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Sent: Monday, March 14, 2011 4:23 PM
To: Living Water Smart ENV:EX
Subject: Business Council Comments on Policy Proposal for the Water Sustainability Act

Attached are the Business Council of British Columbia's comments on the Ministry of Environment's Policy Proposal for the Water Sustainability Act, along with a covering letter.

The attached files are in Adobe Acrobat (pdf) format.

Regards,

Sent by

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on behalf of



Business Council of
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Building a competitive and growing economy that provides opportunities for all who invest, work and live in British Columbia.



Business Council of
British Columbia

March 14, 2011

Via Email: livingwatersmart@gov.bc.ca
(Original to Follow by Mail)

Water Act Modernization
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Re: Policy Proposal for the *Water Sustainability Act*

Attached is the Business Council of British Columbia's submission on the Ministry of Environment's Policy Proposal for the *Water Sustainability Act*. This submission is supplemental to the Council's previous submission dated April 30, 2010 regarding the Ministry of Environment's *Water Act* Modernization Discussion Paper.

Yours sincerely,

Original signed by
Jock Finlayson

Jock A. Finlayson
Executive Vice President – Policy

/vjc

cc: Cairine MacDonald, Deputy Minister, Ministry of Environment



Business Council of
British Columbia

**Comments on the
Ministry of
Environment's
Policy Proposal
for the
*Water Sustainability Act***

March 14, 2011



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**Comments on the
Ministry of Environment’s Policy Proposal
for the *Water Sustainability Act***

March 14, 2011

The Business Council of British Columbia is pleased to provide these comments on the Ministry of Environment’s Policy Proposal (the “**Proposal**”) for the *Water Sustainability Act* (the “**WSA**”). This submission is supplemental to the Council’s previous submission dated April 30, 2010 regarding the Ministry of Environment’s *Water Act Modernization* (“**WAM**”) Discussion Paper (the “**Discussion Paper**”).

The Business Council, established in 1966, is an association representing some 250 large and medium-sized enterprises engaged in business in British Columbia. Our members are drawn from all major sectors of the provincial economy. Taken together, the corporate members and the associations affiliated with the Council are responsible for approximately one-quarter of all private sector jobs in British Columbia.

The supply of clean, fresh water is an important resource that provides valuable benefits to the province and its citizens. We agree with the Ministry that this resource needs to be maintained and protected. At the same time, the province’s abundant water resource is also a significant competitive advantage that can continue to be used to sustain a strong economy going forward.

The comments that follow reflect the diverse membership of the Council. A number of our member organizations (individual companies and industry associations) may provide more detailed comments on more technical areas relevant to them.



A. Over-Arching Concerns

The Proposal as drafted raises a number of broad concerns, some of which are discussed further below in relation to specific Policy Directions:

1. The Business Council believes insufficient weight has been given to the submissions from industry groups and business community stakeholders in response to the earlier WAM Discussion Paper. The Ministry's Report on Stakeholder Engagement (the "**Report**") indicates that "...some submissions were made by representative organizations or associations on behalf of many individuals or companies....While analysts considered this reality in their review of submissions, no attempt was made to adjust the data based on the size or membership of the organization." The "What we Heard" sections of the Proposal do not reflect key concerns expressed by the Business Council on behalf of a sizable segment of the province's business community – concerns that were echoed by other individual businesses and industry groups who offered separate comments on the WAM Discussion Paper. Instead, the Ministry seems to have accorded greater weight to the many submissions from individuals over those developed by industry and business groups in a collective fashion. As a result, some of the significant impacts on business and the economy which are likely to follow from the Ministry's proposals appear to have been ignored. Specific concerns that warrant greater consideration are set out in Part B of this submission.
2. The Proposal offers very little information on how the policies under consideration would be implemented through specific provisions and the language of the WSA. There is only a very high-level discussion of policy concepts, with no detail on options for implementing such policies. Without more information on the implementation of the proposed policies, it is difficult for stakeholders to analyse and comment meaningfully on them.
3. The Ministry has indicated that this engagement period is the last time that stakeholders will be consulted directly about WAM, including the proposed WSA.



