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August 11, 2023

Environmental Assessment Office
Government of British Columbia
Submitted via: EAO.DisputeResolution@gov.bc.ca

Re: Teck Response to the *Environmental Assessment Act 2018* Dispute Resolution Regulation Discussion Paper

As the Environmental Assessment Office (EAO) develops a dispute resolution regulation and policy framework under the *Environmental Assessment Act*, *2018* Teck is pleased to submit comments and recommendations in response to questions from the discussion paper published in May 2023.

Proudly Canadian, Teck is committed to responsible mining and mineral development with major business units focused on copper, zinc and steelmaking coal. Headquartered in Vancouver, we own or have interest in ten operations in Canada, the United States, Chile and Peru. In B.C., we own the country's largest copper mine near Kamloops; one of the world's largest integrated zinc and lead smelting and refining complexes in Trail; and four steelmaking coal mines in the Elk Valley. Teck directly employs over 8,000 people in B.C., and our operations create and sustain tens of thousands of additional jobs across the province.

Teck, with two projects currently in the provincial Environmental Assessment (EA) process, is uniquely attuned to the need for effective consensus-seeking tools. As one of two proponents to have undergone the dispute resolution process to date, our experience has provided us with insights related to the role of the proponent, duration, and the principles of procedural fairness.

We feel that there are significant opportunities to improve the current dispute resolution process. The dispute resolution process we have been involved with has significantly delayed the environmental assessment of a project without advancing the underlying issues that led to the dispute resolution in the first place. As the EAO re-examines this process, we hope it does so with a view to helping achieve consensus and enabling projects to enter and proceed through the assessment process in a timely manner. It is our point of view that ultimately it is within the EA process that discussions on impacts and mitigations can progress meaningfully.

We appreciate the opportunity to participate in these discussions. If you have any questions about our comments and recommendations, or wish to discuss them further, please do not hesitate to contact me.

Sincerely,

Jeff Hanman
Senior Vice President, Sustainability and External Affairs

Cc: Scott Maloney, Vice President Environment
Amber Johnston-Billings, Vice President Community, Government Affairs & HSEC Systems
Marcella Munro, Head, Government & Regulatory Affairs
Sheila Risbud, Vice President, Sustainable Development, Coal
Rebecca Sullivan, Director Indigenous and Government Affairs

Summary of Teck Response to the *Environmental Assessment Act* Dispute Resolution Regulation Discussion Paper

We have prepared our feedback based on our experience as a proponent whose proposed project was the subject of a dispute resolution process, and our strong desire to support the EAO in ensuring dispute resolution assists parties in achieving the consensus needed to enable projects to enter and proceed through the assessment process. In summary, we strongly favour a process that:

- Is procedurally fair and gives proponents the ability to participate fully in the process.
- Allows proponents the opportunity to respond if new information is introduced.
- Recognizes that dispute resolution is not a catch all to resolve issues that are beyond the project scope.
- Obligates facilitators to terminate the dispute resolution process when there is no possibility of reaching a successful outcome.
- Is time-bound, as a time limit will provide greater certainty for all participants and would be helpful.

The following is a more in-depth consideration of the above summary based on the Discussion Paper provided by the EAO.

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Teck Response to the *Environmental Assessment Act* Dispute Resolution Regulation Discussion Paper

Principles for Successful Dispute Resolution Processes

What principles should guide dispute resolution?

The *Environmental Assessment Act, 2018* (the "EA Act, 2018") requires that the EAO seek to achieve consensus with participating Indigenous Nations at various stages of the EA process. Where consensus is not achieved, the EA Act, 2018 further provides that a participating Indigenous Nation or the Chief Assessment Officer (CEAO) may refer a matter to dispute resolution ("DR" or the "DR process").

Teck agrees with the EAO that key principles that should guide dispute resolution are the recognition that participating Indigenous Nation(s) have jurisdiction and decision-making authority consistent with the Province's commitment to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as provided for in the *Declaration on the Rights of Indigenous Peoples Act*, and the text of the EA Act, 2018 itself; and advancing reconciliation and working to address the historic relationship between Indigenous Peoples and the Province of British Columbia.

Teck also agrees that the EAO has an obligation of procedural fairness to a proponent. This duty extends to all participants in the decision-making chain, including Indigenous Nations that have entered into agreements with the Province such that they are a statutory decision-making authority.

