Policy Proposal on British Columbia's New Water Sustainability Act

A Comment by Watershed Watch Salmon Society

Last month the Ministry of the Environment (MOE) released a document titled "Policy Proposal on British Columbia's New Water Sustainability Act". MOE invited comment on this Policy Proposal starting January 2011. Staff will then present final legislative options to government, government will decide on the direction for the new water law, and the process of drafting legislation will begin. The Water Sustainability Act for BC is expected to be introduced into the legislature in 2012.

This brief reviews the Policy Proposal.

I. Overview

No one disputes that the Water Act is long overdue for reform. The inclusion of 'sustainability' in the title of the proposed new Act reveals a welcome change in the way water could be viewed. The hoped-for emphasis on water sustainability recognizes that humans are not the only users of water, but that nature itself requires good quality abundant water. However, the Proposal is relatively short, and while it offers some insight into how a new Act will work, it remains unacceptably vague on some key issues, such as water governance.

The proposal sets out three levels of action:

- new requirements that will apply province-wide,
- discretionary strategies for known problem areas, and
- recovery action for chronic problem areas.

This area-based approach helps clarify where additional government resources and activities will be concentrated.

The Proposal lists seven Policy Directions:

1. Protect stream health and aquatic environments *
2. Consider water in land-use decisions
3. Regulate groundwater use *
4. Regulate during scarcity
5. Improve security, water use efficiency and conservation *
6. Measure and report, and
7. Enable a range of governance approaches. *

This list expands the previous four themes of Water Act Modernization (original noted by * above). The added Policy Directions are encouraging *directions*. Of the four previous themes, the most detail is provided on stream health and groundwater regulation. Nevertheless, more detail is still required for both. Improving allocation has been expanded in two directions: regulating during scarcity; and improving security, efficiency and conservation. The least developed

section in the Proposal relates to water governance, which is surprising as the province has perhaps done the most work on governance reform: MOE commissioned two detailed background reports and held a round of four workshops around the province on this topic before the WAM process began.

II. New Policy Directions

The sections below provide a preliminary review of the merits and demerits of each of the new policy directions.

1. Protect stream health and aquatic environments

The government proposes to consider instream flow guidelines in new licence applications for both surface and groundwater.

Though this is a step forward, the limitation of instream flow considerations to new licences alone is an apparent problem, as it fails to address the existing 44,000 water licences which are currently in effect in the province, and are currently causing impacts—sometimes severe—to instream flows in many locations.

And the Proposal notes that while there was wide support for standards, the government has apparently decided to instead use guidelines for the purpose of instream flow protection, without providing justification for this decision, or giving due consideration to the general inadequacy of guidelines in regulating resource extraction. The proposal states that when the instream flow needs (IFN) guidelines are incorporated into licence requirements, they will be enforceable. However, it also appears that decision makers on water use will also have the discretion whether or not to place IFN terms into water licences as the proposal states that decision makers will 'consider', rather than 'require protection of' instream flow needs.

The Proposal also lists some of the drawbacks to greater protection of IFN: additional water storage infrastructure may be required in some areas to ensure flow maintenance throughout the year, and some licencees may face regulatory action to reduce their water use during times of scarcity. Though there will be impacts on existing and future water users, the benefits to fish, wildlife and ecosystems that depend on sufficient water flow at the right time are not given equal or greater emphasis in the proposal.

Climate change is recognized as a serious potential threat to salmon survival and productivity. Changing thermal conditions, intensified by instream flow reduction are a major environmental factor responsible for adult sockeye salmon mortality. It is therefore imperative the effects of climate change on instream flow are considered in the WSA for the protection of fish and wildlife.

2. Consider water in land-use decisions

The Proposal discloses that new Provincial Water Objectives (PWOs) will guide decision makers considering land and resource uses. The PWOs will focus on issues such as access to water, conflicts between and among users, protecting flows and ecosystem health, and cumulative impacts.

This is a significant new commitment. Recognizing the impacts of land use decisions on water, and potentially restricting land and resource development if the impacts on water are unacceptable, could be a valuable new tool. Objectives that must be considered by a range of decision-makers, not just water regulators, is also indicative of a more integrated approach to resource management.

3. Regulate groundwater use

The groundwater regulation section in the Proposal provides the most comfort to those concerned about the outdated state of BC's water regulations.

