

Please find three documents that relate to the Water Sustainability Act.

1. An article by Bill Bosch on the required changes to the old *Water Act*
2. Notes from a bilateral meeting with the Ministry of Environment, and
3. Letter to BC Wildlife Federation on changes to provincial *Water Act* legislation to address changes in the habitat provisions made to the federal *Fisheries Act*.

Yours sincerely

Al Martin  
Director,  
Strategic initiatives  
BC Wildlife Federation

## Water: Nature's Lifeblood

Water is nature's lifeblood - all life depends on it, which makes effective management of our water resources absolutely critical to conserving our fish, wildlife, and habitat so that the public can continue to access and enjoy B.C.'s wildlife resources.

As an organization that is committed to ensuring the sustainability of fish and wildlife habitats and the populations they support, the B.C. Wildlife Federation is encouraged by the commitment of the Government of B.C. to modernize our province's *Water Act*. A recent announcement revealed that an overview of the coming changes to the *Act* will be released in October, with a detailed legislation to be introduced in the provincial legislature in the spring of 2014.

Due to its current age and deficiencies, reforming B.C.'s *Water Act* is an important step – it can play a critical role in both the sustainability of our natural environment and the effective management of our water resources. The following key features are needed to modernize British Columbia's *Water Act*:

- Rules for setting environmental flows that are binding and enforceable;
- An allocation system that reflects priority uses such as drinking water and agriculture and enshrines “public trust doctrine” to ensure water resources are protected for the benefit of present and future generations;
- Groundwater licencing and regulation;
- Transparent monitoring and reporting of water use by licenced water users, and;
- Mechanisms to ensure impacted stakeholders have a voice in critical water decisions through local watershed management boards.

It has become increasingly difficult for local communities and various levels of government to manage resources on a watershed or landscape scale. The Water Objectives, Water Sustainability, and Watershed Plans that have been foreshadowed as being part of the new *Water Act* will be critical new tools in conserving and protecting our rivers, creeks, lakes, and aquifers. The proposed approach will encourage and enable community involvement, with key decisions being made by stakeholders at the local level. This will allow those that are most affected by these decisions to be more directly involved in management and governance, especially if they are also willing to provide technical, financial, and community support. This new shared approach will also need to include First Nations in all aspects of water decisions.

The effect of resource development on our natural environment should be of great concern to everyone. Our natural assets – of which water is one of the most important - are being subjected to unprecedented levels of development. The modernized *Water Act* should be

implemented in watersheds and aquifers where there is a clearly identified need and an opportunity for economic, environmental, and social return on investment. Required applications for environmental flows, provisions for groundwater protection, and shared watershed governance and responsibility are clear examples of how this approach should be applied.

Alongside a modernized Water Act, water and land use could be made more effective with the establishment and funding of an independent Natural Resources Board (NRB) that provides reports to the provincial government. The Board would provide independent performance and compliance audits and reporting to the public on natural resource and sustainability issues in order to increase the effectiveness and performance of resource management in B.C. This type of oversight and reporting could be achieved by expanding the role of the existing Forest Practices Board to cover all legislation administered by the Ministry of Forests, Lands and Natural Resource Operations.

The establishment of a “science secretariat” that could serve as a resource for research and knowledge to assist the Natural Resources Board would also be a tremendous asset in protecting our water. Knowledge would be accumulated in collaboration with universities, technical colleges, and professionals from the public and private sectors with the required scientific expertise. The B.C. Wildlife Federation has already forwarded these suggestions to the Minister of Environment; Minister of Forests, Lands, and Natural Resource Operations; and the Select Standing Committee on Finance.

While revenue from the sale of hunting and angling licences should be used to fund resource management, a similar model should be used to fund water use and the infrastructure required to deliver, monitor, and manage it is unlikely to be fully addressed by the government in the modernized *Water Act* expected this spring. The ability of local watershed councils to support watershed management plans could be funded through a \$5 million per year contribution to the Living Rivers Trust Fund until sustainable pricing and funding models are developed in collaboration with First Nations, local governments, communities, industry and other stakeholders.

Fresh water provides a foundation for the environmental and economic well-being of present and future generations, and the current debate on the *Water Act* is significant and fundamental to the public interest. It is important for those of us that would like to see greater protection for B.C.’s fish, wildlife, and habitat to constructively contribute to the modernization of an outdated piece of legislation.

Yours in Conservation,

Bill Bosch,  
President, BC Wildlife Federation

## Minutes of Meeting on Water Sustainability Act

2975 Jutland Road Victoria

Monday November 2013-11-04

10:00 to 11:00 AM

Water Sustainability Branch, Lynn Kriwoken and Ted White

BCWF, Bill Bosch President, Rick Mayor Vice President, and Al Martin

Ducks Unlimited, Les Bogdan and Andrea Barnett on speakerphone

BCWF indicated that they had made presentations on the Water Sustainability Act to Ministers Polak, Thomson, Bond and the Select Standing Committee on Finance.

We have prepared a summary paper but in interest of time we would raise what we see as the outstanding issues with respect to the Act and our recommendation:

1. Absence of a sustainable funding framework. With new regulations coming into effect licencing groundwater, water objectives, environmental flow needs and critical environmental flows the resources required to implement these changes should come from water licences. Further pricing could be used as a tool to drive conservation.
2. Oversight: The BCWF recommends a Natural Resources Board reporting to the legislature supported by and independent scientific panel should be established by transforming the Forest Practices Board to look at all resource management legislation including the Water Sustainability Act.
3. Implement changes to Section 9 of the *Water Act* as recommended by the BCWF following the research conducted by the University of Victoria Environmental Law School. These changes are needed to address the reduction of protection of watershed due to recent changes in the federal *Fisheries Act*. Ted had a copy of the document with him for the meeting.
4. Enabling legislation that allows local watershed governance in priority areas such as the Cowichan.
5. Enforceable water management objectives, environmental flow needs and critical environmental flows that are tailored to the specific sensitivity watersheds and aquifers. (It was clarified later that the definition groundwater does not include saline aquifers)
6. The need to implement the act on area based approach. Lynn Krywoken indicated that they were looking at the definition of a stream. Andrea Barnett indicated that wetlands are important ecosystem components that should be part of the discussion. \*See points below from BCWF.
7. Change the allocation system to one based on beneficial uses rather than the current first in line system and review the licences based on the sensitivity of the licences. Lyn Kriwoken stated this could be done in select watersheds where there are critical environmental flows.

