



LEGISLATIVE ASSEMBLY
of BRITISH COLUMBIA

October 5, 2017

Hon. George Heyman
Minister of Environment and Climate Change Strategy

Hon. Michelle Mungall
Minister of Energy, Mines and Petroleum Resources

Dear Ministers Heyman and Mungall,

It has recently come to our attention that there are several dozen dams that have been built in our province without proper regulatory oversight or provincial authorization. There have been concerns raised in an article by Ben Parfitt and published by DeSmog Canada, that the dams, built primarily for fracking operations, are in violation of several provincial regulations. These include applying for water licenses after the structures have already been built, failing to submit engineering plans for structures that store large amounts of water and that meet the province's definition of a dam, failing to ensure proper safety measures are in place such as spillways and seismic evaluations, and failing to do adequate consultation with local First Nations. Several concerned groups have suggested that the construction and operation of these dams may have contravened various provincial laws and regulations including the Water Sustainability Act, the Environmental Assessment Act, and provincial dam safety regulations.

Despite the significant environmental and public health and safety risks associated with these projects, it appears that the government has done little to address the concerns. There has been no issuing of fines or penalties despite the apparent contraventions.

These are serious allegations, which if substantiated raise several questions:

1. To what degree are these companies flagrantly ignoring the law?
2. Is the Oil and Gas Commission doing its job in policing the industry?
3. What actions is the government going to take to reform the governance in the oil and gas sector to remove conflicting interests within the Oil and Gas Commission?

Two of the several dozen unauthorized dams are over 15 meters high and are therefore classified as a 'reviewable project' under the Reviewable Projects Regulation. These are the Lily Dam and the Town Dam built by Progress Energy. Neither dam has ever received an environmental assessment.

Legislative Office

Room 028 Parliament Buildings
Victoria BC V8V 1X4
T 250-387-8347
greencaucus@leg.bc.ca

In July of this year, more than 5 years after the Town Dam was originally completed and roughly 3 years after the Lily Dam was completed, applications to exempt both dams from an Environmental Assessment were submitted.

The public comment period for the Environmental Assessment Certificate Exemption Request for these two dams lasted less than a month and closed on September 21. Despite the limited timeframe, there were substantial submissions from West Coast Environmental Law, the Blueberry First Nation, Sierra Club BC and the CCPA, among others. Their submissions raise serious questions as to how this situation arose in the first place and its overall legality. They also highlight the fact that retroactively exempting a company from following the law only further erodes public confidence in government.

Granting a retroactive exemption to a company that has breached the Environmental Assessment Act not only erodes the legitimacy of the Environmental Assessment Office (EAO), it also sets a dangerous precedent. Granting such an exemption without sufficient justification essentially risks encouraging illegal behaviour by companies.

We understand that a decision on whether or not to grant an exemption is immanent. While BC's Environmental Assessment Act does not account for a situation in which projects are illegally built and then an exemption is sought, we urge you, as Minister, to investigate the evidence in this matter and to take appropriate actions to determine whether there is sufficient justification for these applications for exemption. Furthermore, we urge you to consider taking further action by asking the EAO to conduct a broad assessment of the Lily and Town Dams to discover why provincial regulators allowed the projects to proceed without referring them first to the EAO. This review should also look at the much bigger network of unauthorized/unlicensed dams built throughout northeast BC in recent years.

We look forward to your response.

Sincerely,

Adam Olsen
MLA for Saanich North and the Islands

Sonia Furstenau
MLA for Cowichan Valley



File: 30200-04/PECD

Reference: 312198

October 30, 2017

SENT VIA EMAIL

Adam Olsen, MLA
Saanich North and the Islands
Sonia Furstenau, MLA
Cowichan Valley
BC Green Party Caucus
Room 028 Parliament Buildings
Victoria BC V8V 1X4
greencaucus@leg.bc.ca

Dear Colleagues:

Thank you for your letter dated October 5, 2017 regarding dams in northeast BC. My response will address the two projects (Progress Energy Lily Dam and Progress Energy Town Dam) that are reviewable projects under the *Environmental Assessment Act*, as I understand a response is being prepared by the Honourable Michelle Mungall regarding matters related to the role of the Oil and Gas Commission (OGC).

