RESPONSE TO WORKING GROUP AND PUBLIC COMMENTS ON THE SITE C CLEAN ENERGY PROJECT ENVIRONMENTAL IMPACT STATEMENT

Technical Memo

CONSIDERATION OF HISTORICAL CONTEXT IN ASSESSMENT OF POTENTIAL IMPACTS ON THE EXERCISE OF ASSERTED OR ESTABLISHED ABORIGINAL AND TREATY RIGHTS

MAY 8, 2013

Subject: Consideration of Historical Context in Assessment of Potential Impacts on the Exercise of Asserted or Established Aboriginal and Treaty Rights

Purpose

A number of Aboriginal groups have asserted that BC Hydro has not included a consideration of the historical context of their use of lands and resources and/or exercise of their asserted or established Aboriginal or treaty rights in its Environmental Impact Statement (EIS) and that these considerations are essential to a proper determination of the effects of the Project. Some reviewers have suggested the proper approach to do this is to set a pre-industrial baseline for its cumulative effects assessment. In some cases, as support for their position, the Aboriginal groups have relied on the B.C. Court of Appeal's decision, *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*.[1]

The purpose of this Technical Memo is to clarify BC Hydro's position on the application of the *West Moberly* decision to the environmental assessment for the Project, and describe how BC Hydro has met the requirements of *West Moberly* and related case law in carrying out the environmental assessment and related consultation.

BC Hydro's methodology for assessing cumulative effects is set out at Volume 2 Section 10.5 and elaborated on in the Technical Memo: Cumulative Effects Assessment. Please refer to that Technical Memo for an explanation as to why a pre-industrial baseline is not an appropriate method to predict cumulative effects.

This technical memo addresses:

- Case law on past infringements and historical context
- Description of how and where historical context has been incorporated into the EIS
    - Gathering information
    - Incorporation of information
        - Volume 3 Section 19 and Volume 5 Section 34
        - Use of TLUS and Community Baseline Reports
        - Heritage Resource Effects Assessment
        - Characterizing Residual Effects: "Context"
        - Environmental Background: Previous Development

[1] *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 ("*West Moberly*")

Case Law on Past Infringements and Historical Context

In *West Moberly*, the BC Court of Appeal found that when a current Crown decision will have an adverse impact on an Aboriginal right, the past may be relevant when conducting consultations related to that decision.

The *West Moberly* decision arose from a judicial review of an amendment to permits granted to First Coal Corporation for bulk sampling and exploration of coal in an area within the traditional hunting territory of the West Moberly First Nations. The area was also known to be a habitat of the Burnt Pine caribou herd. There was evidence before the Court that only 11 animals in the herd remained and the herd was in danger of extirpation. The ultimate issue before the chambers judge and the Court of Appeal in *West Moberly* was whether the Crown had adequately consulted and sought to accommodate the West Moberly before granting the amendments to the permits.

With respect to the scope of Crown consultation with the West Moberly First Nations, Chief Justice Finch found: "historical context is essential to a proper understanding of the seriousness of the potential impacts on the [West Moberly First Nation's] treaty right to hunt".[2] He clarified that taking matters relating to the past into account (such as the fact caribou were an important part of the West Moberly First Nations' way of life and cultural identity, and that the West Moberly took steps to preserve the Burnt Pine caribou herd by banning hunting) was not "to attempt to redress past wrongs" but "simply to recognize an existing state of affairs."[3]

The BC Court of Appeal's comments in *West Moberly* must be read in conjunction with the Supreme Court of Canada's reasons in *Rio Tinto Alcan v Carrier Sekani Tribal Council*,[4] released several months before *West Moberly* was decided. In *Rio Tinto*, the Supreme Court of Canada found that the duty to consult is prospective,[5] relates to "immediate or prospective" Crown conduct,[6] and "the subject of consultation is the impact on the claimed rights of the *current* decision under consideration."[7] The Court rejected the view that the duty to consult is triggered when a decision is made regarding an already existing project which has a continuing impact on asserted Aboriginal rights. This point was emphasized in the concurring reasons of Hinkson J.A. in *West Moberly:* "[F]or the duty to consult to be triggered, the Crown's current proposed conduct must itself be causally linked to the potential adverse consequence affecting the Aboriginal right. <u>It follows that where this test is met, the duty to accommodate should only be concerned with addressing the potential adverse affects of the current proposed Crown conduct, and not with remedying harm caused by past events</u>." (emphasis added)[8]

