

**A PETITION TO THE AUDITOR GENERAL OF CANADA**

pursuant to s. 22 of the *Auditor General Act*

respecting the proposed reissuance of a North Dakota Pollutant Discharge Elimination System Permit that will continue to allow the discharge of polluted water from Devils Lake, North Dakota into the Sheyenne River, thus threatening the environment and economy of the communities around Lake Winnipeg and the Red River Basin.

June 12, 2008

**To:** Office of the Auditor General of Canada  
Commissioner of the Environment and Sustainable Development  
Attention: Petitions  
240 Sparks Street  
Ottawa, Ontario K1A 0G6

The Hon. John Baird,  
Minister of the Environment  
Les Terrasses de la Chaudière  
10 Wellington Street, 28th Floor  
Gatineau, Quebec, K1A 0H3

The Hon. David Emerson,  
Acting Minister of Foreign Affairs  
Foreign Affairs Canada  
Office of the Minister  
125 Sussex Drive  
Ottawa, Ontario, K1A 0G2

**Petitioners:** Friends of the Earth Canada  
260 St. Patrick Street, Suite 300  
Ottawa, ON K1N 5K5  
(613) 241-0085

The Manitoba Chambers of Commerce  
227 Portage Avenue  
Winnipeg, MB R3B 2A6  
(204) 948-0100

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## Petition Summary

The Petitioners request the Ministers of Environment and Foreign Affairs to explain what the Government has done to advance and seek to enforce the August 5, 2005 Multi Layered Safeguard Agreement respecting the Devils Lake outlet. We also seek any information the Ministers may have on the activities of the Canadian Ambassador to the United States and the Canadian Consulate General in the United States relating to enforcement of the August 5, 2005 Multi Layered Safeguard Agreement.

On August 5, 2005, the Governments of Canada, the United States, North Dakota, Minnesota and Manitoba announced a layered system of environmental safeguards at the Devils Lake outlet and a cooperative approach to monitoring the Red River Basin. The agreement required that the United States and Canada cooperate in the design and construction of an advanced filtration and/or disinfection system for the Devils Lake outlet to prevent the contaminated waters from harming Lake Winnipeg and the Red River Basin. Almost three years later, the advanced filtration system is still not operational and there is no firm timetable as to when construction will be complete.

In the interim, North Dakota is using a gravel filter that has proven to be inadequate. Invasive species of concern that are known to exist in Devils Lake have been found on the other side of the barrier after several water diversions. Given that environmentally and economically harmful invasive species may have already been released into Canadian waters, the Petitioners would like to know what steps have been taken to hold the United States government accountable to the provisions of the 2005 Agreement.

The 2005 Agreement also required the participants to work with the International Red River Board of the International Joint Commission to develop and implement a shared risk management strategy involving an early detection and monitoring system for water quality and aquatic nuisance species throughout the Red River Basin. Should any nuisance species that pose significant risk to the Basin be identified, the participants are then required to take immediate measures to prevent the spread of such nuisance species. The Petitioners would like public disclosure of information regarding what sort of system has been established, whether any nuisance species have been identified, and what actions have been or will be taken to prevent the spread of nuisance species.

The Devils Lake Outlet is not wanted by citizens on either side of the Canada-U.S. border for a broad range of reasons. The Petitioners would also like to know what consideration is being given to the overwhelming public desire to simply have the outlet shut down because its operation is costing millions of dollars but has failed to meet its stated need.

The Devils Lake Outlet project has likely already caused substantial and irreversible environmental harm to Canadian waters, such as the introduction of invasive species. Furthermore, the nature of the project and the 2005 Safeguard Agreement are focused on trans-boundary water and Canada-US relations. This petition is therefore directed at the Ministers of Environment and Foreign Affairs.

We petition the Commissioner for the Environment and Sustainable Development to request:

**The Hon. John Baird, Minister of the Environment and the Hon. David Emerson, Minister of Foreign Affairs to:**

- a. Explain what measures the Government of Canada has taken, and intends to take, to hold the United States Government accountable to the provisions of the August 2005 Multi Layered Safeguard Agreement.
- b. Explain what the Government of Canada has done since August 2005 to ensure that an advanced filtration system at Devils Lake is actually constructed and will prevent water pollution and invasive species from reaching or damaging Canadian waters.
- c. Explain the state of discussion and status of the permanent advanced filtration system that is required to be built at the Devils Lake outlet, including a statement on when the advanced filtration system is expected to be completed and operational.
- d. Explain what the Government of Canada has done since August 2005 to develop and implement a shared risk management strategy for the greater Red River Basin, involving an early detection and monitoring system for water quality and aquatic nuisance species throughout the Basin.
- e. Disclose and explain the results of any detection and monitoring systems for water quality and aquatic nuisance species in the Red River Basin that have been implemented since August 5, 2005.
- f. Explain what measures the Government of Canada has taken, and will take, to prevent the spread of identified aquatic nuisance species posing significant risk to the Red River Basin.
- g. Explain what active consideration is being given to the public concerns surrounding utility of the outlet and the overwhelming desire to simply have it shut down.
- h. Explain whether the Government of Canada is prepared to demand that the outlet be permanently shut down if the United States fails to deliver on the requirements of the August 2005 Multi Layered Safeguard Agreement.
- i. Explain what knowledge the Ministers have on any actions being taken on the above issues by the Canadian Ambassador to the United States or the Canadian Consulate General in the United States.

