

MANITOBA HYDRO
INTEROFFICE MEMORANDUM

FROM S.A. Thomson
President and Chief Executive Officer

TO Honourable S. Struthers
Minister Responsible for Manitoba Hydro

DATE 2014 10 01

FILE

SUBJECT **MANITOBA HYDRO RESPONSE TO THE MANITOBA CONSERVATION AND WATER STEWARDSHIP CONSULTATION DOCUMENT ON POTENTIAL CHANGES TO MANITOBA'S ENVIRONMENTAL ACT**

The attached submission represents Manitoba Hydro's response to a July 2014 Manitoba Conservation and Water Stewardship (MCWS) document entitled "Environment Act Consultation: the Road to Enhancing Environmental Protection in Manitoba." It is our understanding that this review of the Act is part of a provincial commitment made under the *Tomorrow Now* initiative. Responses are requested by September 30, 2014. We thought you would appreciate an advance review of our comments, as we did with our April 2014 response to a similar process facilitated by the Manitoba Law Reform Commission (MLRC).

We are hopeful that our comments on the MCWS document will be useful for provincial government officials currently undertaking the review of the Act. As a frequent proponent of a number of both large and small projects that have been subject to review under *The Environment Act* since its promulgation, we have considerable experience with, and significant interest in the application and interpretation of, the Manitoba environmental assessment regime.

From our perspective, the Act already provides the level of rigor required for environmental protection, while offering the flexibility needed to accommodate projects of different sizes and scope throughout Manitoba. It is imperative to us that these critical features not be lost as the Act is updated. However, the Act is almost 30 years old and we can appreciate that it may benefit from some updating to provide greater clarity and certainty in implementation.

A key focus of refining and updating *the Act* should be an emphasis on aligning it with the new *Canadian Environmental Assessment Act, 2012* (CEAA 2012). CEAA 2012 allows for the provincial assessment process to substitute for the federal process, if federal authorities are satisfied that the provincial process meets all of the requirements of the CEAA 2012 process. This provides an excellent opportunity to streamline and coordinate environmental assessment processes and, in so doing, provide much greater certainty and efficiency to project proponents.

Honourable S. Struthers

2014 10 01

Page 2

Please feel free to contact me if you have any questions or concerns with the content of our response to the MCWS consultation document.

A handwritten signature in black ink, appearing to read 'S. Struthers', with a long horizontal flourish extending to the right.

SAT/gt

Att.

c: W.C. Fraser
F. Meier
B. Dancey
M. Rowson

**Manitoba Hydro's Draft Response to
Manitoba Conservation and Water Stewardship's
Environment Act Consultation:
The Road to Enhancing Environmental Protection in Manitoba**

October 1, 2014

Introduction and Response Summary

On July 22, 2014, Manitoba Conservation and Water Stewardship's (MCWS's) Environmental Approvals Branch (EAB) issued a document initiating a consultation process on *The (Manitoba) Environment Act* ("*the Act*"), reflecting a commitment made in the provincial government's *Tomorrow Now – Manitoba's Green Plan*. The consultation document organizes 13 questions under the following four themes: the environmental assessment process, the licensing process, the enforcement process, and public engagement. This response document provides Manitoba Hydro's perspectives on these four themes, along with possible opportunities for improvements to the Act in each of these areas.

As a proponent of numerous projects of various size and scope that have been subject to review under *the Act* and a likely future proponent, Manitoba Hydro welcomes the opportunity to participate in this consultation process. Manitoba Hydro also took the opportunity to comment on the ideas presented by the Manitoba Law Reform Commission (MLRC) in its discussion paper on Manitoba's environmental assessment and licensing regime, and have attached this response document in Appendix A as a reference.

In Manitoba Hydro's experience, *the Act* provides the level of rigor required for environmental protection, while offering the flexibility needed to accommodate projects of different sizes and scope throughout Manitoba. It is imperative that these critical features not be lost as *the Act* is updated. With this in mind, Manitoba Hydro's comments focus on opportunities to build upon what currently exists in a manner that provides greater clarity and certainty in implementation of *the Act*. Overall, from Manitoba Hydro's perspective, such opportunities include:

- Continuing to structure assessment requirements and associated processes for each project based on the Classes of Development Regulation (e.g., level of detail required, public consultation, etc.), with particular concern that more onerous requirements not be placed on smaller or more routine projects, adding cost and complexity without improving environmental protection;
- Maintaining the Classes of Development Regulation, with updates to include developments that are currently not captured;
- Developing stand-alone guidance materials for proponents so that expectations under *the Act* are well understood, consistently addressed in a manner suitable to the regulators and compatible with the federal process;
- Formally recognizing in *the Act* the roles and responsibilities of the Environmental Approvals Branch in managing the approvals process, and those of the Technical Advisory Committee (TAC) in providing expert support and advice, including potential TAC membership and timing of its participation in the process.
- Continuing to maintain ministerial and/or departmental discretion (depending on the Project) with respect to licence reviews under the Act, but providing better clarity about the circumstances in which licences may be revisited to avoid the potential for evolving and/or unforeseen expectations with respect to construction, operation and related mitigation measures.

