

## **BC's Water Act Modernization Feedback**

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**Note: These comments are provided from my perspective as a First Nations person who was Chief in my community for 14 years and as an IPP developer, developing one IPP project and working on several others.**

### **INTRODUCTION**

**The discussion paper of the Modernization of the Water Act is said to be informed through engagement with First Nations and stakeholders through workshops, meetings, letters, report and direct discussions. As I am not aware of any of those sessions I cannot comment on the amount of input from First Nations people on shaping the context of this paper.**

**In the introductory section of the paper, page 4, paragraph 2, it is stated that the Water Act could reflect some of the unique cultural interests of First Nations may have with water and promote the use of traditional knowledge in water stewardship and decision making. Culture can be defined in so many ways, so if this is to be used in the act, it must be defined to include the spiritual and ceremonial practices of the First Nations people as use of the water is critical to those practices.**

### **RIGHTS AND TITLE**

**It is clear from the courts that the government of BC cannot legislate about First Nations rights and title. Also section 91(24) of the Constitution Act gives legislative power to the Federal government over Indian and lands reserved for Indians. So the Water Act cannot be about First Nations Rights to the water. Also, there has not been a court case on the rights and title of the First Nations to water, but my assumption is and always has been that First Nations title to water would be as to the land, it is a burden on the water, as is the right to the water. Because the issue has not been definitely resolved in rights and title, it creates problems in dealing with the framework set out in the Water Act.**

**First Nations have a right to the water, and being issued water licenses does not do justice to that right. Also, not being first in line as a license holder is an issue. Aboriginal rights are second only to conservation, as is the right to water. To have all the other water license holders taking precedence before the First Nation creates**

**problems and issues. While the modern treaties such as Tsawwassen and Maa-nulth have agreed that their right to water comes after water licenses issued to others, this has not been agreed to by other First Nations. What becomes more interesting with respect to the water allocations under the Tsawwassen and Maa-nulth Treaties is that their treaty right to water, has now taken on constitutional protection, and the Water act will not be able to interfere with those volumes even in times of drought or other climate catastrophes.**

**As the Act cannot legislate with respect to the aboriginal right to water, the Act or policies and procedures of the Crown will be dictated by Consultation and Accommodation as set out in the Delgamuukw and Haida cases. The paper is clear, as is the courts, that it is the duty of the Crown to do the consultations. What will be the challenge if governance of water is delegated to another body, how the Crown does the consultation and then directs the governance body on what they have to do with the First Nation? That is not clear on how that could actually work when the delegated authority goes to the body to make decisions, and what would happen if they do not take the advice of the Crown on consultations and if the Crown can override the decision making body based on the lack of following the consultations. This process would need to be very carefully defined.**

## **SHARED DECISION MAKING**

**The New Relationship that was agreed to by the Chiefs of the First Nations in BC and the Province of BC in May 2005 states:**

“We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.

**We agree to establish processes and institutions for shared decision-making about the land and resources** and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title “in its full form” ...”

The action Plan agreed to “ 2. Identify institutional, legislative and policy changes to implement this vision and these action items;”

The shared decision making as referred to in the New Relationship has never been fully implemented and the Water Act would be a good place to make the legislative and policy changes to use Shared Decision Making. If processes could be put in place for a true shared decision making model, consultation would be almost unnecessary or would be a very minor task as all the considerations would have taken place at the Shared Decision making phase.

The Opportunity for Shared Decision Making could take place in many areas of the proposed amendments of the Water Act. Shared Decision Making is a process in which decision-makers with respective jurisdictions, authorities and laws, engage in a joint process to reach a common decision.

Possible principles of Shared Decision Making (SDM) include:

- A. First Nations will engage in shared decision making at strategic levels, the infancy stage, planning or development stage, not after a decision has already been made;
- B. SDM process must equally recognize jurisdiction of First Nations, Canada and BC there should be no unilateral authority of any Party;
- C. Consultation is not Shared Decision Making;
- D. Decision Making should be conducted in a sustainable manner that respects the environment and that protects lands and resources for future use.
- E. SDM processes will be clear, effective and efficient;
- F. SDM will ensure early, ongoing, and meaningful engagement that leads to a decision that meets the interests of all involved parties.

