

PIMICIKAMAK FINAL SUBMISSIONS

CEC PROCEEDINGS REGARDING KEEYASK

1. It is Pimicikamak's position that the CEC should not recommend approval of Keeyask unless and until there is a clear understanding of all impacts of existing hydro development -- which Keeyask would add to and alter -- and a full addressing of those impacts to the extent possible.
2. The Hydro Project is NOT clean, green and renewable. This is a sales pitch, and for decades many bought it. The reality of the devastation remained hidden up north, except to those who live in the middle of it – like Pimicikamak, and like the Keeyask Cree Nations (“KCNs”).
3. While Manitoba Hydro touts the Hydro Project as a whole, and Keeyask, as being clean and renewable, it does so in large part because hydroelectric development does not contribute to greenhouse gas emissions (which cause climate change) as much as do other sources of electricity (such as coal or natural gas). However, those impacted by the Hydro Project are feeling the same sorts of impacts that climate change causes, on an equivalent scale. As Dr. Luttermann pointed out in her testimony, when we look at the fears related to climate change, such as drought, flooding, habitat change, the melting of permafrost and the invasion of non-native species, those fears have effectively been realized by those living with the immediate and long-term effects of hydroelectric development. Same impacts – different causes.¹ “River regulation projects that contribute to extreme landscape change on a basin-wide scale, can be seen as akin to, or more severe than, climate change.”²
4. So while on the one hand, Manitoba Hydro persists in touting the Hydro Project and Keeyask as clean and green, on the other hand, it refuses to have the ongoing existing impacts from the current Hydro Project included as part of its cumulative effects for Keeyask or for anything else. One assumes that Manitoba Hydro does not want the real

¹ Lutterman, p. 20.

² Lutterman, p. 21.

scope and nature of existing impacts to be exposed. Because if the Hydro Project really were so clean, why would Manitoba Hydro not want this fact to be fully exposed?

5. Instead, Manitoba Hydro is using the fact that it entered into the agreements with the four KCNs to say “Keeyask is Aboriginally approved”. Manitoba Hydro, in the EIS, intends for these agreements and approvals to substitute for or overshadow serious effects from Keeyask.
6. But what does this “Aboriginal approval” really amount to? The KCNs were left with the impression that Keeyask would be built whether they really wanted it or not.³ After all, the rest of the Hydro Project was built when the KCNs did not want this – and for good reasons. The existing Hydro Project has caused devastating impacts to the KCNs and others.⁴ The KCNs felt they might as well get *some* benefits (however questionable) from Keeyask versus none. This is *not* the same as Manitoba Hydro giving them informed consent to not have Keeyask built at all if they didn’t want it. That choice was never on the table.
7. In order to push Keeyask through, Manitoba Hydro structured the EIS using a series of premises and boxes divorced from the reality on the ground, which lead to fictionalized conclusions:
 - (a) It imposed the baseline of assessment being the environment today, already seriously altered and devastated by the existing Hydro Project and impacts – shutting out any assessment of those.
 - (b) It selected VECs that do not reflect the reality of existing ongoing impacts across the entire watersheds and ecosystems so affected, and instead selected VECs that will not capture this reality. They are narrowly framed and out of context of the actual reality that exists.

³ Chief Garson (Tataskweyak Cree Nation), transcript, October 21, 2013, p. 119; Bland, transcript, November 5, 2013, p. 2132.

⁴ Chief Constant (York Factory), transcript, October 21, 2013, p. 101-102; Chief Kennedy (War Lake), transcript, October 21, 2013, p. 107-108; Chief Garson (Tataskweyak Cree Nation or Split Lake), transcript, October 21, 2013, p. 113-114; Darwin Paupanakis (Pimicikamak), transcript, October 21, 2013, p. 77-79; Anderson, Bland, transcript, November 5, 2013, p. 2123 - 2126.

- (c) It selected a boundary for effects assessment that is too narrow and will not capture reality of all effects, cumulative and incremental, direct and indirect.
 - (d) The cumulative effects assessment (“CEA”) is thus too narrow and weak for the reasons above.
 - (e) The mitigation measures it proposed are thus too weak because they fail to address many impacts that were not really assessed.
8. The EIS concludes that impacts were not significant, because of all the fictionalized and narrow and weak approaches it used, as above.
9. By Manitoba Hydro’s own admission, Manitoba does not need Keeyask for domestic supply for years to come. Maybe not at all, if demand is reduced through conservation and efficiency measures. There is no need to hurry Keeyask along at this time. The CEC should not recommend a licence for Keeyask at this time.
10. These submissions will address the following weaknesses in the EIS, in arguing that a licence for Keeyask should not be recommended:
- (a) Weaknesses in Scope
 - (i) Baseline
 - (ii) Boundaries
 - (iii) VECs
 - (iv) Impacts on Pimicikamak and other Aboriginal Peoples outside the four KCNs
 - (b) Weaknesses in Approach
 - (i) Aboriginal Perspectives
 - (ii) Sustainability Assessment
 - (c) Weaknesses in Conclusions
 - (i) Mitigation Measures, including for sturgeon

(ii) Insignificant Effects

(a) WEAKNESSES IN SCOPE

(i) Baseline

11. The EIS does not use as a baseline the pre-development state of the environment. The failure to recognize the damage that has been done over the last 50 years by hydroelectric development allows for death by a 1000 cuts. This must be taken into consideration.
12. The only impacts that really count are the cumulative impacts, because that is how they are experienced on the ground, in reality. Projects do not exist in fictional vacuums.

