

Advancing Freshwater Protection

Tools and Opportunities in British Columbia's *Water Sustainability Act*

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OLIVER M. BRANDES & ROSIE SIMMS

POLIS WATER SUSTAINABILITY PROJECT, CENTRE FOR GLOBAL STUDIES, UNIVERSITY OF VICTORIA

1. Background and Purpose

British Columbia's 2016 *Water Sustainability Act* (WSA) provides promising tools and potential to address water challenges and promote sustainability. These include the ability to better manage water as one integrated resource, safeguard environmental flows, protect water quality, integrate land and water decision-making, and enable innovative approaches to planning and governance.

Actual *Water Sustainability Act* implementation, however, is still in its infancy. Uncertainty remains around how the Act's main sustainability and planning features will be triggered and used, how local communities can be involved, and how implementation will be supported and resourced.

The WSA is only one of a myriad of governance and legal tools available that can (and should) be deployed by local, Indigenous, and Crown governments alike to help address water security and sustainability. This brief focuses on the specific potential of the WSA.

ABOUT THIS BRIEF

WHO IS THIS BRIEF FOR?

This brief is intended for those seeking to better understand—and use and support—the options offered by the *Water Sustainability Act* to address local water challenges.

WHY NOW?

This brief complements ongoing work by the POLIS Water Sustainability Project at the University of Victoria. It is meant to support communities and local organizations to inform and utilize key provisions in the *Water Sustainability Act* and encourage the provincial government to follow through on further regulatory development and implementation of the Act.

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This brief is a companion to the 2015 report *Awash With Opportunity: Ensuring the Sustainability of British Columbia's New Water Law* (POLIS, 2015).² It is part of a bundle of practical resources that the POLIS Water Sustainability Project and associated partners have developed to build community capacity and understanding around the legal and policy tools to advance water sustainability and watershed governance, including:

- *BC Drought Message Guide* (Canadian Freshwater Alliance, June 2018)³
- *Handbook for Water Champions: Strengthening Decision-Making and Collaboration for Healthy Watersheds* (Centre for Indigenous Environmental Resources/POLIS, forthcoming Fall 2018)
- *Protecting Water Our Way: First Nations Freshwater Governance in British Columbia* (First Nations Fisheries Council, May 2018)⁴
- *Water Sustainability Plans: Potential, Options, and Essential Content* (Curran & Brandes, forthcoming Fall 2018)

Provincial staff and decision-makers alone will not likely be able to implement this legislation. Given the complexity of water challenges in B.C., and the need for solutions to be locally adapted to the particular regional context and issues, realizing the Act's sustainability potential requires strong partnerships and the collective capacity, action, and expertise of Crown governments (federal-provincial-local), Indigenous Nations, communities, and local water champions working together to help protect and steward our shared waters.

Watershed groups, and local and Indigenous governments are often seeking to better understand what the WSA might offer, and what they can do to drive implementation. This brief provides a preliminary overview of the Act's primary sustainability tools and outlines some of the key considerations in deploying those tools. If groups are strategic and prepared, this legislation can enhance local efforts to protect their home waters and watersheds.

2. How This Brief Is Organized

This brief is organized into five sections and identifies seven main tools or opportunities under the WSA. The summary table in the next section provides a brief overview of these seven tools or opportunities, with a more detailed description provided in the discussion that follows. Each detailed description describes:

- what the tool is
- what watershed and governance issues it might be able to help address
- possible roles for watershed entities in either deploying the tool or supporting its use in the context of local watershed challenges
- risks and benefits and any other considerations

The final section concludes and offers a path forward towards a robust partnership approach enabled in the legislative framework of the *Water Sustainability Act*.



Provincial Roles and WSA Implementation

The WSA is administered by the Minister of Forests, Lands, Natural Resource Operations and Rural Development (FLNRORD) and in this brief, unless otherwise noted, “Government” refers to this Minister and Ministry.