With respect to the Discussion Paper and SDM, For Example, Principle 4 Could read: "Water resource legislation, policy and decision making processes as well as management tools are integrated across all levels of government and with First Nations through Shared Decision Making".

Page 9 Options for how environmental flow is to be considered in decisions.."The decision makers under the Water Act for water licenses are the Comptroller of Water Rights and the Regional Water Manager in conjunction with First Nations through Shared Decision Making."

Decisions are made with the First Nation(s) whose territory the watershed is in with the Regional Water Manager and Comptroller of Water Rights with a dispute resolution process that is quick and efficient so decisions cannot be held up for any length of time.

Page 11: Water Allocations Plans must be developed with First Nations through the Shared Decision Making Model developed for this purpose.

Page 15: 6.1: Objectives for Improving Water Governance

"1. Governance roles and accountabilities are clarified in relation to the allocation of water and protection of stream health. First Nations shall be part of the planning and be decision makers. Industry, local communities and NGO's shall play a role in planning and decision making.

Page 16: Possible Solutions, in the Box entitled "Provincial and Federal Governments would retain responsibilities for Understanding First Nations interests in water

management". If Shared Decision Making is used, this statement would not be necessary. If the province insists on consultation only, this is a huge understatement of the duty of Consultation and the Honour of the Crown.

## WATER GOVERNANCE SOLUTIONS

1. Centralized Approach: Puts all authority in the province and ignores the SDM model with First Nations. Consultation is based on a FN by FN basis and the person doing the consultation and is not always consistent. Critical decisions may need to be made regarding water allocations in drought conditions and this cannot be made in isolation of First Nations and the greater community. This model puts First Nation on the same level as stakeholders and would not work because of that. As First Nations with rights, there must be a recognition of that and not just lump first nations with the public.
2. Shared Approach: As set out in 10.4. Regional Visioning for water does not include First Nations. Regional growth Strategies and OCP's were not developed with First Nations and strictly cover the interest of the regional district of municipality. Some First Nations have LUP's, but not all First Nations so First Nation value of the land and water will not be taken into account and they should be the priority. The province has not engaged in LUP's with all First Nations and only those that have taken the initiative to do so would be able to participate at the same level. Establishing "advisory committees" for First Nation and stake holder involvement is not good enough. Advisory committees take a lot of time and commitment and if the province has the final say regardless of an advisory committee, this would be time wasted. This again does not address the concept of Shared Decision Making that was committed to by the Crown.
3. Delegated Approach: as described does not include First Nations but describe locally elected boards or committees with cross sector an all government representation. Some of the Watershed agencies that are already established do not include First Nations and must be taken into consideration. In some areas, First Nations and regional districts or municipalities do not get along and get them on the same board may be impossible. In other areas, relations are good and may be already working together so this must be taken into consideration when establishing delegated models. If First Nations are left out of the process, there will be unrest and continued interruptions of decisions being made as it was with the Halalt this year. The question that was not clear throughout any of the models is whether the province is just offloading the costs of decision making. There must be a clear statement of provincial responsibility costs associated with water management.

## PRINCIPLES

1. Who defines sustainable limits?
2. First Nations spiritual, social and cultural practices associated with water are respected and protected.
3. Science includes indigenous wisdom, or Traditional Ecological Knowledge.

4. Commented on in SDM portion of this paper.
5. How can a predictable investment climate exist if there is a lot of discretion given to decision makers. Climate change brings up uncertainty and unpredictability. This should be revised to reflect this.
8. First Nations have rights. Water licensees should have privileges.

