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**To:** Living Water Smart ENV:EX  
**Subject:** Including the Human Right to Water in the Water Sustainability Act

Hello

Thanks for the opportunity to have some input, and my apologies for sending this at the 11th hour!

I'm surprised that few, if any, of the comments thus far have raised the issue of including the human right to water in the proposed Water Sustainability Act. This seems particularly surprising in light of the recent resolution of the UN General Assembly, and the pioneering recognition of this right in the Canadian context by the Government of the Northwest Territories.

Attached is a detailed summary of the human right to water. I would be pleased to provide further details if that would be helpful.

I wish you all the best in bringing this initiative to successful completion in 2014!

David

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NEW BOOKS: [The Right to a Healthy Environment](#) (UBC Press, 2012)

[The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment](#) (UBC Press, 2012)

**The Right to Water:  
Moving from International Recognition to Provincial Action**

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**Introduction**

Thank you for the opportunity to comment on the proposed *Water Sustainability Act* for BC. This piece of legislation is long overdue, in light of the fact that a minimum supply of potable water is a vital prerequisite for life, health, dignity, and the realization of other human rights (Gleick 1996; Howard and Bartram 2003; UN High Commissioner for Human Rights, 2007). Globally, there are approximately one billion people who currently do not enjoy safe drinking water, thousands of children die every day from water-related illness, and climate change is expected to exacerbate these crises (World Health Organization and United Nations Children's Fund, 2010). Even in the wealthiest nations on Earth, such as the United States and Canada, there are thousands of people who lack access to clean water and adequate sanitation (de Albuquerque 2011; Boyd 2011). This includes people in British Columbia.

Many experts agree that legal recognition of the human right to water is a significant step towards increased access to safe drinking water (Smets 2006; United Nations Development Programme, 2006; World Water Council 2010; Sultana and Loftus 2011). Therefore prominent individuals, governments, and civil society organizations have campaigned vigorously for recognition of this right at both the international and national levels (Dubreuil 2006; Barlow 2007; Gorbachev 2010). Examples include Mikhail Gorbachev, the government of Bolivia, and NGOs such as Green Cross International, the Council of Canadians, WaterAid, Rights and Humanity, and the Freshwater Action Network.

**1. Defining the Right to Water**

The right to water requires that all persons have affordable access to a supply of safe water in quantities adequate for essential personal and domestic uses, which include drinking, sanitation, clothes washing, food preparation, and personal and household hygiene (UN Committee on Economic, Social, and Cultural Rights, 2003). An adequate supply requires a minimum of 50 to 100 litres per person per day (Gleick 1996; Howard and Bartram 2003).

Recognition of the right to water requires governments to respect, protect, and fulfill the right. Respecting the right requires states to refrain from interfering directly or indirectly with the right (e.g. government cannot deny water services to individuals who cannot afford to pay). Protecting the right means ensuring that third parties do not interfere with or violate the right (e.g. through enacting and enforcing legislation that prevents water pollution). Fulfilling the right requires positive state action—such as investment in water treatment and distribution infrastructure—to ensure that the right is universally enjoyed (de Albuquerque, 2010).

The benefits of recognizing that water is a legally protected human right include:

- triggering stronger water laws, regulations, and policies;
- prioritizing resources for investment in water infrastructure, governance, and management;
- empowering citizens and communities to take part in decision-making processes related to water;
- clarifying the appropriate priorities in allocating scarce water supplies;
- providing a potential remedy for those whose right is being or may be violated;
- protecting water from pollution and other adverse impacts;

- preventing discrimination or neglect of under-privileged or marginalized communities; and
- providing a means of holding governments and corporations accountable (Bluemel, 2004; McCaffrey and Neville, 2009; Sultana and Loftus 2011).

It can be argued that the right to water need not be explicitly recognized because it is implicit in other widely acknowledged rights such as the rights to life, health, a healthy environment, and an adequate standard of living (Tully 2005). However, a more compelling argument is that ensuring sufficient attention and resources for the right to water requires that it be given the prominence and visibility of an explicit and distinct right (Langford 2006; Khalfan and Kiefer, 2008). It is also important to recognize that Canada is among a minority of countries globally that does not recognize its citizens' right to live in a healthy environment or right to water.