As discussed below, procedural fairness has two central components in the DR process. Firstly, a proponent must understand the specifics of the issues being raised (its case to meet) and be provided with a reasonable opportunity to respond to issues arising from the dispute resolution process. Secondly, the dispute resolution process must be heard, and a report issued, without unreasonable delay.

The Proponent Must Know the Case to Meet and Have the Chance to Respond

The EA Act, 2018 does not explicitly provide for proponent participation in the DR process. In practice, however, fairness requires that a proponent fully participate in the DR process. This includes, that a proponent has the opportunity to:

1. Attend all sessions in front of the facilitator;
2. Receive submissions and correspondence from the DR participants; and
3. Make oral and written submissions to the facilitator.

In this regard, Teck agrees with the following views expressed by the EAO:

> *The EAO is of the view that it may be beneficial to have the proponent involved. Proponent participation can support more efficient discussions, support experiential learning, yield additional project-specific information, and ensure that proponents have an opportunity to comment on anything that arises that may materially affect their interests.*

This is also consistent with the EA Act, 2018 which enshrines the requirement that the EAO carry out its responsibilities in "a thorough, timely, transparent and impartial way":

> Section 2(2) requires the EAO to carry out its responsibilities under the EA Act, 2018 and, while carrying out those responsibilities, to:
>
> > 2(2)(b)(i) promote sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians and their communities by:
> >
> > (A) carrying out assessments in a thorough, timely, transparent and impartial way…;
> > …
> > (C) using the best available science, Indigenous knowledge and local knowledge in decision making…

If a proponent is excluded from the DR process, an environmental assessment will lose transparency. Arguments may be made in the DR process that are material to future decisions regarding a proposed project. Without participating in the DR process, a proponent will be denied an opportunity to address these arguments and will not know its case to meet. At a minimum, Teck submits that basic fairness requires that the Regulation expressly provide that proponents must receive the entire record presented to the facilitator and be provided with an opportunity to make representations to the facilitator before their report is delivered.

As well, the DR process should not be an opportunity for introduction of substantial new evidence. Rather, the DR should focus on seeking to achieve consensus regarding a crystalized dispute based on the record as it exists before the decision maker. If, however, new information is introduced during the DR process, procedural fairness requires that a proponent must be able to respond to this new information. In circumstances where new information can supplement the DR process and can resolve the disputed matter it should be considered provided the proponent is able to participate in the process and it will not lead to delays.

In summary, the DR process may generate new evidence and arguments. If the proponent is not privy to this, it will be deprived of the chance to respond and will not know its case to meet in the environmental assessment. This would be unfair and result in prejudice towards the proponent. There is no equivalent prejudice if a proponent fully participates in the DR process.

The DR Process Must Proceed Without Unreasonable Delay

Environmental assessments must be carried out in a "timely" way. This requires that decisions are made within a reasonable time. Delay may amount to an abuse of process. Teck submits that procedural fairness requires that the DR Process be efficient and that the Regulations set strict timelines for hearing the dispute and the facilitator issuing a report. Dispute resolution processes are more likely to be successful when dialogue is advanced promptly, with the urgency that comes with clear and definitive timelines. This recognizes that while the Province must seek to achieve consensus with a participating Indigenous Nation, there is no guarantee that consensus will always be achieved. A statutory decision maker should not delay making a decision pursuant to the EA Act, 2018 simply because consensus has not yet been achieved or condition its decision-making on consensus being achieved.

Scope of Assessment

The EA Act, 2018 prescribes waypoints at which a participating Indigenous nation or the CEAO may refer a matter to dispute resolution. For example, the parties may use DR to seek consensus on a pending decision to issue a process order or to issue an Environmental Assessment Certificate.

Teck submits that the dispute resolution process should not be used as a catch-all tool to resolve issues beyond the project or for the Crown to otherwise meet its constitutional obligations. Likewise, the dispute resolution process may only be initiated for "pending decisions." The DR process cannot be used to revisit decisions the CEAO has already made.

Moreover, while the DR process presents an opportunity to facilitate the CEAO and a participating Indigenous nation achieving consensus on a given issue, that process is not a referendum on a project or broad policy issues. Likewise, the views expressed by the parties in the DR Process should not bind a decision-maker exercising statutory authority under the EA Act, 2018. While a decision maker must consider any report prepared by a facilitator, that report is not dispositive of any decision, or limit the CEAO's discretion.

Referrals to Facilitators

How much information should be necessary to initiate a referral to a facilitator?

