Pulp and Paper (Deer Lake Power), Fortis Properties, and Newfoundland Power. It is indicated that comments were incorporated to the extent possible. The Department also advises that ENEL, part owners of Star Lake with AbitibiBowater, were also consulted. The Department does not expect any significant negative reaction from the proclamation, noting that opposition would likely have been expressed when the amendments to the Act originally passed through the House of Assembly.
 14. The communications plan notes that water management agreements are common practices. The Department notes that such agreements in other jurisdictions have focuses on multiple uses and users of a river, i.e. recreation, agriculture, water supply etc. The current suppliers have developed agreements and practices among themselves. In that sense, the proposal is, in one context, formalizing an existing practice. However, none of the existing suppliers is operating on the same scale as the Churchill River and in no other case is a down stream operator as dependent on the practice of the up-stream operator.
 15. Environment and Conservation advises that they have no issues with the Submission and support its recommendation.
 16. Labrador Affairs have reviewed the above the Cabinet submission and concur with the recommendations. Aboriginal Affairs has no comment on the Paper or concerns with the recommendations.
 17. Intergovernmental Affairs Secretariat (IGAS) has no concerns about the recommendation.
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Budget Division Consultation Department of Finance, Treasury Board Support, indicated it had no comment on the Submission.

Secretariat Recommendation Cabinet Secretariat recommends approval of the Submission.

JC
November 26, 2008



2008/11/27


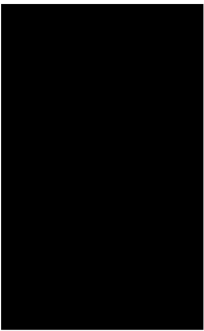
NR/DM
ENVC/DM
C. Lake
R. Dillon
AG
Deputy Clerk
File

The Submission of the Minister of Natural Resources respecting Proclamation of amendments to the Electrical Power Control Act 1994 and promulgation of the Regulations was considered. The following direction was provided:


- 1) Approval was given for the issuance of an Order in Council, pursuant to section 3 of "An Act to Amend the Electrical Power Control Act, 1994," to cause a proclamation to be issued for the signature of His Honour the Lieutenant Governor, to bring the Act into force upon the date of publication in the Newfoundland and Labrador Gazette.
- 2) Approval was given to draft the Regulations entitled "Water Management Regulations" substantially as contained in Annex I of the Minister's Submission; and
- 3) Approval was given for the Clerk of the Executive Council, when required, to issue an Order in Council, pursuant to section 32 of the Electrical Power Control Act (1994) to make the Regulations referred to above.

(NO ACTION TO BE TAKEN ON ITEM 1 UNTIL AN ORDER IN COUNCIL
IS ISSUED)


Clerk of the Executive Council



2008/12/04



NR/DM
C. Lake
R. Dillon
AG
Deputy Clerk
File



Under the authority of section 3 of “An Act to Amend the Electrical Power Control Act, 1994,” the Lieutenant Governor in Council is pleased to cause a proclamation to be issued for the signature of His Honour the Lieutenant Governor, to bring the Act into force upon the date of publication in the Newfoundland and Labrador Gazette.

Clerk of the Executive Council

2009/01/16

NR/DM
C. Lake
R. Dillon
AG
Deputy Clerk
File

Under the authority of section 32 of the Electrical Power Control Act, 1994, the Lieutenant Governor in Council is pleased to make the Regulations entitled, "Water Management Regulations," a copy of which are on file with the Clerk of the Executive Council.

Clerk of the Executive Council