Environmental Law Centre
UNIVERSITY OF VICTORIA

Murray & Anne Fraser Building
PO Box 2400 STN CSC
Victoria, BC V8W 3H7
Phone: 250.721.8188
Email: elc@uvic.ca
Web: www.elc.uvic.ca

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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

Dear Water Protection and Sustainability Branch Staff and Legislative Drafters:

Re: A *Water Sustainability Act* for B.C. Legislative Proposal

Thank you for the opportunity to provide input into the Water Act Modernization process and specifically to respond to *A Water Sustainability Act for B.C. Legislative Proposal* ("the Legislative Proposal"). I have reviewed the submission by Oliver Brandes, Water Sustainability Project at the University of Victoria and am in agreement with the advice provided in that submission. In addition, the purpose of this submission is to provide input specifically on policy proposal 2.3.5 Regulate During Scarcity. The intent is to support and provide more specificity to the stated direction of policy proposal 2.3.5, namely that regulation for a variety of public interest purposes can be used in addition to simply regulating for critical environmental flows. The recommendations provided here also have implications for policy proposals 2.3.2 Protect Stream Health and Aquatic Environments, 2.3.6 Improve Security, Water Use Efficiency and Conservation, and 2.3.8 Enable a Range of Governance Approaches.

In summary, the first in time, first in right principle (FITFIR) that underlies water management in B.C. is a blunt instrument by which to establish priorities for water use. Although it has provided predictability in water allocation, that certainty is becoming a legal fiction because of the looming impact of climate change, aboriginal water rights, the daylighting and licencing of groundwater use, and the over allocation of water entitlements in some watersheds. In the absence of amendments to the FITFIR principle to actually rescind some water entitlements, the Province of B.C. has substantial regulatory space in which to control the conditions under which water use occurs in B.C. This regulatory opportunity is in addition to the current practice of making orders and imposing conditions in licences to use water. While some of this regulation could occur at a province-wide scale, most of it will likely arise in a local context as part of Water Sustainability Plans and ongoing local governance that enables creativity in moving water around during times of shortage.

It is important to note that the prevalent view of water rights are as a property right for which compensation would be payable if the provincial government permanently restricted access to all or part of a volume of water granted under licence.[1] This is one of the primary reasons cited in support of maintaining the FITFIR priority system of licences and allocated water volumes in Western water law, which includes B.C. I am proceeding with the assumption that the provincial government will retain some version of FITFIR under the *Water Sustainability Act*, and make this submission in that context.

1. Context and Issue: No New Water and FITFIR Inflexibility

Several undisputed facts are the basis for this submission. In short, the combination of over-allocation or complete appropriation in many watersheds, the proposed definition and licencing of groundwater, unacknowledged aboriginal water rights and climate change's impacts on hydrology are all factors that either increase the use of water or our understanding of how much water is used, and will decrease the amount of water available for use. This is particularly true when aboriginal water rights are identified as the most senior entitlements in B.C. Climate change is also varying the availability of water with late summer, when fish and agricultural users need water the most, being drier.

A key issue for some watersheds and particularly for the future is how to decrease water use in vulnerable watersheds given existing licenced rights to use water. There are no mechanisms in the current *Water Act* by which this can be accomplished,[2] although the *Fish Protection Act* provides for temporary Ministerial orders where the survival of a population of fish is threatened.[3] It is important to note that the comptroller or regional water manager may, with the written consent of the licensee, issue a licence on the conditions the comptroller or regional water manager deems advisable.[4]

The current regime relies on the FITFR principle of junior or most recent licence holders terminating their water use in sequence, from the most junior to the most senior, acceding to more water use by more senior water licensees. This is, in effect, an all or nothing way of addressing water shortages. Irrespective of the social or economic value of different uses in a watershed, seniority is the sole determinant of water use. While this approach has provided certainty for investment in works for the majority of the current *Water Act*'s tenure, it no longer provides that certainty for two reasons. First, in many watersheds, for example in the Okanagan and East-Central Vancouver Island, licences acquired in the past thirty plus years will regularly be subject to seasonal water use cutoff because of over overallocation or complete allocation in the watershed. This provides no certainty of investment for new water uses that may not be

