

November 27, 2006

Mr. Aaron Berg
Manitoba Justice
Civil Legal Services SOA
Room 730 Woodsworth Building
405 Broadway Avenue
Winnipeg, MB
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Fax: (204) 948-2041

Dear Mr. Berg;

**RE: Manitoba Environment Act – Wuskwatim Generating Station –
Appeal to Cabinet of Licence**

This letter is in response to the November 24, 2006 deadline. We appreciate the delay in submitting until November 27, due to a death in the family.

Our organization is without resources to respond to this deadline, whether that is to undertake research or prepare a submission for the Appeal book. We have made note of this in our previous letter with respect to the appeal of the Wuskwatim Transmission project licence. We would point out that the proponents will be allocating resources to participate in this appeal process; and in the interest of facilitating equal opportunity for all parties, some acknowledgement and accommodation of the unequal capacity of environmental organizations or civil society should be built into this process. It is our position that funds should have been provided to assist us in preparing a submission.

Note: We have used headings in this letter in an effort to improve access to the contents.

CEC Report

It is our conviction that the Clean Environment Commission report to the Minister contains important recommendations which the Minister has failed to respond to, as is the responsibility of the Minister under the Manitoba *Environment Act*. It is further our conviction that Manitoba Hydro's failure to answer interrogatories, or file the technical Manitoba Wildlands continues the work of WWF Canada and Nature Canada for new Manitoba Protected Areas.

reports which its Wuskwatim EIS and Justification/Needs for/Alternatives to materials are based on constitute a primary deficiency in both the review under Manitoba's *Environment Act*, and the CEC proceedings. The CEC report would be based on more facts, and its recommendations regarding issuing a license for the Wuskwatim Generation Station could well have been different if the utility had in fact disclosed the information repeatedly requested throughout the period 2001 to 2005.

Please see our chart titled *Manitoba Wildlands Analysis of Recommendations - Report on Public Hearings - Wuskwatim Generation and Transmission Projects* on the enclosed CD regarding the CEC Wuskwatim recommendations and correlation with Manitoba Wildlands work products and participation.

Manitoba Hydro Failure to Disclose

We request Manitoba Justice to take immediate measures, or advise the Premier, Minister, and Executive Council to take measures so that Manitoba Hydro make all technical reports that were used to substantiate its EIS and JNFAAT filings available to our office, to the public, and to all affected and participating parties in the Wuskwatim Generation Station review and hearings. These should be made available as part of this Appeal process, and lack of access to these reports during the *Environment Act* review and hearings must be taken into account in Manitoba Justice' determinations and advice to Cabinet. This request includes a review of the submissions and the transcript for the CEC disclosure hearing held in January 2004

We continue to be concerned about a process for Appeal to Cabinet that is secret. This is especially troubling given the precedent of an appeal to cabinet in current times which allowed for in-person participation in the cabinet hearing.

Manitoba Wildlands Participation 1999 – Current

As an indication of our involvement and good faith participation it is relevant to mention that two of our staff attended monthly briefing sessions with Manitoba Hydro staff and consultants in advance of the Wuskwatim licensing process. These monthly evening sessions started in late 1999 and continued until December 2003. Our staff also provided advice as to agenda, made presentations, discussed Manitoba Hydro environmental assessment assumptions, and assisted with review of meeting summaries throughout this period of time. Several recommendations were made by our staff with regards to the Wuskwatim environmental assessment and review. These recommendations were solicited by Manitoba Hydro. They were not followed in the Manitoba Wildlands continues the work of WWF Canada and Nature Canada for new Manitoba Protected Areas.

review and hearings, or any of the filings. We also participated in all stages of the review of the Wuskwatim proposal under Manitoba's Environment Act between 2001 and summer 2003. Since the 2004 hearings we have continued to file appeals, respond to the federal Comprehensive Study Report, etc.

