EXHIBIT # MMF-1004
WUSKWATIM GENERATION
& TRANSMISSION PROJECT
CLEAN ENVIRONMENT COMMISSION

Manitoba Métis Federation

The following Clean Environment Commission Information Requests were provided to the Manitoba Métis Federation with respect to the Wuskwatim Generation and Transmission Projects:

Reference: CEC/MMF EIS – 1

> *Please clarify under what authority MMF represents Metis people in Manitoba.*

The MMF receives it authority to represent the Metis Nation within Manitoba through democratic ballot-box elections.

Reference: CEC/MMF EIS – 2

> *(a) Please discuss how MMF has attempted to open negotiations with Manitoba and Manitoba Hydro.*
> *(b) When did MMF first approach Manitoba Hydro?*

The MMF has attempted to enter into good faith negotiations with Manitoba and Manitoba Hydro for over 30 years. In recent years, since November 1999, there has been correspondence between the MMF, the Ministers responsible for Hydro, and Hydro staff. There have also been meetings between the MMF, the Ministers responsible for Hydro, the Chair of the Hydro Board, President and CEO of Hydro, and Hydro staff.

Reference: CEC/MMF EIS – 3

> *(a) Does the response provided by MH/NCN in CNF/MH/NCN II–EIS–PUBPOL–9a satisfy Manitoba's principles and guidelines of sustainable development? If no, what deficiencies exist? What is required to overcome these deficiencies? What are the implications of these deficiencies?*

No, it does not. As stated in our Submission to the CEC, with respect to Metis Nation consultation and accommodation, contrary to the requirements of the Wuskwatim Guidelines and the Clean Environment Commission, the Wuskwatim Generation and Transmission Projects EIS, the supplemental filings, and the responses to interrogatories are deficient and do not satisfactorily incorporate, consider, or reflect Sustainable Development Principles 3(3) and 3(4) or others.

> Sustainable Development Principles 3(3) and 3(4) state:
>
> > 3(3) Manitobans should understand and respect differing economic and social views, values, traditions and aspirations.

> 3(4) Manitobans should consider the aspirations, needs and views of the people of the various geographical regions and ethnic groups in Manitoba, ***including Aboriginal peoples***, to facilitate equitable management of Manitoba's common resources (***bold-italics: our emphasis***).

Meeting these Principles require an understanding of and respect for differing economic and social views, values, traditions and aspirations as well as consideration of the aspirations, needs, and views of the **Metis Nation** as one of the distinct **Aboriginal peoples** within Manitoba. This cannot be done when studying a Northern Affairs Community which is made up of many Aboriginal peoples as well as non-aboriginals without making a differentiation between firstly aboriginal and non-aboriginal interests, and then secondly further differentiating between the distinct Aboriginal peoples (Indians (non-status and status), Inuit, and Metis). How can you respect the views of an Aboriginal people if you lump Aboriginal peoples together as if they are some homogeneous group with no distinctive traits and deal with them through mayor and council, a government created advisory body to the Minister of Northern Affairs.

The terms "Aboriginal peoples" and "Aboriginal community" as defined in Supreme Court Decisions and the Constitution Act 1982 (see CEC submission for details), makes it clear that there is a ***distinct Metis people, known as the Metis Nation, and there is a separate, identifiable, and distinctive, Manitoba Metis Community***. Therefore, the term "Aboriginal peoples," as used throughout Manitoba's sustainable development principles and guidelines, legislation and regulations, policies, necessary approvals, land and resource related agreements and current planning initiatives, including strategies and policies, must be interpreted as recognizing, and affirming the Metis Nation as one of Canada's distinct Aboriginal peoples. For the purposes of consultation, accommodation, and meeting the various items above, an Aboriginal Community is not a northern affairs community made up of 50% plus one 'aboriginal people' (Indians (status and non-status), Inuit and Metis).