At the outset, I would like to clarify that while the process on the exemption requests submitted by Progress Energy Canada Ltd. (Progress Energy) for the Lily and Town Dams is underway, a decision is not imminent. The Environmental Assessment Office (EAO) is conducting a review of the exemption requests in accordance with its guidance available on its website at http://www.eao.gov.bc.ca/ea_process.html.

I do share your concern regarding regulatory oversight and how this present situation of unregulated dams in northeast BC arose and I have raised the matter with the EAO including the process and options available to me as Minister in these circumstances.

The EAO was not aware of the existence of these projects and the fact that they may be reviewable projects until advised by the OGC in the summer 2016 as part of OGC's in-depth review of water storage structures in northeast British Columbia.

...2

**Environmental
Assessment
Office**

Mailing Address:
PO Box 9426 Stn Prov Govt
Victoria BC V8W 9V1

Location:
1st & 2nd Fl – 836 Yates Street
Victoria BC V8W 1L8

While I understand that the implementation of the *Water Sustainability Act* may account for approximately half of the dams now requiring authorizations, there are still a number of dams, such as the two reviewable projects, that would have required authorizations under the previous *Water Act*. The EAO does not vet all development projects to determine if the project is reviewable; it is the responsibility of the proponent to ensure compliance with the *Environmental Assessment Act*.

Now that the projects have been identified as reviewable, the EAO has two separate roles with respect to these projects. The first role is with respect to alleged non-compliance with section 8 of the *Environmental Assessment Act* that requires these reviewable projects to obtain an Environmental Assessment Certificate or an exemption to that requirement before constructing or operating all or part of the facilities of a reviewable project.

In January and again in June 2017, the EAO conducted two compliance and enforcement site inspections of the dams, together with the OGC, and concluded that the projects do not pose an immediate environmental risk. Three Treaty 8 First Nations were invited to participate in the January site inspection, however did not attend. Inspection reports are anticipated to be publically released shortly. The compliance oversight of the projects continues and includes consideration of what, if any, actions are required while the project is in a state of non-compliance to ensure the project is not in operation and to minimize the potential adverse effects from the project.

In addition to the administrative enforcement measures identified above, the *Environment Assessment Act* provides for judicial enforcement measures such as orders from the Supreme Court or prosecution. Prosecution is reserved for the most serious cases where other enforcement measures are unlikely to be effective or there is a need for general deterrence that would result from a court hearing. The decision to pursue prosecution is ultimately determined by the Criminal Justice Branch.

Further information on the EAO's Compliance and Enforcement Policy and Procedure can be found at the following link:

http://www.eao.gov.bc.ca/files/c&e/EAO_Combpliance_Policy_%20Procedure_v6_20150720.pdf

In addition to its compliance and enforcement function, given that Progress Energy wishes to operate and use the dams going forward, the EAO also has a role in conducting an environmental assessment of the projects or reviewing requests to grant an exemption to this requirement and making a decision once the review is completed. As you are aware, Progress Energy is seeking an exemption for both projects.

The decision as to whether a project requires an environmental assessment or meets the requirements for an exemption from this requirement is a statutory decision made by the Executive Director of the EAO. The statutory test under section 10(1)(b) for whether to grant an exemption is whether the reviewable project will have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project. Typically, these requests are considered before a reviewable project has been constructed but an exemption has been granted when a proponent began construction and subsequently realized the scope of the project required an environmental assessment certificate.

Although I have no decision-making role at this stage, and it would be improper for me to direct the Executive Director in this matter, I am pleased to provide you with an overview of the exemption request review process undertaken so far by the EAO.