8. As an Interim measure contribute \$5M/year to Living Rivers Trust Fund to support watershed watershed governance and sustainability projects .

Summary of Notes on Wetlands: Neil Fletcher, Wetlands Coordinator BCWF

**Response to Legislative Proposal (2013) in relation to wetlands**

Wetlands are one of our most imperiled ecosystems in BC, the province having lost 70 to 90% in developed areas. Wetlands are only protected implicitly in the 2013 Legislative Proposal. This is a change in the direction from what we've seen during consultation on the development of the new Water Sustainability Act.

British Columbians and many conservation groups were led to believe wetlands would finally receive some much needed protection when the previous policy proposal: *British Columbia's new Water Sustainability Act (2010)* explicitly stated that one of the 11 province-wide policy measures of the modernized act was: "Preserving and protecting wetlands" (page 7). Inclusion of this objective at the provincial scale is critical to safeguarding wetlands, and was applauded among the conservation community as a much needed improvement in comparison to the 2009 discussion paper. However, in 2013, this supportive and firm language for wetlands conservation has now been dropped almost completely.

**Recommendation:** The Water Sustainability Act is the primary tool that can provide enabling legislation to protect wetlands. We recommend that wetlands are explicitly provided protection by being identified as a key target for protection within the new Act and afforded the appropriate mechanisms to address degradation and loss. British Columbians simply cannot afford to lose as many wetlands as have already been lost in the last 100 years due to lack of sufficient or clear regulations.



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File 2012-03-10

VIA ELECTRONIC MAIL

January 13 2013

Alan Martin  
British Columbia Wildlife Federation  
1710 Ash Road  
Victoria, BC  
V8N 2T6

Dear Mr. Martin:

**Re: Provincial Legislation to Replace Loss of Fisheries Act Habitat Protection**

You have asked us to provide you with information about potential legislative action the province of British Columbia can take to offset the loss of protection afforded to fish and fish habitat as a result of recent and anticipated amendments to the federal *Fisheries Act*.<sup>1</sup> This memo details three areas of existing provincial legislation with the potential for use, either by modification or by strategic employment, to provide greater protection to fish and fish habitat. The relevant statutes are the provincial *Fish Protection Act* and the Riparian Areas Regulation under it,<sup>2</sup> and the BC *Water Act*.<sup>3</sup>

**ISSUES**

The main issue to be addressed in this memo is what law the provincial government can use to protect fish and fish habitat where protection is weakened under the amended federal *Fisheries Act*. Herein, this issue is split into three separate contexts.

- a. Can the creation of Water Management Plans under Part IV of the *Water Act* protect fish and fish habitat?
- b. What changes to the *Riparian Areas Regulation* can protect fish and fish habitat?
- c. Can section 9 of the *Water Act* be modified and updated to directly and indirectly protect fish and fish habitat?

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<sup>1</sup> *Fisheries Act*, R.S.C., 1985, c. F-14.

<sup>2</sup> *Riparian Areas Regulation*, B.C. Reg. 376/2004, O.C. 837/2004.

<sup>3</sup> *Water Act*, RSBC 1996, c 483.

## SUMMARY

The province of British Columbia has an opportunity to offset weakened protection for fish and fish habitat by modifying and strategically employing parts of BC's *Water Act* and BC's *Riparian Areas Regulation* ("RAR").

The province of BC can commit to furthering the development of Water Management Plans ("WMP") throughout the province as enabled under Part 4 of the *Water Act* by designating areas for the creation of WMPs, making WMPs applicable to all statutory decisions by eliminating exemptions for forestry-related decisions, and amending section 65 to require all statutory decision-makers to ensure their decisions conform to a WMP.

Working with the RAR, the province of BC can strengthen the qualifications for the selection of qualified environmental professionals ("QEP") who undertake assessments within riparian areas. As well, it BC can place limits on the exercise of discretion by QEPs developing streamside protection and enhancement areas. The scope of the RAR can be geographically expanded to apply to all of BC instead of only locations in the southern and western parts of the province, and identified industry exemptions should be eliminated from the Regulation.

Finally, section 9 of the *Water Act* can be enhanced so as to regulate groundwater monitoring and licensing, taking a more fulsome, ecosystem-based approach to environmental protection. Section 9 may be modified to mandate a more comprehensive and collaborative assessment process with proponents wishing to develop in areas 'in and about streams'. Lastly, section 9 should be extended to apply to all forestry and mining related decisions.

## BACKGROUND

The federal government first enacted the *Fisheries Act* (the "Act") in 1868. For generations it has been considered the cornerstone law for environmental protection. The Act empowers Fisheries and Oceans Canada, long known as the Department of Fisheries and Oceans ("DFO") to conserve and protect fish and fish habitat across Canada. Fish habitat is defined in the Act as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly to carry out their life processes".<sup>4</sup> The key protections are found in sections 35 and 36 of the Act.

Section 35 of the Act states that it is an offence for anyone to carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat ("HADD"). Where an activity will create a HADD, the DFO must approve the project before the work commences.<sup>5</sup> The application process for a HADD approval includes providing the DFO with plans, specifications, studies and details of the proposed activities, and triggers environmental assessment under the Canadian Environmental Assessment Act.<sup>6</sup> Once a HADD

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<sup>4</sup> *Fisheries Act*, *supra* note 1, at s.34.

<sup>5</sup> *Ibid*, at s.35(2).