Additionally, wherever the proponents utilize NCN to demonstrate and justify that they are meeting the spirit and intent of Sustainable Development's principles and guidelines through local input, there has been a complete omission of the Manitoba Metis Community interests in the project region. It is the MMF's position that the proponents have only partially met these principles and guidelines: 1. Integration of Environmental and Economic Decisions; 2. Stewardship; 3. Shared Responsibility and Understanding; 4. Prevention; 5. Conservation and Enhancement, and; 7. Global Responsibility.

As an example, under principle 5. Conservation and Enhancement:

> "(b) Manitobans should harvest renewable resources on a sustainable yield basis"

Hydro in its answer to an interrogatory by *CNF/MH/NCN II–EIS–PUBPOL–9a* states:

> "Measures will be taken, to the extent feasible and within the control of NCN and Hydro, to ensure that harvest of natural resources is within a sustained yield basis."

The area in question is part of the traditional harvesting area of the Metis Nation, and begs the question why the proponents have not discussed this issue with the collective that holds the harvesting right that may be infringed? Again, this is but one example of how the Sustainable Development Guidelines and Principles have not been and cannot be met vis a vis the Metis Nation. Again the MMF asserts that in addition specifically to Principle 3(3) and 3(4), the proponents have not met Sustainable Development Principles 1, 2, 4, 5 and 7.

Reference: CEC/MMF EIS – 3

(b) *In your view, what constitutes meaningful and proper consultations with the Métis Nation?*

(c) *In your view, what are the responsibilities of the proponent, the federal government and the provincial government in the consultation process being advocated?*

(d) *In your view, what are the implications of the lack of meaningful and proper consultation with the Métis Nation to the CEC review of the Wuskwatim projects?*

(e) *In your view, what is the role of the CEC in relation to the consultation process being advocated?*

What triggers the duty to consult?

The duty to consult is triggered when government is considering authorizing a development proposal that would affect lands or resources in an area where Aboriginal people have asserted rights or title. The Supreme Court of Canada has held that there is "always a duty of consultation". The court held that the nature and scope of the duty of consultation would vary with the circumstances but that the minimum acceptable standard of consultation must be in good faith and "with the intention of substantially addressing the concerns of the aboriginal peoples."[1]

What is the source of the duty to consult?

The duty to consult arises from the Crown's duty to protect Aboriginal peoples. The Supreme Court has said that Aboriginal peoples are in a special relationship with the Crown, which is grounded in the facts of history.

> The fundamental understanding – the *grundnorm* of settlement in Canada – was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and their successors a replacement

[1] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. at par. 68.

> for the livelihood that their lands, forests and streams had since ancestral times provided them...[2]

This policy of respect and protection, based on factual circumstances, was in turn reflected in legal principles, including those in respect of the Crown's obligations. These common law principles have continued to be affirmed and applied by the courts, because it is understood that the economy, culture, way of life and survival of Aboriginal peoples are rooted in, and sustained by, their relationship to territorial lands and resources. The duty to protect Aboriginal interests is a general principle intended to apply throughout Canada as federal common law. It is an essential component of the unique constitutional relationship between the Crown and Aboriginal peoples.

It is this duty to protect Aboriginal interests that is the source of the duty to consult. If the Aboriginal interests that sustain an Aboriginal people's culture and economy are put at risk, the survival of that people is at risk. The primary purpose of the duty to consult is to prevent harm to Aboriginal interests before it occurs. The purposes of the constitutional protection in s. 35 of the *Constitution Act, 1982* will not be achieved if that duty is only defined and enforced after the harm occurs, when effective remedies are usually not unavailable.

> ...the existence of aboriginal interests should inform governments who make decisions which are likely to affect those interests...Given the extreme importance of [their] decision ... the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights. Accordingly, they should have been careful to ensure that they had effectively addressed the substance of the ... concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited ... should be developed.[3]

Who must consult?

The Supreme Court of Canada has said that the Crown has a duty to consult. This duty to consult attaches to the Crown in right of Canada and to the Crown in right of a Province.