- Continuing to provide licences for the operational life of a Project, with reviews occurring as warranted and required based on what is defined in *the Act* as “new evidence”, so that proponents have the certainty required to make long-term capital investments.
- Care in applying *the Act* to projects which predate the legislation, and a much more comprehensive consultation process with industry if *the Act* is to be updated in a manner that requires all past developments to undergo an environmental licencing process based on today’s standards and legislation – something that would have major implications for Manitoba Hydro and many other industries in this province.

Updating *the Act* also creates an excellent opportunity for the province to align its environmental legislation with the new *Canadian Environmental Assessment Act (CEAA 2012)*. As a proponent of projects that have the potential to trigger both provincial and federal environmental legislation, Manitoba Hydro is concerned that the Canada-Manitoba Agreement on Environmental Assessment Cooperation appears to have expired in 2012 and is not being renewed. The purpose of the Agreement was to streamline the environmental regulatory approvals process, with projects undergoing a single assessment administered cooperatively by both governments. With the expiration of the Agreement, there is no formal mechanism for coordination of federal and provincial environmental regulatory processes. This creates uncertainties for proponents because it is unclear how both levels of government will work together, and the level of consistency that will be achieved. Taking this opportunity to create greater coordination and consistency with *CEAA 2012* would improve certainty for project proponents and the public. It would also improve long-term opportunities for the provincial government to pursue substitution or equivalency under *CEAA 2012* for projects which trigger both Acts.

Additional information and commentary on each of these opportunities is provided below, based on the four main themes outlined in the consultation document.

Environmental Assessment

Enhancing the Guidelines

Within the environmental assessment theme the consultation document has several questions on environmental assessment guidelines. It discusses potential enhancements such as the development of more comprehensive, project-specific guidelines for larger, more complex and/or sensitive proposals, as well as improvements to the generic set of guidelines to reflect state-of-the-art environmental assessment practices, and the removal of any duplication within the environmental assessment and review process.

As a proponent of many projects under the Act, Manitoba Hydro strongly believes that environmental assessment guidelines should be scoped based on the size and complexity of projects, using the current Classes of Development approach (see more below). For smaller or more routine projects, for which environmental effects and related mitigation measures are well understood, it is reasonable to expect that assessments be based on a fundamentally different level of study and analysis than those undertaken for larger, more complex projects that have the potential for numerous environmental effects.

The practice of environmental assessment is evolving and clearly articulating provincial expectations of proponents, particularly for larger, more complex and/or sensitive proposals, would certainly be beneficial. From Manitoba Hydro's perspective, much of this guidance can be provided in stand-alone supporting guidance documents, rather than distinct changes to *the Act*. Such guidance documents would reduce or remove uncertainties for proponents, regulators and the public, but also provide flexibility for updating expectations as new norms in environmental assessment emerge. The guidance provided in these documents could also be used to shape project-specific guidelines for individually proposed developments.

The consultation document suggests that the guidelines should consider aspects such as cumulative effects, climate change and/or alternatives assessment. These are topics most appropriately considered within the context of larger, more complex and/or sensitive projects (e.g., some Class 2 and Class 3 developments), and could be addressed through the development of guidance documents. In the case of cumulative effects assessment and climate change considerations, it is our experience and observation that proponents of larger projects are most often held to the standards and expectations articulated in federal guidance documents – regardless of whether the project triggers federal environmental legislation. Given this, it would certainly be beneficial if provincial guidance on these topics was consistent with that provided at the federal level.

Manitoba Hydro's perspective on the assessment of alternatives depends on the context in which it is being considered. Analyzing alternative means of carrying out a specific project continues to be part of the *CEAA 2012* process, and is an important consideration for many larger projects. Where appropriate, Manitoba Hydro is supportive of this type of assessment because it can lead to better project design that mitigates or lessens environmental and social effects. However, some have gone further to suggest that the need for and alternatives to a project proposal should also be considered by its proponent – something that has now been removed from *CEAA 2012*. From Manitoba Hydro's perspective, this requirement is not reasonable or feasible for most proponents, and we would be very concerned about formally including this aspect of alternatives assessment as part of *the Act*. This type of assessment is certainly not appropriate in all circumstances, most notably for private developers pursuing specific projects based on an internally generated business case. Manitoba Hydro would strongly recommend that the requirements for this type of analysis remain at the discretion of government.

The Role of TAC

Within the environmental assessment theme the consultation document has questions on the importance of the Technical Advisory Committee (TAC), defining its membership, roles and responsibilities, and formally including it in *the Act* "to ensure permanency."

From a provincial perspective, it would be valuable to have *the Act* reflect the role of the MCWS Environmental Approvals Branch (EAB) in managing the approvals process and granting the licence, and to clearly define the roles and responsibilities of TAC in supporting EAB throughout this process. Manitoba Hydro has developed a good working relationship with provincial representatives and proactively deals with many scientific/socioeconomic technical issues. However, formally recognizing TAC and its role in *the Act* may assist in improving the efficiency of the process. On projects where

federal involvement is required, there is also value in having federal representatives on the TAC to coordinate and encourage a collaborative government EIS adequacy review process.

