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Ministry of Forests, Lands and Natural Resource Operations
Natural Resource Road Project
Via email at NRRoadAct@gov.bc.ca.

Dear Sirs/Mesdames:

Re: Natural Resource Road Act Project

Thank you for the opportunity to comment on the proposed Natural Resource Road Act, as described in your discussion paper, dated November 2011 (the "Discussion Paper").

In general we are supportive of the idea of legislation that better coordinates the construction, management and deactivation of resource roads. A lack of coordination can result in the over-construction of road infrastructure, and the unnecessary breaking up of wilderness areas.

Part 1 – Framework Principles

We do not have any fundamental objections to the principles listed in Part I; however, as always, how these principles are applied, prioritized and implemented will be important.

As well, what is missing from these principles, and from the Discussion Paper, is important. We have reviewed the submissions of Wildsight, Conservation Northwest et al and entirely agree that the Discussion Paper does not spell out in any meaningful way how the public interest is to be judged under the proposed Act, or recognize many of the environmental harms inherent in road construction. In particular, the Discussion Paper does not recognize that the environment and the public interest may be best served by the deactivation of roads, and by limiting the proliferation of roads into wilderness and environmentally sensitive areas (for example, by establishing and implementing limits on road density to maintain critical habitat for species like grizzly bear). Further, we are not reassured from the Discussion Paper that the potential of the Act to minimize some of the cumulative impacts of industry – a major concern for us – will be realised.

We entirely agree with and support the call of Wildsight, Conservation Northwest et al for an access management planning process to determine how the public interest and environment are to be judged under the proposed Act.

We also are concerned that the Discussion Paper does not recognize the importance of consultation with both the public and with affected First Nations in the Road planning process, or give any indication as to when and how that may occur.

While the principles are fine at a general level, the Discussion Paper's explanation of some of them raise concerns. For example, principle c requires "that all roads be located, built and maintained with due consideration for the environment." However, the explanation of "what this means" makes no express reference to location/siting, limiting proliferation, or other issues related to whether a particular road

should be built, which are obviously key issues, and instead focuses on “management ... [of] unacceptable environmental impacts,” which appears to presume that the road will be built. It is not obvious that this specific language includes all aspects of the general principle.

A number of valued ecosystem components from water quality to species habitat are potentially impacted by roads. In order to meaningfully give due consideration to the environment, scientifically-based benchmarks/ targets related to maintaining and where necessary restoring such values need to be legally established and spatially applied in order to provide meaningful direction to decision-makers under the NRRA and otherwise. Current land use plans fail to do so in a meaningful way with respect to roads for a variety of reasons, ranging from timber supply impact caps on implementation of biodiversity measures, to legal limitations on the extent to which even legalized objectives (e.g., under the *Land Act*) apply in subsequent planning and resource decision-making for forestry, let alone other industries.

Part 2: Framework Policies

Part 2 sets out some of the specifics of the structures and decision-making processes required under the proposed Act, and here we do have some specific comments.

First, before referring to the numbered sections of the Discussion Paper, we note that there is no policy/topic listed in Part 2 that directly addresses the environmental impacts of roads, or explains the government’s objectives in relation to those impacts. Environmental impacts are incidentally mentioned in a number of the sections, using vague language like “unacceptable environmental impacts” or “consider any environmental risks.” The lack of such a section underscores the concern, referenced above, that the government has not fully appreciated or addressed the range of specific environmental risks and harms associated with road construction.

Second, we were surprised that the Discussion Paper does not address or acknowledge the fact that forestry roads are paid for by reductions in stumpage paid by forest companies. It seems to us that this structure could have a profound impact on the operation of the proposed Act, by subsidising the creation of roads, and thereby increasing their number, and by indirectly extending that subsidy to other industries that will now use the same resource roads. These issues should be fleshed out and explored.

Third, as with the Principles, we submit that Part 2 should have committed to meaningful First Nations and public consultation. The Act, and the duration and scale of the road building approvals, should be structured in a way that facilitates meaningful consultations. For example, members of First Nations or the Public should be able to identify clearly from the proposed right-of-way what roads are contemplated, where and when. Similarly, if road approvals or portions of road approvals remain valid for years after the road was originally proposed, then First Nations or the public may be unable to comment on changed circumstances should the holder of the approval finally decide to proceed.

Without further ado, here are our comments on specific elements of Part 2 of the Discussion Paper. Again, the numbers refer to the numbers used in the Discussion Paper.