Understanding the significance of the effects of any single project development, such as the effects of a hydroelectric project, requires an understanding of the total effects of other human activities and natural processes that occur within the watershed, such as forestry, mining, linear features, water withdrawal, in-stream and other disturbances to aquatic and terrestrial habitat.⁵

13. With the exception of the terrestrial effects section, which gives some minimal consideration of the cumulative impacts of the Hydro Project since the Project first began, the other sections of the EIS essentially ignore the devastation and ongoing impacts of the existing Hydro Project.
14. Drs. Noble and Gunn submitted that:

The Keeyask Project's incremental effects appear to be underestimated, and in many instances dismissed, given explicit recognition in the EIS that:

- (a) the Nelson River sub-watershed has already been 'substantially altered' by past developments over the past 55 years;
- (b) those effects persist today; and
- (c) the Keeyask Project will cause additional effects to an already substantially altered environment.⁶

⁵ Noble and Gunn, p. 8.

⁶ Noble and Gunn, p. 13.

15. Furthermore, Dr. Lutterman found:

the fact that the Keeyask project EIS focuses primarily on one portion of the Nelson River systems presents a number of weaknesses from the perspective of developing an understanding of the potential landscape level ecological effects of the proposed Keeyask project added to the existing hydroelectric developments in this river system...The Nelson River wetlands are already degraded and are accorded little value now...The Nelson River shoreline habitats that would have existed prior to initial hydroelectric are effectively written off in this assessment.⁷

(ii) Boundaries

16. The EIS does not consider a broad enough area in order to capture cumulative effects that may be eventually experienced as a result of Keeyask.

(a) Underlying the CEA is the notion that the components of the existing Hydro Project are physically separated therefore the impacts are physically separated. However, as Dr. Noble highlighted in his November 12, 2013 testimony, spatial separation is irrelevant when dealing with a watershed as it is a connected system – multiple projects or disturbances in a river system or watershed will all contribute to sedimentation, for example, despite their physical footprints not overlapping.⁸ This is another example of how the conclusions of the CEA are questionable.

(b) Instead, what the Partnership did is create a narrow geographic scope where direct effects from Keeyask (rather than indirect cumulative effects) will be assessed. “Cumulative effects...are not [only] direct effects, they are effects that are often indirect.”⁹ Drs. Bram Noble and Jill Gunn submitted that good practice CEA goes beyond a direct effects analysis. It should adjust boundaries to be able to assess VEC sustainability, and to capture both the project’s effects and cumulative

⁷ Lutterman, p. 4

⁸ Dr. Noble, transcript, November 12, 2013, 2701-2702.

⁹ Dr. Gunn, Transcript Nov 12, 2013, 2683, 17-23.

effects of all other projects and activities that create cumulative pressure on VEC sustainability.”¹⁰

- (c) Dr. Lutterman concluded in her submissions that limiting the CEA to the Nelson River was overly restrictive considering the influence of the upstream reaches of Lake Winnipeg and the entire basin on sediment and nutrient transport, and dispersal of species, among other ecological processes.¹¹
- (d) The EIS should have considered an area broad enough to capture both direct and indirect effects.

(iii) VECs

- 17. VECs were selected that were too narrow and did not capture the real cumulative impacts of Keeyask with the ongoing effects of the existing Hydro Project. This is a consistent error and manipulation throughout the EIS.
- 18. As stated by the Partnership itself, the “assessment evaluates the VEC populations directly affected by the Keeyask project [only].”¹²
- 19. The Partnership should have selected VECs that captured the interconnectedness of the environment and more particularly the system-wide nature of the impacts of hydroelectric development, particularly in an interconnected system like the Hydro Project in Northern Manitoba.
 - (a) One such VEC identified by Dr. Lutterman is the naturally functioning riparian corridor of the Nelson as it provides a landscape-level understanding to that corresponds to the Cree world view.¹³
 - (b) Another VEC could be an “ecological process”, such as the natural hydrological regime, as a key driver (and an indicator) of biodiversity in a river landscape.¹⁴

¹⁰ Noble and Gunn, p. 23.

¹¹ Lutterman, p. 7.

¹² Dr. Gunn, transcript, Nov 12, 2013, 2684, 12-14 – QUOTED FROM IR RESPONSE – CEC Rd 2 CEC-0103a

¹³ Lutterman, p. 6.

¹⁴ Lutterman, p. 24.