The notice to initiate the DR process must include sufficient information to allow the EAO to determine if an initiating request meets the requirements set out in the EA Act, 2018, and to allow other participating Indigenous Nations to determine if they wish to participate in the DR process. To meet these requirements, it is essential that an initiating request include:

- A description of the nature and basis of the dispute;

- An overview of the initiating party's position in relation to the dispute and indication of alternative positions or compromises they are willing to consider;
- Correspondence, information or other materials from the environmental assessment process that are relevant to the dispute;
- Names and qualifications of preferred facilitator(s); and
- Description of the staff, consultant or other organizational resources the party has allocated for the duration of the process to ensure they have the ability to participate in good faith.

We also suggest that the proponent, EAO and any other parties who wish to participate in the DR process, be required to provide the same information.

The initiation process must allow the EAO to confirm that the issue being referred to the DR process is (i) within the scope of the EA Act, 2018, (ii) relevant and limited to the environmental assessment at issue, and (iii) being raised at the appropriate phase of the assessment. The process should also support the facilitator's assessment of whether or not the parties are genuinely interested in reaching a consensus.

Qualifications

What knowledge do facilitators need to be able to facilitate disputes in the context of assessments?

Facilitators must be able to demonstrate:

- knowledge of the environmental assessment process as set out in EA Act, 2018, including but not limited to the DR process; and
- knowledge of Canadian laws or Indigenous legal orders.

What qualifications or experience should be required?

Facilitators must be able to demonstrate:

- experience leading dispute resolution processes, in either the western or traditional context; and
- experience working with Indigenous Nations, either directly or as a facilitator for ADR processes involving an Indigenous Nation.

Knowledge of the relevant industry would be an asset.

Are there any factors or circumstances where a facilitator should be ineligible to facilitate a dispute (e.g., if they have a personal or financial interest in the project undergoing an assessment)?

A facilitator should be ineligible to facilitate a dispute if there is any actual or apparent conflict of interest or any other reasonable perception of bias. Factors that could lead to a reasonable perception of bias include:

- direct or indirect personal or financial interest;
- the proposed facilitator has been engaged by any participant (participating Indigenous Nation, proponent or other stakeholder) with respect to the applicable environmental assessment in any capacity; or
- prior statements about the subject matter of the dispute indicating that the facilitator cannot be objective.

It is Teck's position that natural justice requires that all parties playing a role in the decision process be free from any apparent bias, not simply the final decision maker.

Are there specific contexts or criteria for the use of team facilitators?

There are numerous contexts in which team facilitators could provide value to the DR process:

- where participating Indigenous nations are unable to agree on a facilitator, the regulation could set out a process for appointing team facilitators;
- in the event the participants in a DR process are unable to agree on a facilitator or facilitators who meet all of the prescribed criteria, the regulators could provide a mechanism for an additional facilitator to be appointed to meet those criteria; and
- when participants in a DR process agree that multiple facilitators should be utilized.

We also note that multiple facilitators may be required if a traditional Indigenous dispute resolution process is used.

To facilitate the timely and efficient appointment of team facilitators in the scenario where participants cannot agree on any or all of the facilitators, we suggest the regulation incorporate an appointment process modelled after Rule 8 of the Vancouver International Arbitration Centre's ("VanIAC") Domestic Arbitration Rules. Under this rule, if the parties are unable to agree on an arbitrator, VanIAC will provide each party with an identical list of 4 proposed arbitrators and give the parties 2 days to provide a list of its order of preference. VanIAC will also consider any selection criteria or qualification provided by the parties while compiling their list of proposed arbitrators.

In addition to the above circumstances, a team approach to facilitation may also be beneficial to ensure that any 'default' process set out in the regulations incorporates both western and traditional knowledge and dispute resolution experience[1].

[1] For example, the Waitangi Tribunal, which has been utilized to uphold the principles of the Waitangi Treaty in New Zealand since 1985 could provide a useful model for the Province. The members of the Waitangi Tribunal, which is described as a permanent commission of inquiry, are approximately half Maori and half non-Maori. The Tribunal considers Maori claims that the Government of New Zealand has not met its obligations under the Waitangi Treaty and, following an inquisitorial hearing which relies

Co-Development of Dispute Resolution Processes

Is the co-development of the process foundational to successful dispute resolution in the context of environmental assessments?

Co-development of the process applied in a DR process is beneficial to successful dispute resolution and an early indicator of the parties' willingness to resolving the dispute. However, in the event parties are unable to reach an agreement on the process to be applied within a reasonable prescribed timeline, the facilitator should have the ability to (i) impose a 'default' process which is set out in the regulation, or (ii) determine the parties are not genuinely willing to resolve the dispute and end the DR process.

