SITE C | CLEAN ENERGY PROJECT

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

Technical Memo

METHODOLOGY FOR THE ASSESSMENT OF THE POTENTIAL IMPACTS OF THE PROJECT ON THE EXERCISE OF ASSERTED OR ESTABLISHED ABORIGINAL AND TREATY RIGHTS

MAY 8, 2013

Subject: Methodology for the Assessment of the Potential Impacts of the Project on the Exercise of Asserted or Established Aboriginal and Treaty Rights

Purpose

The purpose of this Technical Memo is to clarify the methodology used by BC Hydro to assess the potential impacts of the Project on the exercise of asserted or established Aboriginal and treaty rights (EIS, Volume 5, Section 34.3.3).

Analysis

Table 34.1 of the EIS, shown below, lists the 29 Aboriginal groups that were identified in Section 20.1 of the EIS Guidelines[1] by the federal Minister of Environment and the Executive Director of the BCEAO as having the potential to be adversely affected by the Project.

Treaty 8 First Nation Signatories		
British Columbia	**Alberta**	**Northwest Territories**

• Blueberry River First Nations
• Fort Nelson First Nation
• McLeod Lake Indian Band
• Saulteau First Nations
• Treaty 8 Tribal Association (T8TA):
  ○ Doig River First Nation
  ○ Halfway River First Nation
  ○ Prophet River First Nation
  ○ West Moberly First Nations
	• Athabasca Chipewyan First Nation
	• Beaver First Nation
	• Dene Tha' First Nation
	• Duncan's First Nation
	• Horse Lake First Nation
	• Little Red River Cree Nation
	• Mikisew Cree First Nation
	• Smith's Landing First Nation
	• Sturgeon Lake Cree Nation
	• Tallcree First Nation
	• Woodland Cree First Nation
		• Deninu K'ue First Nation
		• Salt River First Nation

British Columbia First Nations		
• Kwadacha First Nation • Tsay Keh Dene First Nation		
Métis		
British Columbia	**Alberta**	**Northwest Territories**
• Métis Nation British Columbia (as directed by the CEA Agency) • Kelly Lake Métis Settlement Society (as directed by the CEA Agency)	• Métis Nation of Alberta – Region 6 • Paddle Prairie Métis Settlement Society • Fort Chipewyan Métis Local 125	• Northwest Territory Métis Nation

BC Hydro undertook a two-step analysis to assess the potential impacts of the Project on the exercise of asserted or established Aboriginal and treaty rights of the Aboriginal groups listed in Table 34.1.

[1] EIS, Volume 5, Section 34.3, page 34-1; EIS Guidelines, s. 20.1

BC Hydro first provided its understanding of the content and scope of the Aboriginal and treaty rights held or claimed by these groups (see Volume 5 Section 34.3.2 and Technical Memo: Oral Promises Under Treaty 8). BC Hydro then sought to determine whether the Project had the potential to impact upon the exercise of those rights (Volume 5 Section 34.3.3). The analysis in the second stage was based on baseline information which BC Hydro gathered from various sources regarding the current use of land resources for traditional purposes, including hunting, trapping and fishing of the Aboriginal groups listed in Table 34.1 (Volume 3 Section 19.3) and the related effects assessment for current use of land resources for traditional purposes (Volume 3 Section 19.4).

Content and scope of asserted or established Aboriginal and treaty rights

BC Hydro was required by the EIS Guidelines (s. 20) to set out its understanding of the asserted or established Aboriginal rights and Treaty rights held by each potentially affected Aboriginal group.

Treaty rights

Twenty-one of the 29 Aboriginal groups listed in Table 34.1 are signatories or adherents to Treaty 8. BC Hydro's understanding of their rights under Treaty 8 is set out at Volume 5, Section 34.3.2.1 and the Technical Memo: Oral Promises Under Treaty 8.

BC Hydro's understanding is based on the text of the Treaty itself and case law cited in that section. The case law includes guidance on the duty to consult with respect to taking up land under the Treaty, the interpretation of Treaty rights, the significance of oral promises, incidental rights under the Treaty, and geographic limitations on Treaty rights to hunt, fish and trap.

