Summary of Workshop with Vegetation Management Industry Representatives

Process for Consultation with First Nations on Pest Management Activities Conducted under the *Integrated Pest Management Act*

Integrated Pest Management Program
Ministry of Environment

November 28, 2007

I. Ministry of Environment Presentation - Summary of Progress to Date

- December 2004 – new Integrated Pest Management legislation (IPMA) came into force soon after a key court decision. The new legislation was implemented without addressing the issue of First Nation consultation, but with the intent that the issue would be reviewed with stakeholders and First Nations and then addressed.

- April 2006 – MOE issued draft consultation guidelines to industry and First Nations. New guidelines provided some guidance to industry about consultation and required consultation reports to assess whether adequate consultation has occurred. There was some confusion created by the guidelines because they referred to industry conducting consultation (not just "engagement"). MOE does recognize that the Crown has ultimate responsibility for consultation, but this was not adequately reflected in the guidelines.

- September 2006 – Integrated Vegetation Management Association (IVMA) provided comments on guidelines.

  Issues that industry has raised about the 2004 guidelines include:

  - The guidelines are inconsistent with legal obligations. There needs to be more clarification about what types of pest management activities are likely to impact Aboriginal rights and title.

  - The term "aboriginal interest" is so vague and all-encompassing that there is likely no location in British Columbia where "aboriginal interest" is absent.

  - Pesticide use on railways or within industrial compounds such as substations would not have an impact on Aboriginal rights and title when applied in areas where there is no public access or on existing rights-of-way where public access constitutes trespass under the law (and is inherently dangerous).

  - Some aspects of the proposed consultation process may increase the ability of opponents, including First Nations, to prevent the railways from fulfilling their legal safety requirements embodied in the Railway Safety Code, or from keeping electrical facilities safe for workers and the public.

  - Government responsibility to consult needs to be clearer in the guidelines.

  - The guidelines are contrary to the results-based approach because they are prescriptive on timelines, etc. Principles should be used instead of guidelines

  - There is confusion about the need for consultation at the PMP (5-year) stage and the need for consultation on an annual basis. This will have to vary based on industry sector. For example on land used for railways, electrical facilities and gas pumping stations, where the treatment area is unvarying from year-to-year, annual consultation is redundant and therefore unnecessary.

- The draft guidelines result in inefficiencies because they require consultation where none may be required, and because they require a proponent to engage First Nations in more than one consultation process about the same IPM activity.

- March – July 2007 – regional workshops with First Nations (11 sessions). A final report summarizing the issues raised at the workshops was completed by the consultants and sent to all workshop participants, First Nations, and the First Nations Leadership Council. The workshops were well attended (approximately 100 First Nation communities were represented) and there was a lot of positive feedback and suggestions.

  MOE did not talk to First Nations while developing the consultation guidelines, Therefore, MOE did not bring the guidelines out specifically at the workshops – the guidelines were brought along for information but more as a point of discussion, not for a thorough review.

  In general, First Nations stated that they want to work with MOE and industry to resolve issues. First Nations were clear that they do not want to override agreements that are already in place between communities and industry, and stressed the importance of relationship building. There were concerns about the use of pesticides and not a lot of knowledge about integrated pest management. There was a general perception that "results-based" means industry does what it wants without restrictions".

  Other specific concerns that First Nations raised regarding the 2004 guidelines included:

  - How to determine whether consultation is complete.
  - No remedies in the regulations for MOE to act if First Nations do not think consultation is complete (i.e. MOE not given authority to simply cancel plans, etc).
  - No way to address First Nation requests to leave out certain areas from treatment. First Nations often want more detail about where treatments can occur then is available at the pest management stage.

- November 2007 – industry workshop. MOE is interested in feedback from industry and also open to receiving follow-up comments.

