

From: Brenda McCorquodale [brenda@fnfisheriescouncil.ca]
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To: Minister, ENV ENV:EX; Living Water Smart ENV:EX
Subject: First Nations Fisheries Council
Attachments: FNFC WAM Submission_Final_April_30_2010.pdf

Importance: High

Please find attached a submission for consideration with respect to the current ongoing Water Act Modernization process from the First Nations Fisheries Council.

Thank you.

Brenda

Brenda McCorquodale
Executive Director
First Nations Fisheries Council
P.O. Box 2606, Unit 209 – 99 Tsakis Way
Port Hardy, B.C. V0N 2P0
Telephone: (250) 902-8380
www.FNFisheriesCouncil.ca

FIRST NATIONS FISHERIES COUNCIL

**SUPPORTING STEWARDSHIP OF FISHERIES RESOURCES
FOR CURRENT AND FUTURE GENERATIONS**

First Nations Fisheries Council

PO Box 2606, #209 – 99 Tsakis Way,

Port Hardy, V0N 2P0

Telephone: 250-902-8380

www.FNFisheriesCouncil.ca



FIRST NATIONS
FISHERIES COUNCIL

April 30, 2010

Honourable Barry Penner
Minister of Environment
PO Box 9047 STN PROV GOVT
Victoria, B.C., V8W 9E2
env.minister@gov.bc.ca

Dear Minister Penner;

We write to you today on behalf of the First Nations Fisheries Council with respect to the *Water Act Modernization* Process and Discussion Paper.

The First Nations Fisheries Council was established in 2007 as an organization that works with B.C.'s 203 First Nations on issues related to fishing and aquatic/marine resource management. The Council has 14 seats for First Nations representatives from the various diverse geographic regions of the province. The Council works to identify and address issues of common interest to First Nations with respect to fisheries and aquatic resources, including title and rights concerns, building community capacity, and moving toward a more robust and responsive system of co-management.

British Columbia's Water Act is over 100 years old and the Council agrees that an updated Water Act is long overdue and that significant changes to the existing Act are required to address key issues (including: challenges affecting First Nations, salmon and freshwater fisheries, aquatic habitats and ecosystem services, water source protection, and water governance and decision-making). As you are aware, B.C. First Nations assert substantive Title and Rights which relate directly to *Water Act Modernization* (Appendix A). Furthermore, it is important to note that water is a defining element of fisheries habitat. Current and future water management actions, and any proposed changes to the *Water Act*, including potential impacts to fisheries habitats, may infringe upon First Nations' fisheries rights, thereby triggering the need for deep and meaningful consultation and accommodation between British Columbia and B.C. First Nations.

It is essential that First Nations Title and Rights interests are recognized and that your government takes all of the steps necessary to ensure that a revised Water Act meets the test of a high and robust consultation and accommodation process with the proper rights-holders in B.C. The First Nations Fisheries Council is concerned that the Province's WAM consultation process as presently constituted is inadequate to allow for the meaningful consultation and accommodation which flow from the

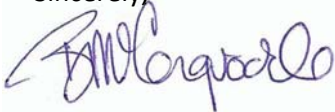
knowledge of the Province that Water Act Modernization will impact on asserted Title and Rights. The Council is concerned that the lack of resources and the short review period have not been sufficient to allow First Nations the opportunity to be meaningfully engaged in the *Water Act Modernization* process. As well, limited information which has been made available to B.C. First Nations at the present time with respect to the Government's intent, coupled with a lack of capacity in many communities to respond to technical and policy issues, call into question the likelihood of adequate consultation taking place on this issue.

To improve the Process and to give an opportunity for meaningful engagement and input into a revised *Water Act*, the First Nations Fisheries Council recommends the following:

- Improve the bi-lateral government-to-government relationship and dialogue with First Nations by engaging directly, and in person, with First Nation Bands and Tribal groups;
- Extend the consultation period for the *Water Act Modernization* Process to give First Nations the time necessary to undertake a thorough review and analysis of issues and challenges related to issues raised in the *Water Act Modernization* Discussion Paper and the *Water Act*, and to prepare thoughtful and meaningful input for *Water Act* revisions (an extension of the consultation period would also allow time for the Province of British Columbia to work with First Nations to develop an accommodation process);
- Provide financial resources to First Nation communities and organizations to undertake a thorough review and analysis of the *Water Act* and key resource documents such as the *Water Act Modernization* Discussion Paper and Technical Background Report ;
- Extend the consultation period to give adequate time for First Nations to review potential options and draft revised *Water Act* legislation before it is introduced to the B.C. Legislature.

