



POLIS Project on Ecological Governance
Centre for Global Studies
University of Victoria
PO Box 1700 STN CSC
Victoria, British Columbia V8W 2Y2
Canada



November 12th, 2013

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

RE: University of Victoria's POLIS Water Sustainability Project Submission in Response to the B.C. Government's "Legislative Proposal for British Columbia's Water Sustainability Act" (October 2013)

We commend the B.C. Government on its effort to engage the broader public in a robust process to modernize the B.C. *Water Act*. The recent legislative proposal offers insight into a new *Water Sustainability Act* (WSA)—a welcome priority for the Province to pass and fully implement. The proposal captures important central themes and some promising new directions that were discussed during the extensive engagement process.

The proposed governance provision is a potentially useful framework for improved water stewardship, and opens the door to shared watershed decision-making with local watershed entities, local government, and First Nations—a strategy supported by POLIS. Efforts to improve monitoring and reporting, protection of environmental flows, and dealing with scarcity are all welcome and critical aspects of any kind of modern water legislation.

We specifically identify a number of areas that require additional refinement and must be addressed in the final phase of drafting to create an effective and meaningful piece of legislation. In addition to these priority items, this submission contains two appendices. Appendix A offers a detailed analysis with specific recommendations for the legislative proposal for B.C.'s *Water Sustainability Act*. It identifies areas requiring additional work, specific solutions to address concerns, and a number of positive aspects laid out in the proposal. Appendix B offers detailed examples of the public trust doctrine (PTD) as codified in legislation in other jurisdictions where this approach has successfully assisted government in safeguarding fresh water now and into the future. The specific examples outlined in Appendix B are in similar jurisdictions with a common law legal tradition that offer clear proof of possibility for British Columbia.

1. Priority Concerns to be Addressed

Environmental Flows—are crucial to the function of healthy watersheds and must be protected as a priority over other non-essential human uses.

- Environmental Flow Needs (EFN) and Critical Environmental Flows (CEF) must be embedded in Provincial Water Objectives (WO).
- All decision-makers must be obligated to consider WOs that include explicit efficiency, conservation, "beneficial use," and EFN requirements.
- Explicitly allow decision-makers to refuse to issue a licence if it negatively affects an aquatic ecosystem.



University
of Victoria

POLIS Project on Ecological Governance

research • policy • education • action

Public Trust and Beneficial Use—are interlinked and powerful concepts that must be included and clearly defined in the legislation. Beneficial Use does currently exist in the *Water Act*, however it has only a narrow definition. A better approach is for it to reinforce the notion that any use of licensed water is subject to the broader public use and interest, and must be used efficiently. It must also explicitly be defined to ensure environmental flow needs and essential household needs as prerequisites to beneficial use.

To reinforce this notion, Section 2 of the *Water Act* should be modified to ensure that private entitlements do not impair the public resource. It should state:

The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government in trust for the public and any private rights established under licences or approvals under this or a former Act are subject to be managed in the interest of present and future generations.

Area-Based Regulations—are a potentially useful tool to create appropriate customized solutions in priority regions across the province. To be effective they must be explicitly empowered in the legislation (not just regulations) to:

- suspend “first in time, first in right” (FITFIR) for new and existing licences when EFN are jeopardized;
- require monitoring of use for all new and existing licences;
- protect environmental flows in watersheds where they are not met in an average runoff year;
- include conservation requirements in new and existing licences; and
- close new licence applications in watersheds where EFN are not being met in an average year.

Licence review periods—are critical to ensure the Province better understands how water is being used, and that this still meets our collective interests for a strong economy, healthy environment, and prosperous communities. Licence review periods must:

- be 20 years (or less);
- be done in a phased approach starting immediately with the new proposed groundwater licences (starting with largest users or clustered by priority regions); and,
- extend to existing surface water licences commencing in five years (starting with oldest licences first).

Public Participation—the hallmark of effective legislation is that communities and affected individuals have an opportunity to include comments and challenge decisions. Ensuring broader participation and engagement will build legitimacy and build public confidence. To achieve this with the WSA, the following are needed:

- explicitly enable proposed watershed governance arrangements to be statutory (formal) decision-makers;
- any advisory committees created under the WSA have public representation, and proceedings and recommendations of these committees be public;
- licence reviews, setting of water objectives, setting of environmental flows, planning and Area-Based Regulations, and water efficiency standards include public notification, consultation, and hearings as appropriate;
- applications for new licences be made public and that members of the public are allowed to challenge and appeal licences to the Environmental Appeal Board (with leave); and
- government expand the powers of the Forest Practices Board to include WSA with public investigation and reporting requirements.



Water Fees and Royalties—groundwater fees and rentals are set far too low. Overall water-use rentals (fees) for both groundwater and surface water resources do not cover full administrative expenses, including comprehensive monitoring and reporting of water withdrawals and enforcement capacity, or encourage more efficient use of water.

- Explicit provisions must be made that enable local watershed governance arrangements to levy fees to fund delegated management and governance functions.

2. Main Areas of Additional Concern in Proposed *Water Sustainability Act*

- The FITFIR water allocation principle remains fundamentally unaltered and is now extended to groundwater.
- Water as a public trust is not codified in the proposed legislation.
- The lack of clear and robust legally enforceable environmental flow protections that apply across the province in watersheds where EFN are under threat.
- No explicit requirements in Area-Based Regulations to protect EFN and apply WOs to all existing and new licence applications.
- Excessive reliance on statutory decision-maker discretion to ensure social and ecological benefits are protected.
- No provisions for oversight and accountability, such as the creation of an independent Resource Practices Board.
- Weak monitoring and reporting requirements.

3. Next Steps in a Credible Process

It is imperative that government maintains the high standard of transparent and meaningful engagement that has been established in the *Water Act* modernization process to date. Public dialogue must continue as the *Water Sustainability Act*, and its supporting regulations, are developed and implemented.

