

**Re: Yellow Falls Power Limited Partnership
Application for Leave to Construct a Transmission Line
Board File No. EB-2009-0120**

Replies of Wabun Tribal Council to Interrogatory of Yellow Falls Power Limited Partnership on its Evidence in this proceeding (September 3, 2009):

YFPLP Interrogatory #1:

Reference: WTC Written Evidence Statement August 25, 2009 (“WTC Evidence”), and covering letter of John Edmonds [*sic*] dated August 27, 2009 (“Edmonds Cover Letter”).

Preamble

The Edmonds Cover Letter states that the Memorandum of August 25, 2009, from Mr. McKay summarizes his findings respecting the scope of the traditional territory of the Mattagami First Nation.

Questions

- (a) Describe Mr. McKay’s qualifications to provide evidence in this proceeding, and provide a *curriculum vitae* or resume for him.
- (b) Does Wabun Tribal Council (WTC) take the position that Mr. McKay is an expert witness? If so what is he an expert in, and provide the information necessary to qualify him as an expert.

Replies:

- (a) Mr. McKay obtained a diploma as an Aboriginal Resource Technician in 2002 from Sault College of Applied Arts and Technology, Sault Ste. Marie, ON, following completion of a three-year program in that field. As his resumé attests, he was employed as a Community Resource Information Specialist for the Gawuhigaewin Community Development Corporation of the Mattagami First Nation until 2005, when he started his own consulting service, W.C. McKay Consulting Services. In the former capacity his work included mapping of cultural values in a database and management of the Community Resource Information Project for the community. As Principal Consultant in his firm, he has continued his work in these fields, as well as expanding into the many other areas relevant to the present purpose set out in his resumé, attached.
- (b) It is the position of the Wabun Tribal Council that Mr. McKay is qualified to be an expert witness in any proceeding in the course of the YFPLP application before the Board relative to the Aboriginal issues arising from the application. This includes but is not necessary limited to the methodology employed to prepare the statement and develop the maps filed as items referred to as items 1, 4 and 5 in the Edmond letter of August 27, 2009, and to elaborate on these materials based on his professional expertise. He is also qualified to speak to the provenance and background of items 2 and 3 of that letter, the Learmontt/Speck letter and map. Further information respecting his qualifications as an expert in the Aboriginal issues arising from this application is contained in his resumé.

Interrogatory No. 2:

Reference: Wabun Territory 4 map attached to WTC Evidence.

Preamble

The Edmonds Cover Letter states that W.C. McKay Consulting Service prepared the Wabun Territory 4 map and that the shaded portion indicates the traditional territory of the member First Nations of the WTC.

Questions

- (a) Please describe the process by which Mr. McKay obtained the information necessary to create the Wabun Territory 4 map, and the process by which he created the map.
- (b) When did Mr. McKay create Wabun Territory 4 map?
- (c) To what extent has the territory mapping on the Wabun Territory 4 map been discussed with other First Nations, such as Taykwa Tagamou Nation (TTN), that are not part of the WTC?
- (d) Has the extent of the traditional territory of the member First Nations of the WTC as indicated on the Wabun Territory 4 map been recognized or agreed to by any government agency or court? If so, please provide details.
- (e) Has WTC provided the Wabun Territory 4 map, or the information/data sources used to support the creation of the Wabun Territory 4 map, to the Ministry of Natural Resources or the Ministry of the Environment as part of the consultation relating to the Yellow Falls project? If so, when? If not, why not?
- (f) Do the member nations of the WTC assert treaty rights over some or all of the shaded area shown on the Wabun Territory 4 map? If so, please identify the relevant treaty and provide a copy of the treaty with the relevant excerpts highlighted, and explain the basis for the asserted treaty rights.
- (g) Are the WTC and/or Mr. McKay aware of any other First Nations asserting similar treaty rights over some or all of the shaded area shown on the Wabun Territory 4 map? If so, please identify those other First Nations and explain to the best of WTC and/or Mr. McKay's knowledge the extent of the rights being asserted by those other First Nations.

