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November 15, 2013

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Water Sustainability Act
Ministry of Environment
Water Protection and Sustainability Branch
PO Box 9362 Stn Prov Gov
Victoria BC, V8W 9M2

Attention: Hon. Minister Mary Polak

Dear Minister Polak:

Re: Concerns Respecting the Water Sustainability Act Legislative Proposal

We write to comment on the *Water Sustainability Act* ("WSA") Legislative Proposal (the "Proposal"). While "modernization" of B.C.'s 104 year old *Water Act* is important, we are concerned that the Proposal fails to address 'Namgis First Nation's constitutionally-protected rights to sufficient quality and quantity of water. We have many concerns about the Proposal. However, due to the extremely short comment period provided, this comment will address general high level concerns, providing some detail where possible. There is a need for a consultation process to be developed with our First Nation which provides a meaningful opportunity to engage directly with the Province on the Proposal, and which will provide a forum to address the concerns outlined herein with respect to potential adverse effects of the proposed regime on our constitutionally-protected Aboriginal and Treaty rights and title.

First Nations' unextinguished and constitutionally protected rights and title to water must be explicitly addressed in the proposed legislative reforms. Specifically, the reforms to the *Water Act* should codify an allocation principle that prioritizes First Nations' water rights and flow requirements. This priority should be extended to all decision-making respecting water allocation in the Province, amending other related legislation where required, so that there is one priority allocation system guiding water use decision-making in the Province. Sustainable water management and protection of First Nations' water rights, source water, and watershed functions are required to prevent conflict with other activities and developments. We are disappointed that this does not appear to be the direction taken in the Proposal to date.

The lack of explicit reference to the importance and priority of Aboriginal and Treaty rights and title to water in the Proposal is particularly concerning, considering that a new "oil and gas purpose" is proposed to be added to the water use purposes under the Act. As stated in the UBCIC Resolution 2009-30, *Support for Work Regarding the Recognition of First Nations Water Rights*:

> Water rights are essential to support hunting, trapping, fishing, the production of food, the economic development of the land, and as part of the spiritual and cultural existence of First Nations peoples.

We are concerned about the priority being given to oil and gas development in the Proposal. This approach suggests that the provincial Crown's intention is to prioritize development over meaningfully engaging with and accommodating the water rights of First Nations. There is presently immense pressure on our water sources from existing water uses, along with the projected developments (including the liquefied natural gas boom, which relies on hydraulic fracking processes that intensively uses water). Given the current pressure on our water resources, which support the exercise of our constitutionally-protected rights, it will be important to ensure that the legislative reforms afford priority to First Nations' water rights and title, include traditional knowledge decision-making respecting water resources, and respect our jurisdiction and role as traditional stewards in water governance.

Lack of Consultation

We are concerned with the lack of direct and meaningful consultation with 'Namgis First Nation respecting the modernization of the *Water Act*. The Proposal, as it stands, has the potential to adversely impact our Aboriginal and Treaty rights and title to water. Aboriginal title is an inherent right grounded in prior occupation and use of, and/or some control or governance over, the lands or water in question. Our First Nation continues to assert Aboriginal title to both water and land, engaging the honour of the Crown and the resulting duty to meaningfully consult and accommodate our Nation on this matter. Our Aboriginal rights and title over water are held at a Nation level, and each First Nation has authority to make decisions about its lands and resources to address the unique circumstances of the particular Nation. Given that, to date, the public consultation process on the proposed legislative reforms does not meet the level of consultation required by the honour of the Crown in fulfilling the duty to consult.

While the Proposal states that "It would not address Aboriginal rights and title to water or infringe on existing rights"[1] it is not clear how that is possible, given that the issue of Aboriginal title is largely unresolved in BC. The Crown's unilateral assumption of jurisdiction over water, including groundwater is problematic given First Nations' claims to title, including over water. We hereby reiterate the requests of other First Nations in the Province, by calling for direct Nation to Nation engagement in this process and in relation to water governance in BC generally.

Priority

The Proposal recognizes that there will be times when water supply is insufficient to meet demand. However, rather than prioritizing water allocations on a principled basis and affording priority to First

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[1] Section 1.4 of the Proposal

Nations' water rights, the Proposal relies by in large on the arbitrary and outdated allocation system of *"First in time first in right"* principle ("FITFIR"), subject to affording priority to essential domestic uses in times of scarcity. The application of the FITFIR principle to both surface water and ground water allocations will allocate priority over water to those who first obtained licences, without recognizing the priority in time and right of First Nations who have been using water since time immemorial for the exercise of their constitutionally protected rights. The introduction of the water licensing system by the Province does not change the fact that Aboriginal peoples of BC, and indeed across Canada, were the first users of the water, and continue to use water for the exercise of their constitutionally protected Aboriginal and Treaty rights.

