

An Agenda for Change: Lake Winnipeg Regulation and Water Power Governance in Manitoba

Closing Arguments of the
Consumers' Association of Canada Manitoba Branch

Presented to the Clean Environment Commission
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EXECUTIVE SUMMARY

The Consumers' Association of Canada Manitoba Branch (CAC Manitoba) is pleased to present its final recommendations related to the Lake Winnipeg Regulation hearing.

The recommendations of CAC Manitoba are driven by its conclusions that:

- it is not appropriate to immunize LWR from environmental assessment for another eleven years given ongoing and unstable adverse effects as well as material uncertainties relating to climate change and ongoing human developments
- it has not been established that the ongoing and evolving effects of LWR are socially, environmentally and economically sustainable
- the existing governance regime is not acceptable in a Province committed to sustainability and transparent public processes
- there is an urgent need to restore public confidence in LWR governance by actively engaging with policy communities
- enabling LWR to escape meaningful environmental review for another eleven years would invite an ongoing refusal to environmentally regulate other legacy Hydro projects

Given its recognition that the status quo cannot endure, the recommendations of CAC Manitoba are intended to:

- assist in the restoration of public confidence and improve outcomes by initiating a meaningful engagement process
- create a framework for robust adaptive management by initiating an environmental assessment
- achieve better balance in governance and outcomes through meaningful law reform

CAC Manitoba appreciates the opportunity to participate in this proceeding.

INTRODUCTION

The Interim License and the Absence of Environmental Analysis

Faced with increasing electricity demand and pressure to assuage Lake Winnipeg flooding pressures, the federal and provincial governments reached an agreement in 1966 to develop the Nelson River hydroelectric project (the project). Perhaps the two most notorious elements of this project are Lake Winnipeg Regulation (LWR) and the Churchill River Diversion (CRD) given their significant and interrelated, environmental and social effects.

Despite the impassioned efforts of downstream First Nations to protect their traditional lands and a recognition that LWR/CRD would likely have significant effects, the pre-project time frame was tainted by the absence of meaningful impact analysis and a marked lack of consultation.¹ Certain analysts associated with the planning process characterized remote First Nations as a “problem” with “no future” in their current location.²

Notwithstanding these fundamental planning flaws, the Province granted Manitoba Hydro an LWR Interim Licence on November 18, 1970 under the *Water Power Act (WPA)*. Two years later, a Supplementary licence was granted. On August 1, 1976, the LWR project was completed and Manitoba Hydro began regulating Lake Winnipeg.³

Hydro has continued to operate LWR under an Interim Licence to this date. It is accorded significant operating discretion. Only in 2010 did Manitoba Hydro apply for a Final Licence.

Hydro does not seek to correct the tainted original licensing process. Instead, it seeks finalization of the licence without any changes to the terms. Given the legislated 50 year maximum, the Final licence would expire on or before August, 2026. Manitoba Hydro acknowledges that a relicensing process will likely happen prior to that time.

The CEC Hearing and the Continued Exclusion of Meaningful Environmental Analysis

According to the *WPA*, Manitoba Hydro is “entitled” to a Final Licence “upon implementation and compliance with the Interim Licence.” However, in an apparent response to concerns about the alleged effects of LWR, the Minister of Conservation and Water Stewardship asked the Clean Environment Commission (CEC) to hold public hearings.

The Referral Letter and Terms of Reference (TOR) for the CEC hearing appear to implicitly assume that Manitoba Hydro has complied with the terms of the interim license. There are no articulated criteria setting out how compliance will be judged. Instead, the CEC is invited to “summarize and make public comment on the concerns raised” about the LWR Project and Lake Winnipeg.⁴ Much of the commentary to date reflects an ongoing concern with the

¹ Known History at p 2.

² “Whenever possible, the provincial government tried to bypass or dismiss the legitimacy of the NFC as the voices of affected First Nations communities.” : Letter from HP Daniel Van Ginkel and Ralph Hedlin to Dr B Kristjanson (May 15 1967) found in Ginkel Associates and Hedlin, Menzies and Associates Ltd, *Transition in the North – The Churchill River Diversion and the People of South Indian Lake*, prepared for Manitoba Development Authority, Winnipeg (Manitoba, 1967) np cited in “Known History” at p 56 also see *ibid* at p 33.

³ The LWR project includes the Jenpeg Generating Station and Control Structure, three excavated channels (2 mile, 8 mile and Ominawin Bypass) and a dam at the outlet of the Kiskitto Lake.

⁴ Terms of Reference, August 2011 at p 3.

alleged effects of the project upon downstream and upstream communities.

The TOR also makes the bold suggestion that “*The Environment Act* does not apply to the Lake Winnipeg Regulation project as it was completed before this legislation came into force.” No legislative authority is cited in support of this claim. The statutory justification for this claim remains unclear and highly questionable.⁵

The Broader Regulatory Picture

LWR is only one of a number of legacy Hydro projects that appear to have escaped meaningful environmental review. The absence of modern environmental oversight for much of the Manitoba Hydro system raises important issues in terms of the environment, transparency and public confidence in our regulatory system.

While the LWR hearing has offered an important opportunity to review Manitoba’s water governance regime, it also has demonstrated important environmental loopholes and regulatory blind spots.

As our Province considers an appropriate regulatory future for the LWR, a series of threshold questions must be asked:

- Given the failure to conduct an initial environmental analysis is it appropriate to enable LWR to escape environmental licensing for another eleven years?
- Are the effects of existing operations socially, environmentally and economically sustainable?
- Is the existing governance regime acceptable for a Province committed to sustainability and transparent public processes?
- What are the implications for communities and for credible public processes of a perpetuation of the licensing status quo for another eleven years?
- Does enabling LWR to escape meaningful environmental review invite a continued failure to regulate other Hydro projects?
- What are the implications for the Hydro brand in export markets of an ongoing failure to exercise environmental licensing and oversight over significant portions of the Hydro system?

WE ARE FAILING OUR STEWARDSHIP DUTIES

*As Manitobans, as Canadians, we have been given the responsibility of being the custodians of this great Lake. To date I feel we have somewhat failed in this regard.*⁶

According to the *Principles and Guidelines of Sustainable Development*, 'stewardship' refers to the notion that “the economy, environment, human health and social well-being should be

⁵ In fact, a strong argument can be made that the Minister has jurisdiction to licence LWR under the *Environment Act* by virtue of s. 12(2) b). “Where **no existing limits, terms or conditions exist** by licence or regulation; the minister may require any person operating an **existing Class 3 development** to file a proposal with the department, to be considered under this section.” (emphasis added)

⁶ Mike Mason, March 11, 2015 LWR Hearing at p 326.

managed for the equal benefit of present and future generations.”⁷

A dominant theme of the LWR hearing is the failure of stewardship and the consequential adverse effects on the people, waters and lands of the Nelson River and Lake Winnipeg.

Material concerns have been alleged in this proceeding relating to:

- the deterioration in downstream water quality⁸
- a steep decline in animal and aquatic species⁹
- losses due to higher water levels and flooding¹⁰
- erosion of shorelines¹¹
- loss of marshlands and beaches,¹² and
- unsafe and uncertain travel conditions.¹³

The intensity of the concerns in Nelson River communities was well expressed by one of the Northern presenters:

*And then she [our grandmother] noticed the water, the colour of the water. She asked us how come the water looks like that, is it dying?*¹⁴

In terms of the upstream communities potentially affected by LWR, Lake Winnipeg's status as the “Most Threatened Lake of 2013”¹⁵ has been implicitly acknowledged by a flurry of well-meaning activity undertaken by Governments, NGOs, consortiums, stewardship boards and Lake Friendly Accords.

Licensing inaction in the face of community frustration

But amid this frenetic activity, there has been an eerie oasis of licensing inaction. Despite its notoriety, LWR has operated on an interim WPA license for almost 40 years. It continues to escape meaningful environmental assessment.

⁷ *Principles and Guidelines of Sustainable Development* at s.2.

