

From: Tracey Saxby [mailto:tracey@myseatosky.org]
Sent: Thursday, April 30, 2020 2:37 PM
To: corporate <corporate@whistler.ca>
Subject: Woodfibre LNG's request to extend their EA certificate

Dear Mayor and Council,

As you may already know, Woodfibre LNG has recently applied for a 5-year extension to its environmental assessment certificate, which expires on 26th October 2020.

Our understanding from the BC EAO is that there is no opportunity for public engagement throughout the extension application process. As such, we would like to share our concerns about Woodfibre LNG's extension application with members of the Technical Working Group, which **may** include the Resort Municipality of Whistler, and we request council to incorporate our concerns in your response to the BC EAO.

Has the Resort Municipality of Whistler been notified by the BC EAO of Woodfibre LNG's request to extend the certificate for another 5 years?

Can you please advise us of your internal timeframes and process to participate as part of the Technical Working Group to review Woodfibre LNG's extension application?

If RMoW is **not** a member of the Technical Working Group, we suggest that you engage directly with the BC EAO and Minister George Heyman to share any concerns you may have.

The current deadline for the Technical Working Group to respond is **19th May 2020**. Given the current COVID-19 pandemic, we are concerned that this is not enough time for local governments to adequately review Woodfibre LNG's extension application and provide feedback, especially as local governments are on the frontlines of the pandemic response.

We are also concerned that Woodfibre LNG submitted its application for an extension two months late, which further reduces the amount of time available for the BC EAO and the Technical Working Group to review the application. Please see the attached letter from Ecojustice to the BC EAO on behalf of My Sea to Sky with regards to this matter.

It is not clear which policy framework will be applied to Woodfibre LNG's extension application by the BC EAO, as in Woodfibre LNG's application they refer to the BC EAO's 2016 guidance documents, however BC EAO staff have verbally suggested that the new BC EAO 2020 Certificate Extension Policy will apply.

We intend to review Woodfibre LNG's extension application in greater detail, and we will share our concerns with Mayor and Council as soon as possible to help inform your response. At this time, however, we can say that both the viability of the natural gas industry and the urgency of climate change may indicate the need for Woodfibre LNG to be completely re-evaluated rather than for its extension application to be summarily approved.

For your convenience, we have provided links to the relevant documents below and attached. Please feel free to contact me directly if you have any questions.

Sincerely,

Tracey Saxby

BACKGROUND INFORMATION:

- 1) Woodfibre LNG's application [letter](#) dated 24th March 2020.
- 2) [BC EAO's 2016 guidance documents](#) which Woodfibre LNG refers to in their application.
- 3) New BC EAO [2020 Certificate Extension Policy](#) that was published on 24th April, 2020.
- 4) Ecojustice letter to BC EAO on behalf of MS2S, calling for BC EAO to reject the application (attached), dated 30th April 2020.

Tracey Saxby

Executive Director

My Sea to Sky

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We proudly acknowledge that we work in the traditional, unceded territories of the Coast Salish peoples, including the x̱məθḵʷəyə̱m (Musqueam), Sḵwx̱wú7mesh (Squamish), and Seḻíḻwítulh (Tsleil-Waututh) Nations.

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File No: 749

April 30, 2020

Sent via E-mail: eaoinfo@gov.bc.ca

PO BOX 9426 STN PROV GOVT
VICTORIA BC
V8W9V1
Attention: Scott Bailey,
Assistant Deputy Minister, Environmental Assessment Operations

Dear Mr. Bailey:

Re: Proposed Extension to Woodfibre LNG Limited's Environmental Assessment Certificate (#E15-02) – request for reconsideration of formal acceptance of application

We represent My Sea to Sky in the above-noted matter. We write in regard to the letter from David Keane to Michael Shepard dated March 24, 2020, which requested an extension of the duration of Environmental Assessment Certificate #E15-02 to October 25, 2025, and to the posting on the Environmental Assessment Office (EAO) website dated March 30, 2020 stating “The EAO has formally accepted an Application from Woodfibre LNG Limited for an extension to the deadline of their Environmental Assessment Certificate (E15-02), issued on October 26, 2015.”

We write for three purposes:

- i. To request a copy of the record of decision with respect to the decision by the EAO to formally accept the request for an extension;
- ii. To request a reconsideration of that decision;
- iii. To request that if the EAO should ultimately decide to proceed to consider the request for an extension, that My Sea to Sky be accorded status as a participant in that process.

Background

The law is clear that the holder of an environmental assessment certificate that intends to make an application under section 18 (2) of the *Environmental Assessment Act*¹ for an extension of the deadline specified in the certificate must make the application no later than 9 months before the

¹ Mr. Keane's letter indicates an understanding that this matter falls under the old version of the *Act*: SBC 2002, c. 43. We are also proceeding based upon that understanding.

deadline expires.² By our calculation, the deadline for submission required by the regulation was January 26, 2020. The applicant failed to meet this deadline, however, and submitted its application two months late, thereby reducing the amount of time available for reviewing the application by more than twenty percent. We note that the applicant failed to provide any explanation for the late filing. We also note that since the January 26 deadline predated any Covid-19-related restrictions in British Columbia, the failure to comply cannot have been caused by any such restrictions. And while we acknowledge that the “Certificate Extension Policy”³ was not released until after the applicant submitted its application for an extension, some of the contents that that policy specifies “must” be included are conspicuously absent from the application; the need for addressing such highly relevant factors might reasonably have been apparent to the applicant even apart from their inclusion in the policy.

The presumptive outcome should therefore have been that the EAO refused to accept the application. The application could not have been legally accepted unless the applicant could discharge the onus of showing that: (a) the EAO could legally accept the application for an extension in this case; and (b) the EAO should accept the application for an extension in this case.

