From: Andrew Gage [mailto:Andrew_Gage@wcel.org]
Sent: Friday, November 15, 2013 4:02 PM
To: Living Water Smart ENV:EX
Subject: WSA Submissions

Please find attached West Coast Environmental Law's written submissions on the Water Sustainability Act. These are in addition to a set of joint submissions which we have also signed and which you will receive separately.

Andrew Gage

Andrew Gage • Staff Lawyer, West Coast Environmental Law
1153 Esquimalt Road • PO Box 36008 ESQUIMALT • Victoria, BC • V9A 3N6
Victoria Tel. 250-412-9784 • Vancouver Tel. 604-684-7378, ext. 206
Toll-free. 1-800-330-9235, ext. 206 • Fax. 604-684-1312

WEST COAST
environmental law

200 – 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

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Ministry of Environment,
Water Protection & Sustainability Branch,
PO Box 9362 Stn Prov Gov,
Victoria BC, V8W 9M2.

***** BY EMAIL @ LIVINGWATERSMART@GOV.BC.CA *****

Dear Sirs/Mesdames:

Re: Water Sustainability Act – Comments

Thank you for the opportunity to comment on the proposed *Water Sustainability Act*, and we appreciate that the BC Government is attempting to modernize the *Water Act*. It is crucial that BC have an act that lives up to the name Water "Sustainability" Act and we hope that the current proposal can be strengthened to build a statute that ensures the sustainability of BC's water resources.

We have also made submissions on your blog and in a joint letter along with several other organizations. These submissions further develop our views, and provide additional comments on topics not covered in those other submissions.

Let us begin by noting that so far as we can tell, BC's First Nations have not been meaningfully consulted about these changes, and it is unclear whether and how First Nations Title and Rights, and specifically rights in respect of water, can be addressed through the proposed *Water Sustainability Act*. As we have said throughout the Water Act modernization process, a failure to address the outstanding claims of First Nations, in addition to being contrary to the honour of the Crown, could leave the new Act, and decisions under it, open to legal challenges. We strongly urge you to undertake good faith consultations to ensure that First Nations concerns are fully addressed. We hope that some of the ideas proposed in these submissions may be helpful in these discussions.

1. Protecting stream health and aquatic environments

We agree that the current Water Act does not do a good job of protecting environmental flows and stream health. We therefore are encouraged by new and expanded tools in the Proposal to allow government to deal with droughts and chronic problem areas.

However, in relation to existing water use, and in relation to water use in non-chronic problem situations, we feel that the Act locks in unsustainable use, and does not represent the strong guarantees of stream health that were supported in earlier public consultations. This is largely because the Proposal seems to view existing water licences as sacrosanct, despite the fact that

the rights contained in the existing *Water Act* are actually fairly limited, and subject to a requirement to use water in ways that convey a broader public benefit.

In addition, such rights have always been subject to constitutional obligations not to damage fish habitat (since damage to fish habitat is federally regulated and cannot be legally authorized by the Province acting alone) and not to infringe First Nations Rights in respect of fish and water.

Consequently, the Proposal's insistence that existing water licences (or even existing use in the case of groundwater) cannot be re-examined in light of stream health is bad policy, and does not live up to the mandate you have from British Columbians.

Environmental Flows

We acknowledge that under the current Water Act there is no explicit legal requirement for government decision-makers to consider environmental flows in their decisions about water (as noted, there may well be constitutional requirements). That being said, today most decisions do consider environmental flows, as mandated by government policy.

In earlier consultations on environmental flows, the government was told loud and clear that British Columbians want "binding standards" to guarantee water for fish, wildlife and stream health, as opposed to "guidelines", which were perceived as "too flexible or otherwise not enforceable."[1] However, the Legislative Proposal says that government decision-makers will be required to "consider" environmental flows. "Consider" is a weak and ambiguous legal test that implies guidelines, rather than binding standards.

Not only that, but the Proposal entrenches the controversial existing "First In Time, First In Right" (FITFIR) system of water licence rights that gives priority to older licences (and expands that rule to groundwater). What that means is that older licences – which were issued perhaps 100 years ago (to early ranchers or industrial operations) when environmental flows were not considered – as well as licences that will be issued for existing groundwater uses (for example to Nestle for water bottling) – will continue to trump environmental flows (as well as First Nations uses and more recent licences for drinking water, agricultural use, etc.). It is only for new licenses, or amendments to licences, that environmental flows will be considered.

The Proposal does provide for the possibility (but not requirement) of a review of licences, but not until 30 years after the Act comes into force (or 30 years after a new license is issued). However, we are advised that reviews will not allow for the take back of water where required to address environmental flow needs, and we have not received confirmation of the extent to which environmental flows may be considered in such reviews more generally. As proposed, the water licence reviews provide limited options for environmental flow needs in areas where current water use is already impacting the ecosystems– unless they get degraded enough, and there is political will, to use some of the more exceptional drought/scarcity powers discussed below. This is not acceptable – water licence reviews are the appropriate time to consider whether water use is negatively impacting other legal rights, such as the public rights in respect of fish and wildlife, or First Nations Rights, as well as environmental requirements generally.

