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Mr. Terence Hubbard
President
Impact Assessment Agency of Canada
160 Elgin Street, 22nd Floor
Ottawa, ON
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Email: terence.hubbard@iaac-aeic.gc.ca

Subject: WaterPower Canada Comments Regarding Indigenous Impact Assessment Co-Administration Agreements

Dear Mr. Hubbard:

WaterPower Canada (WPC) is pleased to provide its comments as part of the Impact Assessment Agency of Canada's engagement regarding Indigenous Impact Assessment Co-Administration Agreements.

WPC is the national industry association representing the Canadian hydroelectricity sector. Our members include both public and private hydropower producers, equipment manufacturers, engineering and construction firms and other suppliers of goods and services for the hydropower industry, which has been providing electricity to Canadians across the country for more than one hundred years. Our industry has considerable experience working with Indigenous groups, through signed and implemented impacts-benefits and redress agreements, as equity partners with Indigenous groups, and through participation in environmental assessment, permitting, and ongoing environmental monitoring.

Canadians depend on the energy produced by large hydro projects, which typically trigger a Federal Environmental Impact Assessment. These projects bring economic growth and prosperity to the regions where they are built. The energy transition requires accelerated investments in renewable energy sources in the coming years, as recognized by the recent Cabinet Directive on Clean Growth Projects. We believe it is important to retain this focus as applicable frameworks are developed.

This Discussion Paper was not developed with the participation of potential proponents, and as such we believe it is important to consider some of our observations before the framework and the regulations that will enable the negotiation of co-administration agreements are finalized. The expansion of hydro-power projects is fundamental to ensuring Canada can achieve its net-zero aspirations. Clear and transparent regulatory frameworks are essential to ensuring the future of these and other large-scale projects. Maintaining clarity, timeliness and coordination with the provinces and Indigenous Peoples while co-administering the impact assessment process is critical.

One overarching concern that we foresee with co-administration agreements as framed in the Discussion Paper is that the Government of Canada could be sharing or ceding as-yet undefined decision-making powers to the Indigenous co-administrators. As conceived in the Discussion Paper, the federal government could, if asked, be ceding its authority over the impact assessment process to a third party without a clear basis for their jurisdiction. This raises issues regarding to the possibility that multiple

Indigenous communities claim jurisdiction in the project area, which could lead to uncertainty, time delays and cost increases.

Our second main concern is that the Discussion Paper does not provide enough information to proponents regarding how they can undertake activities that would lead to a positive outcome. As proposed, it is impossible for proponents to assess the potential costs and risks associated with a federal Environmental Impact Assessment and it ignores the many occasions where proponents have already developed deeply collaborative relationships with the local Indigenous communities New federal approaches should include what is currently existing between Indigenous communities and industry and not seek to replace these or introduce further ambiguity into the assessment process.

Our specific points in the remainder of our submission are structured to address the Discussion Paper questions directed towards proponents from the IAAC website.[1]

Regulations and policy framework

We agree that regulations and policies will need to be developed to implement co-administration agreements between the federal government and involved Indigenous groups. We did note, however, that the Discussion Paper does not describe how provincial governments, who maintain jurisdiction over many aspects of resource development and have parallel impact assessment processes, will be engaged in this process.

It is unclear to us how a co-administration framework could be developed without provincial involvement and how decision-making responsibility would be shared among the federal government, involved provincial government(s), and involved Indigenous groups. Indigenous Co-Administration Agreements could create even more uncertainty and complexity in coordinating the federal and provincial assessment processes.

It is also not clear how the federal government can delegate or implement shared final decision-making in the absence of an underlying legal framework, such as a treaty or other legal instrument, that clearly identifies roles and responsibilities, land rights, applicable jurisdiction, dispute-resolution mechanisms, and legal recourse for proponents.

Negotiating agreements

The process of negotiating co-administration agreements will be a lengthy and complex undertaking, and the suggestions of the Circle of Experts while helpful, are likely to be insufficient if challenges arise regarding the authority of a group or body to exercise authority, or when multiple Indigenous groups claim governing authority on the same land.