Once an EIS is filed, it is also important to proponents that TAC review schedules are developed, understood and followed. Where relevant, it is important that these schedules are coordinated and aligned with those of federal regulators. There should also be coordination and alignment with the Clean Environment Commission (CEC) process to maintain some type of sequencing, where appropriate, between the EIS TAC review and the CEC process of preparing for and undertaking public hearings. It can be very challenging as a proponent and for the public to be concurrently participating in and following both TAC and CEC review processes.

The Licensing Process

Classes of Development

Within the licensing process theme the consultation document has questions on the current process and use of classes of development. In terms of the current process, the consultation document notes that “the needs and values of society have evolved” and that there have been technical advances and new industries that are not currently adequately captured in *the Act*. It asks if the current Classes of Development Regulation should be maintained or reconfigured using some new system, whether/how new developments based on new technologies can be categorized, and which activities should be considered, in order to improve clarity and flexibility in the process.

Manitoba Hydro agrees that there is a need to update the Classes of Development Regulation to address recent development trends that are currently not captured, and to improve clarity regarding their interpretation for potential triggers. While some flexibility is good, it is critical to maintain the concept of Classes of Development so that the scope of required effort can be matched with the magnitude of the project/likely effects. This provides consistency, clarity and certainty in approach and reduces the risk of burdening small projects with overly onerous requirements. There would also be value in having director or ministerial discretion to include projects not currently specified in any class of development as new technologies or types of projects emerge. Consistency could be accomplished by having the Classes of Development Regulation include criteria that would inform/guide a determination on the appropriate Class of Development in such circumstances.

Licence Reviews, Renewals, Alterations and Appeals

The consultation document asks about licence reviews and the conditions for renewal or alteration. It notes that many developments are long term and that scientific knowledge and what is environmentally acceptable by society can change over time. It proposes periodic reviews of licences and licensing conditions to address these changes and asks if the circumstances should be related to time, changing conditions or other factors. The final question raised about the licensing process concerns the appeals process and how it can remain effective for the greater benefit of society.

The Act, as currently written, does provide flexibility for the director or minister to review existing licences “where in the opinion of the minister new evidence warrants a change in the existing limits, terms or conditions; or where no existing limits, terms or conditions exist by licence or regulation.” This

flexibility allows for new circumstances to be readily accommodated and, if warranted, allows for the implementation of additional environmental protection measures in cases where unanticipated environmental effects are experienced. From Manitoba Hydro's perspective, this section of *the Act* does not require any major amendments, but would benefit from improved clarity regarding what is deemed to be "new evidence", and what information would be required prior to determining that an existing project / facility should be reviewed. As a proponent of several projects throughout Manitoba, it is important to Manitoba Hydro that a clear understanding of the circumstances in which licences may be revisited is established to prevent the potential for evolving and/or unforeseen expectations with respect to project construction and operation and related mitigation measures – which, depending on the circumstances, may have huge cost implications. The potential for licences under *the Act* to contain specified expiration/renewal clauses is also troublesome because it creates risk and uncertainty, especially for long-term projects that require major capital investments. Manitoba Hydro's preference, as a developer, is that licences continue to last for the life of a project, with reviews occurring as warranted and required based on what is defined in *the Act* as "new evidence".

Manitoba Hydro is also very concerned about the potential for *the Act* to be updated in a manner that requires all past developments to undergo an environmental licencing process based on today's standards and legislation. This would have major implications not just for our Corporation, but for many other industries in this province. For projects developed prior to *the Act* being in place, the levels of pre-project assessment work and project mitigation measures implemented at the time of construction are, for the most part, fundamentally different than for projects constructed today. The ability to determine potential project effects that have already occurred or are occurring, or to retrofit, rebuild or change the operating parameters of existing projects so that they meet today's standards, would be a very costly and time-consuming exercise. For projects that are marginally economic, it may mean that some developers choose to no longer operate in our province. From Manitoba Hydro's perspective, if this type of update is being considered, it is extremely important that it only be done following extensive consultation with industry, and a much more fulsome consideration of the potential consequences that may arise.

Finally, in terms of the appeals process, Manitoba Hydro has been satisfied with the current process. As a proponent, it is important that the current approach to appeals be preserved and that the director's or minister's decision continues to stand pending the outcome of the appeal. This is because, at that point in the process, the expert decision maker has completed a review process, including participation by the public and experts, and made an informed decision. If there were to be a change in this provision, Manitoba Hydro would be concerned about the potential impacts on the implementation of a project once a license has been issued because business decisions, often involving commitments to schedules and substantial costs, are typically made at this stage.

Enforcement

Within the enforcement theme, the consultation document indicates that Manitoba plans to diversify the available enforcement options by looking to alternative penalties beyond the scope of monetary fines and imprisonment, and to continue to develop innovative compliance tools that will increase

accountability of the polluter. It asks how Manitoba can more effectively enforce the provisions of *the Act*, and for feedback on the expansion of penalty provisions in *the Act*.

Manitoba Hydro has not experienced any concerns regarding the current enforcement process, but sees value in having more public information available concerning compliance and enforcement with respect to environmental assessment and licensing matters. One option may be to reorganize *the Act* to include a separate compliance and enforcement section (possibly in regulations that could be more readily updated) that clearly describes the mechanisms that are available, and a proponent's responsibilities with regard to compliance and enforcement.

