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March 9, 2011

Honourable Murray Coell
Minister of Environment
PO Box 9047, STN PROV GOVT
Victoria BC V8W 9E2

Honourable John Slater
Parliamentary Secretary for Water Supply and Allocation
East Annex, Parliament Buildings
Victoria, BC, V8V 1X4

Dear Minister Coell and Mr. Slater,

We are writing in follow-up to Minister Coell's meeting with the First Nations Leadership Council (First Nations Summit, Union of BC Indian Chiefs and Assembly of First Nations), as represented by Grand Chief Edward John and Chief Bob Chamberlain, on February 25th, to discuss the current provincial *Water Act* modernization (WAM) process. We welcome the opportunity to engage at this high level on this important and urgent matter.

We wish to reiterate our proposal that we enter into a Memorandum of Understanding to help move dialogue forward on the range of issues in an appropriate and comprehensive way, including convening a Water Forum to bring First Nations and the provincial government together for discussion. It is imperative that the Province engage with First Nations meaningfully before proceeding with its current process.

To underscore this, we set out in greater detail some of our serious concerns and objections regarding the current WAM process and the policy directions being proposed for the new *Water Sustainability Act* (WSA) (the "Policy Proposal"). Specifically, we are disappointed that the Policy Proposal does not clearly incorporate First Nations input from May 2010 formal submissions, either generally or in the seven proposed policy directions for the WSA. Further, we continue to contest the general process and lack of appropriate and meaningful consultation on a government-to-government basis with First Nations in British Columbia, as required by law and committed to in the *New Relationship*.

Aboriginal Title, Rights and Treaty Rights are held at the Nation level, and each Nation has authority to make decisions about their lands and resources to address the unique circumstances of their particular Nation. As such, the Province has a duty to consult directly with the Nations on proposed decisions, including strategic level decisions. The current provincial process is a generic public process with no distinct or government-to-government engagement with First Nations that will be affected by any new water legislation.

The BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs are separate province-wide, political organizations that politically advocate for First Nations in British Columbia through their respective mandates. The First Nations Leadership Council (FNLC) is a collaborative political working partnership among our three organizations, with the aim of advancing the interests of First Nations in British Columbia.

1. *Failure of Policy Directions to Incorporate First Nations' Input*
In the context set out above, our organizations each made submissions to the Ministry of Environment in response to the WAM Discussion Paper, in addition to 13 other First Nations submissions from a variety of groups. While each submission highlighted unique viewpoints and concerns, there were several common threads throughout. Some of these concerns are included in the Report on Engagement; however, we feel that they were unjustly "softened" and were not adequately incorporated into the proposed policy directions. Below are some of the key points in this regard.

   - First Nations have constitutionally protected Aboriginal Title, Rights, and Treaty Rights, and object to provincial assertion of jurisdiction over water. This is noted in the Ministry of Environment's Report on Engagement and the introduction to the Policy Proposal states that, "For greater certainty, the provisions of the new Act are intended to respect aboriginal and treaty rights in a manner consistent with the *Constitution Act of Canada*." However, this does not acknowledge that there remains an outstanding requirement in BC for reconciliation of existing Aboriginal rights, including title, with the assertion of Crown jurisdiction. Instead, the policy directions for the WSA continue to assert provincial jurisdiction over water, including groundwater. Aboriginal rights, including title, are protected under section 35 and the provincial Crown does not enjoy full beneficial interest in the lands and resources. This matter remains largely outstanding in BC and any legislative and policy reform must reflect this reality.

   - First Nations seek a more appropriate and inclusive government-to-government process for engagement in the WAM process. First Nation submissions on the WAM Discussion Paper were clear that greater and more meaningful engagement with First Nations – consistent with jurisprudence and the Province's commitments in the *New Relationship* - is necessary, and that three First Nation-specific "workshops" on the WAM Discussion Paper were woefully inadequate. Unfortunately, the Ministry of Environment has been unresponsive to these requests and has implemented an even less meaningful process for engaging with First Nations through its current "blog" process, with no in-person or government-to-government engagement sessions. It is necessary to distinguish between those entities with governance/stewardship responsibilities (First Nations and other governments) and those of users (industry) and interest groups (non-government organizations). First Nations have constitutionally protected Aboriginal title and rights, which give rise to a right to make decisions about the land and resources.

