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15 September 2017

Environmental Assessment Office
PO Box 9426 Stn Prov Govt
Victoria BC V8W 9V1

***** BY FAX AT 250-387-2208 *****

Attn. Teresa Morris, Project Assessment Manager

Dear Sirs/Mesdames:

Re: Progress Energy Applications regarding Lily and Town Dams

We write in regard to the current application by Progress Energy to exempt two *existing* dams from the *Environmental Assessment Act* ("the Act"). It is our view that it is inappropriate and contrary to the intent of the Act to retroactively authorize an exemption for a reviewable project that has been constructed in violation of the Act. The Act provides the Minister, and not the Executive Director, with the legal authority to remedy non-compliance with the Act, and does not contemplate a situation in which an exemption is granted after a reviewable project has already been built.

Moreover, the circumstances under which these exemptions are sought raise fundamental questions about the role of the Oil and Gas Commission in the construction of these projects and in the enforcement of environmental statutes against oil and gas companies operating in northeastern BC.

Our recommendations, in brief, are that you:

- Refer the environmental assessment to the Minister pursuant to s. 10(1)(a) of the Act;
- In the alternative, restart the public consultation process with new public notice to make it clear that the full range of options under s. 10(1) of the Act are being considered and to provide clear notice to the public of the relationship between the application and Progress Energy's non-compliance with the Act;
- Provide a wider range of information to the public on the off-site impacts of the dams and on the status of Progress Energy and BC Oil and Gas Commission non-compliance with environmental statutes;
- Refer information on Progress Energy's non-compliance with the *Environmental Assessment Act* and the *Water Sustainability Act* to Crown Counsel; and
- Initiate a public review of enforcement of environmental statutes in relation to the oil and gas industry in the northeast of BC and especially in relation to the role of the Oil and Gas commission in enforcement.

Background

We set out below the facts as we have gleaned them from a brief reading of the Project Descriptions and associated literature. We believe that many of these key facts should be highlighted in the information provided to the public.

1. In 2012 the BC Oil and Gas Commission granted Progress Energy authorizations for an Associated Oil and Gas Activity and Temporary Authorization of Crown Land in respect of the Lily Dam Project. The Temporary Authorization has subsequently been converted into a Licence to Occupy. None of these documents are available on the EAO website or, to our knowledge, publicly.
2. In 2012 the BC Oil and Gas Commission granted Progress Energy authorizations for an Associated Oil and Gas Activity and Temporary Authorization of Crown Land in respect of the Town Dam Project. The Temporary Authorization has subsequently been converted into a Licence to Occupy. None of these documents are available on the EAO website or, to our knowledge, publicly.
3. The Project Reports for both dams acknowledge that at least some of the water stored in the dams originated from surface water flow within a defined stream channel[1] (albeit channels which the reports categorize as non-classified).[2] Lily Dam apparently also includes a "diverted spring" which feeds into an "inlet ditch."[3]
4. In addition, both dams are provided with water from other water licences, but in particular Water Licence No. C131230.[4] Water Licence No. C131230 was issued by the Oil and Gas Commission and provides for the removal of up to 2,993,000 cubic metres per year from the Sikanni Chief River and the storage of up to 274,000 cubic metres of that water in dug outs. It specifies the locations on which the water so withdrawn may be used, and does not specify other storage locations.[5] The water from Water Licence No. C131230 is carried to the two dams via an extensive water pipeline network.
5. Construction of the Town Dam was completed in June 2012 – an incredible engineering feat if construction was really only begun after approvals were received earlier in the same year. Lily Dam was completed in 2014. Both dams are over 15 metres high and have

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1 Lily Dam Project Description, p. 6; Town Dam Project Description, p. 6.

2 The Oil and Gas Commission defines non-classified drainage as: "An ephemeral or intermittent watercourse having a defined channel less than 100m in length ... They are generally defined as streams but do not meet the criteria for the definition and classification of stream under the EPMR." - BC Oil and Gas Commission - Glossary and Definitions. Version 1.4, published September 2017.

