BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS

British Columbia Assembly of First Nations

Submission to:

Government of British Columbia on the

DRAFT B.C.'S OFFSET PROTOCOL POLICY

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1. INTRODUCTION*:*

The British Columbia Assembly of First Nations (**BCAFN**) is a Provincial Territorial Organization ("PTO") representing the 204 First Nations in British Columbia. BCAFN has the mandate to advance the rights and interests of First Nations people in British Columbia ("**BC**"); restore and enhance the relationship among First Nations people in BC, the Crown and the people of Canada; develop and promote programs and policies for the benefit of First Nations people in BC; and work in coalition with other organizations that advance the rights and interests of Indigenous peoples**.**

Climate change is impacting British Columbia and First Nations peoples and communities in particular. Given the current climate crisis, the development of mechanisms, procedures, and tools, such as carbon offset protocols, to guide greenhouse gas emission reductions is imperative and urgent. However, these protocols and climate mechanisms must be developed in a way that recognizes and respects First Nations' inherent and constitutionally protected Indigenous title, rights, and treaty rights.

This submission, a review of the *British Columbia Offset Program: Offset Protocol Policy*[1], was prepared by BCAFN with the support of Miller Titerle + Company.

2. SUMMARY

a) There is a lack of inclusion of Indigenous rights-holders ("**rights-holders**") and representative Indigenous governing bodies ("**IGB**") at all levels of carbon offset protocol ("**Protocol**") development and management.

b) In the development of Protocols, rights-holders or IGBs are not given priority. Given that decision-making powers generally remain in the control of the Province of B.C. (the "**Province**"), not giving priority to rights-holders or IGBs who choose to put forward Protocols for development appears contrary to the spirit of the UN Declaration[2]**.**

c) In choosing which Protocols to develop, the Province should include their impact on rights-holders as a necessary criteria for consideration.

d) There is also no inclusion of rights-holders or IGBs impacted by a Protocol to take part in development processes outside of providing submissions along with the general public.

[1] British Columbia Offset Program: Offset Protocol Policy, March 2022 (the "**Policy**")

[2] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (the "**UN Declaration**"), 13 September 2007, online: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>

This should change, with rights-holders and IGBs being included at an early stage of the development process.

e) In Protocol reviews, there is also no explicit inclusion of rights-holders or IGBs. Instead, there is only mention of a review triggering based on a lack of alignment with the Province's "broad priorities" – which likely includes a Protocol's impacts on rights-holders or IGBs. Impacts on rights-holders or IGBs should be its own criteria triggering a review, and not be considered as 'one of many' of the Province's priorities.

f) Rights-holders should also be part of review processes where their interests are affected. Where rights-holders are negatively impacted by a Protocol, they should be part of the decision-making around its deactivation. Currently, there is also no reference to rights-holders inclusion as a deactivation consideration criteria.

g) Any inclusion of rights-holders in development, review or deactivation processes should be voluntary.

3. COMMENTS AND CONSIDERATIONS

(a) Protocols Overview

The Policy document details new procedures surrounding the creation, review and deactivation of carbon offset Protocols. Protocols, as the Policy sets out, "provide a set of eligibility requirements and a methodology for calculating the incremental carbon emissions reductions and/or removals of a given activity type for use in B.C. projects"[3]. They ensure that offset projects are providing a methodology to quantify their emissions reductions and to ensure that the offset project is achieving the reductions it is being paid to meet. Additionally, different offset Protocols are used for different project types.

Currently, only Protocols that have the approval of the Director under the *Greenhouse Gas Industrial Reporting and Control Act* ("**GGERCA**") can generate B.C. Offset units[4]. The Director is also the statutory decision-maker for the B.C. Offset Program and is also titled the "Regulator" in the Policy[5].

(b) Developing a Protocol

The Policy sets out the criteria that the Regulator uses to assess where a Protocol should be developed. These criteria the Regulator balances are[6]:

[3] Policy at page 3.
[4] Policy at page 4.
[5] Policy at page 5.
[6] *Ibid*.

- *Alignment with B.C.'s broad government priorities, including B.C.'s commitment to reconciliation and working collaboratively with Indigenous nations to create new economic opportunities;*
- *Monitoring, reporting and verification (MRV) methodology readiness;*
- *Technological readiness;*
- *Potential scale of opportunity in B.C.; and*
- *Marketability of offset units in the global carbon market.*

These criteria are problematic in that they only vaguely include the involvement of Indigenous peoples. While they should be using the language of Indigenous governing bodies throughout the document, they instead reference Indigenous nations. This language is not in alignment with the *Declaration Act*[7]. Indigenous governing bodies is a more useful term in that it acknowledges that rights-holders will choose who they want to be their representatives as rights-holders in matters pertaining to law-and-policy-making engagement. The reference to a 'commitment to reconciliation' is also similarly vague and does not provide any substantive content on how this affects the Regulator's decision-making.

