



POLIS Project on Ecological Governance

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RE: University of Victoria's POLIS WSP Submission in Response to the Government's "Policy Proposal on British Columbia's new Water Sustainability Act" (December 2010)

We commend Government on its effort to engage the broader public in a robust process to modernize the BC *Water Act*. The recent government policy position paper offers insight into potential priorities of a new *Water Sustainability Act* and is a welcome addition to the ongoing dialogue. The proposal captures important central themes and some promising new directions discussed during the recent *Water Act* Modernization engagement process. Overall, there is clear progress in a number of areas including:

- groundwater regulation and licensing;
- attention to environmental flows;
- use of economic instruments and "beneficial use" provisions to achieve efficiency gains;
- monitoring and reporting requirements; and
- the development of new tools and processes such as "provincial water objectives" and "area based decision-making."

Concerns and Priorities Going Forward

A number of the identified policy priorities remain questionable or poorly developed. Specifically, the problematic reference to water markets¹ and backsliding on water use reporting requirements need to be clarified.

If the desired outcome of a modern *Water Sustainability Act* is to be achieved², four unresolved core issues remain. Each requires further development and clear commitments.

Unresolved Core Issues:

1. The *priority of environmental flows* over other non-essential human uses, and the need for clear binding and legally enforceable rules, as opposed to guidelines.
2. An *allocation system that embeds the public trust* to build resilience and avoid conflict.

¹ Reference to water markets has resulted in a significant push back by the water community. It is important to note that, while water markets have been used by other jurisdictions, the limited success that has been achieved is in the context of a robust and up-to-date water governance regime. BC is well behind many of these jurisdictions regarding basic requirements such as transparency, accountability, credible monitoring, and effective dispute resolution and decision-making processes – all critical elements for a viable water market. Employing tradable permits in the current BC context is fraught with risk. A water markets-based allocation system beyond short-term temporary transfers of water rights in the face of severe scarcity or the existing appurtenancy based system is simply too premature in British Columbia. An expanded approach should only be considered after further, substantial review and the building of significant social and ecological safe guards and basic governance infrastructure.

² Many of these issues have been discussed previously in the original University of Victoria's POLIS Project formal submission, "Towards a Modern Water Act" (April 2010), which outlines a number of action items and offers specific solutions based on leading examples and the latest research (available at <http://poliswaterproject.org/publication/349>).



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3. ***Commitment to shared watershed governance*** to ensure those who are affected have a say in relevant decisions. Support of co-governance and substantive local participation on key water (and other resource) decisions must be enabled.
4. ***Accountability and oversight*** to provide British Columbians with transparency and confidence that what is promised will be done.

Please refer to the appendix for additional discussion and potential specific solutions to each of these core issues.

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 WAM process to date. Public dialogue must continue as the *Sustainable Water Act* policy proposal is further developed. In particular, a formal commitment to offering an opportunity for public comment on draft legislation 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.

Water: A Clear Priority for British Columbians

Strong recognition exists that fresh water is a key strategic resource, and a crucial foundation to the economy and the environment; good, clean, and abundant fresh water is fundamental to community prosperity, human health, watershed function and quality of life throughout British Columbia.

A recent, major survey by McAllister Opinion Research examined the attitude of British Columbians toward water. With nearly unanimous support for updating and improving water management and governance in the province, the results of the poll confirmed the priority and importance of water to the average resident. Recent reports by the Auditor General (on the heels of a number of leading research and expert analysis) further reinforce the need for significant systematic reform. Reforming the *Water Act* is a critical first step to attaining the broad vision for a new paradigm of water management as committed to in the *Living Water Smart Plan*.

On behalf of the Water Sustainability Team at the University of Victoria's POLIS Project on Ecological Governance, I look forward to supporting this process as it continues, and seeing further progress and ongoing engagement on this crucial issue.

Sincerely,



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APPENDIX: Further Discussion of the Core Unresolved Issues

1. Priority for Environmental Flows. The previous government discussion papers and the engagement process all acknowledge that environmental flows are crucial to the function of healthy watersheds. They indicate the emerging consensus that environmental flows must be protected as a priority over other non-essential human uses. The Report on Engagement (Fall 2010) clearly indicates the general preference for standards, which offer clarity and consistency, over guidelines. Although more flexible, guidelines generally result in lower thresholds and incremental decisions with potential negative cumulative implications.