On the question of whether the EAO could legally accept the application for an extension, it only has the discretion to do so if satisfied that sufficient time remains to appropriately review the application.⁴ It appears that Mr. Keane’s letter contains no submissions whatsoever on this point. Neither did the EAO solicit from interested parties – which would include My Sea to Sky, an intervenor in the original hearing by which the applicant obtained its certificate five years ago – submissions on their expectations as to the parameters of the decision-making process on the request for an extension or their intentions with regard to participating in that process. *Prima facie*, therefore, there was no factual basis upon which the EAO could base a decision on whether or not it was legally able to accept the application for an extension.

At this time, the EAO has not released reasons for its decision to formally accept the application for an extension. As a participant in the hearing that resulted in the issuance of the certificate five years ago, My Sea to Sky has an ongoing interest in the certificate and in the question of whether or not it should be extended. It therefore had a legitimate expectation that the EAO would provide reasons for its decision to accept the application,⁵ particularly given that that decision turned upon whether or not a legal test established by regulation could be discharged.

Could the burden of showing that sufficient time remained to appropriately review the application have been discharged?

In our submission, it is very unlikely that the onus of showing that sufficient time remains to appropriately review the application could have been discharged in any event due to the current Covid-19 crisis. Mr. Keane’s letter acknowledges that in its business dealings, the applicant is “attempting to adjust timelines as the effects of COVID-19 unfold”. The EAO’s own website

² *Environmental Assessment Fee Regulation*, B.C. Reg. 50/2014, s. 5(1).

³ Environmental Assessment Office, “Certificate Extension Policy”, April 22, 2020.

⁴ *Environmental Assessment Fee Regulation*, s. 5(2).

⁵ *Gichuru v. Law Society of BC*, 2010 BCCA 543 [28].

acknowledges that “While we are continuing to seek to advance projects and respond to issues in a timely way, we anticipate that there may be delays in some circumstances.” At a time when the provincial state of emergency has been extended yet again, travel is restricted, and most offices are closed, it would be unrealistic to expect that an appropriate review in a contested application – and we can advise that this application will be contested - could be conducted in less than the minimum time required under the regulations rather than requiring more than that minimum time.

Admittedly, it may seem unfair that a factor beyond the applicant’s control – Covid-19 – is a factor that could be determinative of whether or not the application for an extension can be received. The test established by the regulation, however, is an absolute one, which makes no allowance for whether factors are external to an applicant’s control. In addition, of course, other factors that make the review more complicated, such as the ongoing requests for amendments to the certificate, are ones that were within the applicant’s control. Further, the decision to apply two months late and the decision to make no submission as to whether the review could be completed in the remaining time were also factors entirely within the applicant’s control.

If the application could have been accepted, should it have been accepted?

If, however, the EAO were to have decided that it could legally have accepted the application, then the question would still have remained of whether or not it should exercise its discretion to do so. On that question, it would be our submission that the application for an extension should not be accepted. While we do not wish to unnecessarily anticipate the arguments that My Sea to Sky would make on the ultimate question if the application were to proceed to a review process, several of the same grounds that would be raised as to why the application should not ultimately succeed are also relevant to the question of whether the application should even be accepted.

Of these, we will only mention the most crucial one at this time, namely that circumstances have changed so completely in the five years since the certificate was issued as to make it inappropriate to simply extend the certificate rather than undertaking a fresh evaluation. As your office states in its user guide, “The time limit is in place to ensure that certificate conditions do not become outdated as a result of changes over time in government policy, technical standards, scientific information, legal/regulatory expectations, and other factors.”⁶ Exactly such changes have occurred since the certificate was issued five years ago. A major change is to the financial viability of the oil and gas industry, which has led to hundreds of bankruptcies in the oil and gas sector during the 2014-2019 period, and will have affected the business case for the project specifically, as well as the revenues that the Province expected to realize through the operation of the project. As well, new knowledge about the severity of climate change following the 2018 release of the IPCC’s Special Report on Global Warming of 1.5°C has resulted in declarations of a “climate emergency” with implications for British Columbia, given that if all LNG projects proposed for British Columbia were to proceed, it would be impossible for the province to meet its climate target. Further, the new provisions of the *Fisheries Act* that became law in 2019 pursuant to Bill C-68 have mandated much greater attention to the implications of the project for the marine environment than was the case five years ago.

⁶ BC Environmental Assessment Office, “EAO User Guide: Introduction to Environmental Assessment Under the Provincial Environmental Assessment Act (2018)”, version 1.01, March 30th, 2020, p. 47.

Since the likely outcome of a review into whether the certificate should be extended would be a decision to not extend the certificate and to instead require a new application, that would mitigate against an exercise of discretion to accept the application for an extension.

How to Proceed

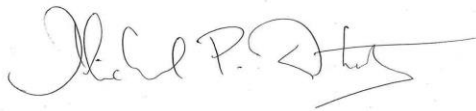
As set out above, it is our submission that the EAO has made legal errors by formally accepting the application for an extension and by failing to provide reasons for that decision.

This is, however, subordinate to the overriding concern that if the application for an extension were to be accepted, that the application receive a thorough review before any decision is made on whether or not to grant the extension. In our submission, an appropriate review would require at a minimum:

- the full participation of My Sea to Sky;
- a process that allow participants to adduce expert evidence, submit written and oral argument, and cross-examine representatives of the applicant.

We look forward to hearing from your office regarding this matter at your earliest convenience.

Sincerely,



Dr. Michael P. Doherty
Barrister & Solicitor

c. D. Keane
K. Jardine
Hon. G. Heyman