The process for collaboration with IGBs is also not its own weighted criteria, as it appears in the Policy as just one of the Province's broad government priorities. This is unacceptable. To be in alignment with the *Declaration Act*[8], any Protocol development decisions that impact Rights-holders must require their involvement in decision-making processes. This process should be co-developed with IGBs and representative Indigenous political organizations. An assessment of the potential impact on rights-holders should also be its own listed criteria.

Given the power of the Regulator regarding Protocol development decision-making, proposals put forward by IGBs should be given priority evaluative status to support Indigenous carbon offset projects. This is in recognition of Indigenous people's inherent rights to conservation and protection of the environment and the productive capacity of their lands, as stated in the UN Declaration[9]. IGBs should be given decision-making authority regarding Protocols that they have put forward and the process for their approvals need to be co-developed with rights-holders. This is in following with Articles 3 and 4 of the UN Declaration[10]:

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[7] *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019] chapter 44 (the "**Declaration Act**") at section 1.
[8] *Supra* note 6.
[9] *Supra* note 2 at page 21.
[10] *Supra* note 2 at page 8.

> *Article 3 – Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
>
> *Article 4 – Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

The Policy lists an eight-stage process for Protocol development that will take place once an emissions reduction or removal activity is identified as a priority[11]. At no stage of this process are IGBs identified specifically as participating in the process of development. The likely stage of an IGB's inclusion would be "Stage 5 – Public Engagement" ("**Stage 5**") where they would only have "a minimum 30-day consultation period [to] follow the release of a draft Protocol"[12]. Instead, when an IGB puts forward an offset Protocol for consideration or an IGB may be impacted by the implementation of an offset Protocol, an IGB's participation should start earlier in the process.

IGBs and Provincial Territorial Organizations ("**PTO**"), like the First Nations Leadership Council, should be involved at Stage 1 of the Protocol development phase, this is essential to ensure that IGBs are able to provide input on the Protocol at its conceptual stages. While Stage 1 involves a review of relevant technical documentation[13], and so may be less open for policy discussion, taking part at this early stage can offer important insights into the technical aspects of Protocols at their inception. This will ensure that the appropriate levels of co-development and meaningful engagement can be had with IGBs, before internal policy reviews take place without the voices of rights-holders present, and before the release of a public document with no clear process for the inclusion of IGBs in decision-making.

This should allow IGBs the ability to have a say and participate in a way that respects their status as rights-holders. Another addition to the stages to consider might be under "Stage 8 – Director approval and release" in a situation where an Indigenous rights holder is impacted by the development of a Protocol[14]. To recognize the sovereignty of rights-holders, it will be important to include their approval to sign off on the use of such a Protocol.

Protocols need to be developed in a way that considers their potential uses for Indigenous rights-holders, providing an analysis of the potential benefits or impacts on Indigenous rights-holders. Protocols need to ensure that they make clear the benefits and opportunities for First Nations under them and the potential projects which could be developed from their use. Protocols should

[11] Policy at page 6.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.

be developed, and prioritized, to the degree that they provide clear benefits to projects likely to be developed by Indigenous rights-holders.

(c) Reviewing a Protocol

The Policy also contains the conditions necessary to trigger the review of a Protocol. The factors that the Regulator are to consider are[15]:

- *Environmental, legal and financial risks to the Province or the integrity of the B.C. Offset Program that are related to the Protocol's applicability and use;*
- *Changes in circumstances post-approval that impact the Protocol's:*
  - *Alignment with B.C.'s broad government priorities;*
  - *Ability to ensure that projects result in permanent additional emission reductions and/or removals;*
  - *MRV suitability or efficacy; and*
  - *Administrative burden and/or costs.*
- *Opportunities to expand the scope of an existing Protocol to cover additional activities closely related to those already covered in the Protocol; and*
- *Submissions made to the Regulator by interested parties.*

There are again no explicit mentions of the participation of IGBs in the triggering of a review process. There is potential for IGBs to make submissions to the Regulator where their interests are involved to trigger a review. An impact on, or infringement of, Indigenous rights must be one of the indicated criteria that trigger a Protocol's review post-approval. Rather than making this contingent on the government's 'broad priorities' at the time, there must be an explicit consideration for how the Protocol impacts rights-holders post-approval as a necessary criteria for consideration.

