KSI LISIMS LNG

Delivered by e-mail

August 18, 2023

Attention: Elenore Arend
Chief Executive Assessment Officer and Associate Deputy Minister
Environmental Assessment Office
2nd Floor 836 Yates St
PO Box 9426 Stn Prov Govt
Victoria BC V8W 9V1

Dear Elenore Arend:

Re: Dispute Resolution Regulation Discussion Paper
Comments from Ksi Lisims LNG

Thank you for the opportunity to provide feedback on the Dispute Resolution Regulation Discussion Paper (Discussion Paper) released by the Environmental Assessment Office (EAO) in May 2023.

Ksi Lisims LNG's feedback is based on being one of the first projects in B.C. to have direct experience with the new dispute resolution process. As such, we are in an ideal position to share with you a proponent's perspective of working through real-life dispute resolution challenges and experiences with the goal that our feedback will help inform the development of the dispute resolution regulation and supporting guidelines.

Our recommendations and comments have also been informed after reviewing: the Discussion Paper (May 2023); Dispute Resolution – Interim Approach (December 2021); Lax Kw'alaams Band and British Columbia Environmental Assessment Office - Dispute Resolution: Final Report (February 2023); Dispute Resolution – Interim Approach (June 2023); Interim Guidelines for Dispute Resolution Facilitators (June 2023); and the 2018 *Environmental Assessment Act* (the "Act").

Support of the Act and the Value of the Dispute Resolution Regulation

We support the goals of the Act, including the establishment of a dispute resolution process. We believe that the Act could help advance reconciliation with Indigenous peoples across B.C. while recognizing other important interests, including the need for fairness, certainty, and predictability in the administration of the Act.

Together with supporting reconciliation with Indigenous peoples, we note that additional purposes of the Act are to promote sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians. We believe that the Act is intended to advance reconciliation while allowing for sustainable economic development that supports long-term goals and interests of Indigenous communities. In line with the purposes of the Act, the Ksi Lisims LNG Project is a excellent example of how a major development can make measurable contributions

towards advancing economic reconciliation. However, for such major developments to take place in B.C., the investment community and potential resource sector proponents, including Indigenous co-developers, must be confident that the environmental assessment process will be administered in an effective, efficient, and fair manner.

These considerations are why the dispute resolution regulation is so important. Unless the regulation is developed in an all-encompassing manner, there is a potential for dispute resolution to result in serious adverse consequences to B.C.'s resource-based economy as well as efforts to provide meaningful jobs, sound economic opportunities, and sustainable benefits to Indigenous communities.

Experience with Dispute Resolution

Ksi Lisims LNG's overall experience with the dispute resolution process has been less than satisfactory. The process took over 230 days to conclude with the same recommendation as the preliminary views first expressed by the EAO before the dispute was referred to the facilitator - that being that the issues raised were either not related to the Project or not appropriate for the current phase of the environmental assessment. The issues at dispute were not complex and should have been easily and timely administered through a more fair, efficient and effective process.

The EAO's decision to allow the Project to proceed to an environmental assessment was made a full 7 months and 23 days after the request for dispute resolution was made. This is three times longer than the timeline the EAO first indicated. This significant delay in the environmental assessment process increased costs, schedule impacts and reputational damage to the Ksi Lisims LNG Project.

It was concerning to us that EAO did not have a supporting regulation in place to guide the dispute resolution process in a fair, timely, and predictable manner. This is especially surprising given the Act is now over four years old and the dispute resolution process has often been cited as a hallmark feature of the Act.

While the EAO has developed interim dispute resolution guidelines, implementation of the guidelines has proven to be problematic due to missed timelines and unexpected delays. We were concerned that the EAO appeared unable to follow their interim guidelines which resulted in heightened and further uncertainty and substantive timeline delays for our Project.

In addition, the EAO's interpretation of the dispute resolution provisions of the Act does not align with our understanding of the Act. For example, upon the plain and simple reading of section 5(1) of the Act, we believe that it is reasonable to interpret that section to mean that the minister has discretion whether to appoint a facilitator. Yet, the EAO informed Ksi Lisims LNG that they interpret the phrase "may appoint individuals to facilitate" a dispute to mean that the Minister "must appoint individuals to facilitate" a dispute (*i.e.*, no discretion to do otherwise).

Please see Appendix 1 for a more details and comments about our dispute resolution experience.

