

August 2, 2006

Honourable Stan Struthers
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Dear Minister Struthers, Ms. Braun;

Re: Appeal – Environmental Licence No. 2699 for the Construction, Operation and Maintenance of the Wuskwatim Generating Station (Public Registry File #4724.00)

This letter is in response to the June 21, 2006 issuance of a licence under the Environment Act for the construction, operation and maintenance of the Wuskwatim Generating Station. Please consider this letter as an official appeal of Licence No. 2699. Please file this letter in the Public Registry File for the Wuskwatim Generating Station (PR File #4724.00). Manitoba Wildlands respectfully requests a timely response to our comments below; we look forward to receiving a response to our comments within two weeks of receipt of this letter.

Manitoba Wildlands' appeal of Licence No. 2699 for the construction, operation and maintenance of the Wuskwatim Generating Station is based on issues concerning:

- 1) Provincial duties under the *Environment Act*, due diligence in the public interest
- 2) Environment Protection Plan(s) for the construction, operations and maintenance phases of the Wuskwatim Generating Station project & CEC Recommendation 7.1B
- 3) Clean Environment Commission (CEC) Recommendations excluded from the Wuskwatim Generating Station Project environment licence
- 4) Species, especially woodland caribou
- 5) Climate Change

- 6) Public accountability and transparency
- 7) Access to ongoing information, studies, including archeological studies, that were never made publicly available
- 8) EIS Guidelines & public policy, licensing
- 9) Nisichawayasihk Cree Nation's (NCN's) Project Development Agreement referendum
- 10) Aboriginal rights and consultations
- 11) Quality of life

1) Provincial Duties Under the Environment Act, Due Diligence in the Public Interest

It is our contention that the Province has not fulfilled all of its duties under the *Environment Act* and has not exercised due diligence in other respects concerning the Wuskwatim Generating Station Project. As a result, Licence No. 2699 should not be finalized.

For instance, Section 2(1) of the *Environment Act* states,

The aims and objectives of the department are to protect the quality of the environment and environmental health of present and future generations of Manitobans and to provide the opportunity for all citizens to exercise influence over the quality of their living environment.

The fact that Clean Environment Commission (CEC) recommendations are not being included or acted on in specific requirements of License No. 2699 (e.g. Recommendation 7.1B) constitutes a failure of the Province to “protect the quality of the environment and environmental health of present and future generations of Manitobans”.

Further, Section 12(4) with respect to Class 3 projects implies the duty of government departments to review and comment on proposals (environmental impact statements – EIS) filed under the *Environment Act* in stating that,

Upon receipt of a proposal under this section, the minister shall within such time as may be specified by the regulation . . . (b) file a copy of the proposal with the Interdepartmental Planning Board and other departments as may be affected by the development, for their review and comment;

It has been policy and the practice to make departmental review comments publicly available to assist the regulators and the public and to allow for transparency in the EIS review and comment process. This did not happen in the case of the Wuskwatim Projects. Both Manitoba Wildlands interrogatories and ministerial correspondence reflect our efforts to access the extensive review of the EIS done by government branches, both for our review and on behalf of public participants. These were not made public, despite a pattern in previous and similar reviews of access during review periods. It has also

remained unclear whether federal regulators and responsible agencies ever obtained these review comments.

We also believe that due diligence on the part of the Province was lacking in that:

- Manitoba did not conduct an independent species assessment with respect to impacts from the proposed Wuskwatim Generating Station Project
- Manitoba did not conduct an independent hydrological assessment with respect to impacts from the proposed Wuskwatim Generating Station Project
- Manitoba did not conduct independent archeological studies with respect to impacts from the proposed Wuskwatim Generating Station Project
- Manitoba did not apply *Heritage Act* provisions for sites identified as sacred sites or sites of cultural significance
- Manitoba did not ensure access to information during the review under the *Act*, and Manitoba did not require Manitoba Hydro to disclose answers to all interrogatories, and file its technical reports (the basis for the EIS documents filed)

2) *Environmental Protection Plan(s) & CEC Recommendation 7.1B*

Licence No. 2699 should be declared null and void on the grounds that the Minister of Conservation has failed to adequately fulfill his duty under Section 12(8) of the *Environment Act* which states (emphasis added):

