

From: Kieran Broderick [KBroderick@treaty8.bc.ca]
Sent: May-04-10 9:31 AM
To: Living Water Smart ENV:EX
Subject: Treaty 8 First Nations
Attachments: Treaty8-Water-Act-Submission-April30-2010.pdf

Follow Up Flag: Follow up
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Dear Living Water Smart Administrator:

Please find attached the Treaty 8 First Nations initial submission regarding British Columbia's Water Act Modernization Discussion Paper. I apologise for the delay, as we have been experiencing server issues.

If you have any questions or comments, please feel free to contact me at the number below, or send me an email (kbroderick@treaty8.bc.ca).

Thank you,
Kieran Broderick, BNRS, RPF
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April 30, 2010

Water Act Modernization Submission

Ministry of Environment

Water Stewardship Division

PO Box 9362

Stn Prov Govt

Victoria, BC V8W 9M2

E-Mail: livingwatersmart@gov.bc.ca

Re: Water Act Modernization – Initial Submission

Please find attached our initial submissions regarding Water Act Modernization. We would welcome an opportunity to help shape the new legislation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kieran Broderick', is written over a horizontal line.

Kieran Broderick

Treaty 8 Land and Resources Director

TREATY 8 : Water Act Modernization – Initial Submissions

GENERAL COMMENTS

Site ‘C’

Site ‘C’ is incompatible with many of the proposed principles and objectives set out in the Water Act Modernization Discussion Paper. It does not make much sense to modernize water legislation and ignore the massive impacts of mega projects on water flow and water quality. The Williston Dam has and continues to be an environmental nightmare. First Nations still suffer the effects of dislocation, loss of Territory, harvesting areas, and cultural sites, disruptions in travel routes, increased methyl mercury contamination, etc. There is no point creating new protection and regulation for water quality and flow if the Province is going to blow it all up with a new mega-dam.

Aboriginal and Treaty Rights

There is no mention of aboriginal and Treaty rights in the Discussion Paper. The Discussion Paper assumes the Province owns all the water in B.C., even apparently water that is on or under Indian Reserves or aboriginal title or Treaty lands. These types of assumptions are legally wrong and need to be corrected.

In addition, the Discussion Paper does not mention the necessity of a process that guarantees full and meaningful consultation and accommodation in the development of new laws that potentially infringe aboriginal and Treaty rights.

The *Water Act* process needs to be carried out in full accordance with the laws relating to aboriginal and Treaty rights and title. We have set out more detailed comments under Principle #3 below.

Existing Problems with Industrial and Oil and Gas Contamination

As we mention below the waters in our Territory have been extensively contaminated by industry, particularly by oil and gas. The provincial government have in many cases authorized this contamination and in other cases have failed to monitor and enforce. There is an urgent need for monitoring and water quality sampling to assess existing contamination issues and for monitoring and enforcement to prevent this pattern of contamination from continuing.

COMMENTS ON SPECIFIC SECTIONS

Why Consider Changing the Water Act

This section states:

Most First Nation reserve lands have associated water licences. However, many First Nations have also expressed interest in additional volumes of water for community and economic development purposes. The Water Act could also reflect some of the unique cultural interests First Nations may have with water and promote the use of traditional knowledge in water stewardship and decision making.

We appreciate this introductory section but there does not appear to be much follow-up on these concepts in the rest of the Discussion Paper.

Principles

1. *BC's water resources are used within sustainable limits, for all uses including residential, agricultural, commercial and industrial.*

We agree. As we have noted elsewhere, many of the most pressing water issues are caused by industrial uses. The oil and gas industry uses and contaminates vast quantities of clean water and water sources. Mining companies are increasingly looking to mines and mining practices that include destroying lakes, rivers and other water sources. Principle #1 should explicitly state that industrial uses of water must also be sustainable.

2. *First Nations aboriginal and Treaty rights and title and social and cultural practices associated with water are respected and accommodated.*

This principle is a helpful start. However, it is not just about social and cultural practices. First Nations have rights and title to water. Aboriginal rights to water in the United States have been recognized by the courts since 1908 under the *Winters* doctrine. The provincial government may not accept this for British Columbia yet but it is highly likely that the courts will confirm at least aboriginal rights to water in the near future.

Even the provincial government does not yet recognize aboriginal rights or title to water, *Haida* and other cases require the provincial Crown to consult and, if necessary, accommodate First Nations based on asserted aboriginal rights. Therefore principle #3 should include aboriginal and Treaty rights and title.

3. *Science and Traditional Ecological Knowledge informs water resource management and decision making.*

This is fine. However, science should also include Traditional Ecological Knowledge.

4. *Water resource legislation, policy and decision making processes as well as management tools are integrated across all levels of government, including Crown corporations.*

We agree this is an important principle. In our experience there is virtually no coordination between the Oil and Gas Commission, Ministry of Environment and other agencies. This must be changed.

5. *Rules and standards for water management are clearly defined, ~~providing a predictable investment climate across the province.~~*

We agree with clearly defined rules and standards but do not understand why they are linked to a predictable investment climate. It makes it sound as if the over-riding rationale for modernizing the *Water Act* is to attract investment. If we look across the border in Alberta they arguably have clearly defined rules and standards and attract lots of investment but the rules and standards allow for the tar sands to contaminate millions of gallons of water.

6. *Flexibility is provided to adapt to extreme conditions or unexpected events on a provincial, regional or issue-specific level.*

It makes sense to allow for flexibility as long as this flexibility is not abused to lower standards and sustainability requirements for the benefit of oil and gas, mining or other industrial users in specific parts of the province.

7. *Incentives are created for water conservation that consider the needs of users—and investors.*

We agree that there should be incentives for water conservation. Again, we do not see the link to investors. Investors are typically new users or proposing new uses of water. Including investors in this principle gives the impression that the Province intends to create incentives for investors or to create incentives for current users to conserve water so investors can propose new projects that require water.