Some specific roles and responsibilities for WSA development and implementation across the provincial government include:

Ministry of Forests, Lands, Natural Resource Operations and Rural Development (FLNRORD)

- Delivery and statutory decision-making, for example:
 - Administer the WSA, including all statutory decisions pertaining to surface and groundwater licences
 - Other programs and related statutes, for example dam/dike safety, flood management, drought management, and utility regulation
 - Issue enforcement orders
- Monitoring and reporting
- Joint leadership of WSA, including developing related pilots, plans, and agreements

Ministry of Environment and Climate Change Strategy (MoECC)

- Policy, legislation, and science monitoring, for example:
 - Provincial water strategies and policy, legislation, and regulation development
 - Water objectives, standards, and guidelines
- Advice, guidance, and support to statutory decisions
- Monitoring networks
- Transboundary and inter-governmental agreements
- Joint leadership of WSA including developing related pilots, plans and agreements

Ministry of Indigenous Relations and Reconciliation (MIRR)

- Lead the B.C. Government in pursuing reconciliation with First Nations and Indigenous People of British Columbia
- Advance and implement government-to-government agreements with Indigenous Nations, including supporting plans and pilots associated with the WSA (e.g. providing support and financial resources in partnership with First Nations)
- Adopting and implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and the Calls to Action of the Truth and Reconciliation Commission, including reviewing policies, programs, and legislation to determine how to bring the principles of the declaration into action in British Columbia

3. Summary Table: WSA Tools at a Glance

TOOLS	WHAT IS IT/PRIMARY PURPOSE?	WATERSHED PROBLEM IT SOLVES
Water Objectives (s. 43)	<ul style="list-style-type: none"> – Establishes thresholds for water quality, quantity, and aquatic ecosystem health to sustain specified water uses or for supporting aquatic ecosystems – Provides link between land and water decision-making – Can be set at a variety of scales (from provincewide to watershed- or stream-specific) 	<ul style="list-style-type: none"> – Water quality, quantity, temperature, or riparian concerns – Cumulative impacts from multiple land and water decisions that can undermine watershed health or function – Consistent consideration of water in decision-making
Environmental Flows and Critical Flows (e.g. s. 15; 86-88; 124(o))	<ul style="list-style-type: none"> – Builds a robust regime to ensure legal protection for adequate water flows for fish and watershed health and function 	<ul style="list-style-type: none"> – Future overallocations, protecting water for nature and safeguarding critical flows during periods of drought or shortage
Water Sustainability Plans (s. 64-85)	<ul style="list-style-type: none"> – Sophisticated and comprehensive planning tool to help resolve water conflicts, address watershed restoration needs, or risks to water quality – Provides a sustainable watershed vision and creates a framework to adapt to future challenges and improve management and decision-making 	<ul style="list-style-type: none"> – Overallocated watersheds, persistent water supply and demand concerns, or compromised environmental flows – Degraded ecosystems/habitat (changes to land use and riparian areas) – Areas with ongoing water conflict and in need of comprehensive and innovative local-based solutions – Address risks to water quality
Sensitive Stream Designation (s. 128)	<ul style="list-style-type: none"> – Provides additional protection for identified Sensitive Streams (which can include tributaries and aquifers) allowing for possible additional requirements related to licensing, diversions, authorizations, change approvals, monitoring, and mitigation – Contributes to the protection of a fish population whose sustainability is at risk because of current or future activities and ongoing damage to the aquatic ecosystem 	<ul style="list-style-type: none"> – Threatened, vulnerable, or Sensitive Streams or fish populations with particular ecosystem values
Water Reservations (s. 39)	<ul style="list-style-type: none"> – A legal means of retaining unreserved (unlicensed) surface or groundwater for future use (e.g. retain water in a stream or aquifer, for fish, treaty, or municipal use) 	<ul style="list-style-type: none"> – Areas where potential future uses (or anticipated growth) might limit water availability for environmental flow needs, social, municipal, or Indigenous water supply
Advisory Boards (s. 115)	<ul style="list-style-type: none"> – Offers a formalized mechanism to provide enhanced expertise to inform policy and management, and improve statutory-decisions under the WSA (e.g. methods and considerations for determining environmental flows, critical flows, and Water Objectives) 	<ul style="list-style-type: none"> – Complex situations (or persistent water challenges) where additional advice and expertise concerning water quality, quantity, environmental flows, or watershed health is needed to enhance decision-making and management
Delegated Authority (s. 126)	<ul style="list-style-type: none"> – A mechanism to draw down decision-making authority under the WSA to another person or entity; decision-making is limited to decisions of the comptroller, water manager, engineer, or officer. 	<ul style="list-style-type: none"> – Demands for more local control or persistent conflict where local knowledge, expertise, and capacity would improve decision-making