*Where the minister has requested a public hearing regarding a proposal and subsequently advice and recommendations are presented to the minister, and the minister does not incorporate the recommendations of the commission in the environmental licence, **the minister shall provide written documentation of the reason for the decision** to the proponent, the commission and the files of the central registry at the time of notifying the proponent of the decision.*

In regards to Clean Environment Commission recommendation 7.1B with respect to the Environmental Protection Plan requirements for the Wuskwatim Generating Station Project, the Minister has indicated that the “Generation Licence requires preparation of an EPP in consideration of the CEC recommendations, however does not stipulate specific requirements recommended by the CEC. The Licence provides flexibility so that the proponent can prepare the plan in consideration of CEC recommendations on EPP requirements.”

Requiring a proponent to only ‘consider’ the CEC’s recommendations with the sole reason for doing so being to allow ‘flexibility’ for a proponent is not a valid reason for allowing the proponent to avoid carrying out the requirements outlined in CEC Recommendation 7.1B. Weakening or ignoring the CEC’s recommendations is not in the public interest, nor is it in the best interest of the environment. A

Minister whose duty and portfolio exists in order to act in both the public and environmental interest should not fail to do so. Further, by failing to act in the interest of the public and the environment and instead relaxing requirements in the interests of the proponent, the Minister of Conservation has indicated bias in favour of the proponents. In our view, the Minister of Conservation has not fulfilled his duty under Section 12(8) environmental licence No. 2699 has been issued in error.

Failing to require the proponent to adhere specifically to the requirements of CEC Recommendation 7.1B, while mentioning it as a basis for elements in the licence also fails to guarantee public access and review of annual reports on the implementation of environmental protection plans. CEC Recommendation 7.1B Part 4 states,

Manitoba Hydro and Nisichawayasihk Cree Nation should be required to:

- *report on the implementation of environmental protection plans annually and to ensure that such reports are readily and easily accessible to stakeholders and to the general public.*

Public access to these reports will increase transparency and allow for third-party and community review and monitoring as to how the proponents are fulfilling licence requirements. Licence No. 2699 should specify where such implementation reports will be filed in both paper and electronic format and how the proponents will ensure that the implementation reports are ‘readily and easily accessible’. Clearly this approach in Licence No. 2699 is also a contradiction to the government’s support of CODSI recommendations regarding public registry contents and accessibility.

Similarly, failing to require the proponent to adhere specifically to the requirements of CEC Recommendation 7.1B means that all direction re species, VECs, use of TEK, thresholds, integrity of protected areas, effects on woodland caribou, greenhouse gas emissions and public access requirements so clearly articulated by the CEC in Recommendation 7.1B are diminished in importance and rigour because the Minister has directed the proponent only to ‘consider’ CEC recommendations concerning Environmental Protection Plans. This would make most members of the public wonder who is making the decisions, and why environmental assessment, review and hearings occurred.

Another concern, which is also grounds for appeal of the environmental licence for the Wuskwatim Generating Station Project, is the lack of public access to the environment protection plan(s) (EnvPPs) prior to the issuance of an environment licence for the project. Environment licence No. 2699 is written as if EnvPPs have not yet been written; however there has been conflicting information on this point. Ministerial correspondence appears to confirm that these EnvPPs are already written. EnvPPs must be publicly accessible (both on paper and filed in the Public Registry File and posted on the internet) and available as soon as they are made available to Manitoba Conservation officials. A process should also be in place to allow for public comment and input to the EnvPPs for the Wuskwatim Generating Station Project. Annual audits under the EnvPP should also be public.

We challenge the Director of Environmental Assessment and Licencing and the Minister of Conservation to review the record for Wuskwatim concerning discussions, queries, commitments, recommendations regarding Environmental Protection Plans (EnvPPs). This would include EIS review comments, interrogatories, interrogatory responses, supplemental filings, the record of the hearings and closing statements, and the 2004 CEC report to note their importance and reflect upon the detail that was ultimately recommended by the CEC in Recommendation 7.1B regarding EnvPPs. Licence No. 2699 should require the proponent to adhere to the specific conditions outlined by the CEC.