As indicated by the breadth and complexity of issues raised within the *Water Act Modernization* Discussion Paper, it is clear that the *Water Act* is critical legislation and the issues surrounding it will not be easily resolved. The First Nations Fisheries Council has offered some initial feedback with respect to the tabled *Water Act Modernization* process and materials (Appendix B); however it is clear that further work and discussions need to take place. It is our sincere hope that the Provincial Government will act diligently and in good faith to respect and accommodate Aboriginal Title and Rights and will do its utmost to meaningfully engage B.C. First Nations in this important initiative.

Sincerely,



Brenda McCorquodale, Executive Director for
Allan Claxton, Chair, First Nations Fisheries Council

CC: B.C. Assembly of First Nations
First Nations Summit
Union of B.C. Indian Chiefs
Water Act Modernization Submission, Water Stewardship Division, Ministry of Environment

Appendix A

Substantive First Nations Title and Rights Issues Related to Water Act Modernization

In British Columbia, as elsewhere, the prevailing water law and water management regime have reflected and privileged the dominant culture's economic, social and cultural perceptions of water¹ at the expense of the First Nations' laws, protocols as well as our economic, social and cultural perceptions of water². First Nations economic, cultural and social perceptions of water persist and find a foundation in Title and Rights.

First Nations in British Columbia assert Title and Rights to water that flow from numerous sources including:

- Aboriginal Title; First Nations are the original inhabitants and governing authorities of this land and have distinctive rights that flow from that status³,
- Aboriginal Rights to fish and fisheries for food, social, and economic purposes that rely upon water, moreover First Nations' relationship with water is *sui generis* and has significant ceremonial and spiritual dimensions, the management of which will be affected by this law,
- Establishment of a reserve either by treaty or executive action (Order-in-Council),
- Riparian rights derived from previous occupation of lands that adjoin to a body of water, riparian rights are common law rights held by Canadians.⁴

In *Calder v. Attorney General of British Columbia* (1973) SCR 313, [1973] "Justice Hall described aboriginal title as "a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams."⁵ First Nations rights flow out of that recognized ownership and includes both land and water. Aboriginal title and rights include the ability of First Nations to make decisions about their lands and resources, and to benefit from the resources that are used or extracted.⁶ The Water Act did not extinguish Aboriginal rights to water; these un-extinguished rights ought to reflect Aboriginal perspectives including their rights to water.

As water is a defining element of fisheries habitat, any current and future water management actions and any proposed changes to the *Water Act*, may have potential impacts to fisheries habitats. There

¹ Water claims had been recorded for 20 years before Indian Reserves lands were involved in the statutory scheme, Indian reserves were thus at considerable disadvantage in the first come first serve system. "This issue is especially important in relation to reserves along coastal B.C., many of which are small and uninhabitable, and unproductive from an agricultural point of view, and were created of their importance to their respective First Nations fishing stations. One of the key considerations for the Reserve Commission was to allocate land which would help achieve the social policy of assimilation..." (Hugh Braker, pages 27, 47).

² For a more thorough description of Indian Reserve creation, see submissions by the B.C. First Nation Summit and the Union of B.C. Indian Chiefs.

³ RCAP Principles of Renewed Relationship

⁴ Claudia Notzke page 8 and Hugh Braker page 31

⁵ Claudia Notzke pages 8, 9

⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. (First Nations Summit submission page 2)

are two cases⁷ that demonstrate that potential infringements on asserted First Nations' fisheries rights can be used as the basis for protection of fisheries habitats against potentially harmful impacts.

First Nations water rights derived from aboriginal title cannot be limited to historic and traditional uses, in *Sparrow* "an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time." (*Sparrow v. R* [1990] 3 CNLR 161) *Sparrow* lends itself to a contemporary use of water resources. First Nations rights, contemporary or traditional, enjoy a constitutional priority.