Taking these decisions together, several principles can be ascertained:

(a) The duty to consult is prospective and the subject matter is the impact of the current decision under consideration on asserted or established rights;[9]

(b) Consultation on a proposed project is not the proper forum to remedy past or continuing adverse impacts on the exercise of asserted or established rights;[10]

---

[2] *West Moberly*, at para. 117 per Finch CJBC, para. 181 per Hinkson JA
[3] *West Moberly*, at para. 119 per Finch CJBC
[4] *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43 ("*Rio Tinto*")
[5] *Rio Tinto*, at para. 35
[6] *Rio Tinto*, at para. 54
[7] *Rio Tinto*, at para. 53 (emphasis in *Rio Tinto*)
[8] *West Moberly*, at para. 180 per Hinkson JA
[9] *Rio Tinto*, at paras. 35, 53

(c) The nature of the duty to consult varies with the situation, and increases with the strength of the Aboriginal claim and the seriousness of the potential impact on the exercise of the asserted right;[11]

(d) Assessing the seriousness of the impact entails a consideration of the historical context; matters that can be taken into account include the historical importance of a potentially affected resource to an Aboriginal group;[12]

(e) The purpose of taking historical context into account is to assist in understanding the existing state of affairs; the purpose is not to redress or accommodate for past events.[13]

Approach to Incorporating Historical Context

BC Hydro has received information from Aboriginal groups with respect to their historic use of land and resources, their importance to Aboriginal groups, and changes to the land and those activities as a result of previous development or other causes. The information received was incorporated as described below.

Gathering information

Information from Aboriginal groups

Historical information regarding Aboriginal groups' past practices and their importance came from direct consultations with each group as well as Traditional Land Use Studies, and the Community Baseline Reports provided by Aboriginal groups who have the potential to be most impacted by the Project. BC Hydro also invited Aboriginal groups to share information on (among other things) their traditional territories and traditional knowledge.

BC Hydro retained consultants to review the Traditional Land Use studies and other publicly available information on the 29 Aboriginal groups named in the EIS. The consultants produced summaries entitled "Aboriginal Land and Resource Use Summary" that are included at Volume 5 Appendix A Part 4, which identify, where available, past use of lands and resources for traditional purposes that may be adversely impacted by the Project.

The content of the Traditional Land Use studies varies from group to group. They generally contain current use information, as well as details on how changes in the land and modern advancements have impacted traditional activities of the Aboriginal groups such as hunting, fishing, trapping and gathering, including availability of wildlife, fish and traditional plants as a result of encroachment from industrial and agricultural activities, changes to the watershed through past hydro-electric development, access to wider territories through modern means (such as cars, guns for hunting), and other factors.

The Community Baseline Reports contain information from Aboriginal groups on the accumulated effects of development on their land use and cultural practices including the alienation of their traditional territory over the last two generations, the decline of their cultural practices, threats to their

[10] *Rio Tinto*, at paras. 48-49; *West Moberly*, at para. 180 per Hinkson JA
[11] *Rio Tinto*, at para. 36
[12] *West Moberly*, at paras. 117, 118 per Finch CJBC
[13] *West Moberly*, at para. 119 per Finch CJBC, paras. 181-182, per Hinkson JA; para. 251 per Garson JA

economic self-sufficiency through the loss of commercial fishing and traplines, and the evolution and adaptation of their subsistence practices (such as hunting) as a result.

Information from Other Sources

The Project Description, found at Volume 1, Section 4.1, describes the proposed Project outlining both the natural elements and human elements that define the region, and includes a description of development of the land from first contact with Europeans to today.

