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Re: Initial comments on Environmental Mitigation and Offsets Policy Discussion Paper

Dear Ms. Feick:

We appreciate the invitation to comment on the Ministry's Environmental Mitigation and Offsets discussion paper and ideas for a proposed policy (the "Policy"), as well as your willingness to answer various questions we raised in previous correspondence.

It is our understanding that further public consultations will be held regarding the proposed Policy in the Spring or Summer, as the Policy is drafted. However, we did want to make some general comments on the current Discussion Paper and on our hopes and concerns regarding the Policy as currently envisaged.

General comments on mitigation and offsetting

While avoidance, and where that is not possible, mitigation of environmental harm is always desirable, our groups have not widely endorsed the concept of environmental offsets. The idea that environmental destruction can be put right in one place by improving environmental features elsewhere is troubling for many of us.

Some of our groups have come to believe that carbon offsets, appropriately monitored and governed and on a limited basis, are a valuable tool in reducing greenhouse gas emissions, but even on this issue there is skepticism. We know too well the difficulties of creating real offsets that will result in actual reductions and not be subsequently reversed.

Conceptually similar, and additional, problems exist with offsets to compensate environmental features. In particular, there is a bias in designing offsets towards over-simplification, since modeling complex ecosystems is both expensive and time-consuming. This, combined with the sheer difficulty of replacing ecosystem features and some features that are irreplaceable and should never be subject to offsets, means that it is common for offset based systems to fail to meet the goal of no-net loss. For example, reviews of Fisheries and Oceans Canada's No Net Loss policy demonstrated that the policy has in fact failed to achieve no net loss.¹ We have similarly been alarmed at the willingness of both the federal and provincial governments to consider accepting the destruction and replacement of entire lake ecosystems as an "offset" in mining projects, despite the evidence that the construction of such ecosystems is beyond current scientific knowledge.

The Discussion Document does suggest that priority will be given to avoidance and mitigation. However, it also refers to a cost-effectiveness test in determining when mitigation is not practical.² **In our view, offsets should be the exception rather than the rule under the Policy and should form a relatively small portion of the over-all approvals under the Policy** (just as the use of offsets is constrained in the design of many carbon offset systems). Even mitigation should be encouraged if at all possible.

The Discussion Document seems to contemplate that such offsets can be evaluated on a case-by-case basis, and does not recognize that identification of when offsets will be appropriate, where they should be located, how extensive they should be must all take place in the context of a broader conservation strategy for the province. As explained in the Insight Investments and IUCN (the World Conservation Union) report, *Biodiversity Offsets: Views, Experience and the Business Case*:

In order to make such trade-offs, **it is essential to reach broad agreement on conservation priorities**; to assign values that allow a determination of what can be damaged, what needs to be protected, and what can be traded for what.³

Those interviewed for that report "stressed that those designing offsets should understand the conservation priorities of the country or region concerned and plan their offsets with a view to making the best possible contribution at an ecosystemic, landscape or eco-regional level."⁴

Similar points are made in the Biodiversity Offset Design Handbook written by the Business and Biodiversity Offsets Project, which discusses a variety of approaches to prioritize avoidance and mitigation and to identify features for heightened environmental protection, in the context of

¹ D. Harper and J.T. Quigley. "No net loss of fish habitat: a review and analysis of habitat compensation in Canada." ENVIRON MANAGE. 2005 SEP;36(3):343-55.

² Discussion paper, p. 5.

³ Biodiversity offsets: views, experience and the business case, available at http://biodiversityeconomics.org/library/browse_the_library_by_major_theme/business_and_consumers/csr/offsets/.

⁴ Ibid.

agreed upon conservation priorities.⁵ In particular, some offset systems have been designed to include multiplier effects, to discourage offsets and prioritize avoidance, as well as to deal with uncertainty, environmentally rare or valuable features, and address other concerns about loss of environmental features arising from an offset system.⁶ This policy, when informed by a broader conservation strategy, could address specific concerns associated with the cost-effectiveness test by the placing emphasis on conservation priorities when considering the cost-effectiveness of avoidance and mitigation. Unless and until the Policy fits directly into this type of broader conservation strategy, with that strategy guiding its implementation and the selection of avoidance/mitigation/offset options, it will be difficult for our groups to support it.

We have some specific comments on issues and points raised in the Discussion Document.

Principles and Goals

There are currently no goals that speak to maintaining ecosystem health, values or resiliency. Given one of the principles of this policy is 'no net loss,' it seems like a logical step for this principle to be reflected in the goals. An example of this goal could be "Maintain regional ecosystem resiliency."

We also note that best practice guidance on the development of offset systems often adopt a number of principles that do not appear in the current Discussion Document. We would refer you to the Principles advocated for by the Business and Biodiversity Offset Program.⁷ Without necessarily endorsing each principle, some of the principles which are missing and should be included are:

Additional conservation outcomes: A biodiversity offset should achieve conservation outcomes above and beyond results that would have occurred if the offset had not taken place. Offset design and implementation should avoid displacing activities harmful to biodiversity to other locations.