“Final options” apparently are to be developed and provided to government after the current comment period is closed. We have several concerns about this:

- a) The Ministry and the government's legislative drafters will not be able to draw on direct input from stakeholders to assist in developing effective, reasonable, functional and fair WSA provisions.
- b) Because stakeholders will have no opportunity to comment directly on the implementation aspects of the proposed policies:
 - i. The usefulness of the Ministry's engagement to date on the development of appropriate and effective water management reform may be brought into question.
 - ii. A risk of uncertainty will be introduced for businesses and industries reliant on water resources – and for current and potential investors in these firms and industries.
 - iii. Proposed legislative provisions developed in the absence of direct input from the business community, and which could visit significant prejudice on certain industries, may be met with opposition at the legislative stage, when such opposition might otherwise have been avoided through further engagement.

It is in the interest of all parties to ensure that there is full, transparent and timely engagement about any “final options” that are developed, as well as on proposed implementation measures. Stakeholders need to be provided with reasonable notice of and adequate opportunity to comment on the “final options” and how the Ministry proposes to implement them, in advance of such options being recommended to the Provincial Government.

This recommendation accords with requests made by many other stakeholders, as documented on page 4 of the Report, and by the submissions of other organizations as set



forth on the Ministry's Living Water Smart website. The Business Council submits that the Ministry's stated objective (as noted on page 11 of the Report) to "[b]uild trust and align relationships for collaborative water stewardship and Living Water Smart implementation," cannot be achieved without further engagement on these critical aspects of the WAM.

B. Business Concerns Warranting Further Consideration

1. Governance Structure and Resources: The Business Council and its members are of the view that the Ministry needs to develop a **centralized approach to water management**, one that features strong Provincial oversight and policy direction in respect of water management decisions. The Proposal as written suggests that a **decentralized model** for policy and decision-making is preferred.

While a collaborative approach may be useful to inform the Provincial Government's development of the content of policies, objectives, codes of practice, standard licence conditions, water management laws and water conservation tools, the ultimate determination of these matters, and of water management decisions and enforcement decisions, ought to lie with the Ministry of Environment and not be delegated to other bodies. Delegation will diminish confidence in those with water interests and among investors as to the quality and certainty of the regulatory environment, as well as the validity and reliability of existing water licences. Reliance on a decentralized model is likely to give rise to inconsistency in the implementation of water management tools, create an uneven playing field for licensees, increase enforcement costs and inefficiencies within government, and lead to higher compliance costs. Shifting to a decentralized model may also compromise existing and future commercial arrangements, undermine the strength and reputation of BC's regulatory system, and act as a disincentive to investment in firms that rely on long-term, secure access to water resources.

If any administrative functions are delegated, they should be delegated only to bodies with the demonstrated capacity, resources and expertise to exercise such functions



effectively and responsibly. Any delegated authority should be exercised consistently and in accordance with clear, unequivocal and transparent laws, codes of practice, best practices and/or guidelines, standards, and policies, as developed and promulgated by the Ministry through a transparent consultative decision-making process.

In any event, appropriate resources and expertise must be available to those tasked with determining and implementing this new regime, so that current and future licence holders, investors, and others with interests in water resources will have confidence that policy reforms can be put into practice effectively and efficiently, and that there is a reasonable chance they will achieve the intended results.

2. Concepts Underpinning the Proposal: The Business Council agrees that the current *Water Act* and water resource allocation regime do not provide an adequate foundation to ensure the efficient management, protection and conservation of water resources. However, in the development and implementation of water management policies, the Ministry should be careful not to encroach on matters that do not require regulation (or to encroach to a degree that is unwarranted). While certain areas of BC, times of year, and conditions exist in which water resources are or can become strained, adversely impacted or scarce, broadly speaking the province has an abundance of water and generally healthy ecosystems. This is recognized by the Ministry in Appendix A of the Proposal where, under the heading "Climate Change," it is noted that "Climate models predict warmer, wetter winters and hotter, dryer summers with *an increase in total annual water supply.*" This is despite the fact that British Columbia's population is expected to increase 23% by 2030.

Distinct from several other Canadian jurisdictions, British Columbia is a large province where extensive, well-managed water resources can offer significant benefits to the province, its residents, and the economy as a valuable marketable commodity. Regulatory and policy reform should take this into account and facilitate



the realization of broader economic benefits from our water resources, while ensuring that such benefits do not come at the expense of sustainability.