There are many misconceptions regarding the right to water (Center on Housing Rights and Evictions, 2007). It does not entitle everyone to an unlimited supply of water at all times, in any place, under any circumstances. It may be limited by the concept of progressive implementation, and such reasonable and just limits as are necessary in a free and democratic society. The right to water does not obligate nations to share their water resources with other nations, as state sovereignty is unimpaired by recognition of the right. The fact that water is a human right does not mean that it should be free. Charging a price for water that reflects its full costs is justifiable on grounds of ecology, equity, and efficiency, subject to the imperative of providing a basic quantity of free or subsidized water for economically disadvantaged communities and individuals.

## **2. International Recognition of the Right to Water**

Although mention of the right to water dates back to the Mar Del Plata Action Plan that emerged from the UN Conference on Water in 1977, there is not yet a global human rights treaty establishing this right in explicit, universal, legally binding terms. Almost all nations have endorsed non-binding political declarations that mention the right to water, such as the Programme of Action of the 1994 Cairo Conference on Population and Development, endorsed by 177 States. Article 14(h) of the *Convention on the Elimination of Discrimination Against Women* provides for the right "to enjoy adequate living conditions, particularly in relation to ... water supply." Article 24(2)(c) of the *Convention on the Rights of the Child* sets forth children's right to "adequate nutritious foods and clean drinking-water."

The right to water is not explicitly included in the *Universal Declaration of Human Rights* or the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*. However, implicit rights to water and sanitation are arguably included in s. 25 of the *Universal Declaration* (the right to a standard of living adequate for the health and well-being of himself and of his family) and ss. 11 and 12 (the rights to an adequate standard of living and health) of the *ICESCR*. The UN Committee on Economic, Social and Cultural Rights published General Comment No. 15 on the Right to Water in 2002, providing guidelines for the interpretation and implementation of the right (UN Committee on Economic, Social and Cultural Rights 2002). General Comment No. 15 identifies a suite of core obligations related to the right to water that are to be implemented immediately:

- (a) To ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease;
- (b) To ensure the right of access to water and water facilities and services on a non discriminatory basis, especially for disadvantaged or marginalized groups;
- (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
- (d) To ensure personal security is not threatened when having to physically access water;
- (e) To ensure equitable distribution of all available water facilities and services;
- (f) To adopt and implement a national water strategy and plan of action addressing the whole population;

- (g) To monitor the extent of the realization, or the non-realization, of the right to water;
- (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups; and
- (i) To take measures to prevent, treat, and control diseases linked to water, in particular ensuring access to adequate sanitation (UN Committee on Economic, Social and Cultural Rights, 2002).

An earlier General Comment published by the Committee on Economic, Social and Cultural Rights confirmed that governments have a core obligation to ensure the satisfaction of, at the very least, ‘minimum essential levels’ of each of the rights enunciated in the *International Covenant on Economic, Social, and Cultural Rights* (UN Committee on Economic, Social and Cultural Rights, 1990).

Momentum toward explicit and binding international recognition of the right to water has accelerated in recent years. In 2007, the UN High Commissioner for Human Rights concluded “that it is now time to consider access to safe drinking water and sanitation as a human right [necessary] to sustain life and health” (UN High Commissioner for Human Rights, 2007). In 2010, the UN General Assembly passed a non-binding resolution recognizing the right to water, with 124 nations voting in favour, none against, and 41 nations abstaining. The resolution stated “the right to safe and clean drinking water is a human right that is essential for the full enjoyment of life and all human rights” (UN General Assembly, 2010). Later in 2010, the UN Human Rights Council issued a similar resolution, confirming that “the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and is inextricably related to the highest attainable standard of physical and mental health, as well as the right to life and human dignity” (UN Human Rights Council, 2010).

The recent UN General Assembly resolution on the right to water has already had a demonstrable effect. In January 2011, the Botswana Court of Appeal relied on the resolution in ruling that the constitutional rights of the Bushmen of the Kalahari were being violated by the government’s refusal to allow them to access a water source within a wildlife reserve where they resided (*Matsipane Moseithanyane et al. v. Attorney General*, 2011).

