

From: Elizabeth Hendriks
Sent: April-30-10 3:07 PM
To: Living Water Smart ENV:EX
Subject: Formal Submission from POLIS Project on Ecological Governance
Attachments: POLIS WAM Submission.pdf

Please consider the attached document the formal submission to the Government of British Columbia by the POLIS Project on Ecological Governance.

As recognized by government in Living Water Smart, BC water laws need to be revised in order to sustain the environment and the social and economical well being of British Columbians. This formal submission offers the position of the University of Victoria's POLIS Project on Ecological Governance and answers the call of the Ministry of Environment and Premier of British Columbia to provide solutions for securing our water future.

This submission is organized into 3 sections:

Section I outlines key context and emphasizes some of the water challenges in BC;

Section II offers specific responses in the context of the Ministry of Environment's Public Discussion Paper;

Section III outlines key additional priorities and opportunities missed by the current government led discussions (and documents) around Water Act Modernizations.

This position paper is submitted to the BC Government as part of its Water Act Modernization (WAM) process by Oliver M Brandes, Associate Director and Water Sustainability Project Leader on behalf of the Associates of the University of Victoria's POLIS Project on Ecological Governance. The content was developed through consultation and discussion with the POLIS Associates, Affiliates and Advisors working on water sustainability issues and is informed by leading research both at the University and from experiences across Canada and around the world. The opinions and positions expressed do not necessarily represent the views of the University of Victoria or any of its officers

Special thanks go to Kelly Bannister, David R. Boyd, Rod Dobell, Liz Hendriks, Jon O'Riordan, Susanne Porter-Bopp, Stephen Tyler and Jim Mattison for detailed review and comments. Appended to this submission is a recent POLIS publication on the Public Trust Doctrine that offers relevant context and additional specific detail. We urge the BC government to take comprehensive and decisive action on this crucial issue.

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Elizabeth Hendriks, MES
Water Governance and Policy Coordinator
250 721 8189
POLIS Project on Ecological Governance -- University of Victoria
www.poliswaterproject.org
www.polisproject.org



POLIS Project on Ecological Governance

University of Victoria
 Box 3060, University House 4, Victoria, BC V8W 3R4 Canada
 tel: 1.250.721.6388 fax: 1.250.472.5060
 email: polis@uvic.ca website: www.polisproject.org

April 30, 2010

RE: *Water Act* Modernization Submission: Towards a Modern *Water Act* – A University of Victoria’s POLIS Project on Ecological Governance Position Paper

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Oliver M Brandes
 Associate Director and Water Sustainability Project Leader
 POLIS Project on Ecological Governance – University of Victoria



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SECTION I - Context and BC's Water At Risk

The following issues provide critical context for modernizing the BC *Water Act*:¹

- Without an adequate supply of clean and safe water, human health, the BC economy, and the environment are threatened.
- Water in all its forms is owned as a public resource and must remain vested in the Crown – private rights to use water are limited, temporary, and must therefore be subject to conditions that protect the public interest in a changing and uncertain world.
- Many of BC's water bodies experience water shortages or flood risks during certain seasons/years.
- BC's water governance regime evolved at a time when there was little recognition of the need to legally allocate water for environmental needs, guarantee an equitable distribution of water, provide credible public oversight and accountability, or to resolve issues of water scarcity and conflict.
- BC remains one of the only jurisdictions in North America that fails to issue groundwater extraction licences.
- BC provides limited independent oversight and opportunity for public input on water licensing decisions, even though it is well recognized that public input increases the quality of environmental decision-making, and water is a resource that supports public and environmental values, in addition to private needs.
- Jurisdictions worldwide are reforming governance and developing allocation systems that recognize ecosystems (including rivers, lakes, wetlands and groundwater) as priority water users. The progressive allocation systems are based on the principle of seasonal sharing of an available consumptive pool among recognized water users, and are based on valuing ecosystem services as the foundation of economic and community development, and human wellbeing.
- Modernizing the *Water Act* (and amending other key legislation appropriately) is the key to delivering the first phase of the commitments set out in *Living Water Smart* (LWS), and, as recognized by the Province, is fundamentally required to build community and watershed resilience and ensure long term economic and social prosperity.