- As Indigenous Peoples, we are intimately connected to our waters and water resources and we have a inherent and sacred stewardship responsibility to responsibly manage and protect our waters. The Report on Engagement recognizes that water is of high spiritual and economic value to First Nations; however, the Policy Proposal does not recognize the inherent self-determination of First Nations over our water and water resources. The Province cannot implement water governance without working with First Nations on an inter-governmental basis. Because of our existing Aboriginal title and rights, and treaty rights, our perspectives, interests and conceptions of stewardship must inform the development of any water policy and legislative/regulatory regime in BC. For example, it is crucial that First Nations be involved in decision-making processes over water allocation. Both the FNS and UBCIC submissions note that water allocation necessitates strategic level decision-making that considers and determines applications for use and diversion of water. Because these decisions have potential to impact on Aboriginal title and rights, and treaty rights, First Nations must be engaged directly on water allocation. The Policy Proposal does not clearly address water allocation in light of existing Aboriginal title and rights.

- The WAM Process must be carried out in the spirit of the *New Relationship*. The Report on Engagement notes this common message from First Nations; however, the Policy Proposal, and the process leading up to it, does not reflect the *New Relationship* at all. First Nations engaged in the *New Relationship* with the Province of BC in 2005 when the Premier acknowledged that the Province's unilateral development of a consultation policy had failed (as illustrated by *Haida*), and that the Province wanted to jointly develop new approaches with First Nation. Our agreed common vision in the *New Relationship* anticipated systemic changes, and we agreed to a "new government-to-government relationship based on respect, recognition, and accommodation of Aboriginal title and rights." The Policy Proposal does not currently reflect such a new relationship. Rather, it perpetuates long-standing, systemic problems in the relationship – in particular, the assertion of provincial jurisdiction where reconciliation remains largely outstanding through court decisions, treaties or other agreements. We remain committed to our *New Relationship* vision and goals and urge the Province once again to re-engage at a high level so that we may work collaboratively on these critical issues and maximize opportunities before us.

2. *General Responses to Policy Directions of WSA*
   The Province must engage First Nations directly in a meaningful process and on a government-to-government basis in legislative and policy reform regarding water and water governance, as it is the First Nations themselves who hold constitutionally protected Aboriginal title and rights, and treaty rights. Further to this direct engagement with First Nations, we offer the following general responses to the draft policy directions set out in the Policy Proposal:

- "Protect Stream Health and Aquatic Environments"- Rules and standards for protecting stream health and aquatic environments must be developed with First Nations and must reflect that there are constitutionally protected Aboriginal title and rights, and treaty rights, in BC which give rise to First Nations governance and decision-making with regard to the lands and resources in their territories, based on their traditional knowledge. We contest any attempt to unilaterally impose provincial standards. Given the potential implications and importance of this matter, the draft policy direction is far too vague to be able to provide further specific comments.

- "Consider Water in Land-Use Decisions"- The Crown has a legal duty to engage First Nations at the strategic level through to the operational level as decisions can be made at each of these levels that can potentially impact Aboriginal title or rights, or treaty rights. A primary feature of the *New Relationship* is to ensure this appropriate level of inter-governmental engagement on issues of mutual interest and concern including, specifically, land and resource use planning, management and decision-making. Strategic level engagement includes development/revision of legislation and policy, and management tools. It is useful to highlight some of the direction from the Supreme Court of Canada on the need for strategic level decisions - not only because of the potential for impacts from a single decision, but also because there exists potential for cumulative impacts from incremental strategic decisions:

  > I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences. The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest

pending resolution of their claims. (*Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at paras 76-77) (emphasis added)

