

National Energy
Board



Office national
de l'énergie

OUTGOING FACSIMILE - MESSAGE À EXPÉDIER

Date: 19 April 2017

Message to/

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Please find attached Board letter to Manitoba Hydro – Manitoba-Minnesota Transmission Project

This letter is available for viewing on the Board's website at A82687.

Regards,

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Dear Ms. Moroz and Mr. Madden:

**Manitoba Hydro
Application for Approval of Manitoba-Minnesota Transmission Project
(MMTP, the Project)
Application by Manitoba Hydro under subsection 58.11 of the *National
Energy Board Act* (NEB Act), and under the *Canadian Environmental
Assessment Act, 2012* (CEAA 2012), S.C. 2012, c. 19, s. 52**

On 16 December 2016, the National Energy Board (the Board) received an application from Manitoba Hydro (MH) for:

- a permit from the Board authorizing the construction and operation of an international power line (IPL) pursuant to section 58.11 of the NEB Act; and
- approval for certain deviation pursuant to subsection 45(1) of the NEB Act.

The Project is a 213 kilometre long, 500 kV IPL from the Dorsey Converter Station near Rosser, Manitoba to the US border crossing near Piney, Manitoba where it will connect to a transmission line in Minnesota. The Project falls within the *Regulations Designating Physical Activities* SOR/2012-147 under the *Canadian Environmental Assessment Act, 2012*,¹ (CEAA 2012) and therefore, must undergo an environmental assessment as set out in CEAA 2012. The Board is the responsible authority under CEAA 2012 to conduct this environmental assessment.

On 21 December 2016, MH published the Notice of Application and Directions on Procedure with respect to the Project as required by subsection 58.12(1) of the NEB Act. In the publications, MH stated that the Board wishes to obtain the views of interested parties on this application before issuing a permit or recommending to the Governor in Council that a public hearing be held.

...2/

¹ S.C. 2012, c. 19, s.52.

As noted in the publication, pursuant to subsection 58.14(2) of the NEB Act, the Board shall have regard to all considerations that appear to be relevant, including:

- (a) the effect of the power line on provinces other than those through which the line is to pass;
- (b) the impact of the construction or operation of the power line on the environment; and
- (c) such considerations as may be specified in the regulations.

Manitoba Métis Federation

On 20 January 2017, a comment letter was submitted by the Manitoba Métis Federation (the MMF) (Manitoba Métis Federation letter). The MMF, in their comment letter, requested that Board recommend to the Minister that the MMTP be designated as requiring a certificate pursuant to section 58.16 of the NEB Act to ensure meaningful Aboriginal consultation takes place because, in their view, a permit process will not permit the Crown to discharge its duties to the MMF. MMF stated that the s. 58.11 permit for which MH has applied could be issued without a hearing and by the Board alone, without the need for the Governor in Council's approval. The MMF stated that this would deny the Crown the possibility of consulting with the MMF before the decision to approve the MMTP is made, making it impossible for the Crown to fulfill its constitutional obligations.

The MMF submitted that CEAA 2012 limits the scope of environment assessment to impacts on Aboriginal peoples' current use of lands and resources for traditional purposes. In the MMF's view an environmental assessment of this nature is incapable of capturing and addressing the impacts that the MMTP will have on future or potential uses of the affected territory by Métis communities exercising their Aboriginal rights.

In addition, the MMF provided a summary of effects to be addressed prior to Project approval and comments on the MMTP Environmental Impact Statement (EIS). The MMF stated that they are working with MH to identify appropriate mitigation. The MMF submitted that should sufficient mitigation not occur, that they would consider residual effects to be significant.

Manitoba Hydro

On 3 February 2017, MH responded to the MMF's comment letter (MH Response to MMF). According to MH, the MMF raises the following concerns in its comment letter: (i) the potential effects of MMTP on the rights, claims and interests of the Manitoba Métis Community;² (ii) the lack of federal Crown consultations with the MMF regarding the Project;³ (iii) concerns that the National Energy Board ("NEB" or "Board") permit process would not allow the federal Crown to discharge its duties to the MMF;⁴ and (iv) a number of specific concerns about MH's EIS that

² Letter from Pape Salter Teillet LLP dated January 18, 2017, p.1.

