STEWART McKELVEY
LAWYERS • AVOCATS

Queen's Marque, 600-1741 Lower Water Street, P.O. Box 997
Halifax NS B3J 2X2 Canada tel: 902.420.3200 fax: 902.420.1417 stewartmckelvey.com

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Nancy G. Rubin, K.C.
Direct Dial: 902.420-3337
nrubin@stewartmckelvey.com

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Delivered by E-mail

Crystal Henwood
Regulatory Affairs Officer/Clerk
Nova Scotia Utility and Review Board
3rd Floor, 1601 Lower Water Street
PO Box 1692, Unit "M"
Halifax NS B3J 3S3

Dear Ms. Henwood:

Re: M11927 - NSPI - CI 50518 – HYD Ruth Falls Main Dam Refurbishment ATO

These closing submissions are filed on behalf of the Industrial Group.

NSPI has applied for Authorization to Overspend ("**ATO**") on the Ruth Falls Main Dam Refurbishment project. This was originally approved by the Board as part of the 2019 ACE Plan, Matter M08984, for a total of $7,244,422. NSPI is now applying, six years later, for approval of an additional $8,201,066 for a total project estimate of $15,445,508.

The stated reason for the variance is NSPI's inability to obtain the necessary environmental permitting from the Department of Fisheries and Oceans (the "**DFO**") and the Nova Scotia Environment and Climate Change (the "**NSECC**"). The issue is specifically with respect to permitting from DFO, requiring a Fisheries Act Authorization ("**FAA**"). Amendments to the *Fisheries Act*, RSC 1985, c F-14, were given Royal Assent months after the original capital application, and the original application did not contemplate this impending change to the legislation and required permitting. The elongated process to obtain the necessary permitting is reportedly the cause for the increased costs, along with the construction delays.

The Industrial Group disagrees that NSPI did not, or could not have, anticipated these costs at the time of the original application. Further, despite the more than 100% increase in the total project cost, NSPI has neither completed nor provided an updated cost estimate for the alternative options considered.

Evidence has been filed by Midgard on behalf of Board Staff. While the Industrial Group views this report as having a relatively narrow scope, based on the confines of its opinions articulated in its responses to IRs,[1] the Industrial Group agrees with Midgard's opinion that decommissioning information ought to be considered to assess whether the proposed ATO is the best option for ratepayers.[2] In NSPI's Reply Evidence, it has provided an overall

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[1] Exhibit N-11, Midgard (IG) RIRs.

[2] Exhibit N-9, Midgard Revised Report, page 54 line 28 and page 55 line 1-2.

decommissioning estimate, "based solely on information that was already available at the time and previously on the record with the Board".[3] NSPI estimates the total decommissioning costs as $84.5 million.[4] Decommissioning, however, is not the only consideration in assessing whether the ATO is the best option for ratepayers. Other available options for the refurbishment should be evaluated and considered.

Generally, the Industrial Group submits that NSPI's ATO should not be approved as filed. NSPI would be at liberty to resubmit once a more thorough analysis of the alternatives can be assessed. Alternatively, the Board could place the application in abeyance, pending submission of the additional information.

The Industrial Group also submits that the significant increase in costs associated with this application should not be entirely borne by ratepayers due to the lack of diligence in bringing the original capital project, failing to account for a number of costs associated with the project, and unnecessarily prolonging the permit process.

Test for ATOs

In reviewing an application for an ATO, the Board is asked to consider whether the overspend claimed is necessary and prudent. In doing so, the Board must analyze whether the capital project continues to be economically justifiable, in the best interest of the ratepayers, and the lowest reasonable cost. The overspend must be necessary, reasonable and prudent.

The burden of proof rests with NSPI. Contrary to NSPI's suggestion in its Reply Evidence, at page 5, lines 8-9, the focus is not, and should not be, on whether there is evidence from other participants "*that indicates the Company's proposed refurbishment is not the lowest cost alternative for customers*". This reverses the burden of proof. Rather, it is NSPI that must produce sufficient evidence that it has acted prudently in its application and execution of the capital project, and that the proposed refurbishment is in the best interest of ratepayers.

In these types of applications, the Board has not applied an explicit "ATO test". Instead, the Board generally examines whether the additional expenses applied for are considered reasonable and prudent. In determining what is reasonable and prudent, the Industrial Group refers the Board to the criteria outlined in the decision related to the ATO at Tufts Cove 6 in 2010 NSUARB 220:

> *[6] NSPI should be keenly aware that should the actual cost of this project exceed that amount, the Board will scrutinize an application by NSPI to overspend that amount carefully to ensure that this project continues to be economically justifiable and in the best interest of ratepayers. This review will be conducted in the usual manner, in accordance with the Board's responsibility pursuant to s. 35 of the [Public Utilities] Act, which states as follows:*
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> > *35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any*

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[3] Exhibit N-12, NSPI Reply Evidence, page 14, lines 18-19.

[4] Exhibit N-12, NSPI Reply Evidence, page 15, Footnote 12.

