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August 1, 2018

Nathan Braun
Executive Project Director, Oil & Gas Sector
Environmental Assessment Office

Dear: Nathan

Re: Environmental Assessment Reform feedback

Introduction

Kitsumkalum, in conjunction with the Tsimshian Environmental Stewardship Authority (TESA) member Nations have conducted a review of the BC Environmental Assessment process. The following document was developed in conjunction with other Nations and adapted to address Kitsumkalum specific concerns. Based on the provincial governments outdated and faulty Strength of Claim assessment for Kitsumkalum, the current system does not adequately address impacts to Kitsumkalum's Title and Rights. Over the last five years, as a result of unprecedented development proposals, the Tsimshian Nations have been subjected to an overwhelming number of project reviews and Environmental Assessments. These projects have included, but are not limited to, the Enbridge Gateway pipeline, seven major LNG facilities and two associated pipelines, the development of the Prince Rupert port and its container facility, two propane terminals, a bulk storage facility, a wood pellet terminal, a marine fuel terminal, two wind farms and multiple forestry operations. These projects followed all forms of regulatory processes, including federal joint review panels, federally led environmental assessments (EAs) through CEAA, provincial led EAs through the BC EAO, coordinated EAs with both CEAA and BC EAO, BC Oil and Gas commission processes, Section 67 EAs through the Port of Prince Rupert and smaller development plan engagement through the Province.

As a result of these five years of intense engagement, the Nations have developed experienced professional internal capacity to deal with project assessment. Through their engagement in cooperative efforts such as the Tsimshian Environmental Stewardship Authority (TESA), common problems related to EA were discussed to find proactive recommendations to bring to the EA table.

While engaging in multiple EA's, the Nations have identified numerous issues with the current provincial EA process. These issues range from deficiencies in communication and consultation,

faulty strength-of-claim assessments of Aboriginal Title and Rights, poor understanding by government and proponent of Aboriginal values including cultural and social and a lack of proper system to adequately guide all parties through a project EA. As result of these issues, the Nations lack the information, and confidence to support Indigenous government decision-making regarding a project, or to achieve consent for a project.

All of the TESA Nations have provided both written and oral feedback for both their concerns with the federal review of the Canadian Environmental Assessment Act and the Provincial EAO processes. Now, the BC EAO has engaged in an EA Revitalization process that the TESA Nations have fully engaged in. The Nations, or representatives of the Nations have engaged directly with the EAO on both the draft discussion paper and the discussion paper and have participated in meetings organized by the FNEMC.

A review of the Discussion Paper, the FNEMC Recommendation Paper and the Advisory Committee paper leaves us alarmed that, despite having brought a number of issues forward in written documents and a number of face to face meetings, they are not addressed in any of these documents. Given the mandate of the Ministry of Environment to implement UNDRIP and FPIC, we are concerned that the lack of integration of our concerns in the revitalization process fails to meet the mandate of the MOE.

This document serves to identify the Nation's outstanding issues with the current EA process that are not accounted for in the discussion paper or other recommendation papers and provides Recommendations to those concerns with the expectation that given our expertise in EA and the number of times we have raised these issues, they are addressed in the Revitalized EA.

Environmental Assessment Concerns

Pre-EA

Issue 1. Multi-agency application processes mean that different activities conducted by proponents can have an unaccounted for cumulative impact on a location that might not be addressed or remediated in the long term. For example, proponents might complete certain activities as part of a FLNRO Investigation Use Permit/ License that allow for development activities. Often, their mitigation plans from that permit are carried forward to their project development plan however, if the project does not go forward, remediation does not occur.

- Recommendation 1a. Early engagement should occur prior to any Ministry of Forests, Lands, Natural Resource Operations and Rural Development (FLNR) Investigative Use License (IUL) or exclusive Crown land leases (Sole Proponent Agreements). Some places are simply not conducive to major industrial projects and should not advance to an EA (first critical step in seeking consent).
- Recommendation 1b. There should be a coordinated approach to the development of the project description (PD_ for EA and IUL and Crown land leasing discussions (i.e. FLNR does not issue an IUL or Sole Proponent Agreement if there is not a collective agreement that a proposed project should advance to an EA or if major changes to siting or design are required).