- The ministry representative indicated that First Nation consultation under the new IPMA appears to be working fairly well. In many cases, industry proponents had established working relations with First Nations under the former pesticide management legislation and they continue to use those relations under the new IPMA. There have been relatively few concerns or complaints about specific pesticide treatments brought to the ministry's attention. MOE considers that most proponents are following the guidelines, submitting reports to MOE and addressing First Nation concerns. There have been 5-10 cases over the past 2 years where MOE has had to follow-up with First Nations to resolve ministry or First Nation concerns.

Next Steps in Process:

- MOE will produce an "intentions paper" for industry and First Nation review. A fairly long timeframe (at least 90 days) will be provided for comments to be received, and then a final set of guidelines will be developed. A regulatory amendment is also a possibility.

MOE Proposed Consultation Principles:

(i) First Nations must be consulted when pest management activities are proposed where a First Nation (a) has aboriginal claims, and (b) the activities may adversely affect aboriginal interests.
(ii) The Crown has the duty to consult but may delegate some steps to industry.
(iii) First Nations should be offered a distinct consultation process.
(iv) Appropriate processes/needs to exchange information with individual First Nations should be determined.
(v) First Nations should be given appropriate, timely notice of a proposed pest management activity, and must be given reasonable opportunity to respond.
(vi) Information provided to a First Nation must be meaningful and understandable.
(vii) The level of consultation is determined by the potential impact of the activity on a First Nation's aboriginal interests or exercise of treaty rights.
(viii) Potential impacts related to aboriginal interests or treaty rights must be addressed.
(ix) The Ministry must be able to assess the results of consultation steps delegated to industry to determine how and when to participate.

See comments on these principles from industry participants in section III below.

II. IVMA Presentation:

- IVMA appreciates MOE's work and follow-through on commitments.

- IVMA is an industry group that is over 15-years old. It is a large association that represents every industry that has anything to do with vegetation management – transportation, railways, forestry, utilities, oil and gas distributors and producers, consultants, private lot owners and forest owners, and government agencies.

- The new IPMA legislation is working well and is a big improvement over the former *Pesticide Control Act*, which was flawed because it was too prescriptive and allowed for lengthy appeals (example is a decision involving Canfor that was appealed by 7 individuals in Smithers and took over a year to complete. At the end of the appeal, nothing in the decision was changed, yet legal fees totaled almost $400,000. Moreover, the decision of the Appeal Board held no precedential value, which means that appeals with similar issues could be heard over and over again).

- After the appeal process in Smithers, the IVMA met with the Ministry of Environment to discuss problems with the *Pesticide Control Act*. Industry argued that government should spend less time "approving" plans and more time in the field, monitoring the

application of plans. Industry advocated for a plan registry system, rather than a plan approval system.

- The question for government is how to combine the duty to consult with the registry system. MOE needs to look at the proposed IPM activity to determine whether there will be First Nation impacts and whether consultation will be required. There are a number of IPM activities that would not require consultation because there would not be any impact on First Nations. Legal duty is all about a Crown decision that has a reasonable prospect to impact Aboriginal rights and title.

- When required, MOE must step in and fulfill its legal obligations to consult. The duty to consult rests with the Crown, although procedural aspects can be delegated to industry. It is up to government to do the consultation in the first place, not just consider whether consultation is adequate or not.

- Some First Nation communities have commented about "over-consultation" and being swamped with massive amounts of referrals. Therefore, it would be mutually beneficial to develop a system that would minimize consultation on activities that have no interest.

- The duty to consult should be determined by an analysis that considers: the location of the proposed IPM activity, the nature of the Aboriginal interest asserted in relation to location of activity, and the nature of the expected adverse impact that the proposed IPM activity will have on the asserted Aboriginal interest.

- The draft guidelines require industry to consult on activities that may have no impact and also require proponents to engage First Nations in more than one consultation process about the same activity. This undermines the key purposes of the IPMA legislation to implement a results-based system for regulating activities, and also fails to minimize conflict and legislation.

- The IVMA provided MOE with a table in September 2006 that outlines what IPM activities will likely have an impact on Aboriginal interests and those activities that will not. In general, the Aboriginal rights most potentially impacted by IPM activities are harvesting and gathering.