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Recommendations and Comments to Make Dispute Resolution More Effective, Efficient and Fair

The key recommendations and comments set out below are intended to address the following primary concerns we have regarding the dispute resolution process as currently administered by the EAO. Our position is that these concerns can be addressed through the thoughtful development of the dispute resolution regulation and revised guidelines. Our key concerns about the dispute resolution process include:

- The overall length of time to administer the dispute resolution process;
- The ability to promptly complete the process when the dispute relates to issues that are not relevant to the project, or are being raised at an inappropriate phase of the environmental assessment;
- The need for a more balanced approach and administrative fairness for proponents and other participants in the environmental assessment (*i.e.*, other participating Indigenous nations);
- The qualifications of facilitators and the length of time to engage a facilitator;
- The EAO's application and interpretation of the Act and interim guidelines and policies; and
- Confidentiality requests made by Indigenous nations during the dispute resolution process.

Topic	Key Recommendations and Comments
Guiding Principle of Administrative Fairness	The regulation should include a guiding principle, along with supporting guidelines, on the importance of administrative fairness. In addition to advancing reconciliation with Indigenous peoples across B.C. and other purposes of the Act, the principle and guidelines should help to determine whether a dispute resolution process could adversely impact the economic, procedural, or reputational interests of proponents, including Indigenous partners with clear rights or treaty interests, and how to prevent this. A proponent's right to participate in a dispute resolution process that affects their interests or privileges is an important element of administrative fairness. The rights and interests of other participating Indigenous nations may also be impacted by a dispute resolution process. As a result, careful consideration is required to determine the appropriate role for other participating Indigenous nations, especially if proposed solutions have the potential of adversely impacting their rights and interests. Fair decisions follow the applicable rules in a predictable and certain manner, consider individual circumstances, are equitable, reflect a fair exercise of discretion, and are promptly administered.

Demonstrate Bona Fide Efforts to Resolve Issues	As consensus-seeking is the preferred process for collaboration in the environmental assessment process, the regulations should help ensure that any issues raised for potential dispute resolution by the Indigenous nations should be identified as early as possible during initial consensus-seeking activities led by the EAO. Furthermore, the Indigenous nation raising a potential issue for dispute resolution should be required to specify in the Initiating Document how they have demonstrated bona fide efforts to work with the EAO (and the proponent as applicable) to resolve the issue. Early identification of issues will help reduce the risk of new issues being raised late in the process, thereby hindering the proponent's ability to address the issue before dispute resolution is necessary.
Appointment and Role of Facilitator	Facilitator qualifications should include a proven understanding of the importance of the guiding principle of administrative fairness in facilitating a dispute resolution process. The right of a proponent and other participating Indigenous nations to participate in a dispute resolution process that affects their interests or privileges is an important element of administrative fairness. As the subject matter of an issue under dispute resolution can be highly technical, we suggest that another qualification for facilitators should be demonstrated experience with and knowledge of technical matters and working effectively with technical experts. We recommend that the EAO develop a series of training workshops for potential facilitators to proactively explain the environmental assessment process, including the role of reconciliation, describe the different issues that could justify dispute resolution, and to share best facilitation practices. A 60-day service standard for a facilitator to prepare a report is reasonable. However, the Chief Executive Assessment Officer should have the discretion to shorten the standard, ifmerited by the scope and substance of the dispute. To reduce the time to appoint a facilitator and administer a dispute resolution process, we recommend that the EAO maintain an up-to-date roster of pre-qualified and available facilitators and seek early approval and retain a facilitator well before the formal commencement of a dispute resolution process to help ensure efficiency. At the start of an environmental assessment, the EAO should appoint a facilitator to serve in that role for all dispute resolution processes that arise throughout the course of the assessment, especially for complex assessments.
Confidentiality Requests by Nations	There are circumstances when it is entirely appropriate for a participating Indigenous nation or the EAO to request information be treated as

confidential, especially if it is culturally sensitive or could harm the government's relationship with a participating Indigenous nation.

However, in the context of an environmental assessment process that strives to be open and transparent, and where the exchange of information is not culturally sensitive or potentially harmful to government's relationship with a participating Indigenous nation, a request for confidentiality should be carefully considered before granting the request.

For example, as a result of a request for confidentiality during the dispute resolution, Ksi Lisims LNG was not provided a timely opportunity to review and comment on information and related issues (*e.g.*, the characterization of GHG emissions) put forward before the information was considered by the facilitator and the EAO. We believe that information directly affected our interests and that we should have had an opportunity to comment on the information prior to its consideration.

Ksi Lisims LNG recommends that EAO discuss with Indigenous nations any requests for confidentiality during a dispute resolution process and determine if such a request is reasonable in the circumstances, or could the information be shared with proponents or other parties. If required, the EAO could "redact" culturally sensitive information or information potentially harmful to government's relationship with Indigenous nations before sharing the information with proponents or other parties.