1. **Scope of Resource Roads:** The exclusion of roads under Mines Permits concerns us, particularly since the exclusion is not defined or explained. If this exemption is intended to apply to all mining related roads, then such a broad exemption clearly undermines the entire purpose of the Act. It is not clear to us what is meant by roads under Mines Permits, since it is not immediately obvious that the *Mines Act* allows roads to be authorized under a Mines Permit (neither the definition of Mine, nor the sections related to Permit, make any reference to roads). Clearly the Act should apply to all Mining related roads.

The discussion is also ambiguous, since it clearly presumes that resource roads are not “public roads”, and exempts “public roads” from the purview of the Act. The fact is that under the Transportation Act¹ if public funds are used to build or maintain a road, and it is “travelled”, the road is legally considered a public highway. Similarly, rights of way which the owner gives the public a right of use, and which are used by the public, at common law become a public highway.² Our understanding of the law would suggest that many resource roads in BC may legally be considered public highways. We presume that the government does not intend to override the public rights associated with such roads.

We presume that the proposed Act is intending “Public Road” to refer to roads built and maintained by government agencies, or which are constructed primarily for public passage, but this will need to be defined more precisely in any Act.

2. **Planning:** We understand the Discussion Paper to indicate that existing strategic land use plans will apply generally to road siting, design, construction, maintenance and use, even if the plan was developed in the context of a specific industry (ie. most land use plans were developed in a forestry context, and often do not apply directly to other industries). This proposal is a useful starting point, but as noted above fails to recognize the limitations of existing land use plans. These plans were developed in the context of a policy environment that did not enable outcomes that can be expected to maintain ecosystem resilience or biodiversity in the face of cumulative environmental change from human activities. Maintaining the ‘porosity’ of the landscape and avoiding fragmentation from roads will become an increasingly acute issue as species move to stay within their ‘comfort zone’ in the face of climate change or risk becoming extirpated. An important opportunity exists as the Province and other actors increasingly grapple with new approaches to cumulative effects management in an area-based planning context to add an overlay to existing plans that deals with the needs of valued ecosystem components in a more holistic and scientifically-based manner. We support the requirements to prepare site level assessments as required to assess and avoid environmental risks, subject to our concerns about the over-use of Qualified Professionals, below.
6. **Liability for Damage:** While we have no objection to subjecting a person found responsible to damaging a resource road to “enforcement action,” we note that it is relatively rare to assign “liability for all costs associated” an offence through enforcement procedures. Such legal protection does not exist, for example, to water licence holders whose rights are compromised through violations of the Water Act or (for that matter) through inappropriate road construction. If this approach is adopted, we would suggest that those building, maintaining or using roads should also face possible liability for harming other resource users and/or the environment through non-compliance with the Act. To ensure compensation to industrial road users/designated maintainers, but to deny similar compensation to those negatively impacted by those road operations, is unfair.
9. **Road Suitability Assessment:** While this approach makes sense for industrial users, it does not make sense for occasional or recreational users, and this should be made clear.
10. **Designated Maintainers:** We approve of the idea that roads should have identifiable parties that are legally responsible for their maintenance and eventual de-activation.
14. **Deactivation.** The Discussion Paper appears to contemplate that the Crown is responsible for deactivation in a great many cases. Where possible we would hope that the industrial users will be responsible for deactivation of their roads, but also for the deactivation of the significant back-log of

¹ Transportation Act, S.B.C. 2004, c.44, s. 42.

² Gage, A. Highways, *Parks and the Public Trust Doctrine*, 18 Journal of Environmental Law and Planning 1, pp. 5-13.

roads that already exist on Crown land, where those roads access the same areas as a new road, or are otherwise linked to the current or past operations of an identifiable industrial user. In the same way that the Contaminated Sites provisions of the Environmental Management Act cast a wide net for parties that are responsible for past contamination, we would support a wide net for the parties responsible for deactivating historic roads. While there will doubtless be cases in which the Crown does need to step in to deactivate roads, this should not be a given.

The discussion seems to contemplate that so long as a user is willing to accept responsibility for maintaining a road, the road will likely remain open. This ignores the environmental impacts caused in many cases by simply having a road open.

Finally, with respect to the definition of ‘deactivation’. We agree that permanent mitigation of environmental risks from roads is an important goal, but note that historically, ‘deactivation’ of roads in British Columbia has fallen far short of actual soil rehabilitation. We would flag that required measures are actually sufficient or effective at achieving this goal.