- Recommendation 1c. The EAO should also engage other regulatory agencies and Nations to discuss draft PDs and flag any immediate critical challenges with the proposed project before investing substantial resources moving forward (i.e. identify necessary project siting or design changes to address serious issues identified by local Indigenous or non-Indigenous communities or regulatory agencies).

Issue 2. PDs are often insufficient to support the depth of assessment expected early in the process by the Nations; proponents and the EAO often allow too much uncertainty to FEED-level understanding at the post-EA Certificate (EAC) permitting stage, which is considered problematic as permits do not undergo the comprehensive five-pillar assessment of an EA.

- Recommendation 2a. Early engagement should include detailed engineering and design to support a rigorous EA by providing more clarity around project components, rather than to be allowed to push related decisions to post-EAC permitting. As well, engagement should include a detailed alternatives evaluation that informs options they have considered for siting and design of the project and should aim to seek consent from the Nation as to whether a project enters an EA process, then at key milestones/decision points throughout an EA process.

Issue 3. In our experience, proponents are not properly prepared for the increasingly complex EA process before submitting a PD and the EAO User Guide (2015) online does not provide proponents a clear enough summary of what to expect during an EA.

- Recommendation 3a. The current EAO User Guide must be updated in consultation with First Nations to more clearly define the expectations of proponents in the Pre-EA phase and how they engage with First Nations.

Pre-Application – Substitution Decision

Issue 4. The process for the provincial request and federal decision regarding substitution is not transparent and does not include meaningful consultation with First Nations. Further, it is not appropriate for any level of government to “pass on” procedural aspects of consultation to another government. Substitution currently does not support collaboration on EAs, seeking consent or even meaningful consultation between First Nations and the federal government because CEAA is not directly engaged with Nations until the end of the process.

- Recommendation 4a. The Agency and EAO should consult with (and seek consent from) First Nations together in the request and decision to undertake a substituted EA and throughout the EA process.

Issue 5. The Nations hold little confidence with the EAO conducting an EA on behalf of the federal government. The primary reason for that is the discrepancy between the mandates of the two agencies and their associated EA processes. The federal process allows for “clock stoppages” to address critical issues while the provincial one does not. This prevents critical issues to be addressed during application review and preparing Part C.

- Recommendation 5a. Confidence in a Substituted EA process requires changes to the current EAO practice of proponent-driven suspensions in application review. The EAO needs a better mechanism to support pausing the EA process to adequately address critical issues and draft Part C than the current suspension approach. This could take the form of a gated EA process that requires check in points at certain times that require the proponent to meet defined criteria before moving forward.
- Recommendation 5b. Even in a substituted EA process, greater involvement of CEAA is needed at a minimum to “witness” the EA and understand key issues and build trust with First Nations. This is so Nations can have confidence CEAA and federal decision makers understand the outstanding issues when crafting conditions and considering their final decision.

Pre-Application – Section 11 Order

Issue 6. The EAO’s current approach to designing and issuing Section 11 Orders is adversarial, which is a poor position to start consultation from. The Nations expect that whatever new “Order” replaces the Section 11 Order to scope the EA and provide an approach to consultation, will be developed in a more transparent and collaborative manner which adequately reflects consultation policies/protocols that Nations might already have in place.

- Recommendation 6a. The scoping of, and approach to consultation in the Section 11 Order should be more collaboratively developed with First Nations. Further, the proponent, EAO and Indigenous groups should meet in-person to collectively discuss ideas and options for an Indigenous consultation approach that strives for consensus, better defines a path that meets the needs of First Nations, and ensures a common understanding of consultation expectations that can inform the proponent’s more detailed Indigenous Consultation Plan.

Issue 7. Consultation schedules in Section 11 Orders are seen as representing a “ranking” of importance of Nations in an EA process, and resulting EAC decisions are based only on the Province’s views. In addition, transparency, adequate justification and supporting evidence on these assessments is often lacking. Kitsumkalum sees this as pervading all aspects of a project moving forward, including negotiation of capacity funding with proponents, impact benefit or other agreements with proponents, the extent to which Kitsumkalum’s values and interests are considered, proponents pre- determining the likelihood of effects on Kitsumkalum. This approach does not align with the Agency’s rhetoric about consultation.