'Namgis First Nation has the right to a sufficient quality and quantity of water to exercise its constitutionally protected Aboriginal and Treaty rights and to govern, conserve and use water for social, cultural, ceremonial, domestic and/or livelihood purposes (the "First Nations' water rights"). Notably missing from the Proposal is priority for First Nations' water rights, and protection of the water quality and quantity needed by current and future generations to exercise their constitutionally protected Aboriginal and Treaty rights.

Priority for First Nations' water rights should be explicitly codified in the proposed water legislation. In addition, the water allocation system should move away from prioritizing water use based on prior appropriation, and move toward prioritizing water use based on rights and needs – with first priority being afforded to constitutionally protected First Nations' water rights.

In addition to providing decision-makers with the discretion to give priority to "essential domestic" uses, in times of scarcity, the Proposal also allows for the creation of Agricultural Land Reserves ("ALRs") which can take priority over all other land and water uses. Priority afforded to other water uses, whether domestic, agricultural or industrial, should be subject to the availability of water after ensuring there is sufficient water quality and quantity available for First Nations' water rights.

Simply put, we cannot support the application of the FITFIR principle, and/or the prioritization of other water uses (such as "essential domestic uses", ALRs, etc.) without first ensuring that the Act will recognize the priority of First Nations' water rights. In addition, any water allocation decisions, or uses which may be afforded priority over First Nations' water rights must be the subject of consultation with our First Nation to ensure that those water uses will not adversely affect the quality and/or quantity of water required for the exercise of our constitutionally-protected rights. There will also need to be consultation on what domestic uses are considered to be "essential", in the event that any domestic uses will be afforded priority over First Nations' water rights.

If First Nations' water rights are not afforded priority under the proposed Act, and First Nations' Flow Needs[2] are not taken into consideration in decision-making, First Nations may find that the availability of water for the exercise of their Aboriginal and Treaty rights may become subject to the needs of others – whether for domestic uses in the event that water scarcity becomes an issue, or for a range of other uses afforded priority rights in time based on the application of the FITFIR principle. To the extent that

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[2] For the purposes of this review, protecting First Nations' Flow Needs means maintaining the water – volume/quantity, quality, access timing, and ecosystem health levels – needed to support the exercise of First Nations' Aboriginal and Treaty rights, now and into the future.

the FITFIR principle is proposed in the legislative reforms, it will be necessary to ensure that it can be suspended for new and existing licences if and/when First Nations' water rights and First Nations' Flow Needs may be adversely affected, in addition to ensuring priority to our constitutionally-protected rights in initial allocation decisions, to avoid infringements to our rights and title.

In addition to our concern with the application of the FITFIR system, we are concerned about the need to ensure priority to First Nations' water rights in any alternate allocation system of Water Objectives and priorities. First Nations' water rights must be protected and afforded constitutional priority in decision-making, and be explicitly set out in the legislation, and all decisions made in accordance with this priority should not be appealable on this basis under the WSA. Furthermore, the integration of groundwater licence priority with existing surface water licences under the FITFIR system must be explicitly subject to the priority of First Nations' water rights. We are concerned that the present Proposal for integration could operate to the detriment of First Nations' water rights, which are not presently protected under the FITFIR licensing system for surface water.

Finally, we are not confident that the proposed FITFIR system of priority will "protect critical environmental flows", even with modifications. Rather, a principled approach to water allocation decisions, which explicitly recognizes the priority of First Nations' water rights and First Nations' Flow Needs, and includes consideration of Traditional Ecological Knowledge in establishing thresholds and standards for Environmental Flow Needs and Critical Environmental Flow's will be required in order to protect flow levels, ecosystem health, and to ensure the sustainability of First Nations constitutionally protected rights. We also note that the Proposal outlines the mixed support for maintaining the FITFIR principle, and includes a proposal for decision-makers to consider Water Objectives, and Environmental Flow Needs when making water allocation decisions. We support the move to principled water governance, which prioritizes and codifies the historical and constitutionally protected rights of First Nations to water in the legislative reforms.

Governance

First and foremost, 'Namgis First Nation has constitutionally protected Aboriginal rights and title to water, and objects to the assertion of Provincial jurisdiction over water, including the proposal to retain the vesting of property to water in the Province set out in section 2 of the *Water Act*. The modernization of water legislation in the Province has not yet recognized or acknowledged Aboriginal rights and title to water, but is rather based on the assumption that the Province owns all the water in BC, without first reconciling the prior rights and title to water held by First Nations. Provincial legislation cannot create provincial ownership of water on or under our reserves and treaty settlement land, and throughout our territory without addressing our prior existing water rights and title, which are integral to both our culture and identity. These critical deficiencies must be addressed in any legislative reforms regarding water law in BC.

Indeed, decisions on water governance in the province need to be discussed at a government-to-government level with First Nations, and any legislative reforms must ensure that first priority is afforded to First Nations' water rights. The Proposal to centralize water governance within the Provincial government, does not recognize or address First Nations' rights to make decisions respecting water use, conservation and decision-making pursuant to Aboriginal rights and title to water. This will need to be addressed. It is critical that 'Namgis First Nation be involved in the decision-making

processes over water allocation, given our rights and responsibility to manage and protect our waters for present and future generations.