3. SUMMARY TABLE: WSA TOOLS AT A GLANCE *continued*

CROWN ROLES AND RESPONSIBILITIES	POSSIBLE WATERSHED GROUP/ENTITY ROLES
<ul style="list-style-type: none"> – Objectives are set in regulation by Order in Council and could be set as part of a Water Sustainability Plan process or separately – MoECC leads policy development and supports implementation – FLNRORD implements (other ministries and local governments could also be responsible for implementation) 	<ul style="list-style-type: none"> – Through a rigorous process, describe locally appropriate (and specific) Water Objectives (targets and thresholds) based on Indigenous and scientific knowledge to inform government – Encourage FLNRORD to implement these objectives as WSA Water Objectives – Role in monitoring and reporting on state of the water(shed)
<ul style="list-style-type: none"> – Any non-domestic water licensing decision (surface or groundwater) requires the statutory decision-maker to consider the impacts on environmental flows – Minister or Cabinet declaration of “significant water shortage” triggers a critical environmental flow threshold determination and can safeguard a minimum water level ahead of all licensed users – A fish population protection order is triggered when the Minister deems that “the flow of water in a specified stream is or is likely to become so low that the survival of a population of fish in the stream may be or may become threatened” 	<ul style="list-style-type: none"> – Develop (with Indigenous nations) the necessary methodology and specific region/stream-specific environmental flows thresholds and standards – Role in monitoring and reporting on state of the water(shed)
<ul style="list-style-type: none"> – Triggered by conflict between water users, or between the needs of water users and environmental flow needs, or to address risks to water quality or aquatic ecosystem health (see s. 64) – Government must order the Plan (but third party can request Minister to initiate a Water Sustainability Planning process and Minister can designate a responsible person or entity to develop the Plan (s. 66 (2)(a)) 	<ul style="list-style-type: none"> – A wide range of supporting or driving activities for local entities are possible, including: <ul style="list-style-type: none"> – encourage the Province to initiate a Water Sustainability Plan – develop supporting research or state of the local waters assessments – advise and support during plan development – be designated as the entity responsible for developing the Plan
<ul style="list-style-type: none"> – Sensitive Streams would need to be designated by regulation (Order in Council) – Sensitive Streams were brought into the WSA in 2016 (formerly in the <i>Fish Protection Act</i>) – 15 streams were previously designated as “Sensitive” under the <i>Fish Protection Act</i>; no further streams have been added under the WSA as of yet 	<ul style="list-style-type: none"> – Encourage Government to designate specific valuable rivers/streams as Sensitive Streams, and help define the licensing, monitoring, and mitigation criteria that should apply.
<ul style="list-style-type: none"> – Authority to reserve water rests with the Lieutenant Governor in Council (Cabinet) through an Order in Council – This process may be initiated by an external person/body or from within Government; a Water Sustainability Planning process could also result in a Water Reservation – Order in Council process is supported by analysis undertaken by staff within MoECC and/or FLNRORD and ultimately led by the FLNRORD Minister 	<ul style="list-style-type: none"> – Encourage governments to create a reservation to protect flows for fish and for other important ecological, cultural, economic, and social water uses
<ul style="list-style-type: none"> – Triggers not specified so requires interest and action by Government – Advisory Board Chair & members are appointed by the FLNRORD Minister (s. 115 (2)) 	<ul style="list-style-type: none"> – Recommend who should sit on an Advisory Board, or potentially <i>become</i> an Advisory Board member providing expertise and input to statutory decision-makers
<ul style="list-style-type: none"> – Triggers and criteria not yet specified – This section of the Act is still in development but there are possibilities for delegated authority, including as part of a comprehensive Water Sustainability Plan development process 	<ul style="list-style-type: none"> – Could draw down Provincial authority for specific aspects of WSA decision-making (see nuances and caveats on p. 13)

PAUSE
Before reaching for a solution (within or beyond the WSA) consider:

- What specific water/watershed **problems** are you trying to address?
- Do you have **information/data** about the issue?
- What **capacity** (e.g. human, financial) do you need to use this tool? What capacity do you have?
- Do **Indigenous nations** and the **community** see the issue as a local priority?
- Who will **champion**/lead/convene?
- What is your relationship like with regional provincial staff and decision-makers who would be **implementing** the tool?

