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RE: A Water Sustainability Act for B.C. Legislative Proposal: Submissions of Fort Nelson First Nation

INTRODUCTION

This is the submission of Fort Nelson First Nation ("FNFN") regarding the document referred to as *A Water Sustainability Act for B.C. Legislative Proposal* (the "Proposal"). This submission consists of three parts. Part 1 provides context regarding FNFN's rights and interests in relation to water and water stewardship. Part 2 provides FNFN's comments on the *Water Act* modernization process established by the Ministry of Environment. Part 3 provides FNFN's comments on specific aspects of the Proposal.

PART 1: FNFN WATER RIGHTS AND INTERESTS

1. Who We Are

Fort Nelson First Nation ("FNFN") is a nation of Dene and the Cree people who inhabit an area of what is now northeast British Columbia near the community of Fort Nelson. The traditional territory of FNFN includes the northeast corner of B.C., east of the Rocky Mountains. FNFN is an adherent to Treaty No. 8, and, as such, holds constitutionally protected treaty rights within FNFN territory.

The lands, waters and air within FNFN territory are inseparable from FNFN culture, history and identity. Our relationship with the land and water, and all life within it, has existed as long as our ancestors have been on this land. Our rights and responsibilities to protect, care for, and manage the land, air and water within our territory are part of our heritage. These rights stem from ancestral law, and have been recognized by Canada through Treaty 8, the *Constitution Act*, *1982,* and the *United Nations Declaration of the Rights of Indigenous Peoples.*

As an adherent to Treaty 8, Fort Nelson First Nation holds the rights to hunt, fish and trap throughout FNFN territory. The exercise of these treaty rights necessitates access to, and the protection and management of, adequate quantities of clean, fresh water capable of sustaining life within our territory. The full and adequate protection and management of all our water resources is necessary to fulfill treaty promises and to reconcile conflicting claims, interests and ambitions within FNFN territory.

We require water not only to survive as human beings, but also to survive as Dene and Cree people in our land. The water gives us life. It provides us with sustenance, health, mobility and a spiritual and cultural connection to the land and all our relations. Historically, the availability of fresh, clean water allowed us to travel freely throughout our territory, hunting, fishing, trapping, and gathering the food and medicines necessary for our survival.

2. Water Use in FNFN Territory

The colonization and industrialization of FNFN land and water over the past two generations threatens our traditional relationship with water and all life that it sustains. FNFN territory includes the Horn River Basin, the Liard Basin and the Cordova Embayment, three areas that contain enormous quantities of natural gas that is locked in shale formations. Shale gas extraction and associated industrial activity in FNFN territory is increasing at an alarming pace. This activity poses a very serious threat to the land and water within FNFN territory.

Shale gas is extracted through an industrial process known as hydraulic fracturing, which involves pumping enormous volumes of water mixed with sand and chemical additives into shale formations at pressures sufficient to fracture the rock. It is estimated that 30,000 to 100,000 m^3 of water per well is required for hydraulic fracturing in the Horn River Basin. As of June 2013, to satisfy the current water requirements of the oil and gas industry within FNFN territory, the Oil & Gas Commission (the "OGC") had approved almost 1,700 "section 8" water applications allowing the use of up to 2,623,000 m^3 of water per day. In addition, the Ministry of Forests, Lands and Natural Resource Operations ("FLNRO") has issued approximately 70 long-term water licences in FNFN territory, which authorize the use of about 78,000 m^3 per day. Unlike many other water uses, water use for hydraulic fracturing permanently removes water from the watershed, contaminating it and pumping into deep geological formations. This application of water is relatively new and the short and long-term effects are largely unknown.

Industrial activities associated with hydraulic fracturing that impact water and riparian habitat include:

- Removal of water from lakes, creeks, rivers and shallow aquifers, reducing flows and water levels;
- Altering and redirecting water flows, creating barriers to surface water flow;
- Land clearing and removal of vegetation; and
- Controlled discharges and spills of wastewater, much of which contains toxic chemicals.

These activities result in a host of known environmental effects including changes in the magnitude and timing of peak and low flows, increased run-off and erosion causing higher sediment concentrations, and harm to or loss of wetlands and riparian habitat.

