Interim Guidelines for Dispute Resolution Facilitators

UNDER THE *ENVIRONMENTAL ASSESSMENT ACT* (2018)

The following are intended to be general guidelines for dispute resolution facilitators providing services under Section 5 of the *Environmental Assessment Act* (2018) (EA Act) in the absence of a dispute resolution regulation. The guidelines do not replace requirements of the Act or its regulations. This document will be replaced by the future regulation and policy, following consultation and cooperation with First Nations, and engagement with industry representatives and dispute resolution experts and practitioners.

For information about the consultation and cooperation process to develop a regulation, see the *EAO's website* and the *Dispute Resolution Regulation Discussion Paper*.

BACKGROUND

Section 5 of the Act provides for dispute resolution facilitators to assist the Environmental Assessment Office (EAO) and Indigenous nations in seeking to achieve consensus at specific milestones in the environmental assessment process. The parties may use the services of a qualified facilitator when they are unable to reach agreement or consensus on their own. During the Early Engagement phase, dispute resolution is available to any Indigenous nation who has provided notice of its intent to participate as a participating Indigenous nation under the Act and the Chief Executive Assessment Officer (CEAO). For all subsequent phases of the environmental assessment, dispute resolution is available to participating Indigenous nations and the CEAO.

Dispute resolution is a non-binding process. The facilitator does not make a decision; their role is to help the parties reach consensus on their own.

Only certain matters defined in the EA Act can be referred to a facilitator. If a matter pending decision is referred to dispute resolution (e.g., the pending decision to issue the process order), a decision on the matter cannot be made until the facilitator provides their report. Dispute resolution ends when the facilitator provides a report to the parties and the CEAO or the Minister.

The Act enables a regulation to be established respecting the powers and duties of dispute resolution facilitators; however, this regulation is under development. The EAO has developed a *draft framework to support an interim approach* to dispute resolution and the EAO will work with Indigenous nations and the facilitator to adapt this approach on a project-specific basis. Experience and learnings from applying the draft framework, along with feedback from dispute resolution processes, will inform the development of the regulation and supporting policy and guidance.

SUMMARY – SCOPE OF SERVICES TO BE PROVIDED BY DISPUTE RESOLUTION FACILITATOR

- Develop a customized process for the facilitation that meets the needs of all parties;
- Identify the parties' preferences for other participants (e.g., the proponent, federal government, other Indigenous nations, etc.) to take part in the facilitation (see *Role of the Proponent* below);
- Deliver an Engagement Protocol that summarizes the procedural details agreed to by the parties;
- Deliver a Dispute Resolution Report within the targeted time of 60-days; and
- Consider termination of the facilitation, if necessary.

QUALIFICATIONS

The EAO recognizes the importance of setting qualifications that ensure facilitators with the necessary skills and experience, while not creating barriers. Facilitators should demonstrate dispute resolution experience and experience working with Indigenous peoples. Facilitators must also be able to bring a rights-based lens to dispute resolution processes. This includes having the skills to create and maintain a culturally safe, respectful, and trauma-informed process and to work with Indigenous nations to reflect their laws, traditions, customs, and legal systems into the customized process.

To qualify, facilitator candidates must be able to demonstrate the following minimum qualification:

Required:

- Dispute resolution experience;
  - A minimum of five years of experience facilitating disputes;
  - A minimum of five facilitations within the last five years as the sole or lead facilitator; and,
  - Preference will be given to dispute resolution experience involving Indigenous peoples and relating to resource development/land-use;
- Experience working with Indigenous nations;
  - May be demonstrated, for example, by providing a reference from communities in which they have worked.

(NTD: the number of facilitations/years of experience is subject to practical experience with facilitator selection process and feedback).

Preferred:

- Formal dispute resolution or mediation credentials, such as a mediation training certificate or a Qualified or Chartered Mediator designation;
- Demonstrated understanding of the environmental assessment process in British Columbia or other Canadian jurisdictions and/or familiarity with the natural resource sector. Process-centred experience will be prioritized over technical experience; and,
- Trauma-informed training.

Co-facilitation may be an appropriate option if agreed to by the parties. Two facilitators may co-facilitate a dispute as a team if together they meet the required qualifications for dispute resolution (both dispute resolution experience and experience working with Indigenous peoples).

