

June 7, 2004

**Manitoba Clean Environment Commission (CEC)
Hearings
Manitoba Hydro
Wuskwatim Projects**

**Closing Statement
Gaile Whelan Enns
Manitoba Director
Wildlands Campaign
Canadian Nature Federation***

* Canadian Nature Federation is the Wuskwatim projects funded public participant with Gaile Whelan Enns, director, CNF Manitoba Wildlands Campaign. Gaile Whelan Enns is also director of Manitoba Wildlands. See ManitobaWildlands.org

June 7, 2004

**Manitoba Clean Environment Commission (CEC) Hearings
Manitoba Hydro Wuskwatim Projects**

Closing Statement

G. Whelan Enns

**Manitoba Director, Wildlands Campaign,
Canadian Nature Federation
Director, Manitoba Wildlands**

Manitoba Wildlands (CNF) would like to acknowledge the importance of the participation of First Nations and Aboriginal peoples in the Wuskwatim Projects hearings. Informal and spontaneous presentations (as well as formal submissions and questioning) by Aboriginal peoples are an essential ingredient in this process, as the projects have the potential to impact people in First Nation and Aboriginal communities. We are glad that people from these communities had the interest and passion to attend, listen and contribute to the process. (We are not going to use the aspects of our analysis and work products regarding Aboriginal land uses, rights, etc in these closing statements as that is best heard from the Aboriginal and First Nation voices in these hearings.)

NOTE 1 – Nothing in what we are saying today is to be taken as a complaint about or disagreement with any affected community, participant, presenter, or funded participant. We make this statement before we begin because of the tendency in this room, and in the transcripts for one party to speak for or about other parties. {Interpretive remarks may serve one interest or another, one agenda or another, but are secondary, and perhaps unnecessary compared to the actual contribution of a public participant or presenter.}

NOTE 2 – We also note, for the record, that last week the CEC ruled that only one hour would be available for each closing statement from a public participant AND that no new evidence would be accepted.

These late decisions essentially create a double limitation for closing statements, as the only way to put content into the record is now to read it – thereby lose further closing statements time.

Our earlier 2 hour time slot, which we had been preparing for, combined with these decisions means that our legal counsel is not here today.

• Our Goals & Our Participation.

We have been in stages of participation in the Wuskwatim Projects environmental review since fall of 1999 when our office decided to attend monthly sessions with Manitoba Hydro staff and consultants at the invitation of the utility. These sessions were in respect to Manitoba Hydro's development intentions. So once a month 1, 2, or more of our staff and associates attended these sessions. Agenda was decided jointly, and an ongoing, and often productive exchange of views and information occurred. Access to maps, copies of presentations, and other Manitoba Hydro materials was quick, professional and open.

Those of us who attended those sessions hoped that when Manitoba Hydro staff told us they wanted to hear ahead of time about environmental concerns; wanted to hear suggestions about how to approach the first environmental assessment for a dam to be built in Manitoba in twenty years; wanted to discuss and hear our questions and suggestions regarding environmental planning and management..... well that they meant it. We also hoped that some of our suggestions and identification of improved approaches would be reflected when we came to an EIS and environmental proposal from Manitoba Hydro.

Many of the suggestions and identification of preferred approach from our staff during those sessions were based on the need for Manitoba Hydro's 'social license to operate'. One other observation about those sessions. Early on we ran into a problem which has permeated these (Wuskwatim) hearings. It took some doing to make sure that we were not in 'consultations.' Interesting, that.

Recent exchanges in this room about whether or not Manitoba Hydro would undertake such a process are noted. It may be necessary to have independent and external third party professionals guide the various steps public information and consultation steps which Manitoba Hydro should be directed to undertake in relation to Wuskwatim, the Churchill River Diversion, and any future intended developments, (or review of existing hydro developments.)

That is a Recommendation.

Then, Manitoba Hydro's response to the EIS Guidelines, their initial failure to understand how difficult their EIS materials were to work with, their assumption that while public participants were funded to undertake technical work and to participate that we could all just start the hearings in September last year and finish in October, 2003. Then the ongoing failure to disclose, dismissive answers to interrogatories, and deficiencies in the Hydro filings happened. So I had to assume that our time had been wasted for 3 years plus. I have also had to ask myself this winter whether this same phenomenon repeats itself when the utility holds discussions with affected Manitoban communities, and organizations.

Recommendations are interspersed through this presentation. Next we recommend that the CEC, in order to prepare for report writing, review:

- The 2002 CEC report coming out of public meetings and its own recommendations for the EIS Guidelines – as these may well be CEC policy; and
- The public registry files regarding presentations and public reviews comments on the Wuskwatim EIS Guidelines, including our own;
- The formal appeal of those Guidelines from our office, with detailed analysis, undertaken twice
- The public policy framework referenced in the Wuskwatim EIS Guidelines.

You (the CEC) do not need to have public policy filed as evidence in these hearings to consider it for your recommendations.

(We were going to file our work products regarding the EIS as evidence today, as it appears that panel members and CEC experts may not have had access to them, or had access to the public registry file contents, and EIS comments prior to CEC involvement.)

