

From: Judith Sayers ***PERSONAL IDENTIFIERS REMOVED***
Sent: Sunday, February 20, 2011 3:34 PM
To: Living Water Smart ENV:EX
Subject: Response to Policy Proposal on WSA

Hello:

Please find attached my response to the Policy proposal on WSA.

Respectfully,

Kekinusuqs,
Judith Sayers

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Response to BC's Water Act Policy Proposal on BC's new Water Sustainability Act

A. OVERVIEW

I have reviewed the Policy Proposal paper and would like to make the following comments. There are several principles stated in the paper that I see as positive but will depend on the implementation and the commitment.

- *For greater certainty, the provisions of the new Act are intended to respect aboriginal and treaty rights in a manner consistent with the Constitution Act of Canada:*
 1. This is a good statement but as BC claims ownership to water, this is inconsistent with the First Nations aboriginal rights to water. And as a right to water, the courts have been very specific that First Nations rights are second only to conservation, and so the licensing system of first in time, first in right is not compatible with provincial legislation. If this statement is to be taken in its true intent, then First Nations should have priority right to water.
 2. Several First Nations groups such as the Nisga'a, Tsawwassen, and Maa-nulth have defined their treaty right to water as a volume of water that is protected by s. 35 of the Constitution. Provincial law can only apply as defined in those treaties. Future treaties will have to be construed in the same way.
- *Protecting instream flows aligns with First Nations interest in stream health and supports protection of aboriginal rights to hunt and fish.*
 1. I would suggest that in determining instream flow that this should also include other aboriginal rights including gathering and sacred/spiritual uses and supporting ecosystems which are important to First Nations way of life. This should become a provision in the WSA.
- *Recognition that many First Nations communities rely on groundwater and will be impacted by groundwater regulations:*
 1. How is that recognition implemented, do First Nations communities get priority to that ground water, or do they have joint management on how that source is used. This should include quality and quantity. Clear provisions which ensure the First Nations ability to access sufficient quality water is necessary.
- *The WSA will be flexible to respond to the range of current and potential agreements that may be established between First Nations and the provincial government:*

1. Are there examples of these agreements already in place and those contemplated so that we can ensure that there can be flexibility?
 2. Would be good to have a specific provision in the WSA that allows for this.
 3. As noted above, treaties are protected by s. 35 and would take precedence over provincial law except if there is specific provision in the treaty to state otherwise.
- *The use of traditional knowledge will influence water management and help inform decisions:*
 1. TEK is becoming a more documented and accepted use of Indigenous wisdom. Protecting First Nations knowledge as intellectual property may be an issue and some of that baseline work will need to be done.
 2. Use of TEK should be put right in the Legislation. The Canadian Environmental Assessment Act s. 16.1 now has a specific provision for using TEK in making decisions. There policy can be found at <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=4A795E76-1> I would recommend working with BC First Nations in coming up with this kind of guidance document. BC Hydro as well has been open to using TEK in their processes.
 3. Provision in WSA should include when making decisions, TEK will be used as relevant information.

POLICY DIRECTIONS

1. **Protect Stream Health and Aquatic Environments:**
 - This is a good policy direction that instream flows will be protected as an environmental value. Making sure there is enough water in the stream for the environment, for First Nations ability to exercise their rights. An environmental value should include a watershed based approach to water management.
 - Determining and establishing the instream flows need to be done with First Nations to ensure their values are included.
 - Provisions against in stream dumping or dumping close to a water source that affects the source, is key to stop damaging the quality and environment of water and therefore there must be very large fines that people and corporations would face that would go beyond the cost of doing business.
 - Individuals/corporations should have a mandatory obligation to clean up the environmental disasters or negative effects on the stream as well as paying a large fine.

- What is not addressed in stream health and aquatic environments is what happens when there is scarcity of water? What environmental elements take precedence over another? These types of considerations must be made with First nations.
- This will only apply to 'new' water allocations for both ground and surface waters. There should be no protected licenses issued under the Water Act. All existing licenses should be looked at within the new provincial values and guidelines and reconsidered based on these established criteria. Many licenses issued were done at a time when water quality and quantity was not an issue. They are now and must be reconsidered. There must be fairness and equity in all water licenses and if we value our water, there must be a review and revision of licenses that bring the terms and conditions of licenses up to standards now being established.

2. Consider Water in Land-Use Decisions

- Establish Provincial Water Objectives for BC is a good reflection of the importance of water and the role it plays for all living thing. These provincial water objectives in land, water and other resource use decision making shows that the province is looking at water in a more holistic way, that when things happen on the land, they affect the water. As Nuu-chah-nulth we say Everything is one, everything is connected. Acts like the Forest and Range Practices Act, Oil and Gas Activities Act, etc.
- The *Water Sustainability Act* must have precedence over other Acts.
- Provincial Water Objectives must be made jointly with First nations to ensure their rights are well considered in all decisions affecting water. Most First nations have Land use plans and these must be used in making the PWO's.
- Have Formula based instream flow assessments for all new groundwater and surface water allocation decisions. How much water needs to remain in the stream and how much can be taken out is very important. What concerns me about this proposal is that it is only for "new" groundwater and water allocations. We need to understand what is being taken out in all existing licenses and in the case of ground water what is already being taken, not just NEW allocations. Old allocations that are not being used, or being used in part need to be amended or cancelled, in fact, old licenses should be cancelled and reissued under the new regime. A concerted effort must be made to determine what water is available both in groundwater and surface water so that wise decisions can be made.

3. Regulate the use of groundwater

- the direction proposed is to only regulate Groundwater in problem areas and for all larger amounts of groundwater. It would seem to me that we need to know how much water is being used and would be better if all ground water is licensed and regulated so we have the knowledge. We need to know the demand and supply so it can be regulated.