The POLIS Project on Ecological Governance recognizes that the *Water Sustainability Act* legislation is enabling, and critical detail will follow in regulations. Therefore, we urge an open, transparent, and consultative process during the regulation development stage of the WSA.

In particular, a formal commitment to offering an opportunity for public comment on regulations will help ensure the process remains credible. This opportunity will build confidence that the Province is indeed committed to a new approach to water management and is transparent in its efforts to ensure the protection of fresh water in British Columbia, now and into the future.

Sincerely,



Oliver M. Brandes, BA(H), Dip.RNS, M.Econ., JD
Co-Director & Water Sustainability Project Lead, POLIS Project on Ecological Governance, University of Victoria
Research Associate, Centre for Global Studies, University of Victoria
Research Affiliate, Environmental Sustainability Research Centre, Brock University
Adjunct Professor, Faculty of Law & School of Public Administration, University of Victoria
Adjunct Professor, Department of Environment & Resource Studies, University of Waterloo
Founding Member, Forum for Leadership on Water (FLOW-Canada)



University
of Victoria

POLIS Project on Ecological Governance

research • policy • education • action



APPENDIX A:
**Detailed Strategic Analysis and Recommendations for Revision of the
LEGISLATIVE PROPOSAL FOR BRITISH COLUMBIA'S WATER
SUSTAINABILITY ACT**

Prepared by: Oliver M. Brandes, Co-Director, POLIS Project on Ecological Governance
Centre for Global Studies, University of Victoria¹

Introduction and Broader Context

Water is a critical resource that underpins economic growth and community prosperity. Globally, reforming water legislation is an emerging priority across jurisdictions as water concerns mount and connections between water and the economy, food, energy, health, and security are increasingly revealed. Europe, Australia, New Zealand, South Africa, and the Southwest U.S. have significantly changed and updated their water management and law regimes over the last decade, including explicit protections for environmental flows, modernized and more flexible allocation systems, rigorous water planning and promotion of conservation, improved governance more focused on citizen engagement in decision-making at the watershed scale, and an emphasis on accountability and effective oversight.

In Canada, a number of provinces have also either recently passed legislation (such as Ontario, Quebec, Alberta, and Saskatchewan) or are considering major updates to their water laws (including Nova Scotia, New Brunswick, and the Northwest Territories). An increasing number of Canadians—including First Nations, business associations, local governments, civil society organizations, stewardship groups, and communities of all sizes—place a high priority on safeguarding water resources. One of the most important tools for effectively managing and governing water in British Columbia is the provincial *Water Act*. Fully modernizing this more than 100-year-old legislation is an urgent priority to ensure the Province is well positioned in the coming decades to deal with the variety of challenges associated with a growing and dynamic province, and to deal with the uncertainties of a changing climate and its impacts on precipitation, rivers, and lakes.

Overview of this Brief

The government-released *A Water Sustainability Act for B.C.: Legislative Proposal* (October 2013) provides a good starting point for a comprehensive update of B.C.'s *Water Act* and contains a number of novel and potentially useful elements. If fully executed and implemented, it has the potential to help B.C. catch up with policies already in place in a majority of Canadian provinces and territories. However, a number of uncertainties and identified gaps in the proposed legislation suggest that B.C. will likely fall well short of becoming a leader in freshwater protection and stewardship.

¹ This appendix is based on (and fundamentally unchanged from) the briefing note *Strategic Analysis and Recommendations for "Legislative Proposal for British Columbia's Water Sustainability Act,"* which was released by the POLIS Water Sustainability Project on October 25th, 2013, at the outset of the B.C. Government's legislative proposal review period. Dr. Jon O'Riordan, former Deputy Minister in the B.C. Ministry of Sustainable Resource Management and POLIS Strategic Policy Advisor, provided detailed review and thoughtful input to this initial analysis.

This commentary and analysis on identified policies in the legislative proposal is organized into three main sections:

- **Section 1** outlines the key considerations for advancing a more comprehensive WSA. It describes what is needed to achieve the vision of an updated *Water Act* and reveals areas of concern where the legislative proposal falls short of achieving more sustainable outcomes for fresh water in British Columbia.
- **Section 2** briefly notes areas of strength and where innovative tools are enabled in the proposed legislation.
- **Section 3** identifies significant vulnerabilities or gaps, and notes possible additional options for consideration that could fundamentally improve the proposed legislation.

This appendix is not a detailed, section-by-section analysis of the proposal. Rather, it notes the areas where additional work is needed to strengthen the proposed Act. It is intended as a resource to various groups across the province during the consultative process and to assist government as it seeks to draft the WSA and its supporting regulations.

It is important to acknowledge that government has committed to, and largely fulfilled, its promise to engage in a credible and transparent engagement process. Throughout three phases of public consultation, held over five years, the government has maintained a high standard of meaningful public dialogue. It has provided a variety of useful documents, workshops, background information and presentations, throughout the development of the proposal for a *Water Sustainability Act*. We are hopeful this spirit of openness and engagement will continue—especially as critical supporting legislation, including regulations, are developed.

Despite this general spirit of openness it is critically important to note that the formal consultation effort to date has been far less than acceptable to many First Nations. For the honour of the Crown to be maintained, engaging First Nations in government-to-government consultation and accommodation processes is essential. The process should meet the standards set in the New Relationship and constitute meaningful consultation. Key decision-making elements related to, for example, governance, establishing plans and environmental flow requirements proposed in the WSA must explicitly include affected First Nations at the earliest possible opportunity.

Section 1: Key Considerations for Advancing a Comprehensive *Water Sustainability Act*

If the desired outcome of a modern *Water Sustainability Act* is to be achieved, five core issues must be resolved:

1. Priority for environmental flows;
2. A flexible allocation system that embeds the public trust;
3. Commitment to shared water governance;
4. Full-cost recover through fees and water-use rentals; and,
5. Accountability and oversight.