## A. Background to the Devils Lake Diversion Scheme

1. This dispute relates to a larger, long term North Dakota initiative to install an outlet from the Missouri River through Devils Lake to the Sheyenne River and then into the trans-boundary Red River system.
2. The perceived need to lower the level of Devils Lake has been created in part by the mostly unauthorized drainage of nearby wetlands and poor land use planning such as imprudent and unregulated encroachment of development on the lake bed. Data from the State of North Dakota shows that 358,000 acres of the original 569,000 acres of wetlands in the Devils Lake Basin had been drained by 1998. Rampant and unregulated wetland drainage continues to occur in the Devils Lake Basin.<sup>1</sup>
3. The Devils Lake initiative is part of the original Garrison Diversion Project that the International Joint Commission (“IJC”) held in 1977 ought not proceed, even with modifications, because the introduction of unwanted foreign biota posed an unacceptable risk to the detriment of the people of Canada and to the general ecology of the region, and beyond.<sup>2</sup>
4. Despite this result, the *Dakota Water Resources Act* of 2000 authorized a U.S. Bureau of Reclamation study of water supply needs in the North Dakota portion of the Red River Valley. The 2005 draft study included a Lake of the Woods diversion option and three Missouri diversion options, all of which call for the final destination to be the Red River, which drains into Lake Winnipeg, and ultimately the Hudson Bay basin.<sup>3</sup>
5. The government of Canada voiced significant concern with these options and concluded that it: “...in no way accepts that the approach set out in the Red River Valley Water Needs and Options report meets the standard established by the IJC to eliminate the risk of biota transfer.” The Manitoba government voiced similar concerns and referred to well established evidence that there are numerous organisms of concern found in the Missouri River basin that are not present in the Hudson Bay basin.<sup>4</sup> Both the federal and provincial governments of Canada spoke of the likely need to refer this matter to the IJC.

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<sup>1</sup> Gary L. Pearson, “Outside Witness Testimony”, presented to *United States Senate Committee on Appropriations Subcommittee on Energy and Water Development’s Field Hearing on Flooding at Devils Lake, North Dakota*, submitted March 25, 2008 at pp. 2, 4.

<sup>2</sup> International Joint Commission, Report, *Transboundary Implications of the Garrison Diversion Project* (1977) at p. 114, available at <http://www.ijc.org/php/publications/pdf/ID582.pdf>.

<sup>3</sup> U.S. Dept. of the Interior, Bureau of Reclamation, Report, *Reclamation: Managing Water in the West* (November 2005), available at <http://www.usbr.gov/gp/dkao/redriver/rrvwsp/StartCD.pdf>.

<sup>4</sup> David McGovern, International Relations Directorate, Environment Canada “Government of Canada Comments on the Draft Report on Red River Valley Water Supply Needs and Options” (September 29,

6. The U.S. Government failed to accept the formal invitations of the Government of Canada made in April 2004 and again in 2005 to jointly refer the Devils Lake outlet to the IJC<sup>5</sup>.
7. This was contrary to assurances given by the U.S. government to Canada that any Devils Lake outlet would conform to U.S. obligations under the Treaty. <sup>6</sup>
8. When the U.S. Government failed to agree to a joint referral to the IJC, the U.S. and Canadian governments further failed, and continue to fail, to enforce the Treaty by making a unilateral reference to the IJC to resolve this dispute and thereby prevent the unauthorized diversion and the unlawful pollution.
9. On August 5, 2005, the Government of Canada and the Government of the United States of America issued a joint declaration on the Devils Lake Diversion Project. This declaration included an Agreement on a layered mitigation and joint monitoring approach to protect against the ongoing risks of aquatic nuisance species entering the Basin through Devils Lake. The Agreement specifically required<sup>7</sup>:

North Dakota will put in place a rock and gravel intermediate filter before opening the outlet, to prevent the release of macroscopic aquatic nuisance species from Devils Lake;

The United States and Canada will cooperate in the design and construction of a more advanced filtration and/or disinfection system for the Devils Lake outlet, taking into account the results of ongoing monitoring and risk assessment;

The participants will work with the International Red River Board, of the International Joint Commission, to develop and implement a shared risk management strategy for the greater Red River Basin, involving an early

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2005) and Dwight Williamson, Manitoba Water Stewardship, "Manitoba's Initial Comments on the Draft Environmental Impact Statement Regarding the Red River Valley Water Supply Project" (February 7, 2006).

