

**Speaking Notes for
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**Presentation to the
Clean Environment Commission
Lake Winnipeg Regulation Hearing
Winnipeg, Manitoba
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Good evening. My name is Will Braun. I work for the Interchurch Council on Hydropower, on whose behalf I am presenting. Thank you for the chance to be part of this hearing.

The purpose of the Interchurch Council on Hydropower is to monitor what happens at the northern end of the transmission lines. We advocate for fair treatment of lands and people affected by the Manitoba Hydro system.

Our council includes official representatives of the Catholic, Lutheran, Mennonite and United churches. Our work is rooted in a 40-year history of interchurch involvement in hydro issues. We speak as citizens and users of electricity.

First, I want to review the recommendations made by this Commission in the 2004 Wuskwatim Report. At the time, the Clean Environment Commission (CEC) recommended that:

*“The Government of Manitoba require Manitoba Hydro to **resolve all outstanding issues** with regard to . . . Lake Winnipeg Regulation. Following resolution of these issues, Manitoba Hydro should **apply for the appropriate final licenses . . . under The Environment Act and The Water Power Act as soon as possible**” (emphasis added).*

This Commission further recommended that the process, “*should include a review of the terms and conditions, **an operational review** and **any required environmental impact assessments**” (emphasis added).*

I want to test the current situation against six elements in those recommendations.

- First, the Commission recommended that Hydro apply for a Water Power Act final licence. It has.
- Second, the CEC recommended that the licensing process should happen “as soon as possible.” That was more than 10 years ago.
- Third, the CEC recommended that “any required environmental impact assessments” be conducted as part of the final licensing process. By any professional standard, an environmental impact assessment of LWR has not been done.

- Fourth, the CEC recommended that an operational review be undertaken. In 2011, a Water Stewardship official wrote to us saying: “The final licensing process maybe [sic] thought of as including an operation [sic] review of the project. Project impacts have been addressed under the Northern Flood Agreement.”

Has this process included the sort of operational review the CEC envisioned? I would expect such a review would involve examining operation of the project to identify ways to reduce environmental impact and adjust the balance between power generation and other interests. If this has been done, why has Hydro proposed no changes to licence parameters?

Appended to my written submission is a two-page explanation of what operational review looked like in the case of the Nipigon River in Ontario, which has three dams on it. Environment Canada points to the Nipigon case—in which water flows were adjusted—as “a workable solution to water use conflicts arising from regulated flows.”

- Fifth, the CEC recommended licensing under the Environment Act. Our government has chosen not to do this. A project that has significant impacts on the largest lake and river in the province will not be licensed under Manitoba's primary environmental legislation.

LWR will be licenced only under the Water Power Act, an act intended to allocate rights to projects that “divert, use or store water for power purposes.” The Act, as Water Stewardship staff have pointed out, makes no mention of the environment. It is not an environmental law. That makes this proceeding an environmental hearing into a licensing process that technically has nothing to do with the environment.

That said, some years ago, government officials ensured us that environmental conditions can be added to a Water Power Act licence. That leaves everything at the pleasure of the Crown, creating a situation of regulation and water management by ministerial discretion.

- Sixth, the CEC recommended in 2004 that Manitoba Hydro “resolve all outstanding issues” with regard to LWR. The message you heard recently in Cross Lake is not that Hydro has resolved all outstanding issues. I am willing to wager that you will hear similar messages in Norway House.

Since 2009, we have had written and in-person communication with elected leaders and government staff about LWR and Churchill River Diversion licensing. They point to the Northern Flood Agreement (NFA) as evidence that issues have been resolved, a view Hydro also put forward in a December 30, 2014 letter to you. The NFA is a broad agreement with many provisions. I will highlight a single, easily understood and quantifiable provision. Article 3 promises four acres of new reserve land for every acre affected by the project. Simple. Has this been completed? No. Not in the case of Pimicikamak. And not in the case of Norway House Cree Nation, which obtained expanded land transfer commitments under the 1997 Master Implementation Agreement (MIA). This merely illustrates that just because the NFA was signed does not ensure that issues are resolved.

