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***Sent via facsimile: 250-387-2208***

Teresa Morris
Project Assessment Director
Environmental Assessment Office
PO Box 9426 Stn Prov Govt
Victoria, BC V8W 9V1

Dear Ms. Morris:

**Re: Exemption Request for Progress Energy Lily Dam and Progress Energy Town Dam**

We write on behalf of the Sierra Club of British Columbia Foundation ("Sierra Club BC"), a BC organization whose mission is to protect and conserve BC's wilderness, species and ecosystems. Sierra Club has a long history of working to protect BC water resources, including impacts related to oil and gas development. These comments are made in response to the Invitation to Comment on the exemption requests made by Progress Energy for the Lily and Energy Town dams.

The Sierra Club BC's position is that there has not been compliance with the *Environmental Assessment Act* (EAA). Environmental Assessment Certificates (EACs) for the dams should have been sought, environmental assessments conducted, appropriate conditions and mitigation required, and EACs granted prior to construction, if construction was allowed at all. The issue of exemption from environmental assessment should have been addressed prior to construction and operation of the projects, if at all.

For the reasons explained herein, Sierra Club BC urges the Executive Director (ED) of the Environmental Assessment Office (EAO) to deny the exemption requests and refer this matter to the Minister under s. 10(1)(a) with a recommendation that assessments proceed by way of commissions or panels under s. 14(3)(a) so that non-compliance issues can be properly investigated. This would help ensure an appropriate understanding of how these dams were constructed and became operational without EACs, could help prevent future non-compliance by this or other proponents, as well as address concerns with these dams. As described below,

it is the position of Sierra Club BC that the ED does not have the jurisdiction to grant an exemption to Progress in the current circumstances.

1) **The EAA does not permit non-compliance to be remedied through an exemption, nor the retroactive granting of an exemption in this case.**

The statutory structure and intent of the EAA does not permit s. 10(1)(b) to be applied in a retroactive manner. The prospective nature of the EAA is demonstrated throughout its provisions and overall structure. The definition of "assessment" itself refers to the "potential" effects of a reviewable project (s. 1).

The scheme and process of the EAA require that an environmental assessment be performed in advance of any construction, operation, modification, dismantling or abandonment a "reviewable project". Under s. 8(1), construction, operation or other activities which constitute a reviewable project may not be undertaken **unless** the proponent holds an EAC. Further, under s. 9, the Minister and other government officials are prohibited from issuing approvals under any other enactments allowing a proponent to construct or operate a reviewable project unless the proponent obtains an EAC or a s. 10(1)(b) exemption. **In other words, the Lily and Energy Town Dams were constructed and are being operated in contravention of the EAA and it is likely that other government agents have violated the EAA as well by issuing approvals (such as authorizations under the *Land Act*) in contravention of s. 9.** This is a serious situation that should not simply be "papered over" by the retroactive, unlawful issuance of exemptions. This should be addressed by the EAO through the referral of these projects to the Minister for environmental assessments by commissions or panels as noted above.

In any event, the issuance of a retroactive exemption would be improper under the EAA. Section 10 is found in Part 3 of the EAA, which governs the "Environmental Assessment Process". Part 3 sets out a linear process which establishes the need, scope, conduct, approval and modifications through environmental assessment. Based on the scheme of the EAA, a determination under s. 10(1)(b) is to occur at the very outset of the process.

Further, interpreting s. 10(1)(b) in a way that allows a retroactive exemption is inconsistent with s. 34(1)(a) and would constitute a legal error. Section 34(1)(a) governs situations where a reviewable project is being operated without an EAC and stipulates that the appropriate, and only, remedy for a proponent in violation of the EAA is **to obtain an EAC or cease operating altogether**.

Addressing non-compliance through an exemption is not an option that the Legislature provided under s. 34(1)(a). Interpreting s. 10(1)(b) in a manner that disregards the limits of s. 34(1)(a) would violate the presumption of statutory consistency.