<sup>6</sup> *Environmental Law in Canada*, September 2011, Blake, Cassels & Graydon LLP, online: [http://www.blakes.com/english/legal\\_updates/reference\\_guides/environmental/Environmental\\_Law\\_in\\_Canada.pdf](http://www.blakes.com/english/legal_updates/reference_guides/environmental/Environmental_Law_in_Canada.pdf), accessed November 2, 2012.

is approved, fish habitat may be harmed or destroyed “by any means or under any conditions” – permitting proponents to lawfully destroy fish habitat.

Section 36 of the Act prohibits the deposition of deleterious substances into fish-bearing waters. Under s.36, however, pollution can also be authorized by regulations enacted by the Governor in Council or federal cabinet.<sup>7</sup>

In April of 2012, the Government of Canada tabled its *Budget Implementation Act* (the “*BIA*”), otherwise known as Bill C-38.<sup>8</sup> The Act contains several proposed amendments to the *Fisheries Act*, namely to s.35, which weaken the general protection afforded to fish habitat.<sup>9</sup> The changes are to come into force over two successive amendments to sections 32, 35, and 37. When all amendments have gone through, the existing prohibition against HADD, and the prohibition against killing of fish (s. 32) will be merged into one prohibition against “serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery”.<sup>10</sup> Serious harm to fish is new concept defined as “death of fish or any permanent alteration to, or destruction of, fish habitat”.<sup>11</sup> Whereas a HADD authorization once triggered an environmental impact assessment, these changes in the language of the *Act* will likely mean that authorization is required for impacts on only commercial, recreational, or aboriginal fisheries and to a lower standard of harm than the previous HADD. As a result, many activities that have an impact on fish habitat and fisheries will not be examined at all.

Federal authorizations and the power to make regulations in s. 35 will also be broadened. Whereas formerly a HADD could only be authorized by ministerial authorization or by Cabinet regulation, the amendments would allow not just the Minister or their officials but any person or entity prescribed by the regulation to authorize harm to fish and fish habitat.<sup>12</sup> Also, s. 142(1) of the *BIA* proposes that certain prescribed works, undertakings and activities could be automatically exempted from s. 35(1) as well as harm done to certain prescribed Canadian fisheries waters. Works harming fish and fish habitat could proceed without any notification or consultation of government officials.

Changes to the *Fisheries Act* have caught the attention of a growing number of groups concerned for the well being of fish and fish habitat in BC. This group includes conservation organizations, community groups, hunters and anglers, as well as outfitters and sport fishermen, local governments, First Nations, and industry. Increasingly, individuals and groups are shifting their attention to the Provincial government for meaningful action in the face of these changes. The issue that arises is what the Provincial government can do with legislation already in place, to alleviate concerns over the health and safety of fish in BC.

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<sup>7</sup> *Fisheries Act*, *supra* note 1, at s.36.

<sup>8</sup> *Bill C-38*, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, 41st Parliament, 1st Session, June 2, 2011 – Present, online: <http://www.parl.gc.ca/LegisInfo/BillDetail.s.aspx?Language=E&Mode=1&billId=5514128>, accessed on September 20, 2012.

<sup>9</sup> *Legal Backgrounder: Fisheries Act*, May 2012, Ecojustice, online: [http://www.ecojustice.ca/media-centre/media-release-files/may-2012\\_final\\_simplified-fisheries-act-overview-may-17/view?searchterm=legal%20background%20fisheries%20act](http://www.ecojustice.ca/media-centre/media-release-files/may-2012_final_simplified-fisheries-act-overview-may-17/view?searchterm=legal%20background%20fisheries%20act), accessed September 25, 2012.

<sup>10</sup> *Bill C-38*, *supra* note 8, at s.135(6)(c).

<sup>11</sup> *Ibid*, at s. 133(4).

<sup>12</sup> *Ibid*, at s. 35(2)(c).



## ASSUMPTIONS

This memo is based upon the following assumptions:

- The amendments to the *Fisheries Act*, as proposed, will be enacted and come into force in their entirety;
- The protection of fish falls under the provincial government's jurisdiction for environmental protection and does not conflict with the federal government's jurisdiction over seacoast and inland fisheries; and
- All of the strategies discussed in this memorandum have implications for, and may be affected by, aboriginal rights and title. These implications and effects are not evaluated.

If there are other relevant facts, or if we have misstated the facts or made incorrect assumptions, please tell us immediately. New information may change our opinion.

### ***ISSUE #1: Can the creation of Water Management Plans under Part IV of the Water Act protect fish and fish habitat?***

Enacted in 2004, Part 4 of BC's *Water Act* permits the development of a Water Management Plan ("WMP") for a designated region. The opening section of Part 4 addresses fish health and habitat specifically:

62 (1) The minister may, by order, designate an area for the purpose of developing a water management plan if the minister considers that a plan will assist in addressing or preventing

- (a) conflicts between water users,
- (b) conflicts between water users and instream flow requirements, or
- (c) risks to water quality.

(2) Without limiting the reasons for which an order under subsection (1) may be made, the minister may consider concerns related to fish, fish habitat and other environmental matters.<sup>13</sup>

The Water Regulation defines habitat as:

the areas in and about a stream, including (a) the quantity and quality of water on which fish or wildlife depend directly or indirectly in order to carry out their life processes, and (b) spawning grounds and the nursery, rearing, food supply and migration areas<sup>14</sup>

A WMP's design is tailored to address the unique environment and challenges of a local region. Water Management Plans are one way that the province can achieve local, specific objectives that together build strong provincial protection for fish. Fish and fish habitat can be

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<sup>13</sup> *Water Act*, *supra* note 3, at s. 62.

<sup>14</sup> B.C. Reg. No. 204/88 at s.36.

targeted through stream and riparian protection, groundwater monitoring, and by putting conditions on licences and permits for any activity with potentially adverse impacts on fish processes including water flow and quality. Plans can have a variety of purposes and address many needs - dealing with conflicts between users and between water users and in-stream flow requirements<sup>15</sup> Ideally, plans are comprehensive and address the multitude of uses and activities in a watershed or region that have an impact on fish and hydrology.