So while the proposed *Water Sustainability Act* at least acknowledges the idea of environmental flows, it is clear that it does not prioritize such flows in a way that will actually prevent streams from becoming degraded (particularly in areas that are already overcommitted – meaning that more water can be taken from a stream than is available, or sustainable). This is a major

[1] http://www.livingwatersmart.ca/water-act/docs/wam_report-on-engagement.pdf.

shortcoming, because, as set out in the provincial government's own Living Water Smart policy,[2] healthy watersheds and streams provide many benefits.

Recommendation:

- Mandatory and strong environmental flows requirements. "Consider" is not enough, and environmental flows (like and objectives must be strong enough to meaningfully protect our streams and lakes;
- License reviews can't wait until 30 years after the WSA comes into force, they should happen within 10 years, particularly given what we already know about the impact of climate change on hydrologic regimes and water resources in the province,[3] and it should be clear that such reviews will address environmental flows;
- The First In Time, First in Right rule, if it is to be retained, must come after environmental flows, First Nations water uses and drinking water needs. Those flows and uses should not be trumped by earlier licences – no matter how old. This can be accomplished through recognizing a broad definition of beneficial use (discussed below).

2. Consider Water in Land use decisions

A potentially positive aspect of the Proposal is the concept of "Water Objectives", which could require a range of key government decision-makers to "consider" objectives related to water in their decision-making. Since a wide range of government decisions - from local government land use planning, to approval of logging plans, to the regulation of mines - can have huge impacts on water availability and integrity water objectives, if sufficiently strong, make sense.

Ideally any government decision that is likely to impact water should be bound by (and not just consider) these water objectives, but the Proposal doesn't go so far. Instead the key question of which government agencies need to consider water objectives will be worked out later in future regulations. However, alarmingly, the Proposal reports that you have heard that:

> Existing statutes such as the *Forest and Range Practices Act* and *Oil and Gas Activities Act* contain appropriate provisions to protect water. Additional action by natural resource tenure licensees should not be required in those cases.[4]

In our view the oil and gas and forestry industries as currently regulated pose threats to water, and we do not agree that the existing legislation "appropriately" protects water. Excluding these industries from the water objectives would substantially undermine the credibility of the Water Sustainability Act.

Meanwhile, the proposed water objectives remain pretty vague. Lawson Lundell's Project Law Blog (which advises industry on developments in environmental law) explains it well:

> Examples of "water objectives" are provided, but not proposed; are qualitative; and on their face do not provide a means to resolve conflicts between competing objectives.

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2 http://livingwatersmart.ca/preparation/watersheds.html.
3 http://livingwatersmart.ca/preparation/adapting.html.
4 http://engage.gov.bc.ca/watersustainabilityact/files/2013/10/WSA_legislative-proposal_web-doc.pdf

This element of the proposal, while having potentially far-reaching effects, is still rather embryonic.[5]

The preliminary objectives in the Proposal seem to suggest that water quality can be degraded but only up to standards for the "designated use" of the water. This approach is substantially weaker than the common law, which recognized that water users had a right to the naturally occurring quality of water, and any degradation of the quality of water is actionable even if the ability to use the water is not directly impacted.[6] This rule was developed in large part because of the potential for multiple polluters to collectively impact water quality, leaving the water user without any recourse.

If the Proposal is proposing to weaken the common law rules around water quality, this would be a major step backwards, and we would oppose it. In addition, setting weak "designated use" standards raises a number of serious and unaddressed questions about how such standards would be enforced and implemented.

Recommendation:

- Mandatory and strong water objectives that apply to all activities and industries likely to impact water. "Consider" is not enough, and objectives must be strong enough to meaningfully protect our streams and lakes.
- Full public process to develop water objectives and a commitment that those objectives will strengthen and not weaken existing common law, constitutional or statutory obligations related to water.

3. Regulating and protecting groundwater

About one out of every four British Columbians relies on wells for drinking water. Groundwater is also essential to BC's agricultural sector[7] and is critical for habitat for salmon and other fish species[8]. British Columbians have also been incensed that large companies can take our groundwater free of charge[9]. It is therefore welcome news that BC is planning to finally regulate groundwater use under the proposed *Water Sustainability Act*. But we need to be sure that these new rules on groundwater use don't lock in unsustainable water use, and allow us to get a handle on how groundwater should be licensed in BC.

Here is how the *Water Sustainability Act* (WSA) proposal would regulate groundwater:

- All existing groundwater users – except domestic wells – would get water licences based on their historic use of water. There will be no consideration of whether that level of

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5 http://www.projectlawblog.com/2013/10/23/water-use-in-bc-on-the-threshold-of-a-new-regime/

6 *Young v. Bankier*, [1893] A.C. 691 (H.L.), cited with approval in *Crowther v. Cobourg*, 1 D.L.R. 40; *McKie v. K.V.P. Co. Ltd.*, [1948] 3 D.L.R. 201 at pp. 211 to 213; affirmed with variation [1948] O.W.N. 812, [1949] 1 D.L.R. 39; affirmed with variations [1949] S.C.R. 698, [1949] 4 D.L.R. 497; see also *Embrey v. Owen*, 155 E.R. 579, 6 Ex. 353 at 368.

