

January 26, 2015

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Civil Legal Services SOA
Room 730, 405 Woodsworth Building
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Mr. Mark Stonyk:

**RE: Keeyask Project Appeal to Cabinet –
Environment Act Licence #3107 (Keeyask Generation)**

This letter is in response to the letter from Manitoba Justice inviting Manitoba Wildlands to provide further comments regarding its appeal to cabinet of the licenses issued regarding the Keeyask Project by January 26, 2015. We assume that our original appeal letter regarding this licence is part of the appeal book, and will be made available to Cabinet.

Public Policy and Keeyask

We are glad to see the emerging pattern of direction from the Minister when a license is issued for a Hydro project. Increasingly the Minister is putting the non regulatory recommendations of the CEC in place when the license is issued. Many of these are related to existing public policies in Manitoba, or imply that Manitoba Hydro is a responsible agent of public policy in Manitoba given it is a crown corporation. We expect this pattern will continue, and can only benefit the utility, affected communities, stakeholders, the environment and the economy.

Manitoba Hydro has been a vehicle for public policy for 50 years at least. An argument could be made that every hydro dam in the province is based on delivery of public policy. Manitoba Hydro, like any large corporation, also must secure and maintain its social license.

We are making these comments again because legal counsel for Manitoba Hydro deny that public policy has anything to do with decisions about Manitoba Hydro infrastructure, generation, export or import of energy, or the environmental, social, or economic aspects of the Hydro system in our province. The opposite is true. One simple example would be the new Hydro headquarters in Manitoba – which leads in public infrastructure, and energy efficiency policy application. Another example would be our utility's personnel policies and standards. To be one of the best employers in Canada means our utility fulfilled many policy standards and goals in personnel decisions, including aspiring to train and employ Aboriginal citizens of Manitoba.

It is in separating public policy from the regulatory that many of the risks and complications in decision making by our utility rest. Perhaps Manitoba Hydro should learn from the private utilities whose social licence to operate is reviewed, managed, and improved yearly if not daily!

Which Information? Which EIS?

Throughout the process the proponent has consistently referred to the EIS filed in 2012 as if they are the complete set of materials. However, literally dozens of reports, materials and sources which were only referenced verbally, have still not been completed and provided, or were provided late and used by the proponent *as if they are part of the EIS*. When asked early in the hearings, the project manager simply said late reports were to inform the EIS. We would observe they have been used for much more. These late materials include the curious decision to not make available any of the technical reports for the Keeyask GS EIS for the public reviews, and to only make these reports available *upon request once the CEC proceedings began*.

How to Ensure the Fulfillment of “Non-Licensing Recommendations”

In his July 2, 2014 cover letter enclosing Environment Act License #3107 Minister MackIntosh indicates that it is his intention to ensure that all of the non-licensing recommendations in the CEC report be implemented. However, if the Government was serious about implementing its intentions then why not incorporate these recommendations into the license? As Manitoba Wildlands noted in its closing statement for the CEC Hearings, numerous Participants have expressed frustration over repeated CEC non-licensing recommendations regarding hydro-electric developments not being acted on.

Moreover, it should also be noted that throughout the hearings the proponent and Manitoba Hydro made numerous promises, commitments, and undertakings with respect to the EIS and its operations should a license be issued. There needs to be a way to track or monitor whether these commitments are carried through with. Many of these fall in the area of non regulatory recommendations which the Minister includes in his directional letters to the proponent upon approving a license.

We would point out that anything directed by the Minister when a licence is issued should be part of this review. When the Environment Act is updated perhaps either more actions will be come regulatory, or the policy and ‘non regulatory’ requirements that go with an environment act license will in fact become regulatory.

Compliance Already Shaky

It is one year since the CEC hearings ended, and several months since this license was issued. There is *nothing new on the Keeyask website*. Why? This lack is in contradiction to the commitments made by the proponent in the hearing, the direction of the minister and the intent of various sections of the licence. Should we have the capacity we are sure there would be other aspects of this license already not in compliance.

Our recommendations regarding the review of the Environment Act in Manitoba are motivated by what we see as a high risk, ‘black box’ approach to compliance with license terms for our utility. Commitments made during the hearing, and direction by the Minister should have resulted in a variety of steps by now that would be on the website: work plan for monitoring of species, water, etc., information about the next steps for the environmental protection plan, and posting of missing or / and promised documents.

Compliance with the requirements of Class III licenses under our Environment Act must become transparent and credible. We are all overdue in this regard.

ATK Inadequate

As recommended by numerous hearing participants and community panels, Aboriginal Knowledge and methods for acquiring and applying it to a proposal, should be used to develop environmental impact statements. There should not be two separate tracks. The fact that the ATK work done to date regarding Keeyask Generation is inadequate is supported by the Minister MackIntosh's directive that technical staff will need to follow up to better incorporate ATK regarding the summer resident caribou populations. An ATK standard signed onto by First Nations for use in EA and EIS processes would go a long way. It will also be vital that ATK form an integral part of the Regional Cumulative Effects Assessment Manitoba Hydro is required to submit by October 31, 2015. Note – the comments above are not about the four First Nations who provided traditional knowledge based reports to support their decision to be business partners in Keeyask Generation. Comments above are about Manitoba Hydro's non specific, varying and troubling ATK contents and claims when they filed Keeyask and the Bipole III EIS.

Aboriginal Consultation Inadequate

First Nations now routinely have to inform the provincial government when they have been missed in assessments regarding the Crown's obligation to consult; as to being affected by a project or government undertaking, or license, in order to make sure that consultation takes place. This pattern has emerged over the last five years due to flawed identification of Aboriginal communities impacted by a project. We would observe that government staff appear to not understand Treaties in Manitoba, are often making recommendations about the obligation to consult based on looking at reserve locations only. Errors of this kind affect the credibility of all the Crown's proceedings and decisions regarding a project, including the CEC hearings, and license issued.