- Recommendation 7a. Discussions around strength of claim should not be part of the EA process and should be undertaken in a separate forum, perhaps led by another government agency. Such discussions often create a negative or oppositional relationship between the EAO and First Nations from the outset of an EA, whereas the EAO should be a neutral assessment agency that is not burdened by or even fettered by these discussions.
- Recommendation 7b. The EA process should be adjusted to support more comprehensive and collaborative assessment of impacts on Aboriginal Title, Rights and Interests in a way that better reflects the Canadian Constitution. Sufficient time and resources are needed to undertake that process.

Issue 8. Section 13 Orders (which can include modifications to established consultation direction to proponents) can alter Section 11 Orders at any time and present high uncertainty for proponents and the Nations, including financial and resourcing issues for all parties.

- Recommendation 8a. Whatever order replaces the Section 13 order should require a more comprehensive level of consultation and consent before moving forward to being enacted rather than being sprung on Nations in an informatory manner.

Pre-Application – Application Information Requirements (AIR)

Issue 9. Currently, an AIR does not include a description of collaboratively developed thresholds or acceptable limits to change of assessment indicators that are relevant to First Nation decision-makers. Without agreement on how impacts to Nations' Title, Rights and Interests will be addressed at the AIR stage, the application is unlikely to meet expectations of the Nations.

- Recommendation 9a. Defining Valued Components (VC) that reflect the values of the Nations is fundamental to seeking consent in any EA process. For example, the assessment of marine resource use (including characterizing residual effects) must reflect First Nation values of that resource, not just the western-science based perspective of a professional biologist. Likewise, if a Nation provides the EAO and proponent with specific VCs to study with clear indicators and a rigorous and fair approach to assessing impacts, that information is necessary for that Indigenous government to inform their decision. Failure to incorporate such VCs could make consent on any EA decision challenging or unfeasible.
- Recommendation 9b. The foundation of EAO's 5 pillars should be more comprehensive and flexible to incorporate each Nations government's value "pillars". AIRs should be developed in a way that supports First Nations government decision making, just like it is now developed to ensure it meets the requirements of provincial and federal government decisions.

Issue 10. Benefits of projects are outlined very poorly by proponents (particularly in relation to First Nation communities) and they fail to provide confidence of the accuracy and often fail to provide evidence-based information, yet they are relied upon greatly by the proponent and decision makers when "justification" is required. The inclusion of "benefits" in an EA suggests an EA takes a rigorous approach to assessing tradeoffs, which is untrue. There should be an independent assessment of potential project benefits to confirm the proponent's assessment which would include First Nation consultation and collaboration.

- Recommendation 10a. The AIR should clearly define a more collaborative approach to integrating First Nation information and views in a proponent's application. If a proponent does not work with Nations in reviewing or drafting key aspects of their application, then it should not get through screening.

Issue 11. An AIR outlines minimum information requirements to be included in an application. Deferring important details to post-EAC permitting results in greater uncertainty of impacts and lower confidence in any assessment conclusions of potential effects of the project.

- Recommendation 11a. The EAO needs to provide clear guidance or policy to proponents, shared with First Nations, on the level of engineering information and certainty of design required in an EA. This guidance needs to be developed with First Nations on a project specific basis.

Issue 12. Furthermore, proponents are often insistent in their view of a model or analysis being representative of a “worst-case scenario” without demonstrating a robust analysis of a range of possible scenarios. This approach tends to yield lower confidence in assessment findings.

- Recommendation 12a. The AIR should be more prescriptive regarding information requirements for aspects where we have considerable precedents from other EAs, e.g. Disposal at Sea alternatives assessment, air quality and human health impacts, marine water quality assessments, etc.
- Recommendation 12b. Any modelling or technical analyses should include a sensitivity analysis to understand upper and lower bounds of potential impacts based on a range of plausible scenarios. The AIR should state that the proponent’s application will not be accepted for detailed review if the proponent did not collaboratively develop modelling and baseline data collection plans, undertake activities, and report out on data collection and modelling/analysis results with First Nations and regulatory agencies on the working group, the EAO and the Agency in Pre-application stage.

Issue/ Recommendation 13/ 13a. The EAO must develop clear guidance on how to better assess socio-economic and health indicators that are important to First Nation governments and communities in consultation with First Nations, with corresponding conditions that better address socio-economic and health impacts.

