

A proposed schedule for striking any Basic Needs Level (BNL) for Baffin Island caribou

Nunavut Tunngavik Incorporated, 15 April, 2015

NTI's written recommendation

Scientific research and Inuit Qaujimagatuqangit confirm that Baffin Island caribou are at a low point in their population cycle. In its written submission filed on February 13, 2015, NTI proposed that the Nunavut Wildlife Management Board consider two options to conserve Baffin Island caribou pending completion of a comprehensive management plan –

- 1) establish a short open season for Inuit, and related Non-Quota Limitations, or
- 2) establish a low Total Allowable Harvest (TAH).

The *Nunavut Agreement* requires that where the NWMB has set a TAH on a wildlife population for the first time, the Board must strike a BNL. Accordingly, NTI recommended that, if the Board chooses the second option above, the Board should adjourn the BNL portion of the public hearing until the fall of 2015, reserving the entire TAH to Inuit in the interim because it is certain that any BNL for Baffin Island caribou will be higher than the TAH.

NTI acknowledged that postponing a BNL decision when establishing the TAH would be an unusual step, but submitted that it is warranted in the circumstances of this proceeding.

Discussion at the hearing

NTI's legal counsel presented this proposal at the March 10-13, 2015 public hearing. No opposition was expressed by the parties represented.

NTI offered to file a follow-up written submission expanding on counsel's oral comments. The Board accepted, and the Board's counsel asked that NTI's written submission address, in particular, the basis on which the Board may reserve the entire TAH for Inuit in these circumstances.

Rationale

1) The ordinary case

A TAH is the total amount that may be harvested from a wildlife population (s. 5.1.1, *Nunavut Agreement*). The BNL is the minimum share that the Agreement reserves to Inuit of the TAH (5.6.19; 5.6.20).

Section 5.6.19 of the Agreement instructs the Board to strike the BNL after setting a TAH on a wildlife population for the first time:

5.6.19. Where a total allowable harvest has been determined by the NWMB in accordance with Sections 5.6.16 and 5.6.17, the NWMB shall strike a basic needs level in accordance with this Part.

The Agreement does not set a time limit, but the words “where a total allowable harvest has been determined... the Board shall strike a basic needs level” suggest that, in the ordinary case, the BNL decision must follow the TAH decision immediately.

Section 2.9.4 of the Agreement requires that the provisions of the Agreement be understood according to the purpose they are intended to serve.¹ In section 5.6.19, this clearly suggests that the BNL decision must always be made in time to prevent the TAH from being allocated between Inuit and any non-Inuit harvesters in a way that leaves Inuit less than the BNL. In other words, because the BNL is a share of the TAH, in the ordinary case, the BNL must be struck before the TAH can be implemented. Considering that the Agreement requires government to implement any Board decision “forthwith” after the decision is accepted or varied (5.3.10; 5.3.15), this means that, in the ordinary case, the Board must submit its BNL decision for acceptance either at the same time as, or immediately after, the Board submits its TAH decision to government.

However, in NTI’s view, the circumstances of this proceeding are exceptional.

2) The exceptional circumstances of this proceeding

What is exceptional in this proceeding is that an interim prohibition on any harvesting of the wildlife population in question has been put in place before the Board considers setting a TAH for the first time.² In NTI’s view, if the Board chooses to establish a TAH for Baffin Island caribou, the NWMB should postpone considering the BNL until the fall of 2015, and reserve the entire TAH to Inuit in the interim, for the following reasons:

- a. The affected parties are not ready to present their views to the Board regarding a BNL for Baffin Island caribou. Notice that the Board is considering a BNL decision has not been given; a BNL has not been proposed; the affected communities have not been informed or consulted regarding the future harvest consequences of a Baffin Island caribou BNL, and, as NTI noted in its previous written submission, some affected communities may have concerns regarding the information on which a Baffin Island caribou BNL might be based.

¹ Section 2.9.4 requires that the Agreement be interpreted, with such modifications as circumstances require, according to the federal *Interpretation Act*. Section 12 of the *Interpretation Act* provides that “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” (emphasis added)

² On December 19, 2014, the Minister of Environment for the Government of Nunavut issued an Interim Management Order prohibiting the harvesting of Baffin Island caribou. The Order came into force on January 1, 2015.