Successfully achieving the necessary protection of environmental flows requires clear, binding rules that apply to both new and old water licenses across the province. In essence, these legally established flow protections should “set aside” an ecological reserve that is not available for any use other than the conservation and maintenance of the natural ecosystem. These “blanket” protections could eventually be customized on a region-by-region basis through collaboratively produced basin or watershed level plans. However, any detailed planning process will inevitably take time, resources, and effort. It is therefore necessary that minimum protections be put in place – at least initially – to ensure a basic safety net to protect against ecologically damaging over allocations.

We urge government to formally include presumptive, risk-based environmental flow rules to provide interim protection to all fresh water and aquifer systems as part of the new proposed legislation. These presumptive rules 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.³

Although the current proposal indicates support for both water allocation and watershed plans, it is vague on the resources and process that would be put in place to ensure completion – even in priority, “chronic problem” watersheds. This lack of clarity is a significant concern, especially in light of prevailing government budget and resource restraint.

2. Allocation system that embeds the public trust. A modern allocation system must be flexible and resilient, and ideally help minimize conflict. The current “first-in-time first-in-right” (FiTFiR) system has had some historical benefits, but current challenges – including a changing climate and hydrological cycle, growing water demands and use, uncertainty regarding First Nations rights and title, and increasing water scarcity – indicate the need for a more modern approach.

³ Leading international practice demonstrates such a system is a viable transition toward a more robust protection regime. Generally speaking, a threshold of approximately 75% of flow is needed to ensure sufficient protections of riverine systems. This $\frac{3}{4}$ standard would be a reasonable starting point and would provide some confidence that ongoing activities would not permanently damage watershed function while planning processes were engaged. See, for example, Maine Sustainable Water Use Rule (Maine Department of Environmental Protection – 2006 and 2010); United Kingdom Application of the European Water Framework Directive (Acremean MC, Ferguson AJD. 2010. “Environmental flows and European Water Framework Directive.” *Freshwater Biology* 55: 32-48; Southwest Florida Water Management Districts Approach (Flannery MS, Peebles EB, Montgomery RT. 2002 “A percent-of-flow approach for managing reductions of freshwater inflows from unimpeded rivers to southwest Florida estuaries.” *Estuaries* 25: 1318-1332. For a general review see Gillialan DM, Brown TC. 1997. *Instream Flow Protection: Seeking A Balance in Western Water Use*. Washington, D.C. Island Press, or Richter BD. 2009. Re-thinking environmental flows: from allocations and reserves to sustainability boundaries. *Rivers Research and Applications* 25: 1-12.



The preferred approach is to have a clear and detailed planning process on a watershed-by-watershed, or basin-by-basin, basis. These plans would offer clear direction and locally appropriate solutions. While these detailed plans are under development, a clear provincial framework should be developed that specifies triggers (or thresholds) to ensure collective reduction in water use. This framework could state, for example, that during scarcity an initial phase of voluntary reductions would be followed by mandatory sectoral reductions; this could be followed by a clear articulation of which uses (sectors) would have priority during periods of severe scarcity. Historical FiTFiR rights could inform priority order within the given sectors. This proportional, “share the pain” approach to water conservation is increasingly common in more water stressed parts of the world and is a viable option in British Columbia.

Establishing a link between the present and future benefits of water conservation requires government to clearly acknowledge its role in “stewarding” water for broad social benefit. A simple step toward enabling this concept is amending Section 2 of the current *Water Act* to the following:

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 licenses or approvals under this or a former Act are subject to be managed in the interest of present and future generations.

Section 5 of the current *Water Act* already limits the rights acquired under a water license to “divert and use” water and does not grant any rights of ownership over the water. Thus, a crucial aspect of protecting the public trust is already in place. The *Water Sustainability Act* should be amended to further clarify this fact. It could, for example, include a clear preamble or initial section statement:

Water serves a multitude of public and private purposes, both instream and extractive. This Act provides protections for public uses of water and grants rights to use water for private purposes that may only be exercised in a manner that does not significantly harm public purposes.

This kind of trust relationship is acknowledged in the government’s initial public Discussion Paper and is reinforced by general support as indicated in the Report on Engagement.