Replies:

- (a) This map is a consolidation by Mr. McKay of information contained in previous community research and reports developed by other qualified and recognized researchers, including Indian and Northern Affairs Canada's Treaty Land Entitlement reports.
- (b) Mr. McKay produced the map in late 2008. It was presented to Chiefs for their consideration in the spring of 2009, and remains a work in progress.
- (c) The territory mapping on the Wabun Territory 4 map was not discussed with First Nations who are not members of the Wabun Tribal Council.
- (d) Wabun Tribal Council has entered into a land use planning exercise with the province of Ontario concerning the southern territory of Treaty No. 9 that includes the areas of Wabun territory defined on the Wabun Territory 4 map produced by Mr. McKay. The map was provided to the Ministry of Natural Resources during the MNR/WTC Land Use Planning (LUP) process, in response to a request for such information. It awaits completion of the MNR review. Further, the WTC has successfully negotiated agreements with a number of resource development companies in their traditional territory, using the map as a guide to demonstrate the Wabun traditional territorial boundaries.
- (e) A copy of the Learmontt/Speck map (Edmond letter, item 3) was provided to Yellow Falls Power Limited Partnership at an early stage. In addition, MNR was informed that Wabun territory was impacted immediately by the proposed hydro-electric development at Yellow Falls when WTC received notice of the project.
- (f) The member nations of the Wabun Tribal Council assert treaty rights under Treaty No. 9 over the entire shaded area shown on the Wabun Territory 4 map. The text of the treaty is available at <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t9/trty9-eng.asp>. The Articles of the treaty and the Schedule of Reserves, 1906, in which, *inter alia*, the reserves of the Mattagami, Flying Post and Wahgoshig (formerly Abitibi) First Nations are mentioned, have been copied from this website and are attached hereto. Additional material, including the reports of the Treaty Commissioners, Schedule of Reserves, 1905, and the 1931 adhesion relating to lands to the north and west of the original 1905-06 treaty, is to be found on the Indian and Northern Affairs Canada website referenced above. The treaty speaks for itself and is to be read as a whole; accordingly the Wabun Tribal Council declines to highlight "relevant excerpts," and says the basis for the asserted treaty rights is the treaty.
- (g) While all First Nations within the area of Treaty No. 9 enjoy rights throughout the treaty area, so far as Wabun Tribal Council is aware no specific rights have been asserted by any other First Nation within the area shaded on the Wabun Territory 4 map.

Interrogatory No. 3:

Reference: MATTAGFN map attached to WTC Evidence.

Preamble

The Edmonds Cover Letter states that W.C. McKay Consulting Service prepared the MATTAGFN map and that the shaded portion indicates the traditional territory of the Mattagami First Nation.

Questions:

- (a) Please describe the process by which Mr. McKay obtained the information necessary to create the MATTAGFN map, and the process by which he created the map.
- (b) When did Mr. McKay create the MATTAGFN map?
- (c) To what extent has the territory mapping on the MATTAGFN map been discussed with other First Nations, such as TTN, that are not part of the WTC?
- (d) Has the extent of the traditional territory of the Mattagami First Nation as indicated on the MATTAGFN map been recognized or agreed to by any government agency or court? If so, please provide details.
- (e) Has WTC provided the MATTAGFN map, or the information/data used to create the map, to the Ministry of Natural Resources or the Ministry of the Environment as part of the consultation relating to the Yellow Falls project? If so, when? If not, why not?
- (f) Does Mattagami First Nation assert treaty rights over some or all of the shaded area shown on the MATTAGFN map? If so, please identify the relevant treaty and provide a copy of the treaty with the relevant excerpts highlighted, and explain the basis for the asserted treaty rights.
- (g) Are the WTC and/or Mr. McKay aware of any other First Nations asserting similar treaty rights over some or all of the shaded area shown on the MATTAGFN map? If so, please identify those other First Nations and explain to the best of WTC and/or Mr. McKay's knowledge the extent of the rights being asserted by those other First Nations.
- (h) Are WTC and/or Mr. McKay aware that the TTN also assert that they have traditional rights over portions of the shaded area shown on the MATTAGFN map?

Replies:

