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Ensuring the road to enhanced environmental protection in Manitoba through a futures oriented environmental assessment process

Response to the *Environment Act* Consultation

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Introduction

We appreciate the opportunity to provide written comment on the *Environment Act* Consultation document distributed by MB Conservation. Environmental assessment (EA) is a central feature of the *Environment Act* and of project decision making in Manitoba. Through its application to both public and private development projects undertaken in the province it has served as a useful tool for considering the implications of development before proceeding. At least one other comprehensive review of the Act was undertaken, but no changes resulted, so we hope that through current consultations, as well as the results of the Manitoba Law Reform Commission's recent review of the Act and assessment processes, changes will be implemented that result in Manitoba adopting leading edge legislation.

In the following, we attempt to provide answers to most of the questions that were posed in the consultation document. Given our experience with EA in the province and our backgrounds, some of our responses are more detailed than others. We also provide comment in a number of other areas that we think need attention during this review process. We have attached a PDF document that provides further background on key principles for any EA legislation, with which we strongly agree. Once we have read the input you have obtained through this initiative, we look forward to an opportunity to discuss these comments with other interested organizations and individuals in future public events you organize as you continue and deepen the consultation process to inform changes to the Act.

Since the questions posed relate mainly to the EA key component of the Act, our input is underscored by the understanding that at its core, EA is a decision-making process that should help to ensure 'minimum regret planning'. Through assessment, we should be attempting to ensure that externalities and legacy effects are

identified, evaluated and incorporated into planning and decision-making processes. As such, EA in Manitoba should evolve into a tool for government, other interests and individuals to achieve the intertwined societal objectives of environmental protection and sustainable development.

EA Guidelines

Providing clear guidance to all who want to become involved in assessment processes is key to ensuring effective and efficient decisions. Any reformed regulations related to EIS guidelines should provide a basic level of certainty in terms of what is required for any type of activity covered by the Act. While more comprehensive guidelines should aim to reduce uncertainty, larger, more complex projects will still require project specific guidelines developed with the input of interested participants.

EIS guidelines contained in regulation should require consideration of: reasonable alternatives; a full set of assessment-related considerations, biophysical and socio-economic (etc.), positive as well as negative, indirect as well as direct, and cumulative as well as immediate effects; full life-cycle analysis of options (alternatives to and alternative means of pursuing the preferred alternative), including upstream and downstream life cycle plus legacy effects; mitigation components; follow-up and monitoring of effects and compliance; and requirements for the engagement of public and other stakeholders including governments throughout the process.

TAC Transparency

Provisions for the recognition of the TAC and basic TAC responsibilities should be recognized in any reformed Act. The TAC provides an avenue for a kind of interdisciplinary engagement within government. Roles and responsibilities of the TAC should, at some point, deal with the possibility for learning about how scientists and social scientists might engage meaningfully in assessing projects and other activities. This would seem increasingly important if we take seriously cumulative impacts or cultural implications in a broader scope for assessment.

In terms of roles and responsibilities recognized in a reformed Act, the TAC should review the adequacy and accuracy of all information, analyses, and plans put forward by proponents, including biophysical, social, and economic areas. There should be provision for the Minister and Approvals Branch, as well as the public, to be able to call on agencies with relevant expertise to provide input to the decision process. TAC processes and the input they provide to the assessment and decision processes should be open to the proponent and interested public. There is room and need for a process that is open to public scrutiny in a meaningful way and that allows the public to be part of the dialogue between the TAC and proponent

regarding how public comments are being addressed by the TAC, before the conversation is over.

We do not feel that outside members should be asked to join the TAC, but when in-house expertise on an issue is not available to the TAC that expertise should be sought from outside. Since such action would potentially be contentious due to real or perceived bias, such information needs to be sought in a transparent (to the public and proponent) way (i.e., reported on the public registry with indication of how the input was considered/included in assessment by the TAC, thus leaving it open to public scrutiny).