Water Management Plans are designed through multi-year, multi-phase processes that include public consultation, with local representatives and government crafting guidelines addressing concerns within a designated region. After a WMP is prepared, it can be submitted to the minister who undertakes a review of the plan before sending it to the Lieutenant Governor in Council for approval.<sup>16</sup> If approved, all or part of the plan will be legally binding dependent on the Lieutenant Governor's discretion.<sup>17</sup>

Finally, plans may:

- Require that persons making decisions or classes of decisions under a specified enactment consider those plans in making those decisions;
- Restrict the issuance or amendment of licences, approvals, permits or other authorizations under a specified enactment; and
- Restrict the exercise of a power under a specified enactment.<sup>18</sup>

Regulations resulting from a WMP are limited, however, in their applicability. Regulations may not be made in relation to the *Forest Practices Code of British Columbia Act*,<sup>19</sup> the *Forest and Range Practices Act*,<sup>20</sup> the *Forest Act*,<sup>21</sup> or the *Range Act*,<sup>22</sup> respecting an authorization or the exercise of a power under those Acts. Thus, in the event of a conflict with standards or regulations under forestry legislation, WMPs will not apply.<sup>23</sup>

Although enabled in 2004 under the *Water Act*,<sup>24</sup> presently, only one jurisdiction in BC has made significant headway toward the implementation of a WMP.<sup>25</sup> In September 2009, the Township of Langley Council endorsed the Langley Water Management Plan and sent it to the

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<sup>15</sup> Brandes, O., Curran, D. 2008. *Water Licences and Conservation: Future Directions for Land Trusts in British Columbia*, online: [http://ltabc.ca/images/Water\\_Licence\\_Report\\_FINAL2.pdf](http://ltabc.ca/images/Water_Licence_Report_FINAL2.pdf), accessed October 4, 2012.

<sup>16</sup> *Water Act*, *supra* note 3, at s. 64.

<sup>17</sup> *A User's Guide to Working in and Around Water – Understanding the Regulation Under British Columbia's Water Act*, 2005, Ministry of the Environment, Stewardship Division, online: [http://www.env.gov.bc.ca/wsd/water\\_rights/cabinet/working\\_around\\_water\\_v5.pdf](http://www.env.gov.bc.ca/wsd/water_rights/cabinet/working_around_water_v5.pdf), accessed October 20, 2012

<sup>18</sup> *Water Act*, *supra* note 3, at s. 65(1).

<sup>19</sup> *Forest Practices Code of British Columbia Act*, RSBC 1996, c 159.

<sup>20</sup> *Forest and Range Practices Act*, SBC 2002, c 69.

<sup>21</sup> *Forest Act*, RSBC 1996, c 157.

<sup>22</sup> *Range Act*, RSBC 1996, c 396.

<sup>23</sup> *Water Act*, *supra* note 3, at s.65(2).

<sup>24</sup> *Ibid*, at s. 62.

<sup>25</sup> *Water Management Plans and Water Use Plans*, 2011, West Coast Environmental Law, online: [http://www.bcwatersheds.org/wiki/index.php?title=Water\\_Management\\_Plans\\_and\\_Water\\_Use\\_Plans](http://www.bcwatersheds.org/wiki/index.php?title=Water_Management_Plans_and_Water_Use_Plans), accessed November 12, 2012, at para 4.

provincial government for review and approval.<sup>26</sup> The plan is still with the minister who has yet to forward the plan to the Lieutenant Governor in Council for approval. The plan provides a series of recommendations to protect the aquifers in the Township from overuse and contamination.<sup>27</sup> Guidelines in the WMP that are relevant for the protection of fish and fish habitat include for riparian areas and groundwater health. For instance, the WMP mandates “riparian 60 metre setbacks for new non-domestic wells less than 30 metres deep located next to a fish bearing stream”.<sup>28</sup> Langley’s plan contains enforceable agricultural practices to minimize the risk of groundwater contamination; launches a pilot project for residents nearby a designated aquifer; and creates a position for a local protection officer to monitor and enforce aspects related to the WMP.

### ***Learning From Elsewhere in Canada***

Another interesting example of water management planning in Canada can be seen in the Niagara Escarpment area of Ontario. In 1973, the Ontario Legislature first approved the *Niagara Escarpment Planning and Development Act* (the NEPD Act).<sup>29</sup> The NEPD Act provided the legal basis for the development of the Niagara Escarpment Plan (NEP),<sup>30</sup> which received approval by the Ontario Cabinet in June of 1985. The NEP is Canada’s first large-scale environmental land use plan.<sup>31</sup> It includes policies for seven land-use designations (Natural, Protection, Rural, Recreation, Urban, Minor Urban and Mineral Resource Extraction), establishes criteria for land development, and sets objectives for the Niagara Escarpment Parks System. In order to implement the detailed development control and performance standards contained in the NEP, the Act and the Plan enable the establishment of, and rely on, a Development Permit System. In this plan, approvals related to a permitted use are granted at one time as part of an integrated site-specific application process. Staff of the Niagara Escarpment Commission administer this system.

The NEP contains a section pertaining specifically to fisheries and sets out requirements for all new development or redevelopment adjacent to significant fishery resources. Requirements include no net loss of fish habitat, vegetative buffers on streams, and the maintenance of watercourses. The objective is to ensure “no net loss of aquatic ecosystems including fish habitat or other natural habitats which depend upon lakes, watercourses, wetlands, and groundwater systems for their existence in accordance with the federal *Fisheries Act* and any associated protocols or policies that the province and the federal government have established”.<sup>32</sup> While the NEP functions in accordance with the *Fisheries Act*, it also establishes and allow enforcement of its own set of standards for fisheries protection.