There are a number of governance tools set out in the Proposal, which are intended to structure and inform decision-making respecting water allocation, including:

- Environmental Flow Needs and Critical Environmental Flows
- Water Objectives
- Water Sustainability Plans
- Area Based Regulations
- Agricultural Land Reserves
- Beneficial Use Requirement
- Duration of Licences and Reviews
- Temporary Water Reduction Orders
- Delegated Decision-Making
- Proposals regarding Groundwater

We will outline some of our views on the proposed governance tools below. However, please note that these governance tools – whether old or "new" – must only be considered after affording priority to First Nations' water rights, and ensuring that a sufficient water quality and quantity is available for the exercise of Aboriginal and Treaty rights. In addition, any planning and advisory functions, whether in the form of Water Sustainability Plans, Area-Based Regulations, advisory groups, or delegated decision-making must explicitly afford priority to First Nations' water rights, and protect thresholds required to maintain the sustainability of Aboriginal and Treaty rights now and into the future.

Environmental Flow Needs

'Namgis First Nation is generally supportive of the requirement to take into consideration Environmental Flow Needs when making water allocation decisions, subject to the following comments. We are concerned with the Proposal for Environmental Flow Needs to only apply to new licences, or amendments to licences, and with the vagueness of the Proposal in terms of the application of Environmental Flow Needs to existing licences at the time of licensing reviews. To be effective, Environmental Flow Needs and First Nations' Flow Needs, (which will be discussed below) will need to apply to both existing and future licences, and periodic reviews will be required to ensure water quality and quantity are protected for present and future generations.

With respect to whether sufficient water is available to warrant the granting of new licences, the Proposal provides that Environmental Flow Needs will be considered which account for the sustainability of long-term flows, as well as Critical Environmental Flows. It will be important to consult with First Nations on the definition of Environmental Flow Needs, and Critical Environmental Flows, to ensure that Traditional Ecological Knowledge is considered when looking at the water levels and thresholds required for aquatic ecosystem health.

To expand, at present, the Legislative Proposal appears to set the Critical Environmental Flow level at a low threshold based on a "threshold, below which significant or irreversible harm to aquatic ecosystems may occur". There will be a need to consider Traditional Ecological Knowledge when determining the significance and/or irreversibility of harm. In addition, the threshold will need to consider traditional knowledge, and the need for a buffer level of protection which takes into account the precautionary principle, rather than requiring scientific precision to establish the threshold and the baseline levels. The Critical Environmental Flow threshold and Environmental Flow Needs should be based on the precautionary principle, so that the threshold is not set at an arbitrarily low level based on scientific uncertainty, particularly where Traditional Ecological Knowledge establishes the need for a more robust flow threshold for aquatic ecosystem health.

There will also be a need to ensure that the appropriate standards, thresholds and criteria exist in order to ensure the sustainability of First Nations' water rights. To this end, First Nations' Flow Needs will need to be established in accordance with traditional knowledge and taken into account in water planning and allocation decisions, in addition to Environmental Flow Needs, in order to ensure there is a sufficient quality and quantity of water available to support the exercise of Aboriginal and Treaty rights. While the application of Environmental Flow Needs may indeed contribute to ensuring that First Nations' Flow Needs are met, an assessment of baseline needs to determine the minimum levels of water quality and quantity required to support the exercise of Aboriginal and Treaty rights will also need to be taken into consideration and afforded priority in decision-making.

When considering First Nations' Flow Needs, it will be important to consider both use levels and the importance of streams for the exercise of rights (e.g. considering access, preferred locations, resources available). This will assist in determining whether there is a need to set the threshold below which water levels must not drop, at a higher level than would be required by using a Critical Environmental Flow threshold alone. It will also inform decision-makers of whether higher stream levels are required for the continued exercise of Aboriginal and Treaty rights, compared to that which might be needed using an ecological threshold alone, such as the Environmental Flow Need threshold, based on stream health.

In addition, it is our understanding that Environmental Flow Needs will only be taken into account when considering "new" groundwater and surface water allocation decisions, and will not necessarily be considered prior to the issuance of all new water licences. In our view, this is an inadequate approach that does not take into account the existing pressures on our water system, and on the water required by First Nations for the exercise of our rights. Both Environmental Flow Needs and First Nations' Flow Needs should be considered and applied to all water licencing decisions – whether by way of an inventory or review, in addition to consistent application of these principles going forward. In addition, it will be important to consult with First Nations about which types of decisions will not need to be subject to an Environmental Flow Needs Assessment, and are "low-risk", to ensure that for those applications which may adversely affect First Nations' water rights, and First Nation Flow Needs are maintained.