Licensing Process

We believe that EA processes required under a reformed Act should have broad application to all undertakings that might have significant effects on prospects for sustainable development/sustainability, including policies, programmes and plans as well as capital projects and physical activities. Further, we believe that the current development list should not be retained in a reformed Act in favor of an "all in" approach. In other words, the broad application described above applies to all projects, undertakings, programs, etc. unless excluded. The are many problems with the current list approach, and one that is central to this discussion is that it excludes two types of projects - those that no one has thought about, such as ones resulting from new technologies or techniques, and those that some are aware of but are deliberately not putting forward for inclusion, such as many aspects of oil and gas developments. An exclusion list forces those who want projects excluded to make their case, they cannot just keep quiet and hope no one notices. It also solves the problem of projects no one has thought of, because as they arise they will be subject to the Act unless and until someone makes a convincing case that they should be excluded. It also deals with projects that keep getting built that are designed to be just under thresholds required to be captured by the Act. If the "all in" approach is not adopted then serious consideration has to be given to reforming the current list and various sectors that need full inclusion on it, such as industrial agriculture, oil and gas development and mining.

Activities that are captured under a reformed Act could still be placed in assessment streams that reflect the rigour and types of EIS guidelines developed, with a clear and transparent process for bump-ups and bump-downs. If this were done we could envision different types of EA considerations being required for different types of activities, defined by a clear set of generic criteria, that would include explanation of the rationale for each of the assessment streams (e.g., level of public interest/concern, potential for environmental harm, legacy effects, etc.) and guidance, with project examples, on how projects are assigned in each stream. For more complex cases this process would be open to public scrutiny and the Director/Minister would make a decision on streaming based on input from the TAC, public comments and proponent's arguments, and would provide the rationale for how the stream assignment decision was made and how all input was

considered. This would allow for an 'adaptive' scoping process to replace the current automatic list-based scoping. Given the number of smaller project approvals in Manitoba and that lower levels of scrutiny for such projects may not require that cumulative effects be fully considered, it will be vital to ensure that the combined cumulative effects of these projects are considered at some level.

License renewal and appeal

Given that knowledge is always incomplete and has some uncertainty, and that we should be learning from our actions and decisions, any reformed Act should have provisions in the law requiring that licenses specify timelines for license reviews. These reviews should incorporate ongoing data collection from monitoring (that is made publically available), and where applicable this information should be fit into any regional studies, and used to support regional cumulative effects assessments.

We suggest that the purpose of license reviews would be to assess if license requirements and proponent mitigation measures are having the desired effect of promoting sustainability by preventing significant environmental harm – social, ecological and economic. Unnecessary conditions or measures could be eliminated, new ones could be required, and mitigation measures could be modified or updated to increase their effectiveness. License reviews could also be required in response to legitimate public requests, or when knowledge or environmental sustainability conditions relevant to the project have changed. The purpose of license reviews would need to be clearly spelled out in the legislation, so as to keep it from becoming a backdoor for clearing proponent-desired project modifications.

Appeals processes need to be available to all parties with interest in an activity being assessed. A reformed Act should include clear provisions for appeal. Appeals must be conducted independent of any of the players involved with the case being appealed, and there need to be clear timelines for Minister's decisions on appeals and a requirement to provide reasons for the decision.

Enforcement

Any reformed Act should embrace public action-oriented enforcement. The purpose of enforcement has to be to bring the proponent into compliance. Enforcement should be based on an escalating ladder of actions, with mandated timelines for moving up the rungs – starting with the usual 'coaxing' and 'working with' proponents, and then on to steadily increasing administrative penalties (with no cap), and finally to court action and/or stop work orders. The heft of, or starting point, on the ladder could be tied to the class or stream of development, the severity of the infraction in terms of harm, and/or the economic value of the development.

Public engagement

Public engagement is essential to sound and meaningful EA process as is established by many industry organizations (e.g., CAPP; MAC; MAA), non-government organizations (e.g., MiningWatch; West Coast Environmental Law), practitioners (e.g., IAP2; Praxis; IAIA) and academics. It is also an issue on which we have significant input, having been participants in EA processes in Manitoba and having studied such processes in other contexts. One of the strengths of Manitoba's EA process is that it allows for the possibility of an increased role for the public in environmental decision making and, in the case of CEC hearings, that there is funding available to participants. This should be retained and enhanced in any reformed Act. However, the discretionary power of the Minister still largely determine the extent to which the public can participate in the process and there is no current requirement for proponents to consult the public in the proposal phase. As well, the public registry system, the provision for participant assistance in public hearings, and the CEC itself warrant further consideration.

