

April 26, 2018

Alberta Energy Regulator Breaks New Ground on Offsetting of Caribou Habitat

By: Dave Poulton

Decision Commented On: [TransCanada Pipelines Limited, Applications for the White Spruce Pipeline Project, Fort MacKay Area, February 22, 2018, 2018 ABAER 001](#)

On February 22 the Alberta Energy Regulator (AER) released a decision that could advance Alberta's seemingly endless discussions on caribou conservation and on conservation offsets. By requiring TransCanada Pipelines Limited (TCPL) to offset the disturbance of habitat in caribou range caused by the construction of 2 new oil pipelines, the AER may have signalled its willingness to show leadership on these files.

The facts of the application were fairly unremarkable. TCPL wished to construct two new pipelines to deliver synthetic crude from Canadian Natural Resources Limited's Horizon processing plant to a pipeline terminal in the area close to Fort MacKay. The longest pipeline proposed was 71.5 km in length and passed within 7 km of the Hamlet of Fort MacKay.

The project is located in the traditional territory of the Fort MacKay First Nation (FMFN), and on land to which the FMFN holds treaty rights and aboriginal rights. The FMFN participated in the hearing and several other First Nation and Metis groups filed Statements of Concern, as did Suncor. In addition to the particular impacts of the proposed development, the FMFN expressed overall concern with the cumulative impact of industrial development on their ability to exercise their treaty and Aboriginal rights, including the rights to hunt, fish, and gather culturally-important resources. Of particular concern was caribou (at para 48):

Fort MacKay stated that caribou are a cultural keystone species. Caribou used to be a regular part of their seasonal hunting rotation. They are valued for meat, hides, and implements that are made from the caribou. However, their members now refrain from hunting caribou because of concerns about the low population, which they maintain is due to industrial development. They expressed a desire to harvest caribou as well as being able to share the traditional knowledge about caribou with future generations.

Caribou and Offsetting: More Ink than Action

Of course, the FMFN is not alone in its concern for caribou. The federal government and provincial governments have wrung their hands over the plight of the boreal caribou population for decades. For a brief review of some of that history see [Shaun Fluker's ABlawg post](#) on Alberta's recently released draft caribou range plan. As Professor Fluker pointed out there and in [his subsequent post](#), in Alberta all of the anxiety to date over the species, listed as threatened

under both federal and provincial legislation, has produced more ink than action to actually remedy the conditions that render caribou vulnerable.

Through a roughly corresponding period Alberta has been considering the use of conservation offsets as a tool of resource management. Offsetting is the process of creating environmental benefits to compensate for the residual negative environmental impacts of development projects or programs (after all reasonable measures have been taken to avoid and minimize the losses). It seeks to establish an equivalency between ecological losses and gains on a regional level, such that there will be no net environmental loss due to development. (For more on the theory and practice of offsetting see [here](#), [here](#), and [here](#), among many other publications.)

In March of 2008 the Canadian Boreal Initiative, the Pembina Institute and the Alberta Research Council published a report recommending the use of offsets in the oil sands region of Alberta as one tool to control the terrestrial impacts of oil sands development, including the impact on caribou. The recommendations of that report were taken up by key members of the petroleum industry through the auspices of the Oil Sands Leadership Initiative (now superseded by Canada's Oil Sands Innovation Alliance).

Perhaps because of that convergence of interests from diverse stakeholders, the Government of Alberta picked up on the interest in the use of offsets. December 2008 saw the release of the Alberta [Land-Use Framework \(LUF\)](#), the landmark policy that laid out how regional objectives and plans were to be established for all of Alberta. The *LUF* called for the development of a set of new policy tools for land and resource stewardship, including market-based instruments. Conservation offsets were specifically identified as potentially valuable.

The policy intent of the *LUF* was given life in law in 2009 through the passage of the [Alberta Land Stewardship Act, SA 2009, c A26.8 \(ALSA\)](#). *ALSA* included provisions (sections 45-47) enabling the creation of regulations to establish offsetting, including even a system for a market exchange in offset credits.

Since *ALSA* came into law the potential use of offsetting has been mentioned in several provincial policy documents, such as [Responsible Action: A Plan for Alberta's Oil Sands](#) (2009), the [Woodland Caribou Policy for Alberta](#) (2011), the [Lower Athabasca Regional Plan](#) (2012), and the [South Saskatchewan Regional Plan](#) (2014). A [pilot program](#) on offsetting for native grassland perennials was established in southeastern Alberta.