Public Engagement

Within the public engagement theme the consultation document notes that Manitoba has a robust public engagement process and that it is important to maintain effective public information processes to keep the process relevant and collaborative and to reflect changes in information technology. The document asks whether the current forms of communication (e.g., local newspaper advertisements and public registry) are effective at conveying information to the majority of Manitobans, and whether there are any other effective forms of communication. More broadly, the consultation document asks whether there are any other ways to enhance the public engagement process.

Manitoba Hydro would agree that there have been some positive improvements to the process of sharing public information recently. Further enhancements, such as the electronic notification of licence applications, could still be made. Other jurisdictions, such as British Columbia's Environmental Assessment Office (<http://www.eao.gov.bc.ca/>) have well-developed web sites on this topic.

There would be value in developing stand-alone guidance materials to explain the process and identify opportunities for public engagement to improve knowledge and understanding of the environmental assessment and approvals process. Guidance documents for public participation associated with *the Act* could consist of explanations of the types of participation and where each is most appropriate. This would provide clarity and consistency regarding roles and expectations for the proponent, regulator, and general public.

As indicated previously, it is critical to maintain the Classes of Development Regulation, and the scoping of a public engagement process should be based upon the size and complexity of a particular project. A public engagement process scoped on this basis could enable a requirement for multiple entry points for public participation in the environmental assessment process, depending on project complexity. There is value in including a mandated requirement for the proponent to consult with the public during the proposal development stage for larger projects, and value in having more specific requirements placed in legislation (i.e., regulations) for what information would be made available through the public registry and in public engagement programs. It is recommended that *the Act* provide the director/minister with the authority to require public participation as part of the guidelines, specifying its nature as appropriate, and linked to the classes of development.

Final Comments

Manitoba Hydro is grateful for the opportunity to provide comments on this provincial consultation document and would welcome the opportunity for further discussion as specific revisions to *the Act* are considered. As noted, in Manitoba Hydro's opinion, *the Act* currently provides the appropriate level of rigor and flexibility to accommodate a variety of different types of development projects, while still protecting the environment. However, there are opportunities for enhancements to *the Act* to improve upon its effectiveness, provide greater clarity, and reflect current technologies and public values. From Manitoba Hydro's perspective, enhancements to *the Act* should be made in a way that maintains its positive attributes, builds upon experience implementing and working with *the Act* since its inception, and creates greater alignment between provincial processes and those mandated under the *CEAA 2012*.



MANITOBA HYDRO RESPONSE TO THE

MANITOBA LAW REFORM COMMISSION DISCUSSION PAPER:

MANITOBA'S ENVIRONMENTAL ASSESSMENT AND LICENSING REGIME

April 25, 2014

Preamble

In its 2012 *Tomorrow Now* initiative, the Manitoba government stated its intention to review *The Environment Act* by 2015. It is Manitoba Hydro's understanding that a government-initiated review of the Act is currently underway, and we look forward to participating in any public reviews of the current legislation and any proposed changes.

As a separate process, and at the suggestion of the Public Interest Law Centre, the Manitoba Law Reform Commission (MLRC) began a project in 2012 to "study the provincial environmental assessment and licensing regime and make recommendations for its reform." It has completed a related discussion paper (*Manitoba's Environmental Assessment and Licensing Regime*, January 2014) and invited comment on 18 key "Issues for Discussion", in expectation that responses will contribute to the Commission's objective to "develop proposals for reform that enhance certainty, transparency and flexibility in Manitoba's environmental assessment regime" which might be considered by Government.

This submission represents Manitoba Hydro's response to the MLRC discussion paper. At the present time it is not entirely clear how the MLRC paper and response(s) to it might influence any forthcoming legislative or regulatory amendments. As a frequent proponent of a number of both large and small projects that have been subject to review under *The Environment Act* since its promulgation, Manitoba Hydro has considerable experience with, and significant interest in the application and interpretation of, the Manitoba environmental assessment regime. We have reviewed the MLRC discussion paper in that context and our perspectives are summarized in this paper.

Environmental assessment methodologies and related regulatory mechanisms are the subject of much debate among academics, regulators, public interest groups, proponents and practitioners. That debate highlights the many differences of opinion, and these are certainly embodied and reflected in the 18 issues identified by the MLRC. While Manitoba Hydro does not necessarily agree with all of the commentary and opinions provided for each of the 18 issues, we are aware of these concerns and have spent time as a corporation reviewing, discussing and analyzing our perspectives on these matters.

We believe that most of the 18 issues can be effectively addressed with a combination of amendments to the current Act and Regulations, and by the development of a suite of guidance documents. The nature and scope of the statutory and regulatory issues and what might constitute appropriate improvements must take into account the array of projects to be assessed and be responsive to their size and complexity. Attempting to update the Act based on the perspectives of any one particular contributor can have unintended consequences by being overly detailed and prescriptive.

We fully concur with the MLRC objectives respecting the importance of transparency, certainty and flexibility in the environmental assessment process. We agree that "Reform ought to be aimed at achieving levels of assessment appropriate to the nature, location and circumstances of the proposed development". We also concur with the MLRC that "A well designed [environmental assessment] system should also be efficient in terms of costs in time, money and human resources". The development cost and scheduling implications of environmental assessment can be substantial, even for

organizations as large and well-resourced as Manitoba Hydro. From our perspective, it is critical that the process for any developer does not become so onerous that it discourages appropriate development initiatives on the part of proponents generally—large or small, public or private.