3 Lily Dam Project Description, pp. 6-7. The Project description states that the dam diverts "61,816 m3 /year from overland surface flow, including the diverted NCD course and spring flow," but does not specify the flow specifically from the waters that are legally "streams" within the meaning of the *Water Sustainability Act*. More information may be available in Appendix 6 of the two Project Descriptions, the Water Management Plans, but these documents are not available on the website.

4 Ibid., p. 7; Town Dam Project Description, p. 7.

5 http://www.env.gov.bc.ca/wsd/water_rights/scanned_lic_dir/130000-132499/13123c/lic14a01.pdf.

been that height since their respective completion dates. Dams over 15 metres high are reviewable projects under the *Reviewable Projects Regulation*.[6]

6. Neither dam received an environmental assessment at the time that it received Oil and Gas Commission approvals, prior to construction, or at any other time to present.
7. Information on both of these projects should have been sent to a provincial Dam Safety Officer in the Ministry of Forests, Lands and Natural Resource Operations, under the Dam Safety Regulation.[7] It is unclear whether this occurred.
8. The applications for an exemption from an Environmental Assessment were received in July, 2017, more than 5 years after the Oil and Gas Commission gave relevant approvals for the projects, more than 5 years after the completion of the Town Dam, and roughly 3 years after completion of the Lily Dam.

General Comments on violations of environmental statutes

BC's *Environmental Assessment Act* does not contemplate a situation in which projects are illegally built and an exemption is subsequently sought. While the public notice and correspondence clearly recognize that the dams have already been built, both are curiously quiet about the illegality of what has occurred here and whether (and how) that is being addressed.

Indeed, on its face (and recognizing that we may not have all of the facts) there appear to have been several violations of environmental provisions:

- Section 8 of the *Environmental Assessment Act*, which makes it an offence to construct a reviewable project without an environmental assessment certificate or an exemption from obtaining a certificate;
- Sections 6 and/or 11 of the *Water Sustainability Act* and the equivalent sections under the earlier *Water Act*, which makes it illegal to divert or store water from a stream or to make changes to a stream without government approvals (including a spring and a non-classified stream).
- Violation of the terms of Water Licence C131230, which provides for limited storage of water taken under the licence in dugouts, and not in dams.
- Depending on whether notice was provided to the Dam Safety Officer, there may also have been a violation of the *Dam Safety Regulation*.

In addition, there is the disturbing fact that the Oil and Gas Commission granted authorizations related to the construction of the two dams in apparent violation of section 9 of the *Environmental Assessment Act*, which states that government agencies "must not issue an approval under another enactment for a person to ... construct ... the facilities of a reviewable project."

This section was clearly not followed. It is possible that the Oil and Gas Commission did not have sufficient information before it to allow it to realise that the project was reviewable, but, if

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[6] *Reviewable Projects Regulation*, BC Reg 370/2002, Part 5 – Water Management Projects.

[7] Dam Safety Regulation, s. 3.

so, that raises its own questions about why the Commission was granting significant areas of Crown land to Progress without having much information about their eventual use.

Submissions on impropriety/legality of section 10(1)(b) application

The *Environmental Assessment Act* does not contemplate an after-the-fact application for an exemption under s. 10(1)(b). The Act is clear in sections 8 and 9 that nothing is to be done in relation to a reviewable project until an EA certificate or an exemption is granted.

The remedy in the event of illegal construction is found in Part 5 of the Act. Under that part the Minister has broad powers to order the removal of an illegally constructed project, including repairing harm that has been done.[8] The Minister also has the ability to negotiate an agreement to remedy non-compliance, although only with a party that holds an environmental assessment certificate.[9] The fact that the Legislature expressly limits compliance agreements to parties that hold a certificate suggests that a party that has illegally constructed a reviewable project, and does not wish to remove it, must first obtain a certificate before it can be brought into compliance in this manner.

These powers belong to the Minister – and not to the Executive Director. It would therefore, be inappropriate and of questionable legality for the Executive Director to purport to bring a non-compliant party into compliance through a retroactive exemption under s. 10 of the Act.

