

## Webb, Bruce (SD)

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**From:** Gaile Whelan Enns  
**Sent:** June-27-18 11:25 AM  
**To:** Webb, Bruce (SD)  
**Subject:** Lake Manitoba Lake St. Martin channel - scoping document review

This email is regarding the review of the scoping document for the Lake Manitoba Lake St. Martin ( Lake Winnipeg) Channels project.

We are sending comments within an email and assume this email will be posted among the comments regarding the scoping document. Please advise if you require the comments to be on letterhead.

We note that the environmental scoping document is dated March 2018. It was not filed for public comments until well into May 2018. There is a short and somewhat misleading section in the table of contents regarding the CEAA EIS requirements for this project due to federal responsibility. In fact a variety of provincial and federal authorizations are needed prior to construction of the project, in addition to CEAA and Manitoba Environment Act authorization. Other Manitoba laws are triggered where permits will be required.

Manitoba Sustainable Development could have anticipated the CEAA EIS some time ago, including due to the 2011 exemption from CEAA and federal permits for the emergency channel construction in 2011. The information in the scoping document regarding CEAA is insufficient, and even less than Manitoba Infrastructure is providing at their Open House and presentations. ( Third of three Opens Houses occurs in Winnipeg today.) In fact the EIS being prepared by Manitoba Infrastructure and now late has to fulfill CEAA 2012 on social, environmental, economic and indigenous elements. Section 1.3.3 is lacking in basic information.

We advise Manitoba Sustainable Development to review the requirements for any federal provincial capital project, where federal funds are involved. These agreements require fulfillment of CEAA 2012 and that aboriginal consultations be appropriated completed.

The agreement regarding the federal funds for this project will again have these requirements.

The request for public comments regarding the need for a federal EIS was in February 2018. The decision to go forward was made by CEAA in March 2018. Therefore this scoping document runs a risk of contradicting the requirements of CEAA 2012 and should have been updated when the EIS Guidelines for the project were released - before the release date of the scoping document.

The name of this project is wrong - as it leaves out the vital information that the channels will transport flood waters from Lake of the Prairies, The Assiniboine River, Portage Diversion, and Lake Manitoba to Lake Winnipeg. There is insufficient content in the scoping document about Lake Winnipeg, which will need to be included in the EIS. A reminder - Premier Pallister was clear in his release last summer that as many as 14 First Nations are to be consulted about impacts from the project. This includes First Nations around Lake Winnipeg.

Section 2.4 leaves out the requirements of CEAA 2012. Why?

Comments from Indigenous People is not the same as fulfilling the requirement under Section 35 of our constitution for consultations with First Nations and Aboriginal Peoples. In order to receive comments, and conduct consultations - all provincial and federal authorities would need to be knowledgeable and up to date regarding which communities are affected. This applies to non aboriginal communities also. Our observation from the first two open houses is that this did not appear to be so.

Decommissioning is required under CEAA 2012. Where does the 100 year life of project come from? Is there any flood proofing infrastructure in Manitoba 100 years old ?

In 2.4 there are references to Alternatives means of carrying out the proposed projects. Alternatives to the project needs to be included. Any conclusions in the EIS about alternatives and assessment regarding technical or economic feasibility will require full reporting, and data, including methodology, who did the work and how the conclusions in the EIS were arrived at. The same standard of process and information regarding measures to avoid minimize or mitigate environmental effects will be needed in the EIS. This would include methodology and explanation as to definitions, and how conclusions were arrived at. Clearly 2.4 is missing the identification of those adverse environmental effects in the first place, and the EIS will need to show clearly what is considered an environmental effect and how identification of adverse effects was arrived at.

Section 2.2 has a similar problem. The start is with the lands that are crown lands, and where the traditional territories of the affected and potentially affected First Nations are located. We do not see economic effects in 2.4 either. CEAA 2012 requires this also.

An observation from the Open House materials - there was a lack of understanding about cumulative effects. Again the definitions section of the EIS will be important here. "Reasonably foreseeable future" is a phrase that puts the neutrality and methodology of Manitoba Infrastructure at risk. When a government agency is the proponent for a public works and responsible for the EIS extra care needs to be taken at every step to show methods, definitions, and basis for conclusions in the EIS.

Section 3. There is no map provided of the PROJECT region. It should not have been left out. 3.2 re Aquatic Environment leaves out the fishery itself which should be assessed before 2011 flooding and since, and in relation to the future assuming the project will be put in place. This is a significant oversight and is required by CEAA 2012.

