



wildsight

November 15, 2013

Dear Living Water Smart Team,

Thank you for the opportunity to comment on the Legislative Proposal for a new *Water Sustainability Act* (WSA) for British Columbia. As BC's current *Water Act* is more than 100 years old, we appreciate the opportunity the WSA creates for advancements managing water in BC, particularly here in the Kootenay and Columbia Basins. Efforts to bring groundwater under regulation, measures that enable more options for shared watershed governance, and the move to establish review periods for all licences are positive movements. The issue is also very complex: the new law must try to modernize a rigid system of rights at a time when our precious water resources are facing growing uncertainty from climate change, and increasing demand from industrial users.

This legislation needs to be passed in the upcoming Spring 2014 legislative session, but we also need to make sure it gets done right. **Below are some of the key improvements necessary to make sure BC has the decision-making tools, the resources, and the flexibility to manage our water fairly and to protect the public's interest in healthy water sources for communities and nature.**

As a starting principle, we want to reaffirm our support for First Nations in their efforts to have their title and rights with respect to water resources in BC fairly and honourably addressed. A final version of the WSA that does not address these concerns leaves the province open to further court challenges and on-going resource uncertainty. We encourage the government to consider whether some of the recommendations below may be helpful in those discussions, though of course, it is up to the individual First Nations to determine how their title and rights should be addressed.

ENVIRONMENTAL FLOWS

Our new *Water Sustainability Act* (WSA) must protect water for the environment. Protected "environmental flows" are critical to healthy functioning watersheds for both nature and communities and must be clearly prioritized over other non-essential human uses. The WSA must explicitly set aside an ecological reserve of water that is not available for any use other than the conservation and maintenance of fish habitat and preservation of the natural ecosystem. The new WSA should:

- Legally establish standards (not guidelines) for environmental flow needs and critical environmental flow protections;
- Apply environmental flow needs to both new licenses and existing surface water licenses where water is insufficient to meet ecological needs;
- Commit to public consultation on the development of regulations and policy to create the framework for environmental flow needs; and
- Explicitly state that decision makers may suspend or refuse to issue a licence if it would negatively affect an aquatic ecosystem.

PROTECTING PUBLIC INTEREST:

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 today, but for generations to come.

The current *Water Act* requires that water under licence be used in a way that is “beneficial”, but the definition of what that means is very weak: essentially, the use the licence was issued for. The Proposal for the WSA offers a slight improvement to declare that such use must also be “efficient”. However, most people would probably think of water, like air, as part of a commons to be shared (not owned), and that any “beneficial use” of it should recognize a broader set of community, social and environmental benefits (for example, water for fish, or drinking water, etc.). Courts have interpreted “beneficial use” to describe the public’s interest in the proper management of water resources, whereas the current (and proposed) BC approach narrowly focuses on private rights. Licence holders should understand they are not gaining a ‘property right’ but rather using a public resource that they must steward with care.

To ensure that private rights to use water do not impair public’s interest in water resources, the new WSA must:

- Amend Section 2 of the current 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.

- Define “beneficial use” to include environmental flows and essential household needs as pre-requisites. These values must be applied in allocation decisions, licence reviews, and other key government decisions related to freshwater.

WATER OBJECTIVES:

Water Objectives could be very valuable tools, however, currently the Proposal says that decision-makers would only have to “consider” these objectives; there’s also a possibility that forestry and the oil and gas industries would be exempt from them. The new WSA should:

- Incorporate the expanded definition of beneficial use in Water Objectives in order to prioritize essential household use and environmental flow needs; and
- Ensure that Water Objectives are “objectives set by government”, meaning that they must be binding on all decision-makers, ministries, and sectors, including the Forestry and Oil and Gas sectors; if other legislation has freshwater-related objectives they must provide at least the same protections as those in the WSA.

GROUNDWATER:

The Proposal is bringing groundwater withdrawals under regulation for the first time, which is long overdue.

