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*Via Email*

Ministry of Environment  
Government of British Columbia  
Victoria, BC

**RE: Ecojustice Submission on the proposed *Water Sustainability Act***

Thank you for the opportunity to comment on the Legislative Proposal for a new *Water Sustainability Act* (WSA) for British Columbia. As BC's current *Water Act* is more than 100 years old, we appreciate that many of the proposals for the new WSA take steps toward much-needed advancements for managing water in BC, efforts to begin regulating groundwater.

As the WSA Proposal is a discussion paper that describes general directions, Ecojustice is not providing a point-by-point analysis of the WSA paper. However, it is essential that the public be given an opportunity to comment on proposed legislation when it is in draft form, as well as any proposed regulations in draft form.

Ecojustice has published a four-part series in the online publication *The Tye* which outlines our major concerns and recommendations (see: <http://www.thetyee.ca/Series/2013/11/13/A-Better-Fix-for-BCs-Outdated-Water-Act/>). Rather than reiterate that information, we have attached those articles as an Appendix to this submission which contain our critique of the WSA Proposal.

This submission will highlight the three most important changes that are necessary to ensure the WSA protects the environment and the public interest. This submission addresses the following issues:

- 1) Environmental Flows
- 2) Protecting the public trust and the public interest
- 3) Eliminating or limiting FITFIR

## 1. Environmental Flows

BC's water legislation must protect water for the environment. Protected "environmental flows" are critical to healthy functioning watersheds for both nature and communities and must be clearly prioritized over other non-essential human uses. The WSA must explicitly set aside an ecological reserve of water that is not available for any use other than the conservation and maintenance of fish habitat and preservation of the natural ecosystem. The new WSA should:

- Legally establish standards (not guidelines) for environmental flow needs and critical environmental flow protections;
- Apply environmental flow needs to both new licenses and existing surface water licenses where water is insufficient to meet ecological needs;
- Commit to public consultation on the development of regulations and policy to create the framework for environmental flow needs; and
- Explicitly state that decision makers may suspend or refuse to issue a licence if it would negatively affects an aquatic ecosystem.

## 2. Protecting the public trust and the public interest

To ensure that private rights to use water do not impair public's interest in water resources, the new WSA should amend Section 2 of the current Water Act to state that:

*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, and any private rights established under licences issued or approvals given under this or a former Act are subject to be managed in the interest of present and future generations.*

The new WSA should also give the public a true voice in water management through the following changes.

- Require any advisory committees created under the WSA to have public representation and that proceedings and recommendations of these committees be public;
- Include public consultation in any licence reviews, setting of water objectives, setting of environmental flows, creation of area based regulation, and establishing of water efficiency standards;

- Include provisions for public notice of applications, and where appropriate public hearings, as well as the right of any resident of BC to object prior to license issuance, and the ability of the public to appeal the granting of a license; and
- Commit to a Resource Practices Board with the resources and expertise to audit in a manner that fulfills the various requirements for “measuring and reporting”, and the ability to investigate water and watershed management issues (perhaps an extension of the Forest Practices Board).

### **3. Eliminate or Limit FITFIR**

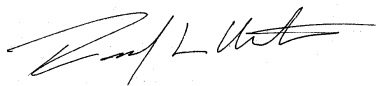
B.C. needs to get rid of the "first in time" system and move toward a modern, flexible allocation system that prioritizes essential human and ecological needs. BC needs a system that requires belt-tightening from all users in times of scarcity.

We acknowledge that an abrupt, wholesale removal of FITFIR would could pose regulatory and political challenges, but there are ways to limit the most negative consequences of this system. One clearly needed step, addressed above, is to give priority environmental flows such that licences allocations must be exercised within sustainable bounds. Further, as seems to be contemplated under the WSA, creating local, customized regulatory responses in times of scarcity could limit some of the most damaging effects of FITFIR.

On the whole, the discussion paper does not reflect an adequate consideration of the alternatives to FITFIR, including not extending the system to groundwater licences nor using the system for new surface water licences. We hope that this aspect of the proposal gets a more rigorous consideration when debates in the BC Legislature begin.