3) *Clean Environment Commission (CEC) Recommendations Excluded from the Wuskwatim Generating Station Project Environmental Licence*

Although it is not a requirement under the *Environment Act*, in our view it is a failure of Licence No. 2699 that it does not take into account those CEC recommendations where both the CEC and public participants were in agreement and ensure that those recommendations were explicitly and unequivocally included in the licence. (for examples, see http://manitobawildlands.org/pdfs/MW_CECWuskRecs.pdf) This chart lists all CEC recommendations and references the majority pattern regarding Manitoba Wildlands contribution, agreement, and provides citations for these recommendations. Similar analysis would provide a pattern from other public participants.

In addition to our analysis/chart above, Manitoba Wildlands would like to reiterate our support for the following CEC Recommendations, which have been excluded from Licence No. 2699 either in whole or in part.

- Recommendation 7.1A
- Recommendation 7.1B-1
- Recommendation 7.1B-2
- Recommendation 7.1B-3
- Recommendation 7.1B-4
- Recommendation 7.1B-5
- Recommendation 7.1C
- Recommendation 7.3
- Recommendation 7.5
- Recommendation 7.6
- Recommendation 7.7
- Recommendation 7.8
- Recommendation 7.9
- Recommendation 7.10

We are providing some comments on specific CEC recommendations that have been excluded from Licence No. 2699. We reject the chart that accompanies the Minister of Conservation's June 21, 2006 letter to the Clean Environment Commission (CEC) and we feel the failure to incorporate these CEC recommendations is grounds for appeal of Licence No. 2699 – see below.

Re: CEC Recommendation 7.1B

We have already provided comments on this CEC recommendation – see 2) above.

Re: CEC Recommendation 7.1.C

The Minister of Conservation in his June 21, 2006 correspondence to the Chair of the CEC rejected CEC Recommendation 7.1C, which states,

The licence should require Manitoba Hydro and Nisichawayasihk Cree Nation to:

- *monitor and report annually on First Nations, other Aboriginal people and northern Manitoba hiring for the Generation Project to Manitoba Advanced Education and Training. The results should also be published in Manitoba Hydro's annual report. The reports should also include results of the effectiveness of the training, life-skills and on-site counselling programs.*
- *include Manitoba Hydro's employment and training terms and conditions in contract specifications and operational procedures for the Generation Project. The contracts and procedures should be audited by Manitoba Advanced Education and Training and the results should be readily available to the public.*

The reason provided by the Minister was that 7.1C is “[b]eyond the mandate of the Environment Act”. This may be the case, but without any additional information to support this assertion, the Minister is open to challenge on this point. The Minister has not performed his duty in rejecting CEC Recommendation 7.1C as no case has been made to justify the notion that the recommendation is in fact beyond the scope of the *Environment Act*.

In the absence of support for the Minister's assertion regarding CEC Recommendation 7.1C, there is a case to be made that the scope of the *Environment Act* allows for the inclusion of requirements in the licence to monitor and report on socio-economic issues such as training programs and hiring/employment. Section 1(1) of the *Environment Act* states (emphasis added),

*The intent of this Act is to develop and maintain an environmental management system in Manitoba which will ensure that the environment is maintained in such a manner as to sustain a high quality of life, **including social and economic development**, recreation and leisure for this and future generations, and in this regard, this Act*
(a) is complementary to, and support for, existing and future provincial planning and policy mechanisms;

- (b) provides for the environmental assessment of projects which are likely to have significant effects on the environment;*
- (c) provides for the recognition and utilization of existing effective review processes that adequately address environmental issues; and*
- (d) provides for public consultation in environmental decision making while recognizing the responsibility of elected government including municipal governments as decision makers.*

It seems clear from Section 1(1) that sustaining socio-economic health is part of the *Environment Act*, and training and employment is very much a significant part of communities' socio-economic health. As a result, the Minister's assertion that CEC Recommendation 7.1C is outside of the scope of the *Environment Act*, without providing any justification for the statement, is unsupported and thus contrary to the requirements of Section 12(8) of the *Environment Act*. Also the licensing Minister can also clearly take a collaborative approach with other ministries and advise that such reporting requirements will be added to the Wuskwatim licence, or written into training agreements etc.