[1] While I do not necessarily agree with this view it is beyond the scope of this submission to provide a complete analysis of the circumstances under which legislation and courts interpreting that legislation view licences as property rights.
[2] R.S.B.C. 1996, c. 483. Although licences are subject to the *Water Act* and Regulations (s.6), Crown-initiated amendments to licences are allowed for the purposes set out in section 18(1). The only allowed amendment relating to water volume is to "increase or reduce the quantity of water authorized to be diverted or stored if it appears to have been erroneously estimated" at s.18(1)(h).
[3] S.B.C. 1997, c. 21 s.9, and as detailed on page 47 of the Legislative Proposal.
[4] *Supra* note 2 at s.18(3).

appropriate or different than stated licenced purposes for land to which is attached existing water entitlements. Second, FITFIR will increasingly become a legal fiction for even senior water licensees as hydrology changes. Many watersheds will experience significant variations in hydrology leading to only the most senior licence holders being permitted to take water. This uncertainty and lack of water for most users is damaging to the economy and social relations in a community. It also fails to acknowledge how water licensees behave in times of shortage. While there are moments when a licensee will flex their FITFIR muscles, in many communities the typical approach is to share the shortage at least for awhile. This is also the trend in the resolution of longstanding water use disputes.[5]

Irrespective of whether or not the new *Water Sustainability Act* will reform the FITFIR principle, the *status quo* is untenable for the reasons set out above. The question becomes, again, irrespective of FITFIR reform, whether there is a middle road between the all-or-nothing rigidity of FITFIR and implementing an entirely different system of water priorities. Expressed another way, beyond establishing conditions for water use in a licence, how can the regulatory apparatus for water use in B.C. limit water takings in a watershed in a particular season such as September or under certain conditions when there is not enough water to go around, and in particular when water is needed for fish?

The answer to that question is that the Province of British Columbia, the provincial Crown that asserts ownership over water in B.C., has vast regulatory jurisdiction available to it to establish baseline conditions or circumstances under which all licensees, licensees in specified watersheds, or licensees taking water for identified uses must take less water than allocated in their licenses. This approach to limiting water use under certain conditions relies on regulation and is not a taking of a property right in water for which compensation is owed.

2. Regulation Not Compensation

The *Water Act* is clear that all licences are subject to further regulation:

> **6** The exercise of every right held under a licence is always subject to this Act and the regulations, the terms of the licence, the orders of the comptroller and the engineer and the rights of all licensees whose rights have precedence.

This regulation is not limited to licence conditions or regulations. It is subject to all of the *Water Act*, regulations under the *Water Act*, terms of the licence, orders, and rights of senior licence holders.

[5] See, for example, Holly Doremus and Dan Tarlock, *Water War in the Klamath Basin* (Washington: Island Press, 2008).

It is important to note that the current *Water Act* scheme relies primarily on licence terms and orders to dictate how and when licensees use water.[6] The existing *Water Act* and regulations do not specify additional criteria for use or a framework within which users can take water.[7] There is an immense regulatory gap between the current licence terms approach and comprehensive regulation of the conditions under which licensees may exercise their right to use water. The Province of British Columbia has significant regulatory space in which to shape how licensee use of water before having to resort to the blunt instrument of FITFIR.