> *service which requires the expenditure of more than twenty-five thousand dollars without first securing the approval thereof by the Board. R.S., c. 380, s. 35; 2001, c. 35, s. 30.*[5]

> *…*

> *[67] As stated by Avon, and consistent with Paragraph 6 of this Decision, the issue to be decided by the Board in this ATO application is:*

> *…whether the Project continues to be* ***economically justified*** *and in the* ***best interest of ratepayers*** *and, in addition, whether NSPI has* ***managed the Project*** *to the* ***lowest reasonable cost*** *to customers. [Emphasis in original]*

To summarize, in considering this ATO, the Board should consider:

1. Whether the project continues to be economically justifiable?

2. Whether the project continues to be in the best interest of ratepayers?

4. Whether NSPI has been prudent and reasonable in bringing and managing the Project?

5. Whether NSPI managed the Project to the lowest reasonable cost to customers?

In considering prudency of NSPI's decision-making, the following criteria applies, as outlined in 2005 NSUARB 27:

- *Were the utility's decisions reasonable in the context of information which was known (or should have been known) at the time?*

- *Did the utility act in a reasonable manner and use a reasonable standard of care in its decision-making process?*

- *The imprudency test should relate to the circumstances at the time in question and not to hindsight.*[6]

More generally, the Board should consider whether any of these additional expenses now claimed could have been avoided through acting reasonably and prudently.

It is submitted that NSPI has failed to meet its burden that the additional expenses on the Ruth Falls refurbishment project were reasonable and unavoidable. Most of the issues that have resulted in the exponentially higher costs come down to NSPI's lack of due diligence in considering the *Fisheries Act* amendments at the time of the original application, and the lack of

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[5] Section 35 of the *PUA* was later amended by SNS 2010, c. 24, s. 1, to increase the level of expenditure which a public utility is authorized to make without Board approval from $25,000 to $250,000, effective May 11, 2010. This is now for projects in excess of $1M.

[6] *Nova Scotia Power Inc., Re*, 2005 NSUARB 2, at para 89; more recently followed in the in Matter M11003, Board Decision Letter, November 3, 2023, page 7.

responsiveness to the requests of NSECC and DFO for required information. Beyond individual expenses, NSPI has failed to update its economic justification for the project, in comparison to alternative options for refurbishment or decommissioning of Ruth Falls.

(1) There is insufficient evidence to assess the Project remains economically justified

This is a foundational consideration. Having regard to the additional costs, the question is whether the Project remains economical. Here, the Board must look at whether the costs for the Project are proportional to the benefits.

In the 2019 ACE decision, *Nova Scotia Power Incorporated (Re),* 2019 NSUARB 60 at para 57, the Board reiterated its view "that a holistic approach to capital costs, which properly matches or allocates all capital expenditures associated with a facility or asset with claimed benefits, is the proper way to reasonably assess whether projects are economically justified." Respectfully, there is simply insufficient evidence produced by NSPI to support such a finding in relation to this ATO.

The ATO's "Justification" section is virtually identical to that in the original capital application. The Application further states: "the primary justification of the Project remains the same: refurbishment of the Ruth Falls Main Dam water-retaining structures (embankments, spillway and sluiceway) is required to address the structural and freeboard deficiencies and meet current CDA Guidelines."[7]

The Industrial Group does not dispute that the Ruth Falls Main Dam requires work, especially given that the Kleinschmidt 2015 Dam Safety Review confirmed the spillway structure did not meet the current CDA Guidelines. More specifically, it does not meet the stability requirements for the In-Flow Design Flood ("**IDF**") loading condition, and the sluiceway structure did not meet the stability requirements for the IDF and earthquake loading conditions.[8] However, the application as filed does not properly allow for a review of the updated economic justification of the project.

To determine whether a project is justified, the Board would need to look at alternatives, including decommissioning, and determine whether the proposed approach continues to remain economical both standing on its own and relative to alternatives. NSPI has only considered the possibility of decommissioning within its Reply Evidence, which is derived from the 2018 Hydro Asset Study. The Industrial Group specifically put the issue of decommissioning to NSPI in the Information Request process, and as of December 3, 2024, NSPI confirmed that it had not considered either selling the asset or decommissioning the generating station.[9] NSPI declined to provide the analysis through the IR process.

Midgard has outlined the importance of the Board being able to review the option of decommissioning in determining it would be in the best interest of ratepayers.[10] The Industrial

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[7] Exhibit N-1, Application, page 3.

[8] M08984, Exhibit N-7, NSPI (NSUARB) RIR 65 (b).

[9] Exhibit N-4, NSPI (IG) IR 4 (b).

[10] Exhibit N-9, Midgard Revised Report, pages 54-55.

Group would submit that this is also relevant for determining whether the project remains economically justified, or if some other option ought to be considered.

Despite the ballooning costs of the project, as per the response to IR, NSPI never turned its mind to decommissioning. However, in response to the Midgard's evidence, for the first time in NSPI's Reply evidence filed on March 18th,[11] it outlines some consideration of decommissioning costs for Ruth Falls based on information from the original application. The estimate is $84.5 million but there are limited details on how this was calculated and given the time when this was produced, there has been no opportunity for IRs. The calculation of archeological costs of $6.9 million is particularly noteworthy, given the low value of archeological costs estimated for this refurbishment from the original application, and again in this ATO.

