

*Nunavut Wildlife Management Board, Public Hearing to Establish the Basic Needs Levels for
Beluga, Narwhal and Walrus, Iqaluit, Nunavut, September 11-12, 2012*

**ESTABLISHMENT OF BASIC NEEDS LEVELS FOR BELUGA,
NARWHAL AND WALRUS UNDER S. 5.6.25 OF THE
NUNAVUT LAND CLAIMS AGREEMENT**

**Nunavut Tunngavik Incorporated
May 31, 2012**

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1. Introduction

In this proceeding, the Board undertakes to establish basic needs levels (BNLs) for beluga, narwhal and walrus. The *NLCA* deadline for this decision expired more than fifteen years ago. Accordingly, NTI reserves all legal rights relating to validity of the Board's and Minister's decision.¹

It is important to have in mind the separate roles of total allowable harvests (TAHs) and BNLs in the Article 5 system of wildlife management when considering this matter.

Under Article 5, quantitative limits may only be placed on Inuit harvesting as a result of the establishment of a TAH (s. 5.6.1). The main justification for setting a TAH is to address a sufficiently pressing conservation concern regarding the stock or population in question.² A TAH describes the allowable limit for any harvesting of the stock or population (s. 5.1.1).

The BNL is the harvest quantity reserved to Inuit if a TAH is placed on the stock or population (s. 5.6.19-5.6.20). The BNL is a priority share of the total allowable harvest. Non-Inuit harvesting is restricted to any surplus, and, if the BNL is equal to or higher than the TAH, the entire TAH is reserved to Inuit (s. 5.6.20). The BNL has no harvesting consequence for Inuit or any other harvesters unless and until a related TAH is set.

“Basic” signifies a minimum “level” in this context. Once struck, a BNL may not be reduced; its guarantee of a harvest quantity to Inuit can only be set aside by a TAH that is less than the BNL (s. 5.6.26; 5.1.1). The “needs” referred to include the full range of Inuit economic, social and cultural needs that inform the *Agreement* right of an Inuk to harvest up to the “full level of his or her needs” in circumstances where a TAH is not warranted (s. 5.6.1)³.

¹ This proceeding initially was adjourned in order to enable NTI to discuss a possible amendment to the *NLCA* that would clarify the basis on which the Board and Minister may act. DFO declined to engage in discussions: see NTI reporting letter to the Board dated April 18, 2012, copy attached to the Board's notice of reinstated public hearing dated May 1, 2012. NTI supports the Board's proceeding to make a decision under the current provision, subject to NTI's reservation of rights.

² Under s. 5.3.3 (a), “Decisions of the NWMB or a Minister” - such as TAH decisions - “shall restrict or limit Inuit harvesting only to the extent necessary ... (a) to effect a valid conservation purpose” The applicable principles of conservation are provided in s. 5.1.5.

³ See also *The make-up of the basic needs level under Article 5 of the Nunavut Land Claims Agreement*, Nunavut Tunngavik Incorporated, December 9, 2010, posted on the Board's website for this proceeding under “Additional Relevant Information”, esp. pp 3-7.

For most species, the *Agreement* requires that the Board strike a BNL whenever it sets a TAH (s. 5.6.19). Section 5.6.25 required that the BNL for beluga, narwhal and walrus be set on or before a fixed date whether or not a TAH was being set:

5.6.25 The NWMB shall establish the basic needs levels for beluga, narwhal and walrus by March 31, 1997; taking into account the fact that they are in short supply in some areas and therefore that the harvest by Inuit has been and is artificially low in relation to their needs and does not necessarily reflect their full level of needs.

As amended by P.C. 1996-1462, September 17, 1996

Currently, DFO has proposed that the NWMB set TAHs for narwhal.⁴ TAHs have not been proposed for beluga or walrus. DFO currently considers Inuit to be subject to quotas respecting beluga, narwhal and walrus which stem from restrictions pre-dating the *NLCA*.⁵

The principal issue in this hearing is to determine the appropriate basis for BNLs for beluga, narwhal, and walrus under s. 5.6.25.