Many of the CEC recommendations could easily be acted on, as there are a variety of mechanisms available. When an *Environment Act* licence is issued, the opportunity exists to either include recommendations in the licence or report as to how they will be delivered.

4) *Species, Especially Woodland Caribou*

Clauses 13 & 14 of Licence No. 2699 refer indirectly and directly to woodland caribou requirements. As the species is newly listed within Manitoba's Endangered Species legislation, Manitoba Wildlands would like to request written clarification as to how the provisions of the *Endangered Species Act* (ESA) will apply to the Wuskwatim Project. This must also be an explicit requirement of Licence No. 2699.

The fact that the Wuskwatim Generating Station is to be situated in an area that is a known calving site for threatened woodland caribou makes the need for explicit direction regarding the Endangered Species Act and woodland caribou monitoring all the more imperative. The health of woodland caribou depends upon the maintenance of low population densities and as independent experts noted during the Wuskwatim hearings, impacts on woodland caribou have likely been underestimated in the Wuskwatim EISs. We are also concerned about the province's approach to woodland caribou management; the 2000 and 2005 Woodland Caribou strategies for Manitoba show different information and recommendations regarding the woodland caribou herds in and adjacent to the Wuskwatim Generating Station project area. License No. 2699 must require the proponents to adhere strictly to the provisions and requirements of Manitoba's *ESA* and all data, reports, records related to this issue must be publicly available to ensure accountability and transparency.

In fact, all information concerning effects/impacts, research, monitoring, etc. must also be publicly available (see comments in below in **6) Public Accountability and Transparency**).

The Clean Environment Commission specifically commented on woodland caribou and included provisions for mitigating, monitoring and reporting on woodland caribou, which have not been incorporated into Licence No. 2699 (see our comments in **3) Clean Environment Commission (CEC) Recommendations Excluded from the Wuskwatim Generating Station Project Environmental Licence** and excerpts from the CEC report noted below). Given all of the testimony, information and arguments made by independent experts during the hearings it is difficult to understand the gap in Licence No. 2699.

CEC Report (page 100)

*Based on these arguments, the Commission is of the opinion that MH/NCN should fully consider the direct and indirect effects of the Projects **beyond their physical footprint**, including the implications to caribou behaviour. This is also of importance in the consideration of cumulative effects of the Projects on caribou in conjunction with the effects of other projects and activities in the region*

...

The Commission will be recommending that provision for monitoring and mitigation of effects on caribou population be included in any licence issued for the Projects.

CEC Recommendation 7.1.B Environmental Protection Plan Requirements (page 124)

1) *The licence stipulate that the EPP require mitigation, monitoring, and reporting on environmental effects, during construction and operation of the Project, on valued environmental components (VECs) and other indicators of change using Traditional Scientific Knowledge (TSK) and Western Scientific Knowledge (WSK) to:*

- *determine thresholds for VECs, where such thresholds are not already established*
- *provide periodic reports on the effects of the Projects on enduring features, biodiversity, ecological integrity and sustainability.*

2) *Specific mitigation, monitoring, and reporting should focus on:*

- *woodland caribou population, distribution and behaviour during construction and operation*
- *fish production in Wuskwatim Lake and the region to verify the prediction that the Generation Project will result in an increase in fish production. The investigation should monitor fish harvests in Wuskwatim Lake in connection with that investigation.*

Manitoba Wildlands would also like to see confirmation and clear language in the provincial environmental licence to indicate that requirements concerning woodland caribou as per the federal comprehensive study report will be upheld, and that all information will be made public – and be provided to affected communities. We would also suggest that the CEC recommendations above be reviewed again for inclusion in the licence.

5) *Climate Change*

We would like to call attention to the fact that the Clean Environment Commission specifically noted that the Wuskwatim EISs were deficient in regards assessment of climate change implications and impacts. The CEC report (page 97) states (emphasis added),

The Commission accepts MH's assertion that the Projects will reduce greenhouse-gas emissions by displacing electricity produced by natural-gas and coal-fired plants in the U.S. However, the Commission believes that MH should attempt to track and report on predicted greenhouse-gas reductions in jurisdictions to which it exports electricity.