Finally, as part of any discussion related to regulatory reform, we think that a primary objective should be an alignment of provincial environmental assessment legislation with the *Canadian Environmental Assessment Act 2012* (CEAA 2012). CEAA 2012 allows for the provincial assessment process to substitute for the federal process, if federal authorities are satisfied that the provincial process meets all of the requirements of the CEAA 2012 process. This provides an excellent opportunity to streamline and coordinate environmental assessment processes and, in so doing, provide much greater certainty and efficiency to project proponents.

More detailed comments on the MLRC paper follow below. Rather than comment specifically on each of the 18 issues identified by MLRC, we have chosen to provide broader commentary. We have organized this response under the following headings, which correspond to relevant chapters in the MLRC paper:

- Environmental assessment and sustainable development;
- Cumulative effects and strategic environmental assessment;
- Public consultation; and
- Balancing certainty and flexibility and specific procedural steps.

Environmental Assessment and Sustainable Development

Chapter 3 of the MLRC discussion paper questions whether Manitoba’s environmental assessment process should be more directly linked to the content of *The Sustainable Development Act* (it is noted that this legislation is also presently under review by Government) and, more specifically, whether some or all development proposals should include consideration of the Needs For and Alternatives To (NFAT) a project and the scope of such considerations.

The Sustainable Development Act, passed in 1997, as with all legislation, contains carefully chosen wording. None of the principles or guidelines is prescriptive. Words and phrases such as “should” (rather than shall); “encouraging and facilitating”; and “take into account” describe the application of the principles and guidelines. There is no suggestion that these are or should be the hard decision-making criteria. Rather, they are factors to be considered and balanced in the development planning process, during which opportunities will be recognized and pursued to enhance sustainability.

It should be noted that *The Sustainable Development Act* currently requires government and Crown corporations to develop their own sustainable development principles to guide projects, activities and work. In order to demonstrate compatibility with *The Sustainable Development Act*, Manitoba Hydro has adopted a Sustainable Development Policy, with 13 related principles. Where directed/appropriate, environmental assessments for Manitoba Hydro projects do indicate how these are met through our

development proposals.

The Sustainable Development Act, however, contains no project-specific compliance regime. Manitoba Hydro considers this to be an appropriate approach, requiring no modification. In order to help guide planning activities it is helpful to have provincially and, in our case, corporately, recognized sustainable development principles and guidelines, and it is reasonable to require an explanation as to the consistency of large projects with these principles and guidelines. This is currently a discretionary requirement of the director or minister and, as is appropriate, is only required for relevant projects.

With respect to the environmental assessment process, and particularly in the case of its major projects, Manitoba Hydro is broadly supportive of the notion of “sustainability”. However, incorporation of sustainability concepts in new or amended legislation should neither duplicate nor unnecessarily complicate or inhibit current and evolving assessment practice under the present legislative framework. Replacing the recognized practice of environmental assessment used across the country with a requirement for “sustainability assessment” has the potential to be hugely problematic for regulators and proponents. Sustainability assessments are not common practice in Canada or elsewhere and defining what this means beyond what is described in the academic literature and within the Manitoba context will take time. Elsewhere in the world, the term is often used when environmental assessment regimes are expanded beyond purely biophysical considerations to include socio-economic aspects of a project like changes to economies, communities and families – these aspects are all well considered within the provincial and federal environmental assessment regimes and incorporated into guidelines provided to proponents by regulators.

Redefining and re-envisioning the Manitoba process to embrace a novel concept that is not used at the federal level could also create duplication and additional costs for both proponents and regulators – two Environmental Impact Statements (EISs) written based on two different standards and methodologies and two fundamentally different review processes that may not at all be compatible. This is particularly concerning in light of new opportunities under the CEAA 2012 that allow for greater streamlining and coordination between federal and provincial environmental assessment processes.

Sustainability assessments are sometimes viewed as an expansion of the current environmental assessment process to include NFAT. While this may be appropriate in some circumstances, it is certainly an aspect of project review that should be left to ministerial discretion.

Manitoba Hydro’s status as a Crown Corporation has meant that, under some circumstances, more extensive justification of project need and a consideration of business case economic alternatives for new generating stations and other large development projects have been required under *The Manitoba Hydro Act*. In such cases, the projects have typically required large capital expenditures and government, based on its own discretion, has determined that it is in the public interest to review the need for and alternatives to the Corporation’s development proposal in an open and transparent public forum and in light of the Corporation’s mandate under *The Manitoba Hydro Act*.

The situation for most privately-owned project proponents is considerably different. For most

proponents, project proposals are defined by the economics of the business case and related proprietary and competitive considerations. In such cases, proponents have already defined the need and have determined the appropriate alternative for their business to pursue. A public review of project economics and possible alternatives has the potential to create competitive risks and may not be in line with its core business. There are also some cases where there simply may be no alternatives available. As well, despite what is noted in the MLRC paper, our experience has been that a review of NFAT does take a considerable amount of time and resources.