Fairness

The CEC consistently applied the onus to the public participants rather than Manitoba Hydro throughout the hearings. We respectfully request Manitoba Justice review the transcript, and evidence during the Clean Environment Commission proceedings, starting in July 2003, with a view to the standard for procedural fairness, and access to information which Manitoba Hydro should have disclosed – and what the impact on the outcome may have been. In particular we request that Manitoba Justice review the transcript of the hearings to determine procedural fairness, prejudice, and procedural consistency with regard to the efforts and participation of Manitoba Wildlands, and our expert witnesses. We would note that throughout the year long CEC proceedings additional expectations arose where the CEC, government participants and the proponents were able to expand their resources, time allotment, budgets etc. Public participants were not.

Joint Appeals

In correspondence with respect to the Wuskwatim Transmission licence appeal, we have requested that the licence appeals for both the Wuskwatim projects be considered jointly. We request the same again in this letter. All steps in the review under *The Environment Act* since 2001 and the Clean Environment Commission (CEC) proceedings were taken jointly. Furthermore, neither 'project' is viable as a single element. This request and other requests in this Appeal letter are being made without prejudice to our right to procedural fairness. Manitoba Justice will in fact have to connect its findings on these Appeals, as a recommendation in favour of the licence for the Transmission system, and a recommendation against the Generation Station would add considerable risk that Manitoba Hydro may proceed to build certain elements of the Wuskwatim transmission system *independent* of the Wuskwatim Generation Station. The same responsibility rests with Cabinet.

All Previous Work Products – This Appeal

Our submission for the Cabinet appeal of the Wuskwatim Generating Station licence, should you reject our request in relation to funds or our request to review both Manitoba Wildlands continues the work of WWF Canada and Nature Canada for new Manitoba Protected Areas.

Wuskwatim appeals jointly, consists of our previous Wuskwatim Generation Station work products on the CD enclosed with this letter. These same materials are posted on the <http://EnergyManitoba.org> website, which we built to provide public access to information regarding the Wuskwatim review and hearing process. We request that Manitoba Justice direct Manitoba Hydro and Nisichawayaisihk Cree Nation to respond to any interrogatory or cross examination question *not yet answered or not answered sufficiently*. With respect to cross examination questions, Manitoba Justice will note that alterations in procedures and rules of evidence, and rules for cross examination were implemented at different junctions during the hearings, including at the start of our EIS cross examination. Therefore, those questions now need to be answered. Also, it will be evident to Manitoba Justice upon review that Manitoba Hydro did not in fact adequately answer many of our interrogatories pertaining to the Wuskwatim Generating Station. We expect these to be answered as a part of this Appeal.

Cross Examination & Grounds for Appeal

Manitoba Wildlands was prevented from asking most of our cross-examination questions during the hearing as a result of the CEC chair's decision to change the rules for cross examination as we were starting our EIS cross examination of the proponents. This particular event is also indicative of a pattern of *ad hoc* and inconsistent decisions with respect to the hearing process that may have impacted the overall CEC recommendations. The panel could not consider what it refused to hear. We are requesting that this appeal include a review of processes followed under *The Environment Act* and by the CEC to determine their implications. Several of the issues raised in our August 2, 2006 letter are relevant for this review (see issues 1, 2, 3, 7, 8 in particular).

We respectfully ask Manitoba Justice to review Wuskwatim evidence, and make sure that Manitoba Hydro responds to each element in our Appeal letter of August 2, 2006.

Aboriginal Rights

In our participation in the review and hearings for the Wuskwatim Generation Station we have consistently raised our concern for the upholding of Aboriginal and First Nation rights. As part of the appeal to Cabinet, it is incumbent upon Manitoba Justice and Cabinet to review the transcript and evidence to determine whether or not the consultations which both Crowns were/are obligated to undertake in advance of a project of this nature which allocates and uses natural resources, given both Federal and Manitoba Wildlands continues the work of WWF Canada and Nature Canada for new Manitoba Protected Areas.