7 http://www.vancouversun.com/technology/Mining+groundwater+could+fuel+climate+change+study+finds/7912954/story.html

8 http://www.watershed-watch.org/publications/files/Groundwater+Salmon++hi+res+print.pdf

9 http://www.theprovince.com/news/Wild+West+groundwater+Billion+dollar+Nestl%C3%A9+extracting+drinking+water+free/8785227/story.html

water use is sustainable or best serves the public interest, although the WSA would allow the government to consider water efficiency standards.

- Domestic well users will be encouraged to register their wells in the province's wells database. Once registered, possible impacts on the well user will be considered in future requests for licences or amendments to licences. Domestic well users will not be allowed to receive a water licence unless an "area-based regulation" is passed requiring such licences.
- New non-domestic well users will be required to obtain a licence before using groundwater. Large-scale groundwater users (250m3/day or more) will be required to pay a nominal amount for their water, and (as with large-scale surface water) will be required to monitor and report their water usage.

So what does that mean for the health of groundwater aquifers and the environment, and for other water users?

So what are the owners of existing wells getting when they get a licence?

To understand the implications of this approach, it's important to recognize that existing well owners are getting an enhanced legal right through the new groundwater licences. Well owners currently have a right to pump water from the ground; however if other well users pump from the same fresh water source and cause the well to dry up or become saline, an owner has no recourse. The rights of groundwater users have been described by the BC Court of Appeal as similar to other "fragile" rights that can be extinguished by other users.[10] Indeed, it is this unregulated access to water that has led to over use of aquifers in some areas of British Columbia.

As proposed, new groundwater licences will give well owners "priority" over anyone who starts pumping from the same water source at a later date. Licences will have a "priority date" based on when the well was first drilled and used. Legally a water licensee can insist that other users who have a more recent "priority date" stop taking water in times of scarcity. This is an attempt to bring unregulated groundwater use with the controversial "First In Time, First In Right" (FITFIR) system of water allocation.

Because of the "fragile" nature of groundwater rights, the proposed WSA could be an opportunity to move away from the FITFIR model, and instead clarify that environmental flows, drinking water, agriculture or other publicly supported water uses have priority. However, the Proposal does not move in this direction.

The proposed WSA would not simply "grandfather" existing wells by giving them licences, it would enhance and expand the rights of the well users – giving them the new right to claim priority over other, subsequent users, as well as over environmental flows and other public values.

Groundwater use and aquifer health

Obviously allowing unregulated access to groundwater can compromise aquifer health, as well as impact on the health of streams on the surface. So regulating groundwater is a positive, if long overdue, development.

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[10] Steadman, below, note 24.

But current use of BC's wells is not always sustainable or environmentally appropriate. By accepting existing wells as a guaranteed basis for a water licence, the proposed Water Sustainability Act will be locking in unsustainable use of groundwater. It is essential, particularly for oversubscribed areas, to re-examine those licences to ensure that the water use is sustainable and maintains the health of the aquifer. In addition to overuse, climate change is likely to have an impact on groundwater supplies,[11] particularly in the interior of BC.

The rights of different water users

There is also considerable potential for conflict between domestic (unlicensed) well users and licensed well users. Because of how groundwater flows, the impact of one well on the water in nearby wells can be considerable, even if the well use is not affecting aquifer levels.

The WSA Proposal says that the interests of registered domestic well owners will be considered in applications for new water licences.

The WSA Proposal does not say that registered domestic wells will be considered when transitioning existing (non-domestic) wells to their groundwater licences. However, we are informed by Ministry of Environment staff that where the Ministry is aware of an existing localized conflict between well users, they will consider it in granting the transition licences, and that the date that the domestic well was first used (as recorded in the Wells Database) will be taken into account. In areas of wide-spread conflict, the impacts on domestic users will not be addressed in these transitional licences, and will instead need to wait for a Water Sustainability Plan.

After all the initial groundwater licences have been handed out, and (hopefully) most domestic wells are registered, there will still be conflicts – whether due to over-allocation, new licences that have unexpected impacts, climatic changes that decrease aquifer depth, etc. A well user with a water licence has an entitlement to the continued flow of water before other licensees with a lower priority date. Legally that right could be enforced either by the Ministry of Environment or in court.

But domestic well owners won't have a licence – just a record in a database. So what, we asked, is a domestic well owner – who has registered – to do if his or her well runs dry? Does he or she need to take on the (expensive) job of drilling a deeper well? Or can he or she insist that other more recent well users stop using groundwater to restore the original aquifer levels?

Ministry of Environment staff emphasized that it was the responsibility of the well owner to make certain that their well had been drilled deep enough to deal with expected fluctuations in the aquifer level. In other words, if you've only drilled to a depth of 50 feet, but water levels in the aquifer regularly fluctuates from 40 feet to 60 feet, then you can't complain if your well goes dry.