Prior to submitting the EIS, BC Hydro circulated a draft memorandum to some of the Treaty 8 First Nations listed at Table 34.1 entitled "Draft Discussion Paper re; Treaty 8 Rights". The memorandum sets out BC Hydro's understanding more fully. BC Hydro received input from some First Nations on the memorandum that was incorporated into its summary in Volume 5 Section 34.3.2.1 (see, e.g., page 34-7, lines 13-16).

As noted, BC Hydro was required by the EIS Guidelines to set out its understanding of Treaty rights held by potentially affected Aboriginal groups. Through consultation with the Treaty 8 First Nations, BC Hydro is aware that their interpretation of rights under Treaty 8 may not always coincide with BC Hydro's understanding, but has taken the First Nations' perspective into account in conducting its assessment (page 34-7, lines 25-29).

Aboriginal rights

Kwadacha and Tsay Keh Dene First Nations have asserted Aboriginal rights as First Nations under Section 35(1) of the *Constitution Act, 1982*. Métis groups listed in Table 34.1 have also asserted Aboriginal rights under Section 35(1), pursuant to Section 35(2) which includes Métis in the definition of "aboriginal people of Canada".[2] In addition, various other First Nations listed in Table 34.1 that are signatories to Treaty 8 have asserted Aboriginal rights in addition to their Treaty rights.[3]

[2] EIS, Volume 5, Section 34.3, page 34-9, lines 12-13.

[3] EIS, Volume 5, Section 34.3, page 34-7, lines 31-34.

BC Hydro's understanding of the asserted Aboriginal rights of those Aboriginal groups is set out in Volume 5, Sections 34.3.2.2 and 34.3.2.3. BC Hydro's understanding is based on guidance from the seminal Supreme Court of Canada decisions on the nature and test for establishing Aboriginal rights (*Van der Peet, Sappier; Gray*), Aboriginal title (*Delgamuukw, Marshall; Bernard*, as well as *William*, a recent BC Court of Appeal decision, leave to appeal to SCC granted), and Métis rights (*Powley*).

BC Hydro also retained consultants to conduct a historical research report regarding Métis in the Peace River area of British Columbia and Alberta between European arrival and the establishment of any current Métis communities. Although the report drafted by the consultants is referenced in Volume 5 Section 34.3.2.3, it was inadvertently omitted from Volume 5 Appendix A16 and A17, and has been added in the Errata and Updated Information.

Potential impact of the Project on the exercise of asserted or established Aboriginal and Treaty rights

In accordance with its understanding of the content and scope of the rights held or claimed by the Aboriginal groups listed in Table 34.1, BC Hydro then assessed whether the Project had the potential to impact upon the exercise of rights by those groups. In doing so, BC Hydro identified a close linkage between the rights held or claimed by the Aboriginal groups, and the current practices of hunting, trapping and fishing of each Aboriginal group. As a result, when BC Hydro assessed the potential impacts of the Project on the exercise of rights in Volume 5 Section 34.3.3, it relied on baseline information presented in Volume 3 Section 19.3 with respect to the current use of lands and resources for traditional purposes of each Aboriginal group listed in Table 34.1. This included information on the nature and location of the hunting, fishing and trapping, and related ancillary activities, of each Aboriginal group.

BC Hydro gathered baseline information in various ways: by recording information provided by Aboriginal groups in meetings and other direct consultation activities with BC Hydro, and with respect to the Aboriginal groups most likely to be the most affected by the Project, by providing capacity funding to complete traditional land use studies and community baseline reports.

BC Hydro engaged consultants to review the traditional land use studies provided by Aboriginal groups and related materials and to consider where additional information would be helpful. After an initial review of the TLUS reports by its consultants, BC Hydro wrote to the Aboriginal groups who provided the reports with specific questions, clarifications, and requests for additional information. In addition, BC Hydro wrote to each Aboriginal group listed in Table 34.1 to request information for consideration in the preparation of the EIS, including a map of their traditional territory, current land use information, and information regarding the exercise of asserted or established Aboriginal rights and Treaty rights, including hunting, fishing, and trapping.

