

March 2, 2007

Mr. Aaron Berg
Senior Crown Counsel, Manitoba Justice
Civil Legal Services SOA
Room 730 Woodsworth Building
405 Broadway Avenue
Winnipeg, MB R3C 3L6

fax: 204.948.2041

Dear Mr. Berg;

Re: Manitoba Environment Act – Wuskwatim Generating Station Licence – Appeal to Cabinet

We are writing to reply to some of the new and relevant issues raised as result of the January 2007 submissions by Manitoba Conservation and the Wuskwatim Limited Power Partnership. We are also reiterating some issues referred to in our previous correspondence that have not yet been addressed – either by Manitoba Justice, the Wuskwatim Limited Power Partnership, Manitoba Hydro, or Manitoba Conservation. Please note that this letter is not intended to be comprehensive or to constitute our response to all of the points raised in the January 2007 submissions by Manitoba Conservation and the Wuskwatim Limited Power Partnership. As we do not have the resources to engage legal counsel to assist us in this process, nor funds to devote to preparation of a response, our ability to participate and provide a response is, by necessity, limited (please see below for more comments on capacity and fairness). Any reference to the Wuskwatim Limited Power Partnership in this letter, or documents for this appeal can be assumed to refer to Nisichawayasihk Cree Nation / Manitoba Hydro.

Our general comment is that the responses of Manitoba Conservation and the Wuskwatim Limited Power Partnership demonstrate a lack of acknowledgement and/or understanding that this is an appeal to Cabinet. We are operating under the assumption that since Manitoba Justice determined that this appeal should go forward, there is a basis for that decision. As such, it is not appropriate for the Wuskwatim Limited Power Partnership and Manitoba Conservation to rely on their previous documents and statements, as clearly the fact that this appeal is being conducted is an acknowledgement of deficiency. Simply put, these two parties must take this appeal seriously and actually address the comments made by both appellants in this process.

In particular, to our knowledge the Wuskwatim Limited Power Partnership has not been given permission to ignore/not respond to “the substance” of our November 2006 letter, which is part of the appeal process. This assertion by Manitoba Hydro (page 1) adds weight to our concern there may not

be procedures in place to guide this appeal process.

Manitoba Justice also appears to have ignored our November 2006 letter, which in our view required a response from the Crown Counsel involved with respect to several matters. We have had no communication from Manitoba Justice that addresses issues raised in our November 2006 letter.

Some comments to address specific points raised by the Wuskwatim Limited Power Partnership and Manitoba Conservation in their January 2007 responses are below.

Re: Churchill River Diversion (CRD) Licencing Process

Ms. Tracy Braun, Director of Environmental Assessment and Licencing, alludes in Manitoba Conservation's January 18, 2007 letter to the fact that a final licencing process for the CRD under the Water Power Act is underway:

The Minister of Water Stewardship has directed that the outstanding issues relating to the Churchill River Diversion project be addressed in order to allow for the consideration of the issuance of the CRD final licence under the Water Power Regulation made under The Water Power Act. A final licence for a water power undertaking cannot be issued under the Regulation until the initial development is complete and this includes determining by legal description the "severence line" for the project, being the area that is essential to the project and which will be governed by the final licence. It is understood that this work has now been completed and the CRD final licencing process is proceeding.

Manitoba Water Stewardship does not currently post any information regarding licence applications under *The Water Power Act* on the Water Stewardship website and there does not appear to be a public registry file for this process. As a result, the public does not have access to any information regarding this process, despite the finalization of the Water Power licence for the CRD being a key recommendation of the Clean Environment Commission (CEC) in its report on the hearings for the Wuskwatim projects (Recommendation 7.6, page 117). Previously, the steps for licencing of the Wuskwatim project under *The Water Power Act* were made public – we wrote to the Minister responsible regarding this process. (See attached correspondence.) We are left to wonder whether Manitoba Justice is aware that a licensing process that has been triggered by the Wuskwatim licensing process is underway without public notification.