Industrial activity in FNFN territory has had very serious adverse effects on FNFN culture, health, way of life, and the exercise of FNFN treaty rights. FNFN people report illnesses from

drinking contaminated water or eating contaminated fish and game. As a result of contamination concerns, FNFN elders no longer drink the water from the land, and many FNFN members are fearful of eating fish and game harvested from FNFN territory. This has a devastating effect on the health and well-being of our people, interferes with our ability to practice our constitutionally-protected treaty rights, and threatens our very identity.

3. FNFN Water Initiatives

Through a number of initiatives, FNFN has been actively working to protect water and improve water management within FNFN territory. FNFN and the provincial government have made a mutual commitment to participate in ongoing "government-to-government" discussions regarding the issue of water use, management and protection in FNFN territory. This forum, which we refer to as the "bilateral water table", was intended to provide a venue for discussion water issues, including the regulation of water under the Water Act and related Acts and regulations. The parties agreed that the content of the discussions at this table would not be used by either party as part of any formal Crown consultation process. The purpose of this agreement was to leave the parties free to discuss our respective interests without concern that either party would face prejudice related to ongoing or upcoming Crown consultation processes.

In 2012, FNFN sought to appeal the issuance of a long term water licence to Nexen Inc. on the basis that the province failed to consider relevant hydrological and environmental issues and did not meaningfully consult FNFN before issuing the licence authorizing the withdrawal of up to 2,500,000 m^3 of water per year from the Tsea River watershed. Nexen and the province argued that FNFN had no standing to appeal the issuance of the licence under section 92 of the *Water Act.* FNFN was ultimately successful in establishing standing before the Environmental Appeal Board (the "EAB").[1] The hearing on the merits of the appeal is currently ongoing.

PART 2: THE *WATER ACT* MODERNIZATION PROCESS

In order to ensure that the rights of our people and the health of our territory are protected, it is essential that the use of water in FNFN territory is carefully managed. As the primary legislation under which water withdrawals in the province are authorized, the *Water Act* plays a critical role in the management of water in FNFN territory.

Due to the important role of water in the protection of FNFN treaty rights, culture and way of life, any change to the legislative regime under which water use is managed in FNFN territory is an important strategic, higher level decision that may impact FNFN treaty rights. As a result, when the Crown contemplates changes to the *Water Act*, the Crown has a duty to consult FNFN.

The *Water Act* modernization process is not consistent with the honour of the Crown and the New Relationship, and does not discharge the Crown's duty to consult FNFN. As noted above, FNFN and the province specifically agreed to discuss legislative reform in the area of water management on a government-to-government basis at the bilateral water table. As a result, the *Water Act* modernization process, including the Proposal, should have been discussed in that forum.

In addition to failing to discharge the Crown's duty to consult, the *Water Act* modernization process does not provide an adequate opportunity for FNFN to comment on the proposed

[1] *Fort Nelson First Nation v. British Columbia (Assistant Regional Water Manager),* 2012-WAT-013(a).

changes. The province has not provided any draft legislation. Rather, the province has supplied a vague "Legislative Proposal" that fails to provide the kind of detail required to ascertain the true nature of many of the key proposed changes. Moreover, the province has provided only four weeks in which to review the Proposal and submit comments, far too short a time to permit an adequate review of the issues raised in the Proposal, particularly in light of the emerging issues regarding hydraulic fracturing, which demand careful attention before any new water legislation is tabled.

Despite the serious flaws in the engagement process regarding the modernization of the *Water Act,* FNFN has elected to provide substantive comments on the Proposal in recognition of the important role played by the *Water Act* in relation to FNFN treaty rights, culture and way of life. FNFN's participation in this flawed process should not be taken as an indication of FNFN's acceptance of this process, or of the substance of the Proposal.

The Northeast Water Strategy

The province recently provided FNFN with a document titled "Northeast Water Strategy" (the "NWS"). This three-page document articulates the goal of responsible water use, and three water stewardship objectives designed to achieve this goal. The NWS calls for a coordinated approach among stakeholder groups, including First Nations, to work to achieve these objectives through five "action areas":

1. Enhance information and tools to support decision-making;
2. Strengthen the Regulatory regime;
3. Coordinate and streamline decision-making processes;
4. Enhance reporting, compliance and enforcement; and
5. Build a water stewardship ethic.