We recommend that as part of the dispute resolution regulations, the EAO clarify and develop guidelines to determine when information should be granted confidential treatment at the request of an Indigenous nation. The guidelines should be co-developed with Indigenous nations.

Termination of Dispute Resolution Process

Ksi Lisims LNG was pleased to see the following proposed reasons to terminate a dispute resolution as set out in the Interim Guidelines for Dispute Resolution Facilitators:

- The substance of the dispute is unrelated to the project undergoing an assessment (*i.e.*, about another project; about a project or activity that is not regulated by the EAO); and
- The substance of the dispute would be better considered during another phase in the assessment.

Ksi Lisims LNG also feels that termination should be considered when a party does not display a willingness to meaningfully participate in good faith or when it is clear that reaching consensus is unlikely. In both situations the dispute resolution process can be protracted far beyond the suggested timelines without any benefits to participating parties.

As suggested by the EAO, Ksi Lisims LNG recommends that reasons to terminate a dispute resolution process should be included in the Regulation rather than set out as policy guidelines as this will provide a greater measure of certainty regarding termination decisions.

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Role of the Proponent	We appreciate that if the central issue of a request for dispute resolution arises from government-to-government relationships, Indigenous rights and interests, or culturally sensitive topics, the role of a proponent may understandably be minimal. That said, in our experience, these have not been principle characteristics of issues commonly raised by Indigenous nations seeking dispute resolution. For example, the majority of issues raised on the Ksi Lisims LNG Project were primarily technical in nature, most often related to information required or analysis needed to undertake an environmental assessment. For these types of dispute resolution processes, proponents should have a more active role for two fundamental reasons. First: administrative fairness. Matters related to information requirements and analysis have the potential to adversely impact the economic, procedural, or reputational interests of proponents. Thus, to maintain administrative fairness, proponents should be afforded certain procedural safeguards to protect those interests. For example, if solutions are proposed during the dispute resolution process, the EAO must engage early and consistently with proponents as well as other participants before any solutions are finalized as they could result in additional costs to proponents and delays to the overall project timeline. This approach also supports the principles of transparency and openness. Second: technical expertise. A more active role for proponents in issues related to information or analysis requirements is that a proponent will often have the required expertise and relevant project-specific information to help resolve issues in an effective and efficient manner resulting in a satisfactory closure to the dispute. At the minimum, if new information or issues are raised by a participating Indigenous nation, the proponent should be provided with a timely opportunity to review the new information or issue to identify any potential adverse effects that it may have on their interests.
Management of Timelines	As stated in the EAO's Dispute Resolution – Interim Approach document (June 2023), Ksi Lisims LNG agrees that dispute resolutions should generally be completed within 60 days. While we appreciate that there may be circumstances where participants need more time for dispute resolution, every effort should be made by all parties to adhere to this service standard. If a timeline extension is required for a dispute resolution, the EAO should consult with the proponent on the proposed extension before a final decision is made. We also recommend that, during a timeline extension, work on the environmental assessment should continue concurrent to a dispute resolution process.

	Further, with respect to future dispute resolution processes, it is important that proponents can, in certain situations, continue to advance the process in a manner that would not interfere with an on-going dispute resolution.
Interests of the Proponent – Initiating Document	We recommend that the Initiating Document filed by a participating Indigenous nation requesting dispute resolution contain more information and analysis to ensure that the EAO and facilitator has adequate and relevant information to make decisions that are consistent with administrative fairness including considering the interests of proponents and other participating Indigenous nations. The EAO should share the Initiating Document in a timely manner with proponents to provide them (and possibly other participating Indigenous nations) with an opportunity to comment on the information included. After receiving an Initiating Document, Ksi Lisims LNG recommends that the EAO develops, with the input from the proponent, recommendations for the facilitator that would include: • Potential adverse effects of the dispute resolution process on the interests of proponents (and possibly other participating Indigenous nations) and measures to avoid or mitigate such adverse effects; and, • appropriate roles for proponents and other participating Indigenous nations in the dispute resolution process. Ksi Lisims LNG also recommends that the initiating document be made publicly available. Consistent with the ideas of transparency and openness, anyone involved in the environmental assessment, or an interested member of the public, should be able to access the initiating document. In addition, rather than relying on an invitation to participate in a dispute resolution process, proponents should be able to make a formal request to the EAO or the facilitator delineating why their participation in the dispute resolution process is warranted.
Overall Process Improvements	The EAO should develop a set of service standards, including establishing timeline standards, to guide the administration of key steps of the dispute resolution process by all participants. For example, we suggest EAO prepare guidelines on how to manage timeline extension requests made by Indigenous nations, including consequences if a participating Indigenous nation misses a timeline requirement. It will be important to seek agreement with participating Indigenous nations with respect to these service standards. Guidelines should also allow for the continuance of the environmental assessment process during the administration of dispute resolutions when such work would not adversely affect the dispute resolution process.