It is notable that CEAA 2012 has moved away from a consideration of a need for a project and possible alternatives, and focuses more heavily on alternative means of carrying out a project. From Manitoba Hydro's perspective, this is a reasonable expectation of proponents and is routinely incorporated into the Corporation's planning processes (e.g., design and siting/routing options, operating regimes, etc.).

From our perspective, the current legislative framework offers adequate flexibility to provide for appropriate review of these concerns, as required. If changes in this regard are considered, we suggest that such proposals reflect successful experience elsewhere and be carefully coordinated with federal assessment practice under CEAA 2012.

Cumulative Effects and Strategic Environmental Assessment

Chapter 4 of the MLRC discussion paper addresses the related topics of cumulative effects assessment, strategic environmental assessment, and regional strategic environmental assessment—all in the context of their appropriate incorporation in a process that would link environmental assessment with the principles of sustainability.

As recognized in the MLRC discussion paper, although the topics in Chapter 4 are related, they differ significantly, especially in respect to purpose, level of detail and appropriate assignment of responsibility for their development.

At one end of the spectrum, project proponents are usually and appropriately expected to conduct project-specific cumulative environmental assessments of their proposals. Such assessments typically focus on the cumulative, or overlapping, effects of a particular project with the effects of other past, current and future developments. They are designed specifically to assess the cumulative change that may occur if a particular project is developed and usually include a consideration of the effects of developments and activities outside the purview of the proponent's control, to the extent that such effects are known, as well as references to suitable standards/thresholds to the extent that these have been established and enforced by regulatory authorities.

The expectation for a project-specific cumulative effects assessment is mandated under CEAA 2012 and, although not specifically required under *The Environment Act*, is typically outlined in project-specific EIS guidelines issued for larger projects. This is certainly an area that could be more clearly outlined in provincial legislation, perhaps with the need for such an assessment based on the discretion of the minister or the class of development being proposed. Similarly, it seems reasonable that provincial

expectations about how to undertake cumulative effects assessments for individual projects could be laid out in guidance documents that can be updated as standards of best practice evolve.

Strategic environmental assessments and regional strategic environmental assessments typically involve a broad-based review of the current state of the environment and possible future outcomes if specific policies, programs or plans (including possible known and foreseeable project proposals) are to be implemented. They are not focused on the cumulative effects of a single project, but rather consideration is given to all possible environmental outcomes based on different policy or development strategies for a specific area or region. This type of assessment is undertaken so that environmental implications are considered in related decision-making processes, including such things as determining desirable land use or development plans/policies for a particular area, or establishing appropriate benchmarks or thresholds of change against which to measure environmental sustainability.

To be credible, most strategic environmental assessments and regional strategic environmental assessments should properly be the responsibility of adequately-resourced government authorities at a broader municipal, district, regional, or provincial level. These authorities are best placed to understand the range of possible policies, programs and plans that may be under consideration and can provide the type of overarching and unbiased review of current conditions and possible future outcomes that is typically required for this type of assessment.

In most cases, it is not reasonable to expect that individual project proponents, whether Crown corporations or private interests, can credibly conduct assessments that require a foundation in provincial land use and development policy, definition of government standards and thresholds, and/or guidance respecting the uncertain future development initiatives of others. The one potential exception may be the conduct of industry-specific (as opposed to project-specific) strategic environmental assessments that consider the combined environmental effects of related industry initiatives in an area broader than that of the individual project footprint. There are very few such circumstances in Manitoba, and it would seem reasonable that the need for such a strategic, industry-specific assessment be determined at the discretion of the Minister. As well, unless a particular proponent is the primary developer in a particular industry, we would note again that such assessments are likely best accomplished through government directive rather than as a specific requirement of a particular proponent within that industry.

Where strategic environmental assessments (industry-specific or regionally based), land use development plans or related thresholds and benchmarks of sustainability are available, they are valuable to the cumulative effects assessments of individual projects because they provide important context against which to assess the appropriateness and acceptability of a project's development. It is reasonable, as suggested by CEAA¹, for such strategic environmental assessments to be considered as part of a project-specific cumulative effects assessment *when they are available*. Such considerations are routinely undertaken by Manitoba Hydro in its environmental assessment activities. However, in

¹ See Canadian Environmental Assessment Agency, 2012. Operational Policy Statement Assessment Cumulative Environmental Effects under the *Canadian Environmental Assessment Act, 2012*.

light of cost and scheduling implications to proponents, the need for a strategic environmental assessment to be complete prior to the licencing of individual projects should be made clear early in the regulatory process. Furthermore, from our perspective, proponent engagement in strategic environmental assessments should be voluntary and developed with proponents on a case-by-case basis, rather than mandated in legislation.

Several references are made in the MLRC discussion report about the need for project-specific monitoring to be undertaken in a manner that supports and contributes to strategic environmental assessment initiatives. The creation of large-scale provincial databases is certainly a laudable goal and one which Manitoba Hydro continues to support through its own monitoring activities. We would caution, however, that project-specific monitoring does still need to address the specific effects of each project and a one size fits all approach may not always be appropriate. In addition, ownership of the database, and a determination of how it can or should be used, should remain with the responsible government authority. Of particular concern is the ongoing protection of confidential, as well as commercially and/or culturally sensitive information. The latter is especially important within the context of Aboriginal Traditional Knowledge.