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<sup>26</sup> Township of Langley Water Management Plan, *Final Report*, 2009, online: <http://www.compassrm.com/database/rte/files/Township%20of%20Langley%20WMP%20-%20Final%20Report.pdf>, accessed October 4, 2012.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, at p.31.

<sup>29</sup> *Niagara Escarpment Planning and Development Act*, RSO 1990, c. 2.

<sup>30</sup> *Niagara Escarpment Plan*, 2012, Niagara Escarpment Commission, online: <http://www.escarpment.org/landplanning/plan/index.php>, accessed November 14, 2012.

<sup>31</sup> *Welcome to the Niagara Escarpment Commission*, 2012, Niagara Escarpment Commission, online: <http://www.escarpment.org/home/index.php>, accessed November 14, 2012.

<sup>32</sup> *Ibid.*, at p.69.

Presently, the Niagara Conservation Authority refers applications requiring an authorization for a HADD to the DFO for final approval. If the Commission does not agree with an authorization granted by the DFO or if the development was not supported by all the applicable objectives and policies of the NEP, including fisheries, the Commission may refuse a Development Permit or Plan Amendment. These decisions may then be appealed to the Environmental Review Tribunal or the Ontario Municipal Board.<sup>33</sup> By virtue of the NEP being enacted through the NEPD Act, requirements imposed under it can ultimately determine the outcome of a development proposal, irrespective of the federal authorization.

## **Limitations**

Although there is virtually no experience with WMP processes in BC, a few challenges are obvious. They can take a long time to go from conception to implementation. Plans have only been pursued voluntarily thus far. There is little immediate benefit and resulting incentive and/or motivation for communities to develop their own plans. Communities and local authorities must have both the interest and the resources to initiate and carry out plan development. Once a WMP has been developed, it still must pass through the necessary provincial approval processes that may ultimately make enforceable only select portions of the plan. The provincial government thereby can limit the power of municipalities, and there is no time limit for how long a minister may take to approve a plan.

Finally, WMP's have no bearing on the exercise of any power under forestry legislation. In addition, under s.65 of the *Water Act*, the Lieutenant Governor in Council may require that persons making decisions or classes of decisions under a specified enactment must consider the plan in making those decisions, but they are not required to do so. Applicability of a completed plan is then potentially limited both in scope and by ministerial discretion.

## **Recommendations**

### **1. Designate areas for the Creation of WMPs Across the Province**

Where communities do not initiate WMPs, the minister could make orders designating areas for which WMPs ought to be developed. In many areas of BC justification for a WMP can be found under section 64(2) for concerns related to fish and fish habitat. The minister could prioritize the approval of these plans and facilitate local governments' jurisdiction to enact standards for land development near watercourses. Because ministerial approval is discretionary and can be used to make all or part of a plan law, a provincial approach to approval of WMPs should be one of empowering communities to enact demanding requirements for the protection of fish and fish habitat.

### **2. Make WMPs Applicable to All Statutory Decisions**

Extend the scope of WMPs to having an impact on decisions made under forestry legislation.

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<sup>33</sup> Email from Lisa Grbinicek, Senior Strategic Advisor, Niagara Escarpment Commission, to Margaret Seiling, ELC Student, November 20, 2012.

### **3. Amend Section 65 of the *Water Act* to Require all Statutory Decision-Makers to Conform with a WMP**

If adopted by regulation, WMPs can have the force of law and can require statutory decision makers such as local and provincial governments to consider the WMP when making decisions. Until all decision-makers are bound by law, however, WMPs will lack authority.

### **4. Require WMPs to have Provisions that Explicitly Target Fish and Fish Habitat**

Plans should include provisions that:

- a. Require local authorization for projects that result in harmful alteration, disruption or destruction of fish habitat
- b. Require local authorization for all drilling, development, and redevelopment within a given distance of all watercourses.
- c. Mandate wide riparian buffers for all new developments and redevelopments.
- d. Delegate to local governments the approval of, or mandate permitting for, groundwater takings within a given area of a watercourse.

Fish and fish habitat need to be targeted directly and indirectly in plan development. For example, mandatory and generous set-backs will help protect waterways, regular monitoring of instream flows will help ensure overall ecosystem health, and groundwater permitting and monitoring will enhance source protection ultimately benefitting receiving rivers. Borrowing language from plans such as the NEP specific to the protection of fisheries, for example “no net loss of aquatic ecosystems including fish habitat”, can empower local oversight in support of fish.

## ***ISSUE #2: What changes to the Riparian Areas Regulation can protect fish and fish habitat?***

The *Riparian Areas Regulation* (“RAR”) is enacted under BC’s *Fish Protection Act*.<sup>34</sup> Section 12 of the *Fish Protection Act* authorizes the Province to establish “policy directives regarding the protection and enhancement of riparian areas that the Lieutenant Governor in Council considers may be subject to residential, commercial or industrial development”.<sup>35</sup> Local governments then must establish legal protection for fish habitat accordingly.

When it came into force in 2005, the RAR replaced BC’s *Streamside Protection Regulation* (SPR).<sup>36</sup> The SPR set minimum streamside protection and enhancement areas (“SPEA”) for how close a new building could be to a watercourse. The areas continue to exist in the RAR, but local governments no longer establish them. Instead, the extent of the SPEA is discretionary – determined through a science-based assessment conducted by a Qualified Environmental Professional (“QEP”). The individual or organization proposing the development hires the QEP responsible for the assessment. The SPR sets the riparian assessment area in which

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<sup>34</sup> *Fish Protection Act*, SBC 1997, c. 21.

<sup>35</sup> *Ibid*, at s.12.