Pre-Application – Application Preparation

Issue 14. Depending on the approach that a proponent takes in completing its baseline studies, there can be low confidence from the Nations in the information supporting a proponent’s application and underlying the entire EA process. It is very costly and inefficient for each Nation to hire and coordinate its own expert review team for each specific topic of interest. Recognizing qualified professionals have an important role in conducting rigorous EAs, the Nations believe that the current approach to comprehensive technical reviews of an EA is not efficient and is inherently adversarial (i.e. EAO, the Agency and Indigenous groups must weigh the evidence of “dueling experts”). Collaboration and peer review are essential for thorough vetting of information and robust decision-making.

- Recommendation 14a. A Section 11 Order and/or AIR could require a proponent to collaboratively develop modelling and baseline data collection plans, undertake activities, and report out on data collection and modelling/analysis results with the Nations, regulatory agencies on the working group, the EAO and the Agency. The EAO would work with the working group to approve baseline work and modelling before the application is submitted for screening; if any major issues are flagged, they must be addressed before submitting the application for screening.

Issue 15. As a result of inadequate engagement during baseline study design and collection, issues are often not properly resolved as First Nations call for more or different VC baseline information. This either forces the proponent to do extra work, which will extend their timelines, or the requests get ignored with the excuse that timeline are too tight. Early and meaningful engagement would help to include these First Nations requirements into the timelines.

- Issue 15a. Topic-specific working group meetings should occur in pre-application to discuss proponent design of baseline studies and modelling, and include Indigenous-provided information; this is where issues should begin. This process would act as a gate for the proponent that would require approval from the Nations and the EAO before moving forward with the next steps of the applications process.

Screening (Initial Application Evaluation)

Issue 16. The current 30-day time limit for screening the application for complex projects is inadequate for the working group, especially First Nations, to discuss key issues and to provide input into the EAO's decision whether to accept an application. In some cases, Nations identify so many large issues during screening that the Application should not have been accepted for the more detailed review. This should be a formal stop point. Kitsumkalum has many examples where several First Nations have said that an application should not go forward, just to have that completely ignored by EAO.

- Recommendation 16. Screening should be greater than 30 days and should provide flexibility to enable a more collaborative and consensus-based decision making with the working group and Indigenous groups. This would enhance confidence that the EA process will adequately address issues and support informed decisions of the Nations.

Issue 17. The Nations have low confidence in the ability of the provincial EA process to allow the necessary time to rigorously investigate issues (see application review issues). This means more concern in the EAO accepting a challenging application. Screening should instill confidence in the process and support consent of the Nations.

- Recommendation 17a. Screening criteria should be applied to transparently guide all parties through a decision, and requirements for changes that are necessary; criteria should be developed with the working group in advance of the screening process based on a standard criteria template and principles that evaluates adequacy (not just presence) of required information to perform a complete assessment.

Issue 18. Proponents often apply pressure at the screening stage to accept an Application for review, regardless of issues identified, and then state during the application process that permitting will address outstanding issues. There is no clear mechanism to ensure proponents cannot keep “pushing issues down the road.” There is a perception that not accepting an application means “no project”; but it is really a defensible decision to support a more positive Application Review and reduce the uncertainty in timelines during that detailed review stage.

- Recommendation 18a. If screening reveals substantial issues that need to be examined, and the application is accepted, there should be a transparent mechanism that allows the EAO to immediately suspend the application review (stop or reset the clock) until the necessary information is provided (increase screening certainty and confidence).

Issue 19. Conceptual management plans in an application are also completed by a proponent's consultants with limited or no input from Nations or regulatory agencies, resulting in low confidence in their effectiveness.

- Recommendation 19a. Conceptual management plans in an application must be collaboratively developed with the Nations and regulatory agencies so that the plans provide greater confidence in mitigating effects.

Application Review

Issue 20. The time limit suspension clause of the *Environmental Assessment Act* is at the proponent's discretion and creates uncertainty that the provincial EA process would adequately address issues. In contrast, the federal ability to pause the "clock" to examine issues means Indigenous groups can feel more confident that issues important to them will be properly assessed. The 180-day application review time limit is viewed to be unrealistic for complex projects, especially in instances where substantive issues are not addressed during pre-application. However, the notion of having substantive issues addressed during pre-application presents a challenge in that it is difficult to examine topics comprehensively until the complete set of information (application) is available.