2. Summary of NTI position

The Board should use the basis set out in the *Agreement* for “presumption as to needs” species when setting BNLs for beluga, narwhal, and walrus. The TAH should serve as the BNL. The *Agreement*’s 1997 deadline for this decision disqualifies the *Agreement*’s Harvest Study formulae from consideration for the striking of these BNLs. The reason the *Agreement* disqualifies those formula is that they are based on past Inuit harvest levels alone. Section 5.6.25 recognizes that, like presumption as to needs species, beluga, narwhal and walrus are at the same time centrally important to Inuit economies, society and culture, and tightly regulated in the quantities that Inuit have been able to harvest. Thus, Inuit needs for these species normally exceed the available supply.

The decision that NTI proposes fits with the negotiating history of s. 5.6.25. DFO and NTI have already agreed to this approach respecting narwhal. Inuit are, in fact, the primary harvesters of

⁴ *Submission to the NWMB*, DFO, April 31, 2012.

⁵ The *Agreement* contains the following allowance for pre-*NLCA* quantitative restrictions:

5.6.4 Any restriction or quota on the amount of wildlife that may be harvested that is in force immediately prior to the date of ratification of the *Agreement* shall be deemed to have been established by the NWMB, and shall remain in effect until removed or otherwise modified by the Board in accordance with this Article.

beluga, narwhal and walrus in the NSA. There is no reason in policy or law why beluga and walrus should not receive the same treatment as narwhal. DFO has already agreed that beluga are a “presumption as to needs” species in the case of Nunavik Inuit.

Until TAHs are set, this decision will not have harvesting consequences. If and when TAHs are set for beluga and walrus, non-Inuit will continue to be able to harvest these species with HTO approval, by means of assignment from the TAH. It is already DFO practice to make licences for non-Inuit harvesting of these species subject to HTO approval. DFO will continue to be able to employ all of its current tools to regulate non-Inuit harvesting of beluga and walrus.

A reservation can be made for harvesting for scientific purposes with the Board’s approval. Harvesting of these stocks and populations outside the NSA will not be affected by the Board’s decision.

3. Proposed decisions

NTI proposes that the Board make the following decision:

“ 1. The NWMB hereby establishes the basic needs levels for beluga, narwhal and walrus under s. 5.6.25 of the *NLCA* by determining that Inuit need the total allowable harvest established by the NWMB of all beluga, narwhal and walrus within the Nunavut Settlement Area.⁶

2. For greater certainty, these basic needs levels are not intended to be implemented so as, in themselves, to prevent fisheries officers or researchers from harvesting these species for purposes of research or of predator or disease control, as approved by the NWMB.”

These BNLs would vary with any variation of the TAH, just as levels of permissible Inuit harvest of “presumption as to needs” species vary with the TAH.

⁶ By comparison, s. 5.6.5 reads in part:

Subject to Section 5.6.6, the NWMB shall presume as a matter of fact and without further evidence that Inuit need the total allowable harvest established by the NWMB of:

(a) all bears;

[etc.]

4. Rationale

a) Three bases for establishing BNLs under the *NLCA*

Under Article 5, a BNL may be struck in one of three ways:

- i) For furbearers, which may only be harvested by Inuit or with HTO approval, the TAH, in effect, serves as the BNL (s. 5.6.12-5.6.13);
- ii) For listed “presumption as to needs” species, such as muskox, the TAH serves as the BNL unless and until a presumption is rebutted (s. 5.6.5; 5.6.7));
- iii) For other species, one of the *Agreement*’s historical formulae based on the Nunavut Harvest Study must be used (s. 5.6.21-5.6.24).