### **3. National Recognition of the Right to Water**

At the national level, the right to water is also gaining broader legal recognition (Langford, Khalfan, Fairstein, and Jones, 2004). In 2007, the UN High Commissioner for Human Rights observed that “an increasing number of States are recognizing safe drinking water as a human right in their constitutions, as well as national legislation, while national courts are enforcing it as a justiciable right” (United Nations High Commissioner for Human Rights, 2007).

#### **3.1. Constitutional Protection**

Constitutional protection of the right to water can occur through explicit provisions or through recognition that the right is implicit in other human rights. Constitutional provisions explicitly requiring the protection and/or provision of clean water are found in at least 18 nations, and are increasingly prevalent in new constitutions.<sup>1</sup> For example, both the Dominican Republic and Kenya enacted new constitutions in 2010 that recognize the right to water, as did Morocco in 2011. In South Africa, the right to water is explicitly articulated in its 1996 *Constitution* and is enforceable through the courts:

- 27. Health care, food, water, and social security
- (1) Everyone has the right to have access to—

...

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<sup>1</sup> Bolivia (Art. 16(I)); Colombia (Art. 366); the Democratic Republic of Congo (Art. 48); Dominican Republic (Arts 15 and 61); Ecuador (Art. 12); Ethiopia (Art. 90(1)); Gambia (Art. 216(4)); Kenya (Art. 43(1)(d)); the Maldives (Art. 23); Mexico; Morocco; Panama (Arts. 110 and 118); South Africa (Art. 27); Swaziland (Art. 215); Switzerland (Art. 76); Uganda (Arts. XIV(b) and XXI); Uruguay (Art. 47); Venezuela (Arts. 127 and 304); and Zambia (Art. 112(d)). See Wolfrum and Grote, 2012.

(b) sufficient food and water ...

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights (Wolfrum and Grote 2012).

Explicit constitutional recognition of the right to water has had a significant effect on South African water laws and policies.<sup>2</sup> For example, the *Water Services Act* of 1997 states:

S. 3(1) Everyone has a right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realize these rights.

(3) Every water services authority must, in its water services development plan, provide for measures to realize these rights... (Act No. 108 of 1997).

South Africa's recognition of the right to water also has contributed to major investments in infrastructure (Kok and Langford 2009; Du Plessis 2011). In 2000, South Africa also passed legislation implementing the procedural rights entrenched in the constitution (e.g. the right of access to information), which are essential for the full enjoyment of substantive rights.<sup>3</sup> Recognition of the constitutional right to water is credited with spurring the extension of potable water to ten million South Africans (predominantly black and poor) in ten years (Smets 2006). Nelson Mandela describes increased access to safe drinking water for millions of South Africans as "amongst the most important achievements of democracy in our country" (Mandela 2002). In Uruguay, the constitutional provision guaranteeing the right to clean water also prohibits privatization of the water supply. UN data show that 100% of Uruguayans enjoy access to improved sources of drinking water, consistent with their constitutional right (World Health Organization and United Nations Children's Fund 2010). Empirical data offers a compelling rebuttal to critics of the right to water.

In a number of nations where there is no explicit constitutional right to water courts have held that the right to water is an implicit but enforceable constitutional right (Boyd 2012). These nations include:

-Argentina (Picolotti 2005; *Beatriz Mendoza* 2008);

-Belgium (Judgment No. 36/98, 1998);

-Brazil (Supreme Court of Justice 2006),

-Costa Rica (Supreme Court of Costa Rica, Sala Constitucional 2007);

-Colombia (Defensoria del Pueblo 2009);

-India (Narain 2010);

-Indonesia (*Judicial Review of the Law No. 7 of 2004 on Water Resources*);

-Israel (Zarchin 2011);

-Nepal (Belbase and Thapa 2007); and

-Pakistan (*General Secretary West Pakistan Salt Miners Labour Union*, 1994).

Courts in these nations based their decisions on the fact that access to safe drinking water is a fundamental prerequisite to the enjoyment of other human rights, including the right to life and the right to live in a healthy environment. The right to life, which arguably includes an implicit right to water, is universally found in national constitutions (Law and Versteeg 2011). There are more than 90 nations whose constitutions now explicitly recognize the right to live in a healthy environment (Boyd 2012). The right to clean water is regarded as an integral element of this broader right. Empirical evidence demonstrates that there is a strong positive correlation between environmental provisions in constitutions and superior environmental performance (Boyd 2012).