At Volume 2, Section 11.1, BC Hydro has also included a narrative of previous hydroelectric development on the Peace River. The narrative describes environmental changes resulting from those developments, follow-up programs put in place to avoid and manage environmental effects of its current facilities, and historic grievances from Aboriginal groups relating to those facilities.[14]

As part of the heritage effects assessment, BC Hydro retained consultants to conduct an extensive, multi-year field inventory and survey, as well as literature review, including paleontological, archeological and historical resources, whose report is included at Volume 4, Appendix C of the EIS. The report contains a detailed review of historical background data related to palaeontological, archeological and historical sites within the local Project area, including areas of cultural importance to Aboriginal groups. The report is extensive and records considerable information regarding the history of these areas and how they have been modified from before European contact to current day.

Incorporation into EIS

Sections 19 and 34

BC Hydro has incorporated historical information from Aboriginal groups, where provided and where publicly available, regarding their past use of land and resources potentially affected by the Project, including the exercise of their asserted and established Aboriginal and treaty rights or other traditional practices in establishing the baseline conditions for current use of lands and resources for traditional purposes (Volume 3 Section 19.3), in assessing effects on current use of lands and resources for traditional purposes (Volume 3 Section 19.4), and in assessing the impact on asserted or established Aboriginal and treaty rights (Volume 5 Section 34.3.3).

The Community Baseline Reports and the summaries of the TLUS reports and other publicly available information found at Volume 5 Appendix A01-29, Part 3, as well as other sources identified in section 19.2, were considered as part of the baseline information for the effects assessment on current use of lands and resources for traditional purposes. Some examples where historical context is specifically referenced in Volume 3 Section 19.3 include the following observations:

- The Peace River valley was noted as a place of high cultural, historical and ecological value to Aboriginal groups[15]

- Actively engaging in traditional activities and maintaining a traditional way of life are essential elements of Aboriginal people's well-being and quality of life[16]

[14] EIS, Volume 2, Section 11.1
[15] EIS, Volume 3, Section 19, page 19-14, lines 9-10
[16] EIS, Volume 3, Section 19, page 19-14, lines 14-15

- Aboriginal groups have indicated that their ability to use lands and resources of the Peace River basin for traditional purposes have been constrained by changes in the overall health of the Peace River and availability of resources, which they attribute largely to development in the area[17]

- BRFN members reported that they believe that oil and gas activity and industrial logging negatively impacts resources around their reserve, forcing them to travel to other regions of their territory[18]

- As a result of concerns regarding pollution from industrial and farming activities in other parts of BRFN territory, BRFN members say they rely more on the Halfway River and the mouths of streams flowing into the Peace River for their fish needs[19]

- The SFN report making concerted efforts to maintain or re-establish their connections with traditional hunting lands; they place economic, social, and cultural importance on their seasonal round and establish hunting, trapping, and gathering camps on hunting lands[20]

- Fishing is described as having played an important role in the SFN traditional annual round of economic and cultural pursuits, and continues to be pursued today[21]

- SFN indicated that access to key fishing sites was a concern and cautioned that certain mitigation measures, such as fish restocking, had not worked in Moberly Lake, where lake trout were lost[22]

- Treaty 8 First Nations members describe the Peace River valley, especially the area between Hudson's Hope and Taylor, as a "critical, essential and irreplaceable part of the cultural landscape"[23]

- The confluence areas along the north side of the Peace River are described by T8TA as heavily used ancestral gathering places[24]

- HRFN described the north side of Peace Reach as being preferred for exercise of treaty and Aboriginal rights, because extensive industrial activity in other areas within the Peace Region has constrained their ability to exercise their rights in those areas[25]

- DRFN identified preferred areas for harvesting which are reportedly now used more than the Peace River region (North of the Reserve to Fontas River; near the Doig and Beatton Rivers, and toward and across the Alberta border, including Boundary Lake and Ole Lake); land alienation was identified as the primary factor for the loss of use of the Peace River area[26]