Information-out communication

Information out to participants and interested parties is an essential on-ramp to participation in EA and notice and registry provisions should be clear and required under the Act. In hopes of improving some of the problems with the current registry system and to improve EA process it is laudable that the province launched an on-line public registry in 2013. We think this is an important evolution in document access, but note that care must be taken to ensure provision is still made in the Act for paper registries to be made available locally, especially in rural and northern communities in Manitoba with limited or no internet capabilities. Notice provisions should be mandatory and should come early and well before irrevocable decisions or announcements committing the Crown to a course of action have been made. Notice could be communicated by a number of required means under the Act other than local newspapers and radio, including using social media (e.g., having a twitter feed that for example, alerts followers to updates to the registry, new proposals and opportunities for participation).

Clarity is also needed in regulation on who is responsible for providing timely information to the public and where the public can get this information. Any such information provided needs to be targeted to the public (i.e., how and where they can get it, what their expectations should be in terms of what information is available) not the proponent.

To aid in meaningful public engagement, regulation under a reformed Act should establish ways for the registry itself to be more organized, complete, and understandable than it currently is. There should be requirements for technical documents to have plain language summaries; project registries need a clear, chronological organization showing how the EA has proceeded and where it is going (i.e., next steps and timelines); and all documents need to be included (TAC comments, public input, all project documents, etc.). The registry should also

include brief plain-language documents explaining how any discretionary decisions are made along the way and how public or expert input was sought and handled (by the government and proponent).

Opportunities to participate

There are many ways to involve the public in EA processes. The most common practice in Manitoba has been to provide the public with passive opportunities to provide written comment on proposals. This, along with notice and the registry, provide a fine on-ramp to more active participation. The main opportunity for active participation envisioned by the Act, however, is through CEC hearings, discussed below, which may account for only around 1% of the cases. Any other participatory activities completed are most often undertaken by the proponent, with the results being reported to Manitoba Conservation by the proponent. We feel any reformed Act has to include provisions that reengage the Government in public participation and ensure that there are public opportunities for dialogue and discussion with the regulator and where appropriate the proponent in addition to opportunities for hearings.

We understand the old adage that one participation technique does not fit all activities, and also that there are many, many approaches documented in guides and the literature. We believe there should be requirements for some of these more active techniques to be used - in the presence of the regulator. Participation plans for larger, more complex projects need to be developed with interested parties and approved by government – perhaps the TAC could include expertise in this regard. We recommend that more of the active participation be taken out of the hands of the proponent. Currently there is too much poor work done by proponents and reported as fact to government, which undermines public confidence in the whole EA process. A reformed Act should reflect a clear rethinking in regard to active participatory activities such as an expanded role for the CEC to carry out more and smaller hearings, as well as other types of participatory events. The Act should mandate that the CEC embraces and facilitates a diversity of hearing types (small and large) and different forms of active participation. The public places high expectations on EA participatory processes and this needs to be better reflected in the law and move well beyond the current provisions for notice and comment, and very occasionally for hearings, to encourage more dialogue.

It is worth recognizing in this regard, that from the perspective of many participants the EA public participation process, whether facilitated by the CEC or not, is two-tiered. There is the public participation part and the expert part. Bridging the gap between the two tiers leaves a large amount of discretionary power to the Minister. For example, when there is tension between the opinions of a Citizen and an Engineer the Minister and staff have significant power in resolving this tension. The alternative would be to create a process of dialogue between these two (or three or four or ten) different interests. This requires more skilled facilitation and more meaningful and participatory processes that are generally absent from more passive non-dialogical and quasi-judicial processes. We know there are proven approaches

to encouraging such dialogue, well documented in guides and the literature, and believe that some of these should be recognized in regulation.

Participant funding

We applaud the fact that the Act makes provision for participant funding during CEC hearings as such funding is essential for ensuring meaningful participation and high quality input. We recommend that the provision of funding for participation in hearings and other CEC activities be mandatory under a reformed Act and no longer discretionary. We also feel that some change is needed to the current application process for funding under regulation C.C.S.M.c E215 in recognition that some participants have noted that the process of reviewing applications for funding can be confrontational and does not reflect the process outlined in the regulation from beginning to end. Currently, the 'proponent pay' regulation only applies to class 3 developments; this should be changed and expanded to all types of developments at the discretion of the Minister. We also seriously question the notion of setting a funding limit for a particular case before knowing the level of interest from the public and the depth to which certain issues will need to be considered. These factors must be considered when deciding on the amount of funding that will be made available. Lastly, we recommend the expansion of the use of participant funding to the sorts of active participation activities facilitated by government as we envision above.