4. Water Sustainability Act Tools: Local Opportunities to Advance Water Sustainability

The seven WSA tools summarized in this section are not mutually exclusive. Instead, they should be seen as a bundle of options that can be combined in a crosscutting and integrated way for achieving maximum freshwater protection. Developing an environmental flows threshold, for instance, could inform both Water Objectives and Water Sustainability Plan development, be further supported by a Water Reservation and a Sensitive Stream designation, and used by Indigenous nations to signal their expectations on environmental flow protection to senior Crown governments. Ultimately the mix of WSA mechanisms deployed will depend on the nature of the water/watershed problem, the local history, economic development priorities, and the role of

Indigenous laws and authority in their traditional territories in a specific region.

It is expected that the provincial government will initially focus on implementation of a few of the WSA's core elements. These initial priorities include: transitioning existing groundwater users into the regulatory regime; continued regulation and program development in areas such as Measuring and Reporting, Livestock Watering, Water Objectives, and Environmental Flows; as well as a provincial Watershed Governance Pilots Program⁵ to test innovative planning and governance approaches.

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Another opportunity for watershed groups to exert influence in policy and law reform is to give input on provincial draft regulations and policies during comment and development periods. Template submissions are often available from the First Nations Fisheries Council, University of Victoria's Environmental Law Centre, Canadian Freshwater Alliance, POLIS Water Sustainability Project, and other organizations.



WATER OBJECTIVES (SECTION 43)

What is it? Water Objectives are a way of setting water/watershed thresholds or targets in regulation that will influence decision-makers. They establish criteria for water quality, quantity, and aquatic ecosystem health (e.g. environmental flows levels, water quality standards, temperature) that land and resource use decision-makers (including local government) are required to consider when making their individual decisions or plans. They can apply to the landscape or site-specific level and are a critical means to get away from the current siloed and “death by a thousand cuts” approach to land/water decision-making.⁶

What problem does it solve? Water Objectives are set in regulation to sustain the necessary water quality or quantity for specified uses of water (e.g. drinking) or to sustain aquatic ecosystems.

How does it work? Water Objectives are an important way the WSA reaches “out of the water” to influence decision-making on the land. To this end, the regulations that create Water Objectives can, for instance:

- Require that a decision-maker under a specified Act (e.g. under the *Forest and Range Practices Act*) consider the Water Objective in his/her decision.
- Authorize a decision-maker to impose terms and conditions on, for example, permits that may have an impact on the Water Objective.
- Apply to local government planning processes:
 - Require that a regional district consider specified Water Objectives when developing, amending, or adopting a regional growth strategy.
 - Require that a municipality (or local trust committee in the Gulf Island Trust area) consider specified Water Objectives when developing, amending, or adopting an official community plan.
- Require Water Objectives be addressed in plans made under other Acts.⁷

Water Objectives are a critical means to link and integrate cross-Ministry land and water decision-making. They are potentially powerful tools to address water supply, quality, and aquatic habitat issues, as objectives can be set to prioritize water in other legislation.⁸

Roles for watershed group/entity? Although the specific process for developing water objectives is not yet settled, a rigorous method will necessarily be required with some consistency across the province. A local watershed entity could help describe locally appropriate Water Objectives based on Indigenous and scientific knowledge—potentially using any provincial guidelines or methodologies as these are developed. It could then encourage FLNRORD to implement these objectives as WSA Water Objectives (separately or as part of a Water Sustainability Planning process or area-based regulation).

If the local watershed entity positioned itself as an Advisory Board (see p. 12), it could also have a direct conduit to provide advice on methods of determining Water Objectives as per section 115 of the Act. Local watershed entities could also be involved in monitoring watershed outcomes and implementation of Water Objectives.

WATER OBJECTIVES KEY CONSIDERATIONS/RISKS

- Water Objectives can be made binding on different land and resource-use decision-makers; regulation would need to specify *which* decision-makers (including local government) in a given watershed must consider the Objective.
- Set in Order in Council—requires interest and action by Ministry and Cabinet.
- Often requires a political champion.
- Not yet clear how WSA objectives relate to: a) the existing Water Quality Objectives set by Ministry of Environment and, b) the Provincial Cumulative Effects Framework.

ENVIRONMENTAL FLOWS⁹ AND CRITICAL FLOWS THRESHOLDS (SECTIONS 15; 86-88; 124(o))

What is it? Environmental flows, according to the WSA definition, refers to the “*volume and timing of water flow required for the proper functioning of the aquatic ecosystem of the stream.*” Although this definition focuses on water quantity, the broader reference to “*proper functioning*” does create a useful opening to link to water quality and broader watershed health considerations.