Limits to what can be offset: There are situations where residual impacts cannot be fully compensated for by a biodiversity offset because of the irreplaceability or vulnerability of the biodiversity affected.

Landscape context: A biodiversity offset should be designed and implemented in a landscape context to achieve the expected measurable conservation outcomes taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach.

Stakeholder participation: In areas affected by the project and by the biodiversity offset, the effective participation of stakeholders should be ensured in decision-making about biodiversity offsets, including their evaluation, selection, design, implementation, and monitoring.

⁵ See <http://bbop.forest-trends.org/guidelines/odh.pdf>, from pp. 59-66 for discussion of another detailed and approach to prioritizing avoidance and mitigation over the use of offsets.

⁶ <http://bbop.forest-trends.org/guidelines/odh.pdf> at pp. 89-94.

⁷ <http://bbop.forest-trends.org/guidelines/odh.pdf> at p. 15.

Equity: A biodiversity offset should be designed and implemented in an equitable manner, which means the sharing among stakeholders of the rights and responsibilities, risks and rewards associated with a project and offset in a fair and balanced way, respecting legal and customary arrangements. Special consideration should be given to respecting both internationally and nationally recognized rights of indigenous peoples and local communities.

Long-term outcomes: The design and implementation of a biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the project's impacts and preferably in perpetuity.

Transparency: The design and implementation of a biodiversity offset, and communication of its results to the public, should be undertaken in a transparent and timely manner.

In terms of the current principles, we object strongly to including a results-based approach and reliance on professionals as “principles” of the Policy. We will discuss further below some of our concerns about these approaches, but regardless, to hold these approaches to regulation up on par with true principles, such as no-net loss, full cost accounting or serving the long-term interests of British Columbians is absurd. We maintain that as generally implemented professional reliance and results-based approach has been inconsistent with the other principles.

The principles and vision that these two “principles” presumably seek to achieve relate to efficiency within government. In our view, these approaches rarely achieve that purpose.

Cumulative Impacts

Although the principle 1 in the Discussion Paper makes reference to cumulative effects, it is not immediately evident how cumulative impacts will be addressed in a system that considers avoidance/mitigation/offset options on a project by project basis. However, consideration of cumulative impacts will need to be addressed in some way to avoid net loss.

The impacts of a project or multiple development projects across an area or region can, when added to the impacts of other projects, have cumulative impacts that are different, larger and farther reaching than anticipated. These impacts can have the effect of undermining ecosystem resiliency and the capacity of an ecosystem to support future projects.

While it is the responsibility of the government to manage across projects and regions, there is not currently any consideration for cumulative impacts in this policy. If cumulative impacts are not considered within this policy, there needs to be an identification and clear integration with separate regulation/policy that does appropriately manage for cumulative impacts.

Ministry staffs have indicated that an inter-agency Natural Resources Steering Committee is currently overseeing two “demonstration projects” aimed at developing tools for “integrated, area-based decision-making,” and suggested that these pilot projects will help guide the development of this policy in relation to cumulative impacts. If area-based decision-making results in effective consideration of cumulative impacts then we would likely support it, but at a minimum there is a tension between area-based decision-making and a policy which seems to focus on mitigating and offsetting at a project level. This tension might be addressed to some

degree by a conservation strategy and/or landscape level approach to offsets which determines the suitability of offsets based upon that strategy, as discussed above.

Minimizing cumulative impacts emphasizes the importance of avoiding environmental impacts in the first place, rather than attempting to address them through mitigation and offsetting measures.

Full cost accounting

Our organizations are supportive of the suggestion, in the Discussion Document, that a full cost accounting approach will be adopted; however, any full cost accounting should include the valuation of ecosystem services, such as the assessment, in dollar terms, of costs or benefits associated with changes in the environment—costs not reflected in the normal market price of goods and services (such as the value of fresh water, forests for climate change mitigation, etc).

Crown lands and resources vs. private lands

The Discussion Paper raises the question as to whether the Policy will apply only to activities occurring on Crown lands or will include activities on private lands which impact Crown lands. Our organizations recommend that all development projects affecting environmental values on Crown Land be included within this policy, including those occurring on private land. One of the purposes of this policy is to seek no net loss of environmental resources on Crown Land. Therefore, it is only logical that all development projects impacting those values be considered, regardless of where they originate.

In addition, there are publicly owned resources, such as water, wildlife, and fish that may be compromised as a result of actions occurring on private properties. We would similarly urge that the policy should apply in respect of actions on private land that negatively impact such public resources.

Parks and other protected areas are unique spaces in the province of British Columbia that are provided with special designation for a variety of reasons, such as ecosystem values, wildlife habitat, scenic values, water values, ecosystem representation, connectivity, etc. As such, any proposed project that impacts protected areas should have adaptation and mitigation requirements that are likely to be different than for other Crown land and will need to consider the unique values and purposes of protected areas in any proposal. The policy will need to make a clear distinction between how impacts to protected and non-protected areas will be managed and provide clear lines of integration with existing policy and regulations for protected areas.