<sup>5</sup> In "Canada's Statement to the International Joint Commission", Canadian Ambassador Frank McKenna in correspondence dated April 14, 2005 to North Dakota's Senator Conrad, copied to Secretary of State Rice and Manitoba Premier Doer urged the U.S. government to join Canada in a reference to the IJC, recalling that the government of Canada had made a prior request in 2004, and noting that: "What leverage will either government have in the future if a state or a province wants to proceed with a transboundary water project, citing Devils Lake as an excuse to avoid the inconvenience of proper environmental assessment". Found at: [http://geo.international.gc.ca/can-am/washington/shared\\_env/statementtoIJC-en.asp](http://geo.international.gc.ca/can-am/washington/shared_env/statementtoIJC-en.asp).

<sup>6</sup> Ibid.

<sup>7</sup> *Joint Canada-U.S. Declaration on the Devils Lake Diversion Project* (August 5, 2005), found at: [http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&publication\\_id=382873&Language=E](http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&publication_id=382873&Language=E).

detection and monitoring system for water quality and aquatic nuisance species throughout the Basin;

The participants will take immediate measures to prevent the spread of any aquatic nuisance species that pose significant risk to the Basin, should any be identified; and

To address concerns raised by Canada, Manitoba and Minnesota with respect to an inlet being built from the Missouri River to Devils Lake to help stabilize lake levels, North Dakota affirms it does not have such a current intention, plan or prospective proposal to construct such an inlet; and the US federal government affirms that it is prohibited by federal law from expending funds towards the construction of such an inlet.

10. An intermediate rock and gravel filter was put into place but was washed away during the first test operation. Despite this failure, the clearly inadequate rock and gravel filter was replaced with a new rock and gravel filter.
11. In September 2005, the State of North Dakota began diverting water out of Devils Lake into the Sheyenne River, from which it flows to the Red River, across the border into Lake Winnipeg in Canada, and ultimately into the broader Hudson Bay drainage system.
12. In 2005, the Devils Lake outlet removed a total of 38.46 acre-feet of water from Devils Lake (Attachment No. 5- 8). That was equivalent to reducing 3.5/10,000<sup>th</sup> of an inch in the level of the 130,000-acre lake.<sup>8</sup>
13. In 2006, the Devils Lake outlet did not operate at all because the 300 mg/l sulfate level constraint in the Sheyenne River was exceeded.<sup>9</sup>
14. On August 17, 2006, the North Dakota Department of Health approved modifications to the original Discharge Permit. The changes were to allow operation despite greater sulfate concentrations than originally permitted downstream from the outlet based on the ambient sulfate concentrations in the Sheyenne River. The modifications to the original permit also removed the limitation that the outlet could only operate from May to November so that the outlet could operate during the entire “open-water season”.<sup>10</sup>

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<sup>8</sup> Gary L. Pearson, “Statement on the North Dakota Department of Health’s Proposal to Reissue a NDPDES Permit for the North Dakota State Water Commission’s Outlet from West Bay of Devils Lake to the Sheyenne River” (May 19, 2008) at p. 15.

<sup>9</sup> Ibid.

<sup>10</sup> *Authorization to Discharge Under the North Dakota Pollutant Discharge Elimination System*, Permit No.: ND-0026247 issued by North Dakota Department of Health (August 17, 2006), found at: <http://www.ndhealth.gov/WQ/DevilsLake/2006/DL%20Outlet%20Permit%20ND0026247%20Mod%2020060817f.pdf>.

15. On June 11, 2007, North Dakota opened the gates at the Devils Lake outlet despite the fact that the promised new sophisticated filter had not yet been installed and the first year of IJC testing results had not been made public.<sup>11</sup>
16. On June 12, 2007, Friends of the Earth Canada sent a letter to the Prime Minister of Canada, the President of the United States, the Premier of Manitoba and the Governors of North Dakota and Minnesota calling on them to account for the commitments made in the August 2005 Safeguard Agreement – specifically, to make public the first year of IJC testing results and to report on installation of the advanced filter or disinfection system.<sup>12</sup>
17. During the summer of 2007, after the discharge permit was modified to increase the permissible level of sulfates in the Sheyenne River by 50 percent and extend the operating season, the outlet operated for a total of about 72 hours over 38 days. During that time, about 298.18 acre-feet of water was removed from Devils Lake. This is equivalent to about 2/1000<sup>th</sup> of a foot, or 2.6 hundredths of an inch, off the lake. In other words, the outlet was able to remove enough water to lower the level of Devils Lake by the equivalent of the width of about 7 sheets of paper.<sup>13</sup>
18. In total, since operation began in 2005, the outlet has removed a total of 336.6 acre-feet of water from Devils Lake. This is equivalent to a reduction in the level of the lake of 0.0024 feet or 0.29 inches – less than a tenth of an inch a year.<sup>14</sup>