SECTION II - Responding to the 4 Themes of Water Law Reform

Theme 1: Protecting Stream and Aquifer Health and Aquatic Environments

Modern science has established the critical importance of water for functioning watersheds and ecosystems. It is not acceptable to treat environmental flows as secondary priorities since diminished ecosystem function will directly undermine economic and community development. These environmental flows must have priority protection and be given priority to ensure a resilient and functioning ecosystem, the foundation of both social and economic prosperity. Therefore we ***strongly support the objectives for protecting stream health and aquatic environments – at 5.1 of the Public Discussion Paper.***

A key first step towards providing legal protection for environmental flows will require that environmental services be recognized as a priority in the *Water Act*. For streams or aquatic systems that

¹This list is adapted from “NGO Statement of Expectations on Reform of the BC Water Act” (Dec 2009) lead by Watershed Watch Salmon Society, and signed and supported by over 29 BC NGOs and community groups.



are designated “at risk” (i.e. flows are below those required to sustain ecological function) a clear priority must be to re-establish sufficient environmental flows. This can be achieved through comprehensive and enforceable watershed plans (see next section for further discussion) and by “clawing back” existing unused (or not “beneficially” used) water licences. A modern *Water Act* must enable and require the Comptroller (or designate) – with community input – to reserve water for ecological purposes and these purposes should have priority over all other uses.

Position 1: Legally established "minimum" environmental flows in each major river/stream system through appropriate designations is required. These “minimums” must be viewed as paramount and therefore are considered and followed in all further decision making. The new *Water Act* should contain a provision that requires the reservation of water for ecological purposes that have priority over all other uses.²

One of the most important tools to ensure environmental flow protection is through robust planning. As discussed in the “improving water governance arrangements” section below, legally enforceable and regularly updated watershed plans for priority watersheds is a critical aspect of good governance. Included in these watershed plans should be specific attention to water allocation planning.

Position 2: Water Allocations Plans should be required for selected watersheds where there are existing or potential conflict between users and/or a need to protect environmental flows. These Water Allocation Plans should be part of any legislated Watershed Plans and would recognize and enshrine the environmental flows needed to ensure watershed function. These plans should be regularly updated and Government should require decision makers to follow these Plans.

Establishing and updating environmental flows is often complicated and requires good science and specific hydrological and ecological expertise. This eco-hydrology field is certainly well established and existing processes such as the BC Hydro Water Use Planning Process “Instream Flow Needs” approach is a good starting point; yet understanding is still evolving. To assist Government and decision makers around the province, we recommend striking an independent expert committee that can provide area specific advice in establishing ecological reserves and general input as understanding or knowledge in the field advances.

Position 3: The *Water Act* should include provision (and terms of reference) for a combined natural and social science-based Environmental Flows Committee. This Committee would be tasked with providing advice on how to establish environmental flows in critical watersheds in an independent, transparent and public manner and providing regular – every 3-5 years – reports for the broader public.

Theme 2: Improve Water Governance Arrangements

The current water governance structure in British Columbia is confusing and piecemeal. A modern *Water Act* is an opportunity to address this untenable situation. Overall, while we do support the “*objectives for*

² Section 7 of the *Fish Protection Act* provides the powers necessary to protect instream flows but only for designated sensitive streams. The Comptroller cannot licence water if this would jeopardize these flows. This provision should, at a minimum, be applied more broadly to all streams and must go beyond just fish survival (ie considerations of watershed function).



improving water governance” (at 6.1 of the Public Discussion Paper), we believe there is significant missed opportunity when contemplating improving water governance arrangements. A more visionary, and ultimately a more robust approach is needed if British Columbia’s water governance system is to enable sustainable water management.

An enhanced approach to water governance would focus on 3 core themes: *sharing power and decision making, watershed planning* and *basic “good” governance* – each is discussed further below.