This is further confirmed by the operation of ss. 41 and 42. Section 41 makes it an offence to construct or operate a reviewable project without an EAC. The ability of the Minister to negotiate a resolution to non-compliance is found in s. 42 and may only be exercised with respect to "[a]n environmental assessment certificate holder". Moreover, any retroactive exemption granted by the ED under s. 10(1)(b) may interfere with any exercise of the Minister's powers under s. 42 to address the non-compliance.

In addition to a retroactive exemption being impermissible under the EAA, it would leave a number of critically important issues unaddressed. For example, the approvals for the Lily Dam and Energy Town Dam that were issued in contravention of s. 9(1) are void (or voidable) under s. 9(2) and cannot be saved by a retroactive exemption. This matter should be referred to the Minister, who has the authority to address this and other issues of non-compliance.

**2) Granting a retroactive exemption to a party that has breached the EAA would violate public policy and set a disturbing precedent.**

It is essential to recognize the offensiveness of the exemption request in this context and the considerable damage that granting the exemption would do to public confidence and the integrity of environmental law implementation. Here, Progress appears to have flouted the requirements of the EAA on more than one occasion and now seeks to avoid any consequences for that action. No explanation for the failure to follow the EAA has been provided.

Progress now seeks to be put in a better position than proponents who follow the EAA by obtaining an exemption (and avoiding the obligations, public scrutiny and potential operating conditions or mitigation requirements that might be applied through the EAA process). To grant these exemption requests would reward Progress for ignoring the EAA. It would also mean that unlawful approvals of other agencies related to these projects would not be reviewed and those unlawful approvals thus sanctioned.

Finally, it would also send a message to future proponents that the most expedient choice is to ignore the EAA because, if caught, there will be no consequences once a retroactive exemption from the requirements of the EAA is an option. This impact cannot be ignored in making a decision on the exemption request.

It is worth noting that Progress' conduct is equivalent to the kind of odious conduct for which courts would deny access to discretionary relief (such as being exempted from the requirements of a statute) under the "clean hands doctrine." Under the doctrine, equitable relief will be denied where the requesting party's blameworthy conduct has some connection to the relief sought.[1] Here, Progress' non-compliance is the very reason for the exemption request. Interestingly, a court would almost certainly deny any attempt by Progress to judicially

[1] Handbury & Modern Equity, 15th Edition (London: Sweet & Maxwell, 1997) at pg. 26.

review the denial of an exemption based on the clean hands doctrine. If what Progress seeks would be unacceptable to a court, it should be unacceptable in the EAA process. As the BC Court of Appeal cited with approval, "[n]o man can take advantage of his own wrong".[2]

Granting the requested exemptions would also run contrary to the stated goal of the BC government to improve and strengthen environmental assessment. The recent Mandate Letter for the Minister of Environment contains a promise to "revitalize the Environmental Assessment process and review the professional reliance model to ensure the legal rights of First Nations are respected, and the public's expectation of a strong, transparent process is met."[3]

In addition to non-compliance with the EAA, there appear to be other compliance concerns. In particular, some of the water sources for the dams appear to not be authorized or are being used in violation of conditions of authorization. The Project Description for the Lily Dam notes that the some of the water comes from water extracted under Water Licence C131230. The terms of Water Licence C131230 only provide for storage in a "dugout" and not behind dam (with a berm above grade level). It also lists water sources for which no licences are noted, including "non-classified" stream and a spring.[4] This is an example of the type of information that should have been addressed in a properly scoped EA prior to the dam construction and the issuance of necessary licences.