## ENVIRONMENTAL FLOWS

1. Environmental flows must take into consideration spiritual use by First Nations.
2. Why is recreation considered in Environmental Flows. It is an activity that is associated with water, but is not critical to the "environment". This should be taken into consideration in another part or licensing not in environmental flows.
3. Small hydro projects cover a smaller part of the stream than larger ones. Hydro projects are considered consumptive when they are not. There should be a separate part of the water act to deal with the non consumptive nature of hydro projects as the water can be used by other users on the same stream. Obviously there are environmental affects associated with smaller projects and even greater ones with larger dams but should be dealt with differently than consumptive uses where water is actually taken out of the stream.
4. Environmental Flow Guidelines: with SDM with First Nations could happen with Option A. There needs to be guidelines as to what constitutes a deviation and what circumstances so that there is no abuse of such powers.

## Objective 5.2

I would agree with watershed based water allocation plans done on a priority basis. The more that is understood about the volume of water available in the province and long term planning, the better able we will be able to manage water. This would also include ongoing monitoring of flows and the impact of climate change. Water allocation plans must be done with First Nation using the SDM model developed.

## Objective 5.3:

Agree with option B. There must be a prohibition against dumping. Not only should the person who contravenes the act have to restore stream health, but should have to pay a large penalty. If stream health cannot be restored, the penalty should be greater. What is most important is to make sure that compensation is a deterrent and not just a minor fine that people can write off as the cost of doing business. Stream health is too important to take lightly.

### Goal 3

With respect to existing water licenses in BC, while there is room to go in and change volumes of water based on use, this has never been done. Nor has enforcement been used to any great degree. This needs to be changed. There should not be any protection for “grandfathered licenses.” Licensees need to be treated fairly and equitably and the New Water Act is a chance to change the things that were not done properly, or in today’s climate.

Objective 4: Short term scarcity should be something that can be decided by priority of life. Drinking water should be the first objective, and the growing of food for local residents, not supporting a business that would export food for business. The essentials of life should be first and foremost. This would be the opportunity to bring together the community to determine priorities together beyond human life for that particular watershed, or stream.

### Objective 7

While I would agree in principle with objective 7.1, there must also be certainty for water users. If flexibility takes away certainty there could be real problems. In times of drought or low flows, drinking water must always be the priority. Defining what the flexibility is in clear terms would be important. Again, this would be in conjunction with First Nations and SDM. I would agree with Codes for efficient infrastructure and practices which would include the ability of decision makers to issue an order to fix any aged, leaking, inefficient systems within a reasonable time frame. I also agree on the use of incentives and economic instruments. I would not agree with rules for the transfer and apportionment of existing water rights. People need to apply for their own specific purposes that have been approved. Change of use cannot be allowed as it would impact environmental flows and stream health.

I am not comfortable with Low Risk applications. While it may seem that low risk applications may be little impact, if there are enough of them, or the water levels are more sensitive to use, or people take advantage and use the water for other purposes and there is not enough enforcement, stream health could be affected. Who would monitor water levels and ensure that there is enough water in the systems for environmental concerns and that there are not too many low risk users who do not have to apply. There were no statistics supplied as to how many low risk applications they are and how much volume of the water they represent.

### GOAL FOUR

Ground Water Extraction: I would choose Option B. Groundwater extraction needs to be determined in relation to watershed allocation plans. Knowing what the impact of extraction

on existing users must be a known factor. These watershed plans and allocation must be done with First Nations and use Shared Decision Making where possible. The issue with the Halalt would not have happened if such planning had been taken place with Halalt involved in the process. Preventing these kinds of issues in the future can be done with greater involvement and shared decision making of the First Nation.

#### FIRST NATION INVOLVEMENT IN THIS PROCESS OF THE WATER ACT MODERNIZATION

Three First Nation specific information workshops were held in different parts of the province. First Nations were invited to all of the public workshop that were held in different parts of the province as well. These sessions and the ability to send in comments on the discussion paper cannot be considered consultation in the legal sense of that word. Consultation of course is the opportunity for every concern a First Nation has about the impact of an action, policy or law on their rights and title be raised and addressed. If the province is looking to Recognition and Reconciliation as has been stated in the New Relationship and in many Throne speeches, the process of modernizing the water act should be with much more First Nations input than has been garnered to date.

Water to First nations people is sacred and the beginning of life. Respectful engagement on such an important element is necessary.

With Respect,

Judith Sayers