Our participation in the Wuskwatim hearings has been framed by the following policy and regulatory elements:

- The EIS guidelines (2 sets) for the Wuskwatim projects, and fulfillment of these guidelines
- The Ministerial reference letters about the CEC hearings for the Wuskwatim projects . We would note here that the Wuskwatim EIS reference letter needs to be interpreted widely and inclusively, in the way that CEC has indicated it will interpret the EIS Guidelines when it reports on these hearings.
- The public notice regarding the Wuskwatim hearings.
- Our public interest work in respect to decision making for crown lands and waters in Manitoba, especially for protected areas establishment. Protected lands of course also significantly increase the likelihood of healthy habitat for species, and sustainability of ecosystem and ecological services, not to mention that they protect carbon stocks, and absorb emissions
- The provisional order regarding participant assistance funding
- Our responsibility as the only environmental and conservation organization in Manitoba with participant funding or capacity to attempt to participate throughout an unpredictable, unprecedented hearing process.
- Public policy of Manitoba or Canada as it pertains to the environmental proposal, JNFAAT and EIS Filings, and the contents of the EIS Guidelines
- The standard and public expectations when government is essentially licensing itself.
- Access to information as a priority for any public review or set of hearings
- The Canada-Manitoba Environmental Assessment Cooperative Agreement.

Our original application for participation in these Wuskwatim hearings did *not* anticipate: (and this applies to all public participants who applied for funds in 2002)

- amalgamation of the Public Utilities Board (PUB) and CEC hearings
- decision to have interrogatories (never done before in a CEC hearing)
- the Manitoba Hydro JFNAAT review
- failure to disclose information
- insufficient time in the hearings for EIS questions and environmental content
- motion hearings requirements

Our review of the EI statements from Manitoba Hydro regarding the Wuskwatim projects was undertaken prior to participant funding.)

It should be stated clearly here that we or any affected community, or environmental participant DID NOT ask for a combined PUB and CEC hearing or for interrogatories. Nor was our opinion requested about these elements of the Wuskwatim CEC process. We will leave it to the experts and the CEC Panel to consider how we got from a CEC hearing to here.and how we will return to CEC hearings.

• **Goals for our participation – Wuskwatim Hearings**

We have tried to keep before us to the best of our ability, these goals:

- providing the CEC panel and participants access to new, independent information, and experts
- maintaining access to information during the lead up to and during the hearings
- maintaining a focus on public policy commitments and framework relevant in the review of these projects
- providing the CEC and the public a different perspective on a variety of issues related to the EIS/JNFAAT filings
- maintaining a focus on aspects most important in our public interest work, including protected areas, species and habitat protection, climate change impacts, etc.

• **Wuskwatim Phenomena**

There are a lot of firsts – call them Wuskwatim phenomena, that have shaped the 14 month Wuskwatim CEC experience for all involved. I am going to identify these for the record.

- This is the first dam or generation station proposal in Manitoba for 20 years.
- It is the first combined hydro project (dam and transmission) to be reviewed under Manitoba's Environment Act, and Canada's Environmental Assessment Act, and the Canada – Manitoba Cooperative Environment Assessment Agreement.
- It is the first such project in Manitoba with the potential of a First Nation joint venture for ownership.
- The winter 2002 public meetings regarding the EIS Guidelines content, held by the CEC, were a first.
- These are the first ever joint PUB and CEC set of hearings.
- Wuskwatim is the first project of its class under the Act with clear federal responsibility and NO federal experts providing information to the panel members during the hearings.
- Wuskwatim is the first project of this magnitude in Manitoba since the Constitution of Canada includes specifics for Aboriginal rights.
- Wuskwatim is also the first project where participant funding enabled northern and affected communities to participate in, and attend the hearings. (Only 2 environmental organizations are funded participants.)
- Presumably this set of hearings is the longest in CEC experience. It is probably not in PUB experience.
- This is the first time formal written questions – called interrogatories – were part of advance steps prior to CEC hearings
- I have never known of changes in the make up of the CEC panel during the period of time bound by the reference from the minister. Probably the same is true about the chair of the CEC changing during the reference period. It may also be a first for the chair of the panel for a review of this significance to NOT be the chair of the CEC.
- The Email distribution system for Wuskwatim projects information, starting with CEC responsibilities July 2003, has never been undertaken before.
- And we have a full transcript for the first time in CEC hearings. This is standard in PUB hearings.
- We might all agree the amount of information, data, documents, presentations, etc is beyond any previous CEC process.

- **Questions – CEC Proceedings**

Perhaps it would be best to pose the general question **WHY** certain things happened in respect to these CEC hearings.