Provincial responsibilities, *were in fact undertaken and completed*. We believe that you will find that this is not the case and we believe you will see evidence that consultation obligations under Section 9a of the Northern Flood Agreement (NFA) and Section 35 of the Constitution have not been fulfilled. Manitoba Justice and Cabinet have a responsibility to review this matter carefully, and thoroughly. As the NFA is a modern day treaty signed by Manitoba, Manitoba Hydro and Canada, subject to various Acts of Parliament there is no doubt of federal responsibility in these matters. Manitoba Justice is requested to determine whether there are standards in place for fulfillment of the Manitoba government's fiduciary obligation to consult with NFA communities and First Nations. We further request that Manitoba Justice advise Cabinet as to whether Manitoba's obligation to consult has been fulfilled. Given that Manitoba Hydro is a crown corporation and its only consultations may have been with the co proponent, we ask Manitoba Justice to ascertain what outstanding matters and steps are required with respect to consultations with Aboriginal Peoples.

Manitoba Justice is also in receipt of our August 2, 2006 appeal of the Wuskwatim Generating Station licence. Overall we expect Manitoba Justice and Cabinet to thoroughly review evidence for each basis our appeal. See comment above about our right to procedural fairness.

This Appeal Process – Procedures

To date, item 3 of our October 8, 2006 letter – our request for schedule and timelines for this appeal – has not been responded to adequately. Although we understand that timelines may shift, we feel we have made a reasonable request to be apprised of the amount of time the proponents will be given to respond to appellants' submissions, if not a precise date. Similarly, the appellants should be apprised of timelines to respond to new and relevant issues raised by proponents' submissions, as well as how long will then elapse before Cabinet is to meet and consider all evidence. Please consider this another formal request for a description of timelines for the steps in this (and the Transmission project) appeal process. If acknowledgement and accommodation of the disparities in terms of parties' financial capacity to participate will not be made, an effort to outline the general timelines for the process would be a basic courtesy. We note that to date we have received one piece of correspondence regarding this Appeal to cabinet sent to the legal counsel for the proponents. We request Manitoba Justice to provide all other correspondence to the proponents, and to make sure that our office is

made aware of who has received our materials. This request would then include a copy of verification of who receives a copy of this letter.

Trapline 18 Submission & Questions

We have been associated with Trapline 18 and the McIvor family since 2003. Public participants supported each other during the CEC proceedings, and year long calendar of events. We, in particular, were conscious of the limitations put on ability to participate by the CEC funding decisions for various of the public participants including Trapline 18. Our efforts, including in preparing interrogatories, was aimed at a thorough basis for disclosure that would assist all public participants. (We would suggest that Manitoba Justice review the provisional order for the CEC funding to reflect on the disparity evident, and the effect on the ability to participate)

We have reviewed the analysis regarding water elevations in the Trapline Line 18 appeal submission which is prepared by Mr. Petr Cizek, and the submission letter. We support the content in the Trapline 18 submission in this Appeal to Cabinet. We agree with the essence of questions put to Manitoba Justice and the Manitoba Cabinet by Trapline 18 and would add these questions:

(This listing is in no way intended to be comprehensive.)

- Did Manitoba Hydro mislead Manitoba Conservation, the CEC, its minister and Cabinet regarding the Wuskwatim projects?
- Was the CEC Wuskwatim process fair?
- Did the CEC block evidence, cross examination, etc?
- Did the CEC assume that Manitoba Hydro evidence and filings were accurate while placing the onus of proof on public participants?
- Were the questions posed to Manitoba Hydro by public participants answered?
- Did the CEC demand independent information, or use the independent information provided by public participants?
- Why did the CEC place the onus on public participants? (Why did the CEC allow Manitoba Hydro to expect every witness and presenter to have *read everything* Manitoba Hydro filed, but not expect Manitoba Hydro experts and consultants to have *read everything* which public participants had filed?)
- Why was Manitoba Hydro information *not* questioned or verified adequately?
- Why did the CEC not demand disclosure of information requested by public participants?

