

**From:** Thistle [mailto:Thistle@shaw.ca]  
**Sent:** Thursday, November 14, 2013 7:29 PM  
**To:** Living Water Smart ENV:EX; Polak.MLA, Mary LASS:EX  
**Subject:** Submissions to proposed Water Sustainability Act

Re: Water Sustainability Act for B.C. Legislative Proposal  
- Public Comment

Dear Ms Polak,

Please find attached our submissions, both our legal review and overview, with respect to the proposed Water Sustainability Act.

If you require clarification or further information please feel free to contact us.

Sincerely,

Laurie Gourlay, Acting President  
Mid Island Sustainability & Stewardship Initiative

P.O. Box 333, Cedar, B.C., V9X 1W1  
(250 722-3444) [www.missimidisland.com](http://www.missimidisland.com)

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"All would be better off if each person took into  
account the effect of his or her acts upon others."  
World Commission on Environment & Development  
~~~~ Our Common Future, 1987 ~~~  
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Att'n: Honourable Mary Polak  
Minister of Environment

cc. - Living Water Smart  
<LivingWaterSmart@gov.bc.ca>

Re: Water Sustainability Act for B.C. Legislative Proposal  
- Public Comment

November 14, 2013

Dear Ms Polak,

MISSI received your invitation to review the Legislative Proposal, the Overview and other background materials on the new Water Sustainability Act, on October 23<sup>rd</sup>.

Although we do not believe this is an adequate amount of time for the public to provide input we have, as a non-profit society with a mandate to address matters pertinent to sustainability and stewardship – with particular interest in the region between Ladysmith and Nanaimo, made a special effort to review the WSA as it pertains to local considerations and circumstance.

First though MISSI would like to commend the government for attending to water considerations which have for so long relegated British Columbia to the last province to have regulations pertinent to this most important and essential element in our health and wellbeing.

That said we are compelled to express concern about potentially serious consequences that may follow if the proposals in the new Water Sustainability Act are not modified so that the public interest, and that of maintaining healthy ecosystems, are not put first and foremost above all other interests.

These matters are so important that MISSI, a local non-profit society with little funding and few resources, decided that it was necessary to engage the services of a lawyer in order to responsibly address important water issues that are not being considered in the proposed WSA.

The attached submission has therefore been prepared on MISSI's behalf, by Ms Denelle Lambert, a local Nanaimo Barrister and Solicitor, in order to clearly address these inadequacies, with the expectation that we will assist the government in refining the legislative proposals.

Before you refer to the accompanying legal review prepared by Ms Lambert however we would add that MISSI has a number of additional recommendations, gained through many meetings and consultations with local residents and authorities, and that we are prepared to go over any of the concerns that we see in the proposed WSA. We very much wish to assist the government in putting forward legislation that meets the public interest and long-term requirements for sustainability and stewardship.

First though we must emphasize that the current state of our local aquifers, and possible threats to drinking water quality and supply, suggest that the health and rural livelihood of residents may be at risk if the WSA is approved in its present form. The interest of southern Nanaimo communities, extending through to Ladysmith, are not adequately addressed nor fully considered in the Water Sustainability Act Legislative Proposal as it now stands.

In this respect, we make this assertion having hosted many public meetings over the past five years, all well-attended by local and rural residents – all raising concerns about local development plans which have the potential to adversely impact the quality and quantity of drinking water in the immediate area.

Residents of the areas comprising south Nanaimo and the communities of Cedar and Yellowpoint, live over the second most vulnerable aquifer on Vancouver Island. Despite this some 10,000 building permits were fast-tracked here over the past few years. Similarly, new developments have been quickly approved and advanced in the adjoining regional district, particular to north Cowichan and Ladysmith aspirations.

Without undertaking the studies and assessments that would determine re-charge capacities and the rate of drawdown underway that is adversely affecting local aquifers and groundwater supplies, these developments see the Cassidy aquifer, a vulnerable and threatened aquifer according to BC government documents, as providing them with the water they'll need.

This is neither responsible, fair nor just in terms of consideration for the needs of local rural residents and the ecosystems upon which they depend. The long-term health and well-being of those who live here, of the farms and small business in these areas, is being put at risk – and there are few requirements for due process or participation in decision-making that will honestly require their concerns to be addressed.

MISSI would then bring some of those concerns to your attention.

- 1) We have already noted the short timeframe as a major obstacle that will by its nature undermine policy and planning changes necessary to achieve best practices. A November 16<sup>th</sup> deadline is a date that serves the government's agenda, not that of rural and local residents who will be affected by the regulatory changes proposed in the WSA.

- 2) Groundwater, aquifer and watershed protection measures need to be fully integrated within planning for the region, Vancouver Island and the province, if growth projections and quality of life are to be assured.

The surprising revelation in the last two years, that the Yellowpoint aquifer is both little understood, and being rapidly depleted, has raised many concerns for local residents. And the vulnerability and potential for contamination of the Cassidy aquifers, beneath the airport and Island Highway, will require serious study before development decisions should be approved.