Re: Information and Disclosure

On page 4 of their January 17th letter, the Wuskwatim Limited Power Partnership claims that “Ms. Whelan Enns has received access to every relevant document shared with the public.” Manitoba Conservation seems to share this point of view in point 7 of their January 18th letter (page 3). Both parties have, however, missed the point of our basis for requesting and continuing to request access to reports and studies that are referenced in and/or were the basis of Manitoba Hydro's environmental impact statement (EIS). The question is – who decides what is relevant? Manitoba Hydro? The Minister of Conservation? If so, why bother with public participants at all?

Manitoba Hydro has refused to provide copies of, or access to the actual studies, technical work products, research reports that informed the Wuskwatim EIS. These have been asked for repeatedly. We suggest Manitoba Justice review the record, including the CEC hearing for disclosure by Manitoba Hydro held late January 2004.

The Wuskwatim Limited Power Partnership also defends this practice of information disclosure and asserts that it addressed all comments regarding information deficiencies in its EIS through the Supplemental Filings. Contrary to the proponents' assertions that the Supplemental Filings addressed comments, in many instances, the responses simply referred back to inadequate information contained in the EIS. The Wuskwatim Limited Power Partnership has not addressed in any way the issue that this type of response is not adequate. (please also see section below in support of Trapline 18's March 2nd submission). It is our contention that a public utility should make its technical studies and reports available – and that this has not occurred.

Re: Aboriginal Rights, Consultations

Ms. Braun notes on page 6 of Manitoba Conservation's letter, for "clarification", that Manitoba Wildlands "would not seem to have any interest in Crown/Aboriginal consultations as it is not a representative of any First Nation or Aboriginal community."

In response, we would point out that any public participant can ask any question, and surely participation in these hearings and this appeal process was and is not based on race, religion, or gender. Manitoba Wildlands strives to raise issues that are in the public's interest – and in most if not all instances, we believe that ensuring Aboriginal interests are meaningfully considered, respected and accommodated is also in the public interest. We find this statement by Ms. Braun, *on behalf of the Minister*, to be insulting and ill-considered. Ms. Braun may wish to review our correspondence to her minister, the Manitoba government, and our legal review memos regarding consultation standards.

Re: The Wuskwatim Limited Power Partnership / Manitoba Hydro Identity Crisis

The January 17th letter from the Wuskwatim Limited Power Partnership is signed by Mr. Ken Adams, who is identified as the Chairman of the Wuskwatim Limited Power Partnership. Although we are pleased to see Mr. Adams' signature on this document, we would point out that Mr. Adams should also identify himself as Vice President, Power Supply, Manitoba Hydro.

This once again brings us to a significant issue and our question (unanswered so far) as to whether the Manitoba Government has made a public policy decision to allow an environmental license and water power licence for a dam to be held by a holding company, and if so, what the legal implications of this decision are.

Re: Legal Cases Referenced

While not having legal resources for this appeal, it appears likely that the proponents are selecting case law that contradicts the weight of both federal and Supreme Court decisions regarding Aboriginal rights and the Crown's obligation to consult. Perhaps then the Crown's honour is at question.

An Aboriginal party has the right to be consulted about any "contemplated decision or action of the Ministry that might affect its known or asserted rights". At this point, the Crown must consult and accommodate the concerns of the aboriginal party. This law is constitutional law and applies no matter what the provincial statute says.

To the extent that the Swampy Cree case was brought by an aboriginal party and thus the judgement applied to it as an aboriginal people, then the law on the duty to consult as established (so far – it continues to advance) by the Supreme Court of Canada might be held to apply. Law regarding Aboriginal rights has advanced much further that it was in 1994.

We would request Manitoba Justice assess whether the Wuskwatim Generating Station license proceedings upheld the rules for consultation as set out by Canada's courts (for Aboriginal peoples):

1. Crown must act honourably
2. reconciliation is a *constant* duty in an *ongoing* relationship
3. low threshold to trigger duty to consult
4. no unilateral actions by Crown to deplete resource or land where subject to asserted right
5. at least in some cases, consultation must happen or begin at the strategic planning level
6. consultation is to occur *before* the fact
7. the constitutional duty to consult is a duty of the Crown's, not third parties or aboriginal parties