Thank you again for the opportunity to participate in this consultation. We look forward to remaining fully engaged on the issue.

Yours truly,



Randy Christensen  
Staff Lawyer

**APPENDIX A: ARTICLES BY RANDY CHRISTENSEN, ECOJUSTICE LAWYER, THAT APPEARED ON *THE TYEE* DURING THE WEEK OF NOVEMBER**

**ARTICLE #1:**

**Unpacking BC's Proposed Water Sustainability Act**

***Updating century-old legislation isn't easy, but we deserve better than what's currently on the table.***

By Randy Christensen, 12 Nov 2013, TheTyee.ca

Link: <http://www.thetyee.ca/Opinion/2013/11/12/BC-Water-Sustainability-Act/>

Water is British Columbia's most important natural resource. Our health, environment and economy all depend upon access to clean water. Yet you'd never know that from looking at how B.C.'s water is being managed.

The Water Act and other provincial legislation have historically failed to prevent water scarcity and ensure that there's enough water to satisfy competing economic, environmental and human health needs. The Water Act has also failed to provide the public fair return on a publicly-owned resource.

That we need a new water law is old news. Both government and advocacy groups have called for the Water Act to be updated so that it is adequately equipped to manage modern-day water demands. And at long last, it seems that progress might be right around the corner.

In late October, after many false starts and delays, the B.C. provincial government unveiled its answer to calls for a modern water law: a proposed [Water Sustainability Act](#).

Sadly, the proposed legislation is just the latest example of the province's penchant for promising excellence and delivering mediocrity. It wasn't long ago that Gordon Campbell's government promised to deliver "the best air and water quality, and the best fisheries management, bar none." A decade later, B.C. is the only place in North America that doesn't regulate groundwater and we've just gone through a multi-year inquiry to find out why wild salmon stocks crashed in 2009.

The proposed Water Sustainability Act is such a weak improvement over the current Water Act that one has wonder why the province has gone to such great lengths to trumpet the announcement and engage the public at all.

A cynic might say that the government wants to create the appearance of protecting water before unleashing a frenzy of fracking, liquefied natural gas and pipeline projects on an increasingly wary B.C. public.

Another explanation might be the growing consensus that water risk is a business risk.

Unrestricted water use seems like a good thing in theory, until you realize that your competitor's profligate use of water is one of the biggest threats to your own supply. Investors, such as global giant Goldman Sachs, are starting to evaluate countries and companies based on water supply risk. Perhaps the proposed Water Sustainability Act is simply meant to tighten up the most egregious failings of B.C. water management before investors start to look askance at our oversight failures.

## Once in a lifetime chance

Whatever the motivation, B.C. residents deserve better than the mediocre offering currently on the table.

## HOW CAN YOU TAKE ACTION?

The province has [invited the public to comment](#) on the proposed Water Sustainability Act. Feedback will be accepted until Nov. 15.

While the proposed legislation won't necessarily make B.C.'s water problems worse, it certainly won't fix them either. The good news is that the province still has an opportunity -- quite literally a once-in-a-lifetime chance, given how frequently water laws are updated in this province -- to produce a strong final law that will protect our most precious natural resources.

In this series, I'll assess the problems B.C. faces, what's being proposed, why it's inadequate and how we can do better by following some examples from across Canada and around the world.

***This is the first of four pieces in this series prepared by [Ecojustice](#). Tomorrow: Water and the public trust. Thursday: Water and the environment. Friday: What happens if B.C. is tapped dry? 🌿***

## ARTICLE #2:

### **Water in BC: Three Ways to Fix Outdated Law**

***Province's water is owned by the public, yet that public has no real voice in water governance.***

By Randy Christensen, 13 Nov 2013, TheTyee.ca

Link: <http://www.thetyee.ca/Opinion/2013/11/13/Water-in-BC-Three-Ways-to-Fix-Outdated-Law/>

Water is unique. It has public, private, personal, health, environmental, spiritual, recreational and commercial dimensions. We need strong governance to balance all of these needs and ensure that water sources are clean and plentiful -- today and for future generations.