## B. Current Status of the Lake and Outlet

19. The target elevation for Devils Lake where operation of the outlet would be suspended is 1445 feet. As of March 25, 2008, the elevation of the lake was approximately 1447 feet. There has been no explanation as to why a lake elevation of 1447 feet represents an unacceptable threat when North Dakota's target elevation for the lake is only two feet lower.<sup>15</sup>
20. According to a U.S. Geological Survey report prepared by Mr. Aldo Vecchia of the U.S. Geological Service, there is a 90 percent chance that Devils Lake will not rise above 1453.8 feet in the next seven years, a 95 percent chance it will not rise above 1455.7 feet in the next seven years, and a 50 percent chance that it will not

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<sup>11</sup> Friends of the Earth Canada (June 12, 2007), *Letter to Prime Minister Harper, President Bush, Premier Doer, Governor Hoeven and Governor Pawlenty re: Operation of Devils Lake Outlet*, found at: <http://www.foecanada.org/index.php?option=content&task=view&id=325&Itemid=2>.

<sup>12</sup> Ibid.

<sup>13</sup> Gary L. Pearson (December 11, 2007), *Letter to Senator Kent Conrad re: Justification for Devils Lake Outlet*.

<sup>14</sup> Gary L. Pearson, "Outside Witness Testimony", presented to *United States Senate Committee on Appropriations Subcommittee on Energy and Water Development's Field Hearing on Flooding at Devils Lake, North Dakota*, submitted March 25, 2008 at p. 4.

<sup>15</sup> Ibid. at pp. 1-2.

- rise above 1450 feet over the next 32 years. An elevation of 1450 feet would be less than one foot higher than it was in 2006 and an elevation of 1453.8 feet would be only four feet higher.<sup>16</sup>
21. The current permit to discharge water from Devils Lake to the Sheyenne River expires on June 30, 2008. The North Dakota Department of Health issued a Public Notice on April 14, 2008 regarding their intention to reissue the North Dakota Pollutant Discharge Elimination System (NDPDES) Permit for “a temporary (intermittent) discharge of surface water from West Bay of Devils Lake to the Sheyenne River...”. The new permit is to have the same provisions and conditions as the original discharge permit with the August 17, 2006 amendments and will not be set to expire until June 30, 2013.<sup>17</sup>
  22. The North Dakota Department of Health has determined that, based on the established antidegradation policy and the Water Quality Standards, a formal review is not required for the re-issuance of this NDPDES Permit. This is in violation of the Department’s own antidegradation review procedures as the U. S. Army Corps of Engineers’ April 2003 *Final Devils Lake, North Dakota, Integrated Planning Report and Environmental Impact Statement* already established that operation of the Devils Lake outlet under the 2003, more strict, sulfate constraints would have a significant adverse effect on beneficial uses of the Sheyenne River.<sup>18</sup>
  23. In the June 2003 *Response to Comments for the Devils Lake Outlet Project*, the North Dakota Department of Health stated that the outlet, operating under a maximum sulfate constraint in the Sheyenne River of 300 mg/L, would export an average of 8,000 pounds of phosphorous and 40,000 pounds of nitrogen per year to the Sheyenne River and Lake Ashtabula. The Department’s current *Statement of Basis, Devils Lake Outlet, ND-0026247 Reissuance* fails to indicate how increasing the sulfate constraint in the Sheyenne River from a maximum of 300 mg/L under the original 2003 permit to maximums of from 300 to 450 mg/L in order to increase the discharge from the outlet will affect the amounts of phosphorus and nitrogen transported by the outlet to the Sheyenne River.<sup>19</sup>
  24. There is no credible evidence what-so-ever upon which an affirmative determination could be made that operating the outlet and thus degrading the

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<sup>16</sup> Ibid. at p. 3.

<sup>17</sup> *Notice of Public Hearing on NDPDES Permit*, North Dakota Department of Health (April 14, 2008), found at: <http://www.ndhealth.gov/WQ/DevilsLake/26247pbn20080401.pdf>.

<sup>18</sup> *Statement of Basis, Devils Lake Outlet, ND-0026247 Reissuance*, North Dakota Department of Health (April 12, 2008), found at: <http://www.ndhealth.gov/WQ/DevilsLake/26247sob20080304D.pdf> and *Integrated Planning Report and Environmental Impact Statement*, U.S. Army Corps of Engineers’ (2003) at p. S-11, found at: <http://www.ndhealth.gov/WQ/DevilsLake/2003/DevilsLakeEIS/>.