Sharing Power and Decision Making

Any modern *Water Act* must allow those affected to have a voice in decision making. First Nations are important actors with special Constitutional roles and responsibilities that must be recognized. Legitimate local entities such as water boards, stewardship or community groups and local governments must also play a key role. Finally, attention must be given to cumulative impacts of activities up and down the watershed. Professionals and experts across sectors recognize that to address this challenge, watersheds and basins must be the key scale for both management and decision making.

A variety of benefits exist to sharing governance, including: leveraging expertise, cooperation and information sharing; building trust, legitimacy and buy-in of influential actors; and increased ability to respond efficiently to new and emergent challenges.³ One of the most important benefits of shared or delegated governance relates to resolving (or avoiding) conflict. Water conflicts typically centre on concerns of allocations or water sharing and are most likely to occur at the local level. Ensuring the correct governance structure is in place will allow communities to deal with conflicts as they emerge and address future challenges or concerns that may not yet be anticipated. It requires a serious rethink about how British Columbians organize themselves to make the often-challenging decisions associated with water including and the rights and obligations that come with its use.

The Government’s *Public Discussion Paper* outlines three options for water governance. The first proposed option is really an extension of the current centralized approach, but would rely on additional financial and human resources to achieve meaningful impact. In today’s climate of government downsizing, cutbacks and minimization of commitments this seems unlikely to be achievable. Furthermore, this centralized model appears poorly equipped to resolve the identified water problems we face in British Columbia and doesn’t address the current piecemeal challenges.

Position 4: A modern *Water Act* must enable the creation of *Watershed Agencies* (as set out in the *Public Discussion Paper*) that have a clear mandate and financial capacity to engage in water management activities and decision making. The legislation must enable these entities to acquire (either through taxation or collection of water rentals or levies) the financial resources to deliver on their responsibilities.

The new legislation should *enable* the creation of *Watershed Agencies* as legal entities and should provide the framework and terms of reference for these “new” bodies. The *Watershed Agency*, while a “new” legal entity, need not require the creation of new institutions. Certainly, in situations where nothing

³ Numerous recent research reports and analyses outline these benefits in detail (such as by the POLIS Water Sustainability Project, the Pacific Salmon Forum, and UBC’s Program on Water Governance).



appropriate exists, new institutions might be established, but in many situations a *Watershed Agency* could evolve from existing arrangements such as Water Boards, Trusts or Regional Districts. This is assuming basic accountability and legitimacy criteria are met – such as at least some elected directors who represent key communities and constituents in the watershed. The legislation should specifically permit the Minister (in consultation with the Minister of Community and Rural Development) to establish such an *Agency*. The legislation should also require public reporting of finances and activities and an ability to raise revenue (via a letter patent) through taxation or collection of water rentals or levies.

Watershed Planning

The Province already has many tools and mechanisms to plan and manage water sustainably in BC, such as regulations, water allocations plans, legislated source protection and watershed planning provisions. Yet these mechanisms are rarely employed, and when they are used they are deployed in an ad hoc manner and not to their full extent. This lack of implementation suggests a significant governance problem. The WAM process provides an opportunity to meaningfully act on new ways to “enable a systematic approach to watershed planning,” and is something the Province has been considering since the early 1990’s.⁴

Provisions under Section IV of the existing *Water Act* are under resourced and unwieldy.⁵ A modern approach to watershed planning must ensure financial support and be streamlined to ensure that meaningful and enforceable plans can be created.

Position 5: A modern *Water Act* must facilitate and streamline watershed planning in all critical watersheds. Such Watershed Plans should be Provincially approved (to give them force of law), but streamlined to remove unnecessarily cumbersome requirements.