- (c) Lake Sturgeon was not identified in the EIS Chapter 7 as a VEC to be included in the CEA for future projects or activities, which means that the impacts of erosion and sedimentation on the water quality of sturgeon habitat were not analyzed as part of the CEA for future projects and activities. This should have been done in order to meet the claim that the EIS adopts an ecosystem perspective.¹⁵
20. Pimicikamak requested consultation on the selection of VECs pursuant to Article 9 of the NFA and the direction under the EIS Guidelines. Despite these requests, Manitoba Hydro failed to adequately engage Pimicikamak.¹⁶ Pimicikamak's voice was thus left out of the selection of VECs even though it stands to be impacted by Keeyask, cumulatively with the ongoing effects from the existing Hydro Project.
21. In the narrow and inadequate selection of VECs, the conclusions in the EIS cannot and do not ensure ecological integrity.
- (iv) Impacts on Pimicikamak and other Aboriginal Peoples outside the four KCNs**
22. The EIS Guidelines require the Partnership to actively solicit Aboriginal concerns from groups other than the Keeyask Cree Nations during the course of the EA.¹⁷ Manitoba Hydro used the NFA Article 9 consultation process to “engage” with Pimicikamak on Keeyask. However, while there have been many meetings, there has been no accommodation of Pimicikamak's concerns. Consultation must always be with the intent of substantially addressing the affected Aboriginal party's concerns.¹⁸ Such addressing of concerns is accommodation. Without accommodation, consultation is nothing more than cheap talk.
23. If it turns out that there are adverse environmental impacts that affect Aboriginal peoples or groups other than the KCNs, like Pimicikamak, Manitoba Hydro has no formal process in place to ensure that these impacts are mitigated in a manner that is acceptable to such affected peoples or groups.¹⁹

¹⁵ Noble and Gunn, pp. 29-30.

¹⁶ Paupanakis, transcript, December 4, 2013, 5077:15 – 5078:3.

¹⁷ *EIS Guidelines for the Keeyask Generation Project*, 7.2 Aboriginal Consultation, p. 12.

¹⁸ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 168.

¹⁹ Pachal and Cole, transcript, December 5, 2013, 5327-5330.

24. The Keeyask Project lies within Pimicikamak's traditional territory:

Pimicikamak has the following rights in relation to Keeyask. We have Aboriginal rights in our homeland. Our traditional territory extends up to the Keeyask area and includes much of the project in Northern Manitoba. We have Treaty rights right across Manitoba, and extends beyond its borders. We have NFA rights across the entire area affected by the project. We have self-determination rights under international law and Canadian law. We have...rights and responsibilities to protect the land and waters under Pimicikamak traditional law.²⁰

25. Darwin Paupanakis described how Pimicikamak has been and continues to be adversely affected and impacted by the existing Hydro Project, especially those irreversible impacts generated from the control structure at Jenpeg.²¹ Keeyask will alter and add to these.
26. Vice Chief Shirley Robinson read a statement by the Chief that described the degradation of Pimicikamak's traditional territory, the social and health crises that plague the community as well as the impacts on Pimicikamak's ability to exercise its inherent Aboriginal rights. She expressed Pimicikamak's fear of Keeyask further impacting their already critically fragile environment.
27. In addition to the direct and indirect impacts above, there will be system impacts from Keeyask that will adversely affect Pimicikamak.
- (a) Dr. Lutterman pointed out that adding another generating station to the watershed will change how decisions are made with regard to capacity, the cost of conducting business and ultimately the revenue generated.²² Money spent there may divert money away from mitigation and other measures that affect Pimicikamak. Further, money is a large driver of how the Hydro Project is operated, and it is unclear how it will be operated after Keeyask is added. It is not clear how Pimicikamak will be affected – the Partnership has not assessed this.

²⁰ Vice Chief Shirley Robinson, transcript, December 4, 2013, 5034, 5-16.

²¹ Darwin Paupanakis, transcript, December 4, 2013, 5052, 12-24.

²² Dr. Lutterman, transcript, December 5, 2013, 5301-5307.

- (b) The Partnership made a statement that there would be no discernible impact on Manitoba Hydro's overall system but did clarify in the hearings that that did not mean there would be no impact.²³
- (c) And even if system impacts do not reach down to the community of Cross Lake, Pimicikamak is not limited to its reserves. Its traditional territory is far reaching and includes the Keeyask area as is shown in Exhibit Pim002.²⁴
28. Despite all this, the EIS does not consider the potential impacts of Keeyask on Pimicikamak at all or offer any mitigation measures designed to offset the potential impacts on Pimicikamak.
29. No one has yet assessed how Pimicikamak and its citizens connect to, value and use and occupy the land. This information is critical to identify and understand "what" Pimicikamak is and thus what is and will be impacted by developments affecting it, including Keeyask.
30. Mr. Paupanakis submitted on behalf of Pimicikamak that:
- Keeyask should not go ahead until ...a land use and occupancy study and impact study completed. Only after these studies are done can Pimicikamak and the CEC panel, the Minister, and all Manitobans understand the true impacts of Keeyask.²⁵
31. These studies are to determine Pimicikamak's connections to, values in, uses and occupancy of the land, and to help assess how Keeyask, including cumulatively with existing impacts from the Hydro Project, may affect Pimicikamak.
32. To date, such studies have never been done²⁶ and until done, we cannot know how Keeyask may impact Pimicikamak and its environment.

²³ Mr. Rempel, transcript, October 28, 2013, 1147-1148.

²⁴ Treaty 5 Map, Exhibit Pim002.

²⁵ Vice Chief Shirley Robinson, transcript, December 4, 2013, 17-24.

²⁶ Paupanakis, transcript, December 4, 2013, 5079.