<sup>36</sup> Streamside Protection Regulation [Repealed] B.C. Reg. 10/2001 [Repealed Mar. 31, 2005 by B.C. Reg. 376/2004].

the QEP is to employ an assessment methodology to develop the SPEA. Following this methodology, the QEP assesses impacts, determines setbacks from the riparian area based on site conditions, and articulates the measures necessary for maintaining the integrity of setbacks.<sup>37</sup> In preparing an assessment report and determining a SPEA, the QEP must use either: (a) a “simple assessment”, applying rules based on the requirements of the SPR; or (b) a “detailed assessment”, undertaking a more complicated calculation based on a new assessment methodology included in the schedule to the regulation.

As it is currently written the RAR contains its own version of a HADD provision. Local governments are not to authorize development within a riparian assessment area without an assessment report containing the opinion of a QEP that “there will be no harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in the riparian assessment area”. Development, however, can occur within a riparian assessment area provided certain conditions are met if the QEP’s assessment report certifies that the development will not result in a HADD, or if the SPEA identified in the report is protected from the development.<sup>38</sup>

In addition, development can proceed where the DFO expressly authorizes a HADD. Still, where the DFO authorizes the HADD of natural features that support fish life processes (by Ministerial approval or regulation), “a local government *may* approve or allow development to proceed”.<sup>39</sup> Local governments are not required to then approve the development.

Finally, under section 12(4) of the *Fish Protection Act*, a local government may exceed the protection set out in the Riparian Areas Regulation. It must “provide a level of protection that, in the opinion of the local government, is comparable to or exceeds that established by the directive”.

## Limitations

The RAR has much potential as a tool with which to protect fish and fish habitat, however, its authority is limited. First, the RAR applies only in specified regions of BC. Currently, it applies only to municipalities and regional districts in the Lower Mainland, on much of Vancouver Island, in the Islands Trust area, and in parts of the Southern Interior. This means that development within 30 m of a watercourse anywhere in the rest of BC will not trigger a RAR assessment report.

Another limitation is in the breadth of the RARs application to activities. The RAR does not apply to activities that are not residential, commercial or industrial activities or ancillary activities regulated or approved by local government under Part 26 of the *Local Government Act*.<sup>40</sup> The provincial government asserts that the RAR does not apply to the following:

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<sup>37</sup> Riparian Areas Regulation Implementation Guidebook, 2006, British Columbia, Ministry of Water Land and Air Protection.

<sup>38</sup> *Riparian Areas*, *supra* note 2, at s. 4 (2)(3)(b)(iii)(a).

<sup>39</sup> *Ibid*, at s. 4(iii).

<sup>40</sup> *Local Government Act*, RSBC 1996, c 323, at s. 26.

- A development permit or development variance permit issued only for the purpose of enabling reconstruction or repair of a permanent structure described in section 911 (8) of the Local Government Act if the structure remains on its existing foundation;
- Existing permanent structures, roads and other development;
- Developments that have been approved but not yet built;
- Farming activities;
- Mining activities, hydroelectric facilities and forestry (logging) activities;
- Federal lands and First Nations reserve lands to the extent that they are already exempt from local government bylaws;
- Parks and parkland in some cases; and
- Institutional developments.<sup>41</sup>

Categories of activities exempt from the RAR, like mining activities and forestry activities, may be regulated by other legislation such as the federal *Fisheries Act*. However, given the weakening of the *Fisheries Act*, exempting projects from the RAR may create a gap that potentially compromises important riparian protection. Limiting exemptions will give local government greater breadth of authority over streamside protection and enhancement areas.

The RAR is also limited by the discretion granted to the QEP in conducting the riparian assessment. The use of a detailed assessment, based upon the complexity of the calculations involved will, for many streams, automatically result in a reduced setback requirement.<sup>42</sup> In addition, there is little oversight of how ‘professional’ an expert professional actually is. In 2009, a review by Environment Canada found that over half of the RAR reviews conducted by professionals were improperly carried out.<sup>43</sup> The regulation of private professionals is arguably unclear and subject to various interpretations.<sup>44</sup> Further, the BC Supreme Court’s most recent statement about the RAR noted that the supporting documents for the RAR (the Guidebook and Intergovernmental Agreement) are not supported in law by the *Fish Protection Act* or RAR,<sup>45</sup> and concluded that local governments cannot interfere with QEP assessments.<sup>46</sup>

## Recommendations

### 1. Limit or Eliminate Discretion within the Riparian Assessment Process

The RAR could be clarified by including the minimum setbacks and standards previously contained in the *Streamside Protection Regulation*. Alternatively, the RAR could mandate the simple assessment method as part of a QEP’s assessment, thereby limiting the discretionary

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<sup>41</sup> Guidebook, *supra* note 37 at p.9.

<sup>42</sup> Gage, A., 2011, *BC law fails to protect fish habitat*, West Coast Environmental Law, online: <http://wcel.org/node/1229>, accessed October 10, 2012.

<sup>43</sup> Gage, A., 2012, *Privatizing Salmon Protection: The Failure of the Riparian Areas Regulation*, in C. Sandborn (ed.) *Maintaining Supernatural BC for your Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, University of Victoria) at pp. 67-69.

<sup>44</sup> Haddock, M., 2008, *Reliance on Registered Professionals*, The Environmental Law Centre, The University of Victoria, online: <http://www.elc.uvic.ca/associates/documents/Reliance-on-Registered-Professionals-Nov24.08.pdf>, accessed December 1, 2012, at p. 7.

<sup>45</sup> *Yanke v. Salmon Arm (City)*, 2011 BCCA 309, at para 25.

<sup>46</sup> Gage, A., 2011, *supra* note 42.

nature of the RAR assessment. Concern over the consistency of QEP assessments could be eliminated by setting enforceable minimum, or by creating greater restrictions on, criteria for the selection of QEPs, as well as providing more monitoring and enforcement of QEP activities.

## **2. Expand Application of the RAR to all of BC**

Expanding application of the RAR to more regions within BC would require all local governments with land development jurisdiction to protect fish and fish habitat.

## **3. Limit Exemptions from the RAR**

Limiting the types of developments exempt from the RAR will ensure that where the *Fisheries Act* mandates a lower standard for environmental assessment, at least the need for a riparian assessment by a QEP will be triggered.