All of these expressions of interest over several years created stakeholder expectations. The Alberta Conservation Association published a proposal for an offset-based habitat banking and exchange program. Several oil sands operators launched [pilot programs](#) to explore the restoration of boreal forest habitat as a means of creating offset credits. Stakeholders and researchers came together to establish their own forum for advancing ideas on offset policy and practices, the [Alberta Association for Conservation Offsets \(AACO\)](#), with which I am affiliated, though this post represents only my own views).

The discussions respecting caribou conservation and the development of offset policy tools were not segregated into silos. Caribou planning often talked of using offsets as a tool for arresting the

decline of the species and its habitat. In the offset discussions, disturbance of the boreal forest, and its impacts on caribou, have often been cited as a prime candidate for application of an offsets model. (For one academic discussion of opportunities and barriers see [this paper by Robichaud and Knopff.](#)) In the same vein, in 2016-2107 AACO ran a series of webinars on offsetting for caribou and caribou habitat (recordings of which can be found [here](#)).

However, there was little concrete progress in the development of a provincial offset program. A notable exception is the *Alberta Wetland Policy* of 2013, which has been undergoing development and [implementation](#). Largely based on the mitigation hierarchy (“avoid - minimize – then offset”), the wetland policy and accompanying documents set out a process for compensating for wetland losses, including the application of a series of multipliers to reflect the difference in condition between wetlands lost and wetlands gained. (My thoughts on the Wetland Policy at the time of its release in 2013 were the subject of [another ABlawg post](#) at that time. Some, though not all, of my concerns then have been dealt with through implementation details in the intervening years.)

Beyond wetlands, however, we have seen little public evidence of progress on offsets policy in Alberta. No regulations have been promulgated under *ALSA*, nor any even proposed. No offset programs have been enabled other than for wetlands. Not even a framework for offset programs, something often discussed, has been released.

And with respect to caribou, the many discussions and studies on the potential of offsetting to aid in caribou recovery were expected to culminate in the Province’s caribou range plans. When the [Draft Provincial Woodland Caribou Range Plan](#) was finally released by Alberta in December 2017, however, the only mention of offsetting was the following (at p 30): “The Caribou Habitat Restoration Committee will make recommendations to Alberta on the role of an offsets program.” At last report the Caribou Habitat Restoration Committee had not been convened, had no terms of reference nor any members. It is not clear in what time frame any of those steps are likely, particularly given the provincial Environment Minister’s subsequent letter to her federal counterpart suspending certain actions that would have helped protect caribou (about which Shaun Fluker wrote in [an earlier ABlawg post](#)). We are apparently destined to continue to talk about offsetting for caribou but doing nothing, at least in terms of policy, for the foreseeable future.

It is important to note that our neighbouring jurisdictions have not been so paralyzed. To our west, the British Columbia [Draft Boreal Caribou Recovery Implementation Plan](#), released in March of 2017, provides that linear disturbance is to be reduced within caribou ranges, in part through the imposition of offset obligations (restoration at a ratio of 4:1) on the oil and gas industry. On our eastern side, the [Draft Range Plan for Woodland Caribou in Saskatchewan](#), released in October 2017 indicates that offsetting will be a major tool to achieve the restoration of healthy boreal forest within the “SK2 Central” pilot region on which the plan is focused. And to the north the Northwest Territories is exploring the use of offsets for both boreal and barren-ground caribou, partly at the urging of territorial and indigenous regulatory authorities.

If we look to federal jurisdiction, the National Energy Board has issued a series of decisions since 2010, with input from Environment and Climate Change Canada, requiring offsetting for

caribou and other species at risk and rare or sensitive habitats. These include conditions placed on the recommended approvals of the Northern Gateway pipeline and the now-inflammatory Trans Mountain Expansion proposed by Kinder Morgan. The federal willingness to require offsets seemingly routinely now is likely aided by clearer policy guidance (including [a 2012 Operational Framework](#) and a [draft Species at Risk permitting policy](#), which is currently being finalized) than has been developed within Alberta.

The picture that emerges from the above is one of Alberta in policy inertia with respect to offsetting generally and for caribou and caribou habitat in particular, while other provinces and territories and the federal government all manage to forge ahead in this area. This is the context of the AER's White Spruce Pipeline decision.