Some progress has been made on issues 1, 2, and 3. However, they each require further development or clearer commitments (perhaps defined in the forthcoming regulations). Minimal progress has been made on issues 4 and 5, and significantly more work is needed in these areas.

1. Priority for environmental flows

Environmental flows are crucial to the function of healthy watersheds and must be protected as a priority over other non-essential human uses. As acknowledged by the Province and emphasized in its *Water Act Modernization: Report on Engagement* (Fall 2010), a general preference by respondents for standards over guidelines exists.

Protecting environmental flows is increasingly common “best practice” internationally, with Australia, South Africa, and Florida as leaders in the field. International leaders tend to clearly prioritize EFN ahead of other non-essential human uses. The legislative proposal recognizes that functioning watersheds and water bodies are the foundation of economic and community prosperity and protecting watersheds is cheaper than attempting to restore watershed function after damage has been done. However, the proposed legal tools are likely insufficient to achieve this goal.

To be effective, an environmental flow regime requires clear, binding rules that apply to both new and existing water licences across the province. These rules must legally establish both environmental flow needs (EFN) and critical environmental flow (CEF) protections. Further, the legislation must clearly “set aside” an ecological reserve that is not available for any use other than the conservation and maintenance of fish habitat and preservation of the natural ecosystem.

TABLE 1: Specific WSA Proposal Concerns and Opportunities: Environmental Flow Needs

Primary Concerns	Possible Solutions
-excessive reliance on the discretion of a statutory decision-maker (through adjudication of EFN clauses only in new or amended licences or through the proposed Water Objectives)—p19	-more clarity and clear direction on how decision-makers will be required to consider EFN, CEF and beneficial use in all aspects of decisions -clarity (possible through guidelines) on how issues such as short-term economic or resource development projects will be weighed against longer-term ecological health or cumulative effects in the consideration process
-CEF protections are insufficient to ensure a basic safety net to protect against ecologically damaging over-allocation (and use)—p48	-in streams where existing licences reduce flows below EFN, the proposed regulations should require the decision-maker to require monitoring and reporting of licensed use, enable more efficient use of water, and/or use Area-Based Regulations to modify existing licences such that EFN and CFN are achieved -these thresholds and supporting allocation systems could then be customized on a region-by-region basis through collaboratively produced watershed sustainability plans -CEF must be well defined and ecologically defensible with “low risk” and “quick licensing” processes well defined and limited to none ecologically sensitive areas -CEF protections during drought or scarcity should extend beyond Section 9 <i>Fish Protection Act</i> powers since 1) fish may not be present in key streams or watersheds and/or 2) critical ecological thresholds may be jeopardized that are different from those required by fish

<p>-EFN protection must apply to existing and new licences—p19</p>	<p>-EFN provisions should not be restricted to just new licences, but should be also applied in streams where water is insufficient to meet ecological needs</p> <p>-provision in the <i>Fish Protection Act</i> that allows the decision-makers to reduce use in order to meet fish flow needs should also be applied in the WSA in the context of EFN</p> <p>-presumptive rules for EFN would create a default placeholder and allow sufficient time and opportunity for regional planning processes and more nuanced application of site-specific environmental flow determinations; the assumption should be EFN protections remain in place with deviations only possible with written reasons</p> <p>-when the EFN is breached in an average flow year (once every second year), the DM must, by Area-Based Regulation, be able to require the new Water Objectives to apply retroactively</p>
<p>-Water Objectives might not be binding on certain sectors such as Forestry and Oil and Gas—p25</p>	<p>-Water Objectives should be “objectives set by government” and, as such, must be binding on all decision-makers, including in the Forestry and Oil and Gas sectors</p>
<p>-Water Objectives do not explicitly include EFN, CFN, or “beneficial use” requirements—p25</p>	<p>-it is critical that both EFN and CFN are clearly set in Water Objectives, especially in critical streams</p> <p>-a redefined “beneficial use” (see below) should also be included explicitly as a part of all Water Objectives</p>
<p>-Water Sustainability Plans do not automatically trigger if EFN or CFN thresholds are jeopardized—p28</p>	<p>-create authority for DM (including local watershed governance authorities) to trigger WSP process when EFN or CFN thresholds are repeatedly realized (e.g. 2 out of 3 years or 3 in 5 years)</p>
<p>-No authority to create an Ecological Reserve</p>	<p>-under the current Water Act it is possible for the Province (though an order) to create an ecological reserve, a similar power should exist in the WSA in ecologically or culturally significant streams, rivers and lakes similar to the proposed Agricultural Water Reserve proposal—p53</p>
<p>-Insufficient public input/participation in setting and ensuring enforcement of EFN and CEFs</p>	<p>-triggers for EFN and CEF must be firm and it must be possible for affected third parties, including First Nations or communities (including where delegated or shared watershed governance arrangements exist), to initiate EFN and CEF protections</p> <p>-the regulation enabling Area-Based Regulations should explicitly require public consultation prior to the Area-Based Regulation being enforced</p> <p>-public review/appeal of EFN and CEF assessments will enhance credibility and build public confidence</p>

2. Flexible allocation system that embeds the public trust

A modern allocation system must be flexible, resilient, and help minimize conflict. The FITFIR system has had some historical benefits and is seen to be administratively simple, but current challenges indicate the need for a more flexible and sophisticated approach. Ultimately, FITFIR must be replaced by a more flexible system that clearly articulates the public trust notion, thereby ensuring that legal protections exist for fresh water across the province for future generations. A more detailed discussion of possible alternatives to FITFIR is offered in Section 3.