Since being advised by the OGC about these reviewable projects in 2016, the EAO has worked with Progress Energy on the information requirements for their exemption requests so that it can properly conduct a review of potential adverse effects associated with the two dams, and consider effectiveness of measures to avoid or reduce potential effects including measures already implemented or proposed for the future. The EAO notified First Nations about the existence of the two projects and the fact they were considered reviewable projects in December 2016.

Upon the start of the exemption request review process in July 2017, the EAO created a technical Working Group with provincial and local government representatives, including members with hydrology and dam safety expertise, to advise the EAO on the exemption requests. Indigenous groups whose Treaty 8 rights could potentially be affected by the two dams were also invited to be members of the EAO's Working Group. Progress Energy is now preparing responses to Working Group comments and once the EAO is satisfied that all comments have been adequately considered, the EAO will post Progress Energy responses and Working Group comments to its website <https://projects.eao.gov.bc.ca/>.

To facilitate an understanding of the two projects that are the subject of the exemption requests, the EAO conducted a Working Group site tour earlier this month that was attended by representatives of the Halfway River, Prophet River and West Moberly First Nations, as well as the Peace River Regional District. Working Group members were able to walk the sites and ask questions of Progress Energy and their dam safety consultants as well as the EAO and OGC compliance and enforcement staff who conducted the two previous site inspections.

...4
The EAO's exemption request review process for the two dams included a 28-day public comment period that closed on September 21, 2017. A public comment period is not usually held on an exemption request; however the EAO did so as it anticipated the public would be interested in the opportunity to review the exemption requests and make its views known. The EAO is now reviewing comments received. These include the various submissions you refer to in your letter that raise the question as to whether it would be appropriate for the Executive Director to grant an exemption in circumstances where the structure has already been built. These points will be considered as part of the process and responses to all public comments will be posted to the EAO's website.

The EAO's exemption review process focuses on whether the projects meet the exemption criteria, namely that they would not have significant adverse environmental, economic, social, health or heritage effects, taking into account practical measures to prevent or reduce any effects to an acceptable level. Following a thorough review of the exemption requests, Working Group and public comments and Progress Energy responses, materials will be prepared for the Executive Director for decision. The EAO's Working Group will have an opportunity to comment on these draft materials prior to being finalized.

In making a decision on the exemption requests, the Executive Director may issue an Order under section 10(1)(b) (Exemption Order), with legally binding conditions, exempting a project from the requirement of an Environmental Assessment Certificate. The legally binding conditions would be akin to and have the same force as, those that are attached to an Environmental Assessment Certificate. This would mean the project would satisfy its legal requirements under the *Environmental Assessment Act* going forward as of the date of the exemption, if it is granted.

The Executive Director could also deny the exemption request or, as a third option, require additional information should he not be able to make a determination based on the information available.

If the exemption requests are denied, then Progress Energy would be required to undergo an environmental assessment and obtain an Environmental Assessment Certificate or dismantle their projects and restore the area to pre-project conditions.

Although there are no legislated timelines applicable to review and consideration of exemption requests, the EAO anticipates completing its review of the exemption request and providing decision materials to its Executive Director in early 2018.

...5

I would also like to take the opportunity to reiterate our government's commitment to revitalizing our environmental assessment process to ensure that the legal rights of First Nations are respected, and the public's expectation of a strong, transparent process is met. Revitalizing the environmental assessment process will also provide opportunities to examine how our legislative framework can address situations of a similar nature going forward.

Thank-you for your letter, I appreciate your interest in this issue and I look forward to working with both of you as we work to protect our shared environment.

Sincerely,

A handwritten signature in cursive script that reads "G. Heyman".

George Heyman
Minister of Environment and Climate Change Strategy

cc: Honourable Michelle Mungall
Minister of Energy, Mines and Petroleum Resources
Michelle.Mungall.MLA@leg.bc.ca



October 24th, 2017

Ref.: 102253

Mr. Adam Olsen, MLA
Saanich North and the Islands
Ms. Sonia Furstenau, MLA
Cowichan Valley
Legislative Office
Room 028, Parliament Buildings
Victoria, BC V8V 1X4

Dear Mr. Olsen and Ms. Furstenau:

Thank you for your October 5, 2017 letter regarding allegations of dams built without proper regulatory oversight and for taking the time to write and share your views with me.