We further submit that if you were to travel the waterways between Warren's Landing and Jenpeg in open water season, you would see a preponderance of outstanding issues.

In its 2011 request for a final licence Manitoba Hydro stated: “Before requesting the final licence, Manitoba Hydro **resolved outstanding LWR issues** with First Nations, communities and resource user groups inhabiting the area along the LWR waterways . . . ” (emphasis added).

We submit to you that that statement is inaccurate. It is probably not even wise to think in terms of *resolving* outstanding issues, as if they were something to tick off a list. The NFA, for instance, sets out a long term relationship. That notion of an equitable ongoing relationship “for the lifetime of the project” is far more useful than final resolution.

To recap, the CEC recommended: 1) Water Power Act licensing; 2) Environment Act licensing; 3) operational review; 4) environmental assessment; 5) resolution of outstanding issues; and 6) that it all be done as soon as possible. We submit to you that Manitoba Hydro and the province are one for six. The regulatory process for Lake Winnipeg Regulation has been minimized, narrowed and dragged out.

Recommendations

- 1) That the report arising from this hearing make note of the 2004 licensing recommendations.
- 2) That the following conditions be placed on the LWR final licence:
 - a. completion of NFA/MIA land transfers for Pimicikamak and Norway House within five years;
 - b. assessment of the implementation of other NFA/MIA provisions;
 - c. completion of a cumulative environmental assessment for the area covered by the licence within three years; and
 - d. completion of an operational review within three years.
- 3) That the Panel members travel a significant portion of the waterways between Warren's Landing and Jenpeg by boat and air before issuing their report.

I would like to move on to six more relatively brief points.

Decision-making Body

LWR licensing must not be reduced to a single number. It is not about 715 feet ASL versus 714 or 716 feet ASL, as the lake level at which Hydro must maximize outflows at Jenpeg. That is an outdated way of understanding water regime management. We submit that while an operating range should be included in a final licence, the correct approach is to establish a multi-party decision-making body that would determine how to operate the system on an ongoing basis. Such a mechanism would serve to better balance power generation with other interests, such as flood control both upstream and downstream of Jenpeg as well as Indigenous use of lands and waters.

Recommendation

- 4) That the LWR final licence include provision for a multi-party decision-making body in which various parties have meaningful say in LWR operation on an ongoing basis. We submit that the governments of Norway House Cree Nation and Pimicikamak, along with the organized resource user groups from those nations, be given particular standing in such a process, along with Indigenous resource user groups utilizing Lake Winnipeg. Such a collective decision-making body could utilize the results of a cumulative environmental impact assessment, an operational review, and ongoing operational review-related study and monitoring.

Water Rental Payments

The Water Power Act governs water rental payments, though technically, rental fees for Jenpeg fall under the Jenpeg licence which is distinct from the LWR licence. Regardless, we believe water rental fees related to Jenpeg should be paid to affected Indigenous peoples, not the province. To use a rough calculation, Hydro paid the province \$125 million in rental fees during the last fiscal year and Jenpeg accounted for about 1.7 percent of energy generation. Therefore, rental fees specific to Jenpeg could be assumed to be in the range of \$2.1 million per year.

We note that the November 2014 Process Agreement between Hydro, Manitoba and Pimicikamak commits the parties to discuss allocation of water rental payments to Pimicikamak.

Recommendation

5) That the LWR final licence be contingent on finalization of a Jenpeg licence in which water rental fees are paid to Pimicikamak and Norway House Cree Nation instead of Manitoba.

Loss of Life

Operation of Lake Winnipeg Regulation has resulted in the deaths of several Pimicikamak citizens. Some deaths happened as a result of boating accidents caused by half-submerged wood debris attributable to LWR. Other deaths were caused by hanging ice and otherwise unsafe and unpredictable ice conditions attributable to LWR.

We lament the fact that people have died entirely preventable deaths so that we can enjoy the inexpensive convenience of electricity.