TABLE 2: Specific WSA Proposal Concerns and Opportunities: Allocation System

Primary Concerns	Possible Solutions
<p>-“beneficial use” and how it will be applied is not clearly defined—p52</p> <p>-in the old <i>Water Act</i>, “beneficial use” simply meant that the licensee paid an annual fee; a much broader definition that includes social benefits is required</p>	<p>-standards of efficiency and requirements to ensure EFN must be clearly built into the definition of “beneficial use” so that all new applicants meet a minimum standard of conservation in order to qualify for a new licence regardless of whether the EFN is being approached</p> <p>-“beneficial use” requirements should be included as an explicit component of provincial Water Objectives</p>
<p>-FITFIR is an outdated, rigid system that locks in water uses and may ultimately lead to increased conflicts and closed systems that create pressure for water markets—p17</p> <p>-FITFIR extended to groundwater—p32</p>	<p>-FITFIR is a problematic system and may increase future claims of compensation to water users; further extending this system to groundwater is not advised</p> <p>-Section 5 of the <i>Water Act</i> already limits the rights acquired under a water licence to “divert and use” water and does not grant any rights of ownership over the water. This should be amended to further clarify that entitlements associated with water licences are not rights but only usufructory.²</p> <p>-see more detailed discussion of alternatives to, and transition from, FITFIR in Section 3</p>
<p>-powers under Area-Based Regulation not sufficiently explicit to address EFN and CFN</p>	<p>Area-Based Regulations explicitly empowered to:</p> <ul style="list-style-type: none"> • suspend FITFIR for new and existing licences when EFN are jeopardized • require monitoring of use for all new and existing licences • include conservation requirements in new and existing licences • close new licence applications in watershed where EFN are not being met in an average year
<p>-Public Trust Doctrine not addressed in legislation—p98</p>	<p>-one simple step toward enabling the public trust concept is amending Section 2 of the current <i>Water Act</i> to the following:</p> <p><i>The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government in trust for the public and any private rights established under licences or approvals under this or a former Act are subject to be managed in the interest of present and future generations</i></p> <p>-see more detailed discussion in Section 3</p>
<p>-review of Licence Terms and Conditions (p55) is currently set to commence 30 years after WSA comes into force (or 30 years after future licences are approved); this is too distant to deal with many challenges that already exist and are likely to only intensify in the coming decade</p>	<p>-reviewing licences to ensure they reflect improved understanding of actual stream flows, aquifer levels, or changing hydrology is critically important as this builds necessary flexibility and ensures the water is being beneficially used</p> <p>-on existing licences, this review should be done sooner than the proposed 2044 review date for existing licences; we propose the following tiered review process:</p> <ol style="list-style-type: none"> 1) next 5 years to review licences 50 years older or more 2) next 10 years to review licences 30 years and older 3) all others existing (and new) licences 20 years from their priority date

² (Law) the right to use and derive profit from a piece of property belonging to another, provided the property itself remains undiminished and uninjured in any way [from Late Latin *ūsūfructus*, from Latin *ūsus* use + *fructus* enjoyment]

3. Commitment to shared watershed-based governance

Modern approaches to water management and governance around the world ensure a robust role for those communities and interests most directly affected by decisions. Strong support for collaborative governance and substantive local participation exists and is acknowledged by the Province of B.C. Although no clear consensus exists on a specific model, consensus does exist on a variety of possible approaches and the need for more say by those affected.

The Province must continue to play a lead role in articulating priorities and setting minimum standards that must be achieved under new watershed governance arrangements. To be effective, local watershed governance arrangements must have a clear mandate and the financial capacity to engage in water and watershed management activities and decisions. Such details should be explicitly laid out in the WSA.

The WSA opens the door for possible delegation and sharing of responsibility for some water management activities or decisions. Provincial pilot projects will provide critical insights as to the range of watershed management approaches and decision-making functions that might be most appropriate. More detail is needed in the forthcoming legislation and regulation, including a clear articulation of accountability mechanisms (which will likely be defined in regulations) and clear statements about who will be responsible for what, and what financial resources will be available for the performance of those duties. We invite an ongoing transparent dialogue as these aspects are finalized in regulations. In the meantime, the WSA should:

- explicitly include local watershed governance arrangements in the list of possible decision-makers under the Act;
- ensure designation of local watershed governance arrangements and that approvals of plans be done through an independent (non-political) process based on clear accountability and representation criteria; and,
- enable local watershed governance arrangements to access sufficient resources to execute activities through, for example, a pool of funds from water-use royalties, a delegated taxing authority, etc.

4. Fees and Water Use Rentals

One of the most important aspects of any modern water act is the ability to secure sufficient resources and capacity to actually implement the key provisions. In B.C., data gathering and additional information regarding environmental flows or groundwater thresholds will be required. In addition, capacity for monitoring, enforcement, and, in some regions, new institutions and organizations will also be needed (e.g. watershed or oversight bodies). It is therefore important to acknowledge that any new legislative regime will require resources to ensure effective implementation. Thus, attention to ensuring additional funds through water rentals and fees (including groundwater) will be critical. Appropriate pricing of water allocations through licensing must be set to ensure:

- an effective provincial enforcement regime can be maintained (polluter pays);
- comprehensive monitoring and reporting of water use and impacts on watersheds and aquifers (transparency);
- financial resources (and expertise) for development of enforceable plans (capacity);
- basic administrative support for designated authorities (watershed governance); and
- increased efficiency and conservation (volume-based pricing).

Current industrial/commercial water use fees and the proposed groundwater fee (rental) are embarrassingly low at 85 cents per 1000m³. This represents a major missed opportunity to properly resource better water management and governance in B.C.³ Water is highly valued and massively underpriced in B.C. British Columbians are willing and able to pay more to ensure that freshwater is protected and effectively managed. Existing fee schedules are not sufficient to even cover basic administrative costs, let alone help support important and needed monitoring, flow assessments, and enforcement. A higher, more appropriate fee for both groundwater and surface water is needed. A comprehensive review of the pricing structure for surface water licences is also needed to better resource the comprehensive approach to water management envisioned in the WSA.

5. Accountability and Oversight

Ensuring that what is said will get done *actually* gets done is fundamental to building public confidence. A foundation of accountability is built on reliable public reporting, which must include comprehensive monitoring, transparent reporting and ability for independent and credible investigation. Reporting on both the state of the resource and the function of the institutions tasked with managing water resources is needed.