<sup>19</sup> Gary L. Pearson, “Statement on the North Dakota Department of Health’s Proposal to Reissue a NDPDES Permit for the North Dakota State Water Commission’s Outlet from West Bay of Devils Lake to the Sheyenne River” (May 19, 2008) at pp. 4-5.

water quality is necessary to accommodate important social or economic development.<sup>20</sup>

25. On May 20, 2008, the North Dakota Department of Health held a public hearing on whether the NDPDES Permit should be renewed. The only person to testify at the hearing was Mr. Richard Betting, a representative of the People to Save the Sheyenne. Mr. Betting stated that the Permit should not be renewed because “The outlet has failed to meet its stated need. The State Water Commission overstated the need for and the effectiveness of an outlet, while minimizing or ignoring its negative impacts...”<sup>21</sup>

## C. Continued Diversion Will Damage the Environment

1. Devils Lake is salty and polluted. According to the U.S. Environmental Protection Agency, the lake contains biota of concern, and high levels of pollutants such as sulphate, mercury, phosphorus and arsenic. The lake water has been described as being too polluted to irrigate surrounding farmland.<sup>22</sup>
2. Lake Winnipeg, the destination of the polluted Devils Lake water, is the world’s tenth largest fresh water lake, and has a vibrant community of commercial, consumer and recreational users.<sup>23</sup>
3. The environmental impacts of the Devils Lake diversion have not been adequately assessed.
4. According to “A Limited Survey of Biota in Devils and Stump Lakes, North Dakota” it is widely acknowledged that insufficient information exists about the biota of Devils Lake.
5. A survey conducted in late July 2005, identifies four types of blue-green algae not found in Lake Winnipeg and three fish parasites that are potential species of concern to Manitoba.<sup>24</sup>
6. These biota of potential concern and the likely contamination of foreign organisms and toxins into Lake Winnipeg’s water will cause irreparable harm to the ecosystem of Lake Winnipeg. This could significantly jeopardize Manitoba’s natural assets and riparian habitat, as well as potable water, commercial and

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<sup>20</sup> Ibid. at p. 16.

<sup>21</sup> Kevin Bonham, “Organization: Shut it Down Permanently”, *Grand Forks Herald* (May 21, 2008).

<sup>22</sup> Friends of the Earth Canada, *Synopsis of Devils Lake Crisis*, found at:

[http://www.foecanada.org/images/stories/devils\\_lake/devil%20brochure%203.pdf](http://www.foecanada.org/images/stories/devils_lake/devil%20brochure%203.pdf).

<sup>23</sup> Government of Manitoba, “Devils Lake Quick Facts”, *Protecting Our Water*, found at:

<http://www.gov.mb.ca/waterstewardship/pdf/devilslakebro.pdf>.

<sup>24</sup> Manitoba Water Stewardship, Report, *A Limited Survey of Biota in Devils Lake and Stump Lakes, North Dakota* (November 2005) at pp. 4, 8, found at:

[http://www.foecanada.org/images/stories/devils\\_lake/biota%20in%20devils%20stump%20lakes.pdf](http://www.foecanada.org/images/stories/devils_lake/biota%20in%20devils%20stump%20lakes.pdf).

recreational freshwater fishing, tourism and cause further serious health problems for animals and other users of the lake.<sup>25</sup>

7. In addition to the threat of introducing harmful algae and invasive species into Canadian waters, the high level of phosphorus loading from Devils Lake into Lake Winnipeg is likely to cause and exacerbate toxic algae blooms.
8. According to the Manitoba government, the artificial Devils Lake outlet will create a pathway that loads approximately 40,000 pounds per year of additional phosphorus into Lake Winnipeg. This could create a layer of algae about five inches thick on nearly 10 miles of Lake Winnipeg beaches.<sup>26</sup>
9. Satellite imagery has shown that large algal blooms are frequently observed in the north basin of Lake Winnipeg. In the summer of 2006, very large algae blooms were visible in the north basin of Lake Winnipeg and more localized blooms developed in the south basin.<sup>27</sup>

## D. Continued Diversion Will Damage the Economy

1. Lake Winnipeg serves a variety of recreation and commercial uses including fishing, angling and boating. Fisheries on the lake have an annual landed value approaching \$25 million while recreation and tourism around the lake generates more than \$100 million per year.<sup>28</sup>
2. Commercial fishing has been a major industry on Lake Winnipeg for nearly 125 years. Today, the Lake Winnipeg commercial freshwater fishery is the largest in Canada, west of the Great Lakes. Freshwater fisheries play an important role in Manitoba's economy. The average annual value of the freshwater fish (mostly walleye and whitefish) harvested from Lake Winnipeg between 2000 and 2005 was over \$20 million. Most of the fish are marketed through the Freshwater Fish Marketing Corporation to consumers in western Canada, the United States and Europe.<sup>29</sup>

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<sup>25</sup> Government of Canada, Department of Foreign Affairs and International Trade, *Downstream Effects of the Devils Lake Outlet: Alien Biota a Concern to Canada*, "...The precautionary principle must be used in a case such as this...", found at: <http://www.dfait-maeci.gc.ca/can-am/washington/pdf/fact-biota.pdf>.