The new *Water Act* should set out the framework for this process by:

1. Setting criteria for designating watershed that require plans.
2. Providing a common framework for preparing plans.
3. Committing to funding a certain number of plans a year (by priority areas).
4. Identifying which participants should be involved and consulted (and which entities might lead the process, such as newly formed *Watershed Agencies*).
5. Prioritizing issues that need to be addressed.
6. Clarifying which responsibilities the Province would delegate or devolve and what resources will be provided; and identifying non-provincial resources to support plan preparation

Basic “good” governance and accountability

Experience from around the world demonstrates unequivocally that a number of basic “good governance” principles ensure effective and efficient decision making that builds public confidence and enables communities to address challenges and issues as they arise. We know we require better transparency and opportunities to engage and promote broad participation, and we also know we need oversight to ensure

⁴ See the Ministry of Environment’s Stewardship of the Water Series (1993)

⁵As exhibited by the protracted process (over 5 years) to establish the first such legislated plan in Langley – which at this point can only be described as a serious disappointment.



follow-through. A modern *Water Act* is the opportunity to codify these basic good governance elements into our water management framework.

At the core of "good governance" is accountability. One of the most important ways to improve accountability is through effective oversight to ensure what is promised is actually happening. This kind of oversight is best achieved through the offices of an independent actor (such as an Ombudsman or Commissioner on Water). In British Columbia a number of institutions exist that could easily be adapted to provide this function. For example the Forest Practices Board could be expanded to include a more robust water/watershed role.

Meaningful and effective reforms require oversight and public reporting on implementation progress and also ongoing activities (and impacts) on the ground. Such an oversight body would also provide incentives to ensure improved information at all governmental levels (and the body itself would provide – or house – important information and expert analysis). Such an independent body would enhance transparency by providing public reporting and build confidence by offering investigations, fact-finding capacity and expert advice in areas of conflict or significant concern.

Position 6: A modern *Water Act* should require the creation (or amendment) of an independent oversight body with investigative and fact-finding powers tasked to publicly report on and oversee transition of the new act and ongoing activities and water practices in watersheds across the province.

Theme 3: Improving the Water Allocation System

Any allocation system requires basic information about volume and impact of use, and must have sufficient resources to ensure monitoring and that the rules are enforced. The resources for comprehensive monitoring and reporting could come from an updated water rentals and pricing structure⁶ that better reflects the administrative costs of managing a modern provincial water allocation system and provides incentives to conserve.

Position 7: A modern *Water Act* must require ongoing monitoring and reporting of water quality and quantity in watersheds and trend analysis. Requirements for water use reporting (including independent verification) would be the responsibility of the licensee and could be phased in through regulation that would start with large water users and those in priority or sensitive areas.

To ensure sufficient resources for effective water monitoring, management and enforcement, a modern *Water Act* would require cost recovery so that all those who impact water quality or quantity, as well as those who benefit from the provision of clean water, contribute to the costs of source protection to a degree appropriate to their impact or benefit.

A modern *Water Act* must move beyond a prior appropriation (first-in-time first-in-right “FITFIR”) system to ensure more flexibility and adaptability in the face of changing hydrological cycles and water use priorities. Ultimately, the provincial government must be responsible and accountable for protecting water resources in accordance with the precautionary principle. Therefore we **strongly support objectives**

⁶ For example, volume based pricing or rentals system based on actual use.



for introducing more flexibility and efficiency in the water allocation system (at 7.1 of the Public Discussion Paper).

Position 8: A modern *Water Act* should enshrine an allocation system that:

1. Protects environmental flows.
2. Ensures monitoring and public reporting of actual water use on a watershed basis.
3. Reforms the FITFIR system to promote conservation and equitable sharing.
4. Provides mechanisms to address drought or short term water scarcity.
5. Harmonizes surface and groundwater licensing

Specifically, the modern *Water Act* should codify an allocation principle that prioritizes the environment through environmental flow requirements (see above). It should also enshrine equitable sharing of a consumptive (but flexible) pool of water among all users in closed systems (ie shares in a defined pool of “available” water after an ecological reserve for watershed function is established).

Existing or new licences should be more flexible and should continue to be required to meet basic “beneficial use” provisions and established “best practices” of water use by the activity proposed. To assist with the administrative burden of management, such an allocation system could exempt water licensing for certain small domestic and agricultural uses, with basic requirements for self registration and use information reporting via web portal.

Position 9: Similar to power licences, all water licences should be time limited to allow periodic review and enable adaptation to future economic, social and environmental priorities. This will require a provision for reviewing existing licences and for amending them as appropriate. Key identified uses such as agriculture or municipal drinking water supplies could have a “fast track” system for renewal.