At p99 of the Legislative Proposal Document a rationale for the lack of need for additional oversight is offered (increased oversight was a common theme and prominent recommendation in earlier engagement periods). The government’s response includes a suggestion that existing tools such as the Ombudsmen or Auditor General’s office are sufficient. A fundamental disagreement exists that these bodies are sufficient. They have no priority (or sufficient resources or expertise) around water. They rarely undertake investigations of the nature needed to ensure the principles and goals (and even the main elements) of the proposed WSA are being implemented.

TABLE 3: Specific WSA Proposal Concerns and Opportunities – Accountability and Oversight

Primary Concerns	Possible Solutions
-no commitment to a Resource Practices Board—p99	-amend the enabling section of the Forest Practices Board to include investigations of water and watersheds -this Board would have explicit priorities to regularly report on commitments and progress on implementation of the WSA, and would also oversee or develop state-of-the-watershed reports (as committed in the <i>Living Water Smart</i> plan).
-reporting requirements on actual water use and impacts on watersheds and communities remains vague—p61	-an independent Resource Practices Board should audit and ensure that the information gathered is accurate and fulfils the key elements of the proposed “measuring and reporting” regulation.

³ This is the equivalent of the water used by approximately 3000 average Canadians in a day—for less than a dollar.

<p>-formal monitoring and reporting requirements only apply to large users—p61</p>	<p>-a large user threshold of 250m³ per day is an absurdly high threshold as only a small fraction of users in the entire province would actually reach this threshold – far more important is understanding the overall use levels and so detailed monitoring of use (and public reporting) should be set at a level so that the majority (but not all) of licensed users meet threshold so an accurate picture of what amounts of water are being used in the province</p> <p>-all major water users are required to meter their water use, with that information being relayed to the Board and/or lead provincial ministry, so that that information will be published on a watershed-by-watershed basis.</p>
<p>-no opportunities for public participation in the process of granting water licences -no mention of groundwater users having standing or rights to participate</p>	<p>-including provisions for public notice of applications, public hearings where appropriate</p> <p>-expand standing for participation in adjudications to include the right of any resident of B.C. to object prior to licence issuance, and the ability of the public to appeal the granting of licences</p>

Section 2: Areas of Strength or Innovation

A number of aspects of the proposed legislation offer opportunities to more effectively manage water in the province. Many of the identified priorities are much needed in B.C. and would be best described as “catching up” with accepted normal practice in many other comparable jurisdictions. These include:

- Area-Based Regulations;
- Regulating Groundwater Extraction and Use;
- Measuring and Reporting;
- Review of Licence Terms and Conditions (time-limiting licences); and,
- New Enforcement Tools.

No detailed discussion or analysis is provided on these areas in this strategic analysis, since they are largely obvious priorities and likely minimum requirements needed to update the legislation. A number of additional potential useful tools are also included in the proposal they include:

- Water Objectives—To be effective these must apply to decision-makers in all sectors and will require clarity about how objectives will be weighed against competing criteria such as resource development.
- Water Sustainability Plans—It is widely acknowledged that comprehensive (community- and stakeholder-based) planning is a necessary criteria for successful management of freshwater resources and although similar planning provisions exist in the province (e.g. Section IV Water Act, Drinking Water Source Protection Plans), few are ever completed or passed into law. This suggests that better mechanisms (or triggers) must be included in the WSA to ensure they are enforceable. **See discussion below on Watershed Plans and Triggers.**

- Agricultural Water Reserve—This is a potentially useful tool for ensuring priority of agricultural water uses in specific regions in the province.
- Enabling a variety of governance arrangements—No one-size-fits-all governance approach is likely to work in a complex social, economic, and ecological environment, like B.C. Thus, enabling a variety of approaches/models will provide a variety of possible solutions, which is more likely to leverage local expertise and resources and positive local outcomes.

Section 3: Main Areas of Vulnerability and Missed Opportunities

Lack of fundamental reforms to FITFIR

FITFIR locks in past uses and thus creates rigidity in water use that limits innovation and incentives to conserve. It is likely to result in closed systems (no new licences can be issued) increasing pressure for eventual adoption of water markets. It is easier to deal with the challenges of transition now rather than later. For example, the experience in Alberta indicates regret at not “fixing FITFIR” and has led to an increased role for water markets.

- FITFIR is a problematic system and should not be extended into new surface water licences or used as the foundation of the groundwater regime.
- There is a modest benefit for FITFIR being easy to administer, but future problems/rigidity will not be “easy” to administer as scarcity and other conflicts increase (costs will outweigh benefits).
- More legal clarity is needed on whether compensation would be owed if a province-wide shift were to be considered, therefore ensuring clarity in the WSA that licences grant usufructory entitlements only (and not property rights).

Possible Alternative

A new system should more explicitly be based on a proportional, “share-the-pain” approach (where in times of scarcity, licence holders would all have to reduce water takings proportionate to what they were assigned). This kind of approach could also be based on articulated priorities—such as drinking water, agricultural use, industrial and commercial, domestic, etc.—and periodically reviewed and supported by a clear provincial framework with specify triggers (or thresholds) to ensure a collective reduction in water use among existing licences based on best practices by sector. This system would apply beneficial use criteria and historical FITFIR rights could inform priority order within the given identified sectors.

Existing FITFIR licences could be grandfathered in, and eliminated over time through beneficial use assessments, specified Watershed Sustainability Planning in designated areas, or, eventually, with some creative forms of compensation (for example offering graduated types of licences at smaller volumes). It is very likely that applying beneficial use assessment on existing water licences will significantly reduce the amount of “old” licences and significantly reduce volumes committed.