Re: Participants' Capacity and Resources to Participate

Manitoba Wildlands has, throughout the Wuskwatim review process and in this appeal, made numerous references to the issue of participants' capacity and resources to participate. Both Manitoba Conservation and the Wuskwatim Limited Power Partnership continue to skirt or misstate the issue. The Wuskwatim Limited Power Partnership refers (page 4) to the \$1 million in participant assistance that was made available for public participants. Although Manitoba Wildlands very much supports and appreciates the existence of this mechanism (environmental organizations spent many years lobbying for this provision in the legislation to be operationalized), the Participant Assistance Fund in no way results in equal capacity and can not be said to enable public intervenors to be on equal footing with proponents in the environmental review process. The fund also applied to one year of a now 5 1/2 year process. If the Wuskwatim Limited Power Partnership could substantiate this position by disclosing the amount of funds Manitoba Hydro directed in staff time, legal fees, consultants fees, etc. to its participation in the review process for the Wuskwatim projects. The very real and significant

differences amongst the various participants in an environmental review needs to be acknowledged and fairly accommodated.

With respect to the current appeal to Cabinet, apparently it is necessary for us to state that Manitoba Justice decided this appeal should be considered by Cabinet, not Manitoba Wildlands. Manitoba Wildlands, like any other public participant, functions with dramatically less capacity than the proponents or the regulators. This is simply a statement of fact and we are confounded as to why this should be disputed in any way.

Re: Gaile Whelan Enns' Participation in Manitoba Hydro 'Consultations'

The Wuskwatim Limited Power Partnership states in point 6 (pages 2, 3) of its January 17th letter that Ms. Whelan Enns "has participated in consultation with Manitoba Hydro concerning environmental and other matters since 1999." The reference to these sessions with Manitoba Hydro as "consultation" is a blatant contradiction of terms of reference and records of these sessions and as such is a false statement. Members of the public who participated in these sessions made it clear on the record that the information exchange and discussions that took place were not consultations. Manitoba Hydro staff can provide documentation to confirm. If not, our office kept records of these sessions.

And the references to the technical workshops – especially July 2003 ignores that these were invitational only, with less than a week's notice and I was unable to attend. Also the only reason there was a Winnipeg information session - January 2004 with environmental organizations and scientists was due to Manitoba Wildlands efforts. It would not have happened otherwise. Until December 2003, all open houses were to be in northern Manitoba.

Re: Support for Submission by Trapline 18

We wish to express our support for the March 2, 2007 submission by Trapline 18. Manitoba Wildlands concurs with many of the statements made in this submission regarding this Cabinet Appeal process and the process for the environmental review of the Wuskwatim projects. Specifically, we agree with Trapline 18's comments that,

- The proponents' in their response have largely reiterated information that was inadequately presented during hearings and that repeated reference to the environmental impact statement (EIS) does not make it accurate or valid (Section 2, page 3).
- Rights to cross-examine were denied in the CEC hearings (Section 2, page 3) – in the case of Manitoba Wildlands, cross-examination procedures regarding the EIS were unfairly changed and then cross examination time equal to other participants was denied without adequate notice or cause.
- Manitoba Hydro used information in its EIS and for hearings presentations that was not current (Section 2, page 3); this provides support to Manitoba Wildlands point that technical

reports that were the basis for information in the EIS were NOT provided, and there is no way to be able to refer back to the results of the original studies.

- The Wuskwatim Limited Power Partnership response over-simplifies the position advanced by Trapline 18 (Section 4, page 4); the same is true in Manitoba Wildlands' case, including with respect to our November 2006 submission.
- The Wuskwatim Limited Power Partnership / Manitoba Hydro continues to fail to disclose information (Section 5, page 7).
- "The importance of having up-to-date elevation data universally available and shared with all citizens of this province is profoundly important in the public interest." (Conclusion - #3, page 9).
- There should be an in-person hearing of this appeal by Cabinet in order to set precedent and establish fair and respectful procedures that will stand the test of time and law.

Thank you in advance for your consideration of the above.

Yours truly,

Gaile Whelan Enns
Director, Manitoba Wildlands

Attached:

Gaile Whelan Enns March 2, 2007 letter to Minister Melnick with attached correspondence