- At present, MOE does not have a tool to intervene when there is an Aboriginal interest that is potentially impacted by an IPM activity. In order to address this deficiency, there are two ways to move forward: (1) go back to the plan approval process or (2) provide MOE with some power so that it can intervene when there is a prospect of impact on title or rights. One of the issues is that it is difficult for MOE to be very prescriptive about consultation, and there cannot be a "one-size fits all" approach.

IVMA recommendations for consultation guidelines:

- Give appropriate and timely notice.
- Provide sufficient information.
- Provide a meaningful opportunity for First Nations to express views.
- Fully and fairly consider issues raised by First Nations.
- Provide a record of the consultation process.

IVMA recommendations for regulatory amendment:

In order to provide the Crown with a tool to intervene, two options were discussed: provide for ministerial intervention in the legislation, or expand the definition of adverse effects to include impacts on Aboriginal rights and title.

1) Ministerial intervention:

- Remove evaluative role of Minister.
- Add intervention provision.
- Make intervention provision appealable (if a plan is canceled, party can appeal decision, but non-intervention (i.e. decision on part of government not to revoke plan) would not be appealable by First Nations). This is modeled after the new Forest and Range Act.
- Make sure information is protected.

MoE indicated that one issue with this model is that it is reactive and does not allow government to "get out in front" of an issue before it gets to the stage of having to be appealed. However, the IVMA suggests that the IPM Act is not the right vehicle to do this with.

2) Expand the definition of adverse effect to include impacts on Aboriginal rights and title:

- Currently, adverse effect is defined as harm to people and animals, but it could be expanded to include adverse impact on Aboriginal interests. IVMA suggests that this is problematic because often the aboriginal interests in an area are not well defined or they are not willing to provide specific details on locations.

III. Comments from Industry Participants:

General comments:

- The relationship between industry and First Nations under the IPMA is working in 90-95% of cases, so there needs to be caution with coming up with changes to address the 5% of cases that do not work.
- There is some onus on the part of First Nations to get engaged and understand the process.

- Need to ensure that the government-to-government role is kept intact and not pushed onto industry.
- There needs to be more education to people about herbicides and their effects.

<u>Comment on MOE Consultation Principles</u>:

(i) *First Nations must be consulted when pest management activities are proposed where a First Nation (a) has aboriginal claims, and (b) the activities may adversely affect aboriginal interests*: The IVMA is of the view that the Aboriginal interest must reflect a genuine potential unreasonable environmental impact and not a general opposition to use of herbicides unrelated to a specific risk.

(ii) *The Crown has the duty to consult but may delegate some steps to industry.* There is some concern about how this would be clarified and the IVMA suggests that the IPM Act is not the best place to establish this clarity. Industry cannot take consultation "steps" on behalf of the Crown. The Crown may delegate consultation "process" but not "steps" to industry. The word "steps" in points #2 and #9 should be changed to "process" or "procedural aspects".

(iii) *First Nations should be offered a distinct consultation process.*

(iv) *Appropriate processes/needs to exchange information with individual First Nations should be determined.* Existing relationships are very important to both industry and First Nations. Existing processes should not be eroded or undermined. In most instances, industry has worked out who to talk to, but if there is any doubt, government can provide assistance.

(v) *First Nations should be given appropriate, timely notice of a proposed pest management activity, and must be given reasonable opportunity to respond:* It was suggested that this is stipulated in the regulation.

(vi) *Information provided to a First Nation must be meaningful and understandable.*

(vii) *The level of consultation is determined by the potential impact of the activity on a First Nation's aboriginal interests or exercise of treaty rights.* The IVMA agrees with this point and have produced a table of activities covered under the IPMA with industry proposed levels of impact. It is very important to note that "one size does not fit all" and that First Nations and industry must have the flexibility to develop engagement protocols appropriate to specific situations.

(viii) *Potential impacts related to aboriginal interests or treaty rights must be addressed.* The IVMA suggests that impacts must be genuine, not hypothetical or a consequence of a general, vague opposition to use of pesticides.