The new approach to modern-day treaties negotiated between Canada, British Columbia and First Nations contain provisions for groundwater and water as well as consultation processes for water licenses. The initial treaties signed in British Columbia "...do not expressly mention water rights, it seems reasonable to infer that they were intended to guarantee Indian bands at least enough water for the development of their reserve lands, particularly agricultural development."⁸ Those First Nations who have entered a treaty as well as those First Nations that have pursued alternate forms of reconciliation have procedural rights to consultation and accommodation process.⁹

Consultation and Accommodation

Despite successive failures by the governments of Canada to recognize and respect aboriginal title and to share wealth the governments of Canada's powers to exploit a claimed resource are constrained by the existence of asserted, as well as proven rights¹⁰.

"To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable."¹¹

Consultation is linked to strength of claim and potential adverse impact on asserted aboriginal rights by the conduct of the Crown. If it is deemed to require deep consultation, then accommodation will be triggered. Asserted Aboriginal title and rights convey more than the ability to provide input, there is a duty on the Crown to take concrete and measurable steps to identify and accommodate First Nations concerns. First Nations do not need prove harm as the duty to consult and accommodate is triggered by the potential harm to a proven or asserted aboriginal right.

⁷ *Saanichton Marina Ltd. v. Claxton* (1987), 18 B.C. L.C. (2d) 217 (B.C.S.C.) 1987 4 CNLR48) and *Pasco v. Canadian National Railway Co.* [1986] 1 CNLR 34 (BCCA)

⁸ Barton 1985: 18; Bartlett 1989:179

⁹ Mikisew and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2005]

¹⁰ Watershed Watch: Fish Out of Water: Tools to Protect British Columbia's Groundwater and Wild Salmon page 14

¹¹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2005] 1 C.N.L.R. 72.

Recommendations

Recently, in the Throne Speech, the province of British Columbia changed its policy approach to the reconciliation of Aboriginal title and rights. Consistent with the New Relationship, BC's approach to reconciliation is based on:

- Government to Government relationships based on respect, recognition and accommodation
- First Nation participation in shared decision making and revenue sharing
- Closing the socio-economic gap
- Negotiated agreements that benefit all parties

There is a need for the province to demonstrate its commitment to First Nations, within and outside the treaty process, to shared decision making and the government to government relationships in the development of Water Act Modernization (WAM). The application of these principles of reconciliation, particularly respect, recognition and accommodation ought to include the recognition of treaty, governance, and decision-making rights over water resources in First Nations territories.¹²

For reconciliation to be meaningful First Nations' economic, social and cultural perceptions of water must be afforded an equitable position in the WAM process. The province must take steps to enable Aboriginal participation in the decision making processes, co-design with First Nations a framework for minimizing potentially negative impacts on demonstrated and asserted rights to water resources, co-design with First Nations a scientific agenda that addresses each parties priorities in WAM.

¹² (First Nations Summit Water Act Modernization Initiative submission April 30, 2010 p. 7)

Appendix B

First Nation Fisheries Council Comments on the *Water Act Modernization Discussion Paper*

Principles

The First Nations Fisheries Council is guided by the *B.C. First Nations Fisheries Action Plan* (2007), and the Plan outlines eight principles to guide actions relating to aquatic resources and habitats:

1. **Ecosystem Approach:** Species and their habitat are managed through an ecosystem approach. An ecosystem approach looks at the role that a species, habitat-type, or activity plays in relation to other species, habitats or activities, and in relation to their broader ecosystem. It also looks at the cumulative effects of different activities. Finally, it includes understanding broader processes and dynamics driving change at smaller scales.
2. **Conservation:** The protection, maintenance, and rehabilitation of aquatic resources, their habitats, and interconnected life support systems, take precedence in managing aquatic resources. For species and ecosystems to continue to produce benefits, we must protect their diversity and resilience to impacts and changes. In making decisions, it is important to respect the limits of our knowledge and understanding of aquatic systems, especially given current uncertainty about environmental change. Resource managers and users should therefore err on the side of caution when making decisions. According to this precautionary principle, where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent harm to aquatic species and their habitat.
3. **Sustainability:** Aquatic resource use should be conducted in an environmentally, socially, and economically sustainable manner. Asking whether an activity can continue to produce similar benefits for future generations is one way of determining whether an activity is sustainable. This test should be applied in the context of prior knowledge, our limited ability to predict the future, and an ecosystem approach that looks at the activity in relation to other activities or broader dynamics. Full-cost accounting that integrates social, ecological, and economic costs and benefits should also be used when making decisions.
4. **Shared Responsibility:** A central First Nations role in management is necessary, based on Aboriginal and Treaty rights and title. First Nations, Federal, and Provincial governments should have primary responsibility for the management of aquatic species and habitat. Local governments, fishers, communities, and the public at large should have opportunities to contribute meaningfully to management.
5. **Accountability:** Aquatic resource managers and users should be accountable for the results of their decisions and actions. Accountability involves establishing desired outcomes, establishing

rules of conduct in achieving outcomes, monitoring rules, evaluating whether outcomes are being achieved, and implementing meaningful corrective action.

6. **Diverse Approaches and Benefits:** We respect the cultural diversity among B.C. First Nations and the importance of continuing and supporting each others' traditional practices. Diversified benefits and participation in management are important in garnering support for protecting aquatic species and ecosystems. Within the framework of a common vision and principles, different approaches and institutions should be nurtured in different geographic or sectoral communities in BC. Diverse approaches should be independently and transparently evaluated according to a common framework. This can provide incentives for innovation and the ability to test and adapt management strategies.
7. **First Nations Ownership:** First Nations rights and title arise from prior use and occupation of the land and ocean spaces, and include rights to utilize and manage aquatic resources. We will respect the rights and title of other First Nations and support each other to advance those rights.
8. **Stewardship:** The use of aquatic species and their habitat should carry with it the responsibility to treat them with respect and ensure their continued and unimpaired use and enjoyment by future generations.

Some of the principles guiding the *Water Act Modernization (WAM)* Process are similar to the eight principles outlined above, and the FNFC is generally supportive of the WAM Principles outlined in the Discussion Paper relating to sustainability, stewardship and conservation. However, the WAM Principles should be revised to reflect:

- That the value of water is priceless and it is vital to maintaining biological and ecosystem functions
- Respect, recognition and accommodation of Aboriginal Title and Rights to lands, water and resources
- The interconnectedness of land and water, and that effective management of watersheds must take an ecosystem-based approach to broadly consider the cumulative effects of land and water uses, management decisions, and policies
- Collaborative management of water resources must occur between governments and with the participation of other interests
- Aboriginal Traditional Knowledge is an area of science that can help to inform water resource management and decision-making

Improved Water Governance

Water management and governance is extremely complex, and the First Nations Fisheries Council is encouraged by the Province's efforts to make much needed and long over-due improvements to water management and governance in British Columbia.

Governance arrangements in British Columbia must respect, recognize and accommodate Aboriginal Title and Rights to lands, water and resources, and B.C. First Nations have repeatedly articulated that they view their inherent Title and Rights as including a right (and obligation) to play a key role in natural resource management within their territories.

For First Nation communities, the strength of authority is concentrated at the local level, as title and rights flow from attachment to land and marine space within a specific territory. As modern governance has pushed decision-making further way from the community level (i.e. in many cases to a B.C. wide scale), the recognized authority for a First Nation community and/or organization in decision-making has become diluted. Generally, within the constitutional framework and within Canadian Court decisions, First Nations' jurisdiction, management authority and responsibilities are considered strongest within the traditional territory of the First Nations community (at the local or Nation scale). First Nations hold Title and Rights, thus have the authority to be consulted with, and make decisions which affect their own territory. In some cases a Nation's territory may align well with a Watershed or Marine ecosystem.

Generally, with proper consultation and a shared commitment to effective governance, policies and strategies may be developed broadly at the Province-wide scale. However, the most appropriate scale for water management and governance is at the watershed level, where local watershed management plans can be developed. Locally developed watershed plans may be better adapted and responsive to watershed needs and uses, and they may also be better positioned to address cumulative effects of land and water uses, and to improve the integration of management decisions, policies and legislation within the watershed.