Ineligibilities

A facilitator will be ineligible to facilitate a dispute if the facilitator has a personal or financial interest in the outcome of the project undergoing an environmental assessment for which dispute resolution has been initiated.

Other factors resulting in actual or perceived conflicts of interest may also disqualify a facilitator. A conflict of interest, whether real or perceived, results from situations where the facilitator's ability to act in the interest of the participants could be impaired or where the participants' trust or confidence in the facilitator would be compromised.

REFERRALS TO A FACILITATOR

To refer a matter to a dispute resolution facilitator, a participating Indigenous nation or the Chief Executive Assessment Officer (CEAO) submits an initiating document to the EAO to begin the referral process. Without a regulation in place, the

facilitator selection process may be different from the one available under the regulation and will be determined on a case-by-case basis.

Once a facilitator has been retained, dispute resolution consists of the following steps:

Initiation:

1. A participating Indigenous nation or the Chief Executive Assessment Officer (together referred to as the parties) decide to refer a matter listed under Section 5(2) of the EA Act to a facilitator for dispute resolution;

Appointment:

2. The party making the referral submits an initiating document to begin the facilitator appointment process;
3. The parties work together to recommend a facilitator;
4. The Minister appoints a facilitator (and must consider the recommendation of First Nations in doing so) and the Province completes a contract with the selected facilitator;

Pre-facilitation:

5. The facilitator helps the parties to develop a custom dispute resolution process, resulting in an *Engagement Protocol*, that outlines, for example:
    a. The issues, objectives, and 'ground rules' for the facilitation;
    b. How other participants may take part in the facilitation; and
    c. Any limitations on confidentiality and how information is shared with outside participants;

Facilitation:

6. The facilitator guides the parties through the co-developed process, and in some circumstances, the facilitator may use their discretion to *end the facilitation*; and lastly,

Report:

7. The facilitator prepares and submits a *report* to the parties and decision-makers.

The timing of each phase will vary for individual disputes. In the absence of a regulation, the Interim Approach includes a target of **60-days** for the delivery of the report that starts once a facilitator is contracted.

During pre-facilitation, the facilitator and participants develop a customized process. The facilitator will arrange a pre-facilitation meeting with all parties, although, in some cases, the facilitator may choose to meet with parties individually to understand each party's concerns. Facilitators will work with parties to incorporate Indigenous laws, traditions, customs, and legal systems into the customized process. The objectives of pre-facilitation are to:

- Clarify the matter under dispute with the initiating party, including the remedy being sought;
- Develop a customized process for the facilitation that meets the needs of all parties;
- Identify the parties' preferences for other participants (e.g., the proponent, federal government, other Indigenous nations etc.) to take part in the facilitation;
- Identify parties' assumptions and seek to find common ground or establish objective criteria for the dispute; and
- Assess the parties' readiness to talk (see box below).

The facilitator will seek to clarify the matter in dispute and ensure that all participants have a clear and common understanding of what the facilitation will aim to achieve. This discussion will inform the facilitator's recommendation for next steps, including a potential termination of the facilitation, if appropriate (see *Termination* below).

Powers

The powers of dispute resolution facilitators include:

- Determine facilitation process for the individual facilitation with the parties, including working with parties to incorporate Indigenous laws, traditions, customs, and legal systems;
- Manage the process so it is completed in a timely manner;
- Advise the parties during the facilitation to assist them with seeking consensus;
- Provide process recommendations, if any, for relationship building in the report; and
- Terminate the facilitation (see below).

Dispute Resolution Duration

As one part of consensus-seeking in the environmental assessment process, it is important that dispute resolutions be conducted in a timely manner. The EAO is of the view that dispute resolution should generally be completed within 60 days. However, there may be circumstances where the parties need more time for dispute resolution. The target of 60 days may be extended by the facilitator if necessary to complete the process. The EAO will notify the proponent of any time extension.

What does 'readiness to talk' mean?

The facilitator will assess the readiness of parties to take part in the process, not whether any participant is right or wrong. Considerations may include:

- What do the parties need to move the dispute resolution process forward?
- Is dispute resolution the right process?
- Is it the right time?
- Have the parties tried to achieve agreement on this issue prior to initiating dispute resolution?
- Is there a willingness to seek common ground?
- Are the parties' positions intractable?