(ix) *The Ministry must be able to assess the results of consultation steps delegated to industry to determine how and when to participate.* IVMA points out this can be done by current

reports provided by industry in PMP reports. How results are assessed needs to be further defined (i.e. will it be determined according to how well the plan was accepted?). Need to identify early on whether there is something additional that government may be able to add to the process. Have to be careful that application of principle does not create extra burdens. If there are gaps in information so that government cannot assess the adequacy of consultation, that is one thing, but if that information is available through other parts of the process, then that needs to be utilized as much as possible.

MOE does not delegate entire consultation process, but determines whether enough information-sharing has occurred to identify and address interests. This helps MOE determine whether consultation has been discharged and whether MOE needs to become involved. In general, MOE "steps in" very infrequently – maybe 5-6 times a year.

Land-use planning and information-sharing:

- The IVMA believes that the IPM Act is not the vehicle for establishing a protocol for joint decision making regarding all land uses issues. Land use planning is beyond the scope of the IPM Act, and using the term "land use planning" is not correct in relation to IPM. Once it gets to IPM activities, decisions on land use have already been made. For example industrial corridors are already established and must now be maintained, or the area has already been harvested and now it is being reforested.

- Government needs to be careful not to take a "one-size fits all" approach to consultation. All industry sectors may be different, so each case needs to be looked at individually to determine what type of information is needed at what time. Also need to consider what benefit will be provided to the decision-maker by providing the information. A lot of information may be provided to government that might not be used.

- Industry struggles with inconsistencies within government, and is very cautious about how principles and expectations are developed and managed. There needs to be a common approach at least within government (many industries have to deal with both federal and provincial governments).

- Forest companies do not want to link herbicide use with cutting approvals – these issues should be kept separate. Industry is not interested in having discussions about land use issues at the PMP stage. MOE can deal with issues such as impacts from herbicides, but should be careful not to try to address broader issues such as how land should be used. Government needs to be very careful about "scope-creep".

- Government should have clear information on how pesticides fit in with other land use practices, and that information should be provided to land use agencies. MOE needs to stay within its mandate of managing pesticides but share information within government.

- If industry is going to use information from First Nations in different processes, then that needs to be explained to First Nations. At the same time, there is a need to use common sense – if it is logical to provide information to another agency within a realistic time frame, then that information-sharing should occur.

- Government needs to be cautious about what it does with information and has to be careful not to set up expectations (i.e. don't want to establish an expectation that decisions will be looked at more again once consultation has already occurred).

- At the regional workshops, many First Nation participants said that they were not clear where information was coming from and that they need to know how their information is being used. In particular, First Nations stressed that traditional use information needs to be kept confidential and not shared within government without their knowledge.

Traditional knowledge:

- The definition of traditional knowledge is not clear. There is a level of distrust among industry for the information that First Nations provide based on "traditional knowledge" (at the same time, it is important to note that First Nations distrust much of industry's "scientific knowledge").

- Regarding issues such as location of archeological sites, special plant communities, burial sites etc, industry always listens to those concerns and accommodates them whenever possible. Medicines, wildlife hunting, fishing, trapping – all of these concerns are taken very seriously by industry.

Approval of local community for consultation process:

- Consultation processes should not have to be "signed off" by First Nation communities – it is very rare that industry can get a letter from a First Nation signing off their approval of any activity. Industry would have serious concerns if this would be considered a measure of success. If industry has to wait for a letter from a First Nation to signal that consultation is complete, that would never happen.

- Providing First Nations with a consultation report would also be an error because those reports will contain information about consultation with other First Nations and there may be confidentiality issues.

- Industry is extremely hesitant to go down "paper-route". If relationships between First Nations and industry are positive, then there is not an issue. Because of importance of relationships, industry generally wants to try to accommodate First Nation concerns. Most effective relationships are those that are built in the long-term.