Based on the TLUS reports and other information where provided by Aboriginal groups, and other publicly available information, BC Hydro's consultants then prepared "Aboriginal Land and Resource Use Summaries" for each Aboriginal group listed in Table 34.1 (see: Volume 5 Appendix A, Part 3). BC Hydro used the information provided by Aboriginal groups through the consultation process, as well "Aboriginal Land and Resource Use Summaries" prepared by their consultants, to prepare the baseline information in Volume 3 Section 19. A complete list of sources used to prepare the baseline information is provided in Section 19.2.

The baseline information along with the results of the Wildlife Resources, Vegetation and Ecological Communities, and Fish and Fish Habitat effects assessments, were used as the basis for the assessment of the potential effects of the Project on current use of lands and resources for traditional

purposes, which is provided in Section 19.4.[4] BC Hydro considered the potential for the Project to result in changes to the following "key aspects":

- Fishing opportunities and practices
- Hunting and trapping opportunities and practices
- Cultural and other traditional uses of the land.[5]

With respect to the third category, BC Hydro assessed potential changes to several current uses of land and resources which may be described as "ancillary" to hunting, fishing and trapping practices, such as travel and access to harvesting opportunities, the establishment and use of of cabins, and harvesting of berries, herbs and medicinal plants. The term "ancillary" was used in the EIS to denote a category of activities which, based on guidance from the case law, may be "reasonably incidental" to the exercise of the Treaty rights to fish, hunt, and trap. Thus, "ancillary activities" is a broader category of which "incidental treaty rights" would be a subset.[6]

To determine whether each Aboriginal group would be brought into the effects assessment in Section 19.4, the baseline information (Section 19.3) was overlaid with the boundaries of the current use of lands and resources for traditional purposes Local Assessment Area (LAA).[7] This analysis resulted in the following conclusions:[8]

- The following nine First Nations (all Treaty 8 signatories) reported current use of land and resource for traditional purposes in the LAA, and were brought into the effects assessment:
    - Blueberry River First Nations
    - Dene Tha' First Nation
    - Duncan's First Nation
    - Horse Lake First Nation
    - Saulteau First Nations
    - Treaty 8 Tribal Association (Doig River First Nation, Halfway River First Nation, Prophet River First Nation, West Moberly First Nations)
- Kelly Lake Métis Settlement Society indicated use of the Peace River valley in a general sense, but did not provide sufficient specific information to be brought into the effects assessment.
- Métis Nation British Columbia submitted a report to BC Hydro titled "A Métis Use and Occupancy Study for the BC Hydro Site C Dam Clean Energy Project", together with related site

[4] EIS, Volume 5, Section 34.3, page 34-11, lines 27-29.

[5] EIS, Volume 3, Section 19.4, page 19-65, lines 35-40.

[6] See: EIS, Volume 3, Section 19.1, page 19-8, lines 20-25, and Volume 5, Section 34.3, page 34-11, lines 29-33.

[7] EIS, Volume 3, Section 19.4, page 19-66, lines 5-8. See Volume 3, Section 19.3, pages 19-10 and 19-11, for a description of the LAA for current use of lands and resources for traditional purposes.

[8] EIS, Volume 3, Section 19.4, page 19-66, lines 9-37.

mapping, after the submission of the EIS. The report and maps will be considered by BC Hydro in the EIS review phase, and any new information will be provided.

- McLeod Lake Indian Band has advised BC Hydro that it intends to provide BC Hydro with a Traditional Land Use Study. If BC Hydro receives the study in sufficient time, it will be considered by BC Hydro in the EIS review phase, and any new information will be provided.

- The remaining 17 Aboriginal groups reported no current use of lands and resources for traditional purposes within the LAA, and therefore were not brought into the effects assessment.