The duty of consultation rests with all parties who are contemplating authorizing actions that will have an effect on lands or resources in the area where Aboriginal people have asserted rights or title. Government itself and any government entities established to facilitate the implementation of such activity would carry that duty, which is usually implemented through the environmental assessment process. The proponents of such projects also have a duty to consult pursuant to the guidelines for which are typically set out under the environmental process.

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[2] *R. v Van der Peet,* [1996] 2 SCR 507 at para. 272, (per McLachlin J., dissenting on other issues)

[3] *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* [2000] B.C.J. No. 1301 (B.C.S.C.) at par. 130; aff'd [2002] B.C.J. No. 155 (B.C.C.A.); appeal scheduled to be heard March 24 & 25, 2004 at the S.C.C.

Such guidelines usually require the proponents to provide information about the effects of the proposed project by, among other things, environmental impact statements, information requests, written submissions and public hearings.

In the circumstances of the Wuskwatim Generation Project and the Wuskwatim Transmission Project, there are three main parties involved: (1) the proponents - Manitoba Hydro and the Nisichawayasihk Cree Nation (NCN); (2) the Government of Canada; and (3) the Government of Manitoba. In addition both government parties have established subsidiary bodies – i.e.: the Project Administration Team and the Clean Environment Commission. The Government of Canada is a participant because its environmental process is harmonized with and carried out by means of the same process. The reality is that the duty to consult must be carried out "with a view to substantially addressing the concerns" of the Aboriginal peoples who stand to be affected by a project. It is likely not possible to neatly distinguish responsibilities as between these bodies. That, in effect is simply an exercise in passing the buck. The better approach would be for each body to assume that the information must be acquired and that each must do the acquisition within its mandate and realm.

Who must be consulted?

Consultation must be with the representatives chosen by the Aboriginal people who assert rights or title in the area to be affected by the project. The assertion of Aboriginal rights or title implies the existence of an Aboriginal collective. This is because Aboriginal rights and title are collective rights. An individual member of an Aboriginal collective can exercise Aboriginal rights but Aboriginal rights are not individual rights. Therefore, when a project has the potential to affect Aboriginal rights, the duty to consult must be with the duly chosen representatives of the Aboriginal collective. Again, because Aboriginal rights are collective rights held by the Aboriginal collective, the duty to consult cannot be implemented by consulting with representatives who are not chosen by the collective. Nor can the duty to consult be implemented by consulting with individuals, who, although they may be members of the collective, have not been chosen to speak on behalf of the collective for this purpose.

In the circumstances of the Wuskwatim projects, consultation must be carried out with all of the Aboriginal peoples who assert Aboriginal rights or title in the affected areas. While, it is certainly appropriate for the proponents and government to consult with municipalities, businesses and others who have vested interests in the area affected, that does not fulfill the duty to consult with the Aboriginal collectives affected. First, these bodies have only advisory mandates. All decisions must be approved by the Minister and can be vetoed by the Minister. In view of this, consultation by the Minister with Mayor and Council can be seen as the Minister consulting with himself.

Further, none of these entities has jurisdiction or authority with respect to Aboriginal rights. This is especially so with respect to municipal authorities whose jurisdiction stops at municipal boundaries. Such statutory bodies have no

authority over Aboriginal rights – especially those that are exercised outside municipal boundaries – which would be the case with most harvesting rights. Finally, those bodies are not established to deal with Aboriginal rights or title.

In fact, most Aboriginal peoples have specifically created entities to represent their Aboriginal collective. The Manitoba Métis Federation is just such an entity. MMF locals have councils that are elected through ballot box elections. The MMF has asserted that it represents the interests of the Métis Nation in Manitoba and in particular that it represents the interests of the Métis in the areas that stand to be affected by these projects. Therefore it is appropriate for the proponents and government to consult with the designated representatives of MMF with respect to the interests of the Métis Nation.

What are the substantive and the procedural components of the duty to consult?