The NWS is very short on specifics. Some of the principles articulated in the NWS are so vague as to be almost meaningless. It is unclear how the specific policies put forward in the Proposal fit with the strategy presented in the NWS, and how the NWS will address FNFN's issues and objectives regarding water management in FNFN territory. The NWS fails to recognize that, as the holder of constitutional rights that depend on the careful management of water, FNFN is in a different position from other parties with respect to their roles in water governance. What is most troubling, however, is that the NWS seems to contemplate a broad water management strategy that encompasses the modernization of the *Water Act* in addition to several other legislative initiatives, none of which has been subject to consultation with FNFN, or raised for discussion the bilateral water table.

PART 3: THE PROPOSAL

1. Purpose of the Act

As the Proposal recognizes, the current Act is no longer adequate in light of changing social, environmental and economic conditions. The Proposal sets out three outcomes that the *Water Act* modernization process is intended to meet: (1) water management is sustainable, efficient and adaptive; (2) rights for water users, communities and industries are secure and transparent; and (3) B.C.'s water and aquatic ecosystems are healthy and protected.

The Proposal, however, makes no mention of the inclusion of a purpose statement in the proposed *Water Sustainability Act* (the "WSA"). Purpose statements, which establish governing principles for the interpretation of statutes, provide important interpretive direction. The Supreme Court of Canada has said that "the most direct and authoritative evidence of legislative purpose is found in formal purpose statements appearing in the body of legislation."[2] Purpose statements provide invaluable assistance to interpreters in circumstances where a matter is not explicitly addressed by substantive provisions, or there is an apparent conflict between provisions. Purpose statements may be of particular assistance when unforeseen matters arise that must be addressed within the context of an existing legislative scheme.

While the current Act does not contain a purpose statement, the purpose of the *Water Act* has been considered in several decisions of the Environmental Appeal Board. These authorities are clear that the purpose of the *Water Act* is twofold: to allocate and regulate water rights in a way that preserves the Crown's interest in the water resource, and to protect and conserve water and riparian resources, including water quality, quantity, usage and preservation, as well as the broader vegetation and natural environment in or near a stream or stream bed and banks.[3]

A recurring and predominant theme throughout the Proposal is that the WSA should ensure that B.C.'s fresh water supply is sustainable, not just with respect to present needs, but for generations to come, even in the face of significant environmental, social, and economic uncertainty. A carefully crafted WSA purpose statement that reflects this principle will enable interpreters to ensure the WSA is sufficiently flexible to ensure the attainment of its objectives despite the significant environmental, economic and social change that the Proposal contemplates.

2. Water Objectives

The Proposal would establish "Water Objectives" that would provide "strategic direction" for decision-makers in relation to understanding, protecting and managing water quality, water quantity and aquatic ecosystem health when making decisions with the potential to impact water. Water Objectives would apply to decision-makers under the WSA and, possibly also to decision-makers exercising authority under other legislation, who would be required to consider the Water Objectives, and to apply appropriate terms and conditions to authorizations. Water Objectives would be established at the provincial, regional, and site-specific level.

FNFN supports the establishment of Water Objectives. The content of the Water Objectives, however, must be determined in consultation with First Nations, and, in particular, with FNFN, which has demonstrated leadership on the issue of water management, and holds critical knowledge on water management issues.

In order to be effective, Water Objectives must be binding on all statutory decision-makers. Decisions affecting water quantity and quality are often exercised under legislation other than the *Water Act*, particularly the *Oil and Gas Activities Act.* The Proposal indicates that the government has heard that, "Existing statutes such as the *Forest and Range Practices Act* and *Oil and Gas Activities Act* contain appropriate provisions to protect water" and, accordingly,

[2] *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008) at 273.
[3] *Burgoon v. British Columbia (Regional Water Manager)*, [2010] B.C.E.A. No. 15 (EAB); *0707814 BC Ltd. v. Assistant Regional Water Manager*, [2008] B.C.E.A. No. 1 (EAB); *Johnston v. British Columbia (Ministry of Environment*, [2009] B.C.E.A. No. 1 (EAB).