The Commission also noted that the EIS documents do not demonstrate that MH/NCN's information on climate change is, in fact, consistent with the CEEA guidance for practitioners on incorporating climate change consideration in environmental assessment.

The Commission will be recommending that provision for monitoring and mitigation of greenhouse-gas emissions and related effects be included in any licence issued for the Projects.

The CEC also makes two recommendations specific to climate change, neither of which the Minister of Conservation has required the proponents to adhere to as part of Licence No. 2699.

CEC Report (page 124)

CEC Recommendation 7.1.B Environmental Protection Plan Requirements

2) Specific mitigation, monitoring, and reporting should focus on:

greenhouse-gas emissions and their effects during construction and operation.

CEC Report (page 127)

Recommendation 7.9

The Clean Environment Commission recommends that:

Manitoba Hydro develop a climate-change policy consistent with provincial and national climate change policies and guidance, and apply the policy in the assessment of future hydroelectric developments. Preparation of a sustainable-development strategy in accordance with provisions of The Sustainable Development Act would be an essential element of such a policy.

In our view, given the ever-increasing importance of climate change in our local and global ecological and economic systems, and the fact that the Manitoba Government promotes itself as a champion of action on climate change, the failure of Licence No. 2699 to reflect and specifically incorporate the CEC's statements and recommendations on climate change is irresponsible and is grounds for appeal of Licence No. 2699.

6) Public Accountability and Transparency

Manitoba Hydro is a Crown Corporation and is accountable to the people of Manitoba. To ensure public accountability and transparency, all reports (especially Environmental Protection Plans), monitoring data, committee minutes, decisions related to the requirements and fulfillment of Licence No. 2699 must be made available and filed in the Public Registry for the Wuskwatim Generating Station Project. Monitoring reports and data are of little use in terms of adaptive management, learning or accountability if they are not publicly available. The CEC has acknowledged the need for information to be publicly available in its 2004 *Report on the Public Hearings for the Wuskwatim Projects*.

Licence No. 2699 is written as if discussions, motions and recommendations concerning public access to information had never occurred. The Licence must include clear information as to what information, reports, and minutes etc will be filed in the public registry, and made available on request. This is especially important given the nature of the holding company for management of the generation station.

Reports / monitoring data / committee minutes, decisions related to the requirements and fulfillment of Licence No. 2699 that should be explicitly required to be made public include:

- Access Management Plans (as per Clause 10 of Licence No. 2699)
- Environmental Protection Plan(s) (as per Clause 12 of Licence No. 2699)
- Details, record of discussions, decisions, reports related to Baseline Monitoring and Ecosystem Research Programs (as per Clause 13 of Licence No. 2699)
- Details, record of discussions, decisions, activities, report of the Advisory Committee (as per Clause 14 of Licence No. 2699)
- Data collected in the course of monitoring or research activities pursuant to Clause 14 (as per Clause 15 of Licence No. 2699)
- Report on Monitoring Programs (as per Clause 16 of Licence No. 2699)
- Annual Report on Results of Monitoring Programs Re: the Environmental Protection Plan(s) (as per Clause 17 of Licence No. 2699)
- Results, annual reports of Shoreline Erosion Monitoring (as per Clause 18 of Licence No. 2699)
- Results, annual reports of Sediment Monitoring (as per Clause 19 of Licence No. 2699)
- Results, annual reports of Fish Production and Fish Harvesting Monitoring (as per Clause 20 of Licence No. 2699)

- Fish Habitat Compensation Plan; Aquatic Effects Monitoring Plan; Sediment Management Plan; Authorization for Work or Undertakings Affecting Fish Habitat (as per Clause 21 of Licence No. 2699)
- Reports regarding exceedances of the mean daily elevation above 234.0 meters ASL on Wuskwatim Lake (as per Clause 32 of Licence No. 2699)
- Results, reports regarding daily water level variations and frequency and magnitude of exceedances (as per Clause 34 of Licence No. 2699)
- Reports / monitoring data / audits etc. regarding those CEC recommendations we identify as being relevant to add to the licence