- Why did the CEC and the Proponents persist in asking presenters who had clearly indicated the scope of their expertise and participation various questions about other aspects of the filings?
- Why are the records, evidence, undertakings, rulings, etc for these hearings in several partial repositories?
- Why has the CEC continued to assume that the Wuskwatim / CEC activity is within the Manitoba-Canada Cooperative Environmental Assessment Agreement?
- Will the CEC follow its rulings, and decisions regarding the Wuskwatim projects in its report?
- Why has the CEC not asked for any Federal government experts?
- Why did the CEC panel and Proponents persist in assuming that everyone participating had the capacity to read every word of the filings and the transcripts?
- Why did the CEC panel and proponents persist in assuming that everyone participating had the capacity to be in the hearing room at all times over 9 weeks?
- Why did the Proponents feel the need to increase the intensity of questions for any presenter who was speaking about Aboriginal rights?
- Why is the CEC discussing its recommendations, and assessments in the hearing room?
- Why did the hearings spend most of its time on two matters: The JNFAAT, and Aboriginal concerns?
- Why have we had a pattern of interjections from CEC during both presentations and cross examination questions?
- Why has the CEC tolerated the level of acrimony, disrespect, pre-judgment and loss of civility in the hearing room? Why did the CEC let the Proponents function in such a disrespectful manner?
- How will the CEC regain its neutrality, civility and fairness standard?

- **Recommendation:**

The CEC consider both the Wuskwatim phenomena and the set of questions above in considering its own recommendations.

RECOMMENDATIONS SECTION:

• Who Has Read What?

One of the areas we were preparing new questions for the EIS portion of the hearing referenced the pattern of questions of presenters during these hearings. Over and over again people were asked what they had read. We were preparing to ask Hydro what it had read. Our concern, originating in the 3 years plus of sessions with the utility staff and consultant, rests on whether or not any learning about new assessment and planning approaches is occurring. So we were going to ask questions about who has read what?

I have with me here several of the international sources we use in our work, which we were going to ask Manitoba Hydro about. It is of the utmost importance to know if the executive staff of the utility are actually in charge of the EIS, and whether they are up to date and knowledgeable enough. One way to start to find out is to ask them what they have read.

We are also concerned about the ability of the CEC panel members to read the materials for these hearings. See our comments about the staffing and remuneration for the CEC panel.

Recommendation: - The CEC needs to talk to participants, review the participant funding program openly, follow more of the recommendations in Dr. John Sinclair's report (commissioned by the CEC) on this and other aspects of CEC hearings. Manitoba Conservation staff would be relevant in such discussions also.

• Access to Information:

I am going to read several recommendations that result from our efforts and our frustrations regarding access to hearing documents.

These will be included in our closing statements document later.

We are all aware of the problems in the geographic scope of the public participants for these hearings and how far from the hearings in Winnipeg many of them (reside). If you are not a funded public participant and not on the list served your access to evidence and documents is very, very limited. The public registry will not be updated until the hearings are over and the inability of concerned citizens to access exhibits reduces transparency and reflects badly on us all.

If you are a funded public participant and not able to be in the room at all times then there is also a problem in this regard. There is a need for a "real time" public registry on the web with all new exhibits posted regularly. We acknowledge that hydro has since March taken a fair bit of effort to follow through on requests of this regard. Some documents have no evidence number and are not listed in the transcript list.

Recommendation: The CEC have the administrative resources that were discussed in the pre-hearing conference last summer.

Recommendation: A staff person to track and record and describe all exhibits before the transcript is posted.

Also there are some undertakings that don't appear in the transcript list but appear on the CEC electronic list in email,

There are different documents entered with identical evidence numbers

Recommendation; Reference materials and evidence no longer be clumped together without their titles.

Verbal responses to undertakings are sometimes identified with the wrong number by the individual making a response. This makes the response more difficult to locate in the transcript and there is the challenge of getting a correction.

Generally speaking we are uncomfortable with the lack of clarity on the verbal responses to undertakings, lack of clarity in the transcript. We would prefer more formal submissions in writing.

Recommendation: A mechanism for a public participant asking for an undertaking to ensure that it was described sufficiently clearly in the transcript to ensure an appropriate answer.

See chart below for specific examples.

Problem	Examples	Solutions
Access to evidence		
1. Videos and CD's not available to public participants. Copies were not distributed as with paper documents.	NCN community profile CD, Fox Lake Presentation CD, trapline 18 video etc.	1. All documents must be electronic
2. If a public participant is not in the room at all times they are unlikely to receive copies of all exhibits	If you are not a funded public participant, thereby not on the listserv your access to evidence is even more limited. The public registry will not be updated and complete until the hearings are over. The inability of a concerned citizen to get timely access to exhibits reduces the transparency and inclusiveness of the process.	2. There is a need for a "real time" public registry on the web with all new exhibits posted every day of the hearings.
3. Protocols for the distribution of evidence have not been consistent throughout the hearings.	In the fall it was easy for our staff to use the CEC resource centre to obtain copied of exhibits. In recent weeks it has become increasingly difficult with the CEC maintaining that it is not their responsibility to distribute documents.	