In the context of water, this raises the issue of how the proposed "Provincial Water Objectives (PWOs)" will be determined that will purportedly be used to guide decisions under the WSA? We must endeavour to avoid the conflicts that have arisen through past unilateral strategic decision-making by the Province, as with the setting of the AAC. We must work jointly to design, develop and implement a water management regime. In this regard, we remind you of the specific political commitments in the *New Relationship*, aimed at a truly "new" relationship, where we agreed to:

- Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing; and

- Identify institutional, legislative and policy changes to implement this vision and these action items;

Fundamentally, these commitments must include strategic level issues on key resources, such as water, as has been consistently and clearly conveyed by our organizations and First Nations in relation to the WAM process. The Policy Proposal is currently vague on the issue of water consideration in land use decisions, but raises numerous important issues and concerns for First Nations given the Province's approach to land use and resource planning to date. Early government-to-government engagement on a new water regime will help to create stability and certainty, thereby reducing the potential for conflict.

- "Regulate Groundwater Use"- Groundwater is of great importance to First Nations. Because most groundwater eventually flows into surface waters, First Nations have huge interest in the management groundwater. As is clear, a lack of, or inadequate, regulations and management tools leads to serious issues such as depletion and contamination, which has direct impacts on other resources, our people and our communities. This is an area requiring urgent attention and policy change. However, we oppose the provincial assertion in the Policy Proposal that it will automatically be the body to regulate and control access to groundwater, without mention of or regard to Aboriginal title and rights, and treaty rights, to water. We are also extremely concerned that the Province is considering providing access to a third party in this way. The textbox on p.9 of the Policy Proposal notes that "Many First Nations communities rely on groundwater and will be impacted by groundwater regulation," yet there is no reference to, or recognition, of our Aboriginal rights or treaty rights.

- "Regulate During Scarcity"- Conservation and sustainability are important principles. However, to advance and achieve them, the Province must work closely and jointly with First Nations as they have valuable traditional

knowledge that will greatly inform and help shape this dialogue. The policy direction, as currently outlined, does not include any mention of First Nations at all.

- "Improve Security, Water Use Efficiency, and Conservation"- Any economic instruments that will be enabled as incentives for improving water use efficiency must be jointly developed with First Nations and must reflect the reality of our existing Aboriginal title, rights, and treaty rights. We are extremely concerned with the vague reference to "tradable permits" and "water markets" on p.11 of the Policy Proposal. We object to the commodification of our water by the Province. The Province has a duty to engage in meaningful discussion with First Nations on any such concept, as well as the proposed Agricultural Water Reserves. These concepts, as currently referenced, are vague, yet have potentially huge implications with respect to our Aboriginal title and rights, treaty rights, and interests.

- "Measure and Report"- First Nations successfully maintained the health of our water for thousands of years prior to contact with European settlers. We agree that measuring and reporting water use is critical to maintaining water health and availability. Measuring and reporting standards must be developed in partnership with First Nations to ensure our traditional knowledge is appropriately incorporated.

- "Enable a Range of Governance Approaches"- Water governance is incredibly complex. The general intent of "updating" water governance is a necessary step as it provides an opportunity to ensure water governance is more appropriately contextualized and reflective of the changing legal and political landscape. As noted by Grand Chief Ed John, "the key to establishing better water governance structure is "recognition and implementation of Aboriginal title and rights, negotiating solutions to public policy challenges directly with First Nations on a government-to-government basis, and developing legislation and regulations in collaboration with First Nations."[1] We all seek less conflict and more certainty. We note that the textbox on p. 13 states that "Aboriginal rights and title must be resolved." This is misleading – it is not our Aboriginal title and rights that must "be resolved"; rather, what is required is the reconciliation of our pre-existing Aboriginal title and rights with the assertion of Crown jurisdiction. Again, the *Constitution Act* makes clear that the Province does not enjoy full beneficial ownership of the lands and resources. In this context, we strongly object to the Province asserting full jurisdiction and that it may delegate governance authority to third parties. Government-to-government processes and institutions for water governance are first required with First Nations as a priority.