The results of the effects assessment in Section 19.4 were drawn into the assessment of potential impacts on the exercise of asserted or established Aboriginal and Treaty rights (Volume 5 section 34.3.3).[9] Based on an individual assessment of the potential impacts of the Project on asserted or established Aboriginal and Treaty rights for each Aboriginal group, BC Hydro concluded that the Project has the potential to impact the exercise of Treaty rights by the nine First Nations listed above under the first bullet:[10]

> "Volume 3 Section 19 Current Use of Lands and Resources for Traditional Purposes concluded that Project activities, including construction-related clearing and reservoir filling, would adversely affect the current use of lands and resources for traditional purposes, including hunting, fishing and trapping, of the [nine] Treaty 8 First Nations. As a result, the Project also has the potential to impact the [nine] Treaty 8 First Nations' exercise of their rights to fish, hunt, and trap on Treaty 8 territory."[11]

While BC Hydro determined, in each case, whether residual effects on the current use of land and resources for traditional purposes, was likely to be significant in Volume 3 Section 19.4, the potential impact on asserted or established Aboriginal and Treaty rights is not a valued component, and no significance determination was required by the EIS Guidelines or carried out.

<u>Mitigation measures and other accommodations</u>

Volume 3 section 19.4 includes a description of mitigation measures to address potential adverse effects of the Project on the current use of land and resources for traditional purposes.[12] Many of the mitigations measures, while intended to address the potential effects of the Project on current use of lands and resources for traditional purposes, also have the effect of mitigating the potential impacts of the Project on the exercise of Aboriginal and Treaty rights. [13] Similarly, mitigation measures that BC Hydro has proposed for environmental Valued Components also have the effect of mitigating potential impacts of the project on the exercise of Aboriginal and Treaty rights. For a summary of mitigation measures from Section 19.4 (current use of land and resources for traditional purposes) that also address the potential impacts of the Project on the exercise of Aboriginal and Treaty rights, see Section 34.4.1. For a summary of mitigation measures proposed for environmental Valued Components that also address the potential impacts of the Project on the exercise of Aboriginal and Treaty rights, see Section 34.4.3.

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[9] EIS, Volume 5, Section 34.3, page 34-11, lines 33-35.
[10] EIS, Volume 5, Section 34.3, page 34-12, lines 30-38.
[11] EIS, Volume 5, Section 34.3, page 34-13, lines 1-27.
[12] Mitigation measures are summarized in Volume 3, Section 19.4, Table 19.12 (beginning at page 19-96).
[13] EIS, Volume 5, Section 34.4, page 34-18, lines 20-27.

As described in the EIS at Section 34.4.4, BC Hydro is also prepared to address and seek to accommodate the potential for the Project to impact Aboriginal and Treaty rights by entering into arrangements set out in Impact Benefit Agreements. Those agreements may provide for lump sum cash payments, payment streams over time, the transfer of Crown lands to the affected Aboriginal groups in fee simple, potential land protection measures or the establishment of special management zone designations. BC Hydro has offered to enter into initial discussions with Aboriginal groups that are likely to be impacted by the Project. To date, three Aboriginal groups have accepted BC Hydro's offer to enter into discussions.[14]

Related Comments / Information Requests:

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

gov_0013-068	pub_0599-001	pub_0641-001	pub_0702-001	pub_0715-002
pub_0727-001	pub_0739-001	pub_0742-001	pub_0777-001	pub_0795-001
pub_0837-001	pub_0844-001	pub_0850-001	pub_0861-001	pub_0862-001
pub_0894-001	pub_0895-001	pub_0897-001	pub_0941-001	pub_0963-001
ab_0001-714	ab_0001-707	ab_0001-710	ab_0004-001	ab_0004-003
ab_0004-093	ab_0004-094	ab_0006-042	ab_0009-025	ab_0009-026
ab_0012-012	ab_0004-092	ab_0004-097	ab_0004-098	ab_0004-103
ab_0006-052	ab_0009-025	ab_0012-003	ab_0012-040	

[14] EIS, Volume 5, Section 34.4, page 34-22, lines 17-30.