Exhibit Tracking		
1. Some documents have no evidence numbers and are not listed in the transcript list.	March 2: MH/NCN response to MH-5 was a third quarter statement filed with the CEC but it does not appear in the transcript list or have an exhibit number	1. A staff person to track, record and describe exhibits.
	April 13: MH/NCN response to MH-70, a copy of the CEAA 1994 guide was filed with the CEC but does not appear in the transcript list or have an evidence number.	2. An electronic exhibit list posted to the web and updated daily
	MH/NCN-1026 does not appear in the transcript list, but this document appeared in the CEC electronic list in an email from Hydro. It is a table describing MMF participation in relation to Wuskwatim	
	In contrast there are 2 documents entered as CNF-1000 one on March 9 (interconnections generations queue) and one on March 16 (Correspondence received from by the CEC from CNF regarding process)	

2. Many exhibits are poorly described making them difficult to identify.	April 15, MMF-1000 Cross examination reference material with 6 documents attached	
	May 25, CASIL 1009 Various data documents presented by CASIL	
	March 2, MH/NCN- 1001 TREE Rebuttal	
Undertaking Tracking		
1. Some undertakings were never described in the transcript	Hydro submitted an exhibit (MH/NCN-1041) that was a comparison of the MH/NCN AIP and La paix des Braves between Quebec and the James Bay Crees. There is no corresponding undertaking identified in the transcript.	1. A staff person to track, record and and accurately describe undertakings as well as the responses.

2. Some undertakings were poorly described	March 9: MH-31 Identify appropriate responses re Manitoba Hydro's climate change policy. The request was actually to have hydro produce a copy of its climate change policy. See transcript for March 9 starting at page 1261. As a consequence of this poor description this undertaking was never answered in a satisfactory manner.	2. An undertaking list posted to the web with links to the exhibits tendered in response to undertaking and a link or location of verbal responses in the transcripts.
3. Verbal responses to undertakings were often identified by the wrong undertaking number or the specific undertaking was not at all identified by the speaker	March 26, verbal response by Elvis Thomas to NCN-20, incorrectly refers to it as undertaking 22	
	May 13, verbal response by Elvis Thomas to MH-63, incorrectly refers to it as undertaking 69	
	May 12, verbal response by Mr. Davies to MH-83, incorrectly refers to it as undertaking 81	
	Mh-48 similar error, MH-64, 65 & 66 were not identified by a number at all when the verbal response was given.	

3. No procedure to dispute if an undertaking was answered in a satisfactory manner (similar issue to the interrogatory responses)	MH-31 Hydro has yet to produce its climate change policy for the commission	
4. Not all participants are in the room at all times, verbal responses require quite a bit of staff time to track down in the transcripts		

• **Manitoba Hydro and New Renewables (Alternative Energy)**

What is at stake here involves more than an economic factor for the province of Manitoba, or the Province fulfilling all of its obligations to Indigenous Peoples. It is also about Manitoba's true leadership role with respect to the essence of the Kyoto Protocol. It is about Manitoba's efforts to curb harmful greenhouse gas emissions in ways that can be most effective in the Province. Benefits from these efforts, and risks from business as usual, can touch Manitobans and extend well beyond the geopolitical boundaries of the Province.

Your recommendations will set a precedent for future reviews of Manitoba Hydro development intentions as discussed in their filings and these hearings. In the final analysis, the decision of the Manitoba Clean Environment Commission will have profound effects on North America's environmental and energy future.

Since the CEC recommendations will perhaps have some effects on the environment, ecosystems and North America's energy future, the CEC must try to think out of the box and analyze the development proposal based on the totality of the circumstances. A fully informed decision must wrestle with some challenging issues including, for example, whether:

- (1) Manitoba will continue to take the "business as usual" electricity path where hydropower is viewed as the only energy source for generating electricity;
- (2) the project decision will fully embrace and respect renewable energy source development opportunities in export markets where local, renewable energy sources could satisfy demand for electricity

(3) the CEC has the wisdom, and strength to allow and even facilitate an alternative energy scenario more consistent with Kyoto Protocol -where the true social and environmental costs of hydropower are internalized into the cost of the product and

4) hydropower as an energy source is no longer allowed to displace the further development of renewable energy sources (in export markets).

Recommendation: - Renewable portfolio standards for renewable energy being put in place by 3 other Canadian provinces, means the CEC can recommend that this step be thoroughly reviewed for Manitoba to do the same.

Recommendation: The CEC consider approaches for alternative energy projects, renewable portfolio standards, and demand side management of energy resources in Manitoba that do not assume Manitoba Hydro is the only vehicle for delivery. (I have been asking the utility for over 2 years what their preference is: an independent self-operating agency of the utility, or a new crown corporation, or some other agency.)

Recommendation: Manitoba Hydro Public reporting of a variety of measurements regarding energy efficiency, demand side management, and new renewable energy become transparent, and regular.

Recommendation: That the province of Manitoba put a long term energy plan before the public for discussion before any further environmental proposals for Hydro developments are filed. This is a public and election commitment.

- **This is a Dam *and* Transmission System -**

Recommendation: That the CEC find out why 3 segments of transmission line are in this proposal, with one segment a 120 meters Bi Pole

- Find out whether one of these segments is sufficient to connect the proposed generation station to the Hydro system. And that the CEC in its report consistently connect the transmission line impacts with the generation station. Many of the EIS issues apply to the transmission line segments to a greater degree than to the generation station – based on among other things the land quantum affected.

Recommendation: That the CEC find out why no clear answers on future or intended projects, connected to these new transmission lines has been provided, despite CEAA requirements in this regard.

- **EIS Guidelines:**

Aspects of the EIS Guidelines have not been fulfilled in the information, filings, and hearings content.

Recommendation: In its report the CEC needs to specify whether and how, (noting where in the information load) each element of the EIS Guidelines of the Wuskwatim projects have been fulfilled by the Proponent.