- (a) It is the position of the Wabun Tribal Council that this and similar maps are the creation of the community from whose oral history and knowledge the map was produced, with the technical assistance of the researcher/producer, in this case Mr. McKay. Sources of this map were elders and on-site mapping, as well as previous research and reports. As noted in the reply to YFLPL Interrogatory No. 1, Mr. McKay also worked for Gawuhigaewin Community Development Corporation of the Mattagami First Nation for several years, and during the “values collection process” developed a strong understanding of the territory.
- (b) Mr. McKay developed the map in late 2008.
- (c) The territory mapping on the MATTAGFN map has not been discussed with First Nations not members of the Wabun Tribal Council.
- (d) As with the Wabun Territory 4 map, the MATTAGFN map is included in the land use planning exercise with the province concerning the southern territory of Treaty No. 9. The review by the province is continuing. (Please see reply to Question (d), Interrogatory No. 2.)
- (e) As noted at the reply to Question (e), Interrogatory No. 2, a copy of the Learmontt/Speck map (Edmond letter, item 3) was provided to Yellow Falls Power Limited Partnership at an early stage. In addition, MNR was immediately informed that Wabun territory, including the territory of the Mattagami First Nation shown on this map, was impacted by the proposal when WTC received notice of the project.
- (f) The Mattagami First Nation asserts treaty rights under Treaty No. 9 over the entire shaded area shown on the MATTAGFN map. The position of the Mattagami First Nation on this question is that of the Wabun Tribal Council, of which it is a member, and is set out in the reply to Question (f), Interrogatory No. 2.
- (g) All First Nations within the area of Treaty No. 9 enjoy rights throughout the treaty area. The Wabun Tribal Council is not aware of specific rights asserted by any other First Nation (other than the Taykwa Tagamou Nation; see (h) below) within the area shaded on the MATTAGFN map. It is for other First Nations to describe any interest they may have in the territory.
- (h) The Wabun Tribal Council is aware that the Taykwa Tagamou Nation asserts traditional rights over portions of the shaded area shown on the MATTAGFN map. In fact, the Chiefs of the communities met and agreed that the territory holds common interest for the First Nations. Further, TTN had agreed to share in the benefits of its negotiations with the proponent because of the nature of the shared territory, but this has not occurred.

Interrogatory No. 4:

Reference: The Edmonds Cover Letter, p. 2 and tab 11 of YFPLP's Pre-Filed Evidence.

Preamble

The Edmonds Cover Letter states:

It is to be noted that the Taykwa Tagamou Nation, which apparently also asserts some claim to the territory in question, moved to its current main location, Reserve "New Post 69A," some 14 km southeast of Cochrane, in 1984, their original but never occupied reserve being 88 km northwest of Cochrane and 4 km east of the Abitibi River (please see IAND and TTN websites). TTN was and remains an Abitibi River community, with cultural affiliations, as Cree people, to the northeast, in the direction of James Bay. The Mattagami First Nation, on the other hand, an Ojibway Nation, is situated on and dependent upon the Mattagami River, on which Yellow Falls is located.

Tab 11 of YFPLP's Pre-Filed Evidence is a [map] showing the location of the New Post Indian Reserve (TTN) and the Mattagami Indian Reserve No. 71.

Questions

(a) Do WTC and/or Mr. McKay agree that the map at Tab 11 of YFPLP's Pre-Filed Evidence accurately shows the current location of the New Post Indian Reserve (TTN) and the Mattagami Indian Reserve No. 71? If not, please explain and provide a map showing any corrections that you think are needed.

(b) In what year did the Mattagami First Nation begin occupying the Mattagami Indian Reserve No. 71? Was the reserve in its same location then as it is today?

(c) Does WTC agree that the Mattagami River flows in a northerly direction?

(d) Does WTC agree that the Mattagami Indian Reserve No. 71 is approximately 175 km upstream (i.e. south) of the proposed Yellow Falls generating station?

(e) Please explain in what ways the Mattagami First Nation are "dependent" upon the Mattagami River.

Replies:

- (a) Given that this map identifies no natural features or any communities other than four reserves by name, and does not identify roads, it is difficult to determine the correctness of the map. However, the locations of the Mattagami First Nation's Reserve No. 71 and the Taykwa Tagamou Nation's New Post Reserve No. 69A relative to one another appear to be roughly correct.
- (b) The Mattagami Indian Reserve No. 71 was "laid aside" under Treaty No. 9 in 1906 on land occupied since time immemorial by the Mattagami people. A land exchange to afford the community better access to Highway 144 and the community of Gogama involved relocation from the 1906 location of less than two km. It is to be noted that the only reserve of the Taykwa Tagamou Nation until 1984 (when TTN moved to New Post Reserve No. 69A) is not located on the map. That reserve was No. 69, located east of the Abitibi River, some 85 km north and east of Yellow Falls.
- (c) The Mattagami River flows in a generally northerly direction.
- (d) Measuring the distance in a straight line on the map at Tab 11 of YFPLP's Pre-Filed Evidence, employing the scale provided, Mattagami Indian Reserve No. 71 is approximately 135 km. south of the location marked as "Yellow Falls Project Location." Allowing for the sinuosities of the river, the distance by water would be somewhat more, but not as much as 175 km.
- (e) It is obvious that an Aboriginal community resident from time immemorial on a waterway will have a close relationship with that waterway, to meet basic transportation and food needs among others. While basic transportation needs are now largely met by other modes, the close relationship remains. The detail of environmental impact on the river system is currently before the ongoing environmental process; accordingly the Mattagami First Nation and the Wabun Tribal Council respectfully prefer to make their detailed submissions on that subject to that forum.

