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Joint West Coast/Sierra Legal Submission to Ministry of Energy and Mines for the

Oil and Gas Regulatory Improvement Initiative

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West Coast Environmental Law and the Sierra Legal Defence Fund have now had an opportunity to review the Oil and Gas Regulatory Improvement Initiative (OGRII) Discussion Paper, dated December 1, 2005.

This Submission to the Ministry of Energy and Mines is divided into two sections – general comments about the tone and direction of the initiative, and specific responses to the policy proposals.

General Comments

The underlying premise of our submission is that the current regulatory regime is not adequate. It does not currently provide a meaningful role for communities and landowners affected by oil and gas development, and it has not done a good enough job of protecting the environment. As oil and gas development continues to increase, this continued failure to properly regulate the industry will pose an increasing risk to the environment and to human health. Any efforts to consolidate, integrate, harmonize or enhance single-window approaches and enable results-based regimes must take these current inadequacies into account.

The tone of the OGRII Discussion Paper does little to address these challenges, and focuses primarily on the ways in which the current regulatory regime is inefficient and is not satisfying the interests of industry stakeholders. The government's rationale for regulatory change includes internal justifications such as overlapping statutes and regulatory requirements, which are somewhat understandable, and external justifications such as competitiveness and the need to attract investment. Given that the location of oil and gas resources is a fact of geology, we find these external justifications difficult to accept. As the markets have shown, the value of this resource is only going to increase. If oil and gas companies want access to BC's petroleum resources, they must be willing to do so under a regulatory regime that protects environmental values and human health at a level acceptable to British Columbians. The primary responsibility of the BC government should be to steward the development of this resource so that it is used responsibly for maximum benefit to British Columbians.

Environmental regulation serves multiple purposes in our society – it exists to encourage responsible development while protecting the health, environment, and long-term interests of the community in which it operates. In the British Columbia context, the oil and gas regulatory regime is currently out of balance – it needs to do more to protect the environment, human health, and the long-term interests of British Columbians. As one reads the OGRII Discussion Paper, it appears that the BC government has devoted more attention to improving the operation of the regime for industry (e.g., the economics of roads, and changes to flaring requirements), than to addressing some of the fundamental concerns that have been expressed repeatedly by the public about oil and gas activity. These concerns include:

- Little or no notice to landowners and affected communities about oil, gas and coalbed methane development;
- Inadequate protection of landowners' rights (e.g., no right to appeal a decision approving a well or pipeline on private land – the Mediation and Arbitration Board deals only with compensation);
- A consistently poor record of compliance with the environmental requirements around oil and gas development, including poor response and government confusion around emergency situations;
- Inadequate enforcement resources (funding, training, number of staff);
- No mandatory standards or processes for cleaning up spills or for remediating contaminated soils and water when a well site is closed;
- A lack of binding regulations protecting the environment and human health (over-reliance on unenforceable handbooks and other policy documents). BC needs clear, measurable legislated standards protecting surface water, groundwater, air and soil quality that can be audited and enforced.
- No requirement for cumulative impact assessment or long-term planning so that communities can get a sense of what the long-term impacts from the industry will be.

Until these, and other issues that have been outlined elsewhere,[1] are addressed and safeguards are created, further streamlining of the regulatory regime is in our view premature.

In terms of the overarching direction that emerges from the discussion paper, we have the following comments. We believe these principles should be considered in any regulatory change:

Results-Based Regulation is a serious concern. Results-based approaches are not precautionary and will not provide sufficient safeguards to prevent irreparable harm to the environment and to human health. Many components of oil and gas development involve the use and release of toxic substances (in drilling muds, through flaring). Results-based approaches are not recommended for activities that can cause serious harm, for example where the threat of groundwater contamination