- **Protected Areas**

The EIS Guidelines are clear about protected areas content. This has not been provided by the proponent despite our efforts in review comments, interrogatories, etc. In fact this EIS is the weakest I have seen in this regard in the last 10 years. Forestry companies in Manitoba have filed much more complete information – where then Manitoba Conservation (natural resource department previously) have audited and commented on the proponent's protected areas information.

The CEC EIS questions about protected areas lack public policy knowledge. The EIS Guidelines refer to the Lands and Water Strategy for Manitoba. And Manitoba's Action Plan for a Network of Protected Areas is part of that Strategy. It has been touted nationally by the WWF as one of the best public / government documents in Canada in terms of protected areas public policy statements of both goals and method. Full information is available also on the manitobawildlands.org web site.

We have never figured out why Manitoba Hydro and its consultants relied on a 1994 document, and never asked – despite my offers – for a briefing about protected areas. We would like to note in the record that my staff and I spent an afternoon with the CEO and executive of Manitoba Hydro regarding protected areas policy and technical matters in January 2002.

Also I have with me today a copy of this recently finished publication of the National Round Table on the Environment and the Economy, "Securing Canada's Natural Capital: A Vision for Nature Conservation in the 21st Century," includes significant and accurate protected areas content. There is a list at page 111 of participants across Canada, and it includes several people from Manitoba Hydro. Why would that be? Why the confusion on such a basic set of public policy?

Recommendation: The CEC acquaint itself with Manitoba protected areas public policy, and apply that to its Wuskwatim recommendations and report. We would recommend also that the CEC obtain full information as to the status of the CEAA guidelines, and out of court agreement regarding both current and future protected areas. Our office and I are available to provide both a policy and technical briefing.

The question I have asked for years of Manitoba Hydro applies:
Does Manitoba Hydro, as a public utility, agree with and support protected areas public policy in the province? Will the utility actually support establishment of protected areas?

Recommendation: The CEC should specify Manitoba Hydro's responsibilities for this and other Manitoba environmental public policies in respect to the Wuskwatim projects, and indicate in its report whether Manitoba Hydro, as a public utility, fulfills these responsibilities.

- **Definitions:**

Another area we intended to work on during our EIS cross was definitions. A growing concern emerged during interrogatories as the utility did not appear to know and apply the meaning of a variety of terms in its environmental planning and policies.

(Such as: precautionary principle, sustainability, ecological integrity, conservation biology, ecological economics, ecosystem functions, social license to operate, civil society, edge effect, externalities)

- **Project Geographic Scope**

Recommendation:

The CEC should consider carefully the situation we have all been in – where the proponent determined, perhaps dictated, the project area, the project region, etc. Continued refusal to provide any comparative geographic scope has worried us all year. What about our natural region system, Canada's eco region system? These systems are compatible, and are based on natural systems, and nature's boundaries. Again, Forestry companies have to provide this kind of mapping analysis for environmental proposals. If the proponent simply can design the project area – with no oversight – then it can also aim to design away impacts, or move them elsewhere in the system.

- **Woodland Caribou**

The CEC needs to consider the national responsibility for this and other species in relation to the Biodiversity Convention, and Canada's Biodiversity Strategy and SARA, which Manitoba signed on to.

It is well established that woodland caribou are declining in Canada due to human encroachment onto their forested range (BFN-1001). For Wuskwatim, the effective loss of caribou habitat will extend well beyond the infrastructure per se – at least hundreds of metres, perhaps several kilometres, from the precise bounds of the reservoir and linear corridors. Such permanent loss of habitat is predictable, based on similar experiences from Alberta to Alaska, from Newfoundland to Norway (BFN-1001; BFN-1004; CNF/MH/NCN I-EIS-CAR-182a).

The predictions from the EIS belie this knowledge. The EIS has borrowed from the low end of the scale (100 m) to generate an estimated decline of less than one-half of one caribou. This figure is an underestimate, and not truly representative of the literature. Our best scientific knowledge indicates that the permanent transfiguration of the landscape – due to the transmission lines, roads, and reservoir – will result in impacts of 250 m to 5000 m beyond the project infrastructure, translating into caribou population losses that are 7.5- to 150-fold those projected by the EIS (BFN-1001).

Recommendation: The EIS prediction – of insignificant effects on woodland caribou – is not upheld by our current understanding of landscape impacts on this threatened species. This scientific work should be redone by independent experts.

The full weight of our knowledge about woodland caribou in the project area has not been applied to the question of transmission line routing. The EIS has relied on a Habitat Suitability Index derived from stand-level, vegetation characteristics. Such a spatial scale is not adequate for woodland caribou, a species that needs to be managed and conserved at the broad, landscape scale (BFN-1001).

The only valid way to evaluate various transmission routes, and their effects on woodland caribou, would be to quantify the number of home ranges crossed and the number of calving sites affected (BFN-1001). Surprisingly, this has not been done.

- **Adaptive Management**

Recommendation:

The benefits of the potential Wuskwatim projects to Manitobans, should it proceed, need to be more than electrical or economic. They should include increased understanding of the ecological effects of such projects on sensitive species like woodland caribou. A sustained independent scientific effort is necessary, well into the operational phase, not only to verify the predictions of the EIS but to provide enhanced environmental understanding, the basis of adaptive management (BFN-1001). Must be transparent and public.