- b. With the conclusion of the first session of the public hearing on March 13, 2015, and followup briefs having been submitted, the parties have presented their views to the Board regarding a TAH and the alternatives to a TAH.
- c. Setting any TAH soon, before the parties are ready to consider the BNL, can grant Inuit harvesters relief in the case of Baffin Island caribou that postponement of a BNL decision does not ordinarily provide - the lifting of a harvest prohibition in the interim. Indeed, if the Board makes and submits its TAH decision immediately after the Board's June 2015 meeting, the Minister will be deemed to accept the Board's decision within 30 days unless the Minister disallows it (5.3.10). If the Minister accepts, or is deemed to accept, the Board's TAH, and meets his duty to implement the TAH "forthwith", Inuit communities may still harvest Baffin Island caribou in the late summer and fall of 2015 within the strict conservation limit of the TAH. Conversely, if the Board were to wait for the BNL decision process before setting the TAH, the 2015 harvesting season would be lost to Inuit.
- d. Considering the current low numbers of Baffin Island caribou, and the substantial Inuit harvest levels reported in the Nunavut Wildlife Harvest Study during previous better years, the Board can be certain that the level of any reasonable TAH set soon will be much lower than a properly calculated BNL. Therefore the Board should reserve any TAH that is set soon entirely to Inuit. In fact, if this step were not taken when the TAH is set, postponing the BNL decision would offend the purposive reading of s. 5.6.19 noted above, by placing Inuit at risk of having a portion of the BNL allocated to non-Inuit harvesters in the process of TAH allocation, contrary to the Agreement.
- e. Only a few months are needed in order to give the parties the opportunity to prepare their BNL case for the Board. It is too early to say whether there will be any differences of opinion presented regarding the data to be relied on when the Board calculates the BNL. It is clear, however, that a short postponement of the BNL portion of the hearing would not pose any risk of prejudice to either Inuit or government.
- f. This proposal is entirely consistent with the Agreement and the interests of non-Inuit harvesters.

3) *Authority to reserve the entire TAH to Inuit under these circumstances*

When providing for interim decisions to restrict harvesting activities before the Board has acted, section 5.3.24 of the Agreement does not specify the actions that the Minister or Board may take. The Minister may make "any reasonable decision" that modifies harvesting activities if urgent and unusual circumstances require immediate action, and the Board must "conduct a full review" as soon as practicable thereafter.

These broad descriptions certainly do not free a Minister or the Board from responsibility to comply with the constraints on their authority set out elsewhere in the Agreement. So, for example, section 5.3.24 does not exempt a Minister's interim decision from the requirement in

section 5.3.3(a) to set conservation limits on Inuit harvesting “only to the extent necessary” to effect a valid conservation purpose. And, generally speaking, when the Board reviews a Minister’s interim decision, the Board may only make the types of decision it could make if the Board were considering the matter afresh.

However, in view of the Agreement’s requirement to read each provision according to its purpose, it is reasonable to interpret section 5.3.24 of the Agreement as imposing some conditions on how the Minister and Board may act that are unique to the interim procedure set out in this section, yet are not enumerated in the section.

One example of such an implicit condition concerns how a Minister’s interim TAH decision may deal with the BNL. In NTI’s view, the Government of Nunavut’s interim orders setting TAHs for Southampton Island caribou³ have correctly reserved the entire TAH to Inuit, notwithstanding that no provision of the Agreement specifies positively that government may reserve an entire TAH for caribou to Inuit. In NTI’s view, this was a necessary and appropriate exercise of the Minister’s interim authority under the Agreement. Urgent and unusual circumstances clearly can render an immediate TAH decision by the Minister necessary before the Board has set a TAH, yet it is difficult to conceive of urgent and unusual circumstances that could render an immediate BNL decision necessary before the Board has struck a BNL. Since, practically speaking, section 5.3.24 reserves the initial decision on any BNL to the Board, it is necessary for the Minister, when setting an interim TAH, to ensure that the Inuit entitlement to the BNL is not prejudiced by the Minister’s interim decision. In the Southampton Island caribou case, the condition implicitly authorized was to reserve the entire TAH to Inuit, because – as in the case of Baffin Island caribou – the facts showed that a reasonable TAH could not possibly be lower than a properly calculated BNL.