Beyond the issue of the decommissioning, the remaining uncertainty on this project is concerning. Unless there is a more current update, NSPI has still not received approval of the FAA from the DFO, and appears to have an outstanding issue with the DFO regarding the appropriate offsetting needed for the project.[12] Despite receiving direction regarding the offsetting required in June 2024, NSPI's Reply evidence indicates it only submitted the package to the DFO on February 28, 2025.[13] It is unclear why there was an eight month delay in responding to DFO's directions.

Given the growing concerns, and age of the hydro fleet in Nova Scotia, there ought to be more information and data produced to justify this refurbishment project. The project is now six years since its original approval, and only 10% complete.[14] Where costs have increased two-fold, the economic justification should not be assumed. NSPI's hydro assets play an important role in its overall generation plan, and Integrated Resource Plan, but the benefits must be weighed against the overall costs of the hydro generation when significant capital investments are required. In this case, the quantity of energy and capacity for this unit is not significant.

NSPI has failed to satisfy its burden that the Ruth Falls refurbishment project, using "Option 4", remains economically justified. This is not to say that it is definitively not justified, the issue is that there is insufficient evidence to confirm that it is in fact still justified given the significantly increased price of the project.

(2) There is insufficient evidence the Project remains in the best interest of ratepayers

The blanket assertion that all options would have increased costs in the same way does not satisfy NSPI's burden of proving that the Ruth Falls Refurbishment, based on "Option 4", continues to be in the best interest of the ratepayers. This is especially so considering that the project costs are now anticipated to be more than double the original estimate.

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11 Exhibit N-12, NSPI Reply Evidence, page 14.

12 See Exhibit N-11, Midgard (IG) RIR – 27 (a), in which Midgard outlines that further clarification is needed for the basis of the 20,000m2 for the offsetting estimate. See also, direction given by the DFO in May 2024 related to requested offsetting of 57,500 m2, at Exhibit N-6, NSPI (NSUARB) RIR- 12, Attachment 14a.

13 Exhibit N-12, NSPI Reply Evidence, page 19, lines 24-25.

14 Exhibit N-6, NSPI (NSUARB) RIR -1(a).

Midgard confirms that the information regarding the decommissioning option of the project should be provided to the Board before a determination can be made on whether the refurbishment of Ruth Falls, as proposed, remains in the best interest of ratepayer.[15] In response to the Industrial Group's IR 30(b), Midgard states: "the Board should always be given the opportunity to evaluate whether decommissioning a project is in the best interest of ratepayers rather than reinvestment."[16] The Reply evidence does provide some of the analysis but not the full picture of the comparison. The estimate for decommissioning is $84.5 million but there are limited details on how this was calculated, and the data used is outdated. There is further reference to the Depreciation Study, which is not yet available for review.

The Industrial Group further submits that NSPI should provide an updated cost comparison to the other options that have been confirmed to also address the deficiencies and CDA Guidelines justifying the reason for this project,[17] similar to that provided in the original application process. More specifically, in the original application, Matter M08984, NSPI previously provided a cost comparison chart in response to Board IR 65(e),[18] which provides the analysis behind the proposition that the project proposed was the lowest cost option by $500,000. Both the Industrial Group and Board staff specifically asked for this update,[19] which went unanswered. NSPI has instead, taken the position that "[r]e-evaluation was not necessary as all five options considered would have the same cost increases as a result of increases in costs associated with environmental permitting."[20]

NSPI's reporting that "Option 4 is approximately $500,000 less costly than the next closest option",[21] is simply outdated information. It is also questionable given that the original Kleinschmidt Associates Canada Inc. (Kleinschmidt) Report, dated June 7, 2018, which provided all the available options and costs, estimated that Option 4 was only $250,000 less than the next closest option.[22] There is no explanation on the evidence which explains this discrepancy.[23]

NSPI has failed to complete any updated economic analysis of the project and declined to do so through the IR process. This is despite receiving questions from the CA,[24] SBA,[25] NSUARB[26] and IG[27] regarding the economic assessment of Option 4 being the lowest cost option. Rather, intervenors are left to rely solely on NSPI's blanket assertion that "Option 4 continues to be the

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15 Exhibit N-9, Midgard Revised Report, pages 54-55.