Public Participation

Chapter 5 of the MLRC discussion paper deals with the importance of public involvement in the assessment process, specifically engagement of First Nations and other Aboriginal groups, and the role of the Clean Environment Commission (CEC).

Manitoba Hydro emphasizes and encourages Aboriginal and public engagement in its environmental assessments. The nature, timing and scope of public engagement are typically determined by the potential extent of project effects, anticipated interest in a project's development and the communities/organizations potentially interested in or affected by project development. Larger undertakings typically have far more extensive public engagement programs than those employed for more routine projects or those with minimal environmental effects.

Manitoba Hydro supports the requirement of proponents to undertake public engagement activities appropriate to the specific project proposal. We would suggest that, as with other project-specific methodologies, provincial expectations in this regard be articulated in guidance documents that provide flexibility to address different circumstances and that can be updated as best practices evolve.

The one exception to this is the prospect of changes to the role of Manitoba Hydro and other proponents in respect of consultation required under Section 35(1) of the *Constitution Act, 1982*. The conduct of s.35(1) consultation is specifically and rightly the responsibility of the Crown. While the Crown may delegate procedural aspects of the consultation to a proponent, it cannot delegate the ultimate duty to deal directly with Aboriginal interests as they relate to the potential effects of a project on the exercise of Aboriginal and Treaty rights. It is not appropriate or desirable for project proponents, including Crown Corporations like Manitoba Hydro, to take on this responsibility and to assess, on behalf

of the Crown, potential effects to Aboriginal and treaty rights and the adequacy of accommodation measures. Proponent involvement in this process should continue to be based on a sharing of relevant Project information, including possible effects and related mitigation, offsetting, compensation or other accommodation measures, that can be used by the Crown to inform its required consultation activities and to fulfill its duty.

The MLRC paper also provides commentary on the role of the CEC in soliciting and engaging the public in the review and discussion of proposed developments. CEC hearings have been an integral component of environmental approvals in Manitoba since the 1960s when the Commission was the approval authority for projects that might release pollutants into the environment. In 1988, with the replacement of *The Clean Environment Act* by *The Environment Act* and the associated expansion of the scope and nature of the assessment requirements, the licensing authority moved to the responsible government department; however, the role of the Commission in providing the forum for public hearings remained. This role has continued to be a vital one in environmental management in Manitoba. It provides the interested public with the critical opportunity to address the proponents of proposed developments, to ask questions and to enter into debate about the effects of the development.

Manitoba Hydro is supportive of the CEC process, and believes its most effective and important role is in seeking and encouraging public commentary from individuals, families, organizations and the general public interested in major undertakings. This was particularly evident during the northern component of the Keeyask Generation Project hearings, which benefited directly from the input of project-affected communities. People spoke from their hearts about their hopes and concerns with respect to project development in an open and informal environment. More formal hearing processes, like those that occurred in the southern round of the Keeyask Generation Project hearings, are a valuable mechanism to further refine project details and related mitigation measures; however, given their technical and sometimes adversarial nature they can be intimidating to the general public.

Lengthy, technical formal hearings are a substantial cost (proponents bear virtually all costs associated with a public hearing, including costs for CEC advisors, facility rentals, and hearing participant funding) and can be a scheduling burden for most development proponents. From our perspective, the need for these hearings is likely best determined by the nature of the project being proposed, the potential for major environmental effects and/or the extent of public interest. In such cases, projects are typically of a larger scale with major public interests/concerns at stake and an extensive public hearing process has the potential to identify further management measures and development processes that enhance environmental protection. It does not seem reasonable to expect that proponents of more routine (i.e., projects whose environmental effects and associated mitigation are well known) or modest undertakings be subject to the cost and scheduling implications associated with a public hearing. In fact, it is anticipated that such a requirement would be a major deterrent to development in Manitoba.

Balancing Certainty and Flexibility and Specific Procedural Steps

Chapters 6 and 7 of the MLRC discussion paper, and the related Issues 10 through 18, deal with relatively specific aspects of the environmental assessment and licensing regime. Manitoba Hydro concurs with the MLRC that there are a number of potential improvements that could be made to the “legislation, regulations and policy framework”. However, in reviewing the identified issues, we are mindful of MLRC’s own caution that “methodological, operational and technical considerations are generally beyond” the scope of its review. From our perspective, there is a considerable amount of feasible and tested assessment practice, as well as practical experience within government that should be relied upon in the updating and implementation of *The Environment Act*, in the administration of related regulations and the development of guidance documents.

Chapter 6 discusses the prospect that balance between certainty and flexibility might be improved through more definitive legislative criteria, particularly with respect to the determination of significance, and by a requirement that decisions be supported by written rationale.

Manitoba Hydro would generally welcome increased legislative direction with respect to approval decision criteria, such as determinations of significance. A determination of the significance of adverse effects is not currently a requirement of *The Environment Act*, but is certainly a strong focus of CEEA 2012. Providing greater clarity on this requirement at a provincial level may be beneficial by aligning provincial legislation and expectations with those of the federal government. As with other specific environmental assessment methodologies, provincial guidance on this type of decision criteria and how this is incorporated into environmental assessments is likely best suited to guidance documents rather than specifically incorporated into legislation.