Recommendation

6) That the report arising from this hearing acknowledge that LWR has cost lives.

Floodway

LWR serves two purposes: to increase power generation potential on the Nelson River and to reduce flooding on Lake Winnipeg. The latter is achieved by means of outlet channels that increase the outflow potential from Lake Winnipeg by about 50 percent in relation to natural outflow capacity.

During high water times, these increased outflows turn the area downstream of Jenpeg into a floodway. Manitobans understand these sorts of flood reduction mechanisms. The well being of the few is sacrificed for the well being of the many. The few should be compensated generously. A compensation agreement with the Indigenous people at Cross Lake is in place, though it only dates back a few years.

Recommendation

7) That the final report arising from this hearing acknowledge that during high water periods, LWR turns the area downstream of Jenpeg into a floodway.

8) That the Panel test the adequacy of the high water compensation agreement with Pimicikamak/Cross Lake First Nation, the need for and adequacy of any related provision for Norway House Cree Nation, and the possible need for retroactive compensation related to floodway usage prior to high water compensation arrangements.

Treaties

LWR operates in territory covered by Treaty 1, Treaty 2, Treaty 3 and Treaty 5. These treaties provide a legal basis without which the province would have no right to grant permits for the utilization of those lands and waters.

Recommendation

9) That the LWR final licence acknowledge the treaties in its “whereas” clauses.

Reconciliation

We live in an age of reconciliation between Indigenous peoples and the rest of us. This is an exciting moment, an important moment. In a statement of apology delivered in Cross Lake on January 20, Premier Selinger mentioned reconciliation several times: “We recognize that reconciliation is an ongoing process and are committed to work with communities toward further reconciliation.”

Similarly, Hydro CEO Scott Thomson was quoted in a press release the same day saying, “We continue to be committed to working with Aboriginal communities affected by our development and operations in a spirit of reconciliation.”

In some ways the technicalities and legalities of a licensing process are ill-suited to something as spirited and intangible as reconciliation. At the same time, if reconciliation is to be more than words and sentiments, it will have to be given legs by various means, including water power licences.

In requesting a final licence, Manitoba Hydro has requested no changes to the licence. But change is exactly what reconciliation demands. Business as usual does not lead to reconciliation. Reconciliation must get to the core of issues, and the core of LWR are water levels, flow rates, rental payments and decision-making power. Should all of those remain unchanged? Can reconciliation happen on the sidelines of those key issues?

Recommendation

10) That the LWR final licence include a preamble referencing the Premier's January 20, 2015 apology to hydro-affected peoples and framing the licence in the context of reconciliation.

The Jenpeg dam is set in concrete. The licence is not. The final licence cannot be a licence for business as usual. This is an opportunity for change, for reconciliation.

Thank you.

Appendix A

Operational Review Based on Environmental Flows: Nipigon River Case Study

The case of the Nipigon River in Ontario provides a valuable example of a meaningful operational review that resulted in substantive changes. The World Wildlife Fund (WWF) published a report in 2009 entitled, "Canada's Rivers at Risk: Environmental Flows and Canada's Freshwater Future."¹ It uses the concept of environmental flows, which the 2007 Brisbane Declaration defines as follows:

*Environmental flows describe the quantity, timing and quality of water flows required to sustain freshwater and estuarine ecosystems and the human livelihoods and well-being that depend on these ecosystems.*²

This concept, as applied to the Nipigon River serves as an example with respect to LWR operational review.