"Additional action by natural resource tenure licensees should not be required in those cases." FNFN strongly disagrees with this assertion. The *Oil and Gas Activities Act* does not contain any provisions to protect water. While the regulations thereunder, particularly the *Environmental Protection and Management Regulation*, BC Reg 200/2010, contain some such provisions, those provisions are very limited and far from sufficient. If the Water Objectives are to be meaningful, they must be binding on all public decision-makers.

3. Water Allocation

a. Baseline Data

Decisions made under the WSA can only be as good as the information on which they are based. Good water stewardship depends on adequate hydrological and ecological baseline and monitoring data. Hydrological models that attempt to predict flows based on data from other riparian areas are insufficiently reliable to form a basis for water allocation decisions. The WSA should require applicants for all water withdrawal applications (both short and long-term) to collect adequate baseline data including multiple years of hydrological data collected from the point of diversion that captures seasonal variability.

b. Cumulative Impact Assessment

It is impossible to determine the significance of the environmental effects of a water withdrawal without considering cumulative environmental effects. Significant adverse environmental effects may result over time as a result of the accumulation of seemingly small or insignificant actions. As the B.C. Forest Practices Board observed:

> …a series of individually insignificant effects can accumulate to result in a significant overall effect. For example, each water license on a stream may only withdraw a small amount of water, but a large number of small licenses may withdraw enough water to negatively affect fish habitat near the mouth of the stream.[4]

Prior to the allocation of water, a full cumulative effects assessment should be performed taking into account all existing water licenses and section 8 (short-term) approvals, as well as those planned (and publicly disclosed) but not yet approved. Such an assessment should also include potential impacts due to land use changes, climate change, and assessments of all aquatic ecosystem components (flow, water quality, groundwater, fish habitat, wetlands, riparian vegetation, wildlife).

c. FITFIR

Under the current Act, the priority of competing water rights is determined based on the principle of "first in time first in right" or "FITFIR". Under this principle, during times of water scarcity, water rights issued earlier have priority over rights that were acquired later. Under the Proposal, the WSA would continue to apply the FITFIR principle to surface water rights, and would extend it to groundwater rights.

FNFN does not support the inclusion of the FITFIR principle in the WSA. The FITFIR principle is an inefficient, unfair and inappropriate way to prioritize water rights. Priority to water should be

[4] Forest Practices Board, *Cumulative effects: from assessment toward management*. Special report. FPSB/SR/39. 2011.

based on use, with ecosystem needs coming first, followed by First Nations water rights (as constitutionally protected rights), household or domestic needs, and finally, industrial and commercial use. By granting priority to water licences assigned earliest, which are generally those issued to industrial users, FITFIR inverts these priorities.

If FITFIR is to be retained, it must recognize that First Nations, who relied on the lands and waters in what is now British Columbia for thousands of years prior to the arrival of Europeans, were actually "first in time" and therefore should have priority over other users.

d. Environmental Flows

Under the Proposal, statutory decision-makers (including the OGC) would be required to consider "Environmental Flow Needs" or "EFNs" when adjudicating most new water licence or short-term use applications for ground and surface water. The Proposal defines EFNs as "the quantity and timing of flows in a stream that are required to sustain freshwater ecosystems, including fish and other aquatic life (i.e., maintain stream health)".

In addition to EFNs, the Proposal would establish a Critical Environmental Flow ("CEF") threshold to regulate short-term flow needs during times of scarcity or drought. Below the CEF threshold, significant or irreversible harm to aquatic ecosystems may occur. Where a CEF threshold is reached, the WSA would allow for the temporary regulation of water use according to the FITFIR principle.

Critically, under the Proposal, EFNs would not be applied to existing licences, unless recommended and approved in a Water Sustainability Plan or as part of any required licence review. While the Proposal is characteristically vague on how EFNs would operate, the Proposal indicates that, in most cases, EFNs would be would be determined on the basis of a "desk-top" assessment. Consideration of EFN would be discretionary for certain "low-risk" applications. The Proposal suggests that EFNs would operate according to the "EFN Policy", which we understand to be a technical document that explains how EFNs are to operate in practice. The EFN Policy has not been made available to the public.

