

Date : 4/24/2007 12:29:17 PM

From : "Hughes, David"

To : "Cleary, Bas" , "Coombs, Robert"

Subject : EA & Ab Consult BN.doc

Attachment : EA & Ab Consult BN_.doc;

Rob/Bas:

Made minor changes to the Mandate to reflect the proposed denial of LMN involvement in the decision making. OK? Rob, Mandate does not deal with the Quebec Innu.

David

Briefing Note

Issue: The Status of the Lower Churchill Hydro-electric Generation Project Environmental Assessment and Accommodation of Aboriginal Groups.

Background:

- Newfoundland and Labrador Hydro (NLH) submitted the EA of the Lower Churchill Project (Generation Phase only) under both the *Environmental Protection Act* (EPA) of Newfoundland and Labrador and *Canadian Environmental Assessment Act* (CEAA) of the Government of Canada on December 1, 2006, triggering both processes.
- The provincial process is in progress. After a 45 day public review, the Ministerial requirement for an Environmental Impact Statement (EIS) was issued on January 23, 2007. An EA Committee is in place and preparing Guidelines for the Preparation of an EIS, which must be provided to NLH by May 23, 2007.
- The province may have the option to enter a joint environmental assessment process with the federal government. On March 13, 2007 Minister Jackman wrote the federal Minister of Environment Canada requesting a joint EA process. If, and until, governments agree to a joint process, the provincial process continues on in accordance with the *Environmental Protection Act*.
- Joint or separate EA processes each have a set of advantages and disadvantages in respect of efficiency, timing, costs and consultations.
- The Responsible Authority pursuant to the federal Environmental Assessment process is the DFO, and its officials have recommended to their Minister that a Review Panel is warranted. Provincial officials, as well as the Minister of Environment and Conservation, continue to impress on their federal counterparts the urgency of a decision.
- The environmental assessment process will be complicated by provisions of the Labrador Inuit Land Claim Agreement, active land claim negotiations with the Innu of Labrador, recent maneuvering and court challenges by the Labrador Metis Nation, rumblings of growing interest by Quebec Innu, and case law which obligates, but does not set out methodology for the province to consult [REDACTED]
[REDACTED]
- The court decisions oblige government(s) to varying levels of engagement and consultation determined by the strength of the respective aboriginal interests in the project area. In the case of the Lower Churchill project this could span a continuum of citizen participation from simple notification to full and active inclusion/participation. Therefore, government(s) needs to engage aboriginal

groups in an attendant negotiation process to identify acceptable parameters for consultation that are sufficient to preclude a later objection or legal challenge on the grounds that the consultation was not meaningful.

- Coupled with the complexity is uncertainty on when the Government of Canada will eventually engage, and with who and how it will want to proceed with consultation.
- NLH timelines and targets are vulnerable by the absence of certainty on the land claim process, and attendant and as yet undetermined consultation mechanisms

Strategic Considerations:


1. Federal/Provincial Environmental Assessment Processes

- Prior to January the federal government suggested to the Minister of Environment and Conservation that there is interest in pursuing the Lower Churchill project as a possible pilot for streamlining federal and provincial EA processes.
- In entering a joint review with Canada, NL expects that all negotiations with Aboriginal organizations will include Canada. NL has no information on how Canada will want to proceed with consultations, but an all inclusive approach is not attractive to the province, as equal status would likely generate false expectations and conflict among interest groups.
- As the Province continues in its process without the federal government, and incurs costs, and makes commitments and accommodations for aboriginal inclusion, the circumstances become increasingly complicated. Stakeholders may protest the process, and the late engagement of the federal government will undoubtedly cause project delays because of the need to harmonize functions.
- NLH advises that any deviation from the existing timelines in the ongoing provincial EA process will set the project back another year.
- The LMN and Innu Nation will seek funding for participation in the EA process.