Codification of the Public Trust Doctrine

The Public Trust Doctrine (PTD)⁴ is not addressed directly in the legislative proposal, however in *Part 5 – Government Response to Policy Suggestions* a rationale for not explicitly using the PTD is

⁴ A detailed analysis of the application of the Public Trust to B.C.’s Water Act is available at <http://poliswaterproject.org/publication/352>

provided. It is our assertion that this section mischaracterizes a number of aspects associated with the PTD:

- In its modern form it is a legal principle, from the United States, but its application is much broader (including New Zealand, South Africa, European Union, India, and elsewhere).
- It has consistently been applied in a number of U.S. States (equivalent to Canadian provinces), such as California, Washington, Oregon, Hawaii, Michigan, and elsewhere. The U.S. system is similar to the Canadian Federation where U.S. States have primary responsibility for water management. So, it is only natural that a level of diversity across states exist (as is the case with Canadian provinces). Numerous states have a long track record of successfully using the PTD as a tool to promote sustainable water management.
- Aspects of the concept and approach have been used in Canada in the context of wildlife management (e.g. Northwest Territories, Yukon).

Watershed Governance and Triggers for Planning and Decision-Making

Who and how decisions are made is one of the most critical elements to ensuring better ecological and community outcomes in B.C.'s watersheds. It is well understood that, currently, insufficient resources exist at the provincial government level to develop and implement plans (or other water sustainability tools). Therefore, enabling more local control will allow for better leveraging of local expertise and resources for completion of key plans and development and implementation of appropriate tools.

The current proposal is unclear or only provides a partial framework for ensuring those most impacted by local water management issues will have a say in either initiating planning provisions or ensuring appropriate area-based solutions are available and made enforceable by law. The proposed system relies on similar triggers to initiate Water Sustainability Plans as the current system of water (and land use) planning.

To be more effective, the planning process should be trigger-able and overseen by a recognized decision-maker or the designated local watershed governance arrangement and approvals for the developed Water Sustainability Plans should be arms length from politically driven short-term priorities and instead be approved by an independent expert body that reports directly to the legislature such as an officer of the legislature or a Sustainable Water Commission that would be mandated to approve WSP that meet certain minimum tests and designate appropriate watershed governance authorities.

Monitoring and Reporting

Although monitoring and reporting is addressed in the proposal, the details remain vague and the threshold for required monitoring is extremely high (250m³ or more per day). A more reasonable threshold that captures the majority of users in the province will be far more useful for developing a comprehensive picture of provincial water use. There are only a very few such large users in the entire province so the information would have only limited value as the real concern is the amount water being collectively withdrawn from B.C. rivers, lakes and aquifers. Details about what requirements for reporting (what is measured, how often, in what detail, and by whom to ensure sufficient confidence of accuracy) are undetermined and are to be left to future regulation development.

Possible Alternative

With a new *Water Sustainability Act*, a more comprehensive reporting and management regime should emerge. One where:

- Estimates of available water resources are made before water resources are allocated;
- Water use plans or Area-Based Regulations are in place before water resources are further allocated in areas approach EFN thresholds; and
- Actual water usage is tracked and compared to water use plans, and there is an ability to modify plans, including changes to approved withdrawal rates, based on circumstances.

State-of-the-watershed reporting was a high priority (with formal commitments) in *Living Water Smart*, yet there has been no progress to date. A new Act should provide resources and a framework/incentives for completion of this review.

The following three recommendations, then, are viewed as an essential starting point for the *Water Sustainability Act* related to monitoring and reporting:

1. Grant one provincial agency sole responsibility for gathering and reporting all information on water use and have an independent auditor periodically verify the agency's performance;
2. Require immediately that all major (the threshold of 250m³ appears to be too high) water users meter the water they consume and report that data to the provincial agency responsible for water use data collection; and
3. Increase water-use fees and use a portion of the revenues collected to pay for a province-wide water-use database and increased environmental monitoring and enforcement efforts.



POLIS Project on Ecological Governance

watersustainabilityproject

APPENDIX B: Examples of Statutory Recognition of the Public Trust Doctrine in Canada, the United States, and Internationally

Appendix Prepared by: Randy Christensen, Lawyer (U.S. & Canada) & Research Associate, POLIS Water Sustainability Project,
Centre for Global Studies, University of Victoria

Introduction

The public trust doctrine (PTD) is increasingly recognized in natural resources management by both legislatures and courts. The ideal operating framework for using the public trust doctrine to protect water resources is like a well-balanced tripod: a robust and updated common law, a constitutional declaration of public ownership of water, and statutory incorporation of the doctrine into water resources legislation. This framework integrates the public trust doctrine in all its forms and allows each form to be mutually reinforcing—a strength in one leg of the tripod can compensate for corresponding weaknesses in another leg.¹

This appendix provides examples of legislative recognition of the PTD in the United States, internationally, and growing recognition of the PTD in Canada.

United States

The PTD has had its widest acceptance in the United States. Individual states display varying levels of robustness in applying the PTD to water resources. Although the doctrine began and has developed as common law, states have adopted supplementary legislative provisions and constitutional amendments. At its core, the PTD remains a state-based doctrine, unique to each state but with lessons transferrable to other states.

The PTD has been applied consistently in a number of U.S. states (equivalent to Canadian provinces) such as California, Washington, Oregon, Hawaii, Michigan, and elsewhere. The U.S. system is similar to the Canadian Federation: U.S. states have primary responsibility for water management. So, it is only natural that a level of diversity across states exists (as is the case with Canadian provinces). Numerous states have a long track record of successfully using the PTD as a tool to promote sustainable water management.

¹ Alexandra B. Klass & Yee Huang, *Restoring the Trust: Water Resources & the Public Trust Doctrine, A Manual for Advocates* (2009).