7) Access to Manitoba Hydro Technical Information, Studies

During the hearings process, there were several Manitoba Hydro technical reports that were never provided to public participants, the CEC, or Manitoba Conservation, despite repeated requests to the proponents for these to be made available. The requests span more than a one-year period. As a result, the ability of public participants and the CEC to assess the full extent of the risks of environmental impacts, and the ability to possess sufficient information to arrive at a complete set of recommendations (on the part of the CEC) was impaired. The proponents should be required to file and make publicly available all the technical reports requested as part of the regulatory review process prior to the finalization of an environmental license. In addition, these technical reports are a part of a wider body of information and documents that were not accessible or made available during the *Environment Act* regulatory review of the Wuskwatim Generating Station Project. These information gaps should be filled and their implications assessed and publicly reviewed prior to the finalization of environmental licence No. 2699.

8) EIS Guidelines & Public Policy

The EIS guidelines for the Wuskwatim Generating Station Project were not fulfilled by either the EIS itself, or the information presented as part of the review and hearings process. The EIS in fact was notable for failing to clearly address all aspects of the EIS Guidelines in the EIS. In addition, the Clean Environment Commission (CEC) report and recommendations and the requirements of environmental licence No. 2699 are both silent as to indicating how the elements of the EIS Guidelines have or will be addressed by the proponents in the construction, operation and maintenance of the Wuskwatim Generating Station Project. This deficiency is a reflection of the overall need to review for consistency and upgrade to the stages of environmental assessment and public review under Manitoba's *Environment Act*.

As part of our June 2003 review, Manitoba Wildlands included a "Summary of Deficiencies as per Environmental Impact Statement (EIS) Guidelines: Wuskwatim Generation Project EIS". This part of the EIS Review was not covered in the proponent's Supplemental Filing. Moreover, the issues raised with respect to aspects of the EIS Guidelines not being fulfilled were not addressed sufficiently as part

of the hearings process, nor do the requirements outlined in environmental licence No 2699 acknowledge aspects of the EIS Guidelines that remain unaddressed or require the proponents to take steps to fulfill gaps. For instance, Licence No. 2699 should reiterate the requirement for the proponents to adhere to the public policy standards that are in the EIS Guidelines and comprehensively reference each policy in the license. Below is a selective listing of some of these sections of the EIS Guidelines for the Wuskwatim Generation Project

(<http://www.gov.mb.ca/conservation/envapprovals/archive/archive01/summaries/wuskwatim/wuskwatimngenstn-guidelines.html>) that we are concerned have not been fulfilled as part of the EIS review, or hearings and where the licence does not address the issue:

Section 3. Regulatory Framework Section 2.3.1 Intent

*It is intended that the Environmental Impact Statement for the Wuskwatim Transmission Project shall incorporate and reflect the **Principles of Sustainable Development** as contained in **Towards a Sustainable Development Strategy for Manitobans** and the policies under **The Land and Water Strategy**.*

Manitoba Wildlands has consistently raised the issue of Wuskwatim's compliance with existing public policies and legislation. We have never received a comprehensive response as to how the Wuskwatim projects reflect the spirit and intent of various Manitoba government policies and legislation. The same query of course also applies to Manitoba Hydro in this and other projects. Such information was not part of the EIS or the hearings. Currently, Licence No. 2699 does not include a provision to ensure that the Wuskwatim Generating Station Project is in keeping with the policies, legislation and regulations that are included in the above mentioned strategies. A requirement to report annually on public policy relevant to the Wuskwatim Generating Station Project should be included as a separate Clause in the licence.

The comments above also apply to climate change policy, as discussed below.