### ***ISSUE #3: Can section 9 of the Water Act be modified and updated to protect fish and fish habitat?***

#### **Description**

BC's *Water Act* offers two notable opportunities to indirectly enhance protection for fish and fish habitat. The first arises when authorities are required to grant approval of changes 'in and about a stream' under s. 9, and the second involves the management of groundwater resources.

#### ***Section 9 of the Water Act***

Section 9 of the *Water Act* provides that a person may only make "changes in and about a stream" under an approval in accordance with Part 7 of the Water Regulation.<sup>47</sup>

#### **Changes in and about a stream**

**9** (1) The comptroller, a regional water manager or an engineer may grant an approval in writing authorizing on the conditions he or she considers advisable

- (a) a person to make changes in and about a stream,
- (b) a minister of the Crown, either in right of Canada or of British Columbia, to make changes in and about a stream, or
- (c) a municipality to make changes in and about a stream.

(2) A minister, municipality or other person may only make changes in and about a stream in accordance with an approval under this section or in accordance with the regulations or a licence or order under this Act.<sup>48</sup>

Under the Water Act, a "stream" is defined as including "a natural watercourse or source of

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<sup>47</sup> *Protecting Stream Health and Aquatic Environments*, 2012, Water Act Modernization, online: <http://livingwatersmart.ca/water-act/stream-health.html>, accessed October 15, 2012.

<sup>48</sup> *Water Act*, *supra* note 3 at s. 9.



water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp and gulch".<sup>49</sup>

Under the *Water Act*, “changes in and about a stream” means

- a. any modification to the nature of the stream including the land, vegetation, natural environment or flow of water within the stream, or
- b. any activity or construction within the stream channel that has or may have an impact on a stream<sup>50</sup>

Section 37 of the Water Regulation then prohibits changes in and about a stream without authorization by an approval, licence or order, or if done in compliance with the Regulation.<sup>51</sup> An approval or licence is required in cases involving more complex works and for the short-term use, storage or diversion of water.<sup>52</sup>

In addition, s.40 of the Water Regulation requires that before a change in and about a stream proceeds, proponents must both notify a habitat officer of the change and obtain from the Ministry the conditions under which they may proceed.<sup>53</sup>

Part 7 of the Water Regulation defines water quality and habitat protection. To protect water quality, a person making a change in and about a stream must ensure that, for example, sediment and debris with the potential for adverse impact does not enter a stream from any activity, rock that may develop acid rock drainage is not used in construction, and stable materials and vegetation are not displaced without approval by a habitat officer.<sup>54</sup> Section 42 of the Water Regulation prohibits an activity that interferes with habitat unless done in accordance with conditions specified by a habitat officer. Conditions relate to the timing of the activity, the maintenance of instream flows, the removal or deposition of material, the alteration of vegetation, and various other key factors for habitat protection.<sup>55</sup>

An application for an approval is typically referred to other regulatory agencies such as the Ecosystem Branch of the Ministry of Environment and Fisheries and Oceans Canada (DFO) for comment during the decision making process. Harm to fish or fish habitat may trigger s.35 of the *Fisheries Act* and require authorization under s.35(2) in addition to a *Water Act* s.9 approval. Fisheries and Oceans Canada has developed a process, similar to notification under the Water Regulation, for activities that pose a low risk to fish habitat. Fisheries and Oceans Canada provides upfront guidance on mitigation measures that are required to avoid a HADD. For activities that meet this criteria, a DFO review or authorization may not be required provided that the standard mitigation measures are followed. For works that may result in a HADD, an

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<sup>49</sup> *Water Act, ibid*, at s. 1.

<sup>50</sup> *Water Act, ibid* at s.1.

<sup>51</sup> *Water Regulation, supra* note 14 at s. 37.

<sup>52</sup> *A User's Guide, supra* note 17.

<sup>53</sup> *Water Regulation, supra* note 14, at s. 40.

<sup>54</sup> *Water Regulation, ibid* at s.41.

<sup>55</sup> *Water Regulation, ibid*, at s.42.

authorization from DFO is required.<sup>56</sup>

### ***Groundwater Monitoring***

BC is the only province in Canada and one of only a few jurisdictions in North America that does not regulate the use of groundwater, though a commitment has been made in the provincial *Living Water Smart* strategy to “regulate groundwater use in priority areas and large groundwater withdrawals by 2012”.<sup>57</sup> Section 1.1(1) of the *Water Act* explicitly states that the licensing provisions of the *Water Act* do not apply to groundwater. Therefore, because the *Water Act* does not currently license groundwater, there is limited power to address all uses of water that affect the hydrologic cycle and thus fish.<sup>58</sup>

Although section 1.1(2) of the *Water Act* allows the Lieutenant Governor in Council (cabinet) to establish a date when the licencing provisions in the *Water Act* will apply to groundwater, cabinet has not used this provision to date.

### **Limitations**

The definition of a ‘stream’ includes a ‘source of water supply’, but it does not outright include groundwater. This may limit the ability of authorities to enforce groundwater protection unless cabinet decides to apply the *Water Act* to groundwater under s.1.1(2). Though the BC government has planned to regulate some groundwater withdrawals as part of the modernization of its *Water Act*, it does not intend to implement province-wide regulation of groundwater withdrawals, except for large withdrawals that are usually associated with industrial, agricultural, group water supply or commercial uses.<sup>59</sup> Integrated watershed management requires the monitoring and management of groundwater. Until a thorough monitoring and permitting program for groundwater is enacted, the fish-bearing streams fed by continuous inputs from groundwater remain vulnerable to pollution and reduced water flow.