(b) WEAKNESSES IN APPROACH

(i) Aboriginal Perspectives

33. Even though there were independent assessments done by each of the KCNs, these did not translate into a true consideration of the interests and values of Aboriginal peoples in the approach taken in the EIS or the conclusions drawn. In the end, the outcome unfortunately looked a fair bit like tokenism.
34. A theme that emerged from the opening statements of the representatives from the KCNs was that all were ignored and their many concerns about the existing Hydro Project were not accommodated in the past. Their concerns about the baseline imposed by Manitoba Hydro for the Keeyask EIS were also ignored.
35. Pimicikamak continues to be ignored and not accommodated with respect to Keeyask.
36. The thresholds or benchmarks used to measure significance of effects in the EIS did not include Aboriginal traditional knowledge or perspectives. They are strictly informed by Western Science.²⁷
37. Despite the finding that ecosystem diversity or the habitat of the Canada goose, caribou and moose will be adversely affected, the EIS comes to the conclusion that these effects will be regionally acceptable. This approach does not incorporate an Aboriginal perspective. The EIS failed to take into account that this environment is someone's home – it is the homeland and traditional territory of Aboriginal peoples. The people who use this land have a deep attachment and connection to it. Thus deep significance is attached to the loss of specific habitats and populations of wildlife.
38. Pimicikamak further submits that the EIS uses a restrictive definition of significance of effects, which does not reflect the significance of effects on Aboriginal people. During the hearings Manitoba Hydro referred to the significance of residual effects as “regulatory significance” and implied that this was some special type of significance and its hands were tied in what it set as the threshold – it had to use technical science. This completely ignores the Aboriginal perspective.

²⁷ October 24, 2013, transcript, Mr. Cole, 903:3-11.

39. The touted “two-track approach” in the EIS really just means that where traditional knowledge says something different than western science, Manitoba Hydro accepts only the western science. For example, for water levels in Split Lake, the KCNs say that the water levels will rise. Manitoba Hydro disagrees with that conclusion. Instead of accepting what the KCNs are saying, Manitoba Hydro will just monitor water levels after Keeyask is built and see what happens. If it turns out the KCNs were right and water levels do go up on Split Lake, then the Partners will discuss what to do about it. This does not create any level of certainty at all that adequate mitigation measures will be put in place. This will leave other interested parties out of future discussions of mitigation measures: the Partnership does not currently have a plan to include other parties in discussions of what to do if there are changes to water levels on Split Lake.²⁸

(ii) Sustainability Assessment

40. The CEC’s recommendations must incorporate the Principles and Guidelines of Sustainable Development.

41. Pimicikamak submits that the CEC should follow the recommendation of Dr. Bob Gibson and conduct this EA in accordance with the requirements for a sustainability assessment, prior to issuing its recommendations, or that it should require the Partnership to complete such an assessment prior to licencing.

42. This approach is consistent with the Principles and Guidelines of Sustainable Development in that it calls for “encouraging and assisting the researching, development, application and sharing of knowledge and technologies which further our economic, environmental, human health and social well-being.”²⁹

(c) WEAKNESSES IN CONCLUSIONS

(i) Mitigation Measures, including for sturgeon

43. Given the many failures in setting the wrong baseline, setting the boundaries too narrowly, defining VECs too narrowly, ignoring the Aboriginal perspective throughout,

²⁸ Pachal, December 5, 2013, transcript, 5330:25 – 5331:11.

²⁹ Government of Manitoba, *Principles and Guidelines of Sustainable Development*, online: Sustainable Resource and Policy Management < <http://www.gov.mb.ca/conservation/susresmb/principles-susdev/>>.

ignoring impacts on Pimicikamak and other Aboriginal peoples except for the four KCNs, wholly inadequate mitigation measures have been proposed in the EIS.

44. The mitigation measures proposed only address the impacts of Keeyask, they do not address the impacts of the existing Hydro Project.
45. The Adverse Effects Agreements (“AEAs”) signed with the KCNs only address the impacts of Keeyask, they do not include any measures to address the devastation of the existing Hydro Project. And there are no AEAs for parties other than the four KCNs, even though Pimicikamak and other Aboriginal peoples will be affected by Keeyask, including cumulatively with effects of the existing Hydro Project.
46. Manitoba Hydro ignored the Aboriginal perspective in developing mitigation measures, where this perspective and knowledge differs from western science. Manitoba Hydro ignores the former and only accepts the latter. It failed to develop any mitigation measures where traditional knowledge indicates a problem will arise that will require mitigation, if western science does not come to the same conclusion. See example regarding water levels in Split Lake, above.
47. Manitoba Hydro is also ignoring what Aboriginal peoples, including Pimicikamak, have said about lake sturgeon. But here, Manitoba Hydro also does not have good backing from western science. It has ignored both, and drawn unsupportable conclusions about how to mitigate effects on lake sturgeon, and the chances of success of such programs. Manitoba Hydro says these programs have a high degree of certainty of success, when the evidence reveals uncertainty at best.
48. Sturgeon has been classified as endangered by COSEWIC (“Committee on the Status of Endangered Wildlife in Canada”). Sturgeon is also an incredibly important species to Pimicikamak. Its protection should be a priority.
49. We know that Keeyask will destroy sturgeon habitat and adversely affect sturgeon.
50. The Partnership is proposing stocking for 25 years. There is no guarantee that the problems in the stocking program can be overcome, and even if they are, that stocking will result in self-sustaining populations of sturgeon. This is particularly a concern given

that neither the Partnership nor Manitoba Hydro are committed to rehabilitating sturgeon habitat that has been destroyed by the existing Hydro Project.

