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VIA EMAIL

The Honourable Steven Guilbeault  
Minister of Environment and Climate Change  
House of Commons  
Ottawa, Ontario, K1A 0A6

and

Impact Assessment Agency of Canada  
210A - 757 West Hastings Street  
Vancouver, British Columbia, V6C 3M2

Dear Sirs/Madams

**Re: Summit Lake PG LNG Project  
Project reference number: 87307  
Comments on Proposed Substitution Agreement**

The Government of British Columbia has requested that the federal impact assessment with respect to the above referenced Project be substituted to the province<sup>1</sup>. If you, in your capacity of Minister of Environment and Climate Change, grant that request, the British Columbia Environmental Assessment Office (hereafter "the BCEAO") would conduct the project's impact assessment on behalf of the Federal Government. The Canadian Impact Assessment Agency has asked for public comments on the proposed substitution agreement and this letter constitutes my comments with respect to the proposed substitution agreement.

I submit that the proposed substitution agreement is not in the public interest and that it should not be approved by the Government of Canada. My reasons for this position are as follows.

### **Meeting Legislative Requirements**

Section 31(1) of the Impact Assessment Act (hereafter "the Act") provides you with the discretion to enter into a substitution agreement with the BCEAO with respect to the Project but that discretion is constrained by Section 33(1) of the Act which provides that you can only approve a substitution if you is satisfied that all of the enumerated conditions are met. Specifically, Section 33(1) requires, among other things:

- (a) process to be substituted will include a consideration of the factors set out in subsection 22(1);
- (e) the public will be given an opportunity to participate meaningfully in the assessment and to provide comments on a draft report;

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<sup>1</sup> <https://iaac-aeic.gc.ca/050/documents/p87307/157055E.pdf>

(f) the public will have access to records in relation to the assessment to enable its meaningful participation; [Emphasis Added]

I respectfully submit that an environmental assessment of the Project by the BCEAO under the provisions of the BC Environmental Assessment Act (hereafter “the BC Act”) will not meet these mandatory conditions of the Act.

With respect to Section 31(1) (a) of the Act, the history of BC Government environmental assessment and decision making with respect to proposed LNG projects in British Columbia has been marked by an explicit and public bias in that it is BC Government policy is to support LNG development, both through predictable approvals under the BC Act and supportive fiscal, taxation and regulatory policies that openly facilitate proposed LNG projects. I respectfully submit that if you agree to the requested substitution agreement that the Project will be approved and receive an environmental assessment certificate regardless of the environmental consequences or public concerns about the Project.

With respect to Section 31(1) (e) and (f) of the Act, the Act requires meaningful public participation. In contrast, the BC Act provides only opportunity for public comment and those opportunities for public comment are largely discretionary<sup>2</sup>. I would submit that this significant difference between the BC and Canadian environmental assessment legislation renders an environmental assessment by the BCEAO of the Project not equivalent to an assessment under the Act.

Even if the public is allowed to make comments on the environmental assessment of the Project, that falls far short of what is generally considered “meaningful public participation”.

Additionally, the Act provides provisions for Participant Funding which has become a standard practice to facilitate meaningful public participation in federal environmental assessments. In sharp contrast, the BC Act provides no such provision, with the notable exception that Section 48 provides the BCEAO the discretion to provide participation costs to Indigenous Nations participating in the environmental assessment. Not providing members of the public with participation costs and therefore severely disadvantages and discourages public participation in the BC environmental assessment of the Project. Again, I submit that this significant difference between the BC and Canadian environmental assessment legislation renders an environmental assessment by the BCEAO of the Project not equivalent to an assessment under the Act. Further, it raises the question of the constitutionality of the BC Act (see below).

### **Principals of Administrative Fairness**

All Governments in Canada have a duty to administrative fairness and equitable treatment in decision making. Given the fundamental flaws I have identified above, I submit that should you exercise your discretion and approve the requested substitution agreement will result in a flawed environmental assessment of the Project. Administrative fairness requires that laws are implemented and administered in a fair and reasonable manner. Administrative fairness is based on the principle that government actions must be legal, and that citizens who are affected by unlawful government acts must have effective remedies.