- **Public Policy/Regulatory Framework**

Recommendation: That the CEC identify the elements in Manitoba and Canada's public policy framework relevant to the Wuskwatim projects, and indicate whether they have been identified and responded to by the proponent. This is standard practice for an environmental review for this class of development.

Much of our work for EIS review regulatory comments, and interrogatories etc relates to elements of the public policy / regulatory framework. See these work products and our February 2002 comments to the CEC.

- **Environmental Management Plan**

Conditions to be fulfilled prior to a decision as to whether to issue licenses for the Wuskwatim projects

- The proponents should not be allowed to address important and/or substantive environmental matters as part of the Environmental Protection Plans, which will be developed subsequent to the issuing of a license under the Environment Act. In too many instances – both in the Supplemental Filings, and in Interrogatories, the proponents have deferred answers to questions that should be addressed within the EIS by simply stating that the issue will be addressed in these Environment Management plans. We accept that certain issues are best addressed ‘on the ground’, however we are concerned that these plans have been used to avoid issues that should be addressed prior to licensing.
- As part of the preparation for cross-examination on EIS, we compiled a list of instances in interrogatories posed by Manitoba Wildlands/Wildlands Campaign of the Canadian Nature Federation and the CEC where responses referred to environmental plans. These (questions) are available should the Commission wish to have a copy.
- **Recommendation:** That before any license is granted regarding the Wuskwatim projects, Manitoba Hydro provide either: the environmental management plan for public review **Or** answer in a public manner, all EIS questions and interrogatories which the utility has indicated are subjects for the EMP.

- **Climate Change**

Throughout the EIS, there are references to climate change as though the scientific community was in some large degree of doubt about the relative role played by solar and volcanic activity and human caused emissions of greenhouse gases in causing climate change.ⁱ The characterization of the issue is simply misleading.

Another significant misunderstanding in the Manitoba Hydro EIS is in its dismissal of climate change science as having anything useful to tell us about climate change impacts on this particular project.

Manitoba Hydro absolves itself of a significant obligation with the bald statement: **“Due to the level of uncertainty relating to the potential effects of climate change, Manitoba Hydro cannot project a specific climate change scenario for the Wuskwatim Generation Project Area.”**ⁱⁱ

The document, *“Manitoba and Climate Change: A Primer,”* co-produced by the Manitoba Clean Environment Commission and the International Institute for Sustainable Development (December 2001) anticipates the potential threat to projects such as this due to climate change impacts:

“The increased summer temperatures, together with reduced precipitation and higher evaporation, might reduce the amount of water available for Manitoba’s hydroelectric production.” (p.10)

Recommendations:

- Prior to licensing decisions, the proponent should be required to conduct a thorough review of alternatives to aid the citizens of Manitoba in making a decision in the long-term interests of the province. The EIS should be updated to include the climate change impacts on the viability of the project.
- The Canadian Environmental Assessment Agency guidelines on climate change should have been applied to the EIS.
- The CEC clarify for Manitoba Hydro its responsibility regarding carbon sequestration and greenhouse gases inside Manitoba.

• **Participant Funding Program**

We would like to remind the CEC and all participants of a few points related to perceptions about funded participant in the CEC Wuskwatim Projects hearings:

- Although we commend the decision to fund participants to participate in the CEC review process and hearings, we feel that the perception persists that this somehow 'levels the playing field' in terms of capacity (both human and financial)
- Participant funding is finite; when the schedule changes to add new elements to the process and / or the number of hearing days increases, no additional resources are forthcoming to increase participants' capacity to respond to these changes. This in contrast to the proponents' situation, where there are a host of staff and legal advice available, and also the CEC where there are also resources to accommodate expansion of the review process.
- To illustrate our point, we would respectfully inform the CEC that there is a significant discrepancy in terms of the work that we were expected to do in order to participate in the review and the hearings (including two rounds of interrogatories added to the schedule after issuing participant funding and extensions of the hearings process, compared to what we were funded to do (as per our PAP proposal).
- In excess of \$15,000 in time and materials was spent to access information, and documents because of inadequate access to information (e.g. convincing the proponents to create an EIS master Table of Contents, continuously having to request documents, monitoring to ensure we were actually receiving all messages as part of the listserv, etc.).
- In excess of \$15,000 was spent on extra fees, travel, accommodation etc. for presenters because of last minute scheduling changes.
- All work that I have done as part of the Wuskwatim review and hearings has been remunerated at minimum wage because resources had to be used to pay contractors and staff.
- These funding realities do not include the costs for the preparation of interrogatories to the PAT that were essentially a waste of time.
- Our participation was largely based on volunteer presenter activity, contractors working at less than half their usual fees, pro bono work or minimum wage work by myself, and redirection of our participant funding resources due to procedural decisions.

We have a recommendation: Never have the proponent forwarding participant funds directly to public participants again. Arms length administration of funds is essential.

The simple fact is that the affected communities, public participants and funded public participants had no increases or flexibility in resources as the schedule and timeline since the EIS was filed grew to 14 months. (We are in the 12th month since CEC activity, and participant funding started.)