⁸ Our people will tell you that the water quality, both raw and potab le, has become much worse since the 1970s..It has become much dirtier, brown, cluttered with debris and algae ridden.”: Chief Bland, York Landing, January 15 2015 at p 17.

⁹ “When you have water on the land....the fur earing animals move... Animals get sick....”: Jason Cook, Thompson, January 12 2015 at p 25.

¹⁰ “...part of the rationale was to reduce flooding on the southern basin. It hasn` t reduced flooding up here.”: Heidi Cook , Grand Rapids, January 21 2015 at p 52.

¹¹ “And I keep telling them, due to the high waters and that, our land base is getting smaller and smaller every year.”: Derrick Gould, Winnipeg, March 25 2015 at p 1574.

¹² “...Netley marsh, as it is now, is hardly there anymore. The centre channel is probably four times as wide as it once was.”: Laurie Hunt, Gimili, February 5 2015 at p 43.

¹³ “...the lake is very dangerous due to the strong current...And we`re very fearful of the water, the system, the lake, it`s very dangerous...But somehow we live with that strong current and the high water level.”: Elder Henry Traverse, Winnipeg LWR Hearing, March 25 2015 at p 1654.

¹⁴ Nellie Redhead, York Landing, January 15 2015 at p 51.

¹⁵ According to the Global Nature Fund.

As noted by a former Manager of the Water Licensing Program and Water Resource Branch:

*the main focus of the WPA and licences is the effective and efficient development of waterpower based on the storage, control, and use of water in Manitoba's rivers and lakes. The WPA and licences have not been applied toward assessing or mitigating project impacts.*¹⁶

Many hearing participants were frustrated with the quiescent¹⁷ failure of Provincial institutions to protect the environment, to investigate and mitigate environmental damage, and to respect the spiritual and cultural importance of water.

While much of the frustration has been directed at licensors, community members also highlighted the important stewardship role of Hydro in reconciling economic, reliability and environmental concerns.

*We understand that Lake Winnipeg is the key asset to the ongoing operations and success of Manitoba Hydro. Their corporate responsibility is to recognize that this is a natural resource that belongs to all of us.*¹⁸

Quiescent licensing is out of step with our public duty to protect

The silence of Manitoba licensing bodies stands in an unflattering light when juxtaposed against significant advances in administrative oversight, environmental protection and water power governance in a number of Canadian and North American jurisdictions.

In contrast to the “hands off” approach to LWR and CRD licensing, there has been a robust evolution of the Public Trust Doctrine (PTD) in the USA. The doctrine recognizes that states and regulators must act proactively to protect and advance public rights and consider cumulative impacts on the environment and its resources.¹⁹ To similar effect, the Supreme Court of Canada has recognized a collective responsibility to protect:

*[O]ur common future, that of every Canadian community, depends on a healthy environment... This Court has recognized that '(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment... environmental protection [has] emerged as a fundamental value in Canadian society...*²⁰

Recognizing this fundamental value, the Yukon Government has acknowledged that it is a “trustee of the public trust” with responsibility “for the protection of the collective interest.”²¹

Quiescent licensing also would appear inconsistent with the recognition in Indigenous legal

¹⁶ Ray Bodnaruk, (2015) at p 7

¹⁷ Quiescent refers to a “state or period of inactivity or dormancy” : Oxford Dictionary Online or “Marked by inactivity or repose”: Merriam Dictionary online; “Quiet inactive, or dormant”: Collins Dictionary Online.

¹⁸ Thora Palson, Gimili, February 5, 2015 at p 9.

¹⁹ *In Re Water Use Permit Applications*, 9 p 3d 409.

²⁰ *British Columbia v Canadian Forest Products Ltd* 2004 SCC 38 at para 7 [Canfor].

²¹ *Environment Act*, RSY 2002, c. 76, s. 38,

traditions of our responsibilities towards all Creation²² and recent jurisprudence imposing a duty to act diligently flowing from the Honour of the Crown.²³

This evolution in administrative attitudes and the law highlights the shift in societal values over time. As acknowledged in the Manitoba Hydro filing,

*LWR was evaluated, debated, and constructed during a time when the social, political, and legal environment was quite different from today. Decisions about LWR occurred in an era when there was much less understanding of the effects of developments on people and the environment, and when there were fewer environmental regulations and legislation.*²⁴

Yet water power governance in Manitoba appears curiously out of step with these modern values. The proposition that a project that escaped proper environmental regulation 39 years ago should continue to enjoy a free pass for 11 more years is highly questionable.

As values evolve, so too should responsibilities and obligations towards the environment.

Uncertainties, knowledge gaps and ongoing destabilization

The CEC hearing reinforced the reality that there are important knowledge gaps relating to the potential effects of LWR. In terms of Western knowledge, CEC experts including Dr. Goldborough and Baird as well as PCN witness Dr. Lutterman highlighted the challenges of making firm conclusions given the lack of data. Core information shortfalls were identified with regard to:

- the implications of material alterations in downstream flow upon the riverine and riparian habitat of the Nelson River²⁵
- ecological flow alternatives which might better balance economic, social and environmental health²⁶
- the effects of compression of lake water levels on erosion around Lake Winnipeg,²⁷ and
- the effects of compression of lake water levels on the health of wetlands and riparian habitats

²² “Anishinaabe law isn’t so much about rights but responsibilities to all of Creation.”:Peter Atkinson cited in Aimée Craft, “Anishinaabe Nibi inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders” (2014) at 11.

²³ Treaty and Aboriginal rights impose a duty on the Crown to act diligently when it assumes discretionary control over a specific Aboriginal interest: *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 14 para 9.

²⁴ The citation will be provided.

²⁵ Final Argument of PCN, May 1, 2015, paras 31 – 44.

²⁶ Given the widespread recognition of the importance of ecological flow analysis in Canada, it is surprising that this is another area where little to no research is available relating to LWR. See also Canadian Science Advisory Secretariat, “Framework for Assessing the Ecological flow Requirements to Support Fisheries in Canada” (2013)

²⁷ Suzek, Baird: “So how much sand is in the near shore environment, what is the geology like, what is the wave exposure like? But certainly in general, and this has been shown on the Great Lakes where there’s been more scientific research, I think, than on Lake Winnipeg...” LWR Transcript, March 23, 2015, pp. 1413-1414, ll. 25, 1-5)

In terms of wetlands, the state of knowledge was described as “trivial in comparison to Laurentian Great Lake.”²⁸ Dr. Goldsborough noted that “we know very little about the coastal wetlands of Lake Winnipeg.”²⁹

Hydro has acknowledged the need to address these knowledge gaps:

*I believe that **it is clear when you come to specific areas there are gaps in our knowledge.** And I think rather than just dealing with those gaps and concerns on an ad hoc basis and hoping that that is sufficient to get us through the renewal process, that a **broader perspective is looked at, and that there is a process laid out so that to the extent that there are gaps, and we talked about some of those today, that we get enough information so that when renewal comes up we've addressed those issues.***³⁰ [emphasis added]

Moving beyond the Western perspective, both Hydro's analysis and the hearing itself were impaired by knowledge gaps relating to traditional knowledge and the failure in the TOR to make appropriate room for the Indigenous worldview.

By contrast, the environmental assessment process related to the Keeyask generating station enabled other ways of knowing to inform debate and influence decision-making.³¹ Allowing for a more equal weighting of Western and Indigenous perspectives set the stage for the richest and most comprehensive environmental impact statement in Manitoba's history.

Although not an EIS, the LWR process takes a step backward in this regard. The hearing record has clearly demonstrated a failure to make room for the perspectives and views of Indigenous people. In the eloquent words of Elder Martha Spence:

*While we commend the government of Manitoba for undertaking a review of the licence, it is evident that the scope of the review and the mandate of the Clean Environment Commission do not provide an appropriate venue for inclusive holistic assessment when considering a final licence for the Lake Winnipeg Regulation.*³²

In addition to knowledge gaps, there are increasing risks and uncertainties relating to climate change and human development. A number of individuals and downstream communities suggest the devastating effects of operations have not stabilized. As noted by a resource user from Norway House:

*There's a lot of unforeseen that is going on in the community. [sic]*³³

²⁸ Dr. Goldsborough, LWR Transcript, March 16, 2015, (p. 929, ll. 18-20) See also Dr. Goldsborough: There have been not many studies done. The Netley-Libau Marsh has frankly been the focus of our work. And prior to that, there had been almost nothing done on the Libau Marsh. So I think it's a safe statement to say we know very little about the coastal wetlands of Lake Winnipeg as compared to the ones on the Laurentian Lakes.” (pp. 936-937, ll. 22-25, 1-7)

²⁹ Transcript, March 17, 2015, at p 936-7

³⁰ The citation will be provided.