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[1] See, for example, *Oil and Gas In British Columbia: 10 Steps to Responsible Development*,, West Coast Environmental Law et al, April 2004; *This Land is Their Land, An Audit of the Regulation of the Oil and Gas Industry in BC*, Sierra Legal Defence Fund, June 2005; and West Coast's Checklist for the Coalbed Methane Produced Water Code of Practice, August 2005. It is noteworthy that the BC Progress Board has acknowledged that the 10-Step Plan is a reasonable starting point to discuss responsible oil and gas practices.

exists, or where sour gas (hydrogen sulphide) leaks are a possibility. A particular concern with results-based approaches is that problems may not come to light until there has been a catastrophic failure in the system, and serious harm has already occurred to the environment or human health. This concern is exacerbated by the fact that the current emergency response system is not working (a good example of this being the situation where a sour gas smell permeated a high school in Fort St John during an evening dance, where the concerned callers were put on hold for 20 minutes and a compliance officer finally arrived on site an hour after the initial call, as described in the Submission by the Old Hope Road Residents Group in their OGRII Submission).

Further streamlining the single window approach will not build public confidence in the regulatory regime. Public confidence in the Oil and Gas Commission is not strong. The OGC is fully funded by industry fees. This fact, combined with the legislative change in the last few years that makes the Deputy Minister the Chair of the Board of the Oil and Gas Commission means that the independence of the OGC as a regulator is seriously compromised. The Ministry of Energy and Mines, which oversees the OGC, is NOT an environmental regulator; rather, it is the agency responsible for promoting oil and gas development in BC. Further, where expertise exists with other ministries, such as the Ministry of the Environment, it only makes sense for these ministries to continue to play a regulatory role.

The oversight role of the Ministry of the Environment needs to be re-established. The role of the existing environmental regulator – the Ministry of the Environment, needs to be restored and reinforced. Traditionally, it was this agency that had all of the environmental and conservation expertise. It can, and should, function as an effective internal check and balance on the oil and gas regulatory system. The success of results-based approaches will depend on effective monitoring and enforcement systems. Rigorous government inspections will be essential to assess the industry's impacts and to ensure it is achieving the desired objectives. This will require a well-funded, well-staffed and well-trained environmental enforcement agency.

A single permit approach for multiple activities is problematic. In the current regulatory context, landowners and directly affected residents are already challenged in trying to keep track of developments. Similarly, the Treaty 8 First Nations are regularly inundated with different permit and authorization applications. Other First Nations have yet to deal with the level of activity that occurs on Treaty 8 territory. While a shift to a single permit will reduce the detail in the procedure for authorizing oil and gas activities, it will further diminish the opportunities for accountability and individual oversight of oil and gas activities. While this proposal may benefit industry, we fail to see how it will help or assist landowners and locally affected communities to understand what the long-term implications of development will be.

Reliance on industry-funded qualified professionals will not build public confidence. We are aware that the reliance on industry-funded qualified professionals has increased throughout government. Our concern about this practice is that by contracting out this work to external consultants who will be retained by a company and work for profit, these privately retained professionals may be driven by economics (profit and short-term gain) instead of public trust and protection of health and the environment. It would provide better protection to BC's environment and to the health of its citizens if government staff operating in the public interest conducted this work in-house.

There are some elements of the OGRII Discussion Paper that we would like to commend. In particular, we are pleased to see the recommendation to work toward **meaningful enforcement** and the **establishment of an enforcement hierarchy**. We firmly believe that the identification of bad actors, the real threat of meaningful penalties, and the development of incentives to encourage

good corporate conduct is essential if any streamlining or shifts in regulatory approach are going to be contemplated. Human nature is such that people (and companies) will conduct themselves responsibly where the threat of a penalty exists or where there are incentives for good behaviour.

However, on these latter points, the devil is in the detail, which has not yet been provided. We remain optimistic and would be pleased to offer input into some of these details. We would like to mention the 13-Point Checklist that West Coast released in advance of the Coalbed Methane Produced Water Code of Practice being finalized. We provided a 13-point checklist of the requirements we felt needed to be met in order for the Produced Water Code of Practice to adequately protect watercourses in British Columbia. None of the 13 recommendations was incorporated into the final code. Some recommendations were partially incorporated, but not to a standard that satisfies the concerns we raised.