³ *Supra*, note 1, p.1.

⁴ *Supra*, note 1, p.2.

are itemized in a table attached to the MMF's comment letter.⁵ MH sets out that, despite the MMF's concerns regarding potential impacts of MMTP, the MMF has not taken the position that the Project should not be approved, but only that the Board should recommend a certificate process for such authorization.

MH submits that it undertook an engagement and assessment process for MMTP to understand these effects. The MMF did not participate in early engagement opportunities, but are now fully engaged.

MH stated that it was confident that, through its continuing engagement process and a draft MMF report, the MMF and MH can come to a common understanding of mitigation measures sufficient to address effects. MH submitted that any unresolved concerns of the MMF related to the construction and operation of the Project can be appropriately addressed through the Board's permit process. MH views the NEB permit process as sufficient to protect the constitutional rights of the Manitoba Métis Community. Moreover, MH submitted that a Board decision to designate the Project as requiring a certificate, and therefore an additional hearing, would be contrary to the Board's duty under the NEB Act to avoid the duplication of measures taken by provincial governments in respect of international power lines.

MH submits that it addresses the MMF concerns by suggesting that:

- The MMF's procedural concerns with the Permit process are unwarranted because the Board process leading up to the potential issuance of a permit for the authorization of MMTP is a robust, comprehensive process with many features that are sufficient to protect the rights of all potentially impacted parties, including the Manitoba Métis Community.
- Replicating a Certificate proceeding duplicates provincial measures because there already is a provincial environmental assessment proceeding that is underway including a public hearing that features: participant funding; various options for participation; written information requests; motions; community oral hearings; a Winnipeg oral hearing and the opportunity to make submissions in Indigenous and French languages.⁶ MH submitted that the MMF has made application and been accepted as a funded participant in the provincial Clean Environment Commission (CEC) proceeding.
- Concerns related to potential impacts have been addressed in the Application, with no significant adverse impacts found to result from the Project, taking into account mitigation measures. MH has committed to reviewing the final Métis Land Use and Occupancy Study - Assessment of Potential Effects Prior to Mitigation to revisit this issue, and has also committed to filing the final MMF Study as part of the provincial environmental assessment proceedings, as per the Contribution Agreement For The Manitoba Métis Federation Engagement On The MMTP that was executed on

⁵ *Supra*, note 1, p.10.

⁶ CEC Hearing Directive, *supra* note 23, p.6-15.

12 January 2016. According to MH, any issues that are not resolved to the MMF's satisfaction prior to the CEC hearing can be adequately addressed through the provincial assessment process.

- Specific concerns related to the EIS including engagement, transmission line routing, and adequacy of the assessment are part of continued engagement. According to MH, failure to incorporate the specific input of the MMF does not lead to the conclusion that Manitoba Hydro's environmental assessment is deficient.

Board Decision

NEB Act

Under subsection 58.14(1) of the NEB Act, the Board may recommend to the Minister that the international power line be designated by Order in Council under the certificate provisions of section 58.15 of that Act.

Subsection 58.14(2) sets out that, in order to determine whether to make such a recommendation, the Board shall seek to avoid duplication of measures taken in respect of the international power line by the applicant and the government of any province through which the line is to pass, and shall have regard to all considerations that appear to it to be relevant including:

- (a) the effect of the power line on provinces other than those through which the line is to pass;
- (b) the impact of the construction or operation of the power line on the environment; and
- (c) such considerations as may be specified in the regulations.

The Board has considered the contents of the MMF's comment letter, and the response by MH. The Board notes that the MMF was the only group to file comments. Based upon all of the comments received, the Board is not persuaded to make a recommendation to the Minister that the Project be designated by order of the Governor in Council under section 58.15 of the NEB Act as an international powerline that is to be constructed and operated under and in accordance with a certificate issued under section 58.16 of the NEB Act.

Scope of the Assessment of the Project

Given that the Project must undergo an environmental assessment under CEAA 2012, and the broad scope of environmental effects and factors that the Board must consider as provided for under sections 5 and 19 of CEAA 2012, and given the Board's mandate to issue a permit under subsection 58.11(1) of the NEB Act, the Board has decided to assess the Project under section 58.11 of the NEB Act as applied for by MH.