16 Exhibit N-11, Midgard (IG) RIR – 30 (b), pdf p 59.

17 Exhibit N-4, NSPI (IG) RIR – 4 (a).

18 M08984, Exhibit N-7, NSPI (NSUARB) RIR - 65 (e).

19 Exhibit N-4, NSPI (IG) RIR – 4(c); N-6, NSPI (NSUARB) RIR -7.

20 Exhibit N-6, NSPI (NSUARB) RIR -7 (a).

21 Exhibit N-1, Application page 2.

22 Exhibit N-6, NSPI (NSUARB) RIR – 2, Attachment 1, page 8 of 34.

23 Midgard is also not able to explain the discrepancy: Exhibit N-11, Midgard (IG) RIR-29 (d).

24 Exhibit N-3, NSPI (CA) RIR-2.

25 Exhibit N-7, NSPI (SBA) RIR-1.

26 Exhibit N-6, NSPI (NSUARB) RIR -7.

27 Exhibit N-4, NSPI (IG) RIR – 4(c).

lowest cost option" since all five options would have had the same cost increases.[28] There is no source data provided to support this assertion.

While Midgard has accepted NSPI's assertion as reasonable, it has not independently verified it.[29] It is difficult to accept that these statements are reasonable, where it appears that NSPI itself has not run any updated cost comparisons. NSPI has an evidentiary burden to prove that the project remains in the best interest of the ratepayers.

At a minimum, the Industrial Group is asking that NSPI be required to show their work in reaching the conclusion that Option 4 remains the lowest cost option by approximately $500,000. Based on the evidence filed to date, it is difficult to understand how after approximately six years, and a number of scope changes, that NSPI is able to definitively conclude this cost difference between the other three options without actually doing the analysis.

It is important to note, that based on the original estimates of the options provided, the current ATO exceeds what the costs would have been for an entirely new dam: $13,891,000 for a new dam vs. $15,445,508 project costs with this ATO. Presumably, in developing an entirely new dam, the FAA permitting costs associated with that project, would have been foreseen and contemplated at that time. It is curious, then, why the costs associated with that project option would have grown by the same amount as Option 4, which did not include the costs for FAA permitting originally. Whether true or not, there is no data to support the presumption that all four options would have increased by the same costs, especially since NSPI neglected to complete this re-evaluation.

Even more, it appears that the estimated archeological costs may still be underestimated. As confirmed in the Midgard Report, the currently estimated archeological costs now align with the original estimates from other hydro capital projects at Gaspereau and Tusket.[30] However, those original costs were found to be significantly underestimated.[31] It is difficult to accept that now aligning the Ruth Falls costs with previously underestimated costs on other hydro projects would, in fact, be a more reasonable estimate of costs. Rather, the estimate in this ATO similarly risks being underestimated.

While Midgard has noted that the archaeological costs now estimated for the Ruth Falls ATO are not *overstated*, "Midgard considers that there remains a risk of future significant increases to archaeological costs, as noted in Section 6.2.3 of Midgard's report."[32]

The Industrial Group would further note that the Hydro Asset Study ("**HAS**"), which had been included as part of the 2019 ACE Plan filings, confirmed the heighted risk of archeological costs. Exh. N-4, at Appendix F of the HAS, includes the Boreas Costing Report, which estimated archeological assessment costs with the development or removal of asset locations. Pages 84-85 of the Costing Report (87-88 of Appendix F), specifically outline that Ruth Falls exhibited

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28 Exhibit N-6, NSPI (NSUARB) IR 7.

29 Exhibit N-11, Midgard (IG) RIR – 30(c).

30 Exhibit N-9, Revised Report, page 26 lines 12-13.

31 Exhibit N-11, Midgard (IG) RIR – 19 (a).

32 Exhibit N-11, Midgard (IG) RIR – 19 (b)

"High Potential" for impacting archeological resources, including around the Power Plant and if water levels were lowered in the reservoir. In this proceeding, however, NSPI has stated that it "was not aware the reservoir exhibited high potential for impacting archaeological resources prior to the original application".[33]

Regardless that NSPI has distinguished the archeological costs in relation to Ruth Falls from that of other hydro projects in its Reply Evidence, the evidence filed in the same proceeding as the original capital project, clearly confirm that NSPI had knowledge, or should have had knowledge, there was "high potential" for archaeological impact based on the specifics of the refurbishment proposed. NSPI has explained that a desktop Archaeological Resource Impact Assessment ("**ARIA**") was completed for the Ruth Falls headpond in 2023 to inform the development of an archaeological protection plan for the drawdown, however this was completed approximately four years after the project was approved by the Board.[34] The ARIA reportedly confirms the headpond was considered elevated potential to encounter archaeological resources.

In the absence of an updated alternative economic assessment, it is submitted that the Board is not able to accurately determine whether this refurbishment project remains in the best interest of ratepayers. Also, the risk of significantly increased archeological costs on this project further calls into question the approach to this project. There may, instead, be a lower cost option, with more longevity, available to NSPI which has not been pursued or considered. Without that evidence, the Industrial Group cannot take a position on what is in the best interest of ratepayers.

(3) The evidence suggests that NSPI has not acted reasonably or prudently

Imprudence in this matter arises in two respects: (a) in preparing the original application and (b) in advancing the capital project forward.

Prudency is assessed from the time the application was originally filed, and not with the perspective of hindsight. The Board must look to the information that was available to NSPI, and should have been known by NSPI, in preparing the original application. Beyond that, NSPI must have been acting diligently in advancing the refurbishment project forward.