Legally, it is important to distinguish between environmental flows and critical environmental flow thresholds. Critical environmental flow thresholds are “*the volume of water flow below which significant or irreversible harm to the aquatic ecosystem of the stream is likely to occur*” (s. 1(1)). In other words, environmental flow regimes support aquatic ecosystems to *thrive*, while critical flow thresholds are the minimum flows for aquatic ecosystems to *survive*. The WSA is one important conduit to legally safeguard environmental flows, but many other legal tools also exist, for example the federal *Fisheries Act* and its provisions regarding habitat as a potentially powerful vehicle through which to advance environmental flows protection.

ENVIRONMENTAL FLOWS KEY CONSIDERATIONS/RISKS

- Establishing the necessary site-specific environmental flows threshold and standards can be a costly process.
- These provisions do not deal with existing overallocations, so could have limited impact in fully subscribed systems.
- No binding requirement for decision-makers to use environmental flows methods/thresholds unless set in regulation (as opposed to current policy).
- Key linkages between environmental flows and Aboriginal rights must be established and acknowledged.

What problem does it solve? Providing legal protection for environmental (and critical) flows is fundamental for long-term watershed health and function, and to help build resilience for local fisheries. Using a basic premise of CPR (conserve, protect, restore) for local streams, aquifers, lakes, and watersheds requires explicit attention to environmental flows. No drought response is complete without an explicit ability to protect minimum flows so rivers and streams don’t run dry and fish and wildlife have enough water to survive.

How does it work? No one single provision exists in the WSA related to environmental flows. Instead, many different aspects of the Act can be used in conjunction to address water supply and environmental flow-related issues. The opportunities include:

- Section 15 requires statutory decision-makers to consider the impacts of their decisions on environmental flows (but does not set out *what* the decision-maker must consider or *how*).
- Section 127 enables the Province to create a regulation to prescribe methods for determining environmental flow needs.
- Sections 86-88 sets out two separate tools: *critical environmental flows* and *fish population protection orders*. In both cases the legislation can require licence holders to stop or reduce water use during periods of drought to protect ecosystems and fish.

Environmental flows are also important considerations in any of the planning instruments (e.g. Water Sustainability Plans, Area-based Regulations, Sensitive Stream designations) and in habitat or riparian considerations related to the construction of other “works” in and about a stream (s. 11).

Roles for watershed group/entity? Many potential roles exist for local entities in supporting implementation of the various environmental flows aspects under the new Act, such as:

- Selecting the most appropriate method of determining environmental flows in the specific creeks and rivers within the watershed,¹⁰ and then supporting regional staff, rights holders, and other partners to adopt this method as part of the required consideration associated with future licensing decisions (s.15 obligations).
- Determining the appropriate environmental flow and critical flow **thresholds** (drawing on Indigenous and local knowledge and science), and then support Government to have these thresholds set in regulation for the local watershed. Since adequate flows of high-quality water are the basis of fulfilling Aboriginal rights, Indigenous nations necessarily play a critical role in establishing and asserting environmental and critical flows thresholds.
- If the watershed entity positioned itself as an Advisory Board (see p. 12), it could also have a direct conduit to provide advice on methods of determining locally appropriate environmental flow needs (as per section 115 of the Act).
- Local entities can also play a role in environmental flows monitoring.



WATER SUSTAINABILITY PLANS (SECTIONS 64-85)

What is it? Water Sustainability Plans are region- or watershed-specific plans that can be developed to prevent or address conflicts between water users or between the needs of water users and environmental flow needs, or to address risks to, and restoration for, water quality or aquatic ecosystem health. Water Sustainability Plans can be comprehensive, multi-party negotiated agreements with legal “teeth,” bringing together Crown and Indigenous governments, water users, and communities to set out a vision and actions to address specific and persistent watershed issues.

What problem does it solve? Water Sustainability Plans offer a sophisticated way to deal with significant water issues in a region in an ongoing and adaptive way. They are the primary way to deal with *existing* water licence/allocations. For example, regulations associated with these plans can change the amount of water that licensees may divert, change conditions of water use, or even

WATER SUSTAINABILITY PLANS KEY CONSIDERATIONS/RISKS

- Would need to be explicit of the complementing Indigenous law framework and ensure explicit attention to securing a co-governance role during Plan development and implementation.
- May be difficult to find “win-win” scenario that satisfies all interests.
- There may be financial cost related to compensation to affected licence holders.
- Risks:
 - Water Sustainability Plan is developed but not implemented or endorsed by all the partners.
 - Lengthy and costly planning process yields minimal changes to land/water use that might not address all the key concerns.
 - Insufficient resources (or political commitment) to follow through on implementation.

cancel ('claw back') water in overallocated systems. Plans can also affect land uses and decision-making under other Acts in relation to water.

