

**PROPOSED BC WATER SUSTAINABILITY ACT (WSA)  
IMPACTS ON FIRST NATIONS**

**Submitted by Kekinusuqs, Judith Sayers  
National Chair of Aboriginal Economic Development  
Assistant Professor of Business and Law  
University of Victoria**

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**General Comments**

With regard to the document “A Water Sustainability Act for BC: Legislative Proposal: I found the document that is for public discussion being lengthy at 127 pages and containing far too much information. The legislative proposal can be found at

[http://engage.gov.bc.ca/watersustainabilityact/files/2013/10/WSA\\_legislative-proposal\\_web-doc.pdf](http://engage.gov.bc.ca/watersustainabilityact/files/2013/10/WSA_legislative-proposal_web-doc.pdf)

There is much information in the proposal that is repetitive of what was done in previous consultations and could have been omitted. In some ways I feel like I am making the same comments I made twice before because they have not been addressed in any way through the process and in the newest proposal.

It would have been good to have a comparison table one column with a brief explanation of what is happening now, and what is proposed. Could have also done a third column with what was said by different interest groups. A more simplified guide to the proposed new law. Also a summary table of what kind of regulations will be put in place in order to give substance and process to the WSA.

Much of the specifics of the act will be done either by regulations which are not drafted yet and which First Nations and the public will not have a say over, or will be at the “discretion” of the decision maker. It leaves me with the distinct feeling that we are only seeing a part of what will be in the WSA. While the document does say that the provincial government will continue to meaningfully engage with First Nations through development and implementation of the proposed WSA-their track record to date does not show this and so does not give much hope there will be more.

Water is an important issue for British Columbia and is becoming more important as climate change and global warming increases issues of drought and water scarcity. Also the demands on our water resource for oil and gas are changing the issues around water.

In order to control the water in the province, it needs to be done through one agency/department. Allowing the Oil and Gas Activities Act and the Forest and Range Practices Act to be providing licenses for large amounts of water does not allow for the coordinated, watershed management approach, nor does it help to control the volumes of water being allocated when it is done by several different entities. It also does not provide the same consistency, fairness, and processes for applying for water licenses.

The earlier proposals for the WSA gave the Act priority over other provincial laws and this continues to be a critical component to the management of water flows. As this was not mentioned it does not seem to be included at this point. In fact, it seems to be just a part of a larger framework where other interests will be taken into account.

Updating the Water Act is important as much has changed in the past one hundred years, but while starting a whole new Act, it needs to be done right and with First Nations free prior and informed consent.

I would like to mention that for several years I sat on a technical advisory group for the WSA. We were never formally disbanded and never told about this legislative proposal or asked for input before it went out to the public. In fact, I didn't find out about the tabling of this

### **First Nations Consultation**

In the previous round of engagement, only 1% of the comments received came from First Nations "organizations" as opposed to First Nations themselves. There was not a concerted effort to meet government to government with First Nations but invited them to 12 general meetings or 3 meetings specifically for First Nations and received 23 written submissions from "bands, associations and other organizations representing First Nations in BC". Clearly with these numbers, it is not a good representation from the 203 First Nations in BC.

It is not clear from the website <http://engage.gov.bc.ca/watersustainabilityact/> if there was going to be any specific consultations with First Nations or just the general call out for comments.

On page 94 the Government laid out comments from First Nations during the previous round of discussions. I am going to enumerate those points and then I will proceed to determine whether those comments, or interests of First Nation have been addressed in any form in the proposed WSA. Consultation means that any concerns raised by First Nations regarding their interests must be addressed in some way. The points from this proposal are listed below along with whether those interests have been addressed:

1. ***“First Nations have concerns around constitutionally protected rights and title and question provincial ownership of water.”***
  - Rights and title to water are not addressed in any way in the proposed WSA. Provincial ownership of water is assumed but First Nations know it is subject to aboriginal rights and title to water. There is no recognition of First Nations rights and title to water, not even a water objective. P. 6, 1.4 First Nations and Water state that the WSA will not address aboriginal rights and title to water or infringe on existing rights. So this interest is not addressed.
  - FITFIR is still the preferred method of assigning licenses. Even though First Nations have an aboriginal right/title to water, there is no priority or recognition of First Nations right to use water within their territories. Applications must be made for water use and priority is the date the license is granted. Concerns have been made by First Nations regarding FITFIR but remains unaddressed by the Province-which is not proper consultation.

