MANITOBA WILDLANDS

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May 15, 2006

Honourable Stan Struthers
Minister of Conservation
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Ms. Tracey Braun
Director, Environmental Assessment & Licensing Branch
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Dear Minister Struthers, Ms. Braun;

Re: Comments – Classes of Development Regulation 164/88 Under the *Environment Act* (Public Registry File #5182.00)

Manitoba Wildlands has reviewed the proposed changes to *Environment Act* Regulation 164/88 Classes of Development and we wish to have our comments noted and placed in the Public Registry file.

We are providing comments with respect to the proposed change to Regulation 164/88, but we are also including some comments regarding the scope of the changes in terms of the *Environment Act* overall. We are pleased that the government is signaling its recognition that changes to the *Environment Act* is needed; however, the scope of the proposed changes (i.e. pertaining only to Regulation 164/88) is too narrow. More extensive examination of the *Environment Act* as a whole, along with its Regulations, is needed.

For ease of reference, sets of comments are grouped under headings in the text below.

Changes to Regulation 164/88 vs. Changes to the *Environment Act*

Although we agree that changes are needed to Regulation 164/88 in order to better define new types of developments, other changes to the *Environment Act* overall are required and are just as pressing, if not more essential. This government acknowledged the need for a comprehensive review of the *Environment Act* when it launched the *Environment Act* Amendments process that took place in 2001-

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2002. Accordingly, we are puzzled at the fact that this amendment process for Regulation 164/88 is taking place without any reference to this previous process, the outcomes of which appear to have been shelved. In terms of the scope of the current changes proposed for the *Environment Act*, we would like to know:

a. What happened to the recommendations from the 2001-2002 process? Why is the *Environment Act* (Regulation 164/88) now being amended as if this process never occurred?
b. Why is the scope for the changes to the *Environment Act* under consideration so narrow?
c. Why has this process not started with the question: does Manitoba need an Environmental Assessment Act (several jurisdictions in Canada have stand-alone EA legislation)?
d. Why are changes to Classes of Development being considered, but other needed changes that have been apparent for some time are not being considered?

We are concerned that this review and amendment process gives the appearance this government is willing to re-examine and amend legislation to accommodate and provide better certainty for developers, but is ignoring the need for broader consideration of other changes that would strengthen the *Act* and ensure a higher standard of environmental assessment in Manitoba. The government is not only ignoring recommendations of this nature by environmental and public interest groups such as Manitoba Wildlands, but it is ignoring the whole *Environment Act* Amendments process of 2001-2002 that stemmed from recommendations of the 1999 COSDI report. The COSDI report was endorsed by the present government soon after it came into office in fall 1999. Further, by considering only these relatively minor amendments to the Regulation 164/88, the government is also ignoring strong, clear recommendations by the Clean Environment Commission in its September 2004 *Report on the Public Hearings Wuskwatim Generation and Transmission Projects* (see Section 7.4 *Improving the Process* and Recommendations 7.8 & 7.10).

Manitoba Wildlands recommends a review of the 2001-2002 *Environment Act* Amendments process in conjunction with the opportunity for public input as part of a review of the *Environment Act* and all its regulations as a whole. Below are some specific suggestions and comments as to amendments that would strengthen the *Act*.

The Need for Comprehensive Review of the *Environment Act* –
Primacy in Relation to Other Manitoba Legislation

With the recent changes to the *Planning Act* and the new *Water Protection Act*, formal clarity and direction is needed regarding the circumstances under which the *Environment Act* does or does not supercede other legislation (including the *Planning Act*, the *Water Protection Act*, the *Water Power Act*, etc.)

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The Need for Comprehensive Review of the *Environment Act* –
Discretion vs. Direction, Transparency and Public Involvement

Currently, the provisions of the *Environment Act* confer a great deal of regulatory discretion upon the Director of Environmental Assessment and Licensing. In the spirit of consistency and the highest standard of environmental assessment, many of these discretionary powers should be eliminated through formal direction in the legislation. The 'may's need to become 'shall's in many instances. As an example, there should be regulatory direction regarding all public reviews required for Class 3 developments and optional Class 2 development reviews.

A review of the *Environment Act* is also an opportunity to improve transparency with respect to several aspects of the *Environment Act* and the environmental assessment process. Regulatory direction regarding standards for the public registry is needed; specifics as to what is posted when in the public registry files are essential. We need a standard to direct that government department and government branch comments on proposals and environmental impact statements be posted, as was done in the 1990s. As another example, we need a standard requiring that public review comments be filed in the public registry within one week of receipt so that they are accessible during review period.

This government has made some strides forward in terms of public involvement in its use of the participant assistance programs. We would like to see enshrinement of public concern in the legislation itself – standards to measure public concern need to be defined in the context of decisions to hold public hearings, regardless of the Class of Development in question.

COSDI recommendations regarding the public registry *must* be acted on. Specifics of the operations, posting, accessibility, paper and electronic public registry should become part of the regulations under the *Environment Act*.