Finally, you invite the addition of new principles for the development of revised legislation. We propose that:

- Health, Safety and environmental outcomes need to be dramatically strengthened to better reflect the impacts that oil and gas development have had on humans and the environment. Your initial principle indicates that these indicators should not be reduced. In our view, these safeguards are already inadequate and need to be improved.
- Meaningful consultation must occur on specific development proposals – both for affected communities and for First Nations, so that they can have a role in determining whether and how oil and gas development will proceed.
- Public faith and confidence in the oil and gas regulatory regime must be strengthened. By government's own admission, the amount of development is increasing rapidly, and government is working hard to keep on top of new developments. Public confidence in the regulator, and the regulatory regime is not high. Streamlining and deregulation initiatives will be of even more concern unless and until public faith in the system is restored by implementing the principles and suggestions found throughout this submission.

Response to Policy Proposals

This section provides our brief comments on each of the policy proposals in order to give you an indication of where our primary concerns are. We would be pleased to meet and elaborate on some of these concerns at a future time.

Proposal 1. Results-Based Regulation. This appears to be one of the more comprehensive reform proposals. Our overall concerns about results-based regulation are identified above. Government audits have revealed a pattern of persistent non-compliance with oil and gas regulation in BC. Thus any shifts toward results-based regulation must only be introduced in the context of a much stronger enforcement and a mandatory independent auditing regime. While the principles of this proposal are outlined clearly, the devil will be in the detail, and we would like to see some of the principles we've identified above incorporated more directly into this proposed system (i.e., a clear independent role for the Ministry of the Environment and no use of qualified industry professionals).

In the event that you do proceed with results-based regulation, we propose:

- that results-based regulation not be permitted in situations where there is a risk of irreparable harm to human health or the environment;
- that the precautionary principle be enshrined as a rule of law in results-based legislation (for government to adopt in all decision-making);
- the creation of a legislative test requiring government decision-makers to assure themselves prior to issuing permits that environmental values will be adequately managed & conserved;
- that all professionals who make decisions in results-based regimes are subject to legislated accountability mechanisms (e.g., disciplinary processes, public complaints processes, requirements to self-report failure to achieve mandated results, similar to the Law Society);
- measures allowing for citizen monitoring of industrial activities;
- rigorous independent auditing with public disclosure of results and of other information not covered by commercial confidentiality;
- that whistleblowers be protected and rewarded in legislation, as they are often the best source of information about industry non-compliance;
- ensure that directors liability provisions are found in the operative legislation;
- the adoption of citizen enforcement mechanisms similar to those found in the federal *Fisheries Act* and regulations, allowing citizens to bring private prosecutions and keep some portion of fines from successful action;
- end the government's policy of staying private prosecutions; and
- create a legal obligation for government to revise results-based legislation if independent reviews show that results and rules are not effective in achieving identified goals (e.g., every three years).

Finally, it would be helpful for the Diagram on page 19 to elaborate on the monitoring role for other ministries, and to specifically provide for an enforcement role for other ministries linked to their monitoring obligations.

Proposal 2. Results Relate to Key Values. Wilderness values should be added to the list of values. If not added as a separate bullet point, they should be expressly recognized in "recreation resources".

Proposal 3. Graduated Compliance, Enforcement and Penalty System. We are pleased to see this proposal on the list. We support many of its elements and would like to see these principles developed further. While the OGC clearly has a primary role in compliance, a strong and meaningful role should also be given to the Ministry of Environment – staffing and resourcing to this and other ministries must be restored to ensure meaningful compliance. While it would be good public relations for the industry to see the government publishing a list of operators with "exceptional compliant operations", there is a greater need from a deterrence perspective to publish a non-compliance list. The Ministry of Energy and Mines and the Ministry of the Environment should jointly publish a non-compliance list, as mentioned in the Discussion Paper (and apparently agreed upon by all stakeholders). We are also concerned about a proposal to provide incentives where there is voluntary self disclosure – such a system cannot be a substitute for a strong auditing

regime. While providing industry incentives for voluntary disclosure is laudable, it is not a substitute for rigorous enforcement.