For example, in Argentina, based on the constitutional right to a healthy environment, courts have ordered governments to provide communities with potable water, construct drinking water treatment facilities, provide medical treatment for individuals harmed by contaminated drinking water, and carry out environmental remediation of polluted watersheds. An Argentine case involving Chacras de la Merced, a poor community whose drinking water was being contaminated by inadequate wastewater

<sup>2</sup> *National Water Act*, Act No. 36 of 1998, Preamble, Art 4. *Local Government Municipal Structures Act* No. 117 of 1998. *Local Government Municipal Systems Act*, No. 32 of 2000.

<sup>3</sup> *Promotion of Access to Information Act 2000. Promotion of Administrative Justice Act 2000.*

treatment in an upstream municipality, illustrates the potential for using the right to a healthy environment to advance the right to water (Picolotti 2005). An ENGO brought a lawsuit against the upstream municipality and the province on behalf of local residents asserting a violation of their constitutional right to a healthy environment. The Court agreed that there was a violation of the right and ordered the government to upgrade the wastewater treatment plant and, in the interim, provide a supply of clean water to the residents of Chacras de la Merced. The court-ordered infrastructure improvements were completed, and in an interesting development, the municipality passed a bylaw mandating that all future sewage and sanitation tax revenues must be re-invested in upgrading and maintaining the sewage system. Similarly, on the basis of the right to a healthy environment the Supreme Court of Argentina ordered federal, provincial, and municipal governments to clean up and restore the heavily polluted Matanza-Riachuelo watershed, home to millions of people (*Beatriz Mendoza* 2008). The World Bank has provided \$840 million for water and sanitation infrastructure as a direct result of the Supreme Court's judgment (World Bank 2010).

Constitutional recognition of the right to water does not create an absolute right to water. Courts will take into account the specific circumstances of a case and the challenges facing a government in determining whether the right is being violated (*Mazibuko et al. v. The City of Johannesburg* 2010).

### **3.2. Legislative Recognition**

Dozens of countries explicitly recognize the right to water in national legislation or policy, including Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Brazil, Burkina Faso, Cameroon, Central African Republic, Colombia, Costa Rica, Dominican Republic, Finland, France, Germany, Ghana, Guatemala, Guinea, Honduras, Indonesia, Latvia, Luxembourg, Madagascar, Mauritania, Namibia, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Portugal, Romania, Russia, Senegal, South Africa, Spain, Sri Lanka, Tanzania, Ukraine, and Venezuela (Langford, Khalfan, Fairstein and Jones, 2004; Smets 2006). For example, France enacted a new law in 2006 that explicitly recognizes the right to water:

Art. 1. Water is the common heritage of the nation. Its protection, enhancement and development, in accordance with the balance of nature, are of general interest.

In the framework of laws and regulations previously established, the use of water belongs to every physical person, for food and hygiene, and everyone has the right to access to drinking water under conditions economically acceptable to all.

The costs of water use, including environmental costs and the resources themselves, are borne by users, taking into account social, environmental, and economic consequences and geographical and climate conditions (Government of France 2006).

In nations where the rule of law is respected and there are adequate resources available, it can be expected that laws and policies recognizing the right to water will be implemented and enforced, resulting in greater access and less human suffering. **The right to water is also being recognized at the sub-national level, with the Northwest Territories being the Canadian pioneer in this regard. In 2007, the 15th Legislative Assembly of the NWT declared, "all peoples have a fundamental human right to water that must be recognized nationally and internationally, including the development of appropriate institutional mechanisms to ensure that these rights are implemented" (Government of the Northwest Territories 2010).**

### **Conclusion**

Incorporating the human right to water in BC's proposed *Water Sustainability Act* is not a silver bullet that will automatically address British Columbia's water challenges. However it is a powerful tool that can be used to focus attention and resources on improving access to water for those individuals and communities who currently endure the hardships imposed by the absence of safe water. It also has the potential to provide political power and legal remedies for individuals and communities whose right to water is not being respected or fulfilled. Finally, recognizing the right to water will ensure that all British Columbians, present and future, have a voice in the management and conservation of this precious

natural bounty, the source of all life.

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