Wuskwatim Generating Station EIS Guidelines Section 6.1 Physical Environment & Section 8. Environmental and Socio-Economic Effects and Mitigation

Section 6.1 states that "The environmental impact statement shall describe: general climate conditions with sufficient data provided to predict the effect of the project on climate and the potential effects of climate on the project"

Section 8 states that "The environmental, socio-economic and cultural effects and associated mitigation shall relate to each phase of the project including site preparation, construction and post construction, operation, maintenance and eventual decommissioning and should assess all components of the environment in the context of section 6. DESCRIPTION OF THE EXISTING ENVIRONMENT"

The analysis of impacts of the project on climate change and of climate change on the Wuskwatim projects was one of the weakest elements of the Wuskwatim EIS and review. Consequently it was a significant element in the CEC hearings. This was more than noted in the presentation by Elizabeth May during the Wuskwatim hearings. These deficiencies were not addressed as part of the review, accordingly, Licence No. 2699 should include a public reporting mechanism concerning climate change impacts and greenhouse gas emissions and monitoring of climate change impacts of and on the project. We note this would be a significant precedent for Manitoba, given our province's clear pro Kyoto stance. Currently Canada's green house gas inventory shows Manitoba Hydro emissions as private. This needs to change with the licence for Wuskwatim.

Wuskwatim Generating Station EIS Guidelines Section 6.4.1 Land and Water Use & Section 8. Environmental and Socio-Economic Effects and Mitigation

Section 6.4.1 states that "The environmental impact statement shall provide: . . . identification of any existing areas or areas under consideration for protected area status under Manitoba's Protected Areas Initiative."

Manitoba Wildlands commented on the deficiencies concerning information in the EIS regarding protected lands and the assessment of effects and mitigation of effects resulting from the Wuskwatim projects. These deficiencies were never satisfactorily addressed, the information was never augmented, and Licence No. 2699 does nothing to ensure accountability (through reporting) or ensure public scrutiny of possible impacts on existing protected areas or the ability to establish future protected areas. This omission is in contradiction of previous environmental licences issued under Manitoba's *Environment Act* in the same region in which the Wuskwatim Generating Station will be located.

We would note that self assessment by a proponent is only credible and valid if the whole record is considered in issuing a licence. The identification and confirmation of the project area is best done on an independent basis, as proponents can serve their own interests if left to identify a project area structure to avoid potential impacts. We believe the *Environment Act* allows the minister to define project area especially if there are specific environmental or social impacts and risks to be addressed in the review and possible licence.

All of our efforts over 3 years to have accurate protected areas information included in the EIS, in order to fulfill the EIS Guidelines resulted in a failure on the part of Manitoba Hydro to even include existing public policy in its technical information. When a public utility, or entity in the public sector is also a proponent for a significant public work, then the public policy of the jurisdiction should be clear in all aspects of their work product and planning. And the Licence

should clearly link the EIS Guidelines as intent in the licence language, in order to fulfill public policy.

9) *NCN Project Development Agreement Referendum*

As has been stated numerous times by the Nisichawayasihk Cree Nation (NCN), Manitoba Hydro, and the Manitoba Government, the Wuskwatim Projects will not proceed without the support of NCN community members. The NCN vote to ratify the Wuskwatim Project Development Agreement (PDA) has taken place, however, there are concerns about the voting process and currently, an appeal process is underway with respect to the PDA vote. Given the proponents' and government commitment not to proceed until NCN community support for the Wuskwatim projects has been established, the issuing of Licence No. 2699 is inappropriate and its finalization should be delayed until all issues with respect to the PDA vote have been resolved. In particular, issuing the Manitoba *Environment Act* licence before the PDA appeal period was over, and then conducting review of the licences before the PDA appeal period was over are actions in bad faith.

Specifically, we are concerned that there is no public balloting record for the NCN PDA vote. Public balloting records are standard procedures for Elections Canada and Elections Manitoba, and are intended to ensure accountability and integrity of the process. As well, reports by the NCN Election Officer and election observers contain no information regarding the balloting or vote count other than at NCN and Thompson; information about vote count at the other 4 sites is absent. There is no indication as to whether an official count was done as is usual in elections (i.e. where all ballots are counted in one place). Both election reports indicate that various individuals were refused a ballot, but do not provide information or records regarding who, why or how many were refused a ballots. There also appears not to have been an ability to swear entitlement to vote, as is standard practice. Licence No. 2699 should be suspended pending an investigation of all of the above issues.