Results-based and Professional Reliance

The Discussion Document adopts with no real discussion as principles that the Policy will rely heavily on a results-based regulatory approach and professional reliance. We have concerns with both.

Results-based regulation is one tool among many, and ideologically committing oneself to a single tool is not effective in obtaining the best result. While results-based regulations can have benefits

in terms of ensuring that end goals are obtained (section 35 of the Federal Fisheries Act, which prohibits the Harmful Alteration, Disturbance or Destruction (HADD) of fish habitat is an example of a results-based law) and allows that regulated individuals have flexibility in achieving desired results, the Results-based approach has a number of draw-backs:

- Unless results are appropriately fashioned and/or there is wide agreement by what is meant by them, the resulting laws may be unenforceable. We believe that this has been a major factor in the collapse in environmental convictions in BC starting in about 2003.⁸ The complexity of drafting enforceable results means that the identification of results should not be left to individual statutory decision-makers, as seems to be contemplated by this policy.
- Contrary to what seems to be a predominant opinion in the BC Government, the implementation of results-based regulation requires greater resources than many other legal tools. This is because determining if results are achieved requires base-line data, field inspections, and the use of experts.
- Results-based approaches as implemented in BC have often constrained the ability of government to ensure that the steps being taken will achieve the desired results. This is not acceptable given the potential for offsets and mitigation measures to be incorrectly designed and to result in permanent environmental or socio-economic harm.
- We are not confident that the Ministry has the resources to perform the types of auditing and enforcement work contemplated by a results-based offset policy.

In regard to professional reliance, in recent years there are increasing examples of professionals hired pursuant to BC's environmental laws reaching contradictory or incorrect results. As with results-based legislation, professional reliance cannot work unless the legislation creating the professional task is appropriately fashioned and/or there is widespread agreement of the expected actions of the professional in achieving the result. In addition, there are requirements for accountability and oversight that have not generally been implemented in professional reliance regimes.

A critical enabling condition for professional reliance is the adherence to best practices. There is considerable literature regarding which approaches work best to incorporate ecological baseline information into regulation, which we recommend your team review. The goal of these authors is to maximize the integrity of the scientific advice, and the transparency and accountability of decisions that follow from it.⁹

Regulation

⁸ See <http://wcel.org/resources/environmental-law-alert/bc-fails-halt-collapse-environmental-enforcement-2009>.

⁹ Hutching, J.A., Walters, C., Haedrich, R.L., Is scientific inquiry incompatible with government information control?, *Can. J. Fish. Aquat. Sci.* Vol. 54, 1198-1210, 1997.
Svancara, L.K., Brannon, R., Scott, J.M., Groves, C.R., Noss, R.F., Pressey, R.L., Policy-driven versus Evidence-based Conservation: A Review of Political Targets and Biological Needs, *Bioscience*, Vol. 55 No. 11, 989-995, November 2005.

The Discussion Paper states that regulatory changes as a result of this policy are not being contemplated at this time unless required to support financial management of offset systems. Should this policy be finalized and implemented, an important aspect for its success in achieving environmental objectives and ‘leveling the playing field’ for all sectors is the degree to which it has ‘teeth’ in regulation. It is the recommendation of our organizations that if this policy is approved that it move beyond being a guide for government staff and be nested in regulation in a legally enforceable framework.

Interface with other policies and issues

This discussion paper will lead to a policy that should clearly be integrated and linked to other policy and regulatory initiatives that the province is undertaking, such as climate change policies and the zero deforestation and the forest-based carbon offset protocols. If not in the policy itself, it will be very important to understand how all of these policies and protocols are being integrated with one another in a manner where they are mutually reinforcing.

In particular, we were surprised, given recent efforts to develop policies and regulations related to carbon offsets, that there was no mention in the Discussion Document of climate change. We believe that greenhouse gas emissions (including the release of stored carbon) should be one of the environmental features that may be considered and addressed in offsets under this policy.

Decision point

The results-based approach contemplated in the discussion paper places responsibility for assessments, baselines, mitigation and offsetting measures, and monitoring on the proponent with guidance provided by the relevant ministry. The discussion paper does not identify a step in the process whereby the province makes a decision, based upon the proponents information, on whether or not the project impacts can be managed for appropriately (locally and cumulatively) for the project to be approved. We recommend that a clear decision-point be included in the policy. Additionally, we recommend that this decision-point precede any physical on-the-ground mitigation work.¹⁰

Conclusion

Thank you for the opportunity to review the Policy. Please contact us if you have any questions or require further information about the above points. We look forward to commenting further as the details of the Policy are developed.

¹⁰ In 2010, Selkirk Power’s (proponent) mitigation measure to translocate blue-listed west slope cutthroat trout from Cupola Creek into Ventego Creek was approved and begun before the independent power project it was intended to mitigate was approved. The translocation was halted due to First Nations and public opposition.

http://www.bclocalnews.com/kootenay_rockies/thegoldenstar/news/108436954.html

Questions or comments on our submissions may be directed to Andrew Gage, West Coast Environmental Law, at 604-684-7378, ext. 206 or Stephanie Goodwin, Greenpeace, at 604-761-6722.

Sincerely,

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