The regulation of land, the most obvious form of property, is instructive. There are no superior court cases in Canada where courts have found the extensive regulation of the use of land to result in a regulatory taking or expropriation except when the land has been regulated to the extent that it can be used solely for a public use such as a park.[8] The result is that provincial and local governments do not have to compensate landowners for land use regulations that have an impact on the value of their property or limitations on the use of their property except where the Crown or local government actually acquires the property outright, for example by creating a provincial park where a mineral tenure is no longer accessible.[9]

This intensive regulatory approach is well demonstrated in the case of *Alberta (Minister of Infrastructure) v Nilsson* where the Alberta Court of Appeal considered at what point "does an interference with the freedom of a property owner and a reduction in the incidents of property ownership equate with a taking of property warranting compensation?", finding that:

> [N]ot every interference with aspects of property ownership will amount to a *de facto* expropriation. In the context of restrictions on land use, it is clear that such restrictions, even down zoning or a development freeze, do not amount to

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[6] This fact is reiterated at page 47 of the Legislative Proposal: "Currently under the *Water Act* the CWR [Comptroller of Water Rights], a RWM [Regional Water Manager] or an engineer may regulate the diversion, use and storage of water from a stream…These regulatory powers are generally limited to enforcing the specific terms and conditions of water licences and short-term use approvals based on priorities in relation to other licensed rights, and curtailing unauthorized uses."

[7] While there are some sections of the *Water Act* and regulations that could be construed as "regulating" water use, there is no discernable code directing different behaviour based on watershed conditions or circumstances. The Water Regulation B.C. Reg. 204/88 concerns itself with application procedures, fees, hydropower and other power developments, expropriation of land by licensees, water districts, changes in and about streams (*Water Act* s.9 approvals) and short term diversion or use of water for well drilling. The other two regulations under the *Water Act* are concerned with dam safety (British Columbia Dam Safety Regulation B.C. Reg. 44/2000) and groundwater protection (Groundwater Protection Regulation B.C. Reg. 299/2004).

[8] For an excellent discussion of regulatory takings/regulatory expropriation/*de facto* expropriation see *Mariner Real Estate Ltd. v. Nova Scotia* 178 NSR (2d) 294; 177 DLR (4th) 696 (1999). The most recent discussion by the Supreme Court of Canada is found in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227.

[9] These circumstances are well known in B.C. See, for example, *British Columbia* v. *Tener*, 1985 CanLII 76 (SCC), [1985] 1 S.C.R. 533 and *Casamiro Resource Co.* v *British Columbia (A.G.)* 1991 CanLII 211 (BC CA), (1991), 80 D.L.R. (4th) 1, 55 B.C.L.R. (2d) 346 (C.A.). In the local government sphere this legal approach is codified in s.914 of the *Local Government Act* R.S.B.C. 1996 c.323:
(1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part.
(2) Subsection (1) does not apply where the bylaw under this Division restricts the use of land to a public use.

> expropriation. Valid land use controls are an unavoidable aspect of modern land ownership, through which the best interests of the individual owner are subjugated to the greater public interest.[10]

This finding is consistent with the view of courts across Canada that extensive land use regulation is the norm in furtherance of the public interest, which includes environmental protection.[11] Restriction of property rights in the nature of regulation of the use of property is valid in Canada.[12]

This position can be advanced *a fortiori* for water licences that grant the use of a volume of water for a specific purpose, which is not a grant of ownership in water. There is significant scope within which the Province of B.C. can regulate the use of water, beyond the specific conditions attached to each licence, which can address water shortages even with the FITFIR regime still operating. While a licensee may have a right to use, it is the purview of the Crown to regulate how that right may be exercised. Rather than relying on hidden licence conditions, or site- or watershed-specific orders, which are equally opaque and inaccessible, the *Water Sustainability Act* and regulations can comprehensively regulate how water may be taken (efficiency) and under what conditions (in times of shortage). Using the legislation and regulations provides a degree of public notice and oversight to comprehensive water regulation.

It is not possible to list in a meaningful way what those regulatory conditions and circumstances would be. There may be some province-wide baselines, such as mean annual discharge or precipitation to date at a certain point in the calendar year, or some conditions that must be met before FITFIR applies, such as that all municipal/local government and community water purveyors must have instituted the most advanced stage of a water conservation bylaw or plan that prohibits, for example, lawn watering (including in parks) and car washing.[13] Another example is the use of a claw back provision where all transfers of water licences, including transfers of use and transfers to another licence holder when land is sold, would retire a percentage of the licence, such as ten percent. The Province of B.C. has used this approach with the transfer of Tree Farm Licences.