2. Labrador Metis Nation Accommodation

- The Labrador Métis Nation (LMN) claims Aboriginal rights and title to large areas of central and southern Labrador. Its claim has not been accepted for negotiation by Canada or Newfoundland and Labrador. The LMN wants the Province to consult it on proposed resource development projects in Labrador in the same manner as the Innu Nation and the Nunatsiavut Government.
- The Province has a longstanding policy of consulting only with aboriginal groups having accepted land claims, or claims in active negotiation (namely, the

Labrador Innu and Inuit). Requests from other aboriginal groups for similar consultation have traditionally been rejected by government to remove any assumption of tacit acceptance of their asserted claims.

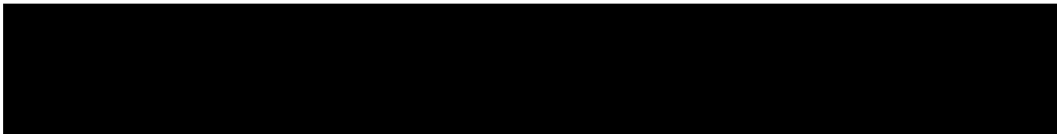
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- Involving the LMN in the Environmental Assessment of the Lower Churchill Project may raise expectations that the proponent is willing to negotiate an Impacts and Benefits Agreement (IBA), as it currently is doing with the Innu Nation. The proponent will want to ensure that any consultation processes afforded to the LMN do not inadvertently and inappropriately increase expectations for (and the likelihood of any requirement for) compensation from the Project. In its planning to date NLH has not made provisions for the negotiation of additional IBAs.


3. Innu Nation Accommodation

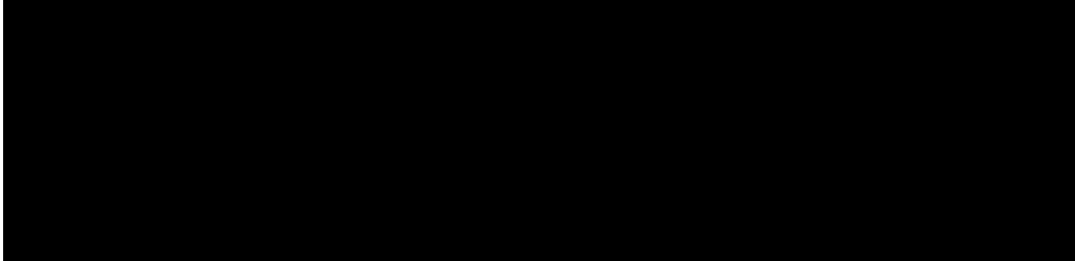
- The Project is located within the Labrador Innu Land Claim Area. The Innu Nation land claim is under active negotiation at the Agreement-in-Principle stage. NLH and Innu Nation have negotiated Process Agreements that establish and fund mechanisms for on-going consultation and cooperation related to the Project, including IBA negotiations, community consultation and on-going cooperation on the environmental work
- The Innu Nation is very sensitive to other aboriginal groups becoming involved in the Project. 


4. Quebec Innu Accommodation

- As a result of recent Supreme Court decisions, the Province may see increased demands for consultation from QC aboriginal groups with asserted land claims in Labrador, both in general and more particularly in the context of the Lower Churchill project.

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- Consulting with a QC aboriginal group due to their asserted land claim in Labrador would represent a significant policy shift for the Province. The Province has maintained that its priority is to negotiate accepted claims with Labrador-based groups, and that any claims by Québec groups may be considered only after these complex negotiations are complete.
 - It will be necessary to devise an approach that ensures any legal obligations are met, minimizes any risks to the project, guards against excessive and undue expectations for consultation (and compensation), and which provides no recognition of the Quebec Innu land claim.