As noted by MH, the Board has broad jurisdiction regarding the scope of matters that it may take into account when determining whether to issue a permit. This authority stems from its enabling legislation, the NEB Act, and would include the authority to take into consideration all relevant

matters since there are no provisions in the NEB Act limiting the Board in this regard. This authority is not limited by any guidelines to prepare applications that are outlined in the NEB Filing Manual. Nor is the Board limited by CEAA 2012. The scope of authority under CEAA 2012 pertains only to NEB's environmental assessment of the Project.

In relation to the concerns noted by the MMF in its filing, the Board is of the view that a permit process combined with an environmental assessment process under CEAA 2012 for which the Board, as a responsible authority, must ensure the opportunity for participation in the environmental assessment, will effectively address these concerns. In addition, the Board notes that there is a provincial process on-going with a public participation component.

Timeline

The Board notes that there is no legislative timeline in the NEB Act for issuing a permit under section 58.11. The Board further notes that there is no legislative timeline in CEAA 2012 within which it must make a determination under that Act. The Board has the ability to consider making a recommendation to the Minister as set out in section 58.14 of the NEB Act for a certificate provision at any point in its assessment of the Project, if it finds that relevant issues are not being appropriately addressed.

The Board has determined that it will not commence the environmental assessment under CEAA 2012 until after the CEC public hearing is completed for the proposed MMTP in order to reduce any duplication of the environmental assessments required by each of the province of Manitoba and the Board. The Board expects to make a determination under CEAA 2012 and to decide to either issue a permit, or make a recommendation to the Minister under section 58.14, if the Board determines this is warranted, in 2018.

Engagement in CEAA 2012 and NEB Act Processes

In its comment letter, at page 12, the MMF stated that neither CEAA 2012 nor the NEB processes will be sufficient to discharge the Crown's duty to consult the Métis Community in the circumstances. The Board notes that a number of judicial decisions, including *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,⁷ have acknowledged the Crown's ability to rely on opportunities for Aboriginal consultation that are available within existing processes for regulatory or environmental assessment. Such processes provide means by which the Crown may be satisfied that Aboriginal concerns have been heard and considered, and, where appropriate, accommodated. During the Board's process, concerns may be addressed through commitments made by the company and through terms and conditions imposed by the regulator on the company.

With respect to the MMF's view that CEAA 2012 limits the scope of environment assessment to impacts on Aboriginal peoples' current use of lands and resources for traditional purposes,⁸ the Board notes that environmental assessments under CEAA 2012 must take into account effects

⁷ 2004 3 SCR 550, 2004 SCC 74 (CanLII).

⁸ Manitoba Métis Federation letter, page 12.

from any change the Project may cause to the environment on factors with respect to Aboriginal peoples, including the current use of lands and resources for traditional purposes, as set out in subparagraph 5(1)(c)(iii). The Board further notes that CEAA 2012 also applies to reasonably foreseeable future uses by Aboriginal groups as outlined in the Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under CEAA 2012.

In addition to taking into account environmental effects set out in subparagraph 5(1)(c)(iii), the Board notes that under section 5 of CEAA 2012, Aboriginal peoples have the opportunity to comment on impacts related to a variety of components of the environment. The same can also be said of the factors listed in section 19, including the broad spectrum of matters allowed for in paragraph 19(1)(j), which states “any other matter relevant to the environmental assessment that the responsible authority... requires to be taken into account.”

Participant funding would be available for the environmental assessment process under CEAA 2012 to facilitate participation in the environmental assessment by Aboriginal groups, as well as by members of the public.

The Board will issue a Procedural Directive Letter outlining how the assessment process for the Project will proceed under CEAA 2012 and under section 58.11 of the NEB Act. The Board will assess matters under the *National Energy Board Electricity Regulations*⁹ prior to CEAA 2012 process completion but without issuing the permit until after the Board makes its CEAA 2012 determination. Opportunities for public participation will be included in the Procedural Directive along with details of how to apply to the Board for participant funding.

The Board directs MH to serve a copy of this letter on all parties participating in the Manitoba CEC process, affected neighbouring jurisdictions, Aboriginal groups, landowners, and interested persons.

Yours truly,



Sheri Young
Secretary of the Board

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⁹ SOR/97-130.