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COMMENTS ON BC'S DRAFT CUMULATIVE EFFECTS FRAMEWORK

Thank you for the opportunity to comment on the draft BC Cumulative Effects Framework (CEF). We are pleased that the Province is in the process of developing a strategy to better assess and manage the cumulative ecological and social effects of past, present and future developments.

In particular we are very supportive of the overall policy commitment to undertaking periodic values-based regional cumulative effects assessments, and to using the results in operational, tactical and strategic decision-making. We also have a number of suggestions to clarify and strengthen the current draft of the CEF.

In our submission the ability of the CEF to ensure that the values and rights of importance to British Columbians are truly safeguarded will depend on:

1. Assessment of the condition of values as compared to a pre-industrial baseline in order to understand current condition and future risks to values.
2. The existence of legal management objectives and related management triggers that are based on best available science and Indigenous law/knowledge and are directed at managing to low risk for identified values.
3. Involvement of First Nations as decision-makers in all aspects of cumulative effects assessment and management.
4. Meaningful participation of the public and civil society groups in all aspects of cumulative effects assessment and management.
5. A legal requirement to implement the outcomes from cumulative effects assessment in operational, tactical and strategic decision-making.

We would also make the overarching comment that in developing a new approach to such a critical area as cumulative effects assessment and management there is both an opportunity and an obligation to collaborate with Indigenous peoples - one that has not been fully realised to date. New models of shared and joint decision-making are operating on the ground in BC right now and this reality is not yet reflected in the draft policies. We also caution that the governance and decision-making aspects of the draft policies do not appear to adhere to the principle of free, prior and informed consent as set out in the UN Declaration on the Rights of Indigenous Peoples, which the federal government has recently committed to as a foundation for nation-to-nation relations and consultation in Canada.

Objectives and triggers

Cumulative effects management is a cycle of activities that begins with establishment of strategic level direction, and includes assessing, managing and regulating activities to ensure objectives are met, as well as monitoring of effects and undertaking adaptive management. Seen in this light, the importance of ensuring that strategic plans and legal requirements are designed to truly uphold identified values is apparent.

We have explored extensively elsewhere many of the legal barriers to effective cumulative effects management in BC. See for example: “BC’s Land Use Laws are ‘Hardwired for Failure’”¹. This 2013 analysis of all legally established, mapped areas with conservation-related management objectives at a landscape level or above raised a number of fundamental issues about the adequacy of existing legal objectives for effective cumulative effects management and to provide for the resilience and adaptability of ecological systems and human communities in the face of climate change.

In short, to the extent that management triggers and management responses² are directed at upholding outdated or inadequate legal objectives the whole CEF framework rests on a shaky foundation. At the broadest level, we advocate for the evolution of land use designations and legal objectives to reflect best available science, local knowledge and Indigenous law/knowledge applied through proactive ecosystem-based planning and assessment. We see the potential for CEF regional assessments to identify the need and catalyze needed shifts at this strategic level.

For this reason, we also recommend that the CEF be refined and implemented to focus on safeguarding values rather than simply meeting bare minimum legal requirements. Many of the tools for doing so are already embedded with the draft policy with modest shifts in emphasis.

Determining baselines, benchmarks and triggers

Baseline: For assessing the current condition of CEF values, a pre-industrial baseline should be used. While Part 1 of the Framework states that the timeframe used for assessing current conditions will be historic to present,³ FLNRO staff at the June 16 CEF workshop suggested that a pre-industrial baseline may not be used to assess current conditions. It has been accepted by Canadian review panels assessing the impacts of proposed projects in areas subjected to historical industrial impacts that the base case should represent a pre-industrial baseline, which “represents conditions before substantial industrial development of [a] region”⁴ ⁵and therefore most accurately reflects the impacts of existing and approved developments. To ensure that cumulative effects assessments accurately incorporate the effects of historic activities

¹ Jessica Clogg and Deborah Carlson, *Land Use Planning for Nature, Climate and Communities* (West Coast Environmental Law Research Foundation, 2013), available on-line at: http://wcel.org/sites/default/files/WCEL_LandUse_report_web.pdf.

² While pleased to see the introduction of an “early warning” enhanced management class we note that the stated management goal in that class remains linked to the regulatory/policy trigger (not scientific benchmarks related to the actual risk to the value).

³ British Columbia, “Cumulative Effects Framework Part 1: Policy for Cumulative Effects Assessment” (April 2016 Review Draft for Engagement) at 12.

⁴ Jackpine Mine Expansion Project Joint Review Panel, “Shell Canada Energy Application to Amend Approval 9756, Jackpine Mine Expansion Project,” 2013 ABAER 011 (July 9, 2013) at 11: <http://www.ceaa.gc.ca/050/documents/p59540/90873E.pdf>.

⁵ The historic range of variability in ecosystem conditions reflected in a pre-industrial baseline should also be understood to include as an integral component conditions arising from Indigenous management.

consistently across the board, we submit that the policy should include a requirement to use a pre-industrial baseline when assessing current conditions of values.