We also recommend a public review of CEC procedure to consider ways to improve current process (e.g., interrogatories, quasi-judicial approach, etc.) and to establish approaches other than hearings (e.g., small 'hearings', appropriate ADR, etc.) that could be adopted in a revised CEC 'procedure book'.

Essential concerns missing from the discussion document

Aboriginal Participation

The current review provides the appropriate opportunity to consider how any reformed Act will interface with the processes of Aboriginal governments and peoples. The Manitoba Law Reform Commission consultation on the *Environment Act* has started a discussion by reflecting and reporting on this. The discussion is critical since much of the resources development proposed for Manitoba occurs on Aboriginal Lands and/or affects Aboriginal people. The government should continue the work started by the Law Reform Commission in this regard and reflect any solutions in a reformed law.

Significant Effects

In the early portions of the current Act, the word *significant* appears at many of the crucial decision points in descriptions of the EA process and legislation, yet does not appear in the definitions section of the Act, or anywhere in the regulations. For example, the definition of *development* in section 1(2) of the Act refers to significant effects on the environment and on social, economic, environmental health, and cultural conditions. With no definition of this key qualifier, the determination of

significance remains at the discretion of the Minister. This level of discretion has no place in a reformed Act and significance needs to be defined if it retains such a decisive role in assessment processes carried out under the Act.

Discretionary Powers

The absence of a definition for significance links with the larger issue of the discretionary power of the Director of Environmental Approvals and the Minister of Conservation under the current Act. This power is underscored by the frequent use of 'Minister may' clauses throughout the Act. For example, in what are currently steps 3 and 4 of the EA process, the decision to hold public hearings regarding a proposal remains at the discretion of the Minister as outlined in the Act in sections 10(7), 11(10), and 12(6). Further, the decision as to whether or not further information is required also remains a discretionary power. Even when a formal EA is required, the form of assessment with regard to guidelines, public involvement, and review remains in the hands of the Minister. We understand that all law retains a certain level of discretion, but feel that discretion in the case the *Environment Act* is often associated with the most fundamental EA issues and this lack of clarity greatly impacts the effectiveness and efficiency of the EA process under the Act. We recommend limiting the amount of discretion left to the Director and Minister under any reformed Act and that there be clear guidance developed for the exercise of any discretion remaining under the Act.

Staged Developments

We recommend the removal of staged assessment, particularly as it is envisioned under section 13 of the current Act. To do EA properly one has to be able to envision and review the whole of the proposed activity. Further, we recommend that the reformed Act award a 'development approval' that enables and directs a proponent to then seek any needed regulatory licenses under other legislation.

Missing components

The *Environment Act* is currently deficient in a number of ways when compared to proven EA practice. Some of these deficiencies have been raised through the CEC process by participants and by the CEC itself. Five issues that we feel are particularly important to address in any reformed legislation include:

i. legislative provision requiring the consideration of need for and alternatives to the proposed activity/undertaking as early as possible in the EA process;

ii. explicitly legislated requirements for the consideration of cumulative effects and proven, practice-based guidance material to implement such provisions. This issue is considered in some detail in the CEC reports for the Wuskwatim generation project and the Bipole III project;

iii. establishment of a framework for strategic (policies, plans and programs) and regional approaches to environmental assessment. Strategic environmental assessment, or SEA, is now a proven EA practice;

iv. creation of a legislative linkage between the provincial *Sustainable Development Act* and the *Environment Act*, thereby ensuring that sustainability is incorporated as the key measure in the assessment of projects to be undertaken; and

v. recognizing the importance of multi-jurisdictional contexts through provisions that establish approaches to effectively collaborate with other jurisdictions, including the federal government.

Conclusions

We strongly agree with the fundamental commitment envisioned in the consultation document of ensuring that any future assessment processes require that activities being undertaken make a positive contribution to sustainability. The route to achieving this lies in making some fundamental and necessary changes to the law that governs EA, by way of adding proven and essential provisions to law, improving regulation and providing needed guidance. Manitoba needs a clear EA Act that ends in a decision about the acceptability of a project, and under what conditions, and that provides the legal authority to then proceed to obtain licenses from the various branches of government implicated. We have merely scratched the surface of many of the issues we believe are essential to achieving such a cutting edge legislated EA process, and look forward to future discussions about these as the renewal process proceeds.