"Okay," we said. "Let's say the well owner did drill a deep enough well, and it still goes dry."

Well then, we were told, "It depends." Let's just say that answer makes us worry about how much protection domestic well owners will actually have.

[11] http://www.obwb.ca/fileadmin/docs/impacts_of_climate_change_groundwater_bc.pdf

First Nations and groundwater licences

It is well established in Canadian law that a First Nation has a right to be consulted on government decisions that may affect rights that they have established or which they are credibly asserting. It is also indisputable that in some, perhaps many, cases groundwater use can affect the legal rights of First Nations. In Halalt Nation v. BC[12] the trial judge said (in reasons that were overturned on other grounds):

> The evidence establishes that there is not an impermeable barrier between the Chemainus River and the Aquifer as the River flows through I.R.#2 adjacent to the site of the Project. The two are intricately connected. The groundwater feeds the Chemainus River and influences its flow levels. The River is, and has been traditionally, integral to the lives of Halalt because of its fish and fish habitat, plants and bathing holes. It sustains the animals the Halalt people hunt and the plants they gather. The Aquifer's groundwater is a significant source of the water levels for the entire length of the Westholme side channel. The Aquifer is of central importance to the sustenance of fish and fish habitat. The groundwater warms the side channel in the winter and cools it in the summer. … I go no further than to say that Halalt has an arguable case for a proprietary interest in the groundwater of the Chemainus Aquifer, most of which underlies I.R.#2.

In my view the province faces a formidable problem in that the proposed legislation seems to purport to limit the government to considering only a narrow concept of "beneficial use" before convert existing wells into water licences. To the extent that the Crown, with this language, is attempting to legislate itself out of its constitutional obligations, this is highly inappropriate. Since the licences entrench the water uses, and represent government endorsement of those uses, the government cannot credibly claim that the change does not at least potentially affect First Nations' rights.

This problem is exacerbated by (so far as we understand) a failure to adequately consult First Nations in developing the legislation and the extension of the First In Time, First In Right system to groundwater, which many First Nations organizations strongly opposed in the consultations that did occur.

Recommendations

Government should have the powers and responsibility to manage aquifers to maintain the health of the aquifer and associated surface water flows. This must include the ability, through licence reviews, to adjust water licences, including reducing the water allocation, as required based on new data, changes in the climate or other changing circumstances.

Current-well users should not receive final licences, or those licences should be fully reviewable, until:

- At least 5 years of water monitoring data for the aquifer obtained under the new monitoring requirements is available;
- The licenses can be assessed to ensure that the use of the aquifer does not exceed recharge rates and does not negatively impact the health of the aquifer or the health of nearby streams;
- Any constitutional obligations to consult First Nations regarding specific licences can be addressed.

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[12] http://courts.gov.bc.ca/jdb-txt/SC/11/09/2011BCSC0945.htm#_Toc298310382

If, at that time, current levels are not sustainable, licences must be adjusted (possibly through Water Sustainability Plans) to ensure that use rates are sustainable and do not negatively impact the health of nearby streams.

The rights of domestic well owners to the continued flow of water in their wells, as against licensed well owners, should be clarified.

"Cleanest LNG" and the Water Sustainability Act

BC's government has committed to the rapid development of Liquefied Natural Gas (LNG), which depends upon fracking to dramatically increase access to natural gas resources, promising that it is the "Cleanest LNG" in the world. BC's Environment Minister, Mary Polak, has argued that "Cleanest LNG" is: "… not just greenhouse-gas emissions. You could [also] think about impact on water…"[13]

Against this back-drop, it is worth noting that the *Water Sustainability Act* proposal has little specific to say about fracking, because it presumes without discussion that the *Water Sustainability Act* will make water available for this controversial oil and gas industrial process, just as the current *Water Act* has (although just yesterday (November 13th), our friends at Ecojustice went to court to challenge the legality of some of that water use).

Earlier in the Water Act Modernization process, the government considered a new "priority-based" approach to water – which would prioritize some uses of water (say drinking water and environmental flows) over others (say industrial). Had this approach been adopted, it would have required public debate about the relative importance of different uses of water (including the immense quantities required for fracking). Instead, however, the *Water Sustainability Act* proposal does not focus on what water is used for, but rather who used it first (as noted above, not counting First Nations or environmental uses, which have a pretty credible claim to first use).

But given Minister Polak's claim that Cleanest LNG should be judged against its impact on water, we note that the current Proposal does not deliver.

The *Water Sustainability Act* proposal does acknowledge that in many cases fracking can be done with saline water, rather than fresh water, and exempts deep saline water wells from the requirement to hold a licence:

> Groundwater from some deep formations can be very saline (or salty) … Saline groundwater from these deep formations would not be suitable for use as a water supply (e.g., drinking water, irrigation); however, saline groundwater might be a viable source of water for some commercial and industrial development (e.g., oil and gas production, recovery of oil and gas supplies) and thereby take pressure off the debate for the freshwater.

We are told that one reason for not regulating deep saline water wells is that this will give the oil and gas industry an incentive not to rely upon (licensed) freshwater resources. This seems a pretty weak argument, given that drilling a deep water well would typically cost much more than the proposed rates for freshwater resources.