[17] EIS, Volume 3, Section 19, page 19-14, lines 24-28
[18] EIS, Volume 3, Section 19, page 19-20, lines 19-21, citing Kennedy, 2011
[19] EIS, Volume 3, Section 19, page 19-23, lines 1-4.
[20] EIS, Volume 3, Section 19, page 19-24, lines 38-41.
[21] EIS, Volume 3, Section 19, page 19-29, lines 43-45, citing Weinstein 1979.
[22] EIS, Volume 3, Section 19, page 19-30, lines 10-12.
[23] EIS, Volume 3, Section 19, page 19-34, lines 27-29.
[24] EIS, Volume 3, Section 19, page 19-34, lines 31-32.
[25] EIS, Volume 3, Section 19, page 19-34, lines 44-45, page 19-35, lines 1-3.
[26] EIS, Volume 3, Section 19, page 19-35, lines 14-21.

- DFN expressed concern that industrial development in the Peace region has limited and altered hunting, fishing and gathering practices, with members reporting on the need to travel away from their usual places to engage in traditional activities, and as far as 50 to 300 km to hunt moose[27]

- DFN members reported that they hunt less at the Peace River than in the past. DFN representatives indicated that members "could no longer hunt along the shores of the Peace River because of agricultural development and private property, and due to muddy conditions of the river banks"[28]

- DFN members reportedly fish less in the Peace River than in the past[29]

- HLFN has noted it is increasingly difficult to successfully hunt, fish, trap and gather earth and plant materials within northwestern Alberta and northeastern British Columbia due to development in the region[30]

- DTFN identified the Sulphur Lake-Boundary Lake hunting corridor as an important resource harvesting area, with some DTFN members indicating that it had been used for approximately 30 years[31]

- The Traditional Territory of KLMSS was described being used by the Métis people of Kelly Lake since the early 1800s for purposes such as guiding, trapping, hunting, fishing, and spiritual practices[32]

- In the past, moose, caribou, and bison were reported to be the major species hunted by MCFN, whereas moose is currently named as the most commonly hunted large mammal[33]

- The MCFN asserted that the scale and number of resource developments in MCFN territory had already limited the ability of MCFN members to exercise these rights[34]

BC Hydro's effects assessment on current use of lands and resources for traditional purposes (found in Volume 3 Section 19.4) is divided into an assessment of changes in fishing opportunities and practices, changes in hunting and trapping opportunities and practices, and changes in other cultural and traditional uses of the land. This approach was modified from the approach set out in the EIS Guidelines in part in response to concerns raised by Aboriginal groups and enables BC Hydro to consider changes to cultural and traditional activities and land uses that are and have historically been of importance to Aboriginal groups, where that information has been provided.[35]

The consideration of changes in other cultural and traditional uses of the land takes into account matters identified as important by one or more Aboriginal groups, including cabins and campsites,

[27] EIS, Volume 3, Section 19, page 19-41, lines 27-31, citing General 2012f
[28] EIS, Volume 3, Section 19, page 19-42, lines 15-19.
[29] EIS, Volume 3, Section 19, page 19-43, line 7.
[30] EIS, Volume 3, Section 19, page 19-44, lines 36-38, citing General 2012e
[31] EIS, Volume 3, Section 19, page 19-47, lines 31-35..
[32] EIS, Volume 3, Section 19, page 19-53, lines 1-3.
[33] EIS, Volume 3, Section 19, page 19-56, lines 35-38.
[34] EIS, Volume 3, Section 19, page 19-57, lines 7-9.
[35] EIS, Volume 3, Section 19, page 19-8

drinking water, firewood, feather gathering, trails and water routes, cultural and spiritual places, collection of food and medicinal plants, and use of and access to culturally important places and valued landscapes.[36] BC Hydro's assessment reflects and incorporates the historical importance of these aspects of land use where that information was available.