Jurisdiction	Action	Year	Language	Impact/ Outcome
Hawaii; Constitution	Constitutional protection of public resources and creation of public trust duties	2009	-This provision establishes protection for coastal marshlands to “fulfill the responsibilities of each generation as public trustees of the coastal marshlands for succeeding generations.” -All public natural resources are held in trust by the State for the benefit of the people.	In <i>Robinson v. Ariyoshi</i> (1982) finding a public trust imposed on all waters of the state with “a concomitant duty to maintain the purity and flow of our waters for future generations”
Hawaii, Haw. Rev. St. § 174C-3 6	Vests groundwater as waters of the state; Requires applicants for water permits to show use is consistent with public interest	2008	- This section defines "water" or "waters of the State" as “any and all water on or beneath the surface of the ground.” - Applicants for water use permits must demonstrate that the proposed use is consistent with the public interest.	In the <i>Waiahole</i> case, applied the PTD to all state waters, noting that there was “little sense in adhering to artificial distinctions [between surface water and groundwater] neither recognized by the ancient system nor borne out in the present practical realities of this state.”
California; Cal. Water Code ‘§§ 102 and 104	Vests water in the state and recognizes the public’s paramount interest in the waters of the state and recognizes the state’s responsibility to determine the use of water.	2009	“[a]ll water within the State is the property of the people of the State.” And “[I]t is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.”	In <i>National Audubon Society v. Superior Court</i> 658 P.2d 709 (Cal. 1983) (in a case concerning the diversion of tributaries of Mono Lake, holding that the public trust doctrine encompasses the non-navigable tributaries of navigable waters and that water licences held by the City of Los Angeles would have to be modified.

Jurisdiction	Action	Year	Language	Impact/ Outcome
Washington; Wash. Rev. Code § 90.03.290	Recognition that water belongs to the public and proposed water uses must be measured against the public interest.	2009	For water permits for power development, the Department of Environmental Protection must determine whether the use is “likely to prove detrimental to the public interest, having in mind the highest feasible use of the waters belonging to the public.”	In <i>Caminiti v. Boyle</i> 732 P.2d 989 (Wash. 1987) in upholding statute that permitted riparian owners to build private recreational docks, the court established a test to determine the violation of the public trust doctrine.
Arizona, Ariz. Rev. St. § 45-141	Declaration of public ownership of groundwater.	2009	Section 45-141 declares that waters of all sources, including surface and ground, “belong to the public” and are subject to appropriation and beneficial use.	In <i>San Carlos Apache Tribe v. Super. Ct.</i> , the court said that the PTD is the doctrine is a state-level constitutional limitation on legislative power to give away trust resources and found that the legislature could not remove restraints on its powers.
Idaho, IDAHO CODE § 42-1501	Public trust protection of instream flows	2009	Legislative declaration accompanying legislation: “the streams of [Idaho] and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.”	

Jurisdiction	Action	Year	Language	Impact/ Outcome
Vermont, VT. STAT. ANN. tit. 10, § 1390(5)	Legislative declaration of public ownership of groundwater and that groundwater is subject to the PTD.	2009	“It is the policy of the state that the groundwater resources of the state are held in trust for the public.”	In <i>Omya Solid Waste Facility Final Certification</i> , the court found that the public trust is not limited to solely managing groundwater quantity. The public trust should also manage groundwater quality. As such, a rule for considering tailings pits had to be reviewed.

International

In the forthcoming book *The Public Trust Doctrine*, Professor Michael Blumm writes that “[o]ne of the more surprising developments in recent years is the spread of the PTD internationally. In fact, the doctrine has evolved more quickly abroad than it has in the United States,” its growth often in parallel with the ideal of environmental human rights. The UN’s inclusion of drinking water and sanitation as a fundamental human right is an example of a kind of fusion of the PTD and environmental human rights.

Jurisdiction	Action	Year	Language	Impact/ Outcome
South Africa, <i>National Water Act</i>	Established the South African government as “the public trustee of the nation’s waters.”	1998	<p><i>Public trusteeship of nation's water resources, Section 3</i></p> <ol style="list-style-type: none"> 1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate. 2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values. 3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic. 	<i>Have not found an indication that these provisions have been judicially considered.</i>

Jurisdiction	Action	Year	Language	Impact/ Outcome
Philippines; <i>Constitution of the Philippines</i> (“1987 Constitution”)	Constitutional recognition of the right of people to a healthy environment	1987	“[t]he state shall protect and advance the right of the people to a balanced and healthy in accord with the rhythm and harmony of nature”	In <i>Oposa v. Factorum</i> , schoolchildren invoked the 1987 Constitution and the <i>National Environmental Policy Act</i> to challenge timber licences that the government issued sanctioning the clear-cutting of virtually all forests in the country.
Philippines; <i>National Environmental Policy Act</i>	Statutory recognition of government’s role as trustee and guardian of environment	1977	Required the nation to “recognize, discharge, and fulfill the responsibilities of each generation as trustee and guardian of the environment for succeeding generations.”	<i>See above.</i>
Uganda, <i>Constitution</i>	Constitutional recognition of the right to a healthy environment, which has been interpreted by courts as encompassing public trust duties.	1995	The Ugandan <i>Constitution</i> , in Article 39, also proclaims that “[e]very Ugandan has a right to a clean and healthy environment.” The <i>Constitution</i> also states that the government “shall protect natural resources”.	In <i>Advocates Coalition for Development and Environment (ACODE) v. Attorney General</i> , a court struck down a 50-year permit to convert the Butamira Forest Reserve into a sugar plantation. Citizens dependent on the reserve for agro-forestry, water, and other subsistence challenged the permit in the High Court of Uganda, claiming a violation of the PTD.
Uganda, <i>National Environmental Act</i>	Statutory recognition of the right to a healthy environment and protection for future generations.	1995	Declares that the right to a healthy environment is a fundamental right and calls for the “equitable” use and conservation of the environment and natural resources “for the benefit of both present and future generations.”	<i>See above</i>

Canada

The PTD has had a limited embrace in Canadian legislation. But, many Canadian jurisdictions have already adopted many of the key components of the PTD, such as the legislative declaration that water is publicly owned.