- 3) In order to meet the goals of sustainability and stewardship MISSI believes additional research is needed to identify potential threats to the groundwater and vulnerable aquifers of the local area between south Nanaimo and Ladysmith. The Nanaimo River and watershed, Cassidy and Yellowpoint Aquifers, should be now identified as requiring substantive early action and priority attention.

- 4) As this is not clear, and may in fact not be possible given the wording of the present WSA, MISSI would maintain that the proposed Water Sustainability Act be realigned to reflect similar

local goals and objectives as are expressed by the very successful local food and food security campaigns.

In this regard priorities of the government should be re-directed to ensure that protection and sustainability of local ground and surface water be the highest order of business addressed in the WSA.

5) We would finally like to suggest that MISSI believes there is a need to engage residents, business and communities in water issues and solutions – ones that implement sustainable development within economic, social and environmental goals.

Research on the availability, quality and quantity of local water supplies, combined with an education and outreach program that looks at water conservation and protection measures, offer a means to engage the public so that serious problems and pending water shortages might be addressed for sustainability and long-term benefits.

In this respect an emphasis on stewardship opens the door to immediate, proactive and personal actions that can be taken to offset further damage and demands on surface and groundwater.

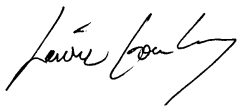
In summary then, MISSI is requesting that the government delay introduction, 1st and 2nd Reading of the Water Sustainability Act, undertake further studies to assess choices and ensure water security, and consider means to involve all residents in the hard decisions that must be made in the near future.

We believe these recommendations along with those noted in the accompanying document, which together comprise MISSI's submission to the proposed Water Sustainability Act, offer a practical, reasonable and responsible approach to water and the regulatory regime in the Province of British Columbia.

With this in mind MISSI would note that we would be pleased to be a partner in these important initiatives, especially as they accommodate the considerations of local rural residents of southern Nanaimo and the region's southern communities extending through to Ladysmith.

Should you or representatives of the Ministry require further information, or if MISSI can assist in other such efforts, please do not hesitate to contact us.

Sincerely,



Laurie Gourlay, Acting President  
Mid Island Sustainability & Stewardship Initiative

P.O. Box 333, Cedar, B.C., V9X 1W1  
(250 722-3444) [www.missimidisland.com](http://www.missimidisland.com) <[info@missimidisland.com](mailto:info@missimidisland.com)>

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November 14, 2013

ATTN: Laurie Gourlay  
Mid Island Sustainability & Stewardship Initiative  
P.O. Box 333, Cedar, BC., V9X 1W1

Dear Mr. Gourlay:

**Re: Water Sustainability Act Proposal**

You asked me to prepare submissions concerning the impact of groundwater protection provisions under the proposed *Water Sustainability Act* (the "WSA") on local water resources. You specifically asked that I focus on the Cassidy Aquifer and the Nanaimo Airport in doing this analysis.

**The Cassidy Aquifer and local business**

The Cassidy Aquifer supplies drinking water to the residents of several smaller local communities and interchanges with the Nanaimo River, which is a drinking water source for Nanaimo residents.

The Nanaimo Airport Commission has operated the Nanaimo Airport since 1992. The Nanaimo Airport is located on top of the Cassidy Aquifer, a high producing aquifer that is sensitive to surface contamination due to its porous nature.

The Harmac Mill is a pulp mill located outside Nanaimo that has been relying on water from the Nanaimo River and on groundwater from the Cassidy Aquifer since the 1950's or earlier. According to the Water Query Licence Report on a provincial government website, the Harmac Mill currently holds 20 water licences for pulpmill purposes on the Nanaimo River, and also holds water licences for pulpmill purposes on two smaller tributaries, Sadie Creek and Halsam Creek, as well as a water storage licence for Foruth Lake. As groundwater is currently unregulated in the province, Harmac Mill's use of groundwater is not licenced.

These submissions will focus on the impact of the proposed WSA on the Cassidy Aquifer using the Harmac Mill and the Nanaimo Airport as case studies.

**Only large-scale users can acquire licence**



The provisions relating to the regulation of groundwater under the proposed WSA stipulate that domestic users are not able to acquire a licence while large-scale users are required to obtain licence. Given that Harmac might apply for a license to use groundwater under the proposed WSA, the question remains of what, if any, recourse of appeal domestic users would have if they disagreed with the government's licensing decision.

Section 92(1) of the current *Water Act* sets out who can appeal licensing decisions, and states:

**92(1)** Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by

- (a) the person who is subject to the order,
- (b) an owner whose land is or is likely to be physically affected by the order, or
- (c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

Assuming that the provisions setting out who has the right of appeal under the *Water Act* are incorporated into the proposed WSA, there appears to be a possibility that the government could issue a license to a large-scale user, such as Harmac, that could have negative impacts on domestic users' water and that such domestic users might not have any right of appeal.

Although a landowner could rely on section 92(1)(b) and attempt to appeal a licensing decision on the basis that the landowner believed that the decision would "physically affect" their land, it is not clear what the limits of this section might be. It is likely that considerable resources would be expended trying to clarify these legal issues and that years would pass before an answer would be given from the courts.