Termination

There may be circumstances where a facilitator may choose to end the process. For example, the facilitator may end the process during pre-facilitation if:

- 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);
- The substance of the dispute would be better considered during another phase in the assessment;
- The dispute has been considered in dispute resolution previously in relation to the same project and there has been no change in the parties' positions;
- The parties have not made attempts to reach agreement on the issue prior to initiating dispute resolution; or
- The participants are not prepared to participate meaningfully in the facilitation (i.e., not "ready to talk").

The facilitator may choose to end the process if:

- The parties are not prepared to meaningfully participate to such an extent that reaching consensus is highly unlikely (e.g., party or parties are too entrenched in their position; a party is acting in bad faith);
- The Indigenous nation participating dispute resolution wishes to end the process, as Indigenous nations' participation is voluntary; or
- The project undergoing the assessment withdraws from the assessment process.

The termination criteria apply equally to all parties. If the facilitator decides to terminate the dispute resolution process, the facilitator must provide notice to all parties. The facilitator must complete a report describing the steps taken and outline the reasons for early termination.

OBLIGATIONS

The obligations of dispute resolution facilitators include:

- Produce a report at the end of a facilitation, including in cases of termination;
- Follow the Interim Standards of Conduct (see *Appendix 1*); and
- Adhere to Section 75 of the Act in relation to any Indigenous knowledge provided in confidence.

Confidentiality

The approach to confidentiality taken by the EAO to date under the interim framework has been that the parties define what information provided in a facilitation is confidential. The parties may also develop guidelines for themselves to determine whether discussions are with prejudice or without prejudice (i.e., able to be used in future litigation). How information is shared or not shared should be defined in the engagement protocol.

While the dispute resolution process itself may be confidential, the outcome of dispute resolution (whether the parties reach consensus on a decision or recommendation) is generally not confidential. In most cases, the dispute resolution report would be posted on the project's page of the *EAO Project Information Centre* (EPIC) (where all public assessment documents can be found) following a decision by the provincial decision-maker. An exception may be made for disputes about an Indigenous nation's participation in the assessment under Section 14 of the EA Act. Given that the report is typically made public, the report may include a confidential memo that includes confidential information for the decision-maker to consider, such as confidential Indigenous knowledge.

Prior to submitting the report, the parties to the dispute will have an opportunity to review the report, make requests for amendments, and agree to what is shared or not shared, recognizing that the EAO has procedural fairness obligations that must be met. Proponents may have an opportunity to review the report and other submissions made during the process as a matter of procedural fairness obligation, which is determined on a case-by-case basis.

The confidentiality provisions of the *Environmental Assessment Act* (the Act) and the *Freedom of Information and Protection of Privacy Act* (FOIPPA) provide protection for confidential Indigenous Knowledge. Indigenous nations may provide Indigenous knowledge to the Minister(s), the CEAO, or a dispute resolution facilitator in confidence under *Section 75(1)* of the Act. Subject to Section 75(2), this knowledge must not knowingly be, or be permitted to be, disclosed to any other party without written consent. For more information on confidentiality and Indigenous knowledge, see the *Guide to Indigenous Knowledge in Environmental Assessments.*

MATTERS TO CONSIDER BEFORE MAKING A REPORT

The dispute resolution process ends when the facilitator provides the report to participants and decision makers. The facilitator and the parties have the flexibility to develop a report format that is appropriate for the individual dispute. The facilitator may use co-drafting as a tool to jointly problem-solve together. This can also help create a report agreed to by the parties.

Generally, the report may include:

- A statement of facts;
- A description of the facilitation, including the perspectives of the parties; and
- A conclusion on whether consensus was reached or not reached;
    - If consensus was reached on the entire matter, a summary of what conclusions the parties reached;

- If consensus was reached in part, a clear explanation of what issues were resolved and where the parties continue to disagree; or,
- If consensus was not reached, a summary of the efforts made and where the parties continue to disagree.