Species at risk information is weak, and current CEAA 2012 EA and EIS processes for Manitoba projects are including species beyond the S 1 and S2 ranking among Manitoba species and information from the CDC Manitoba.

3.4.1 ignores the required steps regarding Aboriginal Consultation. The EIS does not include this information but the CEAA 2012 guidelines regarding Indigenous Peoples must be fulfilled. This means that the EIS will need more content than 3.4.1 indicates. Assumptions about TK studies in 3.4.1 relate to consultation activities. So the EIS will need to use some clarity and make sure of standards including with respect to intellectual property, methodologies attached to any TK information, consent forms, anonymity standards and the TRI Council Standards for Interviews with Aboriginal Persons. Both Manitoba Environment ACT EIS and subsequent hearings and CEAA 2012 and NEB processes are alert to these requirements.

4. Leaves out environmental and civil society organizations in the public engagement program. 4.1 appears to not understand that Indigenous engagement is separate from stakeholders. Ask any developer of significant public or private infrastructure in Canada. Ask the NEB, ask CEAA, ask Manitoba Hydro they are all aware that engagement of Indigenous Peoples is not among or with stakeholders. 4.1 also does not clearly indicate who will receive feedback, who will see comments collected etc. 4.2 has the same problems. "Who has expressed interest in the proposal project" is not appropriate regarding First Nations. Any potentially affected First Nation will need to be engaged by Manitoba Infrastructure. If that has not started yet this will be a long process.

4.2 refers to TK and studies again. To the best of our knowledge there has been no inclusion of local indigenous communities in project planning and design. What is the time line? Our office has been informed that there has been no capacity or funding for TK studies ( which is a misnomer here.). So when will these occur, and what is the process and funding? As far as we have been able to determine there has not yet been a start on the Manitoba Crown consultations with up to 14 affected First Nations either.

What is the time line then ?

Mixing the Indigenous content here is confusing and potentially disrespectful. Perhaps the departments/ proponents staff and consultants are not experienced in the steps required, the need to avoid stakeholder references etc.

## 5. EA Principles and Objectives:

5.1 avoids the primary issue in this EIS. A definition of the baseline condition has to be before the flooding in 2011. Given the emergency federal exemption issued at that time, and the construction of the emergency channel and the dramatic changes of an artificial nature to the environment at that time - which also need assessment and study - the baseline condition is not as of 2018. Clarity on this matter will be needed as soon as possible.

A lot of activity has occurred since March 2018. It is unfortunate that this scoping document is so dated.

5.2 includes reference to archeology. Manitoba Infrastructure to date has not done their homework regarding archeology, and wants to point to a partial study for one element in the project as sufficient for the Project Region.

5.3 The definitions of PF, LAA and RAA are not accurate. Given there is no map provided this is a confusing section. A review of how the PF or equivalent, LAA and RAA are arrived at BEFORE VC areas are identified would be useful to arrive at a full EIS. Review of other EIS products for significant public works under our Environment Act would help Manitoba Infrastructure. VC selection is poorly described, and somewhat self serving. VC are environment elements relevant in the PF, LAA and RAA. They exist, use have habitat or history in these areas. Again the lack of activity regarding First Nation engagement, studies etc to date puts a high risk to the steps identified for VC selection.

Manitoba Infrastructure will need to make sure they are not seen to be selecting VCs that they then indicate are not affected.

5.4 again ignores the EIS guidelines from CEAA, based on CEAA 2012 for this project. Why?

5.5 Residual effects definition is lacking in clarity.

WE note that climate change is absent from this scoping document and an attempt may be made to leave climate change out of the EIS. The content in 3.1.1 is weaker than CEAA 2012. A review of recent CEAA EIS products for public infrastructure, especially where federal agreements and funds are involved, and where the life line of a project will be up to 100 years is advised so that Manitoba Infrastructure understands what is required regarding climate change.

## 6 Monitoring and Follow Up

Again the 'where appropriate' phrase does not provide any confidence in the what this CEAA required EIS will contain. There is no clarity as to who and how the follow up and monitoring will be done. Manitoba is somewhat famous nationally for not conducting independent monitoring or follow up on new infrastructure projects. This is changing where there is federal responsibility, so we look forward to more complete information in this area in the EIS.

Manitobas EIS Guidelines December 2017 document will need to contain clear direction for compliance with a CEAA EIS.