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[13] http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/bcs-pledge-to-keep-lng-sector-clean-faces-steep-hurdles-report-warns/article14455610/

But the mention of the fact that potable water is not required for fracking raises a more fundamental question: should we be making fresh water available for fracking at all? Is it a "beneficial use" that BC's public water should be used to support? And if so, on what terms?

Indeed, it's not just deep saline wells that raise this important question. The fact is that the oil and gas industry is already developing alternatives to hydraulic fracturing that remove the need for water use altogether. Notably, waterless fracking, a technology developed by Alberta's GASFRAC that uses liquid petroleum instead of water in Fracking, seems to be gaining acceptance[14] (including some environmental praise from Inside Climate News[15]).

Without endorsing GASFRAC and its claims that its technology has a lower environmental impact than hydraulic fracturing, it seems clear that making large amounts of water available to the oil and gas industry at low rates hardly encourages the uptake of this type of innovation.

Whatever one thinks of the term "Cleanest LNG", it seems like a no-brainer that Clean LNG requires an industry that uses as little water as possible, and which avoids the use of fresh water whenever possible.

On licensing deep saline wells

It is fairly clear from the Water Sustainability Act proposal that BC is not actually certain that pumping out deep saline water wells will not adversely affect shallower, freshwater wells. The proposal refers to an "assumed disconnection" that "suggests" that these deep aquifers could be "managed separately" from shallow groundwater resources.

By contrast, this BC Ministry of Environment Guidance document for environmental assessments of deep saline well drilling does not assume that deep saline water wells will necessarily be disconnected from other water sources, and instead requires the proponent to demonstrate that no impacts will occur:

> The proponent should present the interpreted evidence to demonstrate the presence or absence of a hydraulic connection between the deep, saline aquifer/reservoir and the shallow groundwater aquifer(s) and/or surface water resources. … To facilitate responsible and equitable use of saline groundwater in the Debolt Formation, the proponent should include an assessment of potential impacts within the deep, saline aquifer. … The effects of mixing on water quality over the life of the project and whether the proposed project disposal activities, if applicable, are likely to cause significant deterioration of the water quality, such that it could adversely impact other users.[16]

This guidance document would seem to undermine the argument that there is no need to regulate deep saline wells. In our view, exempting such wells from regulation to accommodate the oil and gas industry does not boost the credibility of Cleanest LNG or the *Water Sustainability Act*.

We have also heard a rumour that the oil and gas industry is pressing for a broader definition of saline water, in order to harmonize BC's rules around saline water with Alberta's and to exempt a wider range of groundwater from licensing requirements. We cannot confirm that rumour, except to note that Imperial Oil pressed for something similar in its 2010 submissions on Water

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14 http://breakingenergy.com/2013/05/28/renewed-interest-in-waterless-frac-technology/.
15 http://insideclimatenews.org/podcast/waterless-fracking-gas-drilling-game-changer.
16 http://www.env.gov.bc.ca/wsd/plan_protect_sustain/groundwater/horn_river_saline_guidelines.pdf

Act Modernization.[17] As discussed, we do not believe that the exemption on licensing for deep water saline wells is justified, and we obviously oppose attempts to expand that exemption to a broader category of saline water.

Recommendations

We do not support fracking, for a variety of reasons. However, if BC wants to have its promise of "Cleanest LNG" judged in terms of its impacts on water resources, then the proposed *Water Sustainability Act* does not do enough. Cleanest LNG means severely limiting the oil and gas industry's access to fresh water for hydraulic fracturing, and instead providing strong incentives for alternatives to fresh water use.

4. Regulating water use in times of scarcity

The Proposal explains that in problem areas or in times of drought, there will be new or expanded powers to:

- Develop plans to address water allocation, including water for environmental flows;
- Create "area-based" rules that could address (among other things) stream health;
- Change the rules around water allocation, including temporary orders to protect "critical environmental flows".

We are generally supportive of the new and expanded powers for addressing water use during times of scarcity. However, these powers must be secondary to tools which prevent scarcity from arising in the first place; that is what the Act is lacking. The scarcity tools, as proposed, will require adequate financing, and the political will to use them. If the government lacks the political will to require environmental sustainability in relation to existing licences, then it is not obvious that these tools will be more politically palatable when actual water scarcity exists.

Planning and area-based regulations

There are already existing powers for the government to prepare Water Management Plans, but the Proposal would give greater flexibility in this planning through "Water Sustainability Plans". These plans could allow stakeholders (such as water users, local governments, industry, environmental groups, etc.) to develop locally appropriate ways of addressing water scarcity, environmental flows, free up water for new users, or otherwise address joint concerns of multiple stakeholders.

In addition, the government will have powers to develop area-based regulations, either to implement these plans or to address other needs of a particular watershed or region.

As proposed, area-based regulations can be used to carry out some fairly major re-writes to the rules around who has to get water licenses, who has to monitor water use, etc. These powers could potentially be used to help ensure environmental flows, etc.

