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SUBMISSIONS OF WEST COAST ENVIRONMENTAL LAW IN RESPONSE TO THE REVIEW OF POLICY ON ACCESS TO INFORMATION REGARDING COMPENSATION DETAILS IN PETROLEUM AND NATURAL GAS SURFACE LEASE AGREEMENTS

West Coast has reviewed an "Initial Draft" Discussion Paper prepared and circulated on March 11, 2005 by Perrin, Thorau and Associates, consultants to the BC Minister of Energy and Mines, and submits the following comments on the issue of access to information regarding compensation details in petroleum and natural gas surface lease agreements.

Basic principles:

West Coast supports the following core principles:

1. Compensation information in oil and gas leases should be publicly available and accessible. This is the only way to strive for a more "level playing field" for everyone affected by oil and gas development.
2. Government should be both the keeper and registrar of such public records and the one to enforce the requirement that such records be publicly filed. Enforcement of this requirement may be realistically achieved through government refusal of permits until such time as records are complete, verification of information from both parties, imposition of penalties, etc.
3. An open record system should be complemented by the institution of an independent landowners' advocate office or environmental advocate office to serve as a source of information and advice independent of government or company representatives.
4. There is a need to review the scope of items listed as possible heads of compensation in section 21 of the *Petroleum and Natural Gas Act*. At present, the list is too brief and does not fully or adequately address the monetary concerns of surface holders.
5. There is a big need for surface landowners to receive better notice and information regarding sales of oil and gas tenures and how proposed operations may affect their land, their residences, their livelihoods, their safety and their health.
6. There is a big need for surface landowners to have more opportunity for input into decisions about development on their land that may affect their land, their residences, their livelihood, their safety and their health.

Discussion:

1. Compensation information in oil and gas leases should be publicly available and accessible. This is the only way to strive for a more level playing field for everyone affected by oil and gas development.

While it is certainly not clear that everyone, whether landowners or landmen, would necessarily volunteer compensation information, it is clear that making the information public would help to "level the playing field" between landowners and oil and gas companies.

Currently, amounts given as compensation vary, which suggests that some people may not be receiving fair compensation. With fuller information available, it is likely that we could expect a greater accord amongst compensation amounts.

Imperfect information (resulting from both a failure to file lease agreements in accordance with the Act, or from "blacking out" information in the agreements), or one-sided information (information received from development companies) contribute to the current unfair situation, in that the public (including landowners) can only know those agreements that are made public, but these may not in fact represent the whole or average state of affairs.

Landmen have a positional advantage compared to landowners, in that they (1) have the ability to share information with one another, and (2) negotiate multiple deals themselves, and so have a personal knowledge of what is happening in the market.

By comparison, landowners with no experience in negotiating surface leases come into that process with:

(1) no knowledge of what are usual terms, desirable terms, usual compensation rates, etc.;

(2) no prior knowledge of the process or the risks to be considered along the way; and

(3) are usually in the position where they have been recently taken by surprise by the news that a tenure has been granted under their land and that they now have to rapidly understand the new set of circumstances, somehow master the information and risks, and work to protect their interests – all under threat of an arbitrated entry order.

Landowners do not have an existing expertise in this area. Unlike the landmen, landowners do not have negotiating such agreements as their primary area of interest and they also do not have regular contact with others who have made such agreements.

Colouring the whole process is the fact that this is not a regular business deal where both parties come to the table interested in making an agreement. Rather, this is a case where if the parties can't come to an agreement, they will be mediated or arbitrated to an agreement. There is nothing truly "voluntary" about the process of negotiating surface access agreements.

2. Government should be both the keeper and registrar of such public records and the one to enforce the requirement that such records be publicly filed. Enforcement of this requirement may be realistically achieved through government refusal of permits until such time as records are complete, verification of information from both parties, imposition of penalties, etc.

It makes sense for the Mediation and Arbitration Board (MAB), funded by oil and gas royalties, to remain as the keeper of the records. The MAB is the logical repository for these agreements, given its interest in staying abreast of current compensation trends and analysis, as currently reflected in section 10 of the *Petroleum and Natural Gas Act*. There is no need to change the MAB's responsibility in this regard.

The only difference proposed is that the MAB needs to be more diligent in enforcing the requirement to file these records. Enforcement may be achieved through several means, for example, through the refusal of well authorizations until such time as records are complete, upon verification of the information from both parties to the agreement, or through the imposition of appropriate penalties.

There has been some suggestion that because industry will always be motivated to "beat the rules" set for filing surface agreements, that we should not set such rules at all. West Coast fundamentally disagrees with this analysis: it is analogous to stating that because people will not want to file taxes and will try to avoid taxes, that we should just not bother setting any tax laws. The fact that something may be unpopular, or that people may try to avoid it, does not make it wrong, unnecessary, or impossible to enforce. And just as there is a good public policy rationale for collecting taxes, so is there a good public policy rationale for making surface access compensation public information: it is the key to bringing an inequitable situation into a better balance.

West Coast also submits that the *Freedom of Information and Protection of Privacy Act* does not preclude the public disclosure of this information, and furthermore, that the *Petroleum and Natural Gas Act* supports its disclosure. West Coast agrees with the legal analysis of Sierra Legal Defence Fund Staff Lawyer Timothy Howard on this topic (set out in Mr. Howard's letter to Ms. Gwen Johansson dated January 12, 2005 and shared with Peter Mills of Perrin, Thoreau and Associates during her meeting with him on March 17, 2005).