It is our understanding that for existing licences, Environmental Flow Needs will only be considered at the amendment stage, or upon review of the licences, if any such review occurs. This raises concerns with respect to the proposal to continue to grant licences with an indefinite term, and to only require reviews on a discretionary basis after 30 years (or in some cases, such as for hydro-electric, after 40 or 50 years). Licences should have limited, defined terms, so that Environmental Flow Needs and First

Nations Flow Needs will be assessed upon renewal on a regular basis. This will allow for adaptive management, as well as ensuring that priority is afforded to water uses which are constitutionally protected, and to uses which will not compromise the sustainability of our water resources.

If and when Environmental Flow Needs are considered, it is our understanding that they will be completed by a simplified Environmental Flow Needs Assessment (e.g. desk-top assessment), including for applications related to oil and gas, and that in only certain instances will a more detailed assessment, involving information gathering, be required. The proposal to conduct the majority of Environmental Flow Needs Assessments by way of simplified desk-top studies is likely to result in First Nations' traditional knowledge and use information, not being reviewed or assessed, and those with traditional knowledge and oral histories not being interviewed or given an opportunity to provide information within their living knowledge. This simplified desktop approach will not ensure that traditional knowledge and use information is reviewed and integrated into the needs assessment. First Nations will need to be consulted about the types of projects which will be subject to the simplified desktop assessment, and those which will require a more thorough assessment and information gathering, in order to ensure that the assessments take into consideration First Nations' knowledge about the ecosystem needs of the streams relied upon for the exercise of rights.

In order to address the above-noted concerns, consultation with First Nations will be required prior to the development of Regulations to address: (i) appropriate methods for determining Environmental Flow Needs (e.g. a desk-top method for most projects, or a detailed assessment for larger, more complex projects such as Independent Power Projects or flow-sensitive areas); (ii) Situations where Environmental Flow Needs do not have to be considered; (iii) Categories of applications where the consideration of Environmental Flow Needs would be discretionary and the requirement for additional information unlikely; and (iv) Application information requirements.

Finally, the Proposal sets out that Environmental Flow Needs will not be considered for existing licences unless recommended and approved in a Water Sustainability Plan, or as part of any required licence review. If this is maintained, there will need to be explicit requirements to consult First Nations about whether an Environmental Flow Needs Assessment and/or First Nations' Flow Needs Assessment is potentially required in Water Sustainability Plans and in licence reviews to ensure there are no adverse impacts to First Nations' water rights.

Water Objectives

There will need to be consultation on the proposed Water Objectives, the General Indicators to measure the objectives for particular areas, and the Management Targets for specific areas or sites, to ensure that First Nations' water rights and First Nations' Flow Needs are considered in decision-making. For example, with respect to the Water Objectives, there will be a need for consultation on the proposed Objectives of water quantity, water quality, and aquatic ecosystem health. These Objectives need to be defined so as to ensure there is sufficient quality and sustainable quantity of water available for the exercise of First Nations' rights, in a functioning aquatic ecosystem.

At present, the proposal to assess water quality based only on the uses which may be applied for (the "designated uses") does not take First Nations' water rights into consideration as a factor for decision-making. Nor is there any guidance as to what level of water quality will be considered "sustainable" – a

consideration of whether First Nations will be adversely affected by water shortages and their frequencies should be included as a Management Target to address this concern. Furthermore, assessing the level of potential cumulative impacts to the quality and quantity of water available to First Nations should also be part of the assessment of impacts to Water Objectives and 'aquatic ecosystem health.

Similarly, the Indicators to measure the Water Objectives will need to be developed in consultation with First Nations, to ensure that traditional ecological knowledge is integrated into how sufficient levels and quality of water are measured for the exercise of First Nations' rights. The Management Targets for specific areas and/or sites should measure whether First Nations' water uses can continue without diminishing the quality or quantity of water resources required to access and exercise rights in the area. The Water Objectives related to aquatic ecosystems should ensure that both Indicators and Management Targets consider the buffers required for the exercise of rights in the aquatic ecosystem, and should also consider whether conservation objectives for species of importance to First Nations will be met.

There will be a need for consultation with First Nations on the development and implementation of Water Objectives, and with respect to the regulations which will:

- Establish Water Objectives and define how they will be measured,
- Enable processes to establish and implement the Objectives,
- Identify who will be required to consider the Objectives (e.g. which decision-makers under which statutes) and whether the WSA takes precedence over other statutes, and
- Require local governments to consider the Objectives in their planning and decision processes.

Not only will there be a need for consultation with First Nations on the Water Objectives to be considered in decision-making, but there will also be a need to ensure that the WSA, under which the above-noted regulations are developed, sets out the weight and priority to be afforded to the Water Objectives. Furthermore, to be effective, Water Objectives must apply to all decision-makers in all sectors. In addition, it will be necessary to clarify the weight and priority to be afforded to the Water Objectives, and how they will be weighed against competing criteria such as resource development. For example, to be effective, it will be necessary to first take steps to ensure that First Nations Flow Needs are met, and potential adverse impacts to First Nations' rights to sufficient quality and quantity of water are addressed prior to decision-making, given that these objectives are foundational to the exercise of constitutionally protected rights.