Moreover, if it was found that section 92(1)(b) did not apply to landowners who are domestic users, conflict would likely ensue as it is unlikely that domestic users would tolerate not having any say in what happens to the water that they rely on for drinking or other purposes, such as small-scale farming.

While riparian owners have historically enjoyed the right to appeal government decisions concerning water *abutting* their property, the failure to afford domestic

users with any right of appeal for decisions affecting water *under* their property would be unusual. A failure to afford a right of appeal to domestic users, while forbidding them from acquiring license, appears unprecedented.

### **Obligation to consider water in land-use decisions**

Because the Nanaimo Airport sits on top of the Cassidy Aquifer, which is a shallow porous aquifer, there is concern that as development at the Airport increases the quality of water in the aquifer below will decrease. As more jets are added, for example, the aquifer may be exposed to more jet fuel or to contamination from other toxins, such as toxins used in fire-fighting foams.

To compare with another case, the Hamilton Airport in Ontario used fire-fighting foam that contained Perfluorooctane Sulfonate (PFOS), which was later found to have seeped into the groundwater below. PFOS is listed as a Persistent Organic Pollutant in Annex B of the Stockholm Convention on Persistent Organic Pollutants. Tests at several wells around the Hamilton Airport determined that the level of PFOS in the groundwater, where present, met Health Canada guidelines. However, some well users became uncomfortable relying on the water for drinking purposes and elected instead to purchase drinking water.

In another airport pollution case in Williams Lake, British Columbia, Transport Canada reportedly spent 2.4 million dollars remediating the airport site after pollutants were found in the soil below.

It is unclear how the proposed WSA would prevent similar situations from occurring in the future.

### **Groundwater quantity**

According to page 27 of the of the legislative proposal *A Water Sustainability Act for B.C.* (the "Proposal"), the provincial standard for water quantity would be that water quantity is sustainable, and the indicators of sustainability would include "groundwater levels", "licensed volume (percent of total natural supply)", and "frequency of water shortage".

It is not clear from the proposed WSA provisions whether any licensing decisions concerning groundwater would have to be made so as to ensure that the replacement rate of any water is at least equivalent to the extraction rate, which would ensure a continued minimum quantity of water.



If the standards in the proposed WSA were applied to a license to extract water from the Cassidy Aquifer it appears that a potential licensee would still be permitted to extract quantities of water that exceeded the aquifer's replacement capabilities, while still being labeled "sustainable".

### **Groundwater quality**

According to page 27 of the Proposal, the provincial standard for water quality would be that "water is suitable for its designated use", and the regional indicators would include the aquifer intrusion rate and any applicable drinking water quality guidelines.

To put the implications into context using the Harmac Mill and Nanaimo Airport Development examples, it appears that under the proposed WSA development at the Nanaimo Airport could be permitted with reductions in the quality of the groundwater in the Cassidy Aquifer so long as the quality of water was high enough to meet whatever industrial standards would be required of the Harmac Mill per their designated purpose and that the quality of water met the minimum standards for drinking water and no aquifer intrusion would occur.

Outside of the context of the Cassidy Aquifer, it would appear that the minimum requirements for decision makers to consider in making licensing decisions could also result in the loss of *future* drinking water. To illustrate, in the case that an application was made for a licence from a groundwater source that did not presently provide drinking water and did not have any licences currently attached to it, it would appear that the only external standard for measuring the impact of extraction on water quality would be the aquifer intrusion rate. It therefore appears possible that under the proposed WSA the government could issue decisions that would diminish the quality of groundwater to the extent that such water could not be used for drinking in the future.

### **Public trust**

The greater question that remains is whether the proposed WSA should include a clear statement limiting government discretion so that no decisions could be made that would have the impact of jeopardizing groundwater by drawing down water to unsustainable levels or jeopardizing potential potable water sources.

It isn't clear from the Proposal whether the goal with respect to groundwater management will be to ensure the health of groundwater above other considerations, such as commercial or economic ones. Such a lack of clarity, and a lack of commitment to the public trust doctrine, may have negative consequences.



## Recommendations

Given the above, I might suggest the following:

1. A clear right of appeal for domestic users;
2. A provision indicating that the water quality could not be diminished to any significant extent, especially where the water is relied upon, or may in the be relied upon in the future, for drinking purposes;
3. A provision that would prohibit a decision maker from issuing a licence where the extraction rate is higher than the replacement rate;
4. Stronger water objectives that would be binding upon local governments or developments that ensure the protection of land in or around aquifers;
5. A provision that clarifies that no decision could be made under the WSA that would have the effect of decreasing the quality or quantity of water such that it might not be usable for drinking water or other purposes by future generations.

## Conclusion

It would appear that under the WSA there would be some form of oversight for groundwater management that would implicate the Cassidy Aquifer. Unfortunately it is not clear from the Proposal whether the provisions would be adequate to protect the Cassidy Aquifer from potential negative impacts. It is possible that stronger water objectives would be needed in order ensure the ongoing health of the Cassidy Aquifer.

Sincerely,



Denelle Lambert  
Barrister & Solicitor