Approvals granted under the *Water Act* result in the issuance of a permit. While permits may be conditional as decided by a habitat officer or a responsible authority, the process is proponent driven and reactionary. This ‘take-and-go’ approach limits the ability of the *Water Act* to fulfill a more comprehensive assessment or planning role that may better recognize and thereby mitigate cumulative impacts on streams. At the same time, it contributes to a complex and adversarial system of water governance arguably less successful for environmental protection in the long-run. In their paper on options and opportunities in water governance reform in BC, Brandes and Curran explain that “insufficient financial and human resources exist for comprehensive and long- term planning, monitoring, and enforcement” and “[e]ffective management is further limited by fragmented and varied water governance approaches across

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<sup>56</sup> *Water Act, Section 9 Approvals and Notifications for “Changes In and About a Stream”*, 2012, Ministry of Forests, Lands, and Natural Resources Operations, online: [http://www.env.gov.bc.ca/wsd/water\\_rights/licence\\_application/section9/](http://www.env.gov.bc.ca/wsd/water_rights/licence_application/section9/), accessed November 20, 2012.

<sup>57</sup> *Fish Out of Water: Tools to Protect British Columbia’s Groundwater and Wild Salmon*, 2009, online: [watershed-watch.org/publications/files/FishOutofWater-web.pdf](http://watershed-watch.org/publications/files/FishOutofWater-web.pdf), accessed October 16, 2012.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Reporting of Water Withdrawals*, 2012, BC Water and Waste Association, online: <https://www.bcwwa.org/resourcelibrary/>, accessed November 1, 2012.

this province”.<sup>60</sup> The fact that so many provincial and federal departments may be called upon over the course of an approval is one example of this. Further, with the amendment of the HADD provision, it is increasingly unclear which projects will be transferred to DFO for authorization.

Under section 44 (2) of the Water Regulation, an Approval or Notification is not required for in-stream works related to forest activities where a person holds an agreement or road use permit under the *Forest Act*, an agreement under the *Range Act*, or a special use permit under the *Forest Practices Code of British Columbia Act*. Exemptions exist for approvals given under several mining related Acts.<sup>61</sup> This means that even if standards for permit approval in these Acts are lower than those determined as part of the Water Regulation, the *Water Act* has no authority to intervene for activities ‘in and about streams’.

## Lessons from Elsewhere in Canada

In Ontario, integrated watershed management (IWM) has become the focus of plans developed for community water protection. Integrated watershed management stresses the importance of a more comprehensive approach to water protection, inclusive of groundwater. Conservation Ontario highlights the importance of a fulsome understanding of a water system while scoping for water protection plans:

Characterization also includes identifying natural features, linkages, surface and groundwater systems, plus quantifying precipitation, and assessing existing flow regimes, recharge areas, and identifying interconnections between aquatic, terrestrial and groundwater systems, buffers and linkages. It also examines constraints to flow including floodplains, steep slopes, erosion areas, wetlands, forests, habitat, corridors, buffers and wellheads.<sup>62</sup>

Groundwater withdrawals ultimately can have an impact on instream water flow and are critical for overall ecosystem health. Surface water and groundwater are more effectively monitored and protected when managed as a single, connected resource.

## Recommendations

### 1. **Expand the Application of the *Water Act* to Groundwater: Make Licensing Under the *Water Act* apply to Groundwater and Expand Section 9 to include Activities Involving Groundwater**

Groundwater can only be managed if it is metered and monitored. Cabinet could utilize s. 1.1(2) to apply licensing requirements to groundwater. Further, s.9 can be expanded to require approvals for activities involving groundwater. This would allow habitat officers or the responsible authority to be more proactive with source protection by regulating the drilling of new wells, enforcing well-head protection measures, or ordering other actions.

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<sup>60</sup> Brandes, O., Curran, D. 2008. *Setting a New Course in British Columbia– Water Governance Reform Options and Opportunities*, POLIS Project on Ecological Governance.

<sup>61</sup> *Water Act Section 9 Approvals*, *supra* note 56; *Water Regulation*, *supra* note 14 at s.44(2)(a)(i).

<sup>62</sup> *Navigating Ontario’s Future: Summary Report*, 2010, Integrated Water Management, Conservation Ontario, online: [www.conservation-ontario.on.ca/watershed\\_management/reports/IWM](http://www.conservation-ontario.on.ca/watershed_management/reports/IWM), accessed November 1, 2012.

## **2. Modify the Approval Process to Require Assessment and Planning**

The *Water Act* could be updated so as to require proponents to submit their requests for permitting approval as part of an impact assessment process set out in legislation. This could involve collaboration between proponents and government

## **3. Create a Strict Provision Prohibiting Harmful Changes In and About Streams: Define Harm**

As an alternative to the above recommendation, prohibiting defined harmful changes in and about streams will prevent activities that create changes beyond a designated threshold of harm. This type of a provision will remove the discretion invoked when drafting conditions for the approval of a project involving significant harm. It will also provide a safety net, catching changes in and about streams with an impact on fish that may no longer trigger s. 35 of the *Fisheries Act*. By drafting provisions targeting areas ‘in and about streams’ and not fish or fish habitat, it avoids infringing on areas of federal jurisdiction.

## **5. Make Section 9 Approvals Applicable to All Statutory Decisions**

Extend Section 9 to include forestry- and mining-related decisions.

## **CONCLUSION**

Individuals, community groups, and provincial bodies have become engaged as a result of the federal government’s proposed amendments to the *Fisheries Act*. The BC provincial government, to support subsequent changes in its own legislation, can harness this active engagement. Opportunities to offset the weakening of fish and fish habitat protection exist in several existing statutes, namely the *Water Act* and the Riparian Areas Regulation. Under this legislation, local and the provincial governments are empowered to protect natural features that indirectly result in the protection of fish. The key to bolstering this protection involves the expansion of the geographical application of these laws, the limiting of exemptions, and the enhancement of provisions to better protect ecological features with a clear link to fish health.

We are pleased to discuss this memo and the options presented in it with you. Feel free to contact us if you have any questions or require additional information.

Yours Truly, [ORIGINAL SIGNED BY]

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Margaret Seiling, Student

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Deborah Curran, Lawyer