The Fisheries Act amendments were, or ought to have been, contemplated

Based on the evidence included in the record of this proceeding, along with concurrent hydro applications of NSPI, NSPI knew or ought to have known about the legislative changes to the *Fisheries Act*. And, given the specifics of the refurbishment project, NSPI's risk assessment had it been acting prudently, should have contemplated the possibility of requiring an FAA for this project regardless of a legislative amendment.

Bill C-68, "*An Act to amend the Fisheries Act and other Acts in consequence*," was introduced to the House of Commons on February 6, 2018, and completed its third reading on June 20,

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[33] Exhibit N-4, NSPI (IG) RIR – 9 (a).

[34] Exhibit N-4, NSPI (IG) RIR – 9 (a).

2018.[35] While the amendments were not given Royal Assent until June 2019, the amendments with respect to the requirements for FAAs were well within contemplation, or ought to have been contemplated, at the time of the original Ruth Falls refurbishment capital application on November 29, 2018.

In response to Industrial Group IR 8 (f), Midgard has confirmed that at the time, "there was significant published public information relating to the potential changes to the Fisheries Act".[36] Midgard also believes it is likely that NSPI would have been aware of the potential changes as a prudent hydroelectric operator. The Board and stakeholders should have similarly been made aware of these impending changes and their implications for the project application, especially if it is now being reported as resulting in the doubling of costs for this refurbishment project. The potential of this significant impact should have been contemplated and considered when deciding on the economic justification of this project and the options available to NSPI at the time.

Midgard has stated that "[g]ood utility practice involves assessing regulatory changes; however, NS Power had to balance this with the need to proceed based on its understanding of the law and concomitant regulations at the time."[37] While that may be true, it is misleading to seek approval on the capital project based on a calculation of costs which failed to capture the full extent of the costs and efforts involved in the project, including the need of an FAA. This ought to have been reasonably contemplated at the time of the original capital project. Where the position of NSPI is that the new need to obtain an FAA has transformed this project into a significantly more expensive refurbishment, it should have alerted the Board and intervenors of that possibility in the original application and assessed the risk.

As articulated by the Board in its Letter decision in the AMI ATO Matter M11003, in deciding whether to grant an ATO in light of an evaluation of imprudence:

> *A balance must be struck between the level of detailed engineering required (conducted at shareholder risk prior to approval); the ability of the utility to take advantage of favourable market conditions; regulatory efficiency; and the timely submission of capital projects.*[38]

NSPI left out a critical detail it knew, or ought to have known, at the time of the original application.

It is even more abundantly clear that NSPI knew, or ought to have known, about the relevant amendments to the *Fisheries Act* and the impact on FAA applications for hydro capital projects generally, when looking to the concurrent hydro capital project at the Tusket Main Dam. Without diving too deep into the intricacies of the ATO application initiated in 2021 in Matter M10197, the Industrial Group would highlight that the evidence filed on that application confirms:

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35 Parliament of Canada, LegisInfo, Bill-C-16, 42nd Parl., online: https://www.parl.ca/legisinfo/en/bill/42-1/C-68

36 Exhibit N-11, Midgard (IG) RIR- 8(f), pdf p 15.

37 Exhibit N-11, Midgard (IG) RIR – (i).

38 Matter M11003, Board Letter Decision, page 8.

- Construction began at the Tusket Main Dam site in 2017, upon receipt of the NSECC Watercourse Alteration Approval and DFO FAA.[39]

- In 2019, a water infiltration issue arose, which required a change in the approach to the project and re-permitting with the NSECC and the DFO, along with additional conditions for those environmental permits. [40] NSPI was no longer able to dewater the construction zone and instead had to lower the reservoir.[41]

- The DFO assessed that the lowering of the reservoir could cause harm to fish.[42] NSPI had to develop a fish rescue and fish habitat monitoring plan, which also informs the offsetting measures needed. The DFO needed these additional requirements for the FAA.[43]

- NSPI worked with the DFO in the fall of 2019 and submitted a subsequent FAA application December 6, 2019.[44]

- In April 2020, the DFO completed its review of the FAA application and found it to be complete, although there were still some outstanding areas to be addressed, including a drawdown monitoring plan and consultation to be completed.[45]

- NSPI was able to obtain an amended Watercourse Alteration Approval in June 2021, regardless of the issuance of an FAA.[46]

- The FAA was issued by the DFO by July 2, 2021.[47]

While there was back and forth with the DFO in relation to the issuance of the FAA for Tusket, the delays in receiving approval are clearly not as significant as in this project at Ruth Falls. Despite the similar timing of these FAA applications, NSPI, years later, still does not have the FAA for Ruth Falls. It is also clear that NSPI would have had an open dialogue with the DFO precisely at the same time as the Request for Review (which NSPI has not produced in this matter), which was sent to the DFO on this matter on December 2, 2019.

Given NSPI's experience, and knowledge of the *Fisheries Act*, there is no doubt NSPI knew or ought to have known that the Ruth Falls project would have triggered the need for an FAA or would have been significantly impacted by the anticipated legislative changes.