Area-Based Regulations and Water Sustainability Plans

Any establishment of area-based regulations, which define thresholds of water use, and/or set out potential exemptions from licencing, must be subject to consultation with First Nations, to ensure that First Nations' Flow Needs and First Nations' water rights are taken into account. There will be a need to set thresholds which ensure sufficient quality and quantity of water for the exercise of First Nations' Aboriginal and Treaty rights. Any area-based regulations and/or water sustainability plans must respect and comply with these thresholds. The legislation should require all regulations and plans to respect First Nations' water rights and priority in all water planning and decision-making.

It is our understanding that Water Sustainability Plans will in some cases be developed to inform integrated water and land use decision-making, and to assess impacts to water. Water Sustainability Plans can consider a range of issues which could adversely affect First Nations' water rights – from providing water allocation planning information and advice, to conducting cumulative effects assessments, to drawings links to Water Objectives and Environmental Flow Needs, to developing conflict resolution processes and making recommendations to develop area-based regulations or Agricultural Water Reserves.

Water Sustainability Plans which inform decision-making will need to take into account First Nations' water rights, when making recommendations and providing guidance for the assessment of impacts to water quality, quantity and ecosystem health. As such, it is recommended that adequate recognition and priority for First Nations' water rights and First Nations' Flow Needs be set out in the legislation, to ensure that Water Sustainability Plans afford adequate protection to First Nations' water rights.

In addition, Water Sustainability Plans can help to ensure that First Nations' water rights and First Nations' Flow Needs are considered and addressed in both land and water resource planning. To the extent that the Plans attempt to address or prevent water use conflicts (among users or with the environment), it also will be important to ensure that the legislation provides guidance respecting the priority of First Nations' water rights, and that Water Sustainability Plans be required to respect the constitutionally protected nature of First Nations' rights to sufficient water quality and quantity and ecosystem health.

With respect to the multi-stakeholder development of the plans, it will also be important to ensure that First Nations involvement and the issues concerning First Nations water rights do not become subsumed into public discourse and subjected to debate – First Nations' water rights must be clearly acknowledged and set out beforehand, through meaningful consultation on the proposed legislation and regulations, and respected in all Plans. If the legislation does not clearly set out an understanding of First Nations' water rights and First Nations' Flow Needs and how they will be assessed and factored into decision-making, there is potential that water allocation decisions could be informed by the Plans without adequate consideration of First Nations' water rights.

It is recommended that the further details on Water Sustainability Plans be subject to consultation with First Nations now, as they are being developed, prior to the WSA coming into force, so that issues raised herein can be addressed in the enabling legislation, rather than left subject to public and stakeholder consultation on regulatory development. The legislation will need to clearly set out the priority of First Nations' water rights, and the requirement for Water Sustainability Plans to respect the priority of First Nations' water rights and First Nation's Flow Needs, in all water planning and decision-making. In addition, there will be a need for comprehensive consultation on the regulations and the Plans, to ensure that First Nation's Water Objectives and First Nations' Flow Needs are met. The proposed public consultation respecting Water Sustainability Plans will not be sufficient, particularly given that these plans may be developed by parties other than the government, which will not allow for Crown consultation with First Nations during the development of the Plans, unless required by the enabling legislation.

With respect to the transition of Water Management Plans to Water Sustainability Plans, it is also recommended that the legislation require existing plans to be updated to be brought in line with the new

legislative developments respecting the priority of First Nations' water rights, and how these rights will be considered in decision-making. Finally, while Water Sustainability Plans and/or Area-Based Regulations may require all groundwater extractions to be licenced, the Proposal does not outline the criteria upon which these decisions would be made. The criteria by which the decisions regarding the necessity of licensing needs to be subject to meaningful consultation with 'Namgis First Nation, to ensure that activities which may adversely affect our water rights are well-regulated and monitored.

Agricultural Water Reserves

With respect to Agricultural Water Reserves, we are concerned that agricultural use will be afforded priority with respect to lands and waters which are relied upon by First Nations for the exercise of their rights. Dedicated supplies of water for agriculture for agricultural land reserves should only be made after water supplies for First Nations' water needs are established and afforded priority, and after consideration of the water quality and quantity needed by First Nations to support their exercise of Aboriginal and treaty rights, now and into the future.

Furthermore, any recommendation in a Water Sustainability Plan to establish an Agricultural Water Reservation should require consultation with First Nations to ensure that the establishment of such a reserve would not adversely affect First Nations' water rights or water reservation needs. The legislation should also include flexibility, such that changes in water use purposes can be made, even in respect of Agricultural Water Reserves, if it is shown that First Nations' water rights and needs are not being met. In sum, any priority in the establishment, or ability to maintain and continue an Agricultural Water Reserve, should be subject to the availability of water supply after considering the priority water rights of First Nations.