However, it is likely that many of the regulatory conditions and circumstances will be watershed-specific given the divergent hydrology and conditions of use across the province. This regulatory middle ground between FITFIR and a different priority regime requires local governance for planning and some decision-making that enables creativity in taking flexible approaches to water use in times of shortage.

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[10] *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283.
[11] See, for example, the cases listed in *supra* note 7.
[12] See, for example, *Wallot c. Québec (Ville de),* 2011 QCCA 1165.
[13] See the Capital Regional District Water Conservation Bylaw No. 3061.

3. Local Governance and Flexibility During Water Shortages

The Legislative Proposal establishes policy goals of providing for some baseline environmental flows,[14] priority for domestic use in times of shortage,[15] and securing water through an agricultural water reserve.[16] Given the current chronic shortage of water in some watersheds and existing conditions that contribute to the uncertainty in water availability, like climate change, aboriginal water rights and daylighting groundwater withdrawals, it will be impossible to meet these policy goals under FITFIR without the ability to creatively decrease the amount of water used without threatening existing entitlements to use water. Meeting these policy goals necessitates water sharing or reduction mechanisms beyond the proposed review of licence terms and conditions in the Legislative Proposal.[17] Regional water governance approaches should enable area-based regulation or local regulation or agreements that allow water to flow in the most productive way in times of shortage. Ideally this would be through Water Sustainability Plans that can include watershed-specific approaches that maintain priorities but allow for those priorities to be rearranged by agreement when there is a drought. This Province of B.C. can enabled such an approach by regulation as one or the first component of Water Sustainability Plans, namely in drought management or water shortage chapters.

An oft cited example of this type of creativity would be to generate a fund from by junior users, such as municipal water purveyors and agricultural users, that would pay senior water licence holders using the water for a non-essential use, such as irrigating hay, not to use water when there are critical environmental flows. Water should also be able to be reallocated on a temporary basis amongst users of water licenced in the agricultural water reserve, and priority given to agricultural uses during drought, such as by reallocating water from municipal purveyors. These kinds of arrangements could become permanent and reflected in licences if the parties agreed as per section 18(3) of the *Water Act*.

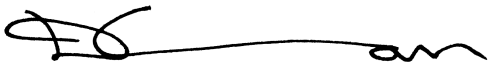
Finally, while the Province of B.C. is enabling local governance structures, there must be some permeability between centralized provincial decision-making and local governance. This divide can be bridged by allowing communities to initiate Water Sustainability Plans in addition to the Minister designating an area for a Plan. This triggering process must be transparent and be available to those communities that meet specified criteria for such planning, including demonstrating skill and capacity to undertake planning. As an expression of the precautionary principle, the opportunity to initiate a Water Sustainability Plan must be available to those communities that have not yet reached a water quality or quantity crisis yet have the support to proactively plan for the resolution of issues that will arise in the future.

[14] Legislative Proposal at policy proposal 2.3.2 page 18.
[15] Legislative Proposal at policy proposal 2.3.5 Allowance for Essential Household Use page 49.
[16] Legislative Proposal at policy proposal 2.3.6 page 53.
[17] At page 55.

In conclusion, it is heartening that the Province of B.C. has vast regulatory space for establishing conditions and circumstances by which water licensees may use water. This regulatory approach addresses the inflexibility and blunt effect of the FITFIR principle, and also supports key policy directions set out in the Legislative Proposal, namely environmental flows, improving security, water use efficiency and conservation, which includes area-based regulation, and enables a range of governance approaches.

I would be pleased to speak with you about the recommendations made in this submission and can be contacted at dlc@uvic.ca or 250-853-3105.

Yours truly,



Deborah Curran
Lawyer, Environmental Law Centre
Hakai Professor in Environmental Law and Sustainability
Faculty of Law, University of Victoria

cc: Lynn Kriwoken, Ministry of Environment
Ted White, Ministry of Environment
Livia Merit, Ministry of Justice
Oliver Brandes, Water Sustainability Project University of Victoria