The review process for a Protocol occurs in three stages[16]:

- *Stage 1 – Review of relevant technical documentation*
- *Stage 2 – Regulatory alignment review*
- *Stage 3 – Internal government scan for policy alignment*

There is no mention in Stage 2 of considering whether the Protocol aligns with the *Declaration Act*; this should be a necessary part of the review process. There should also be room for the

[15] Policy at page 8.
[16] *Ibid*.

rights-holders impacted by a Protocol post-approval to be involved in the review process. This involvement could occur likely at around the second stage of the review process when the Protocol is scanned to determine how it aligns with current regulations.

(d) Deactivating a Protocol

The Regulator can deactivate a Protocol subject to these considerations[17]:

- *No longer aligns with the GGIRCA, GGECR, any other applicable regulations, and existing B.C. Offset Program policy,*
- *Covers activities subject to legal requirements that were not in place at the time of approval,*
- *Relies on assumptions, approaches or quantification or monitoring methodologies that [are] significantly divergent with best practices or the most recent data available, and/or*
- *Is based on activities which utilize a technology or practice that is no longer considered to exceed business as usual.*

There is also a special process followed by the Director when a Protocol is being considered for deactivation[18]:

- *A discussion document regarding rationale for deactivation is released,*
- *Interested parties have 60 days to provide feedback,*
- *The Director will consider the feedback provided as part of the decision-making process,*
- *If deactivated, owners of projects using this Protocol will be notified, the Protocol is removed from the list of active Protocols and no new projects will use this deactivated Protocol.*

Projects that were previously approved under a deactivated Protocol are allowed to continue to function, so long as it continues to meet the standards required under that deactivated Protocol.

Areas, where rights-holders may cause the deactivation of a Protocol, are where legal requirements pertaining to rights-holders appear that were not present at the time of approval. It may be beneficial in cases where rights-holders are negatively impacted by an existing Protocol that they are included as part of the deactivation process in some capacity. This could be necessary to ensure that the views of rights-holders are properly accounted for in the deactivation process, so decision-making powers are not entirely left to the Regulator.

[17] Policy at page 9.
[18] *Ibid*.

Another area for challenges is where projects continue to function even after deactivation. If these projects were deactivated because the Protocols they abided by had adverse, negative impacts on rights-holders, these should be remedied or some other solution preferable for the Indigenous rights holder should be chosen.

(e) Engagement

Ultimately, there are opportunities in each of these processes to ensure meaningful engagement and collaboration with rights-holders. All areas of inclusion suggested should remain voluntary for the rights-holders impacted. The Joint Committee on Climate Change has provided a Best Practices guide that can serve as guiding principles for collaboration on Protocol development[19]. In its Annual Report, the JCCA states that any program seeking to involve First Nations needs to be designed to be flexible and accommodating to the needs of First Nations[20]. A flexible approach acknowledges that resources and funding support are necessary to ensure successful co-development and also works towards delivering co-benefits for the parties involved.[21] The JCCA – Best Practices also mentions the importance of providing early and on-going engagement opportunities for First Nations in the development process[22].

Given the technical nature of these Protocols in accounting for carbon emissions there will be value in having a designated resource for technical expertise, and capacity funding, to assist rights-holders in engaging in these processes. This capacity support is essential for Indigenous rights-holders to participate in these processes, and is a requirement of the Provincial government through the Declaration Act, as Article 29(1) of the UN Declaration states[23]:

> *Article 29(1) – Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous people for such conservation and protection, without discrimination.*

It is important to acknowledge that Indigenous rights-holders and their governing bodies may also be strained in dealing with the various community emergencies and developmental opportunities that demand their attention. This allows for PTOs to ensure that First Nations voices are represented in the development of regulations which might impact Indigenous rights-

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[19] Joint Committee on Climate Action ("**JCCA**"), *Annual Report*, 2020. Annex 2. Online at: <https://www.afn.ca/wp-content/uploads/2021/07/21-0015-JCCA-Annual-Report-EN.pdf> (the "**Annual Report**")
[20] *Supra* Note 18 at page 37.
[21] *Ibid*.
[22] *Ibid*.
[23] *Supra* Note 2 at page 21.

holders in the Province. Importantly, collaborative work with PTOs can never replace the involvement of Indigenous rights-holders and their governing bodies. PTOs can ensure that collaboration and meaningful engagement with Indigenous rights-holders is conducted in an appropriate way. The involvement of PTOs can ensure accountability that the Province is fulfilling their obligations to rights-holders at all stages of Protocol development, review and deactivation.