We recommend that the province and the CEC arrive at a formula which sets participant funding in relation to the cost/ revenues/ and level of government responsibilities in relation to an environmental proposal so that public participant funding is understandable, and not politicized. Then that formula needs to be put in place for the provisional order variables for significant change in expectations for public participants.

We wish to go on the record to indicate that the per diem paid to Manitobans who provide their time to commissions and boards such as the CEC need to have a significant raise. The current per diem, which has not been increased in decades, simply is not in the public interest.

Recommendation: Per diem for CEC panelists to be at least \$400 a day! And travel time, reading time, and meeting time must be remunerated.

Recommendation: - The CEC needs to talk to public participants, review the participant funding program openly, follow more of the recommendations in Dr. John Sinclair's report (commissioned by the CEC) on this and other aspects of CEC hearings. Manitoba Conservation staff would be relevant in such discussions also.

Next Time – CEC Hearings

One of our most significant concerns since last fall is the failure to provide the CEC the additional staff resources which the Wuskwatim hearings required. (Note our written comments August 2003, and requests in the transcript of July 28 pre hearing conference on this matter.)

We Recommend that the CEC: be enabled to provide a credible, consistent level of access to information both in the hearing room and outside the hearing room – for participants, both funded and non funded, and for the public.

We recommend that the CEC:

- Make sure there is a public list of all evidence and all undertakings, and the responses to those undertakings, as an ongoing official source of information during the hearings, updated daily.
- Determine who decides whether an undertaking has been answered, and answered adequately (given our difficulty in obtaining Manitoba Hydro climate change policies.) It is odd that it needs to be said, but surely the proponent does not decide what is relevant information or an adequate answer to an undertaking
- Review the transcript before it is posted, so as to avoid having to pull the transcript down, correct and re post, with the subsequent problems in access to the transcript at crucial times. The court reports have done a tremendous job, but the specifics of titles of evidence documents are often missing.
- No further references to evidence like '8 various documents' should occur, and any unclear non-named evidence for the Wuskwatim proceedings should be corrected.
- Cooperate with the province and federal authorities to make sure that ALL documents from EACH stage of review and hearings are available publicly, in both electronic (where feasible) and paper format, in one accessible place.
- Always make public in the hearings room the schedule for the day, the week, and the next stage of the hearings
- Keep an up to date set of procedures available on its web site, and in the hearings room, including posting decisions and correspondence regarding the hearings on its web site
- Allow its scientific experts to ask questions of presenters and proponents
- Cooperate with public participants who are consistently identifying the need for independent and external expert information
- Implement an evaluation process for each set of hearings, specific to public participation
- Support the public participants and media in requests for and suggestions for access to information mechanisms
- Have a clock in the room !

- **Consultations:**

We have obtained a legal opinion regarding the testimony of Ms Heather Leonoff in these hearings. I will highlight sections of that legal opinion in my remarks today. The Conclusions from the legal opinion from Woodward & Company follow:

In reference to the question of whether the CEC has jurisdiction to hear submissions on the subject of section 35v consultations:

“We are of the opinion that Ms. Leonoff’s comments are wrong in law.”

“Administrative tribunals like the CEC have the authority to consider questions of law and specifically to consider Charter issues. While the CEC may not be quasi-judicial, it has full purview in an administrative law context to consider Aboriginal rights issues. In fact, Aboriginal participants are entitled to have their issues reviewed by tribunals as opposed to proceeding before the Courts in a lengthy and expensive process. The Supreme Court of Canada has said, ‘Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the Courts. To allow an administrative tribunal to decide Charter issues does not undermine the role of the Courts as the final arbiters of the Constitutionality in Canada.’ It is important to note that administrative tribunal is a generic term, applies to boards, commissions agencies or tribunals. The term is of course used interchangeably.

Section 6 and 7 of the Environment Act specifically grant the commission the power to mediate disputes, interpret environmental legislation and regulations it has reviewed.

When we examine the legislative scheme, clearly these provisions indicate that the Legislature intended to grant the CEC the power to consider questions of law.

Therefore, it stands that it has jurisdiction to consider Constitutional issues. It is undisputed in the Supreme Court of Canada judgements that the Constitution as the supreme law must be respected by an administrative tribunal that is called to interpret the law, With respect to aboriginal rights issues, the Supreme Court has stated that ‘the Province has legislative competence to endow an administrative tribunal with the capacity to consider a question of Aboriginal rights in the course of carrying out its valid Provincial mandate.’ The CEC’s mandate specifically grants it authority to consider issues which are culturally sensitive and therefore within the purview of the CEC mandate. It appears that, Ms. Leonoff is suggesting that Aboriginal right issues, Aboriginal and

Treaty rights are extremely culturally sensitive and are therefore within the purview of the CEC mandate. It appears that Ms. Leonoff is suggesting that Aboriginal rights issues, particularly those relating to section 35 consultation should be worked out in the Courts. In our view, encouraging litigation as the primary means of addressing First Nations concerns and Aboriginal concerns is neither responsible nor advisable.

Litigation is both time consuming and expensive. As CEC panelist Robert Mayer noted, ‘that process I understand is to toddle off to Court, which some of us believe turn out to be exceedingly complex and expensive.’