Jurisdiction	Action	Year	Language	Impact/ Outcome
British Columbia, <i>Water Act Water Privileges Act, and Water Act Amendment Act</i>	Right of use of all water vested in the Crown “Ownership” of water by the Crown.	1892 and 1925	“The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.”	
British Columbia, <i>Islands Trust Act</i>	The Government of British Columbia enacted the Islands Trust Act in order to protect the unique character and environment of the islands of the Georgia Strait. The Act creates a unique form of local government for the Islands, establishing an Islands Trust Council and local trust committees to conduct land use planning for the trust area.	1974	The object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally.	The BC Court of Appeal in <i>MacMillan Bloedel v. Galiano Island Trust Committee</i> , [1995] BCJ No. 1763, confirmed that the language in this legislation demands a higher level of environmental protection for the Islands.
British Columbia, <i>Water Act</i>	Inclusion of groundwater in government ownership of Water.	1979	The Lieutenant Governor in Council may, by regulation, fix a day on and from which some or all of Parts 2 and 3 of this Act apply to groundwater in British Columbia	In <i>Greenwood Forest Products Ltd. v. US Fire Ins. Co.</i> (1982), the court noted liability for a chemical spill into a water body was based on public ownership of water.

Jurisdiction	Action	Year	Language	Impact/ Outcome
British Columbia, "Canfor" Decision	Crown ownership of land creates rights and fiduciary duties to protect publicly owned lands, including the environmental values inherent in those lands.	2005	Supreme Court Justice Binnie affirmed "the notion that there are public rights in the environment that reside in the Crown and has deep roots in the common law." He noted "important and novel" issues that may arise from those rights, including "the Crown's potential liability for inactivity in the face of threats to the environment, [and] the existence or non-existence of enforceable fiduciary duties owed to the public."	In <i>British Columbia v. Canadian Forest Products Ltd.</i> , 2004 SCC 38, [2004] 2 S.C.R. 74, the court recognized the provincial government's "right and the fiduciary duty to seek damages for the destruction of wildlife which are part of the public trust.
NWT; <i>Environmental Rights Act</i>	The Act recognizes the need "to protect the integrity, biological diversity, and productivity of the ecosystems in the Northwest Territories" and the right to protect the environment and the public trust.	1988	-"public trust" means the collective interest of the people of the Territories in the quality of the environment and the protection of the environment for future generations.	The public trust provisions have not been judicially considered.
Quebec; <i>An Act to affirm the collective nature of water resources and provide for increased water resource protection</i>	Declares that water is part of the common heritage of the province, creates a duty on every person to protect water, and allows the government to sue for damage to water.	2009	"Being of vital interest, both surface water and groundwater, in their natural state, are resources that are part of the common heritage of the Québec nation."; "Every person has a duty, under the conditions defined by law, to prevent or at least limit the damage the person may cause to water resources and to thus join in the effort to protect water resources."	In <i>Wallot v Québec (Ville de)</i> , 2010 QCCs 1370, the Quebec Court of Appeal cited the Act in upholding a municipality's right to create source water protection plans to address pollution from septic tanks.

Jurisdiction	Action	Year	Language	Impact/ Outcome
Yukon; <i>Yukon Environment Act</i>	Recognizes that the resources of the Yukon are the common heritage of the people of the Yukon, including generations yet to come. Recognizes that the Government of the Yukon is the trustee of the public trust and is therefore responsible for the protection of the collective interest of the people of the Yukon in the quality of the natural environment.	1991	"...the Government of the Yukon is the trustee of the public trust and is therefore responsible for the protection of the collective interest of the people of the Yukon in the quality of the natural environment."	In <i>Western Copper Corporation v. Yukon</i> (2010), the public trust provisions were cited by a court to in granting standing to a First Nation to participate in a mining company's challenge of a denial of a licence.

The Growing Momentum of the Public Trust Doctrine in Canada

Although not yet adopted, Ralph Pentland, Canadian water policy expert, and James Olson, U.S. public trust lawyer, have made a joint submission to the Legislative Committee studying the proposed Ontario Great Lakes Protection Act. Their submission emphasizes that courts in all eight Great Lakes states have recognized the PTD—either expressly by naming the Great Lakes and the connecting or tributary waters subject to a public trust, or through application of the public's paramount right and use of public or navigable waters. More recently, the Canadian courts have begun to recognize the potential of public trust principles, and several Canadian water law and policy experts have urged the adoption of public trust principles by the courts or the provincial governments. Under these principles, governments have a continuing duty to determine that there will be no significant impairment or harm to the flows, levels, quality, and integrity of public trust waters, uses, and ecosystems before they approve or deny a governmental private action. This duty requires the collection of data and information necessary for long-term planning sufficient to satisfy the solemn and perpetual trust responsibility, and affected interests and citizens as beneficiaries can institute administrative or judicial actions, as a last resort, to enforce public trust duties or apply public trust limitations that protect the integrity of the whole.²

Lesson for British Columbia

Water is British Columbia's most important natural resource. Given the pressures of a growing population, a changing climate, and expanding development, steps must be taken to ensure that B.C.'s supply of fresh, clean water is sustainable—not just to meet our needs

² R. Pentland, personal communication, November 9, 2013.

today, but for generations to come. As evidenced by the range of examples and the significant potential developments in the Great Lakes area, the PTD is an important and rapidly emerging priority for any sustainable water management, law, or governance regime. Under the current B.C. *Water Act*, ownership of water is vested in the Crown, but there are scant provisions to protect the public interest. A new *Water Sustainability Act* must ensure that private rights to use water do not impair the public resources. This could be accomplished by amending section 2 of the *Water Act* to state that:

The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, and any private rights established under licences issued or approvals given under this or a former Act are subject to be managed in the interest of present and future generations.

This is a simple, straightforward change. It will go very far in protecting water from emerging threats and from the unpredictable assertion of claims under NAFTA or other trade agreements.