The duty to be fair in the environmental assessment process goes far beyond simply affording the public the opportunity to submit comments. It includes basic matters such as knowing the case to be met, full disclosure of all relevant information, access to a public hearing, and importantly, the right to present evidence and cross examination of witnesses. I personally know

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<sup>2</sup> Section 23 of the BC Act

from participating in several Joint Review Panel proceedings as well as over 30 provincial regulatory hearings the critical importance of cross examination in deducing the evidence required to fully understand the environmental implications of any proposed project. With respect to the Project I am of the view that procedural fairness, in other words, meaningful public participation, can only be achieved if you refer the Project to a review panel. I encourage you to do so.

### **Constitutionality of the BC Environmental Assessment Act**

As previously mentioned, Section 48 of the BC Act provides for providing participation costs but only for Indigenous persons. The BC environmental assessment process excludes all other Canadian citizens by statute from receiving participation costs. Section 15(1) of the *Constitution Act* states:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” [Emphasis Added]

The BC Act does not treat non-Indigenous members of the Public who may be affected by the Project as “equal before and under the law” and the BC Act discriminates based on “race, national or ethnic origin”. Given this, I submit that on the face of it, the BC Act is unconstitutional and subject to 52(1) of the *Constitution Act* could be found to be, “to the extent of the inconsistency, of no force or effect.”

I respectfully submit that you have a legal requirement to ensure all members of the public, not just Indigenous persons, have full access to the opportunity to meaningfully participate in the environmental assessment of the Project. This duty to accommodate, which is set out in human rights legislation and case law, requires that you, in exercising your discretion, accommodate and respect the individual differences that exist in our diverse society, and not discriminate based on personal characteristics that are protected by the *Constitution Act*.

As the Supreme Court of Canada recently noted<sup>3</sup>:

“...that discrimination perpetuates or promotes “the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.””

In my view the BC Act is clearly discriminatory. In light of this, I respectfully submit that agreeing to a substitution agreement that is fundamentally based on a potentially unconstitutional provincial legislation would be in itself unconstitutional and subject to judicial challenge.

### **Fettering discretion**

As previously mention, Section 31(1) of the Act provides you with the discretion to enter into a substitution agreement with the BCEAO with respect to the Project Discretion.

As you know, the exercise of discretion must comply with all applicable legislation and be consistent with the purpose of the Act. Any discretionary decision you make should demonstrate a reasonable interpretation of the applicable legislation or policy, and should be considerate of the individual needs and circumstances of the members of the public who may be affected by the Project. Canada has entered into an Impact Assessment Cooperation Agreement Between

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<sup>3</sup> Quebec (A.G.) v. A, [2013] 1 S.C.R. 61, at paragraph 417

Canada and British Columbia<sup>4</sup> (hereafter “the Agreement”) which provides for cooperation between the two jurisdictions on environmental assessments. My concern is that very existence of the Agreement inevitably results in you fettering your discretion on whether to entering a substitution agreement with the BCEAO. It is notable that, notwithstanding the substantive differences in the environmental assessment legislative regimes, historically, Canada has never denied a substitution request from the BCEAO. In the matter of the substitution request from the BCEAO I am requesting that you should avoid applying the Agreement or any policy in a “one-size fits all” approach, without making an informed and independent judgment about if entering into a substitution agreement with the BCEAO with respect to the Project is appropriate and in the public interest. In other words, do not allow the Agreement or the request for a substitution from the BCEAO to fetter your discretion.

### **Closing**

Based on all of the foregoing reasons, I respectfully submit that you ought to deny the substitution agreement request made by the BCEAO with respect to the Summit Lake PG LNG Project. In the alternative, given the issues involved in the Project and the anticipated level of public concern about the Project, I urge you, as per the provisions of Section 36 of the *Impact Assessment Act*, to refer the impact assessment of the Project to a review panel. Further, I recommend that you seek the cooperation of the BCEAO to establish a joint review panel to consider the Project.

If you or your staff would like to discuss this submission I can be reached directly by telephone at 250-877-8678 or via email at [sawyer@hayduke.ca](mailto:sawyer@hayduke.ca).

Respectfully

<Original signed by>

Micheal D. Sawyer. MEDes.

cc. Kelly Wintemute, Executive Project Director, BCEAO  
Terence Hubbard, President, Impact Assessment Agency of Canada  
Binyou Dai – COO, JX LNG Canada Ltd.

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<sup>4</sup> <https://www.canada.ca/en/impact-assessment-agency/corporate/acts-regulations/legislation-regulations/canada-british-columbia-impact-assessment-cooperation/canada-bc-cooperation-agreement.html>