The language of section 10 is forward-looking, and does not contemplate retroactive effect. For example, the Executive Director is required to determine that the proponent "may proceed with the project without an assessment," which is not a possible determination when the project is already built. There is nothing in the section to suggest that it is intended allow non-compliant parties to escape the effect of the Act, similar to the explicit language of s. 42 of the Act, which expressly protects a non-compliant party who has signed a compliance agreement with the Minister.

Moreover, section 10, as a whole, does not contemplate **an application for an exemption** under s. 10(1)(b). Rather, the section provides a suite of options for the Executive Director when presented with a reviewable project, one of which is to authorize an exemption under s. 10(1)(b). The proponent can certainly argue in favour of an exemption, but equally, members of the public should be encouraged to provide their views not only about whether an exemption is appropriate, but also whether the project should be referred to the Minister under section 10(1)(a) or require an assessment under section 10(1)(c).

The narrow terms of the current public consultation are disturbing, as they suggest that the Executive Director has limited his/her focus to determining whether to grant an exemption or not, and to identifying conditions that might justify an exemption, thereby discouraging members of the public from commenting on the full range of powers under s. 10(1).

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8 *Environmental Assessment Act*, s. 34.

9 *Environmental Assessment Act*, s. 36.

Submissions on effects of an exemption

In order to grant an exemption under s. 10(1)(b) the Executive Director must determine that a "reviewable project **will not** have a significant adverse environmental, economic, social, heritage or health effect."[10]

If there is any uncertainty about the possibility of a significant adverse effect, then the Executive Director is required to refer the project to the Minister or to an assessment. The onus to be overcome by the proponent is a significant one.

It should be noted that an assessment of effects of the "reviewable project" is not limited to the actual dam. Rather, a reviewable project is defined as follows:

> **"reviewable project"** means a project that is within a category of projects prescribed under section 5 … and includes
>
> (a) the facilities at the main site of the project,
>
> (b) any off-site facilities related to the project that the executive director or the minister may designate, and
>
> (c) any activities related to the project that the executive director or the minister may designate.

In the current application, the dams themselves represent the "facilities at the main site of the project." However, either the Executive Director or the Minister may require an environmental assessment that examines "off-site facilities" or "activities" that are related to the project.

At the s. 10 stage, the scope of the assessment has not yet been determined. That is done subsequently by either the Executive Director (under section 11) or the Minister (under section 14). This means that at the section 10 stage, the Executive Director cannot limit his/her consideration to the dam itself, but must also consider the possibility that associated activities or facilities will warrant an environmental assessment. In the case of the current dams, this means that Progress Energy's associated pipeline network, hydraulic fracturing operations and other related facilities and activities are properly within the scope of the section 10 considerations.

As a result, the Project Descriptions provided by Progress Energy are currently inadequate, as neither provides much information on which to judge the impacts of the pipelines, hydraulic fracturing or, indeed, to assess what other facilities or activities might fall within the assessment. Neither the public nor the Executive Director can currently assess the likelihood of impacts in an informed manner.

The fact that the projects were carried out before an assessment means that we also have no access to base-line information about the values supported by the site before the dams were built.

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[10] See *Coastal First Nations - Great Bear Initiative Society v. British Columbia (Minister of Environment)*, 2016 BCSC 34 at para. 108-111, for discussion of the presumption that a reviewable project will generally undergo an assessment.

We submit, also, that if the Executive Director has the legal authority to retroactively consider exempting a project (which we disagree with), then s/he cannot, with the benefit of hindsight, make a finding that such adverse effects did not occur (which we do not concede), and therefore there was no risk of their doing so. As noted, section 10 is forward looking and an assessment is required if the project "may have" significant adverse effects.

On the basis of the above, we submit that this is not an appropriate case to grant an exemption, even assuming that the Executive Director has legal authority to do so.

Public confidence in environmental assessment as a significant adverse effect

To proceed with a retroactive exemption of a reviewable project which has been built in violation of the Act undermines public confidence in the administration of the Act.