FNFN generally supports the inclusion of EFNs and CEFs in the WSA, consistent with the principle of adaptive management of watersheds. There are, however, a number of serious problems with the use of EFNs as proposed. First, EFNs (and CEFs) must apply to all licences, not just new licences. Arbitrarily restricting environmental management priorities to future licences is extremely problematic. Where existing licences exceed EFNs, decision-makers must have the power and obligation to amend those licences. Second, the Proposal indicates that government decision-makers will only be required to "consider" EFNs, a weak and ambiguous requirement. If they are to be meaningful, EFNs must be binding, and decision-makers must have clear direction to consider EFNs in every decision, and no discretion to exempt certain decisions from the application of EFNs.

The effectiveness of EFNs will depend entirely upon the way in which they are administered. In order to be effective, EFNs must be credible. EFNs must be established based on scientific and traditional knowledge, and must reflect the precautionary principle. EFNs must be established based on sufficient site-specific baseline data, and must recognize, quantify and address uncertainty. Consistent with the principles of adaptive management, EFNs require the ongoing collection of hydrological and ecological data, which should inform water allocation decision-making. EFNs should also incorporate safeguards such as lake level drawdown limits.

EFNs cannot be adequately assessed in a “desk-top” manner, as proposed. The NorthEast Water Tool currently used by the OGC is inadequate as it does not incorporate site-specific flow data, does not appropriately account for uncertainty, and does not take into consideration environmental needs (being limited to hydrological needs). Water allocation decision-making based on desk-top analysis that does not incorporate site-specific baseline data or account for uncertainty tends to lead to over-allocation of water and resulting environmental harm.

Unless the technical issues regarding the design and implementation of EFNs are addressed, incorporating EFNs into the WSA will have no impact on watershed and ecosystem health. Through our involvement in water issues in FNFN territory, and particularly in the course of our involvement in the proceedings before the EAB referred to above, FNFN has acquired significant expertise in these issues. It is critical that FNFN play a meaningful role in the establishment and implementation of the EFN Policy as it applies to FNFN territory.

e. Water Mass Balance

In order to understand watershed ecosystem health and the availability of both surface and ground water for allocation it is necessary to understand the water mass balance of the watershed. Any given watershed has water inputs (precipitation, inflows) and outputs (evaporation, transpiration, outflows). Undertaking a balance analysis of all inputs and outputs of water for the watershed is essential to calculate how much the habitats that support fish and wildlife will be affected as a consequence of water withdrawals. A water mass balance analysis must be undertaken prior to any allocation of water.

f. Licence Term

Under the Proposal, WSA decision-makers would have the discretion (but not the obligation) to review most licences after a minimum of 30 years after the WSA comes into force, or 30 years after a new license is issued.

FNFN agrees that all water licences must be subject to periodic review, and that, upon review, decision-makers should have the power to amend licences and reclaim unnecessary flow. The proposed 30-year review interval, however, is far too long, particularly given the rapid pace of oil and gas development in FNFN territory, and the uncertainty presented by climate change. True adaptive management requires that regulators frequently review and reassess water licences in order to respond to changing information and changing conditions. Water licence terms should vary by watershed. In FNFN territory, due to the uncertainty surrounding water use for hydraulic fracturing, the licence term should be no more than five years. Throughout the term of a water licence, decision-makers must retain the authority to amend the licence terms or suspend the licence as circumstances require.

g. FNFN Water Reservations

As discussed above, industrial activity related to oil and gas development in FNFN territory has resulted in significant environmental degradation. Certain areas of FNFN territory have been degraded to the extent that FNFN treaty rights can no longer meaningfully be exercised in those locations. In order to protect remaining areas of cultural importance to FNFN, FNFN should be allocated water reservations with respect to watercourses in those areas. Areas for in which water reservations are to be established should be determined by reference to the Cultural Protection Zones and Lake and Riparian Zones identified in the FNFN Strategic Land Use Plan.

h. Beneficial Use

Under the current Act, water must be used "beneficially". A person who diverts water and does not use it "beneficially" commits an offence. Licences may be cancelled, in whole or in part, if the licensee fails to make beneficial use of the water under the licence for three consecutive years. "Beneficial use" is not defined under the current act.

Under the Proposal, "beneficial use" would be defined as using the licensed volume of water for the intended purpose(s) and in compliance with the terms of the water licence. This proposed definition, which would define "beneficial use" by reference to private use of the water only, is inappropriate and would result in a significant weakening of the Act. Beneficial use should be defined by reference to use that is efficient, in the public interest, protects stream health, and respects aboriginal and treaty rights.