- Recommendation 20a. Time and resources must be provided for review of potential issues as well as review and consultation on EAO's assessment report and conditions. Timelines for application review must be flexible to respond to project-specific circumstances (i.e. depth of issues) and not be dependent on a decision by the Executive Director. A gated process could serve this purpose, with criteria designed to ensure issues are adequately addressed through meaningful consultation with First Nations.

Issue 21. Working group meetings, especially topic-specific sessions, are valuable and provide greater transparency and trust in the EA process. However, this is overshadowed by the rest of application review being a "black box" until the EAO shares its draft referral package for review. The Nations see this current process as resulting in low transparency, low trust, and limited or no ownership from us; therefore, the outcomes of the EA are of little value to Nation government decision-makers and communities.

- Recommendation 21a. Working group meetings should be long enough to allow for meaningful discussion of issues and the appropriate experts need to be present to address these issues. Working group meetings are not effective when issues and concerns are glossed over or dismissed, as currently is the routine.

Issue 22. Community resiliency, within the context and thresholds of acceptable change on VCs and on Aboriginal Title, Rights and Interests are very different than provincial or federal regulatory limits or objectives; however, applications and EAO's Assessment Reports and corresponding conditions rarely meet these different expectations from the perspective of First Nations.

- Recommendation 22. The EA process must work to identify ways to characterize impacts based on First Nation thresholds alongside those applied by the EAO rather than simply summarizing views of Indigenous groups.

Issue 23. While conditions and management plans are developed to address uncertainty or low confidence in proponent’s proposed mitigations; these should be addressed more rigorously and proactively during the EA, rather than be pushed post-EAC when there is little leverage or even just opportunity for First Nations to address challenges if they are not satisfied.

- Recommendation 23a. Given the importance of conditions in mitigating impacts and the intensive analysis and resources to develop good conditions, there is presently not enough time or engagement of the Nations for this stage of the EA. Uncoordinated provincial-federal condition processes further complicates this process.
- Recommendation 23b. EA process must provide more time to conduct more collaborative, iterative and coordinated engagement of First Nations on provincial and federal conditions (jointly by EAO and the Agency). Additionally, the EAO should develop a clear communication protocol at this stage to enable effective tracking, monitoring and reporting on EAC conditions

Issue 24/ Recommendation 24a. As stated earlier, many EAs refer to future developed management plans as a form of mitigation. In past projects, Nations have been forced to accept this form of mitigation in the conditions only to have management plans fail to achieve their intended purpose. Any reference to management plans in conditions must be far more prescriptive to improve confidence that conditions will effectively mitigate impacts. Criteria should be more clearly developed to guide proponents in the development of management plans and should be incorporated in to the gated process of conditions development.

Issue 25/ Recommendation 25a. The Nations are increasingly frustrated with erroneous information about them in proponent applications that are perpetuated in successive EAs. Some errors can result in the perpetuation of critical flaws in successive EAs. This often is of a cumulative nature, as EA’s build off of other assessments. Additionally, errata documents provided by proponents after the fact are insufficient to resolve such inaccurate information on the public record. This includes information that the proponent received from First Nations after the submission of the EA for review. As part of the application review process, there should be a gate to ensure that all information is incorporated into the EA correctly, and the EAO should require proponents to amend an application to eliminate obvious erroneous information. If information comes later in the process, there should be a requirement for that information to be incorporated into the application for public review.

EA Decision(s)

The Nations cannot “give consent” to whether a project should proceed in development at the stage of an EAC decision because consent must consider a number of factors, i.e. accommodations from government and proponents in relation to impacts on Title, Rights and Interests, benefits to the community, net value of the project, etc.

Issue 26. Decisions between governments are not synchronized in a way that provides certainty to proponents that they can advance their projects. The existing non-coordinated decision process is adversarial and can lead to more legal challenges, project costs and uncertainty for proponents. A transparent process for seeking “consent” from the Nations can help address this.

- Recommendation 26a. The EAO should amend EA legislation/policy to facilitate coordinated decision-making across governments. Additionally, they should develop a decision-making process that can fairly include a transparent analysis of net value to BC and Indigenous communities.
- Recommendation 26b. After a decision is made from the EAO Executive Director, there should be a period of time for the Nations to facilitate local government decision making.