3. Certainty: Businesses and those who invest in them require regulatory certainty and predictability. This is particularly true for the large industrial operations that are found in BC's capital-intensive resource sectors. It is important that the provisions of the WSA, as the vehicle for regulatory reform, provide certainty to existing and future holders of water rights, and protect their interests. The words of the laws and associated regulations enacted to effect water management reform should be unequivocal, for example, as to the powers accorded to those administering them; the nature and extent of water management requirements; water rights, obligations, liabilities and priorities of licence holders (current and future); and the process and timing of applications and approvals. If fundamental changes are to be introduced, appropriate transitional measures with transitional timelines should be included, taking into account the impact of any transition on particular water users and industries.

C. Key Policy: Three Levels of Water Stewardship

The Proposal contemplates three levels of stewardship for water in British Columbia – all as part of an **area-based regulatory policy** by which water would be regulated depending on the classification of the particular area. Three area classifications are suggested: 1) “all areas of the province”; 2) “known problem areas”; and 3) “chronic problem areas.” It is contemplated that “all areas of the province” would be subject to a number of regulatory tools, including:

- Provincial Water Objectives, to be used in land, water and other resource use decisions;
- Formula based in-stream flow assessments for all new groundwater and surface water allocation decisions;
- Conservation-based incentives;



- Reporting requirements;
- The use of criteria and thresholds to identify problem areas;
- Regulating groundwater use;
- Agricultural water reserves; a range of collaboration mechanisms and the ability to delegate responsibilities to local or regional agencies;
- Different approaches for managing water during times of scarcity including allowing deviation from priority date under exceptional circumstances; and
- An expanded compliance and enforcement framework

“Known problem areas” would be subject to additional “measures” to pre-empt emerging water supply and quality issues. These may include:

- Water resource assessments that consider available supply and emerging social, environmental and economic trends;
- Area-and sector-based conditions for new licences;
- Incentives, economic instruments, and voluntary efficiency and conservation measures; and,
- Additional reporting requirements.

“Chronic problem areas” would apply further additional “measures”.

This area-based framework is discussed only at a very high-level. Absent from the Proposal is information about a number of issues that are critical to any change in water policy, including:

- How and by what process areas or waters would be classified as “known problem areas” or “chronic problem areas” (these are new concepts subsequent to the WAM Discussion Paper).
- How and by what process the meaning of words and phrases, including “measures,” “water resource assessment,” “scarcity” and others that are critical to allocation decisions, will be determined. For example, will “measures” ultimately



become mandatory requirements, or would those with administrative authority exercise discretion whether to apply or impose “measures”?

- What factors would be considered in the classification development of measures for the above-noted three areas? Would the factors be limited to an assessment of the quality/quantity of water and the quality/quantity of aquatic habitat in such waters, or would they also include a quantitative and/or qualitative analysis of other ecosystem components?
- Who would be responsible for developing criteria for determining which areas fall within these classifications?
- How would existing licence holders in “known problem areas” or in “chronic problem areas” be affected, if the terms of their existing licences prove to be inconsistent or incompatible with the “measures” or regulatory regime developed for these areas?
- Does the measure calling for a water resource assessment in “known problem areas” mean that applicants for a water licence in such areas will effectively be required to undergo a process tantamount to an environmental assessment as a prerequisite to obtaining, altering, transferring, or renewing a water licence?

These are only a few of the concerns that arise from this aspect of the Proposal – and which were not raised in the Ministry’s previous Discussion Paper. The Business Council believes stakeholders should be consulted before the legislative stage with respect to these and other issues relevant to this aspect of the Proposal.

D. Comments on Proposed WSA Policy Directions

1. Protect Stream Health and Aquatic Environments

The Proposal suggests that instream flows and water use will be reduced during times of scarcity, which could result in more frequent regulatory action and the periodic reduction or suspension of licences held by senior licensees who have never been regulated. It is unclear by what process such reductions would be regulated.



Despite the Ministry's comments on page 10 of the Proposal (under "Regulate During Scarcity"), it is also unclear how "scarcity" would be defined for the purposes of the WSA. Very little information is provided on what considerations, factors, or conditions would trigger a determination that water is scarce or becoming scarce, nor on the kind of process that would be used to make and implement such a determination. Only a vague definition of what constitutes "scarcity" is proposed under Policy Direction #4.

That these concepts (which are fundamental to the ability of stakeholders to assess the proposed reforms) will remain a mystery until legislation is introduced will increase uncertainty for business and industry, particularly for current senior licence holders with significant commercial arrangements which depend on the continued availability of the water they are licenced to use or divert. The Business Council recommends that further discussions with stakeholders be undertaken on these issues prior to moving to the legislative stage.