It would appear that the CEC hearings would provide an ideal forum for Manitoba Conservation to address Section 35 consultation issues, as the process is open to the public and far less expensive than court proceedings."

"Ms. Leonoff has failed to recognize that while there are no definitive cases articulating Aboriginal rights in Manitoba, there are several Supreme Court of Canada cases outlining the tests and requirements for extinguishment and infringement of Aboriginal rights. Therefore, we have mechanisms in place to answer questions about existing Aboriginal rights. In addition, we know that Manitoba First Nations are guaranteed certain treaty rights. Although each treaty is in itself unique, Treaties 3, 4 and 5 guarantee that First Nations shall have the right to pursue their avocation of hunting and fishing throughout the tract surrendered subject to regulations made from time to time by the Government of Canada. Furthermore as Chief Justice said in *Simon and reaffirmed in Sioui*, Treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of First Nations. It is important to note that the surviving substance of the Treaty is not a literal promise but a Treaty right to continue to obtain necessities through hunting and fishing by trading the products of those activities subject to restrictions that can be justified."

"Not only do Ms. Leonoff's legal opinions have some significant gaps, but her testimony was actually legal argument and had no place being put before the CEC under the auspices of a witness presenting. It is our submission that the CEC should disregard her presentation entirely. The CEC has the opportunity to address the subject that is of primary importance and significance to large majority of the public participants."

So that would be our **Recommendation**, that you seriously consider how you're going to then address this issue that has clearly been of primary importance.

Recommendations/conclusion:

"It is our submission that the Clean Environment Commission has both the authority and the responsibility to consider consultation issues under s.35 of the *Constitutional Act*, 1982. The Supreme Court of Canada has been clear that administrative bodies have the jurisdiction to consider questions of law, and specifically constitutional issues.

The *Environment Act* specifically contemplates that the CEC consider legal questions, and this logically would include constitutional provisions. In *Paul*, the Court explicitly gave the authority for administrative bodies to hear Aboriginal rights issues.

Furthermore, the contention that Aboriginal rights issues should be settled through litigation is both inflammatory and unnecessary. The CEC process is already underway and ultimately less expensive than proceedings initiated in a court of law. Aboriginal and Treaty rights have been the subject of many Supreme Court decisions, and the principles articulated therein can be used by the Provincial government and Aboriginal communities to work together to settle consultation issues outside of court.

The CEC has the opportunity to address a subject that is of primary importance and significance to a large majority of public participants.

Federal Responsibility/ Cooperative Environmental Assessment

Environmental organizations and voices requested and asked for a joint federal-provincial environmental panel to review the Wuskwatim projects. We are of the opinion today that approach would have been better for all parties.

We would like to remind the CEC and all present that there are still several steps to come in the Wuskwatim regulatory process

- The comprehensive study for the Wuskwatim Generation station by DFO, under CEAA has not yet been submitted.
- Public review and comment on the comprehensive study will also take place.
- The federal Minister of the Environment may still refer the Generation Station project to a federal panel, following the submission of the comprehensive study, which will include public comments.
- The National Energy Board will need to approve energy export permits for this and other Manitoba Hydro permits.
- The Water Power License for Wuskwatim is not yet in place. It and various other interim waterpower licenses for Manitoba Hydro generation stations may require review.

All public participants, and the CEC have been informed that the Canada-Manitoba cooperative environmental assessment agreement is the basis for the current review, and that the Project Administration Team has oversight under the cooperative environmental assessment agreement.

- **Closing**

Finally, I would like to refer to a letter we sent to the Chair of the CEC, Mr. Terry Sargent on May 5, 2004 in which we asked Mr. Sargent (and I quote):

“whether the Clean Environment Commission has confirmed independently whether the assessment of the Wuskwatim projects has in fact been conducted according to the terms of the Canada – Manitoba Agreement on Environmental Assessment Cooperation.”

We posed this question to Mr. Sargent because the public participants were informed repeatedly, including in CEC proceedings, that the assessment of Wuskwatim Projects was being undertaken consistent with the *Canada - Manitoba Cooperative Environmental Assessment Agreement*.

We raise this matter because we have not received a response from Mr. Sargent on this matter and also because we have received correspondence from the Honourable David Anderson, federal Minister of the Environment (dated May 21, 2004) in which he states (and I quote):

“Under the *Canada – Manitoba Agreement on Environmental Assessment Cooperation*, federal officials responsible for completing the federal environmental assessment have been cooperating through Manitoba’s assessment and licensing process. I understand that the Clean Environment Commission’s interrogatories and hearings referenced in your letter are part of the provincial process. However, **as the projects have not been referred to a review panel under the *Canadian Environmental Assessment Act*, the hearings currently being conducted by the Clean Environment Commission are not part of the cooperative environmental assessment.**”

The Minister goes on to state (and I quote):

“Following a thorough public review of the comprehensive study report and comments received from the public, I will make a determination as to whether to refer the Wuskwatim Generation Project to a review panel under section 29 of the Act.”

-

ⁱ EIS, Volume 1, page 5-3, Volume 4, page 12-1.

ⁱⁱ EIS, Volume 1, p. 5-4.