³¹ The Keeyask Cree Nations submitted their own environmental assessments based upon the Cree worldview and placed greater weight on traditional knowledge.

³² Martha Spence, Winnipeg, March 26 2015 at 1682. In the face of uncertainty, Manitoba Hydro continued to take the position that “there was no reason to engage in doing ATK studies on Lake Winnipeg” as LWR is a legacy project. Hutchinson, March 11 2015 at p 284. Also see Mr. Cormie, March 11 2015 at p 290.

³³ Langford Saunders, March 24, 2015 at p 1497.

As islands begin to disappear³⁴ and ice roads show marked deterioration, it has become increasingly apparent that unpredictability of the environment is a risk.³⁵ While risks and uncertainties are inevitable, it is necessary to deal proactively with these factors with adaptive management plans.

In the face of an initially flawed process, ongoing and unstable effects and significant knowledge gaps and uncertainties, can it really be said that we should endorse another 11 years of regulatory inaction?

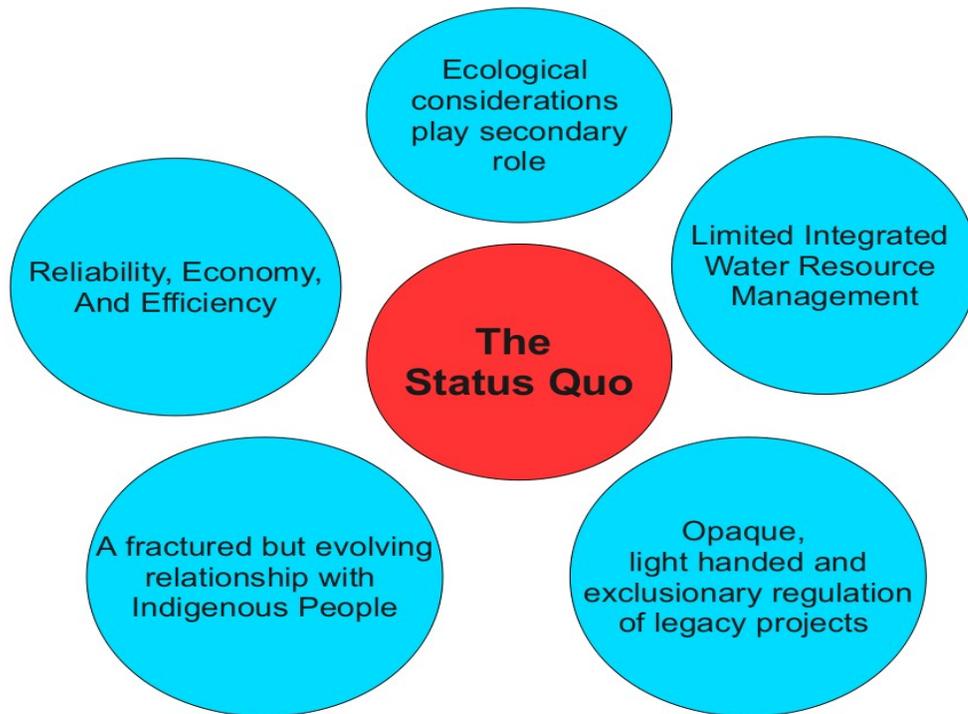
***THERE IS BROAD SUPPORT IN THIS PROCESS FOR LAW REFORM
AND GOVERNANCE REFORM***

The dialogue in this hearing had demonstrated significant distrust and cynicism towards existing governance and licensing. A looming question throughout the hearing has been - can the status quo endure? We understand the status quo to include:

- a fractured but evolving relationship with Indigenous people
- a focus on reliability, economy and efficiency to the relative exclusion of other values
- ecological considerations playing a secondary role to economic and reliability considerations
- very limited integrated water resource management, and
- opaque, light-handed and exclusionary regulation of legacy projects

³⁴ TCN Submission March 26, 2015, p. 6.

³⁵ Chief Ted Bland, LWR Hearing, March 26, 2015, p. 1654.



We have heard many arguments in favour of the status quo. These include the desire to focus on the next licence; the notion that a flawed LWR process is likely to lead to flawed results; and the sense that licensors are relatively powerless given both the existing legislative regime and the executive will.

In sharp distinction, we have heard many concerns with maintaining the status quo including suggestions that:

- the existing system does not listen and is biased
- the current legislative regime is inadequate, and
- Hydro lacks the analytical tools to conduct a modern assessment of operational alternatives

To the credit of the CEC, hearing participants and Manitoba Hydro, the LWR hearing has offered a rare opportunity to “blue-sky” what change in Manitoba might look like. Generally, there has been a surprising amount of agreement about the need for both a 'modern balance' and for a 'road map' to future decisions.

Calls for change have come from most of the parties involved in the LWR hearing, including Manitoba Hydro.

[T]he world around us is evolving and we are learning new things, our social licence to continue to operate as if we were still back in the 1970s is changing, the standards are changing, and I think this is a great opportunity to review all of that.³⁶

³⁶ David Cormie, Winnipeg, March 12 2015 at p 602.

Many representatives from policy communities have agreed that future change should address cynicism and achieve a more equitable and transparent balance.

The change agenda is consistent with the broader dialogue in Manitoba. The Manitoba Law Reform Commission has highlighted the need for a review of the environmental assessment regime in Manitoba. The ongoing Regional Cumulative Effects Assessment (RCEA) is an implicit acknowledgement of the need for a more holistic and integrated understanding of the impacts of hydroelectric activity in Manitoba.³⁷

During the recent Needs For and Alternatives To (NFAT) proceeding, Manitoba's Public Utilities Board (PUB) underscored the reality that the status quo cannot long endure:

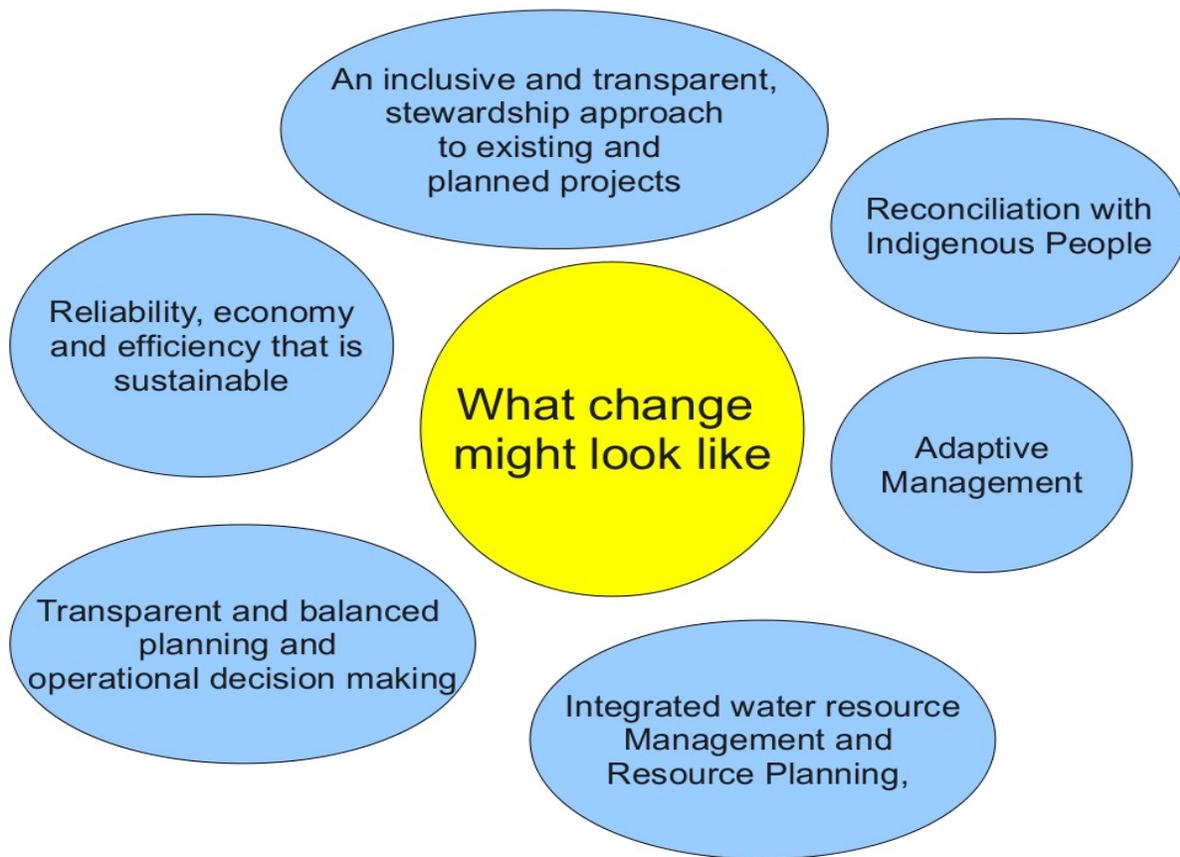
*Manitoba's energy future is uncertain. Wind, solar and energy efficiency technologies, flattening load growth, volatile natural gas prices, climate change and the resulting impacts on water flows, and regulatory changes including the potential for carbon taxes are all creating upheaval in North American energy markets.*³⁸

These wide ranging calls for reform offer some glimpses of the change agenda which might evolve:

- an approach to reliability, economy and efficiency that is sustainable
- transparent and balanced planning and operational decision making
- integrated water resource management and resource planning
- adaptive management
- reconciliation with Indigenous people, and
- an inclusive and transparent stewardship approach to existing and planned projects

³⁷ See Bipole III recommendations which recognized the need for change by recommending a regional cumulative effects assessment. It was said that baseline information was needed before moving forward.

³⁸ PUB, "NFAT Review of Manitoba's Hydro's Preferred Development Plan – Final Report" (June 20, 2014) at p 3.



REFORM IS POSSIBLE - IT HAS BEEN DONE

Law reform focuses on the 'modernization' of law to a) remove outdated or inconsistent provisions; b) improve the administration of justice; c) review judicial and quasi-judicial procedures under any Act; and d) develop new approaches and new concepts which are responsive to the changing needs of society.³⁹

LWR is only the first of 16 legacy projects inviting review. The fundamental policy issue flowing from this proceeding is whether we as a Province are prepared to continue to offer “environmental assessment immunity” for projects with very real environmental impacts. If not, then water governance law reform is necessary.

Recognizing there is no one size fits all model, water governance in Manitoba must be capable of linking development, impacts, western research and traditional knowledge within a framework that is able to adapt in the face of uncertainty.⁴⁰

Examples from other jurisdictions suggest a more coordinated and adaptive water governance regime is possible.

³⁹ *The Law Reform Commission Act*, C.C.S.M. c. L95, s. 6

⁴⁰ According to the OECD, “There is no one-size fits-all answer, magic blueprint or panacea to respond to governance challenges in the water sector, but rather a plea for a home-grown and place-based policies integrating territorial specificities and concerns.”: “The Water Crisis is largely a governance crisis” at p 1.

US Federal legislation is just one example of efforts to create a sustainable balance between economic, environmental and social considerations. In addition to its traditional focus on reliability and economic concerns, the Federal Energy Regulatory Commission is directed to:

*give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.*⁴¹

The North West Territories offers one potential option for those seeking to create a more equitable place for Indigenous people in water power decisions and governance. It has legislatively acknowledged the importance of conserving the well-being and way of life of Aboriginal peoples and expressly recognized a role for both traditional and scientific knowledge.⁴²

Political will and a commitment to restore public confidence are also necessary elements of any meaningful efforts to reform water governance in our Province.

RECOMMENDATIONS

The recommendations of CAC Manitoba are driven by its conclusions that:

- it is not appropriate to immunize LWR from environmental assessment for another eleven years given ongoing and unstable adverse effects as well as material uncertainties relating to climate change and ongoing human developments
- it has not been established that the ongoing and evolving effects of LWR are socially, environmentally and economically sustainable
- the existing governance regime is not acceptable in a Province committed to sustainability and transparent public processes
- there is an urgent need to restore public confidence in LWR governance by actively engaging with policy communities, and
- enabling LWR to escape meaningful environmental review for another eleven years would invite a continued refusal to environmentally regulate other legacy Hydro projects

Given its recognition that the status quo cannot endure, the recommendations of CAC Manitoba are intended to:

- assist in the restoration of public confidence and improve outcomes by initiating a meaningful engagement process
- create a framework for robust adaptive management over the next decade by initiating an environmental assessment
- achieve better balance in governance and outcomes through meaningful made in Manitoba law reform

⁴¹ 16 us 797.

⁴² *Mackenzie Valley Resource Management Act*, 1998, c 25.

Short-Term Recommendation One - Engagement on the CEC Recommendations

*But you know, you have to listen to our people. Our people know the land, they know when the land is hurting. And you know, you don't understand it.*⁴³

The LWR hearing revealed that members of policy communities both downstream and upstream of Lake Winnipeg feel they are not being heard.

For certain communities, the CEC community meetings in January and February 2015 represented the first time anyone from Manitoba Hydro or the Province had ever engaged them on LWR:

*...it has taken 40 years to finally come here and say, look, what do you guys think about the lake?*⁴⁴

Those who are directly affected by the CEC recommendations must be meaningfully engaged. This approach will increase buy-in and strengthen community and institutional capacity for effective decision-making.

What

It is recommended that the Minister of Conservation and Water Stewardship employ his discretionary power under s. 6(5) of the *Water Power Regulation* to designate the Clean Environment Commission to present its findings to the 18 communities where hearings were held. This should be completed by Fall or early Winter 2015.

The purpose of this engagement by the CEC is to receive direct input from affected communities on the CEC recommendations to the Minister. A second round of engagement would allow the CEC to return to communities to further identify knowledge gaps and uncertainties. It would also build trust and foster productive working relationships among policy communities surrounding the Lake.

This additional information could be presented to the Minister in an addendum.

Why

- This round of engagement is a necessary step in clarifying and prioritizing the issues as there was no scoping process for this hearing.
- It is common practice to validate research or notes from engagement sessions with participants. This would reinforce the message that the CEC is making meaningful efforts to engage.
- Further engagement will create buy-in and enhance decision making capacity.

⁴³ The citation will be provided.

⁴⁴ Chief Henderson, Sagkeeng, February 13, 2015 at p 48.

When

- The community engagement should be completed by the Fall or early Winter 2015.

Short-Term Recommendation Two - Establish a Multi-Party Task Force on Water Governance

Why we are not part of those boards or appointments that regulate Lake Winnipeg also.⁴⁵

Our traditional knowledge is never utilized.⁴⁶

A central theme in this proceeding has been a sense of exclusion from decision making whether it is articulated in a criticism of the absence of representation for Indigenous people on decision making bodies or the exclusion of traditional knowledge and views. This sense of exclusion has been exacerbated by distrust towards existing governance systems.

I don't really believe that Manitoba Hydro or the Province has our best interest at heart. They are just going through the motions to get what they want.⁴⁷

The establishment of a multi-party task force would begin to address the sense of exclusion by engaging policy communities on critical issues related to water governance reform. Input from a variety of viewpoints will enrich the reform dialogue.

What

It is recommended that the Minister of Conservation and Water Stewardship establish a Multi-Party Task Force on Water Governance within a period of two years.

Under s. 5 of the *Environment Act*, the Minister has authority to establish and appoint members to advisory committees.