2. ***“Water has the utmost importance and is of high spiritual and economic value to First Nations. As Indigenous Peoples, First Nations are intimately connected to their waters and water resources and believe they have an inherent and sacred stewardship obligation to responsibly manage and protect this resource. First Nations values must be reflected in the legislation.”***

***“All existing licenses should be subject to meeting environmental flow needs.”***

- First Nations have been asking that Environment Flows include water flows that allow for spiritual/cultural use and this has not taken into account in the definition-ensuring water flows and quality of water is integral to continue practicing aboriginal ways of life-rights. Again, another interest not addressed through this process.
3. ***“First Nations maintain that the Water Act Modernization engagement process is not consultation and state a risk of legal action if the province does not fulfill its legal obligations. They consider the Water Act modernizations process to be far too compressed, not allow enough time to understand the proposal and participate.***

***“First Nations assert that the province has a duty to consult directly with the Nations on proposed decisions including strategic level decisions.”***

- The courts have clearly said that consultation must be separate and distinct from a public process –Mikisew case. This has not happened.

- Recognize that this last paper was released very quietly on Friday, October 18<sup>th</sup> and people were given 1 month to respond. There has not been much hype about this proposed legislation trying to get First Nations and the general public involved in responding to this document. It would be my guess that less than 1% of comments received by the province on this recent legislative proposal will be from First Nations.

**4. *“ Use of Traditional Ecological Knowledge should be put into legislation”***

- Traditional Ecological knowledge (TEK)/indigenous wisdom, are two terms to describe First Nations knowledge about land and water. Using TEK is not proposed to be within the legislation. The Canadian Environmental Assessment Act does include TEK as a source to use in assessing environmental impacts and could be done in the WSA. Again, this concept is another interest expressed by First Nations that has not been addressed in the current proposed legislation.

**5. *“ Some First Nations have expressed a desire to co-manage water resources including strategic engagement in planning and decision-making in the context of the New Relationship***

*“First Nation continue to seek a more inclusive government to government process”*

*“The general intent of updating water governance is a necessary step-it provides an opportunity to ensure water governance is more appropriately contextualized and reflective of the changing legal and political landscape”.*

- When introduction of debris into stream occurs, the decision maker orders remediation or mitigation. There should be consultations with First Nations on this remediation, using TEK/indigenous knowledge as it is their fishing rights, spiritual areas, and other interests being affected. There is no mention of involved First Nations in anyway.
- Governance arrangements do not provide for Shared Decision Making as set out in the New Relationship

**Other Areas of Concern:**

**A. Water Use purpose:**

- Water Use purposes are not to change from Water Act-which is a little surprising considering we are updating a very old statute.
- The WSA will not limit the amount of uses within the water license. Currently it is limited to 3 uses. Will there be more demand on water with this increase in the purposes for which water can be used with one license? Seems a logical conclusion. Does not explain the rationale for that.
- The only addition to the WSA water objective is to include an oil and gas purpose: This is very vague in the proposal set out in s. 2.3. Just says it will be a water use purpose and will be defined specifically in relation to activities carried out for the development and production of oil and gas wells. It only says oil and gas is being taken out of industrial activities but doesn't say why.
- It is not clear if this is a new purpose, or is it a purpose being taken away from the oil and gas commission. It is all very vague and does not tell you what the proposal would mean. Is this just to pave the way for fracking in the province? First Nations are very concerned with the volumes of water required for fracking and for the tainting of water that occurs with that process.
- Ensuring that the volume of water is sustainable or within EFN that is established with the First Nations would be important. As well as dealing with one department/agency as the Oil and Gas Commission has a very condensed process and differs from Water Act. There should be one process that is fair and equitable.

## **B. Environmental Flow Needs:**

- The proposal indicates that "most" new licenses would require an EFN. A lot of discretion is being given to decision makers to determine low impact/risk situations. While there will be regulations stating which situations EFNs do not have to be considered, the discretionary part is not consistent with what the regulation is trying to achieve. As well, the proposal on page 19 states that it is difficult to determine EFN's the same way due to hydrology issues but then it states regulations would be put in place to determine those appropriate methods for determining EFN's depending on type of use. Inconsistencies that will need to be cleared up in legislation.
- It is good to see that EFN's apply to Oil and Gas Commission

- I express the concern that EFN's only apply to new licenses so if there is already an over allocation on a stream there is no powers to decision makers to revoke a license or amend licenses to a smaller amount. Only if a stream reaches CFN will a decision maker be able to intervene which could have been prevented if powers existed to deal with over allocations.