8. *Rights to use water come with responsibilities to be efficient and help protect stream, aquifer and watershed health.*

This principle should apply to all water sources and to watersheds.

Although the Discussion paper outlines 8 principles, Treaty 8 First Nations believe that a ninth (9th) principle should be added.

9. *In order to properly monitor and manage water resources, all users of water must track the volumes of water used and report these amounts monthly to the Ministry of Environment and Treaty 8 First Nations.*

This baseline data would allow for the proper monitoring and management of all water sources and watersheds. In addition, an audit function would need to be built in where Treaty 8 First Nations and the Ministry of Environment could undertake audits to ensure the proper tracking of volumes and management of water resources.

GOAL ONE: Protect Stream Health and Aquatic Environments

5.1 Objectives for protecting stream health and aquatic environments

In order to better protect stream health and aquatic environments the following objectives are proposed for a modernized Water Act:

1. *Environmental flow needs are considered in all water allocation decisions to protect stream health*
2. *Watershed or aquifer-based water allocation plans include environmental flows and the water available for consumptive use*
3. *Habitat and riparian area protection provisions are enhanced*

These are all worthy objectives and we generally support them. However, we are concerned with the discussion in this section about “environmental flow”. The Discussion Paper states:

“An environmental flow is the amount of water required in a stream to meet certain objectives such as to protect fish, wildlife or other biological values. Environmental flows are also maintained for recreation, navigation and the dilution of permitted discharges such as effluent.”

The new *Water Act* should not aim at maintaining sufficient flow to dilute chemicals and effluents. The aim should be to limit or eliminate the discharge of contaminants into watersheds.

Environmental Flow Guidelines vs. Standards

The Discussion Paper sets out the following choice:

A. Environmental Flow Guidelines

In this option the environmental flow recommendations are guidelines, from which the decision maker may deviate in certain circumstances. Clear justification must be provided for any deviation and applicants could appeal decisions.

OR

B. Environmental Flow Standards

In this option the environmental flow recommendations become standards that the decision maker must adhere to with no exceptions.

We strongly recommend legislative requirements and standards. We have had too many bad experiences with Guidelines, performance-based measures, self-enforcement, etc. The common pattern with these approaches is that they lead to industrial users operating at more lax environmental standards. Water quality protection does not lend itself to wide variations, “flexibility” in standards, and self-enforcement.

OBJECTIVE TWO: Watershed-based water allocation plans

We prefer watershed-based allocation and planning, provided it begins with environmental protection, sustainability and protection of aboriginal and Treaty rights. We have had many unfortunate experiences with Land and Resource Management Planning because these planning processes have often tended to cater to industrial and extractive uses. We have also seen management plans lose their potential due to lack of funding and support from the provincial government. There is a tendency for the government to fund plans in areas it wants to support resource extraction and then to cut off the funding for other areas and future plans. However, the concept of land and resource management and planning across an ecosystem is a good one just as the concept of water-shed based planning is a good one.

Provided watershed-based water allocation plans are founded on environmental protection, sustainability and protection of aboriginal and Treaty rights, we support and are developed with meaningful participation with First Nations, we support these plans setting the regulatory framework for decision-makers.

OBJECTIVE THREE: Habitat and riparian area protection provisions are enhanced

This is vitally important to Treaty 8. Our Elders and members are forced to carry water out onto our lands because the drinking water our ancestors relied on for thousands of years has been contaminated. Many of our water sources in our Territory smell bad, look bad or have been sampled and found to be unsafe to drink. We have also witnessed

numerous areas where the oil and gas industry have contaminated waters and left them unfenced and unremediated, allowing fish and wildlife to be contaminated by them.

We support stronger standards and laws to prevent dumping and contamination of water.

GOAL TWO: Improve Water Governance Arrangements

This section begins by stating:

Canada's Constitution sets out the roles of the provincial and federal government with respect to water management and stewardship. Water governance in BC is primarily set out in the Water Act which, together with the Water Protection Act, determines that water resources are owned by the Crown to the extent they are not encumbered by aboriginal and treaty rights and title. Crown ownership will not be revisited under WAM, except to the extent required by the law relating to aboriginal and Treaty rights and title, and water will continue to be managed in accordance with the law and in the public trust for current and future generations.

This section is legally incorrect. Provincial legislation cannot create provincial ownership of water on or under Indian Reserves or aboriginal title lands. The section needs to be revised to make it legally accurate.

6.1 Objectives for improving water governance

In order to improve BC's water governance arrangements the following objectives are proposed for a modernized Water Act:

- 1. Governance roles and accountabilities are clarified in relation to the allocation of water and the protection of stream health.
This includes roles for First Nations, industry, local communities and non-government organizations in planning and decision making*
- 2. Governance arrangements are flexible and responsive to future needs and values*
- 3. Management is coordinated with neighbouring jurisdictions across all levels of government and those with a major interest in the watershed*

This is a good start. However, it appears First Nations have been lumped in with various stakeholders who do not hold any constitutionally protected rights. There is also no detail on how governance roles will be clarified. Will First Nations be meaningfully involved in making water allocation and licenses decisions as, for example, in the North with the Gwich'in Land and Water Board? Or is this a much less form of involvement?

There is some wording in this section about a "shared approach" which "delegates specific water management functions and decisions to a First Nation or partner institution such as an existing Regional District, depending on their capacity or willingness to undertake responsibilities."

We are willing to look at these types of options.

Groundwater

We support groundwater regulation provided that the provincial government does not attempt to assert ownership or regulation of groundwater under Indian Reserves and aboriginal title lands and that Treaty 8 is fully and meaningfully involved in developing the regulatory system.