2. Consider Water in Land-Use Decisions

Evidently the Ministry is looking at establishing Provincial Water Objectives (PWOs) on a province-wide basis. There is no discussion in the Proposal of the development of site-specific water objectives (SSWOs). Several locations in British Columbia currently governed by water licenses (and that may be subject to future water management) contain unique characteristics and chemical compositions that could naturally put them off-side PWOs that may be developed. Flexibility should be built into the proposed water management regime to allow for PWOs to be replaced or supplemented by SSWOs in appropriate circumstances. SSWOs could be developed collaboratively, involving interested parties and incorporating Traditional Knowledge, with local agencies facilitating a collaborative approach and supporting information gathering and engagement. However, the Business Council believes the content of SSWOs ultimately should be settled and enforced on a consistent basis,



through a centralized and appropriately resourced governance structure defined by the Ministry, as discussed above.

The Proposal indicates that PWOs will be used to address cumulative impacts and to align how decision-makers under other statutes would consider water when making decisions regarding land use. The Business Council cautions that unless corresponding legislative amendments are made to other statutes empowering those decision-makers to regulate land use, these other decision-makers could exceed their jurisdiction by considering PWOs in the exercise of their powers regarding land use under separate statutes. Impacts to industries subject to land use regulation under other provincial statutes should be considered and specifically engaged as part of a process of co-ordinated land and water use management prior to reaching the legislative stage for the WSA. The public, including industry, should then be directly engaged with respect to the same. In order for such engagement to be meaningful, information must be provided in advance regarding the proposed implementation of PWOs, and how and to what extent the Ministry expects that they would inform land use decision-making under other BC land use planning regimes.

Finally, we would note that it will be difficult to develop PWOs without regulators having a solid understanding of water quality on a watershed basis. This leads us to question how the Ministry plans to define baseline water quality and judge the cumulative effects of multiple activities taking place in various individual watersheds.

3. Regulate Groundwater Extraction and Use

The Proposal envisages that all existing and new large groundwater users would be required to obtain an approval. The definition of a “large withdrawal” is currently being determined, but could potentially be in the range of 250 – 500 m³ per day in unconsolidated aquifers, and 100 m³ per day in bedrock aquifers. This may mean that most mines, many green power projects, and many other resource or energy



project proponents would require a separate ground water use approval, in addition to a water licence for surface water use. Hydrogeological assessments are noted as a potential pre-requisite for such an application, and increased associated monitoring and reporting requirements are also contemplated. It goes without saying that these provisions could substantially increase the burden both on project proponents and regulatory bodies for projects requiring water resources.

In many cases, it may be difficult to predict the source of water at a particular site. In addition, seasonal precipitation events or hydrology at a site may make it difficult to determine the exact source of water required to be used for the operations. In many cases, as noted in the Discussion Paper and in background information published by the Ministry, there may be a significant interplay between groundwater and surface waters that makes it difficult to discern the source of water in a particular area. Accordingly, the requirement for a separate ground water licence could place an undue burden on project proponents and regulators in certain circumstances.

Further, we are concerned that a blanket approach to groundwater regulation throughout the province is likely to lead to an overly cautious regime in areas with an abundance of water. This may put unnecessary strain on regulatory resources and result in significant additional costs to current licence holders and project proponents.

The Business Council supports regulating groundwater extraction in areas of known quantity concerns. But regulating groundwater in areas of water abundance is unnecessary and is likely to be more problematic than beneficial for all interested parties. Restrictions on large withdrawals should be relative to the supply of groundwater in a particular watershed in order to avoid, on the one hand, excessive regulation of large withdrawals where supply is plentiful and competition low, and on the other hand, an arbitrarily high threshold in a low supply or highly competitive area. The abundance of water in British Columbia is a competitive advantage for our economy vis-à-vis many other jurisdictions. There is little benefit in imposing



additional permitting and administrative costs and more regulatory risk unless it is clearly necessary to do so.

4. Regulate During Scarcity

The Proposal suggests encouraging licensees to implement efficiency and conservation measures. The Business Council sees merit in measures such as the preparation of conservation, efficiency and protection plans, and efforts to develop codes of practice, best practices, and water storage and water treatment infrastructure rebates. However, we are concerned about the prospect of new fees and economic measures, instruments, and incentives being imposed that could increase costs and risks for businesses and industries that rely on non-consumptive water resources, or that result in an unbalanced playing field among existing licensees (or between existing licensees and new water use applicants). The Business Council is also concerned that financial incentives or costs, such as fees and rents, may result in disincentives to resource, land and project development in British Columbia.