### **C. Water Scarcity and FITFIR:**

- Decision Makers will have the ability to make allowances for essential household use and deviate from FITFIR. This approach has merit but what happens if there isn't enough water to go around for all household use for all license holders? When does the discretion arise to the decision maker? There are many details missing on how this would operate to give comfort that this could work in a fair manner.
- The Fish Protection Act to use a temporary reduction of water use from a stream would be brought into effect. The question is where does domestic use fit in and agricultural use. Does fish flows become more critical than human needs? Would it be dependent on availability of other drinking water from other streams? How do all these pieces fit in with each other. It is not clear within this proposal.
- Will First Nations be consulted on critical environmental flows and order to curtail use of water for fish use? This would be important to First Nations.

### **D. Water Sustainability Plans: dependent on financing as is Water Governance**

- Water Sustainability Plans can be quite comprehensive. The proposal states that it is to be collaborative, engaging the public, stakeholders and other levels of government including First Nations: Collaboration with First Nations is a pretty weak proposition. Being thrown in a melting pot of everybody is also not respecting First Nations Governments and rights.
- First Nations as rights holders should be able to negotiate Shared Decision making models so that their rights are not competing with all users in a Watershed or be just one of a committee. Working collectively together is important to bring everyone's interest to the table, but in the end, it should be First Nations interests as priority in order to protect their rights enshrined in s. 35 of the Constitution Act. Shared decision making should be

part of the legislation so that First Nations have an assured role in the process around water management and water Sustainability Plans.

- The process for WSPs is to use advisory committees when appropriate, include public review and comment for draft and final plans. There is no specific inclusion of the role of First Nations and so First Nations are just part of the “public” which is not acceptable.
- The proposal says on p. 64 that the provincial government will have the ultimate accountability for environmental protection and will continue to establish and coordinate laws, rules, agreement and financial arrangements including setting provincial objectives and outcomes. Therefore, First Nations would not have the ability for Shared decision making within that framework
- Use of TEK/Indigenous wisdom would be important in these plans and should be included in the list of plan development.

#### **E. Water and Water Governance: p. 65**

- The diagram on p 65 provides an overview of Governance Framework. What is confusing is the mention of Provincial Plans namely, Canada starts here: The BC Jobs Plan, BC Agrifoods: A strategy for growth. Water, water management and Water Governance should not be dependent on the BC Jobs Plans or a growth strategy for Agrifoods. Bringing in goals for jobs and economics changes the whole concept of Sustainability for Water. Water has to be managed and modernized, but when you start including economic growth through water, you change the whole discussion and framework.
- Of course there is economics in hydro development, as a non-consumptive use, which is different than use of water for oil and gas activities. When scarcity or drought is an issue, any economic development projects needs to be put on whole. Use of water for the future has to include wise use of water. Priority of water uses was supposed to be clear in the legislative proposal but clearly such priority has not been developed.

#### **F. Watershed planning as opposed to area planning:**

- The proposal envisions area-based management where a small area may need specific regulations. How is the area based plan taken out of the watershed planning, or how are the objectives of the watershed plan incorporated into the area-based plan? Area based management should be done in context with the entire watershed to ensure all the water objectives are being met and coordinated.

#### **G. Ground Water:**

- Ground water is an important source for First Nations. More research needs to be done around the connection of surface water and ground water and how EFN's can take that into account. Special arrangements/governance structures must be put in place where the First Nation obtains water from ground water or is located on reserve or connected to reserve.

#### **H. Agricultural waters Reserves: How are we defining Agriculture?**

- The proposal now is talking about food security that has not been mentioned before so this is progress. There is a real need to define what agriculture means. Is it inclusive of any food growing, herbs, - does it include growing feed for livestock? Grapes for wine? Does it include food for export or only domestic use?
- There is a proposal for a water reservation for ALR lands, how is this measured? How can it be changed? There is a real lack of detail in this proposed legislation. What is farming lands are not on ALR-for example on reserve-is this reservation too narrowly defined?
- How does this fit into beneficial use? Does Domestic use have priority over agricultural use? Food is necessary for life. With FITFIR, everyone is assured domestic use, but then the use of water goes to the first in line for whatever their purpose there is. This purpose may not be agricultural, so agricultural use-food security is not part of the priorities? This really does need to be fleshed out more.

- I. Review of Licence terms and conditions:** 30 years is a Long time, should be smaller reviews periodically to see if licensee is using the volumes allocated, and are using it for purposes set out.