Just to repeat the basic points stated therein: surface agreements do <u>not</u> fall under the basic definition of "personal information," which is defined under the *Freedom of Information and Protection of Privacy Act* (FOIPPA) as "recorded information about an identifiable individual other than contact information." However, <u>if</u> the information is considered personal information, a public body may nonetheless under section 33.1(1) of the FOIPPA disclose personal information in accordance with an enactment of British Columbia. Under section 15(2)(b) of the *Petroleum and Natural Gas Act* (PNGA), "[t]he board must…provide any person…with copies of a record in the custody of the board." Under section 10 of the PNGA, such entry agreements are explicitly designated as records of the board. Hence disclosure is not only authorized in this case but is actually mandatory under the current legislative scheme.

3. An open record system should be complemented by the institution of an independent landowners' advocate office or environmental advocate office to serve as a source of information and advice independent of government or company representatives.

Landowners and residents affected by oil and gas development have a need for credible, independent information. An office similar to the Farmer's Advocate office that currently operates in Alberta, or an independent environmental advocate office (with reference to models such as the California Environmental Protection Agency or Office of Environmental Health Hazard

Assessment), would fulfil the much needed role of provider of information and advice on process and substantive issues of interest to affected residents and landowners.

4. There is a need to review the scope of items listed as possible heads of compensation in section 21 of the *Petroleum and Natural Gas Act*. At present, the list is too brief and does not fully or adequately address the monetary concerns of surface holders.

Currently, the heads of compensation that are set out in the *Petroleum and Natural Gas Act* do not adequately address all of the costs that are experienced by landowners in the real world. One of the largest omissions is the reduction in land value that may occur to owners when oil and gas activity occurs on or near their lands. The occurrence of losses in land value are documented, both in Alberta and in the United States, and should be compensated.

Other heads of compensation that should be listed specifically are the landowner's time and legal costs.

Currently, the State of Montana lists lost land value as one of the heads for which compensation is to be granted, in addition to such heads as loss of agricultural production and income and lost value of improvements caused by drilling operations. (Montana Code Annotated 2003, 82-10-504 (1)(a))

Notably, the State of Montana also provides for some incentive for timely payment of damages. Subsection 2 of that same Montana Code provision provides:

> "An oil and gas developer or operator who fails to timely pay an installment under any annual damage agreement negotiated with a surface owner is liable for payment to the surface owner of twice the amount of the unpaid installment if the installment payment is not paid within 60 days of receipt of notice of failure to pay from the surface owner."

Every case of compensation requires consideration of the unique circumstances of loss.

West Coast recommends that there be a more thorough consultation with landowners and other stakeholders on the issue of heads of compensation.

5. There is a big need for surface landowners and other affected persons to receive better notice and information regarding sales of oil and gas tenures and how proposed operations may affect their land, their residences, their livelihoods, their safety and their health.

It is notable that the Discussion Paper sets out to highlight at its outset, at some length, all of the rights that landowners DO NOT have vis-à-vis oil and gas development that comes to their lands: no right to refuse entry, no right to set conditions, and no right to share in the value of the resources or any payment other than compensation for damages and rental payment for use of the land.

It is debatable whether there is indeed "no right" to refuse entry or to set conditions. Section 18(2)(a) of the *Petroleum and Natural Gas Act* specifically allows a mediator to dismiss an application; moreover, one can certainly imagine a set of circumstances where a court might at least consider acknowledging a landowner's right to refuse entry or to set conditions, where that person's health or life, liberty or security of the person (section 7 Charter rights) were at stake.

What the Discussion Paper's list does underline, however, is the "forced marriage" that underlies each and every agreement to access private land. What such a forced relationship would clearly benefit from would be some clear guidelines for better communication and information-sharing between oil and gas mineral tenure holders and surface landowners and other affected persons, such as surrounding residents.

Currently, no advance notice is provided to the surface holder that the tenure is going to be auctioned off. This means there is no advance opportunity for the surface landowner to advise the government of any specific values or concerns with the land, or with siting an oil and gas development in a specific location. If such advance notice were granted, it is quite possible that a number of problems could be avoided from the outset, simply as a result of improved communication between the government and the landowner prior to the sale of the tenure.

People confronted with the prospect of oil and gas development on their land need information to be made available to them about the process and about their rights in that process. Currently, a vacuum of information at the outset makes the process seem overwhelming for many people. To provide information at the outset would ensure a fairer, more level framework for the negotiation of surface access that inevitably must take place.

6. There is a big need for surface landowners and other affected persons to have more opportunity for input into decisions about development on their land that may affect their land, their residences, their livelihood, their safety and their health.

Because the system of surface access is analogous to a "forced marriage" (and some see it as a forced marriage with a party that might do them harm), the system also needs to accommodate more opportunities for input from landowners and other affected persons on issues of real concern, such as health and environmental issues.

Health or environmental concerns are often even more important to people than compensation issues, when access is being considered: issues such as the potential health consequences associated with the flaring of sour or even sweet gas, the potential for blow-outs, whether the installation will be an eye-sore or cause endless noise 24 hours a day, 7 days a week, or whether any kind of a detection and warning system will be put in place, may be greater sources of worry than what amount of "rent" the landowner receives for a company's disturbance of land or entry onto the surface. Currently, attention to these issues may fall through the jurisdictional cracks of the regulatory process, at the same time that there is pressure to finalize surface access. It cannot be overstated that these important issues need to receive the due care and attention of both the government and the surface access licensees, and need to be addressed and accommodated in a single, harmonious process - not left to be dealt with in a piecemeal fashion after other key decisions have already been made.

West Coast recommends that there be a thorough consultation with the public on these issues of grave public concern, and how to better address and accommodate these concerns within the regulatory process.

<u>For further information, please contact:</u>

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