The third basis for a BNL above is the most familiar to the Board and parties. Its formulae are based on the results of the Board’s Harvest Study, conducted between 1996 and 2001. However, the third basis for setting a BNL above is not available in the case of beluga, narwhal, or walrus. The only two *Agreement* formulae that can apply when the Study precedes the setting of a TAH require the Study to have been completed in order for each formula to be usable. S. 5.6.23 (a) relies on data entirely based on “the original five year harvest Study”, and the alternative formula in s. 5.6.23 (b) requires that one of the two harvest amounts relied on be an “average annual amount taken over the five years of the Study”. The original 5.6.25 BNL deadline (July 9, 1994), and the deadline set under the current provision (March 31, 1997) expired long before the Harvest Study either was due to be completed or in fact was completed.⁷

⁷ In the original *Agreement*, the date of the first anniversary of *Agreement* ratification (July 9, 1994)) was at the same time the deadline for striking of these BNLs and the *start-date* for the Harvest Study. The original s. 5.6.25 read:

5.6.25 The NWMB shall establish the basic needs levels for beluga, narwhal and walrus within 12 months of the NWMB being established taking into account the fact that they are in short supply in some areas and therefore that the harvest by Inuit has been and is artificially low in relation to their needs and does not necessarily reflect their full level of needs.

The original s. 5.4.2 read:

5.4.2 The Study shall begin in each of the three Regions on or before the first anniversary of the date of ratification of the *Agreement*. The Study shall be carried out under the direction of the NWMB.

With the amendment of s. 5.4.2 to postpone the required Harvest Study start-date to January 1, 1996 (P.C. 1995-2/700, April 26, 1995) and the amendment of s. 5.6.25 the following year, the Harvest Study was still due to be ongoing for three years and nine months when these BNLs were due to be struck on March 31 1997. In the event,

Even before other factors are examined, this consideration suggests that the Board should be looking for guidance to the first two bases above when the Board sets BNLs for beluga, narwhal and walrus.

b) Why the Board should treat beluga, narwhal and walrus as though they are “presumption as to needs” species for this purpose

i) *Negotiating history, and further guidance in s. 5.6.25*

During the negotiation of the *NLCA*, Tunngavik proposed that beluga, narwhal and walrus be included as “presumptions as to needs” species in section 5.6.5 of the *NLCA*. Consensus was not reached, and Inuit did not alter their position.⁸

Reading s. 5.6.25 in the light of this history, it is fair to observe that the parties left the issue that they had been unable to settle for the Board to resolve by exercising its authority under this section.

Again, the current text of s. 5.6.25 reads:

5.6.25 The NWMB shall establish the basic needs levels for beluga, narwhal and walrus by March 31, 1997; taking into account the fact that they are in short supply in some areas and therefore that the harvest by Inuit has been and is artificially low in relation to their needs and does not necessarily reflect their full level of needs.

As amended by P.C. 1996-1462, September 17, 1996

What stands out in this instruction is the connection made by the parties between the short supply of these species in some areas and Inuit needs. The negotiators knew and accepted that the harvesting of these three species has been integral to Inuit economies, society and culture for centuries. As with other key species whose harvest quantities were tightly regulated in the period before and during the negotiation, the Board is instructed to recognize that beluga, narwhal and walrus are needed by Inuit in quantities larger than the available supply:

“The harvest by Inuit has been and is artificially low *in relation to their needs* (emphasis added); [it] “does not necessarily reflect *their full level of needs*” (emphasis added).

the Harvest Study began in June 1996 and ended in May, 2001 (*Final Report, The Nunavut Wildlife Harvest Study*, August 2004, page 5).

⁸ NTI Wildlife staff personal communication with Tagak Curley, member of the Tunngavik negotiating team when these issues were negotiated, February, 2012.

In this sense, beluga, narwhal and walrus are exactly like polar bears, muskox, and bowhead whales, all of which receive presumption as to needs status under the Agreement. The Board is being directed to use the available method of setting the Inuit priority share for these species which best reflects true Inuit needs.