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**PEGUIS FIRST NATION RESPONSE  
TO  
AN ENVIRONMENTAL ACT PROPOSAL  
ON  
THE LAKE MANITOBA AND LAKE ST. MARTIN OUTLET CHANNELS**

Submitted by Peguis First Nation

Prepared by Lloyd Stevenson

July 3, 2018

In most instances the purpose of an environmental act proposal is to lay the groundwork of an EIS (environmental impact statement) where decisions will be made on the EIS contents. It is crucial that all pertinent and concomitant elements be included in the EIS and not just those considered important by the proponent but to be inclusive of other areas such as adverse effects to the environment and to include First Nation perspectives on rights such as land, hunting, trapping and other harvesting and collecting rights. These rights include those described as inherent, constitutional, treaty, aboriginal and aboriginal title.

In terms of Aboriginal Title, Peguis has asserted and continues to assert that it possesses aboriginal title to lands outside the Treaty One area. As the lands in the proposed project area are inside Treaty Two territory Peguis does assert aboriginal title to lands in that treaty area. When Treaty One was signed in 1871, the Treaty One Nations (including Peguis) agreed to share the Treaty One territory and these Treaty One Nations did not relinquish their rights to lands outside the Treaty One territory and accordingly, those rights still exist.

The environmental act proposal and the subsequent EIS can be described as a form of 'strategic planning' and is a process on which rights of the Peguis First Nation will be affected. This was noted in the federal court case of *Dene Tha' v. Canada* where Justice Phelan stated that the environmental and regulatory process has the potential to affect adversely the rights of the Dene Tha'. Furthermore, Justice Phelan stated there was no intention to address the concerns before the environment and regulatory processes were in place. In addition, the court held that a public forum process is not a substitute for formal consultation. That right to consultation takes priority over the rights of other users. (Paragraph 104). In essence, the court ruled that the Dene Tha' concerns have to be incorporated into the environmental and regulatory processes. The Peguis First Nation is requesting that the planners and provincial departments follow this legal standard.

The United Nations Declaration on the Rights of Indigenous Peoples have a number of articles and standards that have to be followed by Canada and the provinces. Article 19, 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. In addition, Article 32.2 it is required that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. These legal standards have been in place since 2010 when Canada formally adopted the UNDRIP albeit three years after the rest of the world.

The duty to consult and accommodate by the Crown has seen a number of cases that address this legal process. A number of cases especially at the Supreme Court of Canada level have set legal standards that have to be followed by the crown to fully discharge the duty to consult. The most relevant case at the Supreme Court of Canada is the Haida case. The court in this case has set a legal standard when the duty to consult is triggered. The duty to consult is triggered whenever the Crown contemplates an activity that may adversely affect a Treaty or an Aboriginal

Right. The provincial government attempted a consultation process with Peguis by delegating this duty to a third party by the name of Golder. Golder came out to Peguis on the spring of 2018 and was in Peguis for two hours with no notification of their impending visit. This is not consultation. Consultation has to be meaningful and is one of the legal standards set out by the courts. The federal court in the Dene Tha' case said at paragraph 116 the duty to consult cannot be fulfilled by giving the Dene 24 hours to respond to this process. Consultation by the Crown must be conducted with the Rights holder which is the first nation and not with a tribal council or a provincial organization unless of course there was a form of delegation. For Peguis there was no delegation or delegated authority given to a tribal council.

The proposed environmental act proposal states that the EIS is to be prepared and reviewed by the provincial and federal regulators. This is the antithesis of the legal standard set out in the Dene Tha' case. First Nations such as Peguis must be directly involved in every facet of the environmental and regulatory process. The proposal also states that the proponent may request the involvement of the Clean Environment Commission. As this is a class 3 development and there will be an EIS, it is incumbent on the proponent that the CEC be involved in this process. The proposal commented that the development may impact fish and fish habitat through alteration of riparian vegetation and the wet land system. The alteration of the wet lands will greatly reduce the integrity of the filtration system. There wet land areas act as the kidneys of the ecosystem and the resultant effect would increase toxic content in Lake Winnipeg. The proposal does not indicate how this risk will be reduced and the environment will once again suffer as a result of this development. History will once again confirm that development of this nature will have priority over the environment.

All of which is respectfully submitted.

Peguis First Nation

## References

Dene Tha' First Nation v. Canada (Minister of Environment) 2006 F.C. 1354. This trial division court was affirmed by the Federal Court of Appeal.

Haida Nation v. British Columbia [2004] 3 SCR 511.

United Nations Declaration on the Rights of Indigenous Peoples

Peguis Policy on Consultation and Accommodation