51. Given the known impacts on sturgeon and the unknowns regarding mitigation, Manitoba Hydro has grossly overstated confidence in its conclusion that there will be no significant adverse effects on sturgeon.
- (a) First, there is limited detailed data on habitat conditions for sturgeon in other reaches of the Nelson River where sturgeon are also severely depleted.³⁰
 - (b) The fish enhancement measures are and must be treated as experimental.³¹ The mitigation measures being proposed, such as the placement of juvenile habitat, are experimental at best. As Dr. Peake said during his testimony on November 13, 2013, “the Proponent should consider the placement of juvenile habitat a worthwhile experiment, no more, no less...[b]ut certainly...treat it as an experiment and have little to no expectations with respect to success.”³²
 - (c) While methods for raising fish in hatcheries are improving, it is not known whether stocking will result in self-sustaining Nelson River populations over the long-term given the many variables associated with degraded habitat conditions.³³
 - (d) The stocking programs described for the upper Nelson River have yet to demonstrate that stocking will re-establish self-sustaining populations.³⁴
 - (e) Artificial spawning structures have seen some success in other rivers, but none have been tried in the Nelson River, making a young-of-the-year habitat experimental. “There is insufficient evidence to conclude that it will off-set the negative effects of additional habitat alteration and destruction.”³⁵

³⁰ Lutterman, p. 10.

³¹ Lutterman, p. 10.

³² Dr. Peake, transcript, November 13, 2013, 2996, 4-14.

³³ Lutterman, p. 10.

³⁴ Lutterman, p. 14.

³⁵ Lutterman, p. 11.

- (f) It is not clear how one can conclude that stocking will result in self-sustaining populations in the long-term, or whether stocking, coupled with artificial habitat enhancement, will fully compensate for the additional loss of what is still functioning habitat.³⁶
 - (g) “A review of reported success in other jurisdictions does not necessarily offer a sufficient level of confidence at this point in time, to justify a conclusion that additional habitat destruction and degradation in the Nelson River will be fully mitigated by habitat enhancement and stocking and that therefore no significant effects can be assessed.”³⁷
 - (h) The evidence of Dr. Peake indicates that there is no track record of consistently successful lake sturgeon production in Manitoba and the Partnership should use caution in extrapolating survival rates reported in southern (i.e. USA) systems to northern rivers where conditions are considerably more difficult.³⁸
 - (i) Lastly, the proposed marking techniques have several drawbacks, including the injury/maiming and killing of the sturgeon, and inability to establish critical population parameters.³⁹
52. Pimicikamak submits that a licence should not be issued for Keeyask until the predicted results from mitigation measures are more certain such that the true residual impacts can be adequately assessed. At this point, all we know for sure is that Keeyask will destroy sturgeon habitat and that we hope some of the Partnership’s efforts to offset the harm to sturgeon will work. If they don’t work, Keeyask may be the 1000th cut for sturgeon.
53. Pimicikamak has experience with many of the mitigation measures being proposed, and Pimicikamak’s witnesses testified that these mitigation measures do not work on the ground as they are touted by Manitoba Hydro as doing.

³⁶ Lutterman, p. 13.

³⁷ Lutterman, p. 15-16.

³⁸ Dr. Peake, PowerPoint presentation.

³⁹ Dr. Peake, PowerPoint presentation.

- (a) The domestic fishing program delivered by Manitoba Hydro involves Manitoba Hydro selectively choosing where Aboriginal people can fish. For Aboriginal people, fishing is much more than the exercise of putting food on the table. It provides an opportunity to teach young people the value of being in touch with the land, to speak their own language and come to understand the traditional knowledge and traditional laws instilled into that language. By restricting fishing activities in the domestic fishing program, Manitoba Hydro is restricting the development of their way of life and culture.⁴⁰
 - (b) There are existing safe travel routes maintained by Manitoba Hydro but these are also subject to the effects of flooding and can become hazardous. As Darrell Settee provided in his evidence, one of Pimicikamak's members drove his snowmobile into open water using one of these so-called safe travel routes.⁴¹
 - (c) As you heard from Mr. Paupanakis and Mr. Settee, Manitoba Hydro is obligated to remove the debris it has produced from the waterways, but has failed for many years to do so adequately. Pimicikamak's members' lives have been taken in boating accidents due to debris floating in the Jenpeg forebay.⁴² Indeed, the Partnership's expert, Mr. St. Laurent, confirmed that they will not be completely removing the roots and stumps of the trees that would be cleared in the reservoir for the Keeyask Project. This means that as the soil erodes with flooding, these roots and stumps will end up in the waterways where they become deadly hazards for those using the reservoir much like the debris in the Jenpeg forebay.⁴³
54. All that mitigation measures can do is dampen some of the impacts so that they are not as acute. They will not reverse the existing impacts of hydroelectric development and they can never completely offset the known harms that Keeyask will cause. The idea of intentionally causing environmental damage when one knows that it will not be fixed, is contrary to the Cree worldview as it was presented by Pimicikamak's witnesses. As the witnesses expressed – Pimicikamak citizens:

⁴⁰ Paupanakis, transcript, December 4, 2013, 5083-5084.

⁴¹ Settee, transcript, December 4, 2013, 5068, 8-16.