A singular focus on defining the significance of adverse effects, however, can be problematic because it tends to inhibit a broader consideration of the overall implications, both positive and adverse, of project development. One of the great benefits of *The Environment Act* is that it provides for such a holistic and thorough review of project effects – something that is far more in line with the principles of sustainable development than a singular focus on the significance, however defined, of adverse effects.

Chapter 7 of the MLRC discussion paper speaks to a series of specific procedural steps with respect to triggering, environmental assessment options, including screening and scoping requirements, staged licencing, federal/provincial coordination, and a number of other matters. If such matters are to receive greater clarity under the provincial legislative framework, it is feasible that some of these enhancements might reasonably be incorporated directly in the legislation; however, in the interest of flexibility, others might more appropriately be the subject of guidance documents. This latter option is especially appropriate in cases where experience with practical application of criteria, and the underlying science, is actively evolving (e.g., selection of VECs, relevant standards/thresholds, etc.), or in circumstances subject to ongoing monitoring and evaluation of past or similar project effects. In this regard, one overriding consideration should be coordination with federal processes (and that of other potentially affected jurisdictions), and the need for consistency and certainty. It is very difficult to comment on the nature of these discussion items in the absence of detailed amendment proposals. Manitoba Hydro

would be pleased to participate in the review and development of any related guidance documents and to provide further comment once detailed amendments are available.

Among the discussion issues identified in Chapter 7, one common consideration should be the need to continue to organize the type (class) of assessment requirements on the basis of groupings of common characteristics, such as project size, complexity, and/or location. Without this distinction there is a very real risk that smaller projects and less sophisticated development proponents may be burdened with excessive or redundant assessment and review requirements. Within the preceding context, an update of the *Classes of Development Regulation* might reasonably extend to clarification of ministerial discretion respecting application of the regulation to such considerations as location, the potential effects of a proposal (especially where these may reflect prior experience with similar projects), and to a process for continuing review and update.

We note that Chapter 7 specifically references existing developments (Issue 14), and whether these need to be brought into the environmental assessment process established under the *Environment Act*. We note that s.12(1) of the *Environment Act* presently enables ministerial discretion with respect to existing developments that would fall into the Class 3 development category. However, we strongly recommend that any exercise of this discretion be framed very carefully.

Manitoba Hydro Class 3 developments, which pre-date the *Act*, have been and continue to be subject to extensive review and scrutiny as to their environmental effects and the management and mitigation of these effects. The same is generally true for Class 1 and 2 Manitoba Hydro developments which pre-date the *Act*. Manitoba Hydro has also entered into settlement agreements with Aboriginal communities and others affected by most of its previous Class 3 developments.

However, for most Manitoba Hydro projects developed prior to the *Act*, the levels of pre-project assessment work and project mitigation measures implemented at the time of construction are fundamentally different than for projects constructed today. The same is likely true for virtually all project developers in Manitoba. The ability to backcast and to determine potential project effects in hindsight, or to retrofit or rebuild projects so that they meet today's standards would be a very costly and time-consuming exercise, particularly for larger Class 3 development projects. For projects that are marginally economic, it could be anticipated that such a requirement may mean that some developers choose to no longer operate in our province.

With respect to staged licensing, the *Act* provides for an environmental assessment process that results in a licence to construct and operate a development. Except for very complex projects, there are no additional regulatory requirements. The licence comprises all of the conditions necessary to proceed and to protect the full range of environmental concerns. For projects with multi-year planning and construction horizons, this can be a complicating factor, because nothing can begin until the licence is issued and the licence cannot be issued until all of the information for every aspect of the project is known, analyzed and approved by the regulator. In order to meet the goal of regulatory efficiency and environmental protection, the notion of staging was introduced into the process. The key to this process is to have a high level of assurance that project effects can be mitigated to acceptable levels. Its

advantage is the opportunity to shorten the planning and approval process for the development, while maintaining the overall environmental assessment and compliance requirements. Staged licensing may also provide the opportunity to enhance project benefits by taking some project components off the critical path. It will be important to consider the value of this flexibility if the opportunity for staging is to be eliminated.

As to appeal, compliance and enforcement provisions, we believe that the MLRC discussion paper has accurately identified the status of the current Manitoba assessment regime and the potential risks associated with the various available alternatives. For Manitoba Hydro and other proponents, development feasibility requires that approvals are timely and certain, and that compliance and enforcement requirements are reasonable. In this latter context, we are concerned that background discussion to Issue 18 raises the prospect of public involvement and community advisory committees in securing improved public participation and access to information respecting post-project monitoring. While this might be appropriate in some specific circumstances, the resource implications to proponents could be enormous. We recommend that any such requirements be discretionary and addressed, where appropriate, in the environmental licence.

Concluding Comments

As a concluding comment, we do want to note that we believe the *The Environment Act* is a solid piece of legislation that provides the rigour and appropriate flexibility to accommodate a variety of different types of development projects, while still protecting the environment. We agree that there are opportunities for enhancements to the Act to improve upon its effectiveness and to provide greater clarity. From our perspective, such enhancements should be made in a way that maintains the positive attributes of the Act, builds upon experience implementing and working with the Act since its inception and that creates greater alignment between provincial processes and those mandated under CEAA 2012.