Consultation has a substantive and a procedural requirement. The substance of the duty to consult also includes two inter-related components – consultation and accommodation. The Crown cannot fulfill its duty without satisfying both the substantive and procedural requirements of consultation and accommodation.

The Supreme Court of Canada said that there is always a requirement to consult when Aboriginal rights may be infringed. [4] Consultation is constitutionally mandated and does not flow from statutory provisions, although it will usually be triggered by a pending exercise of statutory power. The decision of the Supreme Court in *Adams* goes further, requiring statutory regimes in respect of land and resources to provide rules for complying with the duty:

> …In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights…[5]

Consultation is intended to fulfil government's obligation to inform itself about the effects that a proposed development would have on an Aboriginal people. That may not always be obvious. For example, most people do not have the knowledge or experience to understand the profound ecological, cultural or economic impacts caused by building a hydro project or transmission lines through the traditional harvesting grounds of an Aboriginal people. The Aboriginal people have a role to play in providing that information and analysis, but they can only do so effectively if government and the proponent are genuinely seeking to inform themselves.

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[4] *Delgamuukw, supra* at para. 168

[5] *R. v Adams,* [1996] 3 SCR 101 at para. 54

As stated above, the duty to consult is triggered when government is considering a development proposal that would affect lands or resources in an Aboriginal people's territory. At that stage the substantive content of the Crown's duty to consult means that the Crown must inform itself about the Aboriginal interests that will be affected, the significance of such effects, and how those could be mitigated.

That should be done through a neutrally administered process dedicated to this purpose, in which the chosen representatives of the affected Aboriginal people, government and the proponent participate. The time and resources required for consultation will vary with the circumstances. The Crown and the Aboriginal people should jointly design the process. The Aboriginal people must have the resources to be able to participate effectively.

Compliance with consultation procedures would not by itself fulfill the fiduciary duty, which is ultimately substantive and intended to protect and accommodate Aboriginal interests. This is why the duty to consult includes a duty to accommodate. Accommodation is intended to fulfil the Crown's obligation to exercise its authority so as to protect and foster the sustainability of Aboriginal peoples. Effective accommodation measures will vary with the circumstances. The goal of accommodation is not to trade off or surrender Aboriginal interests and rights, but to ensure they will survive and can be effectively exercised. The minimal impairment principle provides guidance on the meaning of accommodation. Various types of measures could be used to provide for accommodation, including changes to the design or timing of a development, the creation of joint management regimes based on sustainability principles, or economic participation agreements.

Accommodation measures should be designed and implemented through negotiations between the Crown and the affected Aboriginal people through negotiated agreements. In order for accommodation negotiations to be effective, the proponent will normally need to participate.

What is the Role of the CEC in relation to the consultation process being advocated?

It is not the position of the MMF that the CEC itself has an obligation to go out and consult with the MMF. Rather, the CEC has the obligation to ensure that the required information is provided in the EIS. The obligation arises because the CEC has a mandate to review and provide recommendations on the potential effects of the project. The CEC is a body with oversight responsibilities, in other words, a body with the mandate to assess and make recommendations on the totality of information (the EIS, public submissions, IRs, etc).

In this way, the CEC must surely have the responsibility to advise the decision-makers as to whether the necessary information is in place. How, could a body such as the CEC make recommendations with respect to the effects of the project

if it has no information on an entire people and it has been notified that it is missing the relevant information? It would seem logical therefore, that at the very least the CEC would have the obligation to inform the Ministers that it is missing information in this regard and that its recommendations are made despite the lack of such information. In any event the Ministers must be informed from all parties that the Métis have objected consistently, on the record, to their exclusion from the consultation process.

Implications if there is no meaningful and proper consultation with the Métis Nation?

When is consultation improper? When is there no meaningful consultation? There is no meaningful or proper consultation if the above components are not met. Generally, there will be no meaningful consultation if the government and the proponent are not genuinely seeking to inform themselves about the Métis Nation's interests that will be affected, the significance of such effects, and how those could be mitigated. Evidence that there is no genuine intention in this regard would be readily shown by the refusal to deal with the duly chosen representatives of the Métis Nation.