It follows that, in the process of reviewing a Minister’s interim decision to restrict the harvesting of caribou, the Board has similar authority under s. 5.3.24 when making a TAH decision. If the Board has good reason to postpone the setting of the BNL for a short period, yet Inuit harvesting needs can be served by making a TAH decision soon, the Board’s review powers under s. 5.3.24 should be understood to enable the Board to set aside the entire TAH for Inuit, where warranted by the facts, until the BNL is struck.

Again, no prejudice to non-Inuit harvesting interests can possibly result from a decision to reserve the entire TAH to Inuit where the facts show, beyond dispute, that a reasonable TAH cannot be lower than the BNL.

³ *Southampton Island Caribou Herd Total Allowable Harvest Interim Order (July 1, 2012 to June 30, 2013)*, NU. SI-001-2012; *Southampton Island Caribou Herd Total Allowable Harvest Interim Order (July 1, 2012 to June 30, 2013), amendment*, NU. R-012-2013; *Southampton Island Caribou Herd Total Allowable Harvest Interim Order (July 1, 2014 to June 30, 2015)*, NU. R-019-2014.

If the Board preferred to describe such a reservation as a ‘provisional’ or ‘presumptive’ BNL for Inuit, this would not be inappropriate.⁴

In NTI’s view, if section 5.3.24 of the Agreement did not authorise such conditions as this, the interim procedure established by the Agreement would be either unnecessarily rigid, or potentially unfair to Inuit. Either the Board would be unable promptly to relax the interim harvesting prohibition by setting a low TAH, or the Board would be unable to do so without forcing Inuit into a premature determination of their BNL.

Instead, in NTI’s view, the Board should give section 5.3.24 the reading that is fair to all interests affected, flexible, and consistent with the construction that the Government of Nunavut already has given this section in its interim orders respecting Southampton Island caribou.

4) *The schedule in the Southampton Island caribou proceeding*

As NTI’s counsel acknowledged at the public hearing, this recommendation reflects a modification in NTI’s interpretation of s. 5.6.20 of the Agreement. Previously, in the NWMB’s Southampton Island caribou proceeding, NTI argued that the Board must always strike a BNL immediately after setting a TAH.

In NTI’s view, the Board’s plan to strike the Southampton Island caribou BNL immediately after replacing the Minister’s interim TAH with a Board TAH remains the appropriate one. Southampton Island caribou are not subject to an interim prohibition on harvesting. The interim restrictions on Inuit harvesting that have been set to date have attracted consensus. The BNL,

⁴ The Minister’s initial Southampton Island caribou Interim Order can be understood to have treated the TAH as a provisional or presumptive BNL in the circumstances. It read in part:

2. (1) A total allowable harvest is established for the Southampton Island Caribou Herd for the harvest year of July 1, 2012 to June 30, 2013, in accordance with this Order.
- (2) The total allowable harvest from the population of the Southampton Island Caribou Herd for the harvest year is 1,000 caribou.
- (3) It is presumed that the Inuit of Coral Harbour need the full amount of the total allowable harvest.
- (4) The full amount of the total allowable harvest and basic needs level for the harvest year is allocated to the community of Coral Harbour.

3. The Coral Harbour HTO may issue tags for allocating the basic needs level among its members.

The current Southampton Island caribou Interim Order sets the TAH at 800 caribou, and reads in part:

2. ...

- (3) It is presumed that the Inuit of Coral Harbour have a basic need for the full amount of the total allowable harvest set in this Order.
- (4) The full amount of the total allowable harvest for the harvest year is allocated to the community of Coral Harbour.

however, is disputed, and NTI has expressed the view that significant delay of the BNL decision process could prejudice the ability of Inuit to make their case. In NTI's view it is appropriate that the Board maintain its current plan for decisions respecting Southampton Island caribou.

Submitted by NTI Wildlife and Environment Department
15 April, 2015