This, however, doesn't happen under B.C.'s century-old Water Act. And the proposed [water sustainability act](#) doesn't go far enough to ensure competing needs will be adequately managed.

B.C.'s current water licensing regime has created a two-tiered system where those with "rights" (approval to take water from a water body) have priority access to water sources. More often than not, these "rights"-holders are industrial and agricultural users, which results in forestry and gas companies having their needs met before other users and interests (read: people and nature) are considered.

How could this happen? The Water Act was developed at a time when the population was low and water was plentiful. Its primary objective was to provide water for industry and agriculture. But times -- and our values -- have changed. Climate change may well usher in changes in precipitation and temperature such that the future scarcely resembles the past.

We desperately need a new water law, one that protects the environment, prevents conflict over water, prioritizes the most socially-important uses of water, gives the public a say in decision making and

ensures that water pricing for commercial use reflects the inherent value of fresh water to British Columbians.

### **Recommendation #1: Protect the public trust**

For more than a century, B.C.'s water has been "vested" in the Crown and water users. But while the public owns B.C.'s water, it's not managed in the public interest under the current law. More disappointingly, that won't change dramatically under the proposed water sustainability act.

What's missing is something that other jurisdictions around the world are embracing: Recognition of the public trust doctrine, which explicitly declares that water is owned by the public and must be managed on the public's behalf. This means that private rights to use water are ultimately subordinate to the overall public interest.

Three years ago, Quebec declared that water is part of the "common heritage" of the province and created a duty on every person to protect it. The Northwest Territories recognized the "public trust" and the need to protect the environment (including water) for present and future generations.

California recognizes that the people have "a paramount interest" in water and that the state shall determine what water can be converted to other uses or controlled for public protection. Washington State recognizes that water belongs to the public and proposed water uses must be measured against the public interest.

In South Africa, the government is the "public trustee" of the nation's water resources and "must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner." And the examples go on and on.

This overwhelming trend makes B.C.'s refusal to recognize the public trust or require that water be managed in the public's interest all the more glaring. The B.C. government hasn't explained for whom it believes it is managing the province's waters, but clearly, it's not the public.

### **Recommendation #2: Give the public a voice**

Under the proposed water sustainability act, water is going to be managed, for the most part, without the public input.

On the positive side, the proposal seems to open the door to watershed management at the local level by creating the power to delegate decisions. But we still need a commitment that local residents will be able to participate in the process when decisions are delegated.

There are also no commitments to include the public in a number of key processes, such as reviewing existing licences, setting "water objectives" (which will guide a range of land-use decisions), establishing environmental flows, creating area-based regulations (which may tighten standards at a local level or address regional water scarcity), and designing water efficiency standards -- just to name a few.

And for the most important decisions, the public will be shut out completely. When someone applies for a licence to take water, there will be no requirement of public notice and no opportunity for the public to participate in the decision.

The regressive nature of the government's position on this issue cannot be overstated. Public participation in this type of decision-making has been a given for decades in environmental law.

### **Recommendation #3: Establish fair return on water**

There was considerable hue and cry this summer when the public learned that Nestlé pays nothing for taking millions of litres of groundwater in B.C. The reason? The Water Act only regulates surface water.

Although one of the bright spots in the proposed water sustainability act is that groundwater users will finally be brought into the system, if water rates remain at their current level, Nestlé would [still only pay](#) around \$265 for the 319.5 million litres it bottles at its Hope, B.C. plant each year. Meanwhile, a Lower Mainland family of three would pay, on average, about \$650 per year for the tiniest fraction of what Nestlé uses.

Running the administrative system for water use in B.C. is expensive, but user fees fail to even cover the cost of running the system, which means that the public is subsidizing the water use of major commercial interests. Water users also pay nothing for the environmental damage they cause.

Clearly, this is an opportunity to increase industrial water-use fees, which can be used to support water governance and environmental remediation instead of being absorbed into the province's general revenue.

There's still time for B.C. residents to weigh in on the proposed water sustainability act. The province has invited the [public to comment](#) and is accepting submissions until Nov. 15. Learn more about the issues [here](#).