4. Monitoring & Reporting

The Proposal refers to enabling the development of a regulation to require larger water users to measure, record and report actual water use and related information on a comprehensive and consistent basis.

Monitoring and reporting are critical to good water stewardship. In order to facilitate adaptive management, hydrological and ecological data must be collected and analyzed on an ongoing basis, and, consistent with the principle of adaptive management, licences must be amended or suspended as information and conditions change. All water monitoring programs undertaken in FNFN territory should include collaboration with the FNFN Lands Department, and involve FNFN environmental technicians. The WSA must provide adequate penalties for non-compliance, including automatic suspensions of licences for breach of monitoring or reporting requirements.

Groundwater levels should be monitored year-round in locations where large volumes of water are used from wells or dugouts. This monitoring is needed to ensure that the water table is not dropping and potentially depriving surface water bodies of groundwater flow. This is especially important in areas where many water sources are located close together, possibly drawing water from the same aquifer, and where water is being taken from locations close to sensitive water bodies such as streams, shallow lakes and wetlands

Large water users must be required to provide public, real-time reporting of water use data. Currently, licensees are required to keep records of actual water withdrawals as part of their conditions for temporary water use, but these data are generally not available to the public. This lack of transparency makes it difficult to examine vulnerabilities of surface and ground water supplies. Licensees in the oil and gas sector must be required to monitor and report on actual water withdrawals from surface and groundwater sources, as well as water levels, wetland health, water quality, and wastewater discharges, in real (or near-real) time.[5]

[5] Current technologies allow for this kind of reporting. Nexen Inc. currently provides water withdrawal information in relation to Conditional Water Licence No. C127986 to the public on a daily basis.

5. Water Governance

a. The Governance Structure

The Proposal contemplates re-evaluating the decision-making structure under the WSA. The Proposal discusses a range of approaches to allow other levels of government, individuals and organizations to participate in watershed governance. The Proposal makes no specific mention of the role of First Nations in this process, though it notes that one of the opportunities presented by the WSA is to facilitate "greater involvement and participation in water management and watershed planning processes".

FNFN is disappointed by the Proposal's failure to articulate an appropriate role for First Nations in water governance in the province. Throughout the history of the province, First Nations have been shut out of water decision-making, with devastating impacts on the waterways and ecosystems on which First Nations depend. First Nations hold constitutional rights that depend on the careful management of freshwater resources, have water stewardship obligations under their own systems of law, and have relied upon healthy waterways and the life that they support for thousands of years. First Nations are critical participants in water management in the province.

As set out above, FNFN has worked extremely hard and dedicated significant resources in order to ensure that FNFN plays a meaningful role in water management in the FNFN territory. The health, well-being and cultural security of our people depend on careful stewardship of the water in our territory. We have seen the results of the province's mismanagement of water in the province, and we are living with the impacts of an immature and rapidly-expanding industry that has enormous impacts on water quantity and quality. In the circumstances, we are not content to sit on the sidelines. We are not merely another interest group or stakeholder. We have water stewardship obligations under our own laws, and constitutionally-protected treaty rights that depend on a sufficient quantity and quality of water. A vague promise of "involvement and participation" is not sufficient. FNFN rights and interests demand that FNFN plays a meaningful role in the management of water in FNFN territory.

FNFN supports the establishment of watershed agencies with appropriate management roles for local First Nations. Watershed agencies must have a clear mandate and financial capacity to engage in water management activities and decision-making, particularly regarding EFNs, water allocation decisions, monitoring, and the relationship between land use and water quantity, quality and health.

b. Water Sustainability Plans and Area-based Regulations

Part 4 of the Water Act currently allows the Minister to designate an area and establish a process for completing a Water Management Plan if the Minister considers that a Plan would help address or prevent conflicts or risks to water quality. Under the Proposal, Water Management Plans would be replaced with Water Sustainability Plans ("WSPs").

WSPs would deal with issues such as water allocation and scarcity, assessment of cumulative effects, and water management strategies. WSPs would generally be developed for all or part of a watershed and could consider activities on both Crown and private land. WSPs would be completed only where use of other area-based tools has not been adequate to prevent or respond to local watershed issues. WSPs might be implemented by policy (leaving compliance voluntary) or by regulation.