Examples where historical context is specifically taken into account in Section 19.4 to determine adverse effects include the following observations and conclusions:

- SFN, T8TA, BRFN have a renewed preference for the Peace, and may be fishing more in the Peace River in the area of the proposed Project today than they had historically; material prosperity, cars, and improved transportation has facilitated the practice of traditional pursuits throughout a wider geographic area[37]

- As a result of pollution from industrial and farming activities in other parts of BRFN's traditional territory, they say they now rely more on the Halfway River and mouths of streams flowing into the Peace River to fish[38]

- Bear Flats area, a site of youth and elder camps, was chosen for this purpose due to its "profound significance as Treaty 8 people have gathered, camped, hunted, and practiced ceremony here since time immemorial"[39]

Historical context was also incorporated into the determination of significance of residual adverse effects on the current use of lands and resources for traditional purpses in the following ways:

- The criteria used to characterize residual effects were based, in part, on consultations with Aboriginal groups and include "context" which includes a consideration of several factors including (i) "importance of use" to Aboriginal groups for traditional purposes, (ii) "importance of area" to Aboriginal groups for traditional uses, and (iii) the level of "disturbance", that is, whether the area "has been substantially previously disturbed by human development or human development is still present."[40] Each criterion (including "context") was taken into account in determining whether a residual effect is significant.[41]

- A determination of significance of a residual adverse effect was made where: "a current use of the lands for traditional purposes would be permanently undermined and its practice cannot be readily reproduced elsewhere; and the current use and area is indicated to be of high value or importance among Aboriginal groups for traditional purposes"[42]

- The effect on other cultural or traditional uses of the land was determined to be significant for T8TA, SFN and BRFN at Bear Flats, Farrell Creek, and Attachie, largely because those areas are historically of high value to those Aboriginal groups[43]

[36] EIS, Volume 3, Section 19, page 19-8
[37] EIS, Volume 3, Section 19, pages 19-68 and 19-69
[38] EIS, Volume 3, Section 19, page 19-69
[39] EIS, Volume 3, Section 19, pages 19-87
[40] EIS, Volume 3, Section 19, Table 19-13, page 19-100
[41] EIS, Volume 3, Section 19, Table 19.14, page 19-104
[42] EIS, Volume 3, Section 19, pages 19-105
[43] EIS, Volume 3, Section 19, pages 19-105

The assessment of potential impacts to Aboriginal and Treaty rights in Volume 5 Section 34.3.3 is based on the results of the assessment on the current use of lands and resources for traditional purposes found in Volume 3 Section 19.4, which relies on the baseline information in Volume 3 Section 19.3. This is described more fully in Technical Memo: Methodology for the Assessment of the Potential Impacts of the Project on the Exercise of Asserted or Established Aboriginal and Treaty Rights.

Use of Traditional Land Use Studies and Community Baseline Reports

In addition to their consideration as part of Volume 3, Section 19, and Volume 5, Section 34, the six Traditional Land Use studies (relating to nine Aboriginal groups) that had been funded and received by BC Hydro at the time it submitted the EIS were provided to BC Hydro's technical staff and considered as part of the baseline information for the valued components: fish and fish habitat, vegetation and ecological communities, wildlife resources, heritage resources and human health.[44]

The two Community Baseline Reports (relating to five Aboriginal groups) funded and received by BC Hydro and available at the time of submitting the EIS were considered throughout the EIS, as applicable, in addition to being incorporated as part of the baseline and the effects assessment for current use of lands and resources for traditional purposes (Volume 3 Section 19). Integration summary tables were drafted outlining where in the EIS BC Hydro considered the information in the reports (see Volume 3 Appendix B). For example, information from the Community Baseline Report provided by Duncan's First Nation was considered in Section 12 (Fish and Fish Habitat), Section 13 (Vegetation and Ecological Communities), Section 14 (Wildlife Resources), Section 19 (Current Use of Lands and Resources for Traditional Purposes), Section 24 (Harvest of Fish and Wildlife Resources), Section 25 (Outdoor Recreation and Tourism), Section 26 (Navigation), Section 27 (Visual Aesthetics), Section 31 (Transportation), Section 33 (Human Health), and Section 34 (Asserted or Established Aboriginal and Treaty Rights).[45] The Community Baseline Reports and accompanying summary tables were provided to BC Hydro's technical leads on fish and fish habitat, wildlife resources, vegetation, land and resource use, and social, economic, and human health, and integrated into the baseline and effects assessment of those valued components as appropriate.[46]