In situations where treaty negotiations have not advanced to the point of at least determining governance authority in principle, implementation of a co-administration agreement may further delay impact assessment compared to existing consultation and accommodation processes. This increases regulatory uncertainty for proponents, and puts projects assessed in Canada at a disadvantage relative to other jurisdictions.

We believe that if co-administration agreements are made in such situations, they should not include the delegation of final decision-making authority. Both the federal and provincial governments have a

[1] Let's talk Indigenous Impact Assessment Co-Administration Agreements | Impact Assessment Agency of Canada- Canada.ca

constitutional obligation to consult with, and where appropriate, accommodate Indigenous groups, and existing processes provide a spectrum of means for participation by Indigenous groups to ensure their concerns and suggestions are appropriately considered and implemented.

It also raises several questions about the neutrality of a process in which Indigenous groups with special interests are both party and decision-maker in the administrative process. This could also lead to uncertainty as to the role of existing tools that act as vectors of stability with impacted indigenous groups. As such, if this delegation of authority must occur, it should only be possible after the adoption of clear guidelines regarding the final determination process, to clarify potential disputes arising from apparent conflicts of interest inherent in the process as envisioned in the Discussion Paper. It should be noted that proponents already use a variety of forms of engagement and participation with Indigenous groups to optimize the benefits of their projects for these communities and develop long-lasting partnerships with Indigenous groups.

The results of both these engagements – by government and by proponents – form a comprehensive body of knowledge for decision making and jointly contribute to economic reconciliation efforts.

While the Discussion Paper outlines options for addressing the question of which group(s) exercise powers and how jurisdictions might work together:

> *"joint representation through a tribal council or other joint entity, having an agreement with only one Indigenous governing body (with consultation/collaboration of others), or having agreements with multiple Indigenous governing bodies on overlapping lands.* [2] *"*

in practice it is possible that neither of these options may be workable. The federal government should work in parallel to improve the other means of Indigenous participation in the impact assessment process that the *Act* already provides, such as consultation, delegation of aspects of the assessment process, and Indigenous participation on review panels.

To the extent that decision-making authority currently lies with the federal government, we believe that the federal government will need to retain that authority and consult with Indigenous groups in accordance with existing processes until regulations are adopted and negotiations have concluded.

Implementing Agreements

While co-administration agreements could permit final Indigenous decision-making in the future, treaties involving the federal government, provincial governments, and affected Indigenous groups will need to be concluded before these arrangements could be implemented effectively.

We foresee several challenges that must be addressed before co-management agreements can be successfully implemented, including:

A) Clarification of Indigenous rights and title to inform which group ultimately holds decision making authority,
B) Clarification of which Indigenous decision-making body holds decision-making authority within an Indigenous group (elected chiefs, band council, hereditary chiefs, etc.),
C) Determination of how overlaps will be addressed to finalize decision-making authority among Indigenous groups with overlapping claims,
D) Legal matters, including liability for decision making,

[2] Let's talk Indigenous Impact Assessment Co-Administration Agreements | Impact Assessment Agency of Canada- Canada.ca, discussion guide question 9.

E) Dispute resolution procedures, and available legal recourse available for decisions of the co-management bodies.

These challenges are significant, and considerable effort will be required by all involved parties to successfully implement co-administration agreements.

Conclusion:

We encourage the Government of Canada to take into consideration the significant progress that has already taken place to ensure that First Nations, Metis, and Inuit peoples are fully engaged and participating in project development. Proponents of large-scale projects are fully supportive of reconciliation efforts and have been playing a significant role in these efforts.

A Co-Administration process that fails to consider these relationships could impede progress in this regard, or worse, disrupt what has already been achieved on some projects.

To that end, we respectfully suggest that efforts to implement co-administration agreements begin with a clear definition of the legal and governance roles and responsibilities for all involved parties – including the federal government, involved provincial governments and involved Indigenous groups. While this work may be complex and time-consuming, it would support the successful implementation of the framework contemplated by the Discussion Paper, while at the same time provide the legal certainty proponents seek.

WaterPower Canada was pleased to have the opportunity to participate in this process, and we are available to address any questions or provide any necessary clarifications.

Sincerely,

Lorena Patterson
President and CEO