10) *Aboriginal Rights and Consultations*

The constitutionally required consultations with Aboriginal peoples regarding the Wuskwatim Generating Station Project (Section 35 of the Canadian Constitution) are not yet complete. At this time it is not clear whether the required consultations regarding the rights and concerns of other Northern Flood Agreement First Nations are completed. At the very least, if these consultations are in fact completed the government of Manitoba should make this known before issuing the licence(s). It is inconceivable that the Wuskwatim Generating Station Project should be allowed to proceed prior to the completion of these consultations. By issuing the environmental licence for the project, the government is prejudging the outcome of consultations and is diminishing the importance of constitutionally required consultations. Surely Manitoba does not intend to take on such a risk. The environmental licence for the Wuskwatim Generating Station Project should not be finalized until consultations as per Section 35 of the Canadian Constitution are concluded.

The environmental licence for the Wuskwatim Generating Station Project should not be issued in light of Manitoba Hydro's failure to fully compensate individuals for damages (past and ongoing) from previous hydro development in the project area, in particular for those individuals impacted who are or were members of the Nelson House First Nation. This does pertain to the licence being appealed, as there is no clarity on compensation for damages from Wuskwatim either. Compensation is due to environmental impacts, and therefore does pertain to the issuing of a Manitoba *Environment Act* licence.

The Clean Environment Commission also made a recommendation in its 2004 report to the Minister of Conservation on the Wuskwatim Hearings concerning the need for Manitoba Hydro to resolve outstanding issue related to previous hydro development. Recommendation 7.6 states,

*The Clean Environment Commission recommends that:
The Government of Manitoba require Manitoba Hydro to resolve all outstanding issues with regard to the Churchill River Diversion, the Augmented Flow Program and Lake Winnipeg Regulation. Following resolution of these issues, Manitoba Hydro should apply for the appropriate final licences for these three operations under The Environment Act and The Water Power Act as soon as possible.*

Minister Struthers has asserted in his June 21, 2006 letter to the CEC that the resolution of outstanding past issues is beyond the purview of the *Environment Act*, and that the matter has been referred to other government departments. Notwithstanding this argument, we suggest that the Minister in fact does have the political power to carry out CEC Recommendation 7.6 in that the licencing of the Wuskwatim Generating Station Project could simply be delayed until these outstanding issues have been resolved, similar to the way the Minister delayed licencing decisions on the Wuskwatim projects until the vote concerning the Manitoba Hydro / NCN Wuskwatim Project Development Agreement had taken place.

Moreover, it is not good enough to indicate that resolution of these past compensation issues has been referred to other government departments. Manitoba Conservation and the Manitoba Government need to be explicit as to accountability, reporting, and time lines to solve these issues.

The failure by Manitoba Hydro to clearly articulate, as a crown corporation, its fiduciary responsibilities with respect to Wuskwatim, the failure by Manitoba Hydro and the Manitoba Government's to fulfill the Northern Flood Agreement in advance of the Wuskwatim projects, plus the lack of benefits to Aboriginal people resulting from the logging to be done to clear the right-of-way for transmission corridors are also grounds for appeal of the environmental licence for the Wuskwatim Generating Station Project.

11) 'Quality of Life'

On page 2 of Licence No. 2699, prior to Clause 1, there is a reference to “requirements intended to . . . ensure that the environment is maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for present and future Manitobans.” We would ask, given that this is an **environmental** licence, why priority is not also placed on concurrently maintaining a high quality of life for species and biodiversity? Or is this in fact included under the reference to ‘sustaining the environment’? This is not a frivolous question, as it goes to the heart of the purpose of an environmental licence. We would submit that the absence of specific language as to protection species and biodiversity is a fundamental flaw and should be addressed immediately. Please see our earlier remarks about including social recommendations from the CEC in this licence.

Manitoba Wildlands appreciates the opportunity to participate in this appeals process and we trust that our comments will be considered carefully. We have participated in this process since late 2001 when the Wuskwatim proposals were filed under the *Environment Act*. Most of our work products, links to presenters, sets of evidence, etc regarding the Wuskwatim projects are posted on <http://www.energymanitoba.org>.

We look forward to receiving a response to our appeal letter that includes acknowledgement of each basis for the appeal and detailed responses to the concerns raised in the above paragraphs.

Yours truly,

Gaile Whelan Enns
Director, Manitoba Wildlands

cc. Mr. Terry Sargent, Chair, Clean Environment Commission