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[39] M10197, Exhibit N-1, Application p 9.

[40] M10197, Exhibit N-1, Application pages 4-5.

[41] M10197, Exhibit N-1, Application pages 11.

[42] M10197, Exhibit N-1, Application pages 11-12.

[43] M10197, Exhibit N-1, Application page 22.

[44] M10197, Exhibit N-1, Application, Appendix E, pages 1-2.

[45] M10197, Exhibit N-1, Application, Appendix D page 17 and Appendix E, page 9.

[46] M10197, Exhibit N-1, Application, Appendix E, page 24.

[47] M10197, Exhibit N-1, Application, Appendix E, page 24.

While the legislative text alone may not provide sufficient detail to determine how every project near water would be assessed, as suggested by Midgard, the extent of this project would have been, and should have been recognized to have triggered the new provisions of the *Fisheries Act*. More specifically, the amended s. 34.4(1) which reads:

> *"No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish."*

There should be no doubt that dewatering of the reservoir, and required maintenance to the dam, would have triggered the anticipated changes to the requirements for an FAA under the *Fisheries Act*. That was also known in relation to the Tusket ATO.

For reference, under the previous version of the *Fisheries Act*, an FAA would have been triggered by the following:

> *35(1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.*

"Serious harm to fish" was defined in s. 2(2) as: "…the death of fish, or any permanent alteration to, or destruction of, fish habitat". While Midgard, and NSPI have emphasized the change to the need for an FAA in the circumstances of "permanent alteration", it is notable that the previous FAA requirements would have also been triggered by "destruction of, fish habitat". Based on the initial application to the NSECC dated December 20, 2019, it is clear that destruction of fish habitat and even a permanent change has always been contemplated for this project.

In the first NSECC submission for the Ruth Falls project dated December 20, 2019, NSPI noted "anticipating an additional <u>permanent instream footprint</u> of approximately 60 m2 on the downstream side of the dam to accommodate additional concrete requirements for certain ogee sections" [emphasis added].[48] The terminology of "permanent instream footprint" carries through to the DFO applications. NSPI confirmed in its filing with the DFO on May 8, 2021,[49] that:

> *The Project will result in a permanent loss of fish habitat, however, it is felt that the Project will not be removing a critical piece of habitat from the ecosystem due to the small amount (60 m2), the location immediately below the dam, the bedrock substrate located in the area, and the lack of vegetation in the area.*

This permanent loss of fish habitat of approximately 60m2 has been contemplated since the initiation of the project. Regardless that the legislation no longer requires a "permanent" change to trigger the need for an FAA, that was precisely what was contemplated with this project regardless of the size of that change.

When asked, Midgard was not able to say, definitively, whether this permanent instream footprint and the described "permanent loss of fish habitat", would trigger the need for an FAA under the previous legislation, but confirmed being involved with projects that had less direct

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[48] Exhibit N-3, (CA) RIR- 5 Attachment 1, page 15.

[49] Exhibit N-06, (NSUARB) RIR – 12, Attachment 2, page 13.

impact that needed an FAA.[50] Respectfully, based on the wording of the legislation, and the language used in NSPI's applications, it could have at least been reasonably contemplated that an FAA would have been needed regardless of the legislative change.

Viewing the evidence as a whole, NSPI acted imprudently by not including the costs of the FAA within its initial application. Either it made a deliberate decision to not include those costs thereby under-representing the costs of the project, or was willfully blind to the impact of the *Fisheries Act* provisions and amendments. Either way, the impact of this imprudence should not rest with ratepayers.

NSPI did not act diligently in advancing the Applications to the NSECC and DFO

With respect to the advancement of the project, the construction has stalled based on the inability to obtain the requisite permits. This is both in respect of obtaining the FAA (the crux of the matter), along with the Watercourse Alteration Approval permit from the NSECC. The latter is a separate permitting process from the FAA.

NSPI has provided some, but not all, of the communications with the DFO and the NSECC.[51] These communications are lengthy and show that the several year delay in obtaining the required permits was in part due to a lack of NSPI's diligence. Specifically, NSPI repeatedly filed insufficient evidence which was required in order to obtain the permits and changed the approach to a phased approach, which required multiple refiles of the evidence and reports.

With respect to the Watercourse Alteration Approval needed from the NSECC, NSPI applied for this permit on December 17, 2019, and only received approval 4.5 years later, June 1, 2024. In regard to this permitting process, the Industrial Group would highlight the following:

- NSPI has provided evidence that this type of permit was expected to take 2-6 months to receive from the NSECC;[52]

- This type of permit was specifically contemplated at the time the original application was filed in 2018;

- Midgard has only completed a high-level review of the NSECC process,[53] and lacks the experience or expertise to specifically comment on the diligence or process of this permitting process in this proceeding;

- The Watercourse Alteration Approval was deemed incomplete twice on January 7, 2020[54] and March 25, 2020,[55] before NSPI first applied for the FAA on June 24, 2020;[56]

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50 Exhibit N-11, Midgard (IG) RIR – 8(d).