⁴² Paupanakis, transcript, December 4, 2013, 5078, 10-18; Settee, 5070, 17-21

⁴³ St. Laurent, transcript, October 28, 2013, 1127-1128.

are stewards of the land and waters. We have a mandate to protect our natural resources. We have a spiritual mandate to protect all living things in accordance with our spiritual law and responsibilities. This law and our relationship with the land that it governs is essential to who we are as a people.⁴⁴

(ii) Insignificant Effects

55. The EIS states in a number of areas, including respecting ecosystem diversity and fish, that the impacts would fall in the moderate range and yet the ultimate conclusion is that there are no significant adverse environmental effects. As pointed out by Dr. Gunn, this conclusion defies common sense.⁴⁵
56. Despite the finding that ecosystem diversity or the habitat of the Canada goose, caribou and moose will be adversely affected, the EIS comes to the conclusion that these affects will be “regionally” acceptable. This approach does not incorporate an Aboriginal perspective, because to Aboriginal peoples who live with the land and rely on this relationship as the core of their identity, such adverse effects felt at the local level, where the land is used by a people, are not and cannot be insignificant. It is this flawed approach that leads to the flawed conclusions in the EIS that the residual effects will be “adverse but regionally acceptable”.
57. During the hearings the Partnership referred to the significance of residual effects as “regulatory significance” and implied that this means any western science could be to determine significance. This is incorrect in law because it completely ignores the Aboriginal perspective. The requirement to incorporate the Aboriginal perspective can be found throughout the *EIS Guidelines for the Keeyask Generation Project*, including requiring the Partnership to explain how Aboriginal traditional knowledge was incorporated into the preparation of effects assessment and that:

[w]here the conclusions drawn from scientific and technical knowledge area inconsistent with the conclusions drawn from Aboriginal traditional knowledge or community knowledge, the

⁴⁴ Paupanakis, transcript, December 4, 2013, 5053, 5-12.

⁴⁵ Dr. Noble, Transcript, November 12, 2013, 2706.

EIS should present the various points of view as well as a statement outlining the proponent's conclusions.⁴⁶

58. Furthermore, the EIS Guidelines require that in determining the significance of residual effects, the Partnership:

will provide a summary of the regional, provincial, Aboriginal or national objectives, standards or guidelines that have been used to assist in the evaluation of the significance of the identified adverse environmental effects.⁴⁷

59. These guidelines in no way suggest that the Partnership was required to use only technical science in developing thresholds for the significance of residual effects. In fact, these passages demonstrate that the opposite is true.
60. Furthermore, as the Partnership has agreed, the CEC is not limited to considering “regulatory significance” in making recommendations under the *Environment Act*.⁴⁸ It is open to the CEC to consider other criteria to evaluate the significance of the adverse environmental effects of Keeyask.
61. While there are some benchmarks identified for some VECs, those benchmarks were not used to assess cumulative effects. It is questionable how the EIS can then make conclusions that the cumulative effects are not significant without measuring predicted cumulative loss against the benchmarks.⁴⁹
62. Due to strong doubts about the efficacy of mitigation measures and the “regulatory insignificance” of residual effects, more and better monitoring programs must be put in place for Keeyask, and must include Pimicikamak.
63. Currently, the Partnership has not committed any funding or resources to any Aboriginal groups other than the KCNs to conduct monitoring activities.
64. As Dr. Luttermann stated in her evidence, the impacts of the existing Hydro Project are very unpredictable from year to year, with no discernible water pattern on an annual basis

⁴⁶ *EIS Guidelines for the Keeyask Generation Project*, pp. 25-26.

⁴⁷ *EIS Guidelines*, p. 29.

⁴⁸ Partnership's answer to CEC Question #1 asked December 20, 2013.

⁴⁹ Noble and Gunn, p. 14 & 32.

near Cross Lake. As a result, it will be incredibly difficult for the Partnership or Pimicikamak to know if there are in fact upstream impacts from Keeyask. The fact that it will be difficult should not preclude efforts being made to determine if there are in fact such impacts so that they may be mitigated. Further, impacts across Pimicikamak's traditional territory, which includes the Keeyask area, will need to be monitored, including by Pimicikamak.⁵⁰

RECOMMENDATIONS FOR STEPS TO OCCUR BEFORE A LICENCE IS RECOMMENDED FOR KEEYASK

65. Pimicikamak submits that the CEC should recommend the following:
 - (a) The EIS must take into account the impacts of the existing Hydro Project when assessing the significance of the impacts of Keeyask and the cumulative effects for all VECs;
 - (b) The Partnership be required to revise its EIS taking into account VECs that capture the interconnectedness of the environment and the system-wide nature of the impacts of hydroelectric development with input from the Aboriginal perspective.

66. Pimicikamak submits that the CEC should recommend that before Keeyask is licenced:
 - (a) A Land Use and Occupancy Study for Pimicikamak must be completed;
 - (b) If the results of that study indicate that impacts from Keeyask on Pimicikamak are possible, an impacts study must be completed;
 - (c) Once the impacts study is complete, Pimicikamak and the Partnership must negotiate and agree on adequate mitigation measures to offset those impacts.

⁵⁰ Dr. Lutterman, transcript, December 5, 2013, 5189-5194.