18. Results-based: We do not believe that the commitment to an exclusively or primarily results-based approach has been effective in protecting the environment in BC law. Rather, a mixture of standards and results uses a broader range of legal tools, and will often achieve better environmental outcomes. If results are used (either exclusively or in combination with other tools), the legislation should impose a clear legal responsibility to collect base-line data. Such data should be publicly available, and is a pre-condition to assessing whether the prescribed results are being achieved. It should also be the case that security is required, to be claimed by the government if environmental results are not achieved.

While qualified professionals can play a role in achieving environmental standards, we are of the view that legal standards are required to provide accountability and transparency for such professionals. Such requirements could include:

- Ensuring that professionals perform functions where there is a clear consensus within the profession, and are not used for functions where no such consensus exists or where they are effectively making subjective value judgments.
- Providing for government to intervene when professionals are failing to follow legal requirements or where the environment or public safety is at risk;
- Clarifying that professionals who carry out public functions of this type are co-retained by the Province, and owe duties of care to the Province (notwithstanding that they are paid by a private party); and
- Imposing liability and sanctions on professionals who falsify data or who are negligent in their work, including liability for environmental damages.

19. Exceptions to Results-based. We would have appreciated more discussion of where such exceptions will be available, and assurances that this does not amount to a relaxing of whatever environmental standards may be put in place.
22. Efficiencies: While we appreciate the efficiencies created by the proposed consolidation of resource roads under one framework, we are concerned about the description of a “minimal process to amend documents”, which apparently includes amendments aimed at “adding a new road.” If the purpose of the Act is to rationalize road construction, making it easier to build new roads would not seem to be consistent. Moreover, this “efficiency” cannot be allowed to undermine meaningful First Nations and public consultations regarding the new road.

In terms of the suggestion of dispute settlement, we would recommend that such a mechanism extend not just to competing industrial road users, but also to members of the public concerned about recreational use, environmental impacts or the impacts on other resources.

23. **Public Watchdog:** We strongly support the idea of a public watchdog charged with overseeing resource road management, and believe that the Forest Practices Board is the appropriate body. Such a function is much better suited to the mandate and function of the FPB, which is resource industry and investigation focussed. The Ombudsman's office and the Auditor General's Offices carry out a much more general function, and requiring them to undertake ongoing monitoring of resource roads would undermine the responsive nature of those offices.
24. **Ownership and Control of Bridges:** At common law a structure which is physically attached to land is considered a fixture, and part of the land. Moreover, bridges are an integral part of roads which, when legally a public highway, may be considered to have been dedicated to the public. Accordingly, we consider proposal (b), which confirms that such structures are a public asset, to be consistent with the law and with good public policy. Certainly, one could foresee a bridge covered by option (a) being used by designated maintainers as a negotiating chip to buy concessions from other road users or from the government.
26. **Noxious Weeds:** The Discussion Paper recognizes the concerns associated with noxious weeds, but then proposes to address those concerns with after-the-fact requirements for soil re-vegetation and weed management (which we take, perhaps incorrectly, to refer to weed control efforts). Pest Management in BC is supposed to be based upon Integrated Pest Management, which requires that ecosystems be managed in such a way as to prevent pest species from arising in the first place. This means (a) minimizing roads that may act as corridors for the spread of noxious weeds; (b) measures to prevent the spread of weed species on roads that are built (ie. inspections of vehicles entering wilderness areas, limitation of access); (c) adjustment of industrial practices to limit cleared areas which are susceptible to invasion, and to maintain healthy ecosystems, which are not, etc.

More generally this point emphasizes that building and maintaining roads inherently poses a range of risks to the environment, especially in wilderness areas, one of which is the introduction of noxious weeds. This further emphasizes the need for the broader discussion that Wildsight and Conservation Northwest have recommended.

Conclusion

In conclusion, while we are broadly supportive of the consolidation of resource roads into a single Act, with consistent rules across industries, we believe that more work needs to be done to define how the environmental risks and costs of such roads will be evaluated and addressed. Some of these risks and costs have been spelled out in the Wildsight/Conservation Northwest submissions, which we endorse.

Finally, the Discussion Paper provides little detail about how the public and First Nations will be consulted, either in a proactive planning sense, or with respect to specific road construction, and we note the importance of addressing these issues.

Thank you again for the opportunity to make these submissions.

Sincerely,



Andrew Gage,
Staff Lawyer