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Summary

We believe that the dispute resolution regulation under the Act can be developed in a manner that reflects a clear commitment to reconciliation while, at the same time, considering other important interests. This should include the interests of proponents, Indigenous co-developers, and others who derive value from supporting sustainable economic development in B.C.

The recommendations and comments set out above are based on our direct experience and presented in good faith. We are committed to collaborating with the EAO to establish a complete dispute resolution process, including the development of a dispute resolution regulation, that is more fair, effective, and efficient.

Please reach out to me if you have any questions about our recommendations or comments. We would also be pleased to meet to discuss the recommendations and comments set out in this letter.

Thank you again for providing us with an opportunity to provide feedback on this important initiative. We hope that our comments, recommendations, and examples will help inform the development of the dispute resolution regulation and guidelines.

Regards,

Sandra Webster
VP, Environment and Regulatory
Ksi Lisims LNG

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Appendix 1

Ksi Lisims LNG Project's Dispute Resolution Experience

- On July 21st, 2022, prior to EAO issuing its Readiness Decision, Lax Kw'alaams Band submitted an Initiating Document to EAO requesting dispute resolution under Section 5 of the Act in respect of the EAO's pending Readiness Decision;

- Ksi Lisims LNG reached out to EAO to arrange a meeting so that we could better understand the issues in dispute and, given the absence of a Dispute Resolution Regulation, the process that EAO would implement to address Lax Kw'alaams Band's request;

- EAO shared a document titled "Dispute Resolution – Interim Approach" (December 2021 version). EAO advised Ksi Lisims LNG that this document would guide the EAO's administration of the dispute resolution process.

- Ksi Lisims LNG relied in good faith on EAO's interim guidelines as explained to us by EAO. It was our reasonable expectation, based on EAO's engagement with us, that EAO would administer the Lax Kw'alaams Band's request for dispute resolution in a manner consistent with the interim guidelines, including conducting the screening in accordance with applicable timelines. Unfortunately, this process was not followed.

- Of particular note is that EAO stated that the timeline to conclude the dispute resolution process (should the EAO screen in and accept the Initiating Document) would be up to approximately 75 days from receipt of the Initiating Document.

- EAO subsequently advised that its preliminary view, based on its review of the Initiating Document, was that the matters raised by the Lax Kw'alaams Band were either not related to Ksi Lisims Project or not appropriate for the current phase of the environmental assessment and that the dispute resolution process was unlikely to proceed.

- EAO also stated that it wanted to undertake additional engagement with Lax Kw'alaams Band to ensure there were no misunderstandings in respect of the Initiation Document, the screening process under interim guidelines, or the implementation of the dispute resolution process more broadly.

- On September 16, 2022, a full 56 days after the Lax Kw'alaams Band submitted its Initiating Document, Ksi Lisims LNG attended a meeting with EAO to receive an update on the dispute resolution process.

- During this meeting EAO advised that, upon further review, EAO now had the opinion that it did not have the ability or authority under section 5 of the Act to screen an Initiating Document to determine whether the matters raised in it are suitable for dispute

resolution. Instead, EAO stated that all requests for dispute resolution, including the Lax Kw'alaams Band's request, need to be referred to a facilitator for screening. The EAO then advised that as a result, the EAO will be proceeding with dispute resolution with the Lax Kw'alaams Band.

- Ksi Lisims LNG expressed on-going concern over how long it took for EAO to hire a facilitator and for the facilitation process to begin.

- EAO advised that it will be incapable of making its Readiness Decision for up to a further 75 days. This effectively meant that Ksi Lisims LNG would not know if the Project was accepted into the environmental assessment process until mid to late December 2022. This timeline was not followed.

- On February 15, 2023, the Dispute Resolution Facilitator (Facilitator) submitted a report to EAO entitled "Lax Kw'alaams Band and British Columbia Environmental Assessment Office - Dispute Resolution: Final Report". The report was submitted by the Facilitator 209 days after Lax Kw'alaams Band started the dispute resolution process. The Report recommended that the Project proceed to an environmental assessment.

- On March 18, 2023, the Chief Executive Assessment Officer, after considering the Lax Kw'alaams Band and British Columbia Environmental Assessment Office - Dispute Resolution: Final Report, accepted the Project into B.C.'s environmental assessment process.