***This is the second of four pieces [in this series](#) prepared by [Ecojustice](#). Tomorrow: Water and the environment. Friday: What happens if B.C. is tapped dry? ***

### **ARTICLE #3:**

#### **Something Fishy About BC's Proposed Water Act**

***Water for the oil and gas industry? Absolutely. Water for fish? Maybe.***

By Randy Christensen, 14 Nov 2013, TheTye.ca

Link: <http://www.thetyee.ca/Opinion/2013/11/14/BC-Water-Act/>

If you want to know what someone really values, don't look at what they say, look at what they do. Take, for instance, how the B.C. government plans to handle the competing needs of fish and the oil and gas industry under the new Water Sustainability Act.

If you look at what the government says in its 120-page legislative proposal, you'll notice an emphasis on the need to protect fish. But when you examine how the proposed amendments mesh with the existing law, it becomes clear that fish needs will still come second to those of the oil and gas industry. While industry will likely continue to have access to pretty much all the water it wants, fish will have no real legal protection for their water needs.

Oil and gas development is putting tremendous pressure on water resources in many parts of B.C. The liquefied natural gas (LNG) boom is one example. Most LNG production relies on hydraulic fracturing, also known as fracking. It's a process that uses, on average 11 million litres of water per well. Since 2005, more than 7,300 wells have been drilled in B.C., with another 500-1,000 approved each year. And with the government proposing at to get at least three new LNG export terminals into operation by 2020, this pace could increase dramatically.

On top of this, the oil and gas industry is allowed to abuse low-scrutiny, "short-term" water approvals by getting unlimited renewals rather than going through the more onerous licencing process. This practice is so egregious that it's attracted a lawsuit, [launched yesterday](#) by my colleagues at Ecojustice. All the while, the government continues to enable users exploiting B.C. water approvals process: Earlier this year, it extended the duration of the permits from one to two years.

Under the Water Sustainability Act proposal, the government intends to reclassify oil and gas water use from general "industry" into a separate class, which would allow the government to apply different standards and pricing for that industry. Given the government's coddling of the industry to date, this is hardly reassuring.

Taken together, the existing law and proposed amendments mean that the oil and gas industry will get special and legally-protected rights to use water, including favorable interpretation and application of the Water Act to ensure continued (and likely increased) access to B.C.'s water.

### **Hard times for fish in BC**

Compare this to what fish get. Under current government policy, the needs are fish are "considered" when water licensing decisions are made. This simply means that the person making the decision has to think about fish, but can then go ahead and give away water the fish need. The proposed legislation would simply formalize this practice by introducing the requirement to consider fish (although exceptions will be made). In other words, the status quo will continue.

While there are also some proposed, discretionary provisions that could be invoked to protect fish in times of scarcity, similar provisions already exist and are rarely -- if ever -- used.

This approach might be defensible if there was some evidence that it actually worked. But this approach hasn't protected fish in the past and won't in the future. Thirty-seven per cent of fresh water fish in B.C. are already red-listed. Meanwhile many water bodies have been licenced for water withdrawals that exceed average flows. You do the math: You don't need to be scientist to know that fish can't survive in dried-up rivers.

The public has made strong, clear calls for legally-binding standards that protect environmental flows -- meaning the life-sustaining water that runs through streams, rivers and lakes and keeps ecosystems healthy. Tellingly, this public input has been ignored.

This is yet another area where B.C.'s approach is completely out of step with how other places are addressing this challenge. A growing number of countries have or will be enacting flow standards including all member states of the European Union, Japan, Mexico, South Africa and Switzerland to name a few.



Similar efforts are ongoing in the United State, including in the neighbouring state of Washington. Even places not known for being particularly environmentally-progressive, such as Florida, have taken steps to address flow concerns.

The lack of real, binding, legally enforceable protections for fish and the environment is, in my mind, the single biggest problem with the proposed Water Sustainability Act. Environmental flows are critical to the healthy function of watersheds and must be clearly prioritized over other non-essential human uses. The Water Sustainability Act must explicitly set aside an ecological reserve of water that is not available for any use other than the conservation and maintenance of fish habitat and preservation of ecosystems.