3. Commitment to shared watershed-based governance. An articulated centerpiece of this law reform initiative is to build robust governance that will ensure effective water management, now and into the future. Support for co-governance and substantive local participation on key water decisions must be enabled. The benefits of increased local participation are significant: increased resources, leveraged expertise and engagement, enhanced transparency, local innovation, and more resilient decision-making.

The Province’s policy proposal offers a glimpse into a collaborative or nested system for governance. However, the proposal does not offer sufficient detail. No commitment is made to enable the delegation or sharing of real decision-making authority with appropriate bodies. The proposal commits only to consulting those affected by key decisions; it does not outline how those affected can participate in actual decision making. Meaningful participation is a basic tenet of any modern approach to water governance. In some cases, as with First Nations rights, it is even a legal requirement. Although no consensus “choice” or model has emerged in the various engagement efforts, consensus does exist on a number of core characteristics for water governance in British Columbia. These include:

- a local or community role in decision making,
- the priority of ensuring watershed function,



- provincial lead role in setting minimum standards, compliance and enforcement and significant decisions, and
- increased accountability.

These points of consensus indicate a true desire for a different kind of approach to water governance. Senior government would still have a clear lead role in governance through its responsibility to ensure the broader public trust is served including setting minimum standards and ensuring compliance with, and enforcement of, rules, laws, and regulations. However, this represents only one element of a sophisticated governance regime. Modern approaches ensure a robust role for those communities and interests affected in the actual decisions. This type of shared decision making would be best achieved through an enabling framework laid out in the new proposed legislation.

To have a meaningful discussion about this identified priority area, a clear indication of which decision making authorities and responsibilities the government will keep, and which are available for devolution or delegation is required. Overall, more clarity is needed.

New forms of shared watershed-based governance sit at the very heart of the broader *Living Water Smart* promise and should be exhibited in the new *Water Sustainability Act*. The new legislation requires clear statements about who is responsible for what, and what resources will be available for the performance of those duties. An enabling framework is a sound first step that has the potential to create a system of governance that can be phased in over time.

One possible solution for developing this new enabling framework is the creation of *Watershed Agencies*.⁴ As set out in the previous public Discussion Paper, the new legislation should enable the creation of *Watershed Agencies* as legal entities, and should provide the framework and terms of reference for these “new” bodies. The *Watershed Agency* must have a clear mandate and the financial capacity to engage in water – and indeed watershed – management activities and decision-making. The legislation must enable these entities to acquire the financial resources to deliver on their responsibilities. This could be achieved through taxation or collection of water rentals or levies via, for example, a letter patent.

4. Accountability and Oversight. Good governance ensures effective and efficient decision making that builds public confidence and enables communities and those affected to address challenges and issues as they arise. Accountability and independent oversight that ensure what is said will get done actually gets done is fundamental to building this public confidence. The current policy position paper is silent on this basic foundation for good decision-making.

The era of senior government making all decisions in a top-down fashion is no longer tenable; in many instances related to First Nations rights, it may not even be legal. Ensuring a smooth transition to a more adaptable and flexible system, where numerous actors and interests have a role in decision-making, requires a different kind of system. This system must be built on a foundation of accountability and

⁴ While these Agencies may be a “new” legal entity in the legislation, they need not require the creation of new institutions. Certainly, in situations where nothing appropriate exists, new institutions must be established. In many situations however, a Watershed Agency could evolve from existing arrangements, such as Water Boards, Trusts, or Regional Districts. Basic accountability and legitimacy criteria would need to be met, such as elected directors who represent First Nations and other key communities and constituents in the watershed.



reliable public reporting, both on the state of the resource and the function of the institutions tasked with managing it. For the government to be seen as a credible enabler of a modern *Water Sustainability Act*, it must make the commitment to accountability and oversight. Citizens must be given the opportunity to see clear, independent, public reporting on progress.

One possible solution is that a modern *Water Sustainability Act* should require the creation of an independent oversight body, or amendment of an existing auditor, such as the Forest Practices Board. This role would come with investigative and fact-finding powers. The oversight body would be required to publicly report on and oversee the transition of the new *Act*, as well as ongoing activities and water practices in priority watersheds across the province.

Such an oversight body would provide incentives to ensure improved information at all levels of government. The body itself would provide, or house, important information and expert analysis. Such an independent body would enhance transparency and build conflict resolution capacity by providing neutral public reporting. It would also build public confidence by offering investigations, fact-finding capacity and expert advice in areas of conflict or significant concern.



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