We are told that the government will not use area-based plans to alter the FITFIR rules (for example, giving environmental flows or domestic users priority over long-standing licences, etc.), unless stakeholders have agreed to such a change through a Water Sustainability Plan.

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[17] http://engage.gov.bc.ca/watersustainabilityact/files/2013/10/Imperial-Oil-Resources.pdf.

But the government seems to contemplate using these water sustainability plans and area-based regulations in problem areas – and they represent the primary tool in the new WSA for protecting environmental flows (and other interests) in areas with chronic drought or water shortages.

Area-based regulations, in particular, could also be used in areas that face potential problems before those problems become serious.

Given the chronic groundwater problems and/or patterns of over-use that already exist in the province, we think that dependence on Water Sustainability Plans as the ultimate way of addressing scarcity or unsustainable use will be expensive (or not implemented adequately) and is short-sighted.

Rules around water allocation

The Legislative Proposal would give Ministry of Environment staff a general power to regulate water use to protect "Critical Environmental Flows" (CEFs). These are not the general environmental flows that government will consider in making new granting decisions, but represent a:

> … short-term flow threshold, below which significant or irreversible harm to aquatic ecosystems may occur. This threshold would be used as a short-term regulation threshold during times of scarcity or drought to regulate (i.e. require users to curtail their water use) both surface water and groundwater users.

Apparently orders under these powers will be based on FITFIR – with more recent licensees required to scale back first – except for "essential household needs", which will be allowed to continue.

In addition, the narrow scope and duration of Critical Environmental Flows is concerning. We are also told that Area-based regulations will not be used to address fundamental problems of over-allocation of water in the absence of a Water Sustainability Plan.

In addition to the short-term authority over CEFs, the Minister will have powers (similar to existing powers under s. 9 of the Fish Protection Act[18]) to order the temporary reduction of water use where water levels are so low as to threaten the survival of a population of fish, "regardless of license priority date and after due consideration for the needs of agricultural users…" However, the circumstances in which these powers can be used, and the evidence required to justify such use, remain narrow.

Recommendations

There are some improvements in the new Proposal over the current Water Act, but environmental flows still have a low priority – at least in relation to existing water users. Here's what we recommend to improve the proposed new Water Sustainability Act, as it related to environmental flows:

- Water resources need to be managed for the benefit of the public, with rules that prevent water scarcity from occurring.

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[18] s. 9 of the Fish Protection Act, http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_97021_01#section9.

- Ensure adequately funding for Water sustainability plans and create incentives for water licensees to agree to come to the table.
- Clarify that Area-based regulations can be used to reduce licence volumes in order to address stream health, essential household needs and other public values.
- Expand the proposed powers around Critical Environmental Flows to allow deviation from FITFIR, and to increase their duration and flexibility.

5. Improving security, water use efficiency and conservation

While the Proposal affirms public ownership over water (without, we note, recognizing the issues that raises for First Nations), it nonetheless treats water, once licenced, as largely private in nature. As a result existing licences are protected from regulation related to environmental flows, except in times of scarcity.

A law that truly focused on water sustainability should (as British Columbians demanded in public consultations), "proactively protect drinking water … and ecological health" and other public values and First Nations' rights.

> **Proactively protect drinking water, food production, clean energy and ecological health.**
>
> Respondents called for a water allocation system that **prioritizes drinking water, food production, clean energy production and protects ecosystems**. There was strong support for environmental flow and stream health standards while promoting efficiencies and recognizing non-consumptive water use in industry.[19]

Similarly, the Water Act Modernization process "principles" included the principle (well supported by those consulted) that "Rights to use water come with responsibilities to be efficient and help protect stream health."

And yet, the Proposal re-affirms the FITFIR system and extends it from surface water users to groundwater users (i.e. well owners) without any recognition that these rights are subject to broader public benefits or a responsibility to protect stream health. The Act, as proposed, would not give any particular priority to drinking water, ecosystem health, food production, or other uses that today's public may have stated they want prioritized. First Nations uses – truly the First In Time human uses of water – also continue to be ignored.

Instead, today's priorities take a back seat to priorities set 20, 50, 100 years ago. For future water licences, ecosystem health (through a requirement to "consider" environmental flows) will be addressed, but where there is already existing unsustainable water use, the Water "Sustainability" Act is locking in that unsustainable use (unless and until Water Sustainability Plans are developed under the Act).

If we keep the antiquated 104-year old system, instead of recognizing that priorities can and have changed, as has the world we live in, it will be one of the great lost opportunities of the new Water Sustainability Act.

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[19] Above, note 1.

Beneficial use

And yet, the current Water Act does not give existing licensees a guarantee of water for all time. Whatever one may think of the priorities of the drafters of the current 104-year old Water Act, water licences under the Act do not grant "ownership" of water – rather, they give a right to use water only as long as the water use is considered "beneficial." If water is not used beneficially for more then 3 years, the government is supposed to reclaim it (although in practice this seems to occur only when complaints are made about a failure to use water).