The White Spruce Pipeline Decision

The wording of the decision does not let on that it is the first time the AER has required a proponent to offset for caribou. It is not explicitly stated whether the move is a mark of impatience with provincial policy-makers. Indeed, one of the remarkable things about the decision is its unremarkable expression of support for offsetting. After noting the concern of the FMFN and others for caribou, and the efforts of the proponent to mitigate the project's impacts, the AER panel states (at para 133):

. . . we note that even with the best efforts, the project will still disturb approximately nine hectares of previously disturbed area and 22 hectares of new cut habitat within the West Side Athabasca Range.

Therefore, we require TransCanada must prepare and submit a caribou habitat restoration plan to the AER for approval This plan must have the effect of restoring 2.0 times the area of new cut habitat affected in the West Side Athabasca Range by the project. The goal or outcome of the plan is to ensure that there is, at a minimum, no net loss of caribou habitat from the project in the West Side Athabasca Range.

The decision goes on to list some of the specific components that are to be included in the restoration plan, including the details of restoration techniques to be carried out, the identification of specific sites, and quantitative and qualitative measures to assure that the goal of offsetting to a total area 2 times greater than that disturbed is met (para 133). This matter-of-fact wording conveys the impression that the panel simply sees this a matter of common sense, not an issue to be fretted over.

At this point I should pause briefly to respond to a possible objection from close watchers of the AER, that this was not their first ambitious offset decision. Indeed the very first report issued by the AER in 2013 when it was first constituted in its current incarnation was that on the [Shell Jackpine](#) application (about which there have been [several ABlawg posts](#), especially by Martin Olszynski). There a federal-provincial joint review panel (JRP) found that the proposed oil sands mine expansion would have significant residual impacts on the ecosystem and recommended a series of conservation offsets to address a wide range of impacts, including those to caribou. It is

important to note, however, that this was a federal-provincial JRP and its comments on offsetting (recommendations, not a binding decision) were largely informed by federal policy, especially the *Operational Framework* of 2012, referred to above. Despite the fact that the report was issued through the AER, it is clear that the Shell Jackpine report was not the voice of the AER acting on its own within exclusive provincial jurisdiction. The White Spruce Pipeline decision is. While I strongly believe that the White Spruce panel is to be complimented on showing ambition and leadership in moving ahead the caribou offset agenda in Alberta, there are aspects of the decision that are causes for concern. These most likely arise from the fact that the panel was operating in a provincial policy vacuum. One manifestation of this is the AER's setting of the goal of no net loss of caribou habitat in the relevant range. No net loss is a very common goal of offsetting. Indeed, one major international body (the [Business and Biodiversity Offset Programme](#)) requires a goal of no net loss as a component of its definition of offsetting. The Alberta government has not, however, made any commitment to no net loss as a goal for caribou habitat on a project by project basis.

The other aspect of the White Spruce decision which reveals a policy vacuum is the setting of the offset multiplier at 2:1 (i.e., twice as much habitat must be restored as will be impacted by the mitigated project). Multipliers are frequently used in offsetting to compensate for the risk of failure of the offset measures and the time lag between when negative impacts of the development project are felt and the positive impacts of offsetting come to fruition, often a period of many years. The AER panel gives no indication whatsoever of how it arrived at the 2:1 multiplier ratio, or why that ratio is necessary to meet the goal of no net loss. This is the very type of assessment which should be done on a principled basis, guided by policy. Alberta has given the AER no such guidance, and this panel appears to have simply taken a shot in the dark. Finally, there is the question of whether the AER has any continuing authority to oversee the implementation of the offset plan. The restoration work order by the panel will presumably continue long after the pipeline is constructed and operational. After the initial restoration work is complete, it should be followed by a program of monitoring and management to assure that it meets its ecosystem objectives. It is not clear that the AER has either the authority or the capacity to oversee that work. In the absence of a provincial policy, can we expect any other provincial authorities to do so?

I hope the White Spruce decision has two implications. First, I hope it is an indication in the future the AER and other provincial regulators will be willing to use their authority to require offsetting to address the very real environmental impacts that those regulators continue to see and to allow. In accordance with the mitigation hierarchy, they should be convinced that impacts cannot be avoided or mitigated in any other reasonable way before considering offsetting, but if they reach that conclusion, offsetting should be a live option for them to consider and to require. Second, perhaps if Alberta's policy-makers see that the provincial regulators are tired of waiting for an offset policy, those policy-makers may finally make the commitments necessary to give life to an offset policy, provide guidance to regulators, and to bring offsetting to the aid of the province's caribou. It cannot happen soon enough.

This post may be cited as: Dave Poulton “Alberta Energy Regulator Breaks New Ground on Offsetting of Caribou Habitat” (26 April, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/04/Blog_DP_AER_Caribou.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