51 Exhibit N-6, NSPI (NSUARB) RIR – 12; and Exhibit N-3 NSPI (CA) RIR – 5.

52 Exhibit N-3, NSPI (CA) RIR -3 (d).

53 Exhibit N-9, Revised Report, page 17, lines 2-5.

54 Exhibit N-3, NSPI (CA) RIR – 5 Attachment 2.

55 Exhibit N-3, NSPI (CA) RIR – 5 Attachment 4.

56 Exhibit N-6, NSPI (NSUARB) RIR – 12, Attachment 2.

- NSECC requested finalized design drawings and contractor documentation for the project multiple times[57] before they were provided by NSPI April 14, 2021;[58]

- NSECC, through the permitting process, raised issues with the project proposal that should have been originally contemplated, including access roads needed for the project;[59] and

- The shifting in phased approach for the project resulted in multiple filings and elongated process.

The result of NSPI's responses to NSECC's requests for additional information, or re-files based on the phased approach to the project, was that it took years, rather than months to obtain this permit.

With respect to the FAA needed from the DFO, NSPI originally applied for an FAA on June 24, 2020 (more than a year after receiving approval for this project), and yet NSPI still does not have this required permitting. NSPI provided an update in the Reply evidence, Exh. N-12, that a "package was submitted to DFO on February 28, 2025." This is approximately eight months after the last discussions with the DFO in June 2024.[60] This delay is indicative of the permitting process throughout.

In reviewing the application process with the DFO, there is evidence that NSPI has contributed to the delays, including lengthy periods to provide information or responses. For example, the first application to the DFO in June 2020 did not include all of the information and documentation set out in the *Authorizations Concerning Fish and Fish Habitat Protection Regulations* (the Regulations)[61] including the information on the specific drawdown needed and the offsetting plan. However, the response from NSPI for the request for this additional information was only filed with the DFO approximately a year later, in May 2021.[62]

It is also difficult to understand how the DFO's processes, and changes in legislation is viewed as the cause for most of these delays in this refurbishment project, when NSPI was in fact able to obtain the new FAA on the Tusket project, within 1.5 years (as outlined above).

It is evident that NSPI's shifting approach to this project, including the phased approach, has added significant time and cost to this project. NSPI has explained the reasoning for its decision to break up the project and complete the construction of the building in advance of the requisite dewatering, i.e., installation of a rubber dam control building. But this too resulted in additional, unnecessary delays and costs. In trying to avoid the permitting delays, NSPI has instead prolonged the process, and was required to refile the applications multiple times. While not ill-

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57 Exhibit N-3, NSPI (CA) RIR – 5 Attachment 2, 4 and 6.

58 Exhibit N-3, NSPI (CA) RIR – 5 Attachment 7.

59 Exhibit N-3, NSPI (CA) RIR – 5 Attachment 8, page 2 of 3.

60 Exhibit N-6, NSPI (NSUARB) RIR – 12, Attachment 14.

61 See letter from the DFO, August 4, 2020, at Exhibit N-6, NSPI (NSUARB) RIR – 12, Attachment 3.

62 Exhibit N-6, NSPI (NSUARB) RIR – 12, Attachments 4 and 5.

intended, it appears that NSPI did not fully appreciate the need for dewatering for each aspect of this project, and the increased costs of this should not fall on ratepayers.

Another issue with NSPI's approach, is the changes in scope for the project that has occurred over the last six years. The records provided confirm that NSPI communicated with the DFO on July 6, 2021, "regarding changes to the scope of work and timelines".[63] This communication has not been provided as part of this proceeding. Regardless, the records suggest that NSPI made scope changes that resulted in a need to refile the application and provide updated supporting materials multiple times. There was no corresponding Scope Change application made to the Board.

Midgard appears to have a different definition for "change in scope", which would exclude different implementation strategies.[64] NSPI in its Reply evidence has outlined a list of additional scope items in Figure 1: Breakdown of Additional Scope Items.[65] Some of these items were identified after the original filing, having been inadvertently omitted, and others arose from the delays and changes associated with the FAA process.

The timing of NSPI learning these changes are relevant, as it ought to have prompted an application to the Board. The changes in scope date back to 2021. Pursuant to the Capital Expenditure Justification Criteria (CEJC), this should have prompted a Scope Change application, before incurring a number of costs associated with that change. The CECJ sets the requirements for *when* the approval is needed. That includes the requirement for NSPI to apply to the Board when there is a Scope Change and ATO. Despite the change in the application as needing the FAA, along with the noted scope changes which NSPI states are mainly caused by the FAA requirement, NSPI only applied to the Board in this matter, October 11, 2024.

The Ruth Falls refurbishment project, is still in its infancy despite being six years since the original application process. Whether NSPI knew, or did not know about the FAA process, it is difficult to understand why the project still is not permitted where this is not the first time NSPI has applied for and received an FAA, nor is it the only FAA it has applied for and received during this same time-period. The Industrial Group submits that the record in this proceeding, as compared to other hydro matters necessitating an FAA, suggests that NSPI did not act diligently and prudently during the nearly five-year process with the DFO or the NSECC. These delays and significantly increased costs should not rest solely with ratepayers.