A good first step would be amending the Water Act to ensure that environmental flows will be legally-protected and have priority over commercial users. Second, we need a commitment that the flows themselves will be determined by a scientifically-defensible methodology (not the guesses of industry consultants and bureaucrats) and public input.

Respected American jurist Oliver Wendell Holmes wrote that "a river is more than an amenity, it is a treasure." Holmes wrote this in 1931. Sadly, the B.C. government has yet to realize this in 2013.

***This is the third of four pieces in this series prepared by [Ecojustice](#). Tomorrow: What happens if B.C. is tapped dry? Find the entire series so far [here](#).*** 🌿

#### **ARTICLE #4:**

#### **BC's Ugly Road to Water Scarcity**

***How our province creates H2O haves and have-nots, a sure path to shrivel.***

By Randy Christensen, 15 Nov 2013, TheTyee.ca

Link: <http://www.thetyee.ca/Opinion/2013/11/15/BC-Water-Scarcity/>

Water scarcity isn't something that most people associate with B.C. It's big, much of it is a rainforest, and the population is relatively small when compared to many other places around the world. There's more than enough water to go around, right?

Properly managed, there's little doubt that B.C. would have enough water for people, the environment and a healthy, sustainable economy. But that's not the current reality. Troublingly, the province is already pushing up against the limits of water availability.

When a stream or lake cannot support any more water users, or use only under very limited circumstances (e.g. use during wet periods), the province imposes a water restriction. More than 4,600 water restrictions are in effect across B.C.

The map below was generated using the B.C. Water Resources Atlas, an online resource. What it shows, in red, is that problems with water availability are more concentrated in areas with higher population densities.

We're much closer to water crises and conflict than most people realize. Throw in climate variability caused by climate change, and we'll be there.

### 'Lord of the Flies' management style

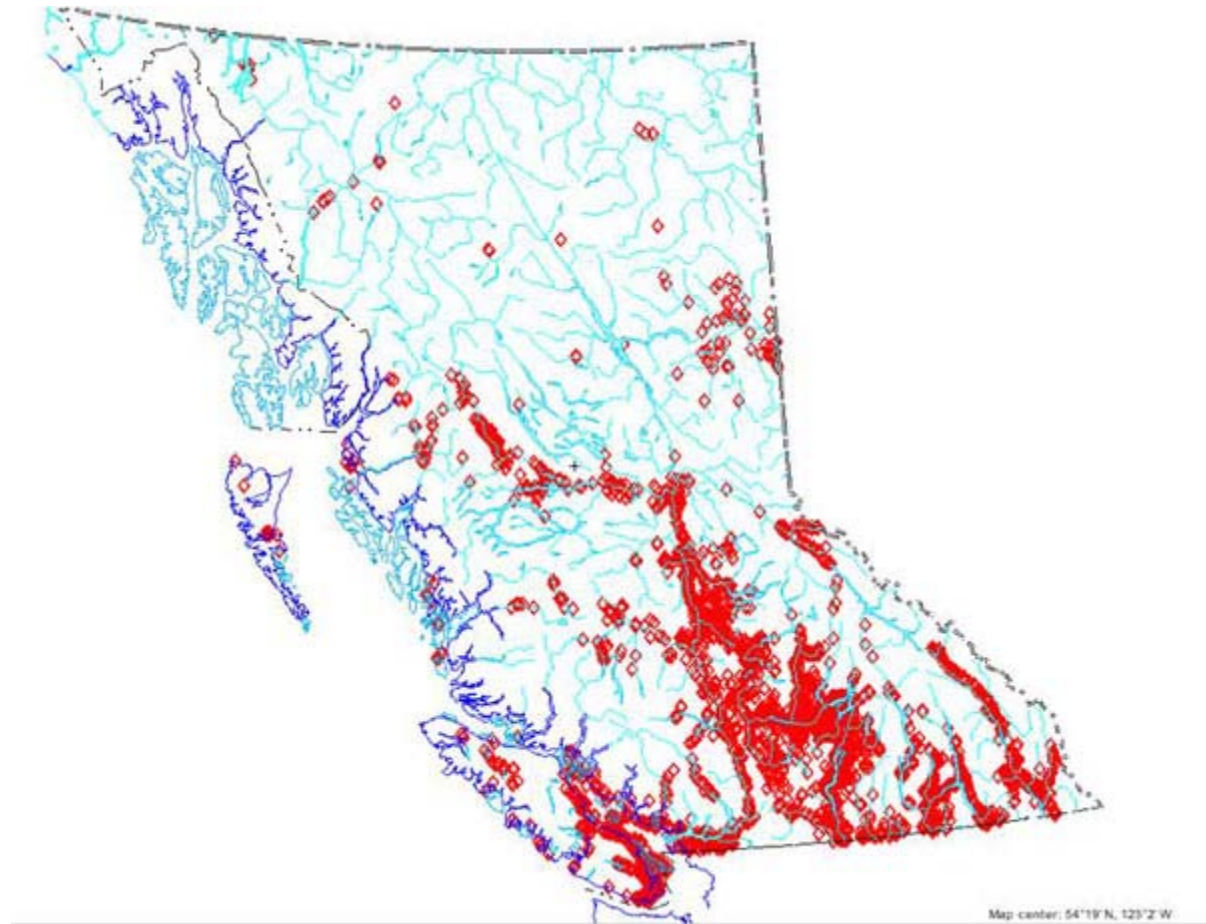
When scarcity hits in B.C., it won't be pretty. That's because the province has used, and under the proposed Water Sustainability Act will continue to use, a system known as "first in time, first in right."