As discussed above the management and administration of the allocation systems could be delegated to statutorily created entities such as *Watershed Agencies*. In a modern *Water Act*, the Province would set out the minimum standards and the general framework as outlined here, but willing and able individual *Agencies* would make the decisions about licensing and ensure reporting and enforcement of the rules. At a minimum (or in areas where no *Watershed Agencies* exist) an established priority of use system would be codified and local community involvement would guide future licensing decisions. This could be reinforced through a Water Allocation Planning Process.

Theme 4: Regulating Groundwater Use

Aquifer overdraft and groundwater extraction are affecting water tables and causing concern across the province. Groundwater licensing is a priority – *only one water cycle exists* and differentiating between the allocation of water based on ground and surface water is inefficient, ineffective and unsustainable. Groundwater and surface water need to be connected in law as they are in nature or any management regime will ultimately fail. Treating water as one interconnected resource also requires water management plans to evaluate both groundwater and surface water systems and the linkages between them. In general we strongly support the *objectives for regulating groundwater extraction and use (at 8.1 of the Public Discussion Paper)*, but see them as only minimum first steps.



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Position 10: Groundwater licensing should be enabled to apply everywhere in the province. This can be done through a phased in process starting with large users and acknowledged "priority areas" and such as the Okanagan Basin, the Lower Mainland, the Gulf Islands and the Southeastern Vancouver Island. The legislation should set out a clear time-table for these initial large users and priority areas.

If any geographical areas are to be ultimately exempted from groundwater licensing requirements, the Province must justify the exemption through scientifically-derived criteria.

SECTION III - Priorities and Opportunities Not Being Discussed

This section outlines two areas that go beyond the frame offered by the Government's discussion paper. We believe these areas are crucially important in any successful water law reform process. They represent real opportunities to not only achieve the goals of the WAM but also to achieve the principles and priorities set out in the broader LWS plan.

Watershed Focus

Inevitably, to address water issues effectively the watershed context and the understanding that crucial goods and services flow only from proper functioning watersheds is required – thus daylighting the crucial land use-water nexus. At a minimum this entails understanding the state of watershed function and identification of water availability (or water budgets), current (and proposed) water use and existing (and emerging) threats.

Although the current LWS plan commits the government to a regular State of the Watershed reporting, an updated *Water Act* should codify these requirements and provide clear direction concerning reporting requirements.

A robust watershed approach could go much further including amending other legislation (or clearly stating in the new *Water Act*) that sustainable water management and protection of priority source waters and watershed function will take priority over other provincially licensed (or permitted) activities – including resource extraction and local land use zoning.

An additional opportunity to help enshrine a clear watershed focus would be to model provisions after federal species at risk legislation. For example, the provisions could require the ranking of watersheds according to their degree ecological decline, and for those at highest risk, ensure their protection, and to the extent practicable, their rehabilitation in concert with environmental assessment, water and land use planning activities.

Public Trust

Clearly establishing a link for present and future benefits requires government to clearly acknowledge its role in "stewarding" water for the broad social benefit (See Appendix A for a more detailed discussion). This kind of trust relationship is acknowledged in the *Public Discussion Paper* and should also be reflected in the new *Water Act*.



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A simple step to enabling this concept is amending the current Section 2 of the *Water Act* from:

The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

To

The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government in trust for the public and any private rights established under licences or approvals under this or a former Act are subject to be managed in the interest of present and future generations.

The current *Water Act* (section 5) already limits the rights acquired under a water licence to, inter alia, to “divert and use” water and does not grant any rights of ownership over the water. Thus, a crucial aspect of protecting the public trust is already in place. The *Water Act* should be amended to further clarify and could include a clear preamble (or initial section) statement, for example:

“Water serves a multitude of public and private purposes, both instream and extractive. This Act provides protections for public uses of water and grants rights to use water for private purposes that may only be exercised in a manner that does not significantly harm public purposes.”

See Appendix for a more detailed discussion.