I want to assure you that our government takes these matters seriously and I have asked officials to review the situation to ensure that any lessons learned can aid in our work to strengthen oversight and inspections in the resource sector.

The BC Oil and Gas Commission (Commission) has authority under the *Oil and Gas Activities Act* to issue short-term water permits (as defined in the previous *Water Act* and new *Water Sustainability Act*) and has held delegated authority for the issuance of Water Licenses from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (FLNRORD) since 2013. In May 2016, the Commission, working with FLNRORD, became aware that a number of water storage structures approved by the Commission were dams as defined under the now former *Water Act*. This meant these structures, approved by the Commission as short-term permits, actually required a water license and dam authorization and thus did not comply with the *Water Act*.

Prior to May 2016, the Commission had authorized water use from these structures to ensure the amount of water used was accounted for and reported on in the Commission's Quarterly Water Report, even though a permit was not specifically required. In addition to the short-term permits, all storage structures were issued *Land Act* authorizations. All applications were sent to Indigenous communities for consultation.

Ministry of
Energy, Mines and
Petroleum Resources

Office of the Minister

Mailing Address:
PO Box 9052, Stn Prov Govt
Victoria, BC V8W 9E2

Telephone: 250 953-0900
Facsimile: 250 356-2965

As the result of an in-depth review of water storage structures in northeast British Columbia, performed in conjunction with FLNRORD, the Commission has identified 51 structures built by oil and gas permit holders that are defined as dams under the new *Water Sustainability Act* (WSA). Of these 51, it is important to note roughly half of them did not meet the size requirements to qualify as dams under the previous *Water Act*. The review confirmed all of the existing structures hold *Land Act* authorizations for the purposes of water storage and were properly consulted on with Indigenous peoples. Two of these dams were determined to be reviewable projects under the Reviewable Projects Regulation and the Commission notified the BC Environmental Assessment Office (EAO) in June 2016.

In response to the information arising from the aforementioned review, the Commission, working closely with FLNRORD, has pursued and received delegations for trained staff as Dam Safety Officers. These appointments allow the Commission to ensure all existing dams are brought into compliance. It is important to note that in addition to the 51 dams operated by oil and gas permit holders, there are many structures on private land operated by private individuals that now require licensing under the WSA. The Commission and FLNRORD are working closely together on this matter ensuring regulatory consistency between sectors.

Each spring the Commission inspects water crossings and storage structures to ensure their integrity following freshet. In May 2017, this inspection specifically applied the regulations governing dams and dam safety to the 51 dams identified in 2016. As a result, the Commission issued seven Orders; five to Progress Energy, requiring them to draw down 50 per cent of the live storage water and two to Conoco-Phillips to dewater dams. The seven orders have been complied with and monitoring and remedial actions will be carried out.

Going forward, the Commission has taken steps to ensure regulated companies in the oil and gas sector are fully aware of the requirements for licensing and authorizations for dams under the WSA. In addition, the Commission is continuing to work with FLNRORD in the training and development of Dam Safety Officers within the Commission and the Ministry – ensuring consistency in approach and competencies.

Finally, in the interests of transparency on this issue, the Commission has developed a public facing Compliance and Enforcement webpage showing all orders and determinations issued to oil and gas operators going forward. Additionally, a regulated dams page displays the location and details of Commission-regulated dams and will be regularly updated.

British Columbians want a natural resource sector that is safe, environmentally sustainable and that creates and maintains lasting jobs in our communities. Our government is committed to ensuring that appropriate oversight is in place to ensure these outcomes.

Once again, thank you for writing. I appreciate the opportunity to hear from you about this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Mungall". The signature is fluid and cursive, with a large loop at the end.

Michelle Mungall
Minister

cc: Honourable George Heyman
Minister of Environment and Climate Change Strategy

Mr. Paul Jeakins
Commissioner and Chief Executive Officer
Oil and Gas Commission