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DOMINION FOUNDRIES AND STEEL, LIMITED
P.O. BOX 460
HAMILTON, ONTARIO
L8N 3J5

July 7, 1975

Chairman and Members of the
Standing Resources Development
Committee
Queen's Park
Toronto, Ontario

Dear Sirs:

Re: Bill 14 - The Environmental Assessment Act, 1975

Attached is a copy of a letter outlining the position of Dominion Foundries and Steel, Limited (Dofasco) on this Bill. These remarks were prepared prior to our receipt of the Bill as amended for Committee study. Since we have just received this amended copy, we hope that there will be ample opportunity to study the amendments and make further submissions thereon to the Committee.

We would appreciate your consideration of the attached comments and would welcome an opportunity to discuss our remarks or answer any questions that any members of the Committee might have.

Yours very truly,

R. J. Swenor
Assistant Secretary

RJS/lt
Attached

DOMINION FOUNDRIES AND STEEL, LIMITED
HAMILTON, ONTARIO

June 12, 1975

F. H. SHERMAN
PRESIDENT AND CHIEF EXECUTIVE OFFICER

The Hon. William Newman
Minister of the Environment
135 St. Clair Avenue West
Toronto, Ontario M4V 1P4

Dear Sir:

Reference Bill 14 - The Environmental Assessment Act, 1975 -

As stated to your predecessor in our remarks on the Green Paper on Environmental Assessment, we feel that there is a need for assessment in the case of major public undertakings and certain large private-sector projects planned for "green field sites" where the impact on the human environment might be relatively great.

However, the Bill as presently drafted leaves to the regulations the designation of the types of projects to which the Act will apply. We are concerned that certain provisions in the Bill have the potential to cause, at the very least, significant delays to necessary industrial growth.

We commend the government for its stated intention to delay the application of this Act to private-sector projects until such time as further experience is gained with the process and more experienced people are available for carrying out the assessments. However, this

delayed implementation leaves a company such as ours in the dilemma of not knowing to which of its future undertakings the Act might apply.

We feel that the designating of private-sector projects under this Act should be tied closely to land use planning -

- Where the intended site is presently zoned heavy industrial, the requirements under the Environmental Protection Act should provide sufficient protection to the environment.

- Where the site is presently zoned for uses other than industrial, the rezoning applications and consequent hearings and reviews should provide the additional protection needed to encompass and consider necessary social and economic considerations.

If the site of a proposed undertaking is not zoned for any use, the requirements of the Environmental Assessment Act may have merit in putting into one package all of the requirements that would currently have to be faced in obtaining the necessary zoning designation and ensuring adequate planning for all implications of the undertaking.

However, the unfortunate side effect is that the Act would put industry in the position of providing the impetus for land use planning, and in our view this is only breeding conflict between "growth and no-growth proponents" or "agricultural and industrial use advocates."

In summary, we feel that land use planning should be done at the provincial level, with the broad view of the needs of the province as a whole. If this is done, industry's

direction will be clear as to where they may be allowed to build new plants or where they will not be allowed to do so.

Our major concerns with the Bill are in the areas of delays, confidentiality, and the potential for stopping growth, depending on the application of the Act by regulations.

With reference to these concerns, specific provisions of the Bill that we feel require amendments are summarized on the attached pages. We would be happy to discuss our concerns in more detail with you or members of your department.

Yours sincerely,

att.

cc:
The Hon.
William G. Davis, Q.C.
Premier - Province of
Ontario
Queen's Park
Toronto, Ontario M7A 1A1

COMMENT ON BILL 14 - THE ENVIRONMENTAL ASSESSMENT ACT

Section 1

The definition of "undertaking" together with Section 5 (1) would prohibit proposals, plans or programs in respect of a designated major commercial or business enterprise. It is difficult to see how a proposal or plan can affect the environment and since an environmental assessment cannot be made until proposals or plans are developed, we do not understand the inclusion of these two subjects in the definition.

Section 2

We believe that the purposes of the Act should include some reference to economic considerations to indicate that the Minister in deciding whether to allow an undertaking should carefully consider the economic trade-offs from both sides. Realistic requirements for acceptable environmental protection should be based on thorough cost-benefit analysis. In the U. S., environmental assessment is generally made on the basis of effects on the "human environment". If this is the intent in Bill 14, it should be made clear in Section 2.

Section 3

By the action of this section, the Act will apply to such private sector activities that are designated by regulations. This leaves industry in the unfortunate position of not knowing what criteria will be used in selecting those projects or enterprises to which the Act will apply. This uncertainty, coupled with the provisions of Section 45 subsection (2) (a), make planning very difficult, if not impossible, for a steel company such as ours which has just embarked on the first stages of an intended doubling of our plant capacity in Hamilton. A steel plant cannot be built all at once as the capital investment involved is enormous. At the same time, effective payback on this investment cannot be realized unless and until all stages are complete. It is difficult to commit a company to a billion dollar expansion program which we may not be able to complete even though half of the investment may have been made.