We suggest that, for the scope of disputes contemplated by the EA Act, 2018, 30 days is a reasonable timeline for participants to co-develop a process and, if necessary, for a facilitator to determine the parties are not genuinely willing to resolve the dispute such that the DR process should be terminated.

If so, how should co-development work?

Co-development should begin at the initiating phase of the DR process by requiring all participating parties to identify their preferred facilitator(s). In the event parties are unable to agree on a facilitator(s) within a prescribed timeframe, then the EAO should have the ability to appoint facilitator(s) such that the parties can proceed with co-developing the process to be applied.

Co-development should be subject to a prescribed time limit, following which the facilitator should have the ability to either proceed with the DR process utilizing a prescribed process or end the DR process on the basis the parties are not genuinely willing to resolve the dispute.

The co-development of the process for dispute resolution would be intended to guide the facilitation itself; so ideally it should not be a protracted process so there is time for the facilitation itself. How much time is needed to develop the process?

We suggest that parties have no more than 30 days to co-develop a process, at which point the facilitator may either (i) impose a 'default' process which is set out in the regulation, or (ii) determine the parties are not genuinely willing to resolve the dispute and end the DR Process.

To facilitate an efficient DR process, we suggest there is value in requiring participants in an assessment process, including the proponent and all participating Indigenous nations, to

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on a flexible process that may incorporate traditional Maori dispute resolution methods, the Tribunal may issue recommendations to the Government. While the context of the recommendations issued by the Waitangi Tribunal is clearly different than the DR Process contemplated here, it provides a proven model on how to incorporate western and Indigenous legal traditions and knowledge into a dispute resolution process.

indicate preliminary preferences for the DR process, in the event it is needed during the assessment. Such preliminary information should include preferred facilitators for use in a DR process. Asking participants to provide this information at the beginning of the assessment process would allow the EAO to take all steps necessary to procure and train facilitators, as necessary, so they are prepared to begin a DR process immediately upon an initiating notice being issued.

We would also suggest the EAO maintain a list of facilitators who are eligible to facilitate the DR process which can be relied on in the event parties are unable to agree on a facilitator. Maintaining a list would allow the Province to establish an appointment process similar to the VanIAC process discussed earlier.

Power and Obligations of the Facilitator

What powers should the facilitator have to be able to manage a dispute resolution process?

Facilitators should be given broad powers to provide the best chance for consensus to be reached during the prescribed timeline for the DR process. Such powers could include the ability to:

- modify process in certain circumstances;
- terminate the process upon determination that the DR process has no reasonable chance of resulting in consensus;
- conclude the process early in the event a consensus is reached; and
- extend the process in the event progress is being made towards consensus.

What should the facilitator be obligated to do?

Facilitators should be obligated to terminate the DR process when, in prescribed circumstances, there is no reasonable prospect of a successful outcome or when, acting reasonably, the facilitator determines the dispute is beyond the scope for the current stage of the assessment process or beyond the scope of the project.

Facilitators should also be obligated to deliver a final report in a DR process within 10 days of the final meeting between the parties.

Besides regulatory powers and obligations, what tools do facilitators need to be supported?

Facilitators need sufficient support to ensure they are conducting a DR process in accordance with the requirements of the EA Act, 2018 and related regulations. A fundamental aspect of this support is to ensure facilitators are aware of procedural fairness considerations and that DR processes are conducted in a manner that meets these considerations.

We additionally would recommend that facilitators have access to legal counsel for ongoing advice.

What demonstrates that the parties are entering and participating in dispute resolution in good faith with a willingness to meaningfully participate?

A genuine willingness to meaningfully participate in a DR process in good faith may be demonstrated by:

- willingness to acknowledge potential outcomes that differ from their position at the time the DR process is initiated;
- willingness to constructively participate in the co-development of the process to be applied;
- responsiveness to requests from the facilitator, including in relation to scheduling; and
- conduct during the process, including allocating resources to facilitate meaningful and timely participation in the DR process.

Where the parties are demonstrating a willingness to meaningfully participate and, in the reasonable opinion of the facilitator, making progress towards a consensus with respect to the dispute, a facilitator should have the ability to extend the DR process for a limited period of time. If the parties continue to make progress but have not yet reached a consensus at the end of the extension period, the facilitator should be able to implement another extension of the same duration. At each possible extension point, the facilitator must be required to assess whether the parties continue to make progress; if the parties are no closer to a consensus, or progress is such that there is unlikely to be consensus by the end of a further extension, then the facilitator should not grant a further extension.