So what is meant by "beneficial"? For whose benefit? Private benefits of water licensees or the benefit of British Columbians? The term "beneficial use" is not defined in the *Water Act*, and BC's courts have never answered the question. The Proposal says that "beneficial use" is only about private use of the water:

> 'Beneficial use' means using the licensed volume of water for the intended purpose(s) and in compliance with the terms of the water licence.

The proposal gives no source for this definition – implying (incorrectly) that it is found in the current Water Act. But if the current Water Act intended merely to require use as contemplated under a water licence, it could easily have said so without introducing such an odd term. In addition, the current Act gives Ministry of Environment staff the legal power to "determine what constitutes beneficial use of water," which would seem unnecessary if the proposal's narrow definition was correct. (In addition, the current Act allows Cabinet to pass regulations defining undefined terms, such as beneficial use).

So if "beneficial" doesn't mean mere use of water in accordance with a licence (which is a private benefit), what is meant by beneficial use? In our submission, the current Water Act asks us to consider whether water use has a broader public and environmental benefit.

The term "beneficial use" used in the Water Act – as it relates to water law – was originally borrowed from U.S. water legislation. Over 40 years ago, the Legislative Research Center at the University of Michigan Law School reviewed legislation and case-law from a number of U.S. states that used the term "beneficial use" and proposed a definition:

> 'Beneficial use' means a use of water ... that is **reasonable and consistent with the public interest in the proper utilization of water resources**, including, but not limited to, domestic, agricultural, industrial, power, municipal, **navigational, fish and wildlife, and recreational uses**.[Emphasis added]

This definition is supported by U.S. cases, holding, for example:

- Extracting water solely to sell it is not beneficial use;[20]
- Wasteful use cannot be not beneficial use and actions that cause a public nuisance cannot be beneficial use[21] – which would suggest that water use that destroys fish habitat (well established as a public nuisance, and one that can only be authorized by the federal government) cannot be considered beneficial use;
- Recreational and fishing use of water are a beneficial use.[22]
- At least in arid regions, and as judged in 1943, "domestic use is the most beneficial use for water" followed by irrigation, "regardless of any statute."[23]

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[20] Millheiser v. Long, 10 N.M. 99, 61 P. 11
[21] State v. McLean, 62 N.M. 264, 308 P. 2d 983
[22] State v. Red River Valley, 51 N.M. 207, 182 P. 2d 421

In addition, the fact that the *Water Act* strongly asserts the public's interest in water and the management of water provides further support for the view that "beneficial use" is not simply about private water use. Notably, the Act asserts public ownership over water (an assertion that must be viewed in light of First Nations unextinguished title and rights in respect of water), and until 1929 it also explicitly recognized a public right to use water for domestic purposes:

> … the general right of all persons to use water for domestic and stock supply from any river, lake, or stream vested in the Crown, and to which there is access by a public road or reserve.

That right, in my opinion, continues to exist (albeit subject to First Nations rights, Water Licences, etc.), since subsequent amendments to the Water Act have never expressly removed it. The 1989 BC Court of Appeal decision in *Steadman v. Erickson Gold Mining Corp*. described the right as a "fragile right"[24] (according to the court a right that is very similar to rights to use groundwater).

Given this context of public rights and public ownership, a court could adopt the reasoning of the Supreme Court of New Mexico (despite differences in the legislation) that "the entire statute is designed to secure the greatest possible benefit from them for the public."[25]

Defining Beneficial Use

When the BC government began consulting on a new *Water Act* it proposed, as a principle, that "Rights to use water come with responsibilities to be efficient and help protect stream health." This principle was "well supported by the majority of submissions and in dialogue at regional workshops," although apparently submissions from the Mining industry were opposed. Some of the submissions "suggested that the responsibility to protect water should be a mandatory component of rights to water use."

The provincial government, to its credit, has proposed defining "beneficial use" to make it explicit that inefficient water use is not beneficial. However, their definition of "beneficial use" ignores the second responsibility mentioned in their principle – to help protect stream health.

Because beneficial use is an inherent limit on the FITFIR system, it would clarify that a water licence brings with it certain basic responsibilities to steward water resources. Such a definition would allow the government to protect stream health in respect of existing and new licences. The *Water Sustainability Act* proposal proposes 30 year reviews of licences that will focus on whether the water is being used beneficially. So it is critical to make sure that the definition of beneficial use reflects environmental flows and stream health.

Similar approaches might also be used to require that other values be protected – such as access to drinking water or food security. In addition, we encourage you to explore, in your consultations with First Nations, whether this concept might help in addressing the Crown's constitutional obligations to protect First Nations rights in relation to water.

The new definition of "beneficial use" must not be narrowly focused on private interests and must allow British Columbia's proposed *Water Sustainability Act* to be flexible in addressing changing social and environmental needs. We offer a draft definition of "beneficial use" for your consideration:

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[23] Tanner v. Bacon, Utah, 1943, 136 P. 2nd 957
[24] http://canlii.ca/en/bc/bcca/doc/1989/1989canlii2697/1989canlii2697.html.
[25] http://www.nmcompcomm.us/nmcases/NMSC/1910/1910-NMSC-061.pdf

Beneficial use

(1) Subject to sub-sections (2) to (4), 'Beneficial use' means a use of water that is reasonable, efficient and consistent with the public interest in the proper utilization of water resources, including the use of water for navigational, environmental, and recreational uses.