The facilitator does not make a decision on the matter and the report is non-binding. The facilitator may choose to include a recommendation on further process. A recommendation for further process will not delay the decision maker from proceeding with a decision. Participants may choose to pursue the recommendation during the rest of the environment assessment (e.g., during consensus seeking on subsequent decisions) or outside of the environmental assessment process for the benefits of relationship building.

TIME TO PROVIDE A REPORT

In the absence of a regulation, the Interim Approach includes a recommended 60-day time period for the delivery of the report that begins once a facilitator is contracted.

ROLE OF PROPONENT IN DISPUTE RESOLUTION

Only participating Indigenous nations or the CEAO may refer a matter to a dispute resolution facilitator. Proponents, however, may be invited to participate in dispute resolution on a case-by-case basis, with their participation ranging range from being an active participant to a silent observer or it may be decided that the proponent is absent from the dispute resolution proceedings. The EAO is of the view that it will typically be beneficial to have the proponent involved in the dispute resolution process. Proponent participation can support more efficient discussions, provide project-specific information, and ensure that proponents have an opportunity to comment on anything that arises that may materially affect their interests.

Regardless of whether the proponent is invited to participate in the dispute resolution or not, the EAO has procedural fairness obligations to the proponent that must be met, given that dispute resolution takes place within a regulatory process for reviewable projects and that the subsequent decision affects the proponent of the project. If commitments or solutions are proposed during dispute resolution, the EAO may need to engage with other participants (such as the proponent or provincial agencies) who may be necessary for implementation. How these procedural fairness obligations are met by the EAO will depend on the facts of each dispute resolution process and will be determined on a case-by-case basis.

Ultimately, it will be up the Indigenous nation and the EAO, with help from the facilitator, to determine how other parties may be involved. Whatever the level of involvement, proponents will:

- Be informed that dispute resolution has been initiated;
- Be informed on the outcome of dispute resolution;
- Receive the facilitator's report (except for Section 14 disputes);
- Be notified of any impacts to environmental assessment time limits and process;
- Be engaged on any commitments or resolutions that are tabled that may affect them; and
- Be given an opportunity to be heard in relation to the dispute resolution report and any relevant submission made during the dispute resolution process.

Environmental Assessment Resources

- *EAO User Guide*, Introduction to environmental assessment under the provincial *Environmental Assessment Act* (2018)
- *Guide to Consensus-Seeking under the Environmental Assessment Act, 2018*
- *Guide to Indigenous Knowledge in Environmental Assessments*
- Find policies for each phase of the EA, where policy exists, on the *EAO's Guidance webpage*

APPENDIX 1 – INTERIM STANDARDS OF CONDUCT FOR DISPUTE RESOLUTION FACILITATORS

NOTE: This appendix was developed in spring 2020 by adapting the Standards of Conduct for Mediators by Mediate BC to fit the dispute resolution process under the EA Act. These standards will be subject to experience and learning from applying the interim approach, along with feedback during future engagement. Standards of conduct for dispute resolution participants may be developed, following engagement and collaboration with Indigenous nations.

These draft standards were developed based on the Standards of Conduct for Mediators by Mediate BC[1] but were revised to fit the context of environmental assessment and the dispute resolution process under the *Environmental Assessment Act* (2018).

1.0 GENERAL

1.1 These standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the standards appear.

1.2 The objectives of these standards are to define principles to guide facilitator conduct, enhance public protection and promote confidence in the dispute resolution facilitation process for those who chose to use it under the B.C. *Environmental Assessment Act* (2018).

1.3 The core principles of dispute resolution under the *Environmental Assessment Act* (2018) (the EA Act) are that each dispute resolution process should:

1.3.1 Be flexible, allowing for customization on a case-by-case basis;

1.3.2 Reflect the unique legal traditions and customs of Indigenous nations and communities; and,

1.3.3 Be predictable and timely.

1.4 These standards are not to be construed as a competing code of behaviour displacing other professional codes, but as additional standards for facilitators.

1.5 Where there is a conflict between these standards and a facilitator's professional code, the professional code prevails. However, a facilitator should make every effort to comply with the spirit and intent of these standards in resolving such conflicts. This effort should include honouring all remaining standards not in conflict with the other codes.