The past and current pattern of quantitative restrictions on Inuit harvesting of belugas, narwhal and walrus can be summarized as follows:

- In the periods before and after the NWMB's Community-Based Management Program, area-specific annual quotas have applied to most NSA waters in which Inuit harvest beluga.⁹
- Currently, under the *Marine Mammals Regulations*, all 21 of the Nunavut Inuit communities that harvest narwhal are subject to quotas, and in DFO's view every Inuk harvester requires a tag.¹⁰ Variations on these restrictions have been in place under previous regulations since 1975.
- For many years, Inuit harvesting of walrus in Coral Harbour, Sanikiluaq, Arctic Bay and Clyde River has been subject to community quotas,¹¹ and every Inuk has been subject to a limit of four walrus per person.¹²

ii) *The agreement respecting narwhal*

Recently, DFO and NTI agreed that TAHs should serve as the BNLs for narwhal (DFO's letter to NTI dated December 9, 2011, attached as **Appendix 1**).

DFO's agreement with NTI on this issue represents a breakthrough in the co-management relationship between Nunavut Inuit and DFO. By adopting this agreement, the Board would help lay the groundwork for resolving other challenges that are preventing Article 5 from being properly implemented in the sphere of fisheries management.

This agreement also demonstrates that treating any species referred to in section 5.6.25 as though it has "presumption as to needs" status under s. 5.6.5 can be the Board's vehicle for resolving this matter. There is no reason to treat beluga or walrus differently from narwhal under s. 5.6.25, and the Board should not do so.

⁹ Currently, see Schedule II to s. 21, *Marine Mammals Regulations*.

¹⁰ Ss 23-23, *Marine Mammals Regulations*.

¹¹ Currently, see Table to s. 26, *Marine Mammals Regulations*.

¹² S 6(1). *Marine Mammals Regulations*.

iii) *Additional factors relating to narwhal*

The DFO-NTI agreement is in part a simple reflection of the reality that Inuit are and always have been the primary harvesters of narwhal within the Nunavut Settlement Area (NSA). Subsection 4(2) of the *Marine Mammals Regulations* already provides that “A license to fish for narwhals shall not be issued to any person other than an Inuk.”

iv) *Additional factors relating to beluga*

In the case of beluga, too, Inuit are and always have been the primary harvesters within the NSA. While the *Marine Mammal Regulations* do not reserve beluga exclusively to Inuit, they prohibit non-Inuit from harvesting beluga without a licence.¹³ DFO issues beluga hunting licences to non-Inuit only in rare cases: two have been issued in the past 15 years (**Appendix 2**, “Number of licences issued to Non-Beneficiaries for Walrus and Beluga in Nunavut”, DFO, provided to NTI on May 24, 2012). It is NTI’s understanding that HTO approval of such licences would have been sought in advance.

Recently, based on essentially the same history, the federal government agreed to include beluga as “presumption as to needs” species in the *Nunavik Inuit Land Claims Agreement*. Section 5.3.7 of that Agreement reads:

Presumption as to Needs

5.3.7 Subject to section 5.3.8, the NMRWB shall presume as a matter of fact and without further evidence that Nunavik Inuit need the total allowable take established by the NMRWB of:

- (a) all scallops and mussels;*
- (b) all beluga whales;*
- (c) all polar bears; and*
- (d) eiderdown from eider duck nests.*

There is no reason in law or policy why the NWMB should not accord Nunavut Inuit the same treatment.

v) *Additional factors relating to walrus*

Inuit also are and always have been the primary harvesters of walrus in the NSA. In recent years, non-Inuit harvesting of walrus has been limited to HTO-approved sport hunts.

Once again, there is no reason why the NWMB should treat walrus differently under s. 5.6.25 than narwhal.

¹³ S. 5. *Marine Mammals Regulations*.

vi) *Scientific harvests*

For presumption as to needs species, s. 5.6.11 of the *NLCA* provides a means to assure enforcement officers and scientists that they have continued access to stocks or populations in order to harvest for research and other specified purposes:

5.6.11 Presumptions as to need shall not be implemented so as, in themselves, to prevent government wildlife officers and researchers from harvesting wildlife for purposes of research or of predator or disease control, as approved by the NWMB.