A Multi-Party Task Force on Water Governance should include representation from:

- a Northern Indigenous community
- a Southern Indigenous community
- the Métis Nation
- a water scientist
- a representative of the rate payer interest
- industry representative(s) (e.g. from the Manitoba Chamber of Commerce and/or affected Industries), and
- an individual who has an understanding of water governance and management and who is familiar with bridging the gap between Western and traditional knowledge

Each organization or community should be responsible for appointing its own representative.

⁴⁵ Chief Henderson, Sagkeeng, February 13 2015 at p 47.

⁴⁶ Mike Sutherland, LWR Winnipeg hearing, March 24 2015 at p 1521.

⁴⁷ Dion McKay, Fisher River, January 26 2015 at p 44.

Conservation and Water Stewardship should appoint the independent water scientist and water governance experts. A representative of Conservation and Water Stewardship should be appointed as a non-voting member of the Task Force.

This Task Force should be **adequately staffed** with at least four members, including but not limited to a lawyer and public liaison expert.

The Task Force will engage all policy communities surrounding the watershed (including Manitoba Hydro) on an appropriate watershed governance structure for Manitoba.⁴⁸

As part of this mandate, the Task Force should consider questions including but not limited to:

- What do we want the watershed to look like in the future? Based on what we already know, what do we need to get us there?
- What are our values and priorities relating to watershed governance in Manitoba?
- How can we best integrate a broad range of criteria to create a more inclusive process?
- How, if at all, can consensus be achieved on what is the 'best operating regime'?
- Should benchmarks and operating rules be developed to measure and protect the health of different systems (such as Netley-Libau Marsh or fisheries)?
- How, if at all, should “natural capital” including ecosystem and cultural services be valued?⁴⁹
- How, if at all, can we ensure this valuation considers the spiritual and cultural importance of the water?
- What is an appropriate governance structure to restore public confidence and provide for holistic, forward looking and inclusive governance?⁵⁰
- What is the appropriate mechanism for meaningful public engagement on an ongoing basis?⁵¹
- Is there a need for ongoing independent oversight of the watershed? If so, what is the appropriate model?⁵²
- Should all licences include preferential employment requirements for affected

⁴⁸ Policy communities are defined as all the groups that may be interested in Lake Winnipeg - including **governments** (federal, provincial, local, First Nation and Métis governments), **business interests** (industry, industrial associations and Unions), and **societal groups** (non-governmental organizations, cottage owners, fishers, farmers, Indigenous people, and the general public affected by LWR).

⁴⁹ It has been argued that power producers focus on power production and may neglect societal values if they are not directed to address them. Some jurisdictions have made overt efforts to better balance economic concerns with other values. Manitoba Hydro does not attribute any monetary valuation to health of the Nelson River ecosystem. Environmental considerations are viewed as constraints. The International Institute for Sustainable Development (IISD) has recommended that financial tools and instruments be used to “increase water management for ecosystem services.” This recommendation is consistent with some literature which suggests that an evaluation of ecosystem services can provide an effective tool for conservation and method to support effective resource management. CAC Manitoba would caution that there is strong criticism from Indigenous and other voices who argue that you cannot put a price on a way of life: “How can you put a value on what's happened of our Treaty, our right, our way of life has been altered in a way for Playgreen Lake and for our families.” Councillor Saunders, Winnipeg, March 24 2015 at 1519-20. Recognizing these seemingly contradictory views, the Task Force can assist in addressing these difficult questions.

⁵⁰ See appendix 4 for examples of effective water governance frameworks.

⁵¹ The failure to listen to those who are directly affected by hydroelectric development is at the root of much frustration among policy communities. An ongoing mechanism for engagement is needed to assist in hearing and reconciling voices of policy communities.

communities or should a representative labour force be addressed through other means? If licensing requirements are related to employment references, what criteria should be used to identify the 'affected communities'?⁵³

Why

As acknowledged by Manitoba Hydro:

*[T]here needs to be an orderly process of identifying gaps, setting priorities and establishing next steps, not ad hoc or random.*⁵⁴

The purpose of the Task Force should be to promote a more holistic and integrated framework to watershed governance.

When

This should be completed within two years.

Short-Term Recommendation Three– Make Public Statement on Whether Manitoba Hydro has Complied with LWR Interim License, Consider Additional Licensing Elements and Set Clear Expectations for the Future

When read with the letter of referral, the TOR imply that the Minister has already concluded that Manitoba Hydro is in compliance with the Interim Licence. However, there is little guidance on what compliance means. Given the precedent setting nature of the LWR hearing, it is important to make a public statement indicating whether Manitoba Hydro has complied with the LWR Interim Licence and to provide reasons. This may assist in addressing the sense of cynicism felt by many policy communities surrounding the Lake.

What

The Minister of Water Stewardship should immediately make a public statement about whether Manitoba Hydro has complied with the terms of the interim license and the basis for that determination. In the event that compliance is found, the Minister should consider adding further licensing conditions. This should be done within one year.

According to s. 43(1) of the *Water Power Regulation 25/8*, the licensee is entitled to a final licence upon completion of the initial development. Additional conditions can be imposed on a final licence under ss. 20, 44 and 92 of the *Water Power Regulation*.

Given the cynicism related to an almost 40 year old interim license and the concern by many that the LWR process was treated by the Minister as a *fait accompli*, clarification should be

⁵² This recommendation is echoed in recommendations by the Interchuch Council on Hydropower and Pimicikamak. For example, Pimicikamak who recommends the establishment of a *water governance board* stressed the importance of meaningful input in decision-making may all affected parties.

⁵³ For example, Pimicikamak has recommended that the license for LWR should include priority employment requirement for Pimicikamak at the Nelson River hydroelectric stations. See : Pimicikamak (March 31 2015) at p 7.

⁵⁴ Cormie, April 16 2015 at p 2717

given in terms of why it was determined to finalize the license at this late date and what the determination of compliance was based upon.

In the event the Minister finds the interim license has been complied with, consideration should be given to:

- whether the final license should be limited to a period shorter than the 50 year maximum (ie 2026)⁵⁵
- whether additional terms and conditions should be applied pursuant to s. 44 of *Water Power Regulation 25/8* including:
 - enhanced monitoring and reporting as recommended in both the Bipole III and Keeyask hearings
 - a provision allowing for the incorporation of additional restrictions on the license in the event of an Environment Act or CEA review
 - a provision to amend the license in the event of a material change in economic, social or environmental circumstances
 - a provision to review the license every five years (including e.g safety, effectiveness, conservation purpose etc.)

Research and monitoring might relate to an:

- assessment of priority downstream issues as identified by those communities⁵⁶
- assessment of ecological flows options that might better balance economic, reliability, social and ecological interest
- independent review analogous to that undertaken on the Laurentian Great Lakes on the impact of compression of lake level variability on wetlands in Lake Winnipeg
- independent review analogous to that undertaken on Laurentian Great Lakes on the impact of LWR on erosion
- assessment of Lake level variation options that might better balance flood control, economic, reliability, social and ecological interests

Why

*It was almost the attitude that you could do whatever you want, this is for the good of all, and if anybody is impacted by it, well, they can get out of the way, tough luck. That attitude is still there, at least as far as I'm concerned.*⁵⁷

Consumers across Manitoba continue to wonder why Manitoba Hydro has been able to operate under an Interim Licence for so many years. CAC Manitoba asks why the Minister would choose to confirm the interim license now and what role was played by economic considerations such as the desire for enhanced sales of “renewable power” to Wisconsin?

⁵⁵ S. 45 of *Water Power Regulation 25/8*

⁵⁶ As a starting point, Pimicikamak has recommended additional research and monitoring needed relating to the health of downstream aquatic and riparian habitat and wildlife population: Pimicikamak (March 31, 2015) at p 6.

⁵⁷ Baldur Nelson, Sagkeeng, February 2015 at pp 77.-8.