2.0 DEFINITIONS

2.1 CEAO: means the Chief Executive Assessment Officer of the Environmental Assessment Office.

[1] Mediate BC is a not-for-profit organization that protects the public by managing roster of mediators and med-arb practitioners across B.C. To find out more, visit https://www.mediatebc.com/about-us. Mediate BC's Standards of Conduct for Mediators were developed and based, in part, upon the Model Standards of Conduct for Mediators prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution, and revised and approved by their successor organization in 2005.

2.2 Environmental Assessment Office (EAO): the office that administers the *Environmental Assessment Act* (2018), including the conduct of environmental assessments of major projects in British Columbia and providing provincial Ministers with advice to inform their decision on whether the project should proceed.

2.3 Dispute resolution: a process whereby eligible participants may refer matters under Section 5(2) of the *Environmental Assessment Act* (2018) to a qualified dispute resolution facilitator, who helps the parties reach consensus.

2.4 Parties: means those persons who are a party to the dispute which is the subject matter of a facilitation under Section 5 of the *Environmental Assessment Act* (2018).

2.5 Project: means the reviewable project that is undergoing an environmental assessment under the Act for which the dispute has been initiated by eligible participants under Section 5 of the *Environmental Assessment Act* (2018).

2.6 Statutory decision maker: means either the CEAO or the minister(s) depending on the matter under dispute.

3.0 Voluntary Participation

3.1 A facilitator must conduct a facilitation having regard to the fact that participation in a facilitation is voluntary (except in certain circumstances for the CEAO). Each party may make free and informed choices during the facilitation.

4.0 Duty of Impartiality

4.1 A facilitator must conduct a facilitation in an impartial manner and avoid conduct that gives the appearance of partiality. Impartiality means freedom from favoritism, bias, or prejudice.

4.2 If at any time a facilitator is unable to conduct a facilitation in an impartial manner, the facilitator must withdraw, and must notify the EAO.

4.3 If at any time a party perceives that the facilitator is unable to remain fully impartial, the party should bring this to the attention of the facilitator, who should seek to resolve the issue. If it cannot be resolved in the facilitation process the facilitator must withdraw and must notify the EAO.

4.4 A facilitator should neither give nor accept a gift, favour, loan, or anything of value that raises a question as to the facilitator's actual or perceived impartiality.

4.5 A facilitator may accept or give *de minimis* gifts or incidental items or services that are provided to facilitate a facilitation or respect cultural norms so long as such practices do not raise questions as to a facilitator's actual or perceived impartiality.

5.0 Duty to Avoid Conflict of Interest

5.1 A facilitator must determine and disclose to the parties and the EAO any monetary, personal, professional, family, social or business relationship or affiliation which is likely to constitute, or reasonably be perceived to constitute, a conflict of interest.

5.2 A facilitator must disclose, as soon as practicable, all actual and potential conflicts of interest that are known to the facilitator and could reasonably be seen as raising a question about the facilitator's impartiality. After disclosure, if all parties agree, the facilitator may proceed with the facilitation, but otherwise must withdraw.

6.0 Facilitator Competency

6.1 A facilitator must acquire and maintain knowledge, skills, and abilities sufficient to provide competent facilitation services.

6.2 A facilitator must provide services only for cases where they are qualified by experience or training.

6.3 A facilitator should ensure that they have knowledge and procedural skills sufficient to properly identify and manage cases involving vulnerable parties, and the skills necessary to ensure the facilitation is free of abuse or the inappropriate use of power by any party.

6.4 If a facilitator, during the course of a facilitation, determines that the facilitator cannot conduct the facilitation competently, the facilitator must discuss that determination with the parties as soon as practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing, or requesting appropriate assistance.

6.5 If a facilitator's ability to conduct a facilitation is impaired by drugs, alcohol, medication or otherwise, the facilitator must not conduct the facilitation.

7.0 Facilitator Integrity

7.1 A facilitator must be honest and diligent, act in good faith and put the interests of parties above those of the facilitator.

7.2 A facilitator must not act in a way that puts into question the integrity of the facilitation process.

8.0 Conduct of the Facilitation

8.1 A facilitator should ensure that all parties understand the nature of the facilitation process, the procedures to be followed, the role of the facilitator and the relationship of the participants to the facilitator.

8.2 A facilitator should make information relevant to the facilitator's training, education, experience, and approach to conducting a facilitation available to the parties.