- We need more information on how ground and surface water are connected and how the use affects the other
- This could begin with priority areas and move to the entire province over time.
- There needs to be systems in place to avoid depletion of ground water and contamination of groundwater.

4. Regulate Water During Scarcity:

- I agree that efficiency and conservation with incentives for doing so should be the most important and stressed methodology.
- I also agree that proportional reductions across all licenses is a good second step. Everyone gets cut by the same amount.
- I do not agree with first in time, first in right as the third action in determining use during scarcity. I have never understood why the person with the first license should have priority over every other person/corporation/government that got a license after them. I think that there needs to be priorities established as to drinking water, crops for eating, etc. be established and that water is then allocated according to those priorities. Why should an industrial operation take precedence over drinking water or water needed for a hospital, etc.
- First Nations and all communities need to determine those priorities for those areas. If there is no agreement, there could be facilitated discussions. If there is still no agreement, there should be a neutral body that would make the hard decisions.
- There needs to be strict provision that water must be used for the purpose that the license was granted for and the priority need that was determined. It cannot be sold, transferred, or used for another purpose. There should be immediate cancellation of a license or a very large fine for such violations.
- I also think that we need to ensure that agricultural water license continue to be used for agriculture and cannot be sold to other businesses. I know this has become an issue in California where it was more lucrative for the farmer to sell his water than to actually farm. These kinds of abuses should not be able to occur.
- As in my previous submission, there should be a section in the WSA based on non consumptive use for power generation. Power generation should be able to occur based on the terms of the license and sufficient flows. If there is a scarcity of water, it is unlikely a power facility would be operating, but if there is still enough water and the water is not being consumed, such uses would be compatible. (other jurisdictions have such sections which regulate water use for power generations.)
- Storage of water should be done within the licensee's allocation and on conditions established. If this water storage helps during scarcity of water it would be based on wise use of water.

5. Agricultural Water Reserves

- The proposed policy direction for this leaves me with many questions. There are to be agricultural water reserves to reserve water for an irrigation system or project. Cancelled water license can be “banked” in the reserve for future uses within the agricultural sector. How do you bank water? Water flows through and is gone and you cannot then reallocate future water supplies with the added burden of a previous unused portion. This needs to be clarified and better explained.
- Also, among the agricultural reserve there can be transfers or extension of rights amongst users. Who will regulate that and ensure that water is being used as it should. Will this be amongst existing users? New users?
- The policy goes on to say that there will be agricultural water reserves for Agriculture land reserve (ALR). But what if no one is farming those lands, and the water is not used, that will need to be taken into consideration. Also, what if there are agricultural lands that are not designated ALR, should they not have as much ability to share in agricultural reserves. I have no problems with making sure there is enough water for the growing of food, but it needs to be used for that purpose and if not, reallocated where it is needed. I would also question what food means? Does it include vineyards for wine? Growing ginseng or hops or other herbs, etc? How do we define food and agricultural uses. This needs to be clear in any legislation. If water is used for a fish farm, is that considered agriculture. If reserves are being made for agriculture, why would there not be reserves for First nations communities that have an aboriginal right to water.
- I agree drinking water and food security are essential to human life, but we must think carefully on how these priorities are established and defined and the process that provides the security.

6. Measure and Report

- I am in agreement that there should be measuring and reporting of all uses of water. I realize that this is a mega project but if we are to wisely manage water and water use, we need to know how much water we have and how much can be used. Future demand has to be taken into consideration as populations increase and industrial/commercial/business use increase as well. There should be growth projections for every area to determine if large allocations are made for business, will there be enough water to sustain the population.

7. Enable a Range of Governance Approaches

- Collaborative mechanisms and participation in activities and decision process will be enabled: Water governance will include laws, regulations, agencies and institutions, policies and procedures, science, information, community and traditional knowledge. The government wants ultimate accountability for environmental protection. They also want to decide the

institutions, system and roles for any delegated responsibilities and the compliance and enforcement framework. Sounds like they want it all, doesn't it. Then the policy says that they will expand opportunities for collaboration and involvement in decision process and give a broader role to British Columbians. Not much room when BC keeps all authority and they carefully say "involvement" in decision processes, not making the decision.

- As far as First Nations are concerned they say the WSA will be flexible to respond to the range of current and potential agreements that may be established between First Nations and the Provincial Governments. These agreements must include shared Decision making where the Province and First Nations collectively decide on all water issues within the territory. Not just with respect to the First Nations need for water. This does not preclude First Nations in participating in community based local or regional agencies, but must be on the decision making level as well. This role will respect First Nations aboriginal rights and title.
- Water governance includes making decisions on laws and regulations. While BC has been working to include First nations in the discussions on the Modernization of the Water Act, it has not been sufficient to fully consult First Nations on issues which affect their rights and title.
- The paper states that BC will ultimately be responsible for deciding the institutions, systems and roles for any delegated responsibilities. I would consider this to be inconsistent with shared decision making as envisioned by the New Relationship. I also consider that if the principle is to respect aboriginal rights and title that First Nations must be part of the decision making process on institutions, systems and roles for delegated responsibilities.

CONCLUSION

Good progress has been made in setting out some principles and concepts. The details of these principles and concepts and how they are laid out in the Water Sustainability Act will determine how First Nations will feel about the Act. It is very good that the government is finally updating a very old Act, but it must be done carefully with a view to future demands and conditions being considered fully. It is too bad that the Water Science Strategy is being done at the same time instead of prior to the drafting of the Act as it could have better informed this process. Providing more opportunities for First Nations consultations and involvement as this goes forward will be very important to this process.

Submitted With Respect,

**Kekinusuqs
Judith Sayers**