Proposal 4. Single Activity Permit. General concerns outlined above.

Proposal 5. Development Permit. We have serious concerns about a shift toward a development permit approach, and it is not clear how the development permit proposal will be consistent with the single activity permit proposal above. In our view, this level of review should be conducted NOT at the permitting stage, but rather at the planning stage, and a process should be developed to ensure consultation occurs at this earlier stage. Individual permits should be required for all significant oil and gas development activities.

Proposal 6. Reliance on Qualified Professionals. We have strong concerns about this proposal, outlined above.

Proposal 7. Single Consolidated Statute. We are generally comfortable with this proposal but will need to see further detail before we can provide meaningful comments. In our experience in the past few years, minor legislative changes have resulted in significant compromises to the public safety net, and we would like to know that baseline standards will not be diminished and, if anything, will be strengthened.

Proposal 8. Public Consultation. We are pleased with this proposal and look forward to details being provided. The reconsideration process definitely needs to be reconsidered – this process should either stay with the OGC Advisory Committee, or with an independent third party; the Advisory Committee should have the ability to require the OGC to reconsider a decision; the OGC should be required to implement a recommendation of the Advisory Committee (or an independent third party and not simply overrule it); and there should be an opportunity to appeal any such decision to a court if need be.

Proposal 9. Regulatory Roles for Environmental Protection. We support the premise of this proposal. The BC government needs to make more information available about industry performance, such as through the regular release of a non-compliance report by the Ministry of the Environment and the Ministry of Energy and Mines, and release of information about the records of different companies within the hierarchical enforcement system.

Proposal 10. Reclamation of Well Sites. We are pleased to see that this process would be subjected to the graduated enforcement hierarchy.

Proposal 11. Watercourse Crossings. We do not think this matter should be relegated exclusively to the OGC, and are of the view that Individual approvals should be required for each crossing. While there may be efficiencies to be gained, and different ways of approaching stream crossing authorizations, this issue is too important. In our view, the enforcement record under the federal *Fisheries Act* is problematic, and the Coalbed Methane Produced Water Code of Practice already threaten watercourses and fish bearing streams in BC. Reducing oversight by eliminating approvals

for stream crossings will result in the same potential problems that we have already identified (and are not fully addressed) in the Produced Water Code of Practice.

Proposal 12. Impacts to Agricultural Lands. We do not have enough experience and information to comment.

Proposal 13, Linear Disturbances. We agree with the premise of reducing the proliferation of linear disturbances by industry activities. However, we believe that issues such as this should be addressed through comprehensive planning processes, and not at the OGC level. Again, consideration of cumulative impacts at an early stage in the process would be one means of addressing this issue.

Proposal 14. Roads. As per above, a long-term planning process that provides for meaningful consideration of cumulative effects is one means of dealing with road-related issues. Our interest is in minimizing road construction, ensuring that the roads that are built are fully utilized, and in ensuring that industry maintains full responsibility for the use and operation of resource roads, and maintains them to an acceptable public standard.

Proposal 15. Flaring. We are pleased to see a proposal for a flaring reduction strategy. As per other comments, we would like to see a meaningful role for the Ministry of the Environment, which is otherwise responsible for air quality and air emissions in BC. We also would like to see companies be required to pay royalties for flaring, as right now, this is free pollution, the costs of which are being borne by local communities and the long-term financial losses are borne by BC taxpayers.

Proposal 16. Oil and Gas Waste Management. While we commend this change, we need to see more details before we can provide comments.