At minimum, accommodation requires the Crown to refuse to authorize proposals that would (1) undermine or endanger Aboriginal interests or (2) alienate or encumber such interests that need to be secured for the Métis Nation to sustain itself as an Aboriginal people.

If the Crown chooses to exercise its legal authority in the absence of meaningful consultation and an agreement on accommodation, any authorization that it grants will suffer from a fundamental legal defect. If the Crown chooses to authorize the project without meaningful consultation, it proceeds at its peril.

Reference: CEC/MMF EIS – 4

(a) *What issues brought forth during the survey and consultations have not been addressed by MH?*
(b) *How should these items be addressed?*

As there was no development of a consultation process or study methodology to ascertain the impacts of the Wuskwatim Projects on the 'Metis people' with the MMF, we do not know the full effects of the proposed projects on our people. Our survey and consultation of our people, as stated in our submission, is not intended as a substitute for meaningful and proper consultations with the Metis Nation within Manitoba or to provide data and analysis on the effects of the proposed Wuskwatim Projects on the Metis People.

However, our people have told us the following:

1. That the Metis Nation within Manitoba, their lands and resources have been and continues to be affected by Manitoba Hydro projects;

2. That the Metis Nation within Manitoba and their communal governance system have been totally ignored and improperly engaged in the consultation process, and;

3. That the Metis Nation within Manitoba believes that the Wuskwatim Projects will lead to a further erosion of their culture because of the destruction to their lands, waters and resources upon which their Metis Aboriginal Title, Rights and interests depend, and that these infringements must be identified and compensated before a license is granted.

Reference: CEC/MMF EIS 5

In your view, how should the Wuskwatim projects be altered to reduce or eliminate negative impacts?

These workshops are not a substitute for meaningful and proper consultations with the Metis Nation within Manitoba or to provide data and analysis on the effects of the proposed Wuskwatim Projects on the Metis People. Again, the purpose of the questionnaire was to assist the MMF in preparing a Metis position for the public hearings. As part of a full and proper consultation and accommodation process with the Metis Nation, further studies must be done.

Reference: CEC/MMF EIS 6

Please provide the results for each of the yes/no questions (i.e., percentage response for each "Yes", "No"), not previously provided in the report.

Please see attached summary.

Reference: CEC/MMF EIS 7

(a) *Are the workshop results consistent with the findings in the EIS documents for the Wuskwatim projects? If yes, how? If no, why not?*

(b) *Based on the workshop results, what are the apparent physical, biological, social, economic and cultural effects of the Wuskwatim projects on the Metis Nation, communities and members?*

(c) *Have the apparent physical, biological, social, economic and cultural effects on the Metis Nation been identified, assessed and evaluated* in the Wuskwatim EIS documents? Please explain your answer.

As earlier stated, these workshops are not a substitute for meaningful and proper consultations with the Metis Nation within Manitoba or to provide data and analysis on the effects of the proposed Wuskwatim Projects on the Metis People.

Due in part to inadequate financial and time resources, the MMF did not attempt to receive nor gather information in order to assess or compare the physical, biological, social, economic and cultural effects of the Wuskwatim projects on the Metis Nation outlined in the study.

What we did determine is that many are concerned that because the Metis were left out of planning and participating in the proponent's EIS studies, that they do not know the full extent of the effects on themselves or the Metis Community at large.

The key point is that the term significant has many connotations, and the Metis believe that you cannot put a hydro dam in the center of a large river, blocking it 100% to fish passage, flood a fore bay and regulate the waters, no matter how small, and cut a transmission line corridor through relatively virgin landscapes (with all the access problems associated with it), and be able to call these insignificant effects. The majority of the Metis surveyed believe that there will be affects on their lands and waters and their lifestyle, and without further study to assess Metis specific impacts, our people generally believe that some will be significant, and will infringe on our Section 35 Aboriginal Rights.