The Proposal also contemplates that regulation during scarcity would involve requiring proportional reductions based on water supply forecasts. If forecasting is to be used as a tool for limiting water rights, it should be based on defensible scientific processes and relevant data, and take into account area or site specific factors to determine the likelihood and appropriate meaning of scarcity.

The Ministry indicates that there may be deviation from the First-In-Time-First-In-Right priority model, toward an importance-of-use priority model in “exceptional circumstances.” Little information is offered as to how and on what basis “exceptional circumstances” would be determined to exist (or be forecasted if forecasting is to apply to this determination as well). For many Business Council members in the mining, energy and other resource sectors, any deviation from the priority date model could have significant impacts on the ability to operate currently permitted facilities. This, in turn, could have negative consequences for jobs and the



health of certain industries. Those senior licence holders in the food industry who rely on consumptive water use could also be significantly affected.

The Report summarizes the differing views of stakeholders on which uses ought to be prioritized over others. There is a divergence of opinion on this point, and several suggestions have been made to the Ministry by different parties about a potential shift away from the priority date model to a priority-of-use model. In certain circumstances, economic conditions, and areas, consumptive uses may necessitate a greater prioritization than other uses. However, if economic conditions or circumstances change, priority uses may also need to change. The Business Council submits that because of the potential for significant adverse impacts from this aspect of reform, further consultation is needed, particularly respecting the determination of thresholds for “scarcity” and the meaning of “exceptional circumstances.”

5. Improve Security, Water Use Efficiency, and Conservation

The Proposal discusses the use of economic instruments and incentives to improve water use and efficiency. We repeat the points made in the first paragraph under item 4) above. The Business Council supports a continued requirement that licensees make beneficial use as a pre-requisite to maintaining water rights.

The Business Council agrees that if water use efficiency becomes a regulatory reality, then consideration of efficiency should be incorporated into the definition of beneficial use. However, the Proposal provides little information on how efficiency would be defined for this purpose, nor on what the implications of doing so might be for existing and new licence holders – as well as licence holders seeking to renew or re-instate water rights. If water use efficiency is to inform the meaning of beneficial use, a clear definition or guidelines should be developed against which to measure efficiency, and this should be done on an administratively fair and consistent basis that does not compromise or lessen regulatory or business certainty.



The Business Council is not opposed to water management reforms that protect water necessary for agricultural uses within the Agricultural Land Reserve.

6. Measure and Report

The Business Council recognizes that under the WSA, there will be increased monitoring and reporting requirements respecting water use throughout the province. Diligent and accurate monitoring and reporting is integral to developing a reliable database of information upon which scientific assessments may be done and sound water resource management decisions made.

However, it is unclear from the Proposal whether the additional reporting measures contemplated could result in significantly increased administrative burdens, whether financial or otherwise, on regulatory authorities or water licence holders. It is also unclear whether any additional information gathered could include private, commercially sensitive, confidential, proprietary information – the public release of which could raise concerns – or instead whether such information might otherwise be protected from disclosure. Any additional reporting requirements should be developed and implemented in a manner that does not jeopardize effective, consistent, fair and timely regulatory administration, nor unfairly or unduly compromise privacy rights or result in unfair commercial advantages or disadvantages. If sensitive information is required, then adequate protections should be established to ensure that its provision does not result in administrative unfairness or undue personal or commercial hardship. Consideration may need to be given to co-ordinating additional reporting requirements with existing privacy laws.

In addition, the appropriate resources must be made available within government to ensure that any information provided through increased monitoring and reporting is reviewed and used effectively to advance sound water management objectives.



7. Enable a Range of Governance Approaches

The Business Council re-iterates the comments above concerning the necessity for strong Ministry oversight and policy direction and a centralized governance structure for water allocation, licensing and management. We see this as essential to ensuring regulatory fairness, project and permitting certainty, and economic stability in British Columbia.

The Business Council appreciates the opportunity to comment on the Proposal. We strongly encourage the Ministry to extend the period for public engagement, including with licence holders and others in the business community, on the issues identified above, many of which are important to successful water management policy development in the province.