Capacity:

- MOE involvement in capacity-building also represents a bit of "scope-creep". Capacity has more to do with relationships between industry and First Nations and should not be included in consultation guidelines. Capacity between Government and First Nations is also important

- Across Canada, there are many groups (i.e. landowners) who are calling for funding for "experts" to review information. If everyone is going to require an expert with funding, then that is going to create a real problem for industry. Industry suggests that there should be more of a focus placed on identifying expertise that everyone can trust at the outset, rather than each party having their own experts.

- IVMA suggests that MOE could work with individual First Nation representatives to ensure they have the capacity and training to effectively review IPM plans.

- Different First Nations have different capacity and expectations – the ad-hoc approach to capacity seems to work best.

Results Based regulations

- Results based legislation needs to gain the public trust. The ministry needs to do a better job of explaining what results based means.

Timing of consultation:

- Most companies develop a "wire framework" of a PMP to share with First Nations as a proposal and discussion document. This allows for input during initial stages, but it is sometimes difficult to get First Nation participation at the beginning of the process.

- Required timing will be different for review of PMP's (issued every 5 years) versus annual notice of intent to treat. In many cases, a 45-day timeframe is enough, and more time could lead to delay tactics.

- Some experience from industry is that high-level discussions are not all that meaningful until there are real specifics to review. Until you get on to the land with exactly what is proposed, the issues are mostly theoretical. It is hard to have really detailed discussions without knowing where treatment is to occur.

First Nation review:

- If there is a potential to develop expertise within a small segment of First Nations, then that would be helpful – such a group could provide an element of trust to communities and provide expertise for review of plans etc. The IVMA supports this approach. They welcome meaningful and knowledgeable comments and criticisms on plans.

Eco-system approach and cumulative impacts:

- Eco-system views of First Nations are not an issue that industry needs to address – this is a government challenge. One sector cannot alleviate the differences in approach nor address how to define cumulative impacts.

- Cumulative impacts are beyond the scope of consultation guidelines. The IVMA suggest that the federal pest regulatory agency of Health Canada has already studied these issues. Product labels already reflect use requirements that ensure there will be no unreasonable adverse environmental impacts. Pesticides go through the most rigorous registration process of any products used in Canada.

Notifications:

- Notification provisions (RE: section 58 in the regulations) are already in the Act, so no major amendment is required.

Monitoring and Enforcement:

- First Nations at the workshops conveyed a general aversion to the concept of "results-based" because it seems like government is abandoning its role of protecting environment and letting industry do what it wants. Moreover, although there have not been issues raised in 90-95% of the IPM cases, this does not mean that the level of compliance has been that high.

  Note: The IVMA suggests that - given a results based compliance environment - industry has had to be even more vigilant with respect to absolute environmental protection let alone perceived protection. The new atmosphere of "professional reliance" has many in the industry concerned about risk with net improvement in environmental protection.

- The government needs to put some resources into educating the public in general and First Nations in particular about the term "results based" legislation. The Ministry needs to do a better job of explaining what results based means. If the First Nations leadership council could identify a few individuals to represent all communities on this issue industry could work with them, to ensure they have the capacity and training to effectively review IPM plans.

- There is an assumption that government can enforce commitments, but there is no example of where this is workable. Government should not police whether commitments are being met.

IV. Closing Remarks:

IVMA:

- Industry wants to have relationships that work in the long term. It is in industry's best interest to have relationships that work, and the key to ensuring this is to have a simple and flexible system. MOE should not get involved in relationships between First Nations and IVMA members.

- IVMA is grateful to the commitment and fairness of MOE staff assigned to this issue.

- IVMA conference will be held in November 2008, and an item on the agenda will be to talk about First Nation consultation.

- IVMA suggests strongly that provincial policy on First Nation consultation should not be built on the single issue of pest management.

MOE:

- MOE may try to get agreement from industry about what it produces around consultation – to do this with First Nations will be a lot more difficult. MOE cannot afford to do another set of regional workshops with First Nations, but may decide to pilot an approach and then ask First Nations and industry to review success.

Attendees:

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