Issue 27/ Recommendation 27a. Conditions are not written in a way that clearly links key issues/impacts with condition mitigations; this results in low confidence that impacts will be effectively mitigated unless there are regular audits required. The EAO should develop a process for linking conditions with issues/ impacts and mitigations. This should be done in direct consultation/ collaboration with Nations.

Post-EA

Issue 28. The negotiation of post-EAC capacity funding with proponents can be challenging if consultation and technical expectations are not clear in EAO’s conditions document.

- Recommendation 28a. It should be made clear to proponents up front that the Nations require resourcing and funds to review post-EAC management plans and for proponents to fulfill consultation expectations/obligations.
- Recommendation 28b. EAC conditions should require comprehensive third-party audits (including involvement of community monitors) to monitor and publicly report effectiveness of mitigations and adaptively manage effects.
- Recommendation 28c. The EAO should examine development of conditions to ensure the expectations of consultation with the Nations is clear to all parties, including specific staff resources required to meet the conditions objectives. This would include a formal co-management structure for natural resource projects monitoring plans to be developed at the G2G level that supports effective mitigation of impacts on Aboriginal Interests.

Issue 29/ Recommendation 29. Ongoing investigative use activities can be substantial leading up to a Financial Investment Decision (FID). If an EAC Holder decides not to pursue the project, First Nations are left with the impacts on their interests and no benefits. Investigative Use License or EA should require significant proponent bonds to mitigate impacts of project-induced effects if the project is not developed.

Additional Process Comments

Issue 30/ Recommendation 30a. Given the potential for development in numerous areas in BC, the EAO must start thinking on a bigger scale to ensure that the values of First Nations are protected adequately. The use of strategic regional EAs that are broader than the context of a single project would help to understand the context of impacts of multiple projects and/or identify ideas to

coordinate projects to decrease overall impacts (e.g. the idea of a “corridor” to be used by multiple parties across northern BC). The EAO develop a mandate to support the engagement of provincial ministries and proponents in strategic EAs. The EAO should also expect proponents to commit to engaging in current or future regional EAs and to incorporate data from existing strategic EAs into project EAs while ensuring that project specific assessments remain robust. A strategic regional EA project could actually assess cumulative effects, something that is lacking now.

Issue 31/ Recommendation 31a. Currently, there is an alarming lack of process or protocol in determining impacts to First Nations’ social and health values. Existing health of local residents and capacity of local health services (context) needs to be more strongly factored into assessment of impacts of a project on human health. The current impression is that projects can pollute up to or even exceed health-based objectives with no consequences or legal mechanisms for health agencies to make project operators change their project design. Conditions are not stringent enough to protect human health.

- Recommendation 31b. The development and adoption of health impact assessment standards for Indigenous people is absolutely critical in the development of a meaningful EA process.
- Recommendation 31c. Additionally, deeper engagement of health-focused experts is needed in EAs. The EAO should work with the Ministry of Health to identify health impacts assessors for EAs to support assessment of project-specific and cumulative effects on people and identify health-based thresholds based on local context.
- Recommendation 31d. The EAO should engage health agencies more broadly (including regional and First Nations health authorities and FN Health Council) to discuss EA challenges and Recommendations for a more robust assessment of human-health impacts.

Conclusions

The First Nations on the north coast of British Columbia have engaged in an unprecedented number of EAs in a short period of time. As a result, they have found a number of deficiencies in the provincial EA process that fail to address the concerns or values of First Nations and have direct impacts to Aboriginal Title and Rights. Furthermore, the failings of the current EA process do not support the current governments’ mandate to support UNDRIP and the reconciliation process. While Kitsumkalum and the other TESA member Nations have identified a number of deficiencies with the EA process, we have also identified Recommendations to those problems that would work to improve the EA process in general, meet the requirements of First Nations and align that process with the mandate of the government.

Kitsumkalum looks forward to working with the province to further developing and implementing these recommendations.

We look forward to discussing the above statements with you. If you have any questions in the meantime, please contact our referrals team directly at Projects@kitsumkalum.bc.ca or Rina Gemeinhardt at 250-635-5000 Ext 6 or at rgemeinhardt@kitsumkalum.bc.ca.

Sincerely,

A handwritten signature in black ink, appearing to read 'Rina Gemeinhardt', written in a cursive style.

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