Under the Proposal, the WSA would allow for the development of area-based regulations that could remove particular exemptions or reduce thresholds to address ongoing or emerging area-specific issues.

First Nations must play an integral role in the process of developing WSPs and area-based regulations, and First Nations' planning processes must be respected. WSPs must be legally binding, and must include with the power to prevent or restrict development and industrial uses in areas where such activity may compromise water quality or quantity. WSPs must provide for a meaningful, forward looking assessment of cumulative impacts on waterways, wetlands, and the ecosystems they support.

6. The Oil and Gas Commission

The vast majority of the water used by the oil and gas industry in the province is obtained through short-term licences issued pursuant to a streamlined permitting process administered by the OGC. Short term licences are issued under section 8 of the *Water Act*. In March of 2013, the *Water Act* was amended to increase the maximum term of section 8 licences from 12 months to 24 months. FNFN was not consulted regarding this amendment, which has significant effects on water management in FNFN territory. In addition, the OGC has a practice of renewing these licences, which extends section 8 licences beyond their 24-month term. The legality of this practice is unclear.[6]

There are some aspects of the OGC's regulation of water use in FNFN territory that are consistent with good water management. The OGC imposes a 10 cm lake level drawdown limit. Under this policy, where water use causes the water level in a lake to drop by more than 10 cm, licences on that lake system may be suspended.[7] In addition, the OGC does not permit water withdrawals from beaver ponds, in recognition of the sensitivity of beaver populations to fluctuations in the water level. These are policies that FLNRO would benefit from adopting.

In many other respects, however, the OGC's oversight of water use is inadequate. Water licenses issued by the OGC are often issued based on hydrological models that do not incorporate baseline data from the point of diversion, which precludes the adequate assessment of environmental impacts. There is no mechanism in the OGC permitting process to meaningfully assess the cumulative impact of the many hundreds of water licences issued to industry in FNFN territory, or to establish a benchmark for acceptable impacts on the aquatic environment or FNFN treaty rights.

Decision-making by the OGC is not sufficiently transparent. There is little evidence that the OGC scrutinizes applications, including the applicant's need for the volume of water applied for and the location of the proposed intake. The OGC rarely, if ever, refuses applications. In consultation with FNFN, the OGC often fails to identify the information on which key decisions are made, including assessment of cumulative ecological and hydrological impacts. This raises concerns that decisions are made solely based on information provided by the applicant and not confirmed with site visits, by reference to independent data, or pursuant to consultation with FNFN.

[6] This practice is the subject of a petition filed by the Western Canada Wilderness Committee and the Sierra Club of British Columbia Foundation on November 13, 2013.
[7] In practice, it is our experience that, in some instances in which licensees exceed the lake drawdown limit, the OGC simply increases the limit.

Vesting the OGC with oversight of water use for the gas industry also creates structural problems by dividing water use oversight among two government bodies. In our experience, the OGC and FLNRO do not cooperate closely enough to facilitate effective oversight of water. Rather, the bifurcation of authority creates “blind spots” that inevitably impede public oversight of the cumulative impacts of water use. In order for the Crown to fulfill its role in preserving Crown and First Nations interests in water, sole responsibility for water use allocation, enforcement and compliance must be restored to the Ministry of Environment.

7. Groundwater

Under the Proposal, the WSA would establish a regulatory framework for existing and new groundwater extraction and use, which would be generally parallel to the framework for surface water. Large volume groundwater users would be required to obtain a licence and pay application fees and annual water rentals. Groundwater use for domestic purposes would generally be exempt from the requirement to obtain an authorization. Groundwater use would be governed by the FITFIR principle, and licences issued to existing large groundwater users would be back-dated to the date of first use, meaning that existing users would have priority over anyone who starts pumping from the same water source at a later date and would be able to require that more recent users stop taking water in times of scarcity.

While FNFN generally supports the regulation of groundwater use, we have concerns regarding the manner in which the Proposal contemplates the regulation of groundwater.

The Issuance of back-dated licences to existing users would be extremely problematic, particularly in conjunction with the FITFIR principle. Many groundwater aquifers are already over-allocated. Issuing licences to all large users would commit the province to these over-allocations and give priority to the rights of large-scale users, which are the users most likely to compromise aquifer health. This approach would enhance the rights of large-scale groundwater users at the expense of the environment and other users.