67. Pimicikamak submits that the CEC should recommend that the Partnership must develop mitigation measures (not just monitoring programs) for effects that the KCNs predict will occur, even if the scientists hired do not agree with those predictions.
68. Pimicikamak submits that the CEC should recommend that if Keeyask is licenced, the Partnership must:
- (a) Enter into a funding agreement with Pimicikamak to fund Pimicikamak's engagement in a monitoring program in its traditional territory to monitor potential impacts from Keeyask;
 - (b) Commit to fund Pimicikamak to hire necessary experts to interpret the results of both Pimicikamak's own monitoring and the monitoring results of:
 - (i) the monitoring by the Partnership related to Keeyask; and
 - (ii) the CAMP or similar monitoring program results from the entire system.
 - (c) If the results of monitoring demonstrate that there are upstream impacts from Keeyask, the Partnership must address those impacts to the reasonable satisfaction of Pimicikamak.

RECOMMENDED LICENCE CONDITIONS, IF KEYASK IS LICENCED

REGIONAL CUMULATIVE EFFECTS ASSESSMENT

69. **Condition: An independent regional cumulative effects assessment must be done for the entire area affected by the existing Hydro Project (or in the alternative, for the Nelson watershed), prior to constructing and operating Keeyask, and the scope, content and procedure for which is to be determined through consultations between Manitoba and Aboriginal Nations affected by the Hydro Project, because all of Manitoba Hydro's developments in Northern Manitoba are part of one large, integrated project, that is operated in a coordinated fashion. Such RCEA to be funded by Manitoba Hydro.**

70. Pimicikamak submits that each new generating facility that is constructed increases the economic pressure to operate the system for maximum hydroelectric generation, second only to flood and drought control in Lake Winnipeg. All other cultural and ecological values are subordinated to these operating objectives. The potential to explore operating systems that are less harmful to the environment, therefore, becomes further reduced.
71. An RCEA must have sufficient scope and structure in order to produce sufficient information to adequately assess the true effects of Keeyask cumulative with the existing hydroelectric development.
72. As such, it is Pimicikamak's position that an RCEA should be completed for the entire area affected by the integrated Hydro Project.
73. This position is not unreasonable. Drs. Noble and Gunn testified on November 12 that the parameter of the RCEA could be even broader than the Nelson River sub-watershed. The point is that "doing a good, full, proper regional cumulative effects assessment is a prerequisite to doing a good cumulative effects assessment at the project level" and watersheds provide a good basis for the RCEA.⁵¹
74. An RCEA must also actively engage Aboriginal Nations and other stakeholders in the process from the beginning in order to ensure that the RCEA adequately examines the concerns of those most impacted by hydro development in Manitoba. Unfortunately, it appears that Manitoba Hydro has prepared draft terms of reference for an RCEA without any input from Pimicikamak, the Nation the most impacted by northern hydro development.⁵² Unless Aboriginal Nations are involved in the entire RCEA process, including the drafting of the terms of reference, the RCEA will not produce sufficient information to truly understand the ongoing impacts of existing hydro development, from which cumulative impacts of new projects can be assessed.
75. The CEC recognized the need for a RCEA in the Bipole III hearings. It said:

During the Bipole III hearings, it became apparent that past hydroelectric developments in northern Manitoba have had a profound

⁵¹ Dr. Gunn, transcript, November 12, 2013, 2887, 1-4.

⁵² Partnership's answer to CEC Question #2 asked December 20, 2013.

impact on communities in the area of these projects, as well as on the environment upstream and downstream. Bipole III and projects proposed for the near future will add to these impacts. (p. 126)

However, in order to fully understand the impact of proposed future projects, it will be necessary to understand the impact of past and current projects in addition to new impacts. A regional cumulative effects assessment is needed for all Manitoba Hydro projects and associated infrastructure in the Nelson River sub-watershed. The result of such an assessment would be a greater understanding of the impacts of the individual projects, as well as the cumulative impacts of all projects together. Understanding these impacts may lead to the use of current mitigation measures being applied to past impacts, resulting in some remediation. Greater understanding may also lead to alterations in the structure or operation of existing projects, and may offset impacts from new projects. (p. 126)

76. As such, the CEC made the following recommendation:

13.2 Manitoba Hydro, in cooperation with the Manitoba Government, conduct a Regional Cumulative Effects Assessment for all Manitoba Hydro projects and associated infrastructure in the Nelson River subwatershed; and that this be undertaken prior to the licensing of any additional projects in the Nelson River sub-watershed after the Bipole III Project.

77. The Minister of Conservation accepted this recommendation. He wrote in August to Manitoba Hydro:

In addition to the enclosed Licence requirements [for BiPole III], please be advised that it is my intent to ensure that all of the non-licensing recommendations in the Clean Environment Commission's report be implemented. Technical staff in my department will contact you in the near future to discuss implementation of the recommendation to cooperatively conduct a Regional Cumulative Effects Assessment for all Manitoba Hydro projects and associated infrastructure in the Nelson River sub-watershed.

78. A baseline analysis of what the environment was like before hydroelectric development, and what has happened to it since, and continues to happen to it, is what the RCEA would undertake – because that is the only way one can understand what all the cumulative impacts from the project have been, and continue to be. What Manitoba Hydro has done in the Keeyask EIS (which it has done for other EAs for hydro projects) is to NOT use

this baseline, and not undertake this cumulative effects assessment, making its analysis thin, inappropriate and inadequate.