Section 35(1) of the Constitution Act, 1982, legally recognizes Aboriginal rights resulting from original occupation of the land, which is now Canada, prior to contact. This includes right to independence through self-governance, land, resource and culture, as shared by First Nations, Inuit and Metis peoples. The Canadian courts have been defining, and guiding fulfillment of these constitutional rights, and treaty rights since the constitutional change.

We appreciate that the Minister did review the s. 35 Consultation report, but the Government of Manitoba needs to fundamentally alter how it handles Consultations with aboriginal people by engaging First Nations much earlier in the process. Please note: The Minister was provided the s. 35 consultations report when in fact those consultations *were not yet completed*. This license therefore was issued based on advice to the Minister *as if the consultations were completed*.

Documentary Evidence for Cabinet Appeal:

Please find below links to documents which we ask form part of the Cabinet Appeal record. The following documents, which our office submitted near the end of the Keeyask hearing

process:

- Keyask CEC hearings product AND an updated Species Chart for the website:
 - <http://manitobawildlands.org/pdfs/1.3.1-SpeciesRankingChartCEC-FNL.pdf>
- Keyask Study Areas report
 - <http://manitobawildlands.org/pdfs/1.4.1-KeeyaskStudyAreasReport-FNL.pdf>
- Keyask Environment Protection Program - Monitoring Report
 - <http://manitobawildlands.org/pdfs/1.5.1-EPPMonitoringReport-Jan12-FNL.pdf>
- Keyask Valued Ecosystem Components - Manitoba Wildlands report
 - <http://manitobawildlands.org/pdfs/1.2.1-VECsReviewdoc-FNL.pdf>
- Proponent Compliance with Environmental Impact Statement Guidelines
 - <http://manitobawildlands.org/pdfs/1.1.1-KeeyaskEISGuidelinesCompliance-jan13-FNL.pdf>
- Manitoba Hydro Keyask Generation & Transmission Projects Chronology Chart
 - <http://manitobawildlands.org/pdfs/2.1.1-Keeyask-ChronologyCECProceedings.pdf>
- CEC Proceedings (Pre-Hearings): List of Manitoba Hydro's Late Filings
 - <http://manitobawildlands.org/pdfs/2.2.2-ProponentLateFilingsDuringCECProceedings.pdf>
- Keyask Environmental Externalities
 - <http://manitobawildlands.org/pdfs/2.6.1-EnvironmentalExternalities-Jan12.pdf>
- Precautionary Principle and Approach for the Keeyask Generation Station Project
 - <http://manitobawildlands.org/pdfs/2.7.1-PrecautionaryPrinciple.pdf>
- January 8, 2014 Manitoba Wildlands closing statements
 - http://manitobawildlands.org/pdfs/MWLKeeyask_ClosingStatements_08Jan2013.pdf

These Manitoba Wildlands products are part of our contribution to the CEC Keeyask proceedings and hearings. Despite steady attendance by Cabinet staff throughout the hearings, a range of outstanding commitments by the proponent, sets of corrections to the EIS, and contributions from independent experts has been ignored in making the licence decision about Keeyask Generation. It is incumbent on Manitoba Justice to consider why this happened again and how the contributions of all parties to the reviews, proceedings, hearings and ultimately in this case, the licence can more fully inform decision making and the contents of any license issued. In particular Cabinet needs to be informed of this flaw in the licensing process. The Minister deserves to have the record from both department and the cabinet staff attending the hearings. The parties to the proceedings and hearings include many knowledgeable Canadian and Manitoban experts who made real contributions to the hearings. We find this license would be stronger and the Minister would be better supported in decision making if the record was more complete.

It is the Manitoba Wildlands position that the Minister was not provided with complete information to make a decision about this license.

While the CEC cannot report on everything during the hearings, tracking commitments from the

proponents during a hearing which change or adjust the EIS contents, and identification of any correction of the EIS, are the least we should be making available before issuing a Class Three License. This was not done for this license. We are losing or discarding a weight of significant contributions, supported by our public commission and the effort of various parties to the decision making.

We also ask that you include Manitoba Wildlands comments on the review of the *Environment Act* in Manitoba as part of the Cabinet Appeal record:

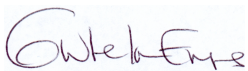
- Manitoba Wildlands comments on the review of the Environment Act in Manitoba
 - http://manitobawildlands.org/pdfs/MWLEnvAct_CoverLetterComments_2014Oct09.pdf

We consider these recommendations to be relevant to this appeal to Cabinet of the license for Keyask Generation because many of the recommendations regarding the Environment Act are based in ten years of experience with decision making about Manitoba Hydro's projects in our province, including the Keyask Generation license. The disclosure section of the Manitoba Wildlands recommendations for the review of our Environment Act in fact may shed some light on the basis for each step Manitoba Wildlands takes prior to the issuing of a license like the Keyask Generation environment act license.

Lastly, we ask that you consider the following recent Court cases regarding the Crown's duty to consult with aboriginal people, and also include them as part of the Cabinet Appeal record:

- Kwikwetlem First Nation v. British Columbia (Utilities Commission), 2009 BCCA 68 (CanLII), <http://canlii.ca/t/22j76>
- Courtoreille v. Canada (Aboriginal Affairs and Northern Development), 2014 FC 1244 (CanLII), <http://canlii.ca/t/gfwn3>
- Enge v. Mandeville et al, 2013 NWTSC 33 (CanLII), <http://canlii.ca/t/fzchb>

Yours, from a Manitoban



Gaile Whelan Enns, Director
Manitoba Wildlands.