The Need for Comprehensive Review of the *Environment Act* –
Formalizing EIS Standards and Guidelines

Manitoba Wildlands has been inquiring about environmental impact statement (EIS) standards and guidelines for wind projects since the assessment of Manitoba's first wind energy project – the St. Leon Wind Energy Project. As we have noted in our comments regarding the St. Leon, Killarney, and Dacotah wind energy projects, the need for EIS standards and guidelines relates to consistency in decision-making, a standard for environmental assessment 'best practices' for wind projects and certainty in terms of requirements for proponents. We are attaching all 4 sets of comments for your review, and so as not to spend time here reiterating and duplicating comments made in terms of EIS standards and guidelines.

The larger issue here, and one that could be addressed through a comprehensive review of the *Environment Act*, is the need for requirements for EIS standards and guidelines, and their review, to be formalized as part of the *Environment Act*. For certain classes and/or types of developments, EIS standards and guidelines, should be mandatory; the decision to issue EIS guidelines or require

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proponents to abide by certain standards should not be a discretionary decision on the part of either the Director of Environmental Assessment and Licensing or the Minister of Conservation. In addition to EIS standards and guideline, specific procedures are also needed for drafting of EISs, public review, final version, and compliance standards. Variances, inconsistencies, failure to apply and comply with EIS Guidelines, in Manitoba *Environment Act* proposal reviews, all point to a need to become clear and formal.

The Need for Comprehensive Review of the *Environment Act* –
Clarifications for Projects with Multiple Proponents, Multiple Project Components

The emergence of wind energy projects, as well as other renewable energy projects is a very positive development in terms of Manitoba's overall mix of energy production. Independent energy producers are now getting involved in energy production projects in the province, and Manitoba Hydro is no longer the sole generator of our power. However, Manitoba Hydro is still the only entity that delivers power to Manitobans. Problems associated with this situation became apparent through the licensing process for the St. Leon Wind Energy Project.

Manitoba Wildlands objected to and appealed the license for St. Leon in part because of the lack of clarity regarding the license and whom it applied to, and what it was for. Subsequently, the license was re-issued with changes to address this problem. The issue is that additional levels of complication arise when one company generates the power, and another company builds/and or owns the infrastructure to deliver the power to consumers.

This sort of situation needs to be addressed through a comprehensive review of the *Environment Act*. Changes to Regulation 164/88 simply do not speak to this type of complexity – the *Act* itself needs to be changed and as this is a situation that will be repeated in the future. More formal measures than varying policy decisions are required.

For instance, we need stronger language regarding whole projects that contain elements that require multiple licenses. These should be provided as a set of proposals that are filed at the same time, at the beginning of the undertaking, with ample public notice of the set of proposals and combined public review. Combined elements of a whole project also may well be the basis for a Class of Development decision.

The Need for Comprehensive Review of the *Environment Act* –
Clean Environment Commission

The Clean Environment Commission (CEC) performs a valuable role in operating at arms length from the government, but more independence for the CEC is needed, as well as increased resources to operate and perform its duties, request evidence, issue subpoenas, and retain expert advice.

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The CEC is required to submit a report not more than 90 days following the close of hearings or meetings directed by the Minister of Conservation. A similar *Environment Act* provision is needed to require the Minister to respond to the CEC's recommendations. We suggest that 120 days is ample time for the government to respond in writing. Also all CEC reports must, under the *Act*, receive formal written response from the licensing agencies.

Standards are also needed concerning the content of the Ministerial references to direct the CEC hearings process. The confusion regarding two reference letters from two different ministers regarding the Wuskwatim projects is one example that illustrates the need for regulatory clarity in this respect. The *Act* also needs to specify response to review comments from proponents: response period, public access, format, and basis for compliance to review comments.

Developments Left Out of Proposed Amendments to Regulation 164/88

Again, we are pleased the government has acknowledged the need to revise and include definitions and classifications for developments not considered when the Regulation was created. However, there are several types of developments that should also be assessed under the *Environment Act* that have not been included as part of the proposed changes to Regulation 164/88.

The following types of development should be defined and classified as projects under the *Environment Act* as part of Regulation 164/88:

- landfills
- industrial thermal heat systems
- co-generation projects
- intensive livestock barns/operations
- large cottage developments on rivers and lake shores
- large suburban/ex urban developments
- ethanol plants

Other Amendments to Regulation 164/88

Some other amendments that would strengthen Regulation 164/88:

- add a definition of climate change to the list of definitions
- provide clarity as to requirements for filing of monitoring reports in the public registry for all Class 2 and Class 3 projects where the license requires monitoring of various ecosystem and environmental elements
- provide clarity as to all the grandfathered environmental licenses in the province; perhaps a public listing in an Annex to Regulation 164/88

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- define standards for the transfer of any grandfathered license or the rebuilding, renovation or expansion of any facility that has a grandfathered license under the *Environment Act*; so that procedures for opening a license are clearly stated.