[1] Grand Chief Edward John, "World Water Day" (Address given to the University of Victoria Consensus
Conference on Small Water Systems Management for the Promotion of Indigenous Health, March 2010)
[unpublished].

3. *Objections to WAM "Process"*

- Engagement with First Nations must be meaningful and in accordance with contemporary case law including the *Haida* (2004) and *Kwikwetlen* (2009) decisions. Where the Crown is considering an action or decision with the potential of infringement on Aboriginal title and rights, its duty to consult is triggered. In this case, the Crown is considering a new legislative and policy framework for all water in BC, which absolutely has the potential to impact and infringe Aboriginal title and rights, and treaty rights. While we appreciate that there is a public process for input into the *Water Act* Modernization, which the Province is required to do, it is also required to engage directly with First Nations who are the holders of Aboriginal title and rights, and treaty rights. As the Report on Engagement notes, there is a risk of legal action if the province does not fulfill its legal obligations.

- Timelines have not been adequate for meaningful dialogue and do not constitute consultation with First Nations. Further to an inadequate and inappropriate process with First Nations, the Province set out impossibly short timeframes for its WAM process and did not provide capacity funding to help enable and assist First Nations to engage. In the current phase of the engagement process, Chiefs and Council received a letter and copy of the Policy Proposal on December 17, 2010, immediately prior to Christmas break, and were asked to provide comment by February 21, 2011 to respond. First Nations and First Nations organizations experience serious capacity limitations, which must be recognized and addressed by the Crown when it seeks to engage First Nations.

- Engagement via a "blog" is an exclusionary use of technology and has resulted in an unorganized record of input that minimizes the serious nature of revising the *Water Act*. Many First Nations do not have regular access to the internet (e.g. due to remoteness) and, so, would not be in a position to access the Living Water Smart Blog in a regular or meaningful way. People with significant knowledge and experience with our water, including Elders, might not have the technical knowledge, understanding or skill to use a blog. Additionally, there is no clear organization to the blog, making it difficult to search or analyze information or submissions. The *Water Act* is the major piece of legislation for all water in BC and we feel that the blog is an extremely poor form of engagement, particularly as the primary vehicle for engagement and given that the flow chart of the WAM process on p. 4 of the Policy Proposal implies that this is the last opportunity to have input into the process.

We note that a high percentage of blog posts object both to the current WAM process, as well as content of the current Policy Proposal, and that a common theme among the posts is that the Policy Proposal is much too vague to be able to adequately provide comment. Additionally we are unclear how the "What we heard" text boxes in the Policy Proposal are intended to be addressed or if they are going to be incorporated in some way into the proposed WSA.

The current process fails to constitute appropriate and meaningful consultation with First Nations and fails to live up to the commitments made by the Province

in the *New Relationship* where we intended new, bold and innovative approaches and new government-to-government relationships. We call on the Province to demonstrate its continued commitment to the *New Relationship* and, again, propose a Memorandum of Understanding between us to move dialogue forward between the Province and First Nations.

In closing, we sincerely hope that we can work together to determine appropriate approaches for a government-to-government relationship regarding water and water governance.

We look forward to your timely response.

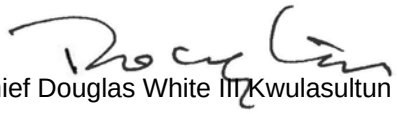
Sincerely,

FIRST NATIONS LEADERSHIP COUNCIL

On behalf of the FIRST NATIONS SUMMIT:


Grand Chief Edward John


Dan Smith


Chief Douglas White III Kwulasultun

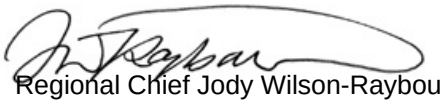
On behalf of the UNION OF BC INDIAN CHIEFS


Grand Chief Stewart Phillip


Chief Bob Chamberlin


Chief Marilyn Baptiste

On behalf of the BC ASSEMBLY OF FIRST NATIONS:


Regional Chief Jody Wilson-Raybould