In addition;

- under s. 43(1) of the *Water Power Regulation*, the licensee is entitled to a final license upon fulfilment of and compliance with the interim license. There is currently no requirement for the Minister to make a public statement on the basis for its decision
- a public statement in the case of LWR would highlight the importance of transparency in deliberations and assist in future understanding of compliance
- to partially address the historic dearth of modern environmental conditions on the license
- to develop an interim measure to enable the incorporation of modern environmental licensing conditions in the event an environmental assessment is undertaken
- to set out clear expectations, responsibilities and timelines for the future licensing process.

When

This should be completed within one year.

Short Term Recommendation Four – Clarify Roles and Responsibilities for Licensing and Assessment in Manitoba

The existing water governance regime in Manitoba is fragmented. The relationship between various pieces of legislation is unclear. The absence of guidance enables *ad hoc* interpretations of the law. Guidance by the Minister of Conservation and Water Stewardship is needed.

What

The Minister of Conservation and Water Stewardship should clarify the roles and responsibilities for licensing and assessment in Manitoba. The Minister should explain the relationship between key legislative elements as well as administrative duties related to the *Water Protection Act*, the *Environment Act* and the *Water Power Act*. This should be completed within nine months to one year.

For example, consideration should be given to:

- who is responsible for environmental assessment and protection relating to legacy projects
- who is responsible for public processes under the *WPA*
- creation of a legislative mechanism that allows the public to access reasons when a pre-existing development is being considered for possible review under s. 10(2), 11(6) and 12(2) of the *Environment Act*
- more express connections to other natural resource and environmental legislation (*Water Power Act*, *Forestry Act*, *Mining Act*, etc.)
- articulating the responsibility for dam safety in the license

The guidance and lingering questions should be referred to the Multi-Party Task Force on Water Governance.

Why

- It is strongly arguable that an environmental loophole exists with regard to older hydroelectric projects and modern assessment
- To provide direction to public servants
- To assist the public to understand roles and to enhance confidence in the commitment to good environmental regulation
- To better link licenses to other regulatory processes.

When

This should be completed in a nine months to one year period.

Short-Term Recommendation Five- Instruct Manitoba Hydro to initiate an open, transparent process to further develop its operating and planning evaluative tools

What

That the appropriate Minister instruct Manitoba Hydro to develop transparent and accessible evaluative tools that would support the evaluation of alternative flow and operating scenarios. This should be completed within two to three years.

Consistent with the advice of Dr. McMahon and international good practice, Manitoba Hydro should engage with policy communities in developing transparent and accessible evaluative tools to consider alternative flow and operating scenarios.

Why

- To create a robust tool for adaptive management in the face of uncertainty
- To create an accessible, transparent evaluative tool that can be used by Hydro, policy communities and licensors
- To facilitate the participation of the policy community and licensors in developing and evaluating alternatives
- To facilitate collaboration and trust
- To encourage transparency and accountability in the assessment of alternatives
- To promote collaboration and more understanding between Western Science and Traditional Knowledge

As Dr. Lutterman noted:

It is understood that any modification in operating regimes will create changes throughout the system that may be positive or negative for various people and environments. Therefore, any such changes must be researched and carefully designed through a collaborative process involving affected parties within the watershed. In some cases experimental design may be required.⁵⁸

⁵⁸ Lutterman, 2015 at p 17.

This approach is consistent with demonstrated good practice. For example, a robust consideration of alternatives was done in the Glen Canyon EIS to improve downstream habitat through the evaluation of flow alterations which sought to balance reliability and economic concerns. This analysis created a healthy foundation for the creation of the Glen Canyon Dam Adaptive Management Program. All the program's research proposals, work products and dam's management plans are peer reviewed.

Similarly, in a process that placed greater reliance on modern computing technology, the International Joint Commission promoted the evaluation of Lake Ontario St-Lawrence River regulation through the consideration of four different climate change scenarios and evaluated hundreds of alternative regulation plans. This approach is intended to facilitate current decision making and future adaptive management⁵⁹

When

This should be completed within two-three years.

Short-Term Recommendation Six– Articulate the Role and Connections Between s.35 Consultations and the *Environment Act* and the *Water Power Act*, and Recognize and Reaffirm Treaty and Aboriginal rights

*...why are First Nations always in disagreement with Manitoba Hydro...Why are we always getting shortchanged...Why can't things be resolved without the extent of roadblocks...*⁶⁰

Section 35 and the Constitution were not enacted at the time many legacy projects were licensed under the *Water Power Act*. Recent case law has strengthened the duty to consult.⁶¹

It is currently unclear how s. 35 consultations fit within the EA and WPA legal frameworks. A breach of the duty to consult whether intentional or inadvertent will have potential legal ramifications for the Province.

What

That the Minister of Water Conservation and Water Stewardship should articulate the role and connections between s.35 consultations and the *Environment Act* and the *Water Power Act* and recognize and reaffirm treaty and Aboriginal rights. This should be completed within two to three years.

⁵⁹ International Joint Commission, "Lake Ontario St-Lawrence River Plan 2014: Protecting against extreme water levels, restoring wetlands and preparing for climate change" (2014) at 12.

⁶⁰ Citation to be provided.

⁶¹ Tsilhqoti'in SCC

Why

*And in our Treaties, you know, farming, fishing, everything, it's there, it's stated that we would carry this on as long as the sun shines, the grass grows and rivers flow, that this way of life would be here.*⁶²

- Subsection 35(1) of the Constitution Act 1982, provides that “the existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed.” Subsection 35(2) defines the aboriginal peoples of Canada as including the Indian (First Nation), Inuit and Métis peoples of Canada.
- The *Environment Act* and *Water Power Act* and Regulations do not contain any provisions requiring consultation of indigenous peoples.
- There appears to be little coordination between environmental assessments, licensing processes and section 35 consultations.⁶³
- To address the sense of exclusion and frustration.

When

This should be completed within two-three years.

Short-Term Recommendation Seven – Host a Public Workshop on Ecological Flow Assessment

What

The Minister of Conservation and Water Stewardship should direct and finance the Clean Environment Commission to host a workshop on ecological flow assessment. This should be done within one year.

The Canadian Science Advisory Secretariat has identified ecological or environmental flow analysis as a critically important but underused tool for investigating and addressing the health of threatened riverine systems⁶⁴

This workshop could bring together participants including government officials, Manitoba Hydro, academics, policy communities and other regulators. The workshop could also help scope a future ecohydrological investigation of operational options recommended by Pimicikamak.⁶⁵

Why

⁶² Citation to be provided.

⁶³ Manitoba Law Reform Commission, “Manitoba's Environmental Assessment and Licensing Regime Under The Environment Act” (2015) at p 35

⁶⁴ Canadian Science Advisory Secretariat, “Framework for Assessing the Ecological flow requirements to Support fisheries in Canada” (2013) at p 13. Environment flow is described as “the quantity, quality and timing of water flows required to sustain freshwater ecosystems and the human livelihoods and well-being that depend on these ecosystems.” (after the Brisbane Declaration, 2007).

⁶⁵ Pimicikamak (March 31 2015) at p 8.

There appears to be little ongoing ecological flow analysis undertaken by the Province or Manitoba Hydro. While Manitoba Hydro has suggested it is too soon for this workshop, we disagree.

The purpose of this workshop is to learn about ecological flow evaluation in general, including its purpose, the challenges that might arise and the types of tools available. It also is critical to understand how other jurisdictions have approached the transition from traditional operating approaches to ecological flow regimes.

The workshop would increase familiarity with a highly valued and increasingly utilized tool to facilitate protection of riverine and riparian species and habitat.

When

This workshop should be held within one year to help guide the selection and development of models and operations. This is an important step in establishing a common level of understanding about what e-flows are and how people have used them.

Medium Term Recommendation One - Regulate LWR Under the Environment Act

I wonder why there is no environmental license in place for this Hydro project?⁶⁶

A strong argument can be made that s. 12(2) of the Environment Act gives the Minister discretionary power to require the proponent to file an EA proposal.

What

The Minister of Conservation and Water Stewardship should exercise the discretion under s. 12(2) of the *Environment Act* to require Manitoba Hydro to file an environmental act proposal (EAP) with the department as a Class 3 development. An Environmental Impact Statement should be submitted. This EIS should be completed within five to seven years.