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- Why did the CEC deny Manitoba Wildlands full opportunity to ask its EIS cross examination questions?
- Why were Manitoba Conservation and other responsible Manitoba government departments exempted from providing evidence during the CEC hearings, despite requests from public participants?
- Why was there no federal government participation in the CEC hearings, despite requests from public participants for their evidence?
- Why were the Wuskwatim panel chair and other panel members disrespectful of the efforts and situation which public participants found themselves in as the hearings went for 9 weeks, at the end of a year long proceeding?
- Why did the CEC rule against the motion filed by the Pimachikamak Cree Nation, supported by most public participants, and then recommend in support in their final report?
- Why was Manitoba Hydro allowed to define the project area for the Wuskwatim Generation Station in such a way that *all effects were outside the project area*?
- Why does the Manitoba government avoid independent review of Manitoba Hydro development plans, projects, and Environmental Assessment, when risk increases in any situation where the same entity is planning, reviewing, and licensing?
- Why did the CEC refuse evidence, and close submission of evidence all together, without any recourse of appeal process?
- Why, when a decision was taken by the Premier to not hold Public Utility Board hearings for the Wuskwatim Generation Station, did the government and the CEC allow Manitoba Hydro to file substantially less information in the economic aspects of the CEC proceedings *than would have been required by the PUB*?
- Why did the CEC ignore the Environmental Impact Statement Guidelines for the Wuskwatim projects under the Environment Act in its deliberations and recommendations?
- Why did the CEC fail to request crucial information from Manitoba Hydro, especially that which public participants were requesting?
- Why would Manitoba Hydro use 1971 data pre CRD as the basis for information for a project yet to be built? Why did the CEC advisors and experts ignore this?
- Why did the CEC use legal counsel who had no previous experience with the environmental issues, terminology etc relevant to the proceedings to ask cross examination questions?

- Why would the CEC use legal counsel who appeared to have *not read the materials pertinent to the hearings?*
- Why did these hearings occur when there was no business agreement between the proponents?
- Why does Manitoba Hydro not have ecological, and archeological experts on staff?
- Why was the CEC silent regarding the water power licence for Wuskwatim?
- Why does this government wish to have a third party hold a water power licence?

We agree with and support the Trapline 18 submission including for **Relief Sought.**

We recommend to Manitoba Justice that a thorough review of the CEC evidence, transcript and recommendations be undertaken especially as they relate to the need to review the existing hydro system in the province before any further projects are developed, or proposed under the *Environment Act*. This particularly applies then to the need for permanent environment licences for the existing system, as these are outstanding. At the same time all water power licences and water power reserves in the province need to be reviewed for their social, economic, and environmental impacts and benefits. Cumulative assessment is long overdue, including with regard to Aboriginal rights and the NFA.

We submit that this and all other requests in this letter are pertinent to review and our appeal of the Wuskwatim Generation Station licence under Manitoba's *Environment Act*. Further we hope that Manitoba Justice will recommend to Cabinet that Manitoba Hydro disclose all requested information from the Wuskwatim proceedings both under the *Environment Act* and the CEC process. A new hearing for mitigation of the problems with the Wuskwatim Generation Station licence is essential. That hearing should join the Transmission project to the Generation project.

The CD of our Wuskwatim work products is enclosed and these documents, along with links to evidence, hearing presentations and hearing transcripts are also found on <http://EnergyManitoba.org>. We are available to discuss appropriate funding for full participation in this Appeals process. We are also able, upon request, to put a monetary value to our Wuskwatim projects pro bono public interest activity which has been



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unfunded, including for this Appeal. Our right to procedural fairness is not fulfilled by the contents of this letter, or cancelled by anything in this Appeals process to date.

Thank you in advance for your consideration of the above.

Yours truly,

Gaile Whelan Enns
Director, Manitoba Wildlands

Attachments:

- CD of Manitoba Wildlands' work products pertaining to the Wuskwatim Generating Station and Transmission project review and hearing (also available on <http://EnergyManitoba.org>)