The Board can provide similar assurance in its BNL decisions for beluga, narwhal, and walrus. Accordingly, NTI's proposed decision above mirrors s. 5.6.11 of the *Agreement*.

vii) *Other harvesting in the NSA*

The presumption as to needs treatment that NTI proposes for these three species duly accounts for the fact that demand for these species by resident and non-resident harvesters in the NSA has been low.

As in the case of any presumption as to needs species, the decision that NTI proposes would enable non-Inuit to continue to have access to beluga and walrus with the approval of the HTO. Again, the BNL will have no harvesting consequence before a TAH is established. Upon the setting of a TAH, the HTO may allocate the TAH to non-Inuit assignees (s. 5.7.34(b)), who would remain subject to all laws of general application, including licence requirements. DFO would remain fully able to regulate non-Inuit harvesting of beluga and walrus through its current licence system.

viii) *Harvesting of the same stocks or populations outside the NSA*

There is no need for concern that appropriate accounting for harvesting of the same stocks or populations when they range outside the NSA would be compromised in any way by establishment of these BNLs on the basis proposed by NTI. Section 5.3.4 of the *Agreement* requires the Board to consider this factor when making any decision under Part 6 of Article 5:

5.3.4 Certain populations of wildlife found in the Nunavut Settlement Area cross jurisdictional boundaries and are harvested outside the Nunavut Settlement Area by persons resident elsewhere. Accordingly, the NWMB and Minister in exercising their responsibilities in relation to Part 6 shall take account of harvesting activities outside the Nunavut Settlement Area and the terms of domestic interjurisdictional agreements or international agreements pertaining to such wildlife.

It is the setting of TAHs if and when a conservation concern requires a TAH – and not the setting of BNLs per se - that is materially affected by this consideration. The Board has a well established record of accounting for this factor when making polar bear TAH decisions. For

example, in the Board's February 17 2010 final decision on a TAH for Baffin Bay polar bears, the Board reduced the TAH for this subpopulation from 105 to 65 over four years primarily in order to take into account increased harvesting outside the NSA by residents of Greenland (see **Appendix 3** attached).

There is thus no reason for concern that reserving to Inuit the total allowable harvests for these species in the NSA would impact negatively on the allocation of harvest quantities across interprovincial or international boundaries.

5. Pre-hearing and hearing procedure

NTI has prepared this submission without knowing what considerations the Board intends to bring to its decision. DFO is in a similar position. In the interests of ensuring an effective hearing that enables the Board to make the best decision possible, NTI proposes that the Board adopt the followed procedure:

- a) After reviewing the parties' initial written submissions, the Board informs the parties by June 15, in writing, of the factors that the Board proposes to base its decision on and of any issues upon which it wishes to have further rationale. If there appear to be any differences on legal issues between the parties, or between the Board and any party, that could affect the Board's decision, the Board's response informs the parties of the Board's position and requests any further rationale that would assist the Board.
- b) If the parties are likely to need additional time in order to prepare reply submissions that address the Board's response, the Board extends the current July 6 deadline for reply submissions. (There appears to be time before the September 11 -12 hearing date for a moderate extension of the reply deadline.)
- c) Recognizing that, unless another party objects, the narwhal BNL decision can be made on the basis of agreement between DFO and NTI, the Board places this issue first on the hearing agenda, and the hearing time reserved for this issue is limited to time necessary to confirm the decision that NTI and DFO propose and to respond to Board questions and comments.

NTI requests that the Board respond to this procedural proposal by June 7 if possible.

NTI also wishes to confirm its understanding that the documents posted on the Board's website as "Additional Relevant Information" in connection with this matter are not admitted in evidence but have been provided to readers for the sake of background information. NTI became aware of this posting recently and NTI staff have not had the opportunity to review all of its contents.

Respectfully submitted,

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APPENDICES to NTI May 31 2012 Submission to NWMB re s. 5.6.25

1. DFO letter to NTI dated December 9, 2011
2. “Number of licences issued to Non-Beneficiaries for Walrus and Beluga in Nunavut, DFO, provided to NTI on May 24, 2012.
3. NWMB February 17 2010 final decision on a TAH for Baffin Bay polar bears