To address interpretive uncertainty and as part of ongoing law reform, consideration should be given to immediately clarifying:

- the obligation of the Minister to consider whether legacy projects should be subject to environmental assessment and licensing
- the definition for "existing development" under the *Environment Act*
- the inclusion of decision making criteria for when an existing development is considered for possible review

Why

- The *Water Power Act* has been in place since 1930s. As stated by a former Manager of the Water Licensing Program and Water Resource Branch, "the main focus of the WPA and licences is the effective and efficient development of waterpower based on the

⁶⁶ Citation to be provided.

storage, control, and use of water in Manitoba's rivers and lakes. The WPA and licences have not been applied toward assessing or mitigating project impacts.”⁶⁷

- No environmental assessment has been undertaken of legacy operations that have a profound influence on the Nelson River and its people
- The impacts of LWR/CRD on Hydro-operations are cumulative, complex, evolving, significant and adverse
- Given significant uncertainty relating to the effects of Hydro operations, climate change and other human development, a robust baseline for adaptive management must be developed as in the case of Glen Canyon Dam
- To allow Manitoba Hydro to engage in a more robust dialogue with policy communities
- To fill knowledge gaps and to identify areas for further research, monitoring, mitigation and adjustment (both Western science and Traditional Knowledge and including cumulative effects monitoring)⁶⁸

While Manitoba Hydro has argued that the RCEA will assist in identifying some research gaps, the current RCEA is not a substitute for a robust assessment.⁶⁹

When

This should be completed within five to seven years.

Long Term Recommendation One – Reform Manitoba's Regulatory Framework for Water Governance

*Much more can be done to work towards achieving a better balance for the future of the watershed.*⁷⁰

A number of participants and intervenors referred to the need for a modern regulatory framework.⁷¹ The Principles and Guidelines of Sustainable Development recognize the importance of integrated decision-making and planning processes.

⁶⁷ Ray Bodnaruk, (2015) at p 7

⁶⁸ CAC Manitoba would note that the Keewatinook Fishers of Lake Winnipeg have recommended that the traditional knowledge include fisher's knowledge. See: Myrle Ballard, “Language is a tool for natural law: Aniin aysi pi mosay maguk” (April 15, 2015) at p 26. Adequate resources should be attributed to gathering traditional knowledge. A potential way of obtaining resources would be to collaborate with universities, provincial and federal governmental agencies to include traditional knowledge in program design and execution.

⁶⁹ The RCEA is scheduled to conduct a phase of public engagement in October 2015. It will be necessary for the Multi-Party Task Force on Water Governance to be kept informed about the results of this engagement. Pimicikamak has recommended that the RCEA be incorporated into the final licence conditions for both the LWR and CRD. This is in line with a recommendation made by the Clean Environment Commission during the Bipole III hearing stating that licensing of future projects should not proceed in the absence of a RCEA. That wisdom should still apply today.

⁷⁰ PCN, Lutterman, 2015 at 4.

⁷¹ For example, Manitoba Wildlands referred to a “twenty first century lens and know how” based on a whole system integrated approach. Manitoba Wildlands, “Governance, Management, Regulation, Monitoring and Protecting Lake Winnipeg – With Respect to a Great Lake As Reservoir” (April 9 2015) at p 8.

Based on our review of the literature and what we heard, effective water governance is:

- accountable, efficient, sustainable and responsive
- fair, equitable and ethical
- open and transparent
- inclusive, holistic and communicative
- coherent and integrative
- coordinated, flexible and adaptive

It involves early and meaningful engagement. It requires clear governance structures.

What

The Minister of Conservation and Water Stewardship should modernize Manitoba's governance regime. This should be completed within seven years.

With advice from the Multi-Party Task Force on Water Governance, the Minister of Conservation and Water Stewardship should modernize Manitoba's governance regime by considering the following:

- Greater coordination and clarity of the roles in its water governance and legislative scheme.
- An integrated watershed approach to cumulative effects monitoring and follow-up that would include participation by different industrial users that impact the hydrological system. This should also include the requirement to develop and maintain an inventory of the Province's water resources (both quality and quantity).
- The application of the *Water Protection Act* should be expanded to include Hydro operations. The *Water Protection Act* includes a number of robust provisions to protect ecosystems but it is not clear that these provisions apply to waterpower operations.
- The development of a clear and well-coordinated process for scrutinizing license applications, including
 - criteria to assess previously unlicensed existing projects
 - opening licenses for review and amendment, and clarifying the process for re-licensing
 - express legislative authority to include the potential for short-term recommendation in licenses.⁷²
 - establishing license conditions consistent with management plans
 - eliminating silos by making provision for the integrated review of operationally integrated facilities (i.e. CRD, LWR, Kelsey)
- Incorporate the public trust doctrine into Manitoba's environmental and water resource legislation, including an obligation to actively protect, exercise ongoing supervisory

⁷² It should be noted that Black River First Nation has recommended that if the LWR license is approved, it should be for a shorter term (10 years or less).

control and revisit previous decisions in the face of change

- Identify criteria for balancing economic, reliability, ecological and social values
- Include the opportunity for participant funding for CEC investigations of legacy projects
- Consider making express provision for ecological or environmental flows
- Allow for habitat and wildlife protection in licensing conditions
- Acknowledge equal space for Indigenous Legal Traditions and Traditional Knowledge (in new license applications and license reviews as well as ongoing monitoring). Manitoba Hydro and the Province should seek direction from Elders and knowledge holders to determine how best to incorporate Indigenous laws.

Why

The recommendation is necessary to bring Manitoba's regulatory framework to standards more consistent with good practices elsewhere in Canada and the world. There is a sense that Manitoba's legislative regime is not well suited to address water governance issues. There also is a need for greater coordination and clarity of the roles in its water governance and legislative scheme.⁷³

The recognition that governments have specific obligations and responsibilities towards the environment is consistent with the principle of the public duty to protect the environment. As US courts have recognized:

*Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water.*⁷⁴

In its oral closing arguments, Manitoba Hydro suggested that any further review of water governance in Manitoba would duplicate the efforts of the Manitoba Law Reform Commission and the Province of Manitoba. On the contrary, the advice of the CEC can only enrich ongoing deliberations.

When

This should be completed within seven years.

Long Term Recommendation Two- Meaningful Ongoing Engagement

*And communication, again, I talked about, I would like to see more communication directly involving with Manitoba Hydro and ourselves from now and for the future.*⁷⁵[sic]

⁷³ BC's new *Water Sustainability Act* creates "water objectives" that set out goals relating to water quality and quantity that must be considered by public officials.

⁷⁴ *National Audubon Society v Superior Court of Alpine County* 33 Cal 3d 419 (1983).

⁷⁵ Citation will be added.

Academics have recognized there is a spectrum of engagement.⁷⁶ Meaningful ongoing engagement initiates a “participatory processes that incorporate all of the essential components of participation, from information sharing to education, and it includes active and critical exchange of ideas among proponents, regulators and participants.”⁷⁷

What

That the Minister of Water Stewardship and Conservation adopt meaningful ongoing engagement as a key principle and implement changes to legislation including but not limited to the *Environment Act*,⁷⁸ the *Water Power Act* and the *Sustainable Development Act*.⁷⁹ This should be completed within seven years.

Effective engagement also envisions the availability of information for affected and interested individuals. The Principles and Guidelines of Sustainable Development include 'access to information' as a guideline including the promotion of the opportunity for “equal and timely access to information by all Manitobans.”⁸⁰ For example, the Minister could instruct Manitoba Hydro to provide notice of the water level changes to communities around the Lake.⁸¹ Engagement should be done with each community to determine the preferred method of notification.

Based on a recommendation from Peguis First Nation, another recommendation for consideration is a mechanism by which all data, maps and photographs would be shared with interested parties. Further work is needed to determine where the information should be housed and managed in an organized way.