Prior to the issuance of any groundwater licence, decision-makers must ensure that large-scale groundwater users will not overtax the aquifer or otherwise adversely impact the environment or domestic users. In addition, as a matter of law, the Crown may not issue a licence in respect of groundwater, whether to an existing or new user, until the Crown has discharged its duty to consult affected First Nations in relation to that conduct.

Finally, industrial users in the oil and gas sector have been known to access groundwater by a number of controversial means, including by digging borrow pits and pumping groundwater that flows in, and by purchasing groundwater from private landowners. These loopholes must be closed.

8. Saline Water

Under the Proposal, saline water, defined as groundwater found at least 600 metres below the surface that contains dissolved solids in certain concentrations, would not be regulated by the WSA.

Saline water, which is not potable, presents a potential source of water for hydraulic fracturing. Provided they can do so safely, industrial users should be required to use non-potable water sources before tapping potable sources. Industrial saline water use should be promoted by

creating appropriate economic incentives through the establishment of water rental rates, and not through the non-regulation of saline water use.

Before saline water use is permitted, the environmental risks must be addressed. Early experiences indicate that the consequences of the use and misuse of saline water may be very serious. On August 19, 2013, Imperial Oil informed FNFN that there had been a blowout at well site b-19-F/94-O-02 involving saline water from the Debolt aquifer. Containment efforts were eventually successful, but not before significant volumes of saline water escaped into the environment, including into Tsimeh Creek, which flows into the Fort Nelson River. In addition to risks associated with blowouts and spills, there is significant uncertainty as to whether and to what extent tapping saline aquifers will lead to contamination of fresh water aquifers.

While industry should be permitted to continue to investigate the use of saline water, this is an area that requires careful oversight by the province. Certainly there is currently no basis on which to justify the exclusion of saline water from the application of the WSA. The ways in which saline aquifers and fresh water aquifers interact are not well understood. The potential for such interaction requires that saline aquifers be subject to the same regulatory scheme as fresh water aquifers. Saline water use should be enabled, but subject to careful oversight and monitoring by regulators.

9. Standing

First Nations must have the express right under the WSA to make a formal objection to an application for a water licence or a section 8 approval, and to appeal decisions granting or amending water licences or section 8 approvals. As noted above, FNFN standing to appeal a water licence was recently recognized by the EAB, but only after FNFN's standing was contested by the province. The standing provisions in the WSA must recognize that First Nations have a legitimate interest in ensuring that the WSA is applied appropriately.

10. Regulatory Thresholds

We anticipate that the WSA and regulations thereunder will establish thresholds in relation to water withdrawals such that withdrawals above a certain threshold will trigger certain obligations or regulatory oversight powers. In our experience, industry often takes advantage of regulatory thresholds by structuring its conduct in a manner that avoids oversight. For example, if reporting requirements apply to withdrawals of 3,000 m^3 per day or greater, an applicant that seeks 5,000 m^3 of water per day might apply for two authorizations in relation to the same water source, each of which is for 2,500 m^3 per day. In order to prevent the circumvention of the purpose of the WSA in this manner, decision-makers must have the discretion to make exceptions to thresholds where appropriate.

11. Water Pricing

Under the current Act, water rental rates are absurdly low. All water users should be charged water rental rates that adequately reflect the cost of the resource. The goal in setting rental rates should be to ensure that water users bear the true environmental cost of their use in order to create appropriate incentives to use water efficiently.

CONCLUSION

Careful water stewardship is essential to the exercise of FNFN treaty rights, and to the cultural integrity of our people. As a result of the rapid expansion of oil and gas activity in FNFN territory, which shows no sign of abating, the stakes for FNFN in effective water management are extremely high. We are very disappointed with the *Water Act* modernization process, and with the manner in which the province has dealt with us on the issue of legislative reform of water management. Our marginalization on an issue so central to our rights and interests is a source of great frustration. Nevertheless, we have made an effort to provide our considered opinion on this Legislative Proposal. We sincerely hope that the province seriously considers this submission and takes this opportunity to enter into a meaningful dialogue with FNFN on water management in our territory. As the people who live and rely on the lands at the centre of some of the most pressing water issues in the province today, we have much to offer.

Mussi Cho!

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