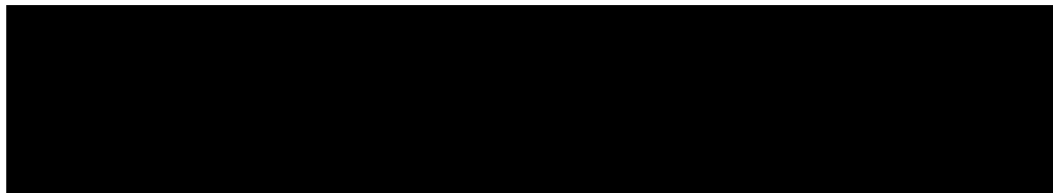
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Recommendations:

1. Cabinet direct the Department of Environment and Conservation to immediately engage in discussions with Environment Canada for the purpose of establishing a MOU on a joint review process between Canada and the Province.
2. Given that Newfoundland and Labrador is first “out-of-the gate” and most significantly exposed by virtue of the nature and complexity of interests in the Lower Churchill Project, officials shall assert during these discussions, and as a non-negotiable or minimum position, that a consultation framework devised by the Government of Newfoundland and Labrador shall govern the joint EA process.
3. The Departments of Environment and Conservation, Labrador and Aboriginal Affairs, and Justice, negotiate separate MOUs with the Innu Nation and the Labrador Metis Nation within the mandate outlined in Appendix A (attached). The agreement with the LMN should give it a higher level of consultation than other stakeholders, but less than that accorded to the Innu Nation.
4. The Departments of Environment and Conservation and Labrador and Aboriginal Affairs shall inform the Nunatsiavut Government that the project may reasonably be expected to have adverse environmental effects in the Labrador Inuit

Settlement Area and/or adverse effects on Inuit rights under the Labrador Inuit Land Claims Agreement.

5.



Prepared by: Robert Coombs
DLAA, April 23, 2007

Appendix A: Negotiating Mandate

There will be seven stages in the conduct of a joint EA process with the federal government which present opportunities for Aboriginal organization inclusion:

1. The Design of Review Process/Development of Terms of Reference
2. Appointment of Panel
3. Review of Draft Environmental Impact Statement (EIS) Guidelines
4. EIS Preparation (Proponent Consultations)
5. Public Review of EIS
6. Public Hearings
7. Decision by Provincial/Federal Governments

The courts have said that the scope of any duty to consult lies along a spectrum, the type and level of required consultation being determined by the strength of the case supporting the claimed aboriginal right and the degree of impact of the proposed action or decision on it. The mandate suggested below complies with that direction. All of the options presented below are dependent on the agreement of the federal government. Of the seven stages, stages 2 and 7 present opportunities where an Aboriginal organization can be involved in decision-making – the appointment of the Panel and the decision on the recommendations of the Panel following the EA process.

Innu Nation:

- The Departments of Environment and Conservation and Labrador and Aboriginal Affairs will negotiate an MOU with the federal government and the Innu Nation which could involve the Innu Nation at all stages of the EA. It is proposed, with the agreement of Canada, to permit the Innu Nation to make a recommendation on the membership of the Panel.
- Stages 3-6 are open to the general public. Officials are permitted to negotiate a greater, separate level of involvement for the Innu Nation at these stages. This may take the form of private meetings with Panel Members or the Proponent.
- Negotiators may only agree to Innu involvement in stage 7 with prior authorization of both the Minister of Environment and Conservation and the Minister Responsible for Aboriginal Affairs.

Labrador Métis Nation:

- The Departments of Environment and Conservation and Labrador and Aboriginal Affairs will negotiate an MOU with the federal government and the LMN which minimizes LMN involvement in some stages of the EA not open to the general public (1 and 2), and ensure it is less than that accorded to the Innu Nation. The LMN will not be permitted to make a recommendation on the composition of the Panel.
- Negotiators will have latitude to negotiate LMN involvement ranging from a greater, separate level of involvement, such as private meetings with Panel Members or the Proponent, at stages open to the public (3-6).
- Under no circumstances are officials authorized to agree to LMN participation or consent as a requirement at decision-making stage (Stage 7) of the process.