The Council is generally supportive of the collaborative development of watershed plans completed at the watershed level (including the design and scope of the plan) as a basis for more effective and accountable watershed management and governance, but a more thorough review, analysis and design of the scope and purpose of watershed plans and the associated planning process is needed to ensure that Aboriginal and Treaty Title and Rights are recognized and accommodated.

Mechanisms must be in place to ensure that there are adequate resources available for effective governance arrangements at the watershed level, and for the development and implementation of watershed plans.

Protect Stream Health and Aquatic Environments

As water is vital to maintaining biological and ecosystem functions, the Council would be supportive of an improved *Water Act* that applies an ecosystem-based approach to water management that “...looks at the role that a species, habitat-type, or activity plays in relation to other species, habitats or activities, and in relation to their broader ecosystem. It also looks at the cumulative effects of different activities. Finally, it includes understanding broader processes and dynamics driving change at smaller scales”¹³.

An ecosystem based approach may allow watershed management to be more responsive, adaptive or resilient to changes and fluctuations in the hydrologic cycle due to natural or seasonal variability and to changing environmental conditions (e.g. climate change or mountain pine beetle affects), or resulting from water extractions and discharges and impacts from other land uses and activities in the watershed (e.g. agriculture, forestry, mining, oil and gas exploration, etc).

The First Nation Fisheries Council is supportive of measures that will directly protect the health and integrity of streams and aquatic environments. By legislating environmental flow standards on fish-bearing streams that account for water flow needs at various life history stages (e.g. spawning, incubation, emergence, migration and rearing), fish and other aquatic organisms may be considered “priority users” of the water resources and be offered some measure of protection within the water allocation system. Environmental flow standards may also protect overall watershed health by recognizing the value and function of “ecosystem services”.

Regulate Groundwater Extraction and Use

Due to the connections and interactions between groundwater and surface water, the First Nations Fisheries Council is supportive of the intention to regulate groundwater, but the regulations should be applied across British Columbia and not just in priority areas. As a source of stored water and as a contributor to surface flows, regulation of groundwater is necessary to protect an important water supply from extraction and exploitation and to protect against what may be irreversible changes to the hydrological cycle if groundwater reservoirs are allowed to be fully extracted.

Under a revised *Water Act*, the proposed future development of watershed plans and revisions to the water allocation system will need to integrate the governance and management of the combined ground and surface water resource.

Introduce More Flexibility and Efficiency in the Water Allocation System

While there is general agreement amongst water users that B.C.’s current water allocation system is outdated, changes to the water allocation system are likely to be the most contentious issue in the Province’s effort to revise the *Water Act*.

¹³ B.C. First Nations Fisheries Action Plan p.7 (2007)

While not an exhaustive list, the First Nations Fisheries Council can identify several areas and issues that need to be fully considered and addressed in the development of a revised water allocation system for groundwater and surface water:

- **Conservation and Protection:** Priority use, environmental flows, future water needs, balancing/tradeoffs between domestic uses and industrial uses
- **Rights:** First Nations inherent rights, terms and conditions of acquired rights granted in the allocation system,
- **Allocation:** Decision-making process, information and tools needed to make informed decisions, changes to the prior allocation system (i.e. “First in Time, First in Right”), allocations for small water uses and large water uses
- **Licensing:** Incentives related to efficiencies, disincentives relating to violation of terms and conditions, changes to water license application process
- **Assessment, Monitoring, and Enforcement:** Science and information, cumulative impact assessments, monitoring and reporting
- **Resources:** development of watershed plans, monitoring and assessment

These considerations are wide ranging and complex and more detailed information on how the Province intends to address these issues and concerns within a revised *Water Act* is required and warrants more time and resources for First Nations to review and analyse before further consultation occurs and before the Province drafts revised legislation. Because there are numerous implications and potential infringements to the Aboriginal and Treaty Title and Rights of BC First Nations with respect to a revised *Water Act*, and in particular to the water allocation system, a more meaningful process of consultation and accommodation is necessary.