79. Clearly, in order for the entire environmental assessment and approvals process for hydro projects, and for Manitoba as a whole, to not look like a complete empty shell devoid of any substance or meaning – then the CEC *should* place this condition on the Keeyask licence now. Otherwise, the Government of Manitoba’s acceptance of the CEC’s recommendation to have such a RCEA, means nothing.
80. The Chair confirmed on October 24 that, although the CEC decided not to adjourn these hearings to allow time for an RCEA, an RCEA could be a licencing condition.⁵³ The CEC *can* do this. The CEC has the authority to recommend conditions on the licence.
81. The CEC *should* do this. This the CEC itself has recognized and stated (in the Bipole III report). You are not alone: there are a number of examples of regional cumulative effects assessments in Canada, and Manitoba’s own sustainable development committee has recommended this approach for this province.
82. Until an acceptable RCEA is done, Manitoba Hydro cannot appreciate the magnitude of the hydroelectric effects on these entire river systems and areas and on Aboriginal peoples, and, therefore, cannot make well informed decisions.
83. Pimicikamak further submits that the CEC should recommend that the results of the RCEA also inform possible additional mitigation measures, and changes to the water regime related to the existing Hydro Project (i.e. not limited to Keeyask).

LAND USE AND OCCUPANCY STUDY FOR PIMICIKAMAK

84. **Condition: A Land Use and Occupancy Study must be conducted to determine Pimicikamak’s connections to, values in, uses and occupancy of the land. An impacts assessment (impacts from Keeyask on the values, connections and uses and occupancy of the land, identified through the LUOS), must be completed *before* Keeyask may be constructed or operated. Once these Studies are complete,**

⁵³ Chair, transcript, October 24, 2013, 900:22 – 901:4.

Manitoba Hydro and the Partnership must meet with Pimicikamak to discuss the resulting necessary accommodation and mitigation measures, and must apply such accommodation measures to the extent possible.

NORTHERN FLOOD AGREEMENT IMPLEMENTATION

85. **Condition: The NFA must be implemented in its full spirit and intent. The NFA must be implemented in accordance with annual action plans developed jointly by Pimicikamak and Manitoba Hydro, and funded by Manitoba Hydro, through good faith best efforts negotiations and in accordance with the spirit and intent of the NFA. The action plans should provide that to the extent feasible, Pimicikamak should manage and employ its citizens to work on, the implementation programs. The resources required for such management shall be provided by Manitoba Hydro.**
86. As the Panel heard from Pimicikamak's witnesses, there are many promises made in the NFA that have not yet been implemented. Manitoba Hydro should be not be allowed to construct and operate further hydroelectric development including Keeyask, until it has met its obligations related to its existing projects.
87. Manitoba Hydro must not be allowed to unilaterally and arbitrarily set caps on how much it will spend on NFA implementation in any year, which is what it does now.

REVENUE SHARING

88. **Condition: Manitoba Hydro must engage in good faith best effort negotiations with Pimicikamak with the intent of sharing with Pimicikamak net revenue from the entire Hydro Project, comparable to other revenue sharing arrangements for mines in BC and Ontario, in order to offset the inequities of financial gains only being offered in respect of, and only being offered to First Nations whose reserves are in the immediate vicinity of, new components of the Hydro Project.**
89. The KCNs made it clear that their communities have been devastated by the impacts of the existing Hydro Project and this time they expected some benefits as well – so that the only effects are not just the negative ones.

“We have seen poverty, chronic unemployment, lack of education, while the people of Manitoba have benefitted and continue to benefit from reliable, abundant and supposedly low cost electricity that’s produced by the Nelson River... the decision to become a partner in Keeyask was difficult... While York Factory supports Keeyask, it’s important to acknowledge that we are impacted by this project in profound ways that affect the way we look at life, our worldview, our culture and our deep relationship with aski, with the land, with the water, the plants, animals, and all of creation. York Factory First Nation chose to support Keeyask, not only so our people could benefit from employment, business and investment opportunities. We chose to become a partner so we could have a voice in how the project is developed and managed.”⁵⁴

“We trust that this Commission will support our rights as the First Peoples of the territories in which the Keeyask will operate, so that we finally may benefit from the use by others of our resources which for so long have been the monopoly of non indigenous [sic] people... Aski and the people of Fox Lake have undergone dramatic change over the past 60 years... [w]e also ask that we, as Fox Lake and our partners, respect the fact that aski will again undergo significant change to provide us with a means to survive and to thrive as a people.”⁵⁵

SUSTAINABILITY ASSESSMENT

90. **Condition: Manitoba Hydro shall complete a sustainability assessment for Keeyask, in substance as recommended by Dr. Bob Gibson, prior to constructing and operating Keeyask.**

MONITORING

91. **Condition: Manitoba Hydro is to develop, jointly with Pimicikamak, monitoring programs to monitor the upstream system effects and cumulative effects in Pimicikamak’s asserted traditional territory, occurring directly or indirectly from Keeyask. Manitoba Hydro shall fund Pimicikamak’s reasonable and necessary costs to engage in any such monitoring, including to hire necessary experts to interpret the results of both Pimicikamak’s own monitoring and the monitoring results of the Partnership (in respect of Keeyask) and the CAMP or similar monitoring program**

⁵⁴ Chief Constant, transcript, October 21, 2013, 102-104.

⁵⁵ Chief Spence, transcript, October 21, 2013, 97-98.

in respect of the entire Hydro Project. If the results of monitoring demonstrate that there are upstream impacts from Keeyask on Pimicikamak, the Partnership must address those impacts to the extent possible, following consultation with Pimicikamak.