This is particularly true given:

- That there is an appearance that a government agency, the Oil and Gas Commission, violated section 9 of the Act and/or enabled Progress Energy's violation of the Act;
- The failure of the Environmental Assessment Office to detect for many years the fact that two large reviewable projects had been built, raising questions about how many other illegally constructed projects exist and the capacity of the Office to enforce the Act. These concerns are particularly germane given a very critical audit of enforcement of the Act by the Auditor General of BC in 2011;[11]
- The fact that no information has been provided to the public that would suggest that Progress' non-compliance with three environmental statutes has resulted in any investigation or consequence, other than possibly being made to apply for this exemption;
- The apparent openness of the Environmental Assessment Office to consider an exemption with no apparent recognition of the legal and public policy challenges posed by retroactive exemptions;
- The precedent that might be set by an exemption under these circumstances which may embolden or (in the minds of their employees or government staff) justify other companies in proceeding with reviewable projects without authorization.

Decreased public confidence and potential impacts on general levels of compliance with the Act are social and environmental effects that could result from granting the exemption. Public confidence in the Act is an important public policy reason for in general not entertaining retroactive applications under the Act.

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11 Auditor General of BC. An Audit of the Environmental Assessment Office's Oversight of Certified Projects (2011). The EAO has, of course, replied to this audit and developed a compliance program. However, this audit focused on enforcement post-certificate, and did not examine the EAO's track record in detecting and prosecuting reviewable projects which proceed despite failing to obtain certificates.

Missing information

In light of the above, we believe that the Project Description and the information provided to the public by the EAO is incomplete and does not allow informed submissions about how section 10 of the Act should be applied in relation to the two Progress Dams.

Specifically, the EAO and/or the Oil and Gas Commission needs to clarify:

- The role of the Oil and Gas Commission in the non-compliance with the *Environmental Assessment Act* and the *Water Sustainability Act* and with the proposed exemption, and plans to ensure that the Commission does not play any such role in future;
- What compliance and enforcement investigations and actions have been undertaken or will be undertaken against Progress Energy for its non-compliance with the *Environmental Assessment Act*, the *Water Sustainability Act* and/or the *Dam Safety Regulation*;
- Why the Environmental Assessment Office has posted incomplete copies of the Project Description on the EPIC website (for example, both Project Descriptions are missing Appendix 6 – Water Management Plans for the projects).

In addition, the EAO should upload copies of the various approvals which have been granted to these dams to the website, together with the information provided by Progress Energy in support of those approvals.

Finally, Progress Energy should be required to amend the Project Descriptions to include information about associated activities and facilities that may give rise to adverse effects, including, but not limited to, information on the impacts of hydraulic fracturing and its water pipeline network.

Recommended course of action

We call on the Executive Director to exercise the power under s. 10(1)(a) to refer the environmental assessments of these two dams to the Minister. We believe that the matter relates to important public policy questions that go beyond the mandate of the EAO, including:

- The effectiveness of the Oil and Gas Commission in ensuring that environmental statutes are complied with and environmental values protected;
- The government's approach to environmental enforcement, including enforcement of both the *Environmental Assessment Act* and the *Water Sustainability Act*.
- The approach to be taken in regulating industries that are not in compliance with the regulations.
- The consideration of cumulative impacts of oil and gas development in the North East.

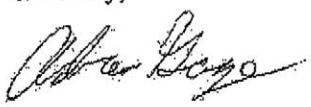
As noted, the *Environmental Assessment Act* provides the Minister, and not the Executive Director, with legal authority in relation to rectifying a project which is out of compliance with the Act. Thus the Minister is best placed to coordinate an assessment with measures to bring Progress Energy into compliance with the Act.

In the alternative, we recommend that the public consultation process be extended and that the notice be amended and republished to highlight the problems of non-compliance and to invite comments on how to address the non-compliance, as well as to reflect the whole range of options available to the Executive Director under s. 10(1). Additional information should be provided to the public, as discussed above.

We recommend that the question of Progress Energy's non-compliance be referred to Crown Counsel for possible charges.

Finally, we recommend that the Minister of Environment and Climate Strategies initiate a review into the extent of oil and gas industry non-compliance with environmental statutes, including an examination of the role of the BC Oil and Gas Commission in authorizing industry action in ways that do not accord with environmental statutes.

Sincerely,



Andrew Gage,
Staff Counsel

cc. George Heyman, Minister of Environment and Climate Change Strategy
(Via Fax @ 250 387-1356)