Beneficial Use Requirement

We are concerned with the requirement that beneficial use be demonstrated for the water purpose set out in the licence, without regard to whether the use set out in the licence (which may be anything from industrial, to mining, power, and irrigation), if enforced, may adversely affect First Nations' water rights. This is why reviews of licences, and ensuring consultation with First Nations on reviews, will be critical to ensuring that water allocation decisions (including with respect to enforcement) do not detrimentally affect the availability of sufficient water quality and quantity needed for the exercise of Aboriginal and Treaty rights.

Duration of Licences and Reviews

We are concerned with the discretionary nature of the Proposal that licences either be subject to an expiry date, or a review. We are further concerned with the Proposal to leave reviews to the discretion of decision-makers, rather than explicitly requiring reviews of licences under the Act. In order to protect First Nations' water rights, the legislation should require set terms for licences, and both the duration of the licences and the review dates should be subject to consultation with First Nations where there are First Nations' water rights which may be adversely affected by the proposed water use allocation decision.

In order to ensure that water is governed sustainably, particularly during times of uncertain water levels and changing conditions, it will be necessary to ensure that reviews are required more frequently than every 30, 40 or 50 years. Thirty years for most licences, with forty years and a potential ten year extension to fifty years for power licences is much too long and will effectively prevent meaningful adaptive management from taking place. Adaptive management needs to appropriately consider water supply and demand, and the priority water rights of First Nations and First Nations' Flow Needs, and effectively implement Environmental Flow Needs.

More frequent reviews will be increasingly important, given the potential of climate change to drastically affect water supply, which will require the implementation of a more principled approach to water management to avoid land and water conflicts. Reviews of licences should be mandatory. In the event that they remain discretionary, we will require consultation on the factors which will be taken into consideration when determining whether or not to undertake a review, and confirmation that First Nations' water rights will be considered in making these decisions. We also request consultation on which types of licences will be excluded from reviews, to ensure that water uses which may adversely affect First Nations' water rights will be adequately monitored.

Temporary Water Reduction Orders

With respect to the ability of the Minister to order temporary reductions of water use to reduce water use from a stream and/or protect the survival of fish populations during drought, we are concerned that this may only be done after consideration of the needs of agricultural users who are given priority. Decisions to temporarily reduce water use should be made only after giving due consideration to the needs and priority of First Nation water users, rather than prioritizing the needs of agricultural users. It will be important to be clear in the legislation that the ability to restrict water use to conserve water for fish and/or First Nations' fishing rights and water rights, should be afforded priority over any agricultural uses of water, given that First Nations' water rights have historical priority and are constitutionally protected. Similarly, any restriction to protect Critical Environmental Flows, or First Nation Flow Needs and fish habitat must be done in consultation with First Nations, in order to ensure effectiveness of the restrictions to protect flows for ecosystem health and the exercise of rights.

Delegated Decision Making

The Proposal also sets out opportunities for the delegation of governance authority to third parties. This raises important questions about how consultation on the governance decisions of other non-provincial government decision-makers will be assured. The Proposal does not appear to have considered Aboriginal rights and title in the decision to delegate decision-making authority, and clarity is needed in this area to ensure clear processes are in place for meaningful consultation respecting First Nations' water rights. For example, to the extent that local governments will be delegated any decision-making authority, it will be important to ensure that there is a requirement for any delegated decision-maker to consider the priority to be afforded to First Nations' water rights, and First Nations' Flow Needs, in water allocation decisions.

Furthermore, the Proposal does not provide any intelligible level of detail with respect to what powers and responsibilities may be delegated to others. At a minimum, any governance system respecting water must include traditional ecological knowledge in water allocation decisions, and prioritize First Nations' water rights in decision-making, whether the preferred approach is centralized, shared or delegated.

Considering Water in Land Use Decisions

With respect to the need to consider water in land use decisions, contrary to what is stated in the Legislative Proposal, we are not confident that existing statutes, such as the *Forest and Range Practices Act* and the *Oil and Gas Activities Act*, contain appropriate provisions to protect water. As such, we are concerned with the proposal to define the Water Objectives with reference to measures contained under these statutes, and in accordance with the development of the Province's cumulative effects assessment framework, which is still in the early stages of development and has not yet been subject to consultation with First Nations.

There will be a need to ensure that all statutory decision-makers working are required to consider the potential impacts of their decisions on water, in a manner that is harmonized with the broader legislative reforms. For example, when making water allocation decisions, decision-makers will not only need to consider Water Objectives and Water Sustainability Plans, but will also need to ensure that both potential adverse impacts to First Nations' rights to sufficient quality and quantity of water, and First Nations' Flow Needs are addressed. In addition to setting out the priority for First Nations' water rights and title under the legislation, this could be achieved by integrating First Nations' water rights (e.g. sufficient quality and quantity of water for the exercise of rights, and First Nations' Flow Needs) into Water Objectives, and ensuring adequate weight and priority is afforded to the Water Objectives in decision-making.

Furthermore, to ensure that there is integrated water governance that respects constitutionally protected rights and needs, there should be one legislative regime established to guide water governance, allocation, and decision-making in BC, which explicitly prioritizes First Nation's constitutionally-protected water rights.