CAC Manitoba would also note that meaningful engagement processes relating to water governance may require individuals from Water Stewardship and Conservation as well as Manitoba Hydro to retain additional persons who speak a variety of language including Indigenous languages.⁸²

⁷⁶ Sherry Arnstein, “A ladder of Citizens Participation” JAIP Vol 35 No 4 July 1969 pp 216-224.

⁷⁷ Sinclair and Doelle at pp 53-4.

⁷⁸ See Recommendations from Manitoba Law Reform Commission, “Manitoba's Environmental Assessment and Licensing Regime Under the Environment Act” (2015).

⁷⁹ Report of the “Consultation on the Sustainable Development Implementation” (1999)

⁸⁰ Principles and Guidelines of Sustainable Development at art. 3 .

⁸¹ For example: Chief Henderson of Sagkeeng First Nation stated: “And whoever is responsible for the notification on the water levels, if it's Manitoba Hydro or the province, we'd like to have that notification somehow. We have a website, sagkeeng.ca, you can send us an e-mail, and then we'll be notified that water is going to be up this week or this month, so we can notify people.” : LWR Hearing, April 13, 2015 at p 2247.

⁸² This is consistent with the Keewatinook Fishers of Lake Winnipeg recommendation that Manitoba and Hydro identify personnel who will learn the language, in order to be able to engage and learn from the fishers.”

Why

*We would like to see an annual relationship with Hydro.*⁸³

As Junker et al. (2007) point out, “interfering with people’s living space without involving them” not only makes them angry, it allows them to avoid taking responsibility for undesirable environmental change and diminishes social capacity to make good environmental decisions.⁸⁴ By contrast, collaborative, place-based governance can promote equity of power among participants and viewpoints, and help to strengthen community and institutional capacity for effective decision-making.⁸⁵

Proponents of meaningful engagement often highlight the fact that adverse environmental effects are disproportionately borne by the poor and politically less powerful.⁸⁶

Meaningful engagement is a cornerstone of achieving effective policy decisions. It recognizes that the voices of those who are directly affected by issues add value to decision making. It seeks to create an equal space for those whose voices are often drowned out by more powerful interests.

Manitoba Hydro has argued that certain issues are too controversial and should be left to politicians. However, research shows that meaningful ongoing engagement:

- strengthens communication among policy communities
- increases the opportunity for learning through the process
- results in better decisions
- increases accountability
- improves scoping, clarifying community priorities and assists in articulating necessary research⁸⁷

We anticipate the changes will assist in fostering early activities relating but not limited to:

- issue scoping
- research priorities
- open access planning and operating model development; and,
- core values and decision making criteria.

⁸³ Citation to be added.

⁸⁴ Heathcote (2015)

⁸⁵ Heathcote (2015); Webler et al. 2001; Webler and Tuler 2006; Reed 2008.

⁸⁶ Report of the World Commission on Dams, “Dams and Development: A New Framework for Decision-Making”, November, 2000, at p. 17, accessed at <http://www.dams.org/docs/reports/wcdreport.pdf> [hereinafter “WCD Report”]. The World Commission on Dams evolved out of a World Conservation Union workshop in April, 1997 attended by participants representing governments, the private sector, international financial institutions, civil society organizations and affected people. Its mandate is to “review the development effectiveness of large dams and assess alternatives for water resources and energy development; and develop internationally acceptable criteria, guidelines and standards, where appropriate, for the planning, design, appraisal, construction, operation, monitoring and decommissioning of dams.”, p. 2 of the Report.

⁸⁷ See for example: Jennifer Stewart and John Sinclair, “Meaningful public participation in environmental assessment: perspectives from Canadian participants, proponents, and government” (2007) *Journal of Environmental Assessment Policy and Management*

Manitoba Hydro has noted the initiation of the Lake Winnipeg Engagement Program. Irrespective of this Program, the voices of those who are directly affected by LWR are not present in Manitoba Hydro's oral and written submissions. The lack of a public voice or a place for local knowledge in the filing detracts from Manitoba Hydro's stated commitment to public engagement.

When

This should be completed within seven years.

Long Term Recommendation Three – Manage Adaptively

*And our children will not see, and great grandchildren will not see that, that beautiful place that we lived.*⁸⁸

Uncertainty is not an excuse for inaction. Based on the literature, monitoring and management programs should be flexible and have the capacity to deal with uncertainties. Legislative and regulatory frameworks should include specific provisions for adaptive management in follow up and monitoring programs.

Currently, the LWR Project does not include any adaptive management plan to deal with uncertainty.

What

That the Minister of Water Stewardship and Conservation adopt adaptive management as a key principle and implement associated changes to legislation including but not limited to the *Environment Act* and the *Water Power Act*. This should be completed within seven years.

Why

- To bring licensing and assessment practices in Manitoba to a standard consistent with recognized good practice elsewhere in Canada and in the world.
- Adaptive management acknowledges the uncertainties inherent in resource management and puts forward a way to acknowledge them. It is a “means of linking learning with policy and implementation”.⁸⁹

When

A framework for adaptive management should be completed within seven years.

⁸⁸ Citation to be added.

⁸⁹ Alan Diduck, Patricia Fitzpatrick and Jim Robson “ Guidance from Adaptive Environmental Management, Monitoring, and Independent Oversight for Manitoba Hydro's Upcoming Development Proposals” (2012) at p 3.

Long Term Recommendation Four – Province Should Assume Responsibility for Shoreline Management Policies and Legislation

Help us work towards solutions to protect our properties and our public beaches for all to enjoy. [...] Work with us to ensure that cohesive, sound engineering practices are used when private or public shorelines require erosion or flooding protection.⁹⁰

What

That the Province develop legislation, policies and programs to regulate and map shoreline development and hazards. This should be completed within five to seven years.

Why

- There appears to be a legislative and policy vacuum relating to the management of shoreline hazards and guidance of new development which may hinder the ability to protect the community leading to a patchwork quilt of municipal policy responses.⁹¹
- To bring Manitoba's practices relating to policies and regulation managing shoreline hazards to a level consistent with jurisdictions elsewhere in Canada and the world.⁹²

When

This should be completed within five to seven years.

Long Term Recommendation Five - Establish an Environmental Auditor

This would serve to address the concerns addressed in past proceedings about independent oversight.

One of the first recommendations, among many, was a creation of an independent body with authority to oversee and advise Hydro in its operations and the effects thereof. This [...] never came into being. Why?⁹³

What

Manitoba should establish an Environment Auditor to monitor and report publicly on the Provincial government's efforts to protect the environment and foster sustainable development.⁹⁴ This should be completed within five to seven years.

⁹⁰ McMorris, LWR Hearing, March 11 2015 at p 352

⁹¹ As Stated by Baird and Associates (2015), municipalities have the majority of the responsibility to evaluate new development proposals, growth plans, and manage existing hazards (see p 34).

⁹² In other jurisdictions the Provincial and State agencies develop legislation, policies and programmes to regulate shoreline development, identify and map shoreline hazards, and protect natural resources: Baird (2015) at p 34.

⁹³ Baldur Nelson, Winnipeg LWR Hearing, March 18 2015 at pp1252-3.

⁹⁴ This recommendation is based on COSDI Report (1999).

The Environmental Auditor should serve as a neutral and arm's length arbiter to receive complaints related to the environment, sustainable development, water governance etc.

Why

The purpose would be to address public comments relating to the need for complaints mechanism and to foster trust with and between policy communities. There is a real and abiding issue whether Manitoba Hydro is appropriately placed to credibly:

- investigate opportunities to improve LWR and mitigate its impacts
- address interdependent and cumulative effects of climatological and, hydrological and physical change during the term of license
- maximize and equitably allocate the benefits of multipurpose regulation while minimizing basin wide flood risk and other potential impacts

When

This should be completed within five to seven years.

CONCLUSION

CAC Manitoba appreciates the opportunity to participate in this proceeding.

This hearing has been hindered by a flawed TOR and limited participant support. However, the open dialogue fostered by the CEC and embraced by participants and by Manitoba Hydro has underscored the critical need for change.

The report of the CEC offers a rare opportunity to create a lasting legacy of environmental law progress and reform.