



FIRST NATIONS FISHERIES COUNCIL

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December 2, 2013

Minister Mary Polak
Ministry of Environment
PO Box 9338 Stn Prov Govt
Victoria BC V8W 9E2

Re: Proposed *Water Sustainability Act* Legislative Proposal

Dear Minister Polak,

This letter is intended to provide an overview of the First Nations Fisheries Council's preliminary concerns related to the management of water in British Columbia under the proposed *Water Sustainability Act*. As you are aware, the *Water Sustainability Act Legislative Proposal* has significant implications for First Nations. Meaningful and direct engagement is required to ensure that through the legislative drafting and implementation stages, First Nations' interests, including Aboriginal and Treaty Rights, are addressed.

The First Nations Fisheries Council (FNFC) was established in 2007 as an organization that works with British Columbia's 203 First Nations to support, protect, reconcile, and advance First Nations Title and Rights as they relate to fisheries and the health, management and protection of aquatic resources. Our priorities are to develop effective governance mechanisms, form collaborative relationships among First Nations organizations, and work together to build a cohesive voice on fisheries matters. The Council is comprised of 14 First Nations delegates appointed from the diverse geographic regions of the province.

The FNFC is not a holder of Aboriginal or Treaty Rights as defined in s. 35(1) of the *Constitution Act of Canada* (1982), and therefore the comments on the *Water Sustainability Act Legislative Proposal* cannot and should not be interpreted as fulfillment of the Crown's duty to consult with Aboriginal peoples. First Nations in B.C. have unequivocally and repeatedly articulated that their Aboriginal and Treaty Rights include a right to have a central role in land, water and natural resource management within their territories. The Courts have also recognized and affirmed First Nations rights in this regard. These rights need to be recognized and respected in the Government of British Columbia's legislation.

Overview of Preliminary Concerns

The Government of British Columbia's consultation process on the *Water Sustainability Act Legislative Proposal* is wholly unacceptable to First Nations. The Government of British Columbia is required to consult with First Nations whenever it proposes a decision or activity that could impact Aboriginal and Treaty Rights. The development and implementation of a *Water Sustainability Act* certainly has the potential to impact Aboriginal and Treaty Rights.

In order for meaningful engagement to occur, a relationship must be developed with First Nations that is respectful of B.C. First Nations' interests, including their constitutionally protected s. 35(1) Aboriginal and Treaty Rights. As you are aware, Canada has endorsed the United Nations Declaration on the Rights of Indigenous Peoples. As a result, Canada has agreed to uphold the expansive and robust principles set out in the Declaration that affirm the rights of Indigenous Peoples with respect to their lands, waters and natural resources (e.g. Articles: 25, 26, 29 & 32).

The FNFC expects the Government of British Columbia to uphold these principles by taking effective measures to recognize and protect B.C. First Nations' inherent rights. It is essential that Aboriginal and Treaty Rights are recognized and that your government takes all of the steps necessary to ensure that a revised *Water Act* meets the test of a high and robust consultation and accommodation process with the proper rights-holders in B.C.

While the FNFC agrees that an updated *Water Act* may be long overdue, we also impress upon you that significant changes to the proposed *Water Sustainability Act* are required in order to address key issues related to the assertion and exercise of Aboriginal and Treaty Rights with respect to water resources and their management. In order to encourage the Government of British Columbia to advance meaningful and direct engagement with B.C. First Nations, the FNFC submits the following summary of its preliminary concerns related to the *Water Sustainability Act* Legislative Proposal:

First Nations' Title and Rights Recognition

- There are significant unresolved governance and jurisdiction issues related to the assumed jurisdiction of the Province over resources that are subject to Aboriginal and Treaty Rights. This is an issue that requires resolution prior to drafting and enacting the *Water Sustainability Act*.
- Numerous Supreme Court decisions have recognized and affirmed First Nations rights, and in this regard, First Nations' participation in developing the legislative framework and in the decision making process around water use and management is required.
- In order to ensure First Nations' interests, including Aboriginal and Treaty Rights, are considered in a meaningful way, First Nations need to participate in the drafting of the *Water Sustainability Act* legislation and regulations and in the development of the specific Provincial Water Objectives.
- The *Water Sustainability Act* should respect and accommodate Aboriginal water dependent rights, e.g. fishing, birding, and gathering.