8.3 A facilitator must conduct a facilitation in a way which provides the parties with an opportunity to fully participate in the process and which encourages respect and civility among the parties.

8.4 A facilitator must ensure, to the extent that such matters are within the facilitator's control, that the facilitation process is conducted with integrity.

8.5 If a party appears to have difficulty comprehending the process or matters, or difficulty participating in a facilitation, the facilitator should explore the circumstances and potential accommodations, modifications or adjustments that may increase the party's capacity to comprehend and participate.

8.6 If a facilitator believes that a party's conduct jeopardizes the conduct of a facilitation consistent with these standards, a facilitator must take appropriate steps including, if necessary, postponing or terminating the facilitation.

9.0 Safety and Appropriateness of Facilitation

9.1 A facilitator must identify things that could affect the safety of any party and make appropriate accommodations to ensure safety.

10.0 CONFIDENTIALITY

10.1 Under Section 75(1) of the *Environmental Assessment Act* (2018), any Indigenous knowledge of an Indigenous nation that is provided to the dispute resolution facilitator, the Chief Executive Assessment Officer (CEAO), or the minister(s) under the Act is confidential and must not knowingly be, or be permitted to be, disclosed without written consent[2].

10.2 Indigenous knowledge provided under Section 75(1) may be disclosed under Section 75(2):

10.2.1 If the knowledge is publicly available,

10.2.2 By court order,

10.2.3 By the CEAO, if the officer considers that the disclosure is necessary for the purposes of procedural fairness, or

10.2.4 In the prescribed circumstances.

10.3 If Indigenous knowledge is disclosed under Section 75(2), conditions may be imposed under Section 75(3) by:

10.3.1 The court, if the Indigenous knowledge is disclosed under Section 75(2)(b),

10.3.2 The CEAO, if the Indigenous knowledge is disclosed under Section 75(2)(c), and

10.3.3 By the prescribed person if the Indigenous knowledge is disclosed under Section 75(2)(d).

10.4 The person to whom Indigenous knowledge is disclosed under Section 75(3) must comply with any conditions imposed under that subsection.

10.5 A facilitator must ensure that the parties agree on what information provided in a facilitation is confidential.

10.6 Unless required by law, a facilitator must not disclose to anyone who is not a party to the facilitation any oral or written information received during the facilitation from the time they are retained, except with the consent of all parties.

10.7 A facilitator who participates in teaching, research or evaluation of facilitation must protect the anonymity of the parties and maintain the confidentiality of the facilitation.

10.8 If required to disclose confidential information by a court, tribunal or similar body, a facilitator must provide as much notice as possible to the parties in a facilitation to enable them to seek an order protecting the confidentiality of the information.

11.0 TERMINATION OF THE FACILITATION

11.1 A facilitator must not withdraw the facilitator's services except for good cause and upon reasonable notice to the parties.

11.2 A facilitator may terminate the facilitation when the facilitator concludes that:

11.2.1 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); or

11.2.2 The substance of the dispute would be better considered during another phase in the assessment ;

[2] Find more information in the *Guide to Indigenous Knowledge in Environmental Assessments*.

11.2.3 The dispute has been considered in dispute resolution previously in relation to the same project and there has been no change in the parties' positions;

11.2.4 The parties have not made attempts to reach agreement on the issue prior to initiating dispute resolution;

11.2.5 The participants are not prepared to participate meaningfully in the facilitation (i.e., not "ready to talk");

11.2.6 The parties are not prepared to meaningfully participate to such an extent that reaching consensus is highly unlikely (e.g., party or parties are too entrenched in their position; a party is acting in bad faith);

11.3.7 The Indigenous nation participating dispute resolution wishes to end the process, as Indigenous nations' participation is voluntary; or,

11.3.8 The project undergoing the assessment withdraws from the assessment process.

11.4 A facilitator must communicate clearly and promptly to the parties and to EAO that facilitation has terminated and provide reasons for termination.

11.5 The facilitator must complete a report for the statutory decision maker describing the steps taken leading up to termination and outlining the reasons for it.

11.6 When a facilitation terminates in circumstances of potential harm to a party, the facilitator must take whatever steps are reasonable to ensure the safety of all participants.