Classification of Wind Projects as Class 2 Developments Only

We agree it is time wind projects are properly defined, described and classified as projects under the *Environment Act*. However, we are disturbed by the classification proposed by the current amendments to Regulation 164/88.

In short, the proposed changes to Regulation 164/88 would classify any wind farm of aggregate capacity of more than 2MW as a Class 2 Development. There is no threshold for wind farms to be considered Class 3 developments.

As we stated in our comments regarding the Dacotah Wind Energy Project in April 2006 (see attached), we unequivocally disagree with the notion that under the proposed changes, no provision or threshold would exist to assess wind energy projects as Class 3 Developments. Although in general we support the development of new renewables such as wind power, all energy development results in environmental impacts. As projects become larger, their environmental footprint increases and the impacts of larger projects tend to be magnified in ways that are exponential or non-linear relative to the size of the project. In short, bigger projects, regardless of their nature, require more detailed and careful scrutiny and consideration.

Under Manitoba's *Environment Act*,

> *"class 3 development" means any development that is consistent with the examples or the criteria or both set out in the regulations for class 3 developments and the effects of which are of such a magnitude or which generate such a number of environment issues that it is as an exceptional project;*

A key element of this definition is the concept of magnitude of effects, which is unrelated to the nature of a project, but in many cases, including wind energy projects, can be argued to be closely related to size. The existing Classes of Development Regulation reflects this in distinguishing the various classes largely on the basis of size, amount of affected land area, or capacity. In this context, it does not seem reasonable to eliminate *any* threshold that would enable the assessment of wind projects as Class 3 Developments.

Also troubling are the implications of restricting wind projects to being classified as Class 2 Developments in terms of environmental impact statement (EIS) guidelines and public hearings. Under Manitoba's *Environment Act*, the decisions to issue EIS guidelines and to hold public hearings are discretionary, regardless of the Class of Development of the project. However, reality and past practice

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indicate that decisions to issue EIS guidelines or hold public hearings occur rarely with respect to Class 2 Developments. The definition of wind projects, regardless of size, as Class 2 Developments, would essentially mean that EIS guidelines would not be applied to wind projects and public hearings would not take place – even if a proposed wind project would involve hundreds of turbines, huge generation capacity and a significant land base. We find this to be a disturbing prospect, despite our support for the development of wind power as a new renewable energy source.

The Relationship Between Project Magnitude/Cost and Level of Scrutiny

Fees for service, license or permit are associated with projects under the various Classes of Development, according to Regulation 168/96. All Class 2 Developments are subject to a fee of $5,000 payable upon application for an *Environment Act* license. Class 3 Developments that fall under the Energy Production Category (for example) are subject to a fee of 100,000 upon application for an *Environment Act* license.

The fee structure of Regulation 168/96 reflects the size/magnitude of the project in terms of cost and environmental impact and as well, the level of scrutiny required for the Class of Development.

However, the proposed changes to Regulation 164/88 in terms of wind projects appear to ignore the concept that the size and cost of a project might have some implications in terms of the fee that should be charged and the level of scrutiny that should be required. Under the proposed changes to Regulation 164/88, any wind project, even if it was a $500 million-dollar project, would be levied a $5,000 fee.

This does not make sense, even taking into account that fact that Manitoba wishes to encourage the development of wind energy. It also sets a dangerous precedent for other types of developments that the government may wish to encourage. There are other and better mechanisms available to encourage and/or provide incentives for wind development in Manitoba. Class 2, and Class 3 wind projects should in fact have a proposal filing fee in relation to the number of turbines, or a per turbine fee.

Summary

In summary, eroding the rigour of environmental assessment for wind projects or any other development, either through relaxation of the requirements for the environmental assessment process (as per the different classes of development), or through diminishing the fees charged for filing *Environment Act* applications, sends the wrong signal to developers. It lowers the bar in terms of maintaining our provinces ecological systems and services and does a disservice to future generations of Manitobans.

Manitoba Wildlands appreciates the opportunity to comment on the proposed changes to Regulation 164/88 and we look forward to participating in a more comprehensive process to amend Manitoba's *Environment Act*. We are available to discuss such a process further – please contact our office at

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204.947.3400. We trust that our comments will be considered carefully and our recommendations and objections responded to in the next phase of this process. We also trust that Manitoba Conservation will return to a full review of the *Environment Act*.

Yours truly,

Gaile Whelan Enns
Director, Manitoba Wildlands

Attachments:

- Manitoba Wildlands October 17, 2003 comments – Sequoia Energy Inc. – St. Leon Wind Energy Project
- Manitoba Wildlands December 12, 2003 appeal of the November 14, 20003 environmental license for the Sequoia Energy Inc. – St. Leon Wind Energy Project
- Manitoba Wildlands March, 8, 2006 comments – Killarney Wind Energy Project
- Manitoba Wildlands April 12, 2006 comments – Dacotah Wind Energy Project

Cc.
Hon. David Chomiak