Think of it as *Lord of the Flies* meets water governance. The "first in time" system creates water haves and water have-nots. It prioritizes users by date of first water use -- meaning the older licence always wins. If there's a drought and not enough water to go around, the newest user gets shut off completely, then the second newest, and on through the priority chain.

There is no proportional cutback of water use and no consideration of human health impacts. If a golf course has an older licence than that of a nearby community, the golf course is still entitled to its full allocation of water. If there isn't enough water left over for the community, it'll have to go without.

Under the proposed Water Sustainability Act, B.C. is not only keeping the "first in time" system, but extending it to the tens of thousands of groundwater users that will to be brought into the system.

Sticking with the "first in time" method of water management inevitably dooms B.C.'s water management system to a logistical logjam of conflicts and strife. It won't be good for the environment or most B.C. residents, but will likely be a boon to lawyers in the province.



In red, the location of the 4,663 "water allocation restrictions" in place across B.C. Source: [B.C. Water Resources Atlas](#).

B.C. needs get rid of the "first in time" system and move toward a modern, flexible allocation system that prioritizes essential human and ecological needs. Such a system would also require belt-tightening from all users in times of scarcity. Water availability changes from day to day and year to year. Handing out licences that have specified, unchanging allocations is like writing big cheques without thinking about where the money will come from.

The province also needs to do a much better job of requiring water use to be monitored and reported. Surprisingly, B.C. collects almost no data on water use by major industries in the province. It's a glaring hole that cripples the efficacy of environmental stewardship efforts and the province's ability to respond during periods of water scarcity.

### **Fight for a worthy water future**

When it comes to water management in B.C., there's a lot at stake. If we get it wrong -- and looking at the proposed Water Sustainability Act, the outlook isn't exactly rosy -- all of B.C. will be forced to grapple with conflict, litigation, missed economic opportunities, lost revenue and environmental ruin.

The good news is that things can change.

The province has enough water to go around, provided that it's managed properly. We can avoid the conflicts that come with water shortages, provide for the environment and have a robust economy that won't be compromised by water supply risk.

The Water Sustainability Act is still at the proposal stage. We can and must do better. There is still time to submit your comments to the Ministry of Environment. Once the comment period closes, you can reach out to the premier, the Minister of Environment and your local MLA.

Let them know we need a water future worthy of the great province of B.C.

***This is the final piece in a [four-part series](#) prepared by [Ecojustice](#). Learn more about Ecojustice's work on water issues by visiting [ecojustice.ca](#).*** 🌱