Water Protection, Planning and Management

- Effective management of water and watersheds must take an ecosystem-based approach to broadly consider the cumulative effects of land and water uses, management decisions, and policies.
- Environmental flows must be protected as a priority over other uses; water is the most critical element of fish and aquatic resource habitat and water flow is required to maintain a broad range of ecosystem and biological functions.
- In the context of potential adverse impacts or cumulative effects to fisheries and aquatic resources, B.C. First Nations need input on the determination of Environmental Flow Needs (EFN) and Critical Environmental Flows (CEF) to ensure the maintenance of aboriginal fisheries.
- Consideration of other Aboriginal and Treaty Rights related to EFN determination and EFN and CEF management include the requirements for maintenance of non-fisheries aquatic resources, vegetation and other animal resources dependent on the EFN.



- The “First in Time, First in Right” (FITFIR) system of water allocation needs to be reformed. FITFIR does not consider the inherent rights that First Nations have in regard to the use and management of water, nor does the FITFIR system adequately protect or encourage responsible use of water.
- Water use purposes should include a category for First Nations cultural and/or spiritual uses. First Nations may be interested in protecting water resources to conduct unique cultural activities that require water.
- Creation of Agricultural Water Reserves should be required to consider First Nations methods of agricultural or “tending” activities that deliberately generate food or medicinal resources.
- In order to manage water resources effectively and responsibly, a more comprehensive system for monitoring and reporting needs to be developed. First Nations should be included in the development of the monitoring program and its implementation.

Aboriginal Traditional Knowledge (ATK)

- The exercise of management rights for water and for impacted or affected fisheries needs to recognize and include aboriginal systems of knowledge and traditional knowledge in the determination of management regimes necessary to protect aquatic health and aquatic species (i.e. CEF and EFN).
- Water Sustainability Plans and Area Based Regulations should include ATK and a requirement for First Nations to be involved in the development, implementation and monitoring of plans and regulations in respect of First Nations inherent rights.

Delegated Authority and Regional Water Boards

- Regional Water Boards should be required to include local or regional First Nation governments as full members.
- In order to have a meaningful governance structure for Regional Water Boards, First Nations will need to maintain their appropriate governance authority.
- Delegation of certain decision making authorities to regional water boards or similar structures needs to be planned in order to ensure that delegation of authority to a board is appropriate; or some other appropriate governance structure should be considered as it may not be feasible to delegate assumed provincial authority to First Nations.
- Research into the best possible methods for developing respectful and fair regional governance bodies needs to occur.

Capacity

- Resources and funding will be required to facilitate First Nations participation in the drafting and implementation of *Water Sustainability Act* and associated regulations.
- Resources and funding will be required to facilitate First Nations participation in Regional Water Boards.

Recommendations

To improve the process and to give an opportunity for meaningful engagement and input into the proposed *Water Sustainability Act*, the First Nations Fisheries Council recommends the following:

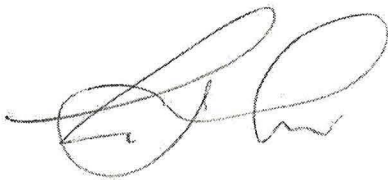


- a) Improve the bi-lateral government-to-government relationship and dialogue with First Nations by engaging directly, and in person, with First Nation Bands and Tribal groups;
- b) Provide financial resources to First Nation communities and First Nation organizations to undertake a thorough review and analysis of key resource documents such as the *Water Sustainability Act Legislative Proposal* in order to prepare thoughtful and meaningful input for *Water Sustainability Act* revisions; and
- c) Enhance the engagement period and engagement methods to give adequate opportunity for First Nations to review potential options and draft *Water Sustainability Act* before introducing it to the B.C. Legislature.

The First Nations Fisheries Council has offered some initial feedback with respect to the proposed *Water Sustainability Act*, however it is clear that further work and discussions need to take place. It is our sincere hope that the Government of British Columbia will act diligently and in good faith to respect and accommodate Aboriginal and Treaty Rights and will do its utmost to meaningfully engage B.C. First Nations in discussions related to this critical legislation.

The First Nations Fisheries Council is interested in continuing to support and to engage B.C. First Nations and First Nation organizations in further review, analysis and dialogue related to the *Water Sustainability Act*. Please contact me at jordan@fnfisheriescouncil.ca or 778-279-2900 to discuss how the First Nations Fisheries Council may be able to assist.

Sincerely,



Jordan Point
Executive Director
First Nations Fisheries Council

CC: Regional Chief Jody Wilson-Raybould, BC Assembly of First Nations
Grand Chief Ed John, First Nation Summit
Grand Chief Stewart Phillip, Union of BC Indian Chiefs
Wes Shoemaker, Deputy Minister, Ministry of Environment
Lynn Kriwoken, Director, Water Protection and Sustainability, Ministry of Environment