Not only will large new withdrawals be subject to licencing, even smaller users in known and chronic problem areas (which could include Langley, the Okanagan Basin, and the Gulf Islands) will be regulated. The Proposal notes that the public expressed strong support for regulating groundwater during the first round of consultations.

While the focus on large users and chronic problem areas is a logical way to prioritize, concerns remain that such regulation will address problems only after they have occurred rather than preventing the problem from occurring.

4. Regulate during scarcity

This direction is linked to the next one. The direction recognizes the growing reality of water shortages in BC, especially in the summer and early fall when water is most needed for agricultural use, fish spawning, and some domestic uses. Water shortages will almost certainly increase in BC as the climate continues to change.

There appears to be no appetite to reform the major allocation principle—and flaw—of BC water law: first-in-time, first-in-right (FITFIR), which means that the oldest water licences have greater water security than any newer uses. In times of scarcity, the newest licenced water use on a particular stream will be curtailed first. This system has been roundly criticized as being inequitable and environmentally unfriendly.

However, though the Proposal does not mention abolishing FITFIR, it indicates that in the new Act, FITFIR may not be the sole operational principle during times of

scarcity. MOE will encourage users to voluntarily reduce water use first. Then proportional reductions for all users may be imposed. If those two solutions don't work, then cutbacks will be imposed based on the priority date of the water licence, unless other exceptional circumstances exist.

5. Improve security, water use efficiency and conservation

If the new Act is to deserve its name of 'water sustainability', adding this set of new water regulation tools to the kit is essential. The current Act focuses on the distribution of water rights, without placing obligations on users to be efficient, or to conserve, and these proposed additions would change this undesirable situation.

The Proposal lists three new areas for improved water security, efficiency and conservation.

First, the new Act will enable a range of economic instruments such as higher or differential fees, rebates, and tradable permits. Though the proposal states that the public comments supported these instruments, it is doubtful that many environmentalists support water markets as a method to return water to the environment. Alberta's experience with tradable water licences has not to date resulted in more water for environmental flows or other ecosystem uses. On the other hand, block pricing is a good way to encourage more efficient use. More detail on how new economic instruments will be used is needed.

Second, the proposal to improve water efficiency through a number of methods is promising. As West Coast Environmental Law pointed out, incorporating water use efficiency into the definition of beneficial use improves the status quo.

Third, the proposed creation of Agricultural Water Reserves is a valuable complement to agricultural land reserves.

6. Measure and report

Modern water laws require users to report on their use. This new direction will be a big improvement over the status quo. Some water users are now required to report on actual use, as opposed to the amount licensed for use. Expansion of reporting requirements will help the government manage the variable conditions of the resource.

7. Enable a range of governance approaches

This direction is the weakest in the Proposal. Though the title states that the new Act will enable a range of governance approaches, in fact there are already a wide range of water governance arrangements in effect in BC. The problem in the existing

Water Act is not a lack of authority to enable new governance structures; it is the lack of mandatory provisions requiring the formation of multigovernment and perhaps multisectoral bodies in those watersheds experiencing high water stress, and the lack of answers to fundamental questions about new water governance bodies: Who must participate? Where should they be formed? What will they do? When will they do it? And how? In other words, will mandatory, timebound, enforceable water or watershed management plans be required throughout the province, or in particular areas of the province, and will the new Water Sustainability Act direct this to occur?

Two of the most recent governance innovations have not yet been tested. One, the drinking water protection plan, has not been used and will in all likelihood not be used in the near future barring a water quality emergency. The other, the water management plan, has been developed in one pilot project for the Township of Langley, though Cabinet has yet to approve the final WMP. Arguably, this plan is a failure, unless it is rejected by Cabinet and sent back to the community for revision, as the measures proposed by the plan will fall short of actions required to reverse the groundwater declines which have increased over the past twenty years.

III. Next Steps

More information on governance reform, justification for the decision to pursue guidelines rather than standards for instream flow protection, water markets, and other topics are needed before the overall merits of the proposed Water Sustainability Act can be thoroughly evaluated, though this Proposal, like Living Water Smart and the first WAM Discussion Paper, are all evidence of a more environmentally conscious regime for regulating and managing water in BC.