



BC ASSEMBLY OF FIRST NATIONS

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Honourable Barry Penner
Ministry of Environment
Government of British Columbia
PO Box 9047, STN PROV GOVT
Victoria, BC V8W 9E2

Dear Minister Penner:

I am writing in regards to the Water Act modernization process. The work you are undertaking is important for all British Columbians. The BC Assembly of First Nations (BCAFN) shares your vision to keep water resources healthy and secure for future generations. First Nations across British Columbia have, for some time now, been developing their own approaches to water stewardship, including ownership, use, protection, and distribution – both with respect to existing reserve lands as well as within their broader territories. This work is ongoing and is proceeding in the context of implementing Aboriginal title and rights, both on and off reserve, and will necessarily involve coordination with your initiative and, if required, negotiation with the Province and/or Canada.

We appreciate your invitation to the BCAFN to provide feedback on your initiative to modernize the Water Act. Unfortunately, the BCAFN has limited resources to conduct substantial reviews of provincial initiatives such as the Water Act modernization. First Nations' responsibility for water management in British Columbia rests with the proper Aboriginal title holder and I strongly encourage you to continue your efforts to work with our Nations directly. Our Nations are currently going through a period of transformative change and rebuilding our institutions of government based on implementing Aboriginal title and rights.

As the Political Territorial Organization which represents all 203 First Nations in this region, I feel it would have been beneficial if the BCAFN had been involved in the preliminary discussions about the process leading to the possible modernization of the Water Act. The process must consider the cross-jurisdictional affects of the Water Act itself, specifically in relation to the unique title and collective rights of First Nations' peoples. The process must ensure that our Nations are engaged appropriately and in the context of the work that we are already undertaking in the area of water stewardship.

As your modernization initiative continues you must properly consider the outstanding legal questions that necessitate First Nations' involvement, including Aboriginal title and rights, treaty rights and other agreements between First Nations and the federal or provincial governments. First Nations are not simply stakeholders as may be interpreted in your technical background paper but have legal and constitutional responsibilities for water stewardship. Both domestic and international law recognizes the importance of Indigenous peoples' relationship to resources such as water.

Feedback I have received from First Nations is that the timelines provided for First Nations and "Multi-Stakeholder" workshops (March 5-April 21, 2010) were not adequate for meaningful dialogue and certainly do not justify consultation with First Nation – especially the mere three sessions held with First Nation "groups". I am assuming, therefore, that the Province is considering a more inclusive process to engage with First Nations on these issues as the modernization process continues. The BCAFN office would be pleased to assist, as part of an ongoing process to engage directly with our membership through our own existing Regional Session Dialogue Process and gather feedback on the Water Act modernization process from a First Nations' perspective. The BCAFN has an important role to play in connecting First Nations and sharing information between First Nations. In this regard, we would also request copies of any submissions already received by the province from First Nation groups or individuals, both written and provided otherwise, at your three group sessions.

In moving forward and aiming to rectify the process at this point, and particularly due to the serious legal questions concerning Aboriginal title and rights and the cross-jurisdictional matters involved, I would also recommend that an immediate and thorough legal analysis of Section 35 of the *Constitution Act*, 1982, be conducted in relation to the impact of the Water Act modernization process upon Aboriginal rights and title holders. Such a review should encompass both the potential negative and positive impacts, depending upon how the Act is modernized in accordance with evolving Aboriginal title and rights law. Further, this analysis should involve direct feedback from a large majority of the 203 First Nations, especially those whose water rights are adversely affected in the Water Act modernization process (where they are protected under Section 35).

As part of this process, you should also consider the practical on-the-ground approaches First Nations are taking with respect to water stewardship, both on and off reserve, to ensure greater understanding and coordination. Practically speaking, it would be beneficial to the management of collective water resources to understand how these approaches can be incorporated into broader decision-making arrangements. The relationship between First Nations' jurisdiction for water, both on-reserve and within our broader traditional territories, ownership of water, harmonization of approaches to protection and conservation and rules regarding the purveying of water (including water quality and safety), among other issues, need to be reconciled between the government of BC and the governments of First Nations and, where appropriate, Canada.

In acknowledging that the proposed Water Act modernization process will have an impact on Aboriginal title and rights and other legislative schemes, both inside and outside the provincial ministries and federal departments, it is strongly recommended that BC:

- 1) Continue to engage further in thorough and meaningful dialogue in an ongoing engagement process with the 203 First Nations in order to seek feedback and direction;
- 2) Undertake a legal analysis of Section 35 rights in relation to Aboriginal peoples' water rights and the potential impact of modernizing the Water Act (both potentially positive and negative impacts); and,
- 3) Ensure that as the legislative process proceeds, that issues raised by First Nations can be addressed, where a First Nation(s) so chooses, through mechanisms such as shared decision-making arrangements, coordination agreements, harmonization agreements etc., and that the legislation is reflective of these arrangements and the evolving Indigenous role and legal reality.

In closing, as the representative of all 203 First Nations in BC, I want to ensure that all First Nations impacted or implicated in this issue have a voice in the Water Act modernization process. I would be pleased to meet with you to discuss this matter further at a future date. Please contact Peshanquet Shognosh at the BCAFN office, telephone (604) 922-7733 or e-mail: executive.assistant@bcfn.ca at your earliest convenience to set up meeting date and time.

Respectfully,

BC ASSEMBLY OF FIRST NATIONS



Jody Wilson-Raybould
Regional Chief

cc: Hon. Jim Prentice, Minister, Environment Canada
Hon. Chuck Strahl, Minister, Indian and Northern Affairs, Canada
Hon. George Abbott, Minister, Aboriginal Relations and Reconciliation
First Nation Summit Task Group
Union of BC Indian Chiefs, Executive
National Chief Shawn A-in-chut Atleo, Assembly of First Nations