(2) Beneficial use carries with it a responsibility to protect stream health and use of water which compromises the ecological health of a stream shall not be considered beneficial use;

(3) Water use that compromises the sustainable use of an aquifer by depleting groundwater is not a beneficial use;

(4) The Lieutenant-Governor in Council may pass regulations further defining what is meant by beneficial use, and how that beneficial use is to be addressed in existing licences, allocation decisions or other decisions, including, but not limited to:

a. defining environmental flows or other indicators of stream health in relation to (2) and the obligations of licensees to protect stream health;

b. setting standards or requirements in relation to depletion or the obligations of licensees to protect the sustainable use of an aquifer under (3);

c. setting standards of efficiency or reasonableness in relation to beneficial water use under water licences; and

d. further defining beneficial use and the proper utilization of water resources.

By defining beneficial use to reflect today's sense of what benefit we expect to see from our water, the proposed *Water Sustainability Act* could go a long way to moving us towards a truly sustainable water system. At a minimum we need a *Water Act* that protects stream health and places that responsibility ahead of private interests. Conversely, locking in a private-interest definition of "beneficial use" will make it difficult for British Columbia to protect stream health and to respond to a changing climate, and to changing needs, in the years and decades to come.

6. Measuring and reporting water use

We agree with expanded monitoring and reporting of water use. We are concerned that the cut-offs for monitoring may not be sufficient to allow for enough information to be gathered on the health of streams and aquifers. We have not received promised information from the government regarding how much water is actually covered.

7. Enabling a range of governance approaches

It is clear that there is both a desire for new models of governance and, at the same time, concerns for potential abuse of these new models. To the extent that these governance arrangements are democratic, accountable and have the ability to protect water and the environment, they are very welcome. Our recommendations include:

- Explicitly include local watershed governance arrangements in the list of possible decision-makers under the Act;

- Ensure designation of local watershed governance arrangements and that approvals of Water Sustainability Plans undertaken through local governance arrangements are done through an independent, non-political process based on clear accountability and representation criteria;

- Enable local watershed governance arrangements to access sufficient resources to execute activities through, for example, a pool of funds from water-use royalties, or a delegated taxing authority; and

- Support provincial pilot projects that can test a range of watershed management approaches and decision-making functions.

In addition to governance approaches, however, good governance requires public participation, as well as transparency and accountability at all levels of government.

The new WSA must:

- Require that any advisory committees created under the WSA have public representation and that proceedings and recommendations of these committees be public;

- Include public consultation in any licence reviews, setting of water objectives, setting of environmental flows, creation of area based regulations, and establishing of water efficiency standards;

- Include provisions for public notice of applications, and where appropriate public hearings, as well as the right of any resident of BC to object prior to licence issuance, and the ability of the public to appeal the granting of a licence; and

- Commit to a Resource Practices Board with the resources and expertise to audit in a manner that fulfills the various requirements for "measuring and reporting", and the ability to investigate water and watershed management issues (perhaps an extension of the Forest Practices Board).

8. Enforcement

We applaud the Proposal for including Administrative Monetary Penalties, which could help improve the very poor levels of enforcement of the *Water Act* that we currently are seeing.[26] More generally, the resources, training and willingness need to be there to identify *Water Act* violations and to take appropriate action.

Given this poor track record, we would also recommend that you adopt citizen's enforcement provisions, to allow the public to enforce the law, and to be compensated for doing so, when the Crown will not, for whatever reason.

Moreover, given poor levels of collection on *Water Act* fines, we recommend provisions intended to create consequences for a failure to pay fines.[27]

- **Interest should be charged** – Not paying promptly needs to mean that the offender will pay more. It is outrageous that people who receive traffic tickets have this type of consequence, but companies that illegally kill fish do not.

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[26] http://wcel.org/resources/environmental-law-alert/what-shielding-water-act-violators-says-about-bc%E2%80%99s-environmental-e

[27] http://www.theprovince.com/news/Environment+Ministry+continues+shield+Water+violators/9013192/story.html

- **Jail Time** – For serious offences, an offender could face a fine or jail time, but jail time in environmental cases is generally used when there is a history of non-compliance. However, if a court imposes a fine (rather than jail time), yet the offender is not paying the fine, then jail should be an option in some cases.
- **Suspension of operations** – We would suggest that the Ministry of Environment be given the powers to suspend water licences or approvals, or to issue stop work orders, for offenders that do not pay for their offences.
- **Increased scrutiny** – A company that offends should face increased inspections and scrutiny by the government, particularly for companies that offend and then do not pay their fines.

Conclusion

Rewriting the Water Act is a daunting exercise. However, we urge you not to be timid. Your consultations to date revealed that British Columbians want an Act which puts water for nature and sustainability first. The current proposal does not deliver on that mandate, but instead entrenches private interests at the expense of the environment and the public interest.

Sincerely,

Andrew Gage,
Staff Lawyer