Groundwater Regulation

There is a need to ensure that Treaty rights and Aboriginal rights and title to water are addressed in legislative reforms, prior to proceeding with the regulation of groundwater resources in British Columbia. Not only are First Nations' rights and title to water protected by section 35 of the Constitution, but the exercise of Aboriginal and Treaty rights depends upon ensuring that there is a sufficient quality and quantity of water available to 'Namgis First Nation. As such, the province's assumption of jurisdiction over groundwater, without first recognizing First Nations' water rights is a particularly concerning aspect of the proposed legislative reforms.

The Proposal clearly sets out the connections between groundwater and surface water quality and quantity: the extraction and use of groundwater can adversely affect environmental flows and the quantity and availability of surface water in streams, as groundwater is often connected to surface water and plays an important role in recharging streams. Similarly, where surface water is contaminated, this may adversely affect and/or contaminate the quality of groundwater stored in shallow aquifers. Despite these connections, to date, groundwater extraction has not been regulated by the Province, and water licences for groundwater use have not been required, even for projects undergoing environmental assessments.

By contrast, the Province is now proposing to regulate groundwater by requiring that licences be obtained for activities in accordance with the FITFIR principle, unless activities are exempt. Proposed

exemptions from licensing requirements set out in the Proposal include saline groundwater used for oil and gas; groundwater used for well drilling, geothermal wells and contaminated sites; groundwater used for testing and measuring and groundwater used for domestic purposes, among others.

We are quite concerned with the Proposal to exempt certain activities from licencing requirements, such as saline water source wells, considering the provincial government's goals around the increase in LNG production in the province. The Proposal mentions that deep, saline groundwater could be managed separately from shallower groundwater resources because the two systems are thought to be physically separate. However, no indication is given as to whether or how that management would occur in the WSA. We understand that saline water sources can be used in the hydraulic fracturing process and other industrial development, and strongly believe that all industrial uses of water should be regulated and licenced. By excluding saline groundwater, and thus excluding its use from reporting requirements, a significant gap in the knowledge regarding BC's water use and consumption will remain.

The Proposal also provides that groundwater extraction licences will be granted for indefinite terms, and the application of any terms and conditions will be left to the discretion of the decision-maker, with the understanding that licences will generally be granted to permit the volume of groundwater that has been used historically for the intended purpose, considering efficiency. Our concerns respecting the FITFIR principle and the duration of licences have already been addressed above and are applicable to the proposed groundwater legislative regime.

The process suggested for awarding licences to new groundwater users is also problematic. Currently, the Proposal states that anyone applying to extract and use groundwater would be required to assess the impact of their proposed extraction and use on known existing groundwater users, included exempted domestic groundwater users. However, because groundwater and surface water are interconnected, new applicants for groundwater licences should also have to assess the impact of their proposed extraction on known existing surface water users. To center the proposed regulation of groundwater around the fact that the two sources of water are connected and then exclude consideration of surface water users in this way is a short sighted and incomplete approach.

Given the need for groundwater to support the exercise of the First Nations' constitutionally-protected rights, it is essential that the gaps in the Proposal regarding First Nations' water rights be addressed, prior to proceeding with any legislative reforms. We, therefore, request consultation on the incorporation of the following principles into the legislation, which in our view will help ensure that the legislative reforms do not adversely affect First Nations' water rights and title:

- The proposed legislation will recognize and respect First Nations water rights and title.

- Priority will be provided for First Nations' water rights in the legislation, which will aim to protect sufficient quality and quantity of groundwater to support the exercise of Aboriginal and Treaty rights now and into the future.

- The FITFIR principle will only be applied, if at all, subsequent to the application of priority to First Nations' water rights and title. FITFIR may be suspended to address First Nations' water rights and First Nations' Flow Needs.

- All decision-makers will be required to afford priority to First Nations' water rights and title, and to address potential adverse and cumulative impacts to First Nation's water rights with respect to all water allocation decisions. All water allocation decisions will occur under one integrated statute which respects the constitutional protection provided for First Nation's water rights.

- The level and quality of groundwater necessary for the exercise of First Nations' culture and rights will be assessed, taking into account preferred locations for accessing water, traditional use and occupancy information, and traditional ecological knowledge.

- Prior to authorizing any groundwater licences, an inventory of groundwater resources will be developed, which will include an assessment of the water quality and quantity of groundwater resources available, and will take into consideration the connection of groundwater to surface water resources, and the cumulative effects of past, present and reasonably foreseeable activities and developments which use groundwater.

- The cumulative effects assessment will consider the potential threats to water quality and quantity for the exercise of Aboriginal and Treaty rights from past, present and reasonably foreseeable activities and developments which use groundwater resources. This assessment will take into consideration the variability of groundwater and surface water supply due to climate change, and the need to protect source water for the present and future exercise of Aboriginal and Treaty rights throughout the First Nation's traditional territory.