(4) The Amounts applied for are not the lowest reasonable cost to ratepayers

NSPI has failed to establish that Option 4 remains the lowest cost option for ratepayers, and that it remains in the best interest of customers. As noted above, there is simply insufficient information on the record to make such a conclusion as there has been no updated cost comparison. An economic analysis of the other options is required in order to accurately assess whether the Ruth Falls refurbishment, under Option 4, remains the least costly option.

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[63] Exhibit N-6, NSPI (NSUARB) RIR – 12, Attachment 5.

[64] Exhibit N-11, Midgard (IG) RIR 2 (b).

[65] Exhibit N-12, NSPI Reply Evidence, at pages 7-8.

Midgard has not reviewed NSPI's ATO application to determine whether the amounts applied for represent the lowest reasonable cost to customers.[66] Midgard's understanding that completing the project as the "lowest cost reasonable option" is based on the justification from the original application "which was outside of Midgard's review scope". However, as outlined, this justification and cost analysis as between options has not been updated.

Beyond the comparison of the possible approaches to the refurbishment project, the Industrial Group would note concerns flagged in the Midgard report with respect to the materials costs outlined in the ATO.[67] NSPI claims that an extended construction timeline contributed significantly to the $2 million cost variance. The Consumer Price Index and the Industrial Product Price Index, reflect inflationary rates of 19.4% and 25.4% (or 37% for some construction materials), respectively.[68] This does not, however, explain NSPI's reported 87% increase over the original materials cost estimate.[69] NSPI has failed to provide sufficient explanation for these dramatically higher material cost increases. In the Reply evidence, at pages 7-9, NSPI confirms that there were some items inadvertently excluded from the original scope, including generators and lighting system. The explanation regarding the costs for concrete rebar and steel walkways appears to be that the cost was included under "contracts" originally, but now split between "contracts" and "materials" costs in this ATO. The amounts noted, however, do not account for the $1.4M increase in costs. Nor does this acknowledge the fact that the costs for "contracts" have also dramatically increased by $2.6M.[70]

In response to an Industrial Group IR regarding how to calculate a disallowance on the basis of the discrepancy in relation to the material cost increases proposed and inflationary increases, Midgard outlined that "a disallowance of increased material costs could be sought if it was determined that NS Power had not sourced its materials through an appropriate competitive process, and as a result had overpaid for materials."[71] NSPI has not provided this additional evidence, in its Reply, regarding competitive procurement of the materials which have led to the significant increase in price despite these concerns being raised. While it is clear that NSPI did use competitive procurement practices with respect to the reduced price for sluice gates, gate actuators, and rubber dams, there is no clear confirmation of the same for the items that have resulted in the overall 87% increase in material costs.

The application record does not provide sufficient evidence that the Ruth Falls refurbishment included in the ATO remains the lowest cost option for ratepayers. As above, NSPI should provide updated alternative economic assessment. Also, there is insufficient explanation or justification for the material cost increases in the ATO, which far exceed the average inflationary increases over the period of this Project.

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66 Exhibit N-11, Midgard (IG) RIR -4 (a).

67 Exhibit N-9, Midgard Revised Report, page 19-21 and 32-34.

68 Exhibit N-9, Midgard Revised Report, pages 19 and 20.

69 Exhibit N-9, Midgard Revised Report, page 32, lines 13-16; Exhibit N-11, Midgard (IG) RIR – 16 (d).

70 Exhibit N-1, Application, page 5.

71 Exhibit N-11, Midgard (IG) RIR – 16(f).

Conclusion

The issue in this ATO is that NSPI failed to account for the need for an FAA in the original application, and the approach to the FAA application and Watercourse Alteration Approval has resulted in significant delays and costs on this project. It is not abundantly clear why the permitting in this project has taken significantly longer than other hydro projects, although the evidence suggests that NSPI's approach to the application has contributed to the delays.

The ATO represents significant cost increases on the Ruth Falls refurbishment project, which should not fall solely on ratepayers given that NSPI was imprudent in its preparation of the original application and the advancement of the permitting process. The Industrial Group says due diligence would have reduced or prevented a number of these costs.

There remains insufficient information on this application to support that Option 4 is the lowest cost option. It is respectfully submitted that NSPI should be required to provide an updated cost analysis of the other Options outlined in the Kleinschmidt Report, dated June 7, 2018, to determine whether Option 4 remains the least costly by $500,000, prior to the approval of this ATO.

There is not sufficient information on the record to demonstrate that ratepayers should fully bear the costs of the overages incurred in this project, particularly where NSPI knew or ought to have known the impact of the changes to the *Fisheries Act* and need for an FAA on the project. In making an application for approval of capital expenditures, NSPI alone is in the position to evaluate and estimate the costs of the proposed project. These costs inform the economic justification, and stakeholders must be able to trust the cost representations made.

Yours truly,

Nancy G. Rubin

Brianne Rudderham

NGR/lmc

cc William Mahody, K.C.
Participants