Under what circumstances should a facilitator consider ending a dispute resolution process?

A facilitator should consider ending a DR process where a party does not display a willingness to meaningfully participate in good faith, or at the point the facilitator determines the DR process is unlikely to result in a consensus. Further to this latter situation, we also suggest that a facilitator should have an obligation to end a DR process where, acting reasonably and in accordance with prescribed criteria, the facilitator assesses the likelihood of a successful outcome to be low.

For example, when we consider the Facilitator's Report, dated December 16, 2022, (the "Fording DR Report") which resulted from the DR process in relation to Teck's Fording River Extension Project, we note the facilitator in that case noted at least three points in that DR process when they determined it was unlikely the parties would reach a consensus.[2] The facilitator also notes that the parties themselves "acknowledged that they would likely not come

[2] See Fording DR Report at pp. 2, 5 and 8.

to consensus"[3]. Not surprisingly, after a DR process which lasted eight months, the participating parties did not reach a consensus.

In situations such as the process set out in the Fording DR Report, a facilitator should terminate a DR process once they can reasonably conclude the likelihood of reaching a consensus is low. In the alternative, and at an absolute minimum, a facilitator should terminate a DR process when the participating parties acknowledge they are unlikely to reach a consensus.

We would also recommend that the facilitator have the option to 'pause' a DR process in the event that an issue raised during the DR process can, and should, be considered within the environmental assessment process. For example, if new information relevant to the pending decision that gave rise to the dispute, and that could not have been introduced by a participant as part of the existing assessment process, is introduced through the DR process, then the DR process should be paused so that the new information can be introduced and properly considered by all participants in the assessment process. This procedure would give the proponent, and other participants in the assessment who may not be participating in the DR Process, an opportunity to consider and respond to the information within the scope of the assessment process.

Time For Dispute Resolution

What should the time limit be?

To align with the principles of procedural fairness, the timeline applicable to the DR process should vary based on factors including what stage of the assessment the process is initiated at and the scope (which could be based on similar considerations as the criteria used to define a reviewable project) of the project being assessed. The timeline should be defined and documented early in the process to allow all parties to set and manage expectations.

For example, if the DR process is initiated prior to a readiness decision under s. 16 of the EA Act, 2018, then the timeline for the DR process should be shorter due to the fact that many issues may be addressed during the environmental assessment process. In the event the facilitator determines, acting reasonably, that a dispute at this stage must be considered prior to the assessment proceeding, then the facilitator may extend the process if the parties are making progress towards consensus; see suggested process discussed at question 23.

What are the challenges of having a time limit in place?

Any challenges associated with a time limit could be addressed by allowing the facilitator(s) to recommend to the CEAO to grant limited extensions in the event parties are making progress towards consensus. If parties are unable to make any meaningful and reasonable progress towards consensus during a time limited process, then it is unlikely such progress would be made in the absence of a time limit.

[3] Fording DR Report at p. 2.

What are the benefits of having a time limit in place?

Implementing timelines in respect of the DR process is essential to maintain predictability of the assessment process and to ensure fairness to the proponent. To provide flexibility, the regulations could allow for a DR process to be extended in particular circumstances and for a limited period subject to an ultimate maximum.

In alignment with our responses above, a failure to reach a consensus during a prescribed time limit could be viewed as an indicator that consensus is unlikely. Referring again to the Fording DR Report, the DR process outlined in that report was extended to a total of eight months and the parties failed to reach a consensus.

Matters the Facilitator Must Consider in the Report

What should a facilitator be required to consider in their report? For example, this could include the 'facts' of the dispute and perspectives of each of the parties.

Facilitators should be required to provide all information the facilitator(s) considered or was otherwise presented with during the DR process. This information should include:

- Facts of the dispute, including relevant materials from the environmental assessment process;
- Perspectives of the parties to the DR process, including their positions at the start of the DR process and any subsequent positions taken in an effort to achieve consensus;
- Process utilized during the DR process;
- Information relevant to an assessment of whether a party was participating in good faith, including responsiveness and conduct during the DR process; and
- Information relevant to a facilitator's determination to either terminate, pause, or extend the DR process, as applicable.

What else should a facilitator consider in their report?

Where a DR process is paused to allow the parties to consider an issue within the environmental assessment process, the facilitator should include details related to the length and outcome of the pause, and any new information or other material that was introduced into the DR process as a result of the pause.