Heritage Resource Effects Assessment

BC Hydro's assessment of the effect on heritage resources is set out in Volume 4, Section 32. Heritage resources are non-renewable resources that may be susceptible to damage from land-altering activities. Many heritage resources have value to Aboriginal peoples as well as the public.[47] As part of its assessment, BC Hydro retained consultants to conduct a multi-year field inventory and assessment program, referenced above. Aboriginal participation in the heritage program is set out in chapter 2 of the report.[48]

The heritage resource assessment incorporated, among other things, traditional use information,[49] historical background data culled from a list of resources set out Section 32.2.1.3,[50] and the results of the extensive multi-year program found in the report at Volume 4, Appendix C. See also the Technical Memo: Archeology.

[44] EIS, Volume 1, Section 9, page 9-32
[45] EIS, Volume 3, Appendix B3, pages B2-B3
[46] EIS, Volume 3 Appendix B1, page B-5
[47] EIS, Volume 4, Section 32, page 32-2
[48] EIS, Volume 4, Appendix C, pages 3-8
[49] EIS, Volume 4, Section 32, page 32-5
[50] EIS, Volume 4, Section 32, page 32-18

The key indicators of heritage resources are palaeontological, archaeological and historical sites.[51] These sites include areas of cultural importance to Aboriginal groups, including areas such as Attachie and Bear Flats, identified by a number of Treaty 8 First Nations as areas where they exercise their asserted Treaty rights.[52]

Characterizing Residual Effects: "Context"

The characterization criteria used to determine the significance of identified residual effects for each valued component includes "context", defined at Table 10.3 as:

> "the extent to which the area within which an effect may occur has already been adversely affected by human activities; and is ecologically fragile and has little resilience and resistance to imposed stresses".[53]

The determination of whether a residual adverse effect is significant, for all residual adverse effects, took into account each criterion, including "context".[54] This ensures that historical changes to an area, and the extent of those changes, is a mandatory consideration in determining the significant adverse effects of the Project.

Environmental Background: Previous Developments

The narrative of previous hydroelectric development on the Peace River included at Volume 2 Section 11.1 was included in accordance with the EIS Guidelines for the purpose of better assessing the potential effects of the Project and the feasibility of proposed mitigation measures.[55] At Section 11.1, BC Hydro states "[u]nderstanding environmental changes, in particular those associated with previous hydroelectric development, provides context for the environmental assessment of the Project."[56]

As noted, the narrative describes environmental changes resulting from those developments, follow-up programs put in place to avoid and manage environmental effects of its current facilities, and how BC Hydro is dealing with historic grievances from Aboriginal groups relating to those facilities.[57]

Related Comments / Information Requests:

This technical memo provides information related to the following Information Requests:

pub_0599-001	pub_0641-001	pub_0702-001	pub_0850-001	pub_0861-001
pub_0862-001	pub_0894-001	pub_0895-001	pub_0897-001	pub_0910-001
pub_0941-001	pub_0963-001	ab_0001-001	ab_0001-016	ab_0001-190

[51] EIS, Volume 4, Section 32, page 32-1
[52] EIS, Volume 4, Appendix C, pages 192, 198-99
[53] EIS, Volume 2, Section 10, Table 10.3 (citing criteria listed in Table 8.3 of the EIS Guidelines). With respect to the characterization criteria applied to determine significance of residual adverse effects in Volume 3 Section 19, the definition of "context" is even broader as noted earlier in this Technical Memo.
[54] EIS, Volume 2, Section 10.4.2.3, page 10-10
[55] EIS Guidelines, Section 9.1
[56] EIS, Volume 2, Section 11.1, page 11-2
[57] EIS, Volume 2, Section 11.1, pages 11-2 to 11-13

ab_0001-191	ab_0001-533	ab_0001-537	ab_0001-711	ab_0003-259
ab_0004-093	ab_0010-090	ab_0010-123		