### 3) Making a determination on the exemption request on a retroactive project description would constitute an error and violate the public's procedural rights

Preparing and filing Project Descriptions after a project is built and operating is not consistent with the intent of s. 10(1)(b) or the scheme of the EAA. In this case, Progress has only filed the Project Descriptions for the purposes of securing exemptions, **not** to ensure that the EAO has the necessary information to undertake an environmental assessment. Fulfilling the requirements of the environmental assessment process requires information sufficient to: ensure proper scoping; review of the project plans with a view to identification and implementation of mitigation measures; develop of appropriate conditions of operation; consider cumulative effects and measures to reduce cumulative effects; and ensure that related approvals contain appropriate terms and conditions. The necessity of these tasks, which would ordinarily form part of an environmental assessment, cannot be properly evaluated because

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[2] *Gill et al v. Darbar et al*, 2003 BCCA 3 at para. 17, citing *Canada (Attorney General) v. Massinghill* (1915), 17 Ex. C.R. 510 (Exch. Ct.) at 514.

[3] Correspondence from BC Premier John Horgan to Minister of Environment George Heyman, July 18, 2017. Found at: http://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/heyman-mandate.pdf

[4] See, e.g., Lily Dam Project Description, p. 6. We note that the definition of "stream" under the *Water Sustainability Act* includes a "spring".

the projects are already operating, thus rendering a s. 10(1)(b) exemption inappropriate. The EAO's project description guidance is clear that project descriptions are to be prospective, with respect to proposed projects and potential environmental, economic, social, heritage and health effects, in order to inform the subsequent EA.[5]

The information included in the Lily Dam and Town Dam Project Descriptions cannot be subjected to an ordinary review by the EAO because many of the things that the EAO would do, such as consult and engage on project scope, review documents to determine mitigation measures and conditions, or establish an understanding of baseline conditions, cannot be done because the projects are operating. The extraordinary circumstances of Progress' dams render the normal evaluation of a project description unreliable.

Indeed, it is likely that the information in these Project Descriptions has been presented in such a manner as to make continued operation of the projects, in current form, the most preferred, best outcome because it comports with Progress' interests. This will make it difficult, if not impossible, to conduct the usual evaluations of an environmental assessment. For example, the Project Descriptions note that withdrawals from water sources such as the Sikanni Chief River would be conducted under terms of the relevant water licences. This violates the intended operation of the EAA where the EA would have been a tool to determine the conditions inserted into the water licence (see s. 9 of EAA). In other words, the environmental assessment and EAC would have determined the conditions of the water licences, rather than the water licence determining the terms of the environmental assessment.

To address the procedural and public confidence issues associated with this situation, the ED should refer this matter to the Minister under s. 10(1)(a) with a recommendation that assessments proceed by way of commissions or panels under s. 14(3)(a) so that this situation can be addressed and remedied. These dams must either cease operating or appropriate measures must be established through a rigorous and credible panel or commission process to ensure that future operation of these dams is in compliance with the EAA.

4) **Even based on the inadequate information available, the project appears to have significant social and environmental impacts**

In any event, Sierra Club BC is concerned about apparent deficiencies in relation to these projects; some of the information available suggests that there are significant adverse effects from these projects as elaborated on in the submission on this matter by the Canadian Centre for Policy Alternatives. For example:

[5] "Preparing a Project Description, Environmental Assessment Office, April 2016. Found at: http://www.eao.gov.bc.ca/pdf/Preparing_Project_Description.pdf

- Engineering concerns in relation to the stability of the Lily Dam, particularly given the risk of induced earthquakes.
- Inadequate or non-existent analysis of the water usage for the projects (whether the interconnected water storage infrastructure or the fracking operations). Importantly, ultimate use and disposal of the water captured, loss of water from the environment through injection, changes in flows, and quality of water after use for fracking have not been properly considered.

This is an unusual situation that should never have occurred. These non-compliance issues should not be remedied by the retroactive granting of s. 10(1)(b) exemptions, but rather, the ED should deny the exemption requests and refer this matter to the Minister under s. 10(1)(a) with a recommendation that assessments proceed by way of commissions or panels under s. 14(3)(a) of the EAA.

All of which is respectfully submitted.

Karen Campbell
Barrister and Solicitor