<sup>26</sup> Government of Manitoba, "Devils Lake Quick Facts", *Protecting Our Water*.

<sup>27</sup> Lake Winnipeg Stewardship Board, Report, *Reducing Nutrient Loading to Lake Winnipeg and its Watershed: Report to the Minister of Water Stewardship* (December 2006) at p. 3, found at: [http://www.gov.mb.ca/waterstewardship/water\\_quality/lake\\_winnipeg/lwsb2007-12\\_final\\_rpt.pdf](http://www.gov.mb.ca/waterstewardship/water_quality/lake_winnipeg/lwsb2007-12_final_rpt.pdf).

<sup>28</sup> Lake Winnipeg Stewardship Board, *Lake Facts*, found at: <http://www.lakewinnipeg.org/web/content.shtml?pfl=public/downloads.param&page=000103&op9.rf1=000103>.

<sup>29</sup> Lake Winnipeg Stewardship Board, Report, *Reducing Nutrient Loading to Lake Winnipeg and its Watershed: Report to the Minister of Water Stewardship* (December 2006) at pp. 9-10.

3. Recreational fishing in pursuit of walleye, pike, perch, catfish, trout, bass and a number of other species is also an extremely valued activity to the region. The direct value of recreational fishing on the tributary rivers such as the Red and Winnipeg rivers is estimated at \$17 million annually.<sup>30</sup>
4. Furthermore, subsistence fishing is very important as a source of food for most families living in fisheries-based communities and plays a central role in the traditional cultural life of the First Nations peoples.<sup>31</sup>
5. As water quality in Lake Winnipeg deteriorates, the fisheries will be adversely affected. Therefore, the diversion of Devils Lake water into Lake Winnipeg may seriously damage the fisheries and threaten the livelihoods of many Manitobans.

## **E. Actions Taken to Address the Problem are Insufficient**

1. On August 5, 2005, the United States and Canada agreed to "co-operate on the design and construction of an advanced filtration and/or disinfection system at the outlet at Devils Lake, North Dakota."<sup>32</sup>
2. Media and other reports indicated that the gravel filter placed at the outlet washed away during the very first test operation.
3. Further, North Dakota operated the outlet for 10 days before it was shut down because of high concentrations of sulphate in the diverted waters, contrary to North Dakota's own discharge permit requirements.
4. Operating the outlet before the biota testing was analyzed and reported contradicts the spirit as well as the intention of the arrangement.
5. At the North American Leaders' Summit in Gimli, Manitoba on May 31, 2006, Prime Minister Harper stated Canada's stance on the Devils Lake outlet to be that the potentially polluted water should not flow from Devils Lake into the Red River waterway until an advanced filtration system is in place.<sup>33</sup>
6. On August 17, 2006, North Dakota weakened the Devils Lake operating permit to allow for 50% higher levels of sulphate pollution (up to 450 mg/L) to flow northward to Canadian waters.<sup>34</sup>

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<sup>30</sup> Ibid. at p. 10.

<sup>31</sup> Ibid.

<sup>32</sup> *Joint Canada-U.S. Declaration on the Devils Lake Diversion Project* (August 5, 2005).

<sup>33</sup> Rochelle Squires, "Floodway a Concern; Must Talk About Cost: Harper", *The Winnipeg Sun* (June 1, 2006).

<sup>34</sup> Government of Manitoba News Release, "U.S. Federal Government Should Take Back Authority Over Environmental Licensing: Ashton" (August 17, 2006), found at: <http://www.gov.mb.ca/chc/press/top/2006/08/2006-08-17-02.html>.