Of the 10 rivers assessed for the 2009 WWF report, only the Nipigon, which flows into Lake Superior northeast of Thunder Bay, received an "improving" forecast for its health. It received the favourable rating even though it is home to three "disruptive" hydro-electric dams. The Nipigon's positive grade is the result of a watershed management plan that has modified the operation of dams to restore environmental flows to more natural conditions. Environment Canada points to the Nipigon River Water Management Plan as "a workable solution to water use conflicts arising from regulated flows."³ Hydro projects continue to alter the flows of the Nipigon River, but according to the government's management plan, they must be "managed with the first priority being the health of the river's water resources."⁴

In the case of the Nipigon River, specific objectives were identified to protect, sustain and where necessary, rehabilitate:

- fish habitat and fisheries;⁵
- wildlife habitat and populations (while still allowing for "Aboriginal subsistence hunting, sport hunting and trapping");⁶
- riparian and bank-side vegetation;⁷ and
- water quality.⁸

We would like to highlight three specific outcomes of the Nipigon process: restoration of shorelines, protection of sensitive spawning grounds, and partnership with First Nations in monitoring impacts.

1 Available at: http://assets.wwf.ca/downloads/canadas_rivers_at_risk.pdf (accessed March 10, 2015).

2 The entire Brisbane Declaration is available at: http://www.eflownet.org/download_documents/brisbane-declaration-english.pdf (accessed March 10, 2015).

3 See: https://www.ec.gc.ca/raps-pas/62865611-7FC3-4245-B8F7-7D3466B48946/685_GL_AOC_Nipigon%20Bay_03_e.pdf (accessed March 10, 2015).

4 "Nipigon River Conservation Reserve Resource Management Plan," Province of Ontario, 2003, Chapter 4, Section 4.8.2, p. 159 (see: http://www.ontarioparks.com/english/planning_pdf/laken_chap4.pdf, accessed March 10, 2015).

5 Ibid., Section 3.4, p. 147.

6 Ibid., Section 3.5, p. 148.

7 Ibid., Section 3.6, p. 148.

8 Ibid., Section 3.7, p. 148.

Managing flows to restore shorelines

Prior to tighter regulations, water level fluctuations on the Nipigon River were at times severe, varying by as much as three meters every day. These fluctuations caused serious erosion which dumped tons of sediment into the river. The Province made a commitment "to work with Ontario Power Generation and other power generators to manage flow regimes in the river in order to maintain and restore the structural (i.e geomorphic/morphological) health of the river channel and its geomorphic processes."⁹ A key objective was to "identify important flow events and regime characteristics necessary to maintain the health of the river channel."¹⁰

Ontario's commitment to studying the relation between the timing of natural phenomena in the river and the timing of hydro regime operations resulted in specific steps to restore shorelines. Ontario's commitment stands as an example for Manitoba.

Managing water levels to protect fish spawn

As reported in the Nipigon River resource management plan, the severe fluctuations on the Nipigon were proven to be destroying brook trout spawning beds by exposing and stranding brook trout fry during their incubation. Subsequent to this discovery in 1990, an interim agreement was reached between the province and the utility to maintain water over the spawning beds throughout the fall and winter incubation periods. Later, the agreement was broadened into a watershed management plan that gave high priority to the flow needs of fish.

LWR is quite different in many ways than the Nipigon River situation, but perhaps the concepts could be successfully applied in Manitoba.

Long-term monitoring in partnership with First Nations

In the Nipigon River management plan, Ontario identified a need for a long-term biological monitoring program for the river, which would include data on "fish stock status, movement patterns, spatial and temporal information on spawning, critical habitats for specific vulnerable life stages (i.e. spawning, migration, overwintering) and barriers to fish migrations in the tributaries."¹¹ This data would be analyzed for the purpose of "developing recovery plans for fish species at risk."¹²

The 1990 interim agreement between Ontario and Ontario Hydro to maintain water levels over sensitive brook trout spawning beds eventually led to development of the Nipigon River Water Management Strategy. From this strategy, an Operating Plan to guide the day to day dam operations was developed (it was released to the public in 2001). We believe a comparable application of best practices for managing environmental flows could result in specific changes to the LWR operating regime that would substantively mitigate some of its most detrimental environmental impacts.

9 Ibid., Section 3.7, p. 148.

10 Ibid., Section 4.8.3, p. 159.

11 Ibid., Section 4.4.1, p. 153.

12 Ibid., Section 4.4.2, p. 154.