Subsection 45 (2) (a) stipulates that a regulation will be effective with respect to an enterprise or activity that has commenced after coming into force of this Act and is not completed when the regulation comes into force. Since the Act does not stipulate what business enterprises may be designated by the regulations, the company may find itself half way through construction of a major facility and having to cease such

construction upon the regulation coming into force until such time as an environmental assessment can be carried out and approval given to the project. As aforementioned, the approval process could involve lengthy delays and the cost effects of halting construction could be significant.

In summary, we feel that the Bill should give some indication as to where one might expect the Act to apply and we believe that this should be limited to undertakings other than those already commenced. At the very least, some specific provision should be made for vetting the regulations prior to their implementation with a specific time period stipulated during which the Minister would receive comments thereon.

Section 5

We believe that the requirements of Section 5 (3) could essentially stop growth in our industry for two or three years if the description required was of such detail to necessitate detailed engineering. A typical method of construction in our industry has been to contract for the engineering and construction of a new installation at the same time. These are often carried on concurrently and this method of constructing would be precluded if the Act were too constrictive.

The requirements of Section 5 (3) (b) and 5 (3) (d) regarding alternative methods of carrying out the undertaking and alternatives to the undertaking could result in investigation of alternatives which are neither economically nor technologically realistic. As an example, our most currently announced undertaking is the construction of a new melt shop. This shop will be a basic oxygen furnace steelmaking facility which is presently the only viable steelmaking alternative for a major-sized steelmaking complex. However, if technological alternatives had to be considered, the antiquated Bessemer process, the electric arc furnace, and open hearth furnaces would be alternatives. These are neither economically nor technically viable alternatives nor are they preferable alternatives from the physical environment point of view. If details of these processes were required for the Environmental Assessment document, we feel that this would be a waste of time and expense.

For any major project, there are endless alternatives and variations that can be conceived. During the planning process these are evaluated and trade-offs are made with regard to suitability, plant site, operability, economics, etc. We recommend that reference to alternatives in this section be deleted. If the proponent feels that alternatives need to be discussed to add weight to his assessment, he can do so and if the Minister has reason to believe that a particular alternative needs to be evaluated, this could be done as part of the review.

Section 7

One of our major concerns with the Bill is the possibility of long time delays between planning an undertaking and being able to commence construction. While we realize that many assessments could take a significant amount of time to evaluate, we do feel that there should be some time limit at least on initiating the process. Therefore, we would recommend that Section 7 (1) (a) stipulate that the review will be completed within 60 days. To further ensure some expediency in the process, we recommend that Section 18 (14) be deleted and that the Bill make clear that the report of a hearing board will constitute the report of the Environmental Assessment Board.

In the paper delivered by your Mr. Victor Rudik to the Air Pollution Control Association on April 22nd of this year, it was indicated that the assessment would be referred to interested ministries and the review would be co-ordinated with such ministries. This should be made clear in the Bill by adding the words "to interested ministries" in Section 7 (b).

Under Section 7 (2), "any person" may inspect the assessment documents. We believe that methods should be provided to the proponent to protect confidential information and our suggestions for this procedure are described below. A necessary amendment to Section 7 (2) would be the addition of the words "subject to any order made under Section 31" at the beginning of this section.

In addition, since Section 7 (2) would permit "any person" to make submissions with respect to the assessment and review of an undertaking, a proponent may be open to legal harassment by unscrupulous suppliers and/or contractors who are unsuccessful bidders or by competitors attempting to maintain an advantage.

We do not understand why the proponent would not be enabled to withdraw his assessment at any time and are particularly concerned by the fact that the Minister in consenting to a withdrawal may impose terms and conditions "by order". This provision could result in the offence section (40) being invoked where the terms and conditions imposed were completely unsatisfactory to the proponent and the proponent would like to just drop the whole matter.

Section 10

We question the right given the Minister under this section to amend the assessment. The assessment as put forward by the proponent represents the proponent's conclusions with respect to the effects on the environment of the proposed undertaking. If the Minister disagrees with these conclusions, he can propose changes to the proponent or submit his comments to the Cabinet or to designated ministers considering his decision with respect to the assessment.

Section 11

While the Minister may require further research and investigations to be carried out before he can make a judgement on the proposed undertaking, we seriously question whether he requires the power to require by order the proponent to carry out such research. From the proponent's position, it may be that the Minister is requiring very expensive research which the proponent feels is not warranted. However, under the provision as presently drafted, non-compliance with such an order would be an offence under Section 40 and could expose the proponent to fines up to $10,000 per day. The words "by order" should be deleted from Section 11 and the requirement by the Minister should be tied to his acceptance of the assessment.