7. Operation of the outlet began again on June 11<sup>th</sup>, 2007 and soon after adult fish were found to have passed through the gravel filter. North Dakota officials initially denied that any fish were on the other side of the filter but a week later admitted that they were incorrect.<sup>35</sup>
8. Despite the violation, the state regulatory agency continues to allow the outlet to operate.<sup>36</sup>
9. As of July 6, 2007, the Government of Canada's position on demanding a permanent filter supposedly had not changed. The Honorable Vic Toews, Treasury Board President, was quoted as saying "We're concerned with the re-opening of the outlet and we wanted the filter in place. That remains our position."<sup>37</sup>
10. The movement of fish, pathogens and parasites out of Devils Lake threatens Manitoba's fisheries and violates North Dakota's permit governing the operation of the outlet.
11. On June 13, 2007, the Government of Manitoba called on the Governments of Canada and the United States to set a firm timeline of when the advanced filter announced in August 2005 would be completed.<sup>38</sup>
12. Based on the application of the internationally recognized precautionary principle, environmental measures should be taken to anticipate, prevent and attack the causes of environmental degradation, especially where there are threats of serious or irreversible damage as in this case.<sup>39</sup>

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<sup>35</sup> Government of Manitoba News Release, "Manitoba Notifies North Dakota of Intention to Sue Following Fish Passage Through Devils Lake Outlet Screen" (June 28, 2007) found at:

<http://news.gov.mb.ca/news/index.html?archive=&item=1872>.

<sup>36</sup> Ibid.

<sup>37</sup> Mia Rabson, "Feds Won't Seek Court Ruling: Toews", *Manitoba Free Press* (July 6, 2007).

<sup>38</sup> Government of Manitoba News Release, "Manitoba, Environmental Groups to Appeal Lowering of Standards for Devil's Lake" (June 13, 2007), found at:

<http://news.gov.mb.ca/news/index.html?archive=2007-6-01&item=1780>.

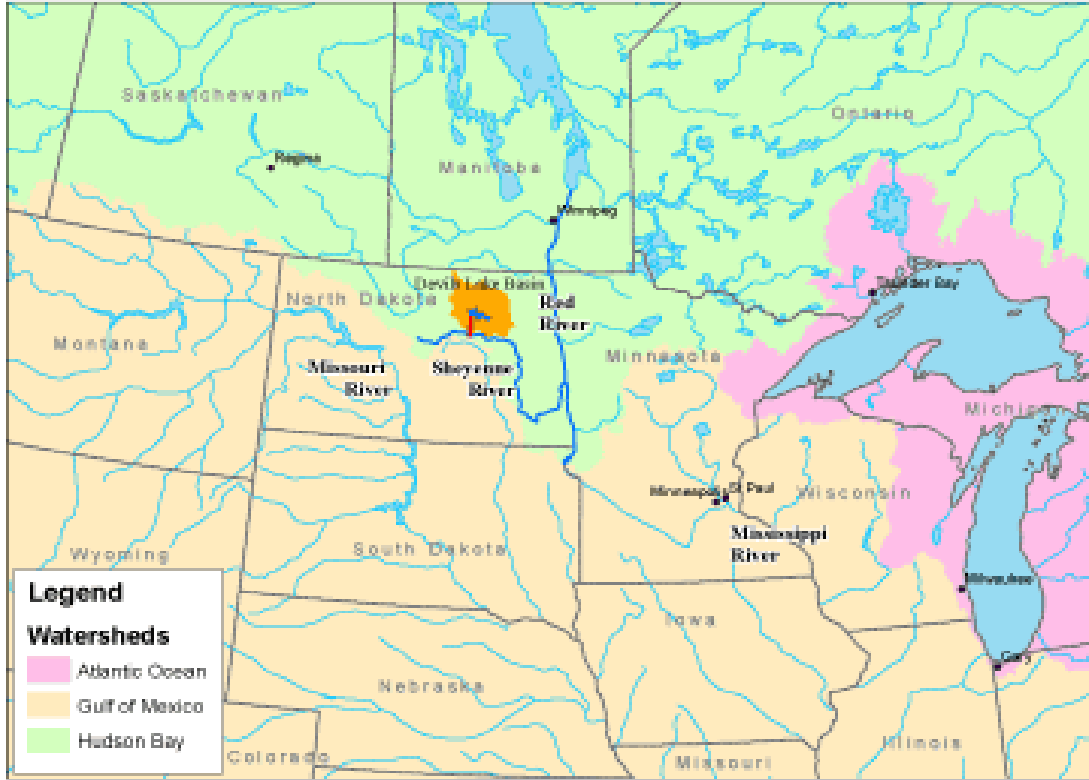
<sup>39</sup> See "Bergen Ministerial Declaration on Sustainable Development", accepted by the Supreme Court of Canada in *114957 Canada Ltee (Spraytech) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at p. 28-29.

## **F. Conclusions**

Given that the Devils Lake water diversion continues to jeopardize the environment and health of Canadians, the Petitioners request the Ministers to explain what measures are being taken to hold the United States Government accountable to the August 2005 Multi Layered Safeguard Agreement and what measures are being taken to ensure that an advanced filtration system is constructed. If the United States Government is not being held accountable to the 2005 Agreement and an advanced filtration system is not going to be constructed, the Petitioners request an explanation of what consideration is being given to the only real alternative both from the public and environmental perspective – permanently shutting down the Devils Lake Outlet.