- Decision-makers will be required to assess the impacts of the proposed groundwater extraction and use on First Nations' water rights. Cumulative impacts to the exercise of Treaty and Aboriginal rights and title will be assessed as part of this review, taking into account traditional use and occupancy information, and traditional ecological knowledge.

- The types of information the Decision-maker will be required to obtain and consider will include information about water availability for the exercise of Aboriginal and Treaty rights, and potential impacts on First Nations' water use and First Nations' Flow Needs.

- Any exemptions from groundwater licensing will be developed with First Nations, to ensure that the cumulative effects of allowing exempted uses do not adversely affect the right to sufficient quality and quantity of water for the exercise of Aboriginal and Treaty rights and culture.

- All groundwater licences will have definite terms for expiry. Both new licences and renewals will be subject to consultation with First Nations, along with amendments and licence reviews at timeframes to be discussed, so that the impacts of licences for groundwater extraction on First Nations' water rights can be monitored and addressed.

- Changes of water use will require a new licence or approval.

Capacity

In order for 'Namgis First Nation to meaningfully engage and participate in the consultation process called for in this review as well as for participation in the WSA drafting and implementation, our First Nation will require resources and capacity funding to be provided by the Crown.

Treaty Related Concerns

To the extent that 'Namgis First Nation reconciles our Aboriginal rights and title claims to water through Treaty, it will be dependent upon the recognition of constitutional priority for our right to sufficient quality and quantity of water to exercise our Treaty rights, above all over other water rights and uses, including those granted in accordance with the FITFIR system, or otherwise. Similar to the above comments on the priority of First Nations' water rights and title, the legislative reforms must explicitly set out that both the Surface and Groundwater Reservations of Treaty First Nations take priority over other water uses (including essential domestic uses, water uses licenced under any FITFIR system, and Agricultural Water Reserves, among other uses). This priority for Treaty First Nations' water rights and the water reservations for both surface water and groundwater, as well as our right to access water, should also be explicitly set out in both the legislation and the Treaty, and all decision makers should be required to respect this constitutional priority in decisions affecting water use and allocation.

Potential adverse impacts to First Nations water reservations and to our First Nations' water rights under Treaty must also be considered in all water licencing management, planning, conservation and licensing decisions which could adversely affect the quality and/or quantity of water supply available to our First Nation. There will need to be meaningful consultation on any and all groundwater or surface water licensing decisions, which could adversely affect the water quality and quantity available to our First Nation, whether as part of our surface water or groundwater reservation, or for the exercise of Treaty rights throughout our Statement of Intent area. Consultation will also be required to ensure that water allocation decisions do not adversely affect access to our water resources, which is integral to the exercise of our constitutionally-protected rights. We will also need to have the ability to make decisions respecting whether to use or whether to conserve water resources (in order to protect against uses which may adversely or cumulative affect our First Nation's water rights).

The legislative reforms must also clarify explicitly in the legislation that the Province does not have the authority to order an emergency and pipe water off of treaty settlement lands to other areas for other uses without deep consultation, and that no application for a water license which may diminish the sufficiency of water quality, quantity and ecosystem health required for the exercise of our rights may be granted without our Nation's consent. In addition, there will need to be deep consultation before issuing any "emergency orders" with respect to water use. It will also be necessary to clarify that First Nations' property rights in water are not affected by the presumption of Provincial jurisdiction in the proposed legislative reforms, given the outstanding water rights and title issues which have yet to be reconciled. We will also need to address the flexibility of water licences and our rights to participate (buy, sell, transfer rights) in the future of the modern water allocation system, in the event that water markets may be established.

We also request that no groundwater licensing or reserves be issued prior to finalizing our treaty settlement land selection, surface water reservation and groundwater reservations, in addition to the

mechanisms for consultation with 'Namgis First Nation on adverse impacts to water rights off of our settlement lands. The section of water management in our Treaty will also need to be updated with respect to our inclusion in the water governance tools proposed to come into force under the WSA (such as our roles and responsibilities in relation to Water Objectives and Environmental Flows, etc.). The Proposal lacks specificity in terms of how decision making by BC will take place if there is a modern treaty in place (in addition to rights and title without a treaty). As such, we will require specific law-making provisions with respect to First Nations water governance over both surface water and groundwater to be set out in the Treaty, along with confirmation in the legislative reforms that any Provincial decisions which may affect water resources will respect the protection and implementation of priority afforded to our First Nation's constitutionally protected water rights. Our law-making authority with respect to the storage, diversion, extraction, use, and protection of surface water and groundwater will also need to be addressed, in addition to determining our roles and responsibilities in relation to water management, planning, protection and allocation decisions.

Conclusion

In sum, we look forward to establishing a process for direct and meaningful consultation on the Proposal and our concerns and proposals outlined herein, to ensure that potential adverse impacts to First Nations' water rights and priority are addressed before the Province proceeds further with the legislative reforms. We look forward to your response, and trust that First Nations' constitutionally-protected water rights and title will be afforded priority in the proposed water governance reforms.

Yours truly,

Chief William Cranmer
'Namgis First Nation