Interrogatory No. 5:

Reference: The Edmonds Cover Letter.

Preamble

The Edmonds Cover Letter states that the traditional territory of the Mattagami First Nation “may be taken to include territory used for hunting, fishing and trapping”.

Questions

(a) i) Explain in what ways the WTC thinks the Yellow Falls transmission line will impact on the fishing rights of the members of the WTC communities and/or the Mattagami First Nation,

(ii) explain why WTC expects these impacts on fishing rights, and the basis for WTC’s concerns, and

(iii) explain how WTC thinks any negative impacts on fishing rights can be mitigated.

(b) (i) Explain in what ways the WTC thinks the Yellow Falls transmission line will impact on the hunting rights of the members of the WTC communities and/or the Mattagami First Nation,

(ii) explain why WTC expects these impacts on hunting rights, and the basis for WTC’s concerns, and

(iii) explain how WTC thinks any negative impacts on hunting rights can be mitigated.

(c) (i) Explain in what ways does WTC thinks the Yellow Falls transmission line will impact on the trapping rights of the members of the WTC communities and/or the Mattagami First Nation,

(ii) explain why WTC expects these impacts on trapping rights, and the basis for WTC’s concerns, and

(iii) explain how WTC thinks any negative impacts on trapping rights can be mitigated.

(d) (i) Explain in what ways does WTC thinks the Yellow Falls transmission line will impact on the any other rights of the members of the WTC communities and/or the Mattagami First Nation,

(ii) explain why WTC expects these other impacts, and the basis for WTC’s concerns, and

(iii) explain how WTC thinks any such other negative impacts can be mitigated.

Reply:

All of these questions may be answered compendiously. Treaty No. 9 provides that the First Nation signatories to the treaty, which includes the members of the Wabun Tribal Council, “shall have the right to pursue their usual vocations of hunting trapping and fishing throughout the tract surrendered,” subject to “taking up” for various purposes. The Supreme Court of Canada has decreed that the taking up of “tracts” shall occur only following direct consultation and accommodation with affected First Nations.

The Edmond letter states, in reference to the traditional territory of the Mattagami First Nation, “This may be taken to include territory used for hunting, fishing and trapping.” It does not acknowledge that the rights are limited to hunting, fishing and trapping, nor does it specifically assert that the proposed transmission line will adversely affect, for example, fishing rights under the treaty. The question of adverse effect on the rights of the members of the Wabun Tribal Council is a matter to be addressed by the direct consultation and accommodation process set out by the Supreme Court. This has yet to occur at the requisite level of detail.

In general, any taking up reduces the area over which the treaty rights may be exercised, and is therefore a loss of rights that must be mitigated by either project modification or compensation for the loss. In this case, it is difficult to envisage project modification that could address these losses.

Adverse effects of the proposed transmission line can be expected to be primarily on hunting rights, and will include, but may not be limited to, reduction or even elimination of game population in the vicinity of the proposed line due to line clearing and subsequent construction, opening of a new road along a part of its length, and inspection and maintenance trips by road or air after construction. It is to be noted that the application is not confined to the 25 km of transmission line, but includes a request to approve construction of a Customer Transformer Station at the facility and a Customer Switching Station at the interconnection with Hydro One, and will entail, if approved, construction of approximately 10 km of new road with two new bridges, all within the traditional territory of the Mattagami First Nation. An existing bridge is to be replaced. All of this can be expected to have significant and unpredictable impact on the population and habits of game over a tract much wider than the right of way for the line and accompanying access road. The effects of the construction may well be long-lasting or even permanent, and it is obvious that the ongoing effects on game of an open swath for the line and new road, as well as operation and inspection of the line, will be permanent.

The foregoing outlines adverse effects on the treaty rights, which would be disclosed in greater detail under the requisite consultation process. As previously submitted, consultation is primarily the responsibility of the Crown in the form of the government of Ontario. It continues to be the respectful position of the Wabun Tribal Council that this application should not be granted by the Board absent assurance from each agency involved in the approval of relevant permits, etc., that adequate consultation has occurred, and that the Wabun Tribal Council concurs.