Section 14 (b)

Subsection (i) of this section would seem to have the potential of removing industry's rights to manage their construction projects. It appears that the provisions of subsection (ii) would provide sufficient protection and we would suggest the deletion of subsection 14 (b) (i).

We also question the need for subparagraphs (v) and (vii) and would appreciate hearing what the draftsmen of the Bill had in mind with these two provisions.

Section 17

Invariably in construction projects, minor changes are necessary as the construction progresses. Interpreted literally, Section 17 would appear to require a new assessment on any changes and we feel this should be amended to stipulate that changes requiring a new assessment must be significant with respect to the environmental impact of the undertaking.

Section 28 and Section 31: Confidentiality

It may be that the information required by the Ministry in the Environmental Assessment documents will contain information which is confidential either from a competitive or a technical viewpoint. Indeed the proponent may be bound by contractual agreement to keep part of the technical details confidential. We would suggest the following amendments to the Bill to allow the proponent to protect confidential information.

Section 31 should be amended to provide for what might be called a "Protection Order". Application would be made to the Environmental Assessment Board, or at the option of the proponent, to the Divisional Court. The proponent should have the right of appeal to the Court of Appeal (as in S. 269 of The Business Corporations Act). All hearings in connection with the application should be held in camera. The Protection Order should be granted where the Court or Board is of the opinion that, having regard to the legitimate commercial interests of the proponent, the relevance of the information in question, and the purposes of the Act, the information should not be disclosed to the public. If the Order is refused, the material filed on the application should be returned to the party who filed it forthwith after the hearing without it being disclosed to anyone not involved in the proceedings.

If the application is refused, the Board or Court would be obligated to grant a Protection Order to cover all those persons involved in the application proceedings with the proviso that if the proponent wishes to proceed with the project, he would be required to waive the Order within 15 days, otherwise his assessment would stand rejected although the Order would remain in effect permanently. If granted, the Protection Order should invoke provisions similar to the protection given under Section 241 of the Income Tax Act. These provisions might appear in Section 28 which would then cover all personnel of the Ministry instead of only the provincial officers as designated in the present wording of Section 28.

These amendments would allow the proponent to have temporary protection of information which he feels is critically confidential while he applies for permanent protection of the information and leave him with the remedy of withdrawing his assessment if he cannot obtain permanent protection and he feels that the confidentiality is more important than proceeding with his undertaking.

Investigations

It is difficult to see the rationale for subjecting a proponent to investigations under the broad powers given to the provincial officers under Sections 26 and 27. The proponent is in a position of having to satisfy the Minister that the information he is presenting in his assessment is complete and accurate in order to have his proposed undertaking approved. If the Minister suspects that the proponent is deliberately withholding or distorting evidence, he has only to tell the proponent of his suspicions and leave it up to him to remove the Minister's doubts. This is very different from a criminal matter where the onus is on the Crown to come up with the evidence to convict, in which case investigatory powers may be justified. Therefore, we feel that these investigatory powers are inappropriate in an Act of this type. However, if these powers are felt to be vital, it would be necessary to devise some fairly elaborate protection devices for the proponent.

The investigatory powers should be given only for the purposes of discovering whether the proponent is withholding or distorting any information relevant to the proposed undertaking. Accordingly, all investigations should be conducted only with the consent of the proponent and with the opportunity being given for the proponent to have a representative present at all times. The proponent should have the right to object to the inspection of any building, area, structure, machine, process, equipment, books, records or documents.

If the investigating officer suspects that the proponent is withholding information or documents relative to the assessment, provision can be made for the Ministry to give the proponent notice specifying the type of information or documents about which the Ministry is concerned and giving the proponent a specified period within which he must either: (a) satisfy the Minister in connection with the said information or documents; or (b) make application for a Protection Order in connection with such information or documents and furnishing such information or documents to the Minister under protection of such Order; or (c) make application for an Order that would recognize the information or documents as being fully privileged so that they would not have to be furnished even to the Minister (a Privilege Order).

The application for a Privilege Order should be made to the Divisional Court, sitting in camera, with provision made for the Court to examine documents and affidavits in the absence of one or both parties. Where the Court concludes, having regard to the legitimate commercial interests of the proponent, the relevance of the information or documents and the purposes of the Act, that the information or documents should not be disclosed to the Ministry, then the Court should order that they be fully privileged. Alternatively, the Court might grant a Protection

Order. Regardless of the outcome of the application, all information and documents and material filed on the application should be returned to the party filing forthwith at the conclusion of the hearing without disclosure to anyone except Court personnel. Provision should be made for an appeal to the Court of Appeal.

We would recommend provisions similar to the above as replacements for the present Sections 26 and 27 of the Bill.