Identifying low risk benchmarks and their relationship to management triggers and responses: We were pleased to hear FLNRO staff confirm at the June 16 workshop that scientific benchmarking will occur for all values as part of the assessment protocol, regardless of the existence a legal objective/regulatory trigger. It would be valuable to confirm this in the policy as well.

We submit that low risk benchmarks for valued components should be identified using best available science, local and Indigenous law/knowledge. The Ministry of Environment defines a low risk benchmark “as conditions with a high probability of sustaining the environmental value in question over the long-term.”⁶ For analysis purposes, moderate and high risk benchmarks may also be identified, but we submit that the overarching goal of the CEF should be to manage valued components to low risk, i.e., to maintain, and where necessary restore “conditions with a high probability of sustaining the environmental value in question over the long-term.”

In other words, we submit that when the results of an assessment indicate that conditions have exceeded or are projected to exceed low risk benchmarks, enhanced management responses (including potentially a decision not to permit the activity in question to continue/not to approve a proposed development) should be implemented. To account for uncertainty, the identification of benchmarks should be based on the precautionary principle.

Also, best thinking in environmental assessment suggests that to achieve sustainable outcomes, assessments should continually strive towards net sustainability-enhancing gains (net environmental and socioeconomic benefits that are fairly distributed).⁷ Put another way, this entails seeking to maintain both ecological integrity and high levels of human well-being – aiming for outcomes that have the greatest mutually reinforcing benefits for all values.

In some areas of the province (e.g., the Central and North Coasts and Haida Gwaii) , legal objectives that embody low risk benchmarks have been enacted that apply to forestry activities (i.e., regulatory triggers are based on low risk benchmarks) . However, in the absence of such regulatory triggers , avoiding or mitigating actual risk to values should must take priority over understanding impacts vis-à-vis legal or policy thresholds that may be inadequate or out of date.

In turn, the outcomes of ongoing assessment and monitoring should provide feedback for evolving understanding of how well identified benchmarks are working to safeguard values, and for evolving benchmarks and regulatory triggers.

Climate change factors

Climate factors should be taken into consideration throughout and not just in long-term scenarios. Multiple scenarios need to be assessed in regards to future activities. Future scenarios should take into account both BC and Canada’s climate commitments and plans (including

⁶ Habitat Branch Technical Bulletin #1, “Environmental Risk Assessment: An Approach for Assessing and Reporting and Assessing Environmental Conditions” (MELP: 2000), available on-line at: < <http://www.env.gov.bc.ca/wld/documents/era.pdf>>.

working towards carbon neutrality by 2050 doing our part to meet Canada's Paris climate commitments) and should not assume that inconsistent activities will be approved.

Reporting

Members of the public feel alienated from meaningful input into environmental decision-making. It is imperative that reporting on cumulative effects assessment and management be both transparent and accessible. Data in general should be openly available but it is also important to have a summary that is easy for all members of the public to understand.

Results should be made available online and include a layperson's summary in narration form with supporting figures, maps etc (including infographics). In addition to the requirements in Part 2, section 8, the policies should include a requirement for all reporting on cumulative effects to be housed in a central location, and for decision-support packages to be made available on individual agencies' websites.

Timing and scope of engagement in cumulative effects assessment and management

We have written elsewhere about the deep disconnect that many residents feel from involvement and control over environmental decisions that affect their lives, and in particular concerns over managing the pace and scale of current and proposed development facing their communities.⁸ We look forward to working with FLNRO and other agencies to more fully flesh out approaches to meaningful public involvement in cumulative effects assessment and management.

In general, engagement should be early and ongoing for the public and civil society groups. The draft CEF policies appropriately provides for public involvement at all stages of the cumulative effects assessment process, but much will turn on the nature and depth of these opportunities. As a fundamental principle, the public and civil society groups should be consulted on the types of involvement they'd like, with a toolbox of co-designed approaches available to meet different needs, knowledge and time availability.

Our initial recommendation would be that collaborative decision-making processes (e.g., planning tables) and/or hearings (with cross-examination), i.e., intensive and formal public involvement opportunities would be commensurate with the significance and scale of periodic regional assessments and the development of assessment reports and recommended management responses. We note that resources, both financial and informational will be required to enable balanced participation in such opportunities given the relative imbalance between residents and civil society groups and corporate proponents.

Criteria for selection of values

We have concerns regarding criteria for selection of values (currently where a value has been identified as government priority through legislation or policy). Selection criteria need to be

⁸ See: Lindsay Staples and Hannah Askew, *Regional Strategic Environmental Assessment for Northern British Columbia: The Case and the Opportunity* (West Coast Environmental Law Research Foundation & Northwest Institute for Bioregional Research, 2016), available on-line at: <http://wcel.org/resources/publication/regional-strategic-environmental-assessment-northern-british-columbia-case-and>.

expanded to include rights, priorities and concerns of the public, First Nations and civil society groups. Also, the Policy should include a requirement for public comment and government-to-government engagement on criteria and require a demonstration of how the selection of values considered the rights, priorities and concerns of the public, First Nations and civil society groups.