We note that the proposal contemplates exempting deep saline groundwater sources, based on “assumptions” that such sources can be tapped without impact on freshwater sources. We also understand that there are questions within the Ministry of Environment as to whether this is really the case. It is also not clear whether the definition of “saline” provided is adequate to ensure fracking will not be drawing from any drinking water sources. While we do not endorse the practice of fracking, questions about how to encourage or (preferably) require the oil and gas sector to use non-potable water or other alternatives in fracking operations clearly requires broader discussion before guaranteeing exemptions from regulation and licensing in law. Given that there are alternatives, it is a valid question whether using fresh water for fracking should be considered a “beneficial use” of this resource.

WATER LICENCE REVIEW and FEES:

The WSA Proposal includes a provision to make all licences reviewable after 30 years. This is an improvement over the current situation where long-standing licences have no provision for review. However, in world facing climate change, 30 years doesn’t offer enough flexibility to respond to what is a rapidly changing water system in many regions.

As well, the Proposal is bringing groundwater withdrawals under regulation for the first time, which is long overdue. However, these ‘grandfathered’ licences would also get the 30 year time line, even though current uses have never been assessed for their impact on local aquifers and other water users. Given that these will be “new licences”, it is also incumbent on the government to honourably address First Nations’ interests in water or risk long, costly court challenges to those licences. The WSA must:

- Ensure licenses are reviewed within a shorter timeframe than outlined in the Proposal so that they reflect improved understanding of actual stream flows, aquifer levels and/or changing

hydrology. A tiered review process should be used: within next 5 years licenses 50 years older or more are reviewed; within the next 10 years licenses 30 years and older are reviewed; and all others existing (and new) licenses are reviewed 20 years from their priority.

- Current well users should not receive final licences, or those licences should be fully reviewable, until:
 - At least 5 years of water monitoring data for the aquifer obtained under the new monitoring requirements is available;
 - The licences can be assessed to ensure that the use of the aquifer does not exceed recharge rates and does not negatively impact the health of the aquifer or the health of nearby streams;
 - Any constitutional obligations to consult First Nations regarding specific licences can be addressed.
- If current levels are not sustainable, licences must be adjusted (possibly through Water Sustainability Plans) to ensure that use rates are sustainable and do not negatively impact the health of nearby streams.
- The rights of domestic well owners to the continued flow of water in their wells, as against licensed well owners, needs to be clarified.

A higher, more appropriate fee structure for both groundwater and surface water is needed while still making water available for essential human needs at a reasonable rate. The new WSA must:

- Ensure full cost-recovery by increasing fees to cover basic administrative costs to government for responsibly managing groundwater and surface water;
- Undertake a comprehensive review of the pricing structure for surface water licenses and setting groundwater fees sufficiently high to better resource the comprehensive approach to water management outlined in the Proposal, including support for monitoring and regular license review, flow assessments, enforcement and new shared-governance models enabled by the Proposal; and,
- Ensure that fees go specifically toward resourcing water management and governance, rather than into the province's general revenue.

SHARED GOVERNANCE:

The commitment to shared governance in local watersheds outlined in the Proposal is a positive step toward recognizing the important role that most directly affected communities can play in local decision-making. The Province must continue to play a lead role in establishing priorities and setting minimum standards that must be achieved under new watershed governance arrangements. The WSA must:

- 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 Water Sustainability Plans undertaken through local governance arrangements are done through an independent, non-political process based on clear accountability and representation criteria;
- Enable local watershed governance arrangements to access sufficient resources to execute activities through, for example, a pool of funds from water-use royalties, or a delegated taxing authority; and
- Support provincial pilot projects that can test a range of watershed management approaches and decision-making functions.

We look forward to seeing the final version of the Water Sustainability Act introduced in the coming Spring legislative session. We sincerely want this long-overdue, much-needed piece of legislation to be something that our communities can support without qualifications.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kat Hartwig', written in a cursive style.

Kat Hartwig
Water Director
Wildsight