## G. Appendix

**FIGURE 1: Map of the Devils Lake Basin**



## H. Signatures of Petitioners

Friends of the Earth Canada  
per:

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Beatrice Olivastrì

Manitoba Chamber of Commerce  
per:

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Graham Starmer

# I. List of Supporting Materials

## Government Documents/Reports

1. Canadian Embassy (April 14, 2005). *Canada's Statement to the International Joint Commission.*
2. Government of Canada, Department of Foreign Affairs and International Trade (undated). *Downstream Effects of the Devils Lake Outlet: Alien Biota a concern to Canada.*
3. Government of Canada and Government of the United States of America (August 5, 2005). *Joint Canada-U.S. Declaration on the Devils Lake Diversion Project.*
4. Government of Manitoba (undated). *Protecting Our Water.*
5. Lake Winnipeg Stewardship Board (undated). *Lake Facts.*
6. Lake Winnipeg Stewardship Board (December 2006). *Reducing Nutrient Loading to Lake Winnipeg and its Watershed: Report to the Minister of Water Stewardship.*
7. Manitoba Water Stewardship (November 2005). *A Limited Survey of Biota in Devils Lake and Stump Lakes, North Dakota: Manitoba's Contribution to a Multi-Jurisdictional Collaborative Assessment Coordinated by the U.S. Council on Environmental Quality.*
8. McGovern, David (September 29, 2005). *Government of Canada Comments on the Draft Report on Red River Valley Water Supply Needs and Options.* Environment Canada, International Relations Directorate: Ottawa.
9. North Dakota Department of Health (August 17, 2006). *Authorization to Discharge Under the North Dakota Pollutant Discharge Elimination System (Permit No.: ND-0026247).*
10. North Dakota Department of Health (April 14, 2008). *Notice of Public Hearing on NDPDES Permit.*
11. North Dakota Department of Health (April 12, 2008). *Statement of Basis, Devils Lake Outlet, ND-0026247 Reissuance.*
12. U.S. Army Corps of Engineers (April 2003). *Devils Lake, North Dakota: Intergrated Planning Report and Environmental Impact Statement.*

13. U.S. Department of the Interior, Bureau of Reclamation, Dakotas Area Office (November 2005). *Reclamation: Managing Water in the West* (see full report at <http://www.usbr.gov/gp/dkao/redriver/rrvwsp/StartCD.pdf>).
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17. Government of Manitoba News Release (June 28, 2007). "Manitoba Notifies North Dakota of Intention to Sue Following Fish Passage Through Devil's Lake Outlet Screen".
18. Government of Manitoba News Release (June 13, 2007). "Manitoba, Environmental Groups to Appeal Lowering of Standards for Devil's Lake".
19. Rabson, Mia (July 6, 2007). "Feds Won't Seek Court Ruling: Toews", *Manitoba Free Press*.
20. Squires, Rochelle (June 1, 2006) "Floodway a Concern; Must Talk About Cost: Harper", *The Winnipeg Sun*.

### Correspondence

21. Friends of the Earth Canada (June 12, 2007). *Letter to Prime Minister Stephen Harper, President George Bush, Premier Gary Doer, Governor John Hoeven and Governor Tim Pawlenty re: Operation of Devils Lake Outlet*.
22. Pearson, Gary L. (March 25, 2008). *Outside Witness Testimony* submitted to United States Senate Committee on Appropriations Subcommittee on Energy and Water Development's Field Hearing on Flooding at Devils Lake, North Dakota.
23. Pearson, Gary L. (May 19, 2008). *Statement on the North Dakota Department of Health's Proposal to Reissue a NDPDES Permit for the North Dakota State Water Commission's Outlet from West Bay of Devils Lake to the Sheyenne River*.
24. Pearson, Gary L. (December 11, 2007). *Letter to Senator Kent Conrad re: Justification for Devils Lake Outlet*.

Other

25. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.
26. Friends of the Earth Canada (undated). *Synopsis of Devils Lake Crisis*.
27. International Joint Commission (1977). *Transboundary Implications of the Garrison Diversion Project*.

## **J. Contact Addresses for Petitioners**

Friends of the Earth Canada  
260 St. Patrick Street, Suite 300  
Ottawa, Ontario  
K1N 5K5  
Attn: Beatrice Olivsatri  
613-241-0085 ext 26  
[beatrice@foecanada.org](mailto:beatrice@foecanada.org)

The Manitoba Chambers of Commerce  
227 Portage Avenue  
Winnipeg, MB  
R3B 2A6  
Attn: Graham Starmer  
(204) 948-0100  
[gstarmer@mbchamber.mb.ca](mailto:gstarmer@mbchamber.mb.ca)