Criteria should ensure that data includes traditional Indigenous knowledge and local community knowledge. Missing values include climate resilience, salmon ecosystem services and social values. More work needs to be done on the criteria in relation to social and economic values. There needs to be space for local knowledge in establishing values, components and indicators. It is important to avoid a simplistic approach to research factors and include sustainability-based criteria, such as longevity and diversity of employment (not just “jobs”), distribution of benefits, intergenerational and interregional equality, housing, and social impacts of industrial change, etc.

Decision-making and tiering

A major shortcoming of the draft policies is that completing regional cumulative effects assessments and other elements of the policies are not actually legally required, nor are decision-makers or other actors legally required to act on the outcomes from assessment. Without a legal requirement to apply the CEF in environmental decision-making, there is a real risk that its application will be inconsistent across departments, regions and industries, and perhaps not applied at all. Public oversight and the ability to appeal or judicially review the application of the framework would also help create consistency and accountability.

We look forward to working with FLNRO and other agencies to develop legal options to better legally integrate the CEF into operational, tactical and strategic decision-making. At one end of the spectrum, the CEF might evolve into a full legal framework. At the other more minimum end of the spectrum an overarching legal amendment could be made, e.g., to the *Environment and Land Use Act*) to include a requirement for all relevant departments to apply the CEF in environmental decision-making across the province. We also recommend evolving the language in the policy itself to change the non-mandatory language in Part 2, section 6 (e.g., “The following should be considered,”) to mandatory language (e.g., “The following must be considered”) (including in sections 6.2 and 6.3). By making complementary legislative changes, consistency in application and effectiveness can be enhanced without raising issues of fettering.

Whatever legal mechanism is used, ultimately for the CEF to work it needs to include a requirement and mechanisms for linking the CEF to decisions at the strategic (plan, policy and programs) and project-level stage. This ‘tiering’ would mean that projects and strategies would be both required to consider CEAs and to feed back into the CEF. For approvals of undertakings, this feeding back would entail updating CEAs with their project-specific information (both at the approval stage and continuously with monitoring). For strategies, feeding back would entail updating the assumptions that underlie future case scenarios. Therefore section 6.1.2.3 should also be amended to require government staff to require baseline and environmental monitoring data collected for CEF values, not just in relation to EAs but in all regulatory permitting processes.

Decision-making criteria

Environmental assessment and decision-making should at its core be not reactionary, but rather forward-looking and based on planning. As noted above, management should aspire to net environmental gains, as opposed to using benchmarks and triggers as a ceiling for protection. To

help achieve these goals, identified decision-making criteria in the draft policies (section 6.1.1.2) should evolve to include concepts like the following:

- a. Whether and to what extent after mitigation the proposal is consistent with maintaining or restoring conditions with a high probability of sustaining the value in question over the long-term; and,
- b. Whether and to what extent the proposal would result in net sustainability-enhancing outcomes that are fairly distributed across communities, values and generations.

In addition, we recommend that the Policy include the provision of reasons by delegated decision-makers that address how CE assessments have been addressed in decisions.⁹

Finally, we note that success of the CEF will depend in part on “buy-in” to the CEF by all agencies, and reporting requirements would facilitate its application. We recommend fostering an understanding within departments, and especially among senior management, of the importance of the CEF, for example by facilitating efficiencies in decision-making. Project approvals should be based on the CEF and feedback into it, in part so that the burden on individual proponents to assess the cumulative effects of their projects in conjunction with past, existing and future projects is lessened. Decision-makers should understand that when properly done, cumulative effects assessments ease the burden on everybody.

To assist with oversight, departments should also be required to report back on how the CEF has been applied in decision-making and how information has been fed back into the CEF.

Considering CEs in the absence of a CEA

Where a CEF assessment has not been completed for an area and/or value, a precautionary and sustainability-based approach should apply to the identification of potential cumulative effects and management objectives. In particular, we recommend the addition of the following criteria:

- a. Whether biophysical systems are adequately protected;
- b. Whether existing impacts are unfairly distributed among individuals, communities, regions and interests, and in particular whether disadvantaged groups bear a disproportionate burden of impacts;
- c. Whether potential impacts will be disproportionately born by future generations, without equal future benefits to those generations; and
- d. Whether current decision-making trends indicate an increased risk to the sustainability of biophysical or social values.

We look forward to the next iteration of the CEF and on working with you to implement the above submissions.

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⁹ From Meinhard Doelle, “The Lower Churchill Panel Review: Sustainability Assessment under Legislative Constraints,” at 16:

<http://poseidon01.ssrn.com/delivery.php?ID=112001112005004074018126003124029071053009053038065056030072016066020082100007095094098007039126015013042084117018026074113120027039038017006088069002069010120030003051034072007089097117028003104028026114006126101065066112117070073091001003112099125&EXT=pdf>.