Water Sustainability Plans offer a way to address the new water realities climate change is creating in B.C. With water deteriorating in both supply and quality, new approaches are needed that break down siloed decision-making and the separation of land/water issues. Water Sustainability Plans have the potential to reorganize power and authority, including co-governance or parallel authority approaches with Indigenous and Crown governments. Water Sustainability Plans can also lead to enforceable standards, objectives, and rules that change both water use (e.g. restricting uses during times of scarcity) and activities on the land (e.g. changing practices that cause harm or disruption to water quality or the water cycle).

How does it work? Water Sustainability Plans are highly adaptable and so can take many forms. Recent detailed analysis¹¹ offers a deeper analysis of the potential and opportunities and has identified a number of potentially core elements likely present in any future plans, including:

- an adaptive implementation approach that is consistent with Indigenous laws
- acknowledgement and incorporation of Aboriginal rights
- a watershed vision
- articulation of Water Objectives
- integrated hydrological and land-use planning
- environmental flows thresholds and identification of appropriate methodologies
- future licensing or dealing with existing overallocated licences
- drought response
- creation of any necessary Water Reservations

Water Sustainability Plans have the potential to articulate various levels of drought response and also change land uses that impact water systems, thus offering localized approaches to dealing with drought or changing water supply regimes, better

adapting water allocations to local priorities, or improving land use planning that can protect local waters and watersheds.¹² Robust processes are required to ensure a plan achieves broad community buy-in and water user and industry support (e.g. co-led by Indigenous Nations and the Province; opportunities for community, stakeholder and local government engagement and participation). If the majority of water users and authorities endorse the planning process and final outcome, Water Sustainability Plans can lead to more durable decisions and reduce the potential for conflicts between upstream/downstream neighbours, and between society and nature.

Roles for watershed group/entity? A wide spectrum of possible roles exists for local watershed entities in development of a Water Sustainability Plan, from simply encouraging (or requesting) the Province and Indigenous governments to initiate a Water Sustainability Plan to address an identified regional water issue/conflict, to providing advice throughout the process, all the way to a local entity being designated as the entity responsible for developing the plan (with the appropriate capacity and resourcing).

Communities and local governments can begin laying groundwork for water sustainability planning now, even if there is no planning process on the horizon. "No regrets" strategies and priority activities include:

- Building relationships with regional provincial staff and Indigenous governments.
- Clearly articulating the watershed conflict/problem that a plan would help address.
- Compiling the elements of a *state of the watershed report* that identifies the main concerns, targets, available data, and monitoring (and gaps).
- Begin engaging the broad range of rights holders and stakeholders to articulate a long-term sustainable vision for the local waters.

SENSITIVE STREAM DESIGNATION (SECTION 128)

What is it? This section of the WSA was brought forward from the former *Fish Protection Act*, and enables the designation of streams and hydraulically connected aquifers as “sensitive” if this designation will contribute to the protection of an at-risk fish population.

What problem does it solve? This designation offers an opportunity for additional protection and attention to address water supply/quantity issues. It is intended to help protect a fish population whose sustainability is at risk because of ecosystem damage.

How does it work? Any new authorizations on Sensitive Streams may have additional protections or measures, including possible terms and conditions related to licensing, mitigation, water use, and monitoring and reporting. Schedule B (in the *Water Sustainability Regulation*) contains the 15 designated streams from the previous section of the *Fish Protection Act*.¹³

Roles for watershed group/entity? A local watershed entity can encourage and work with FLNRORD to have specific creeks, streams, rivers, or hydraulically connected aquifers designated as “sensitive” if there are clear concerns about fish populations at risk and the sustainability of the overall river system.

SENSITIVE STREAM DESIGNATION KEY CONSIDERATIONS/RISKS

- This is a reactive tool not a proactive approach. As set out in legislation, a Sensitive Stream Designation is intended to apply in situations where there is a fish population that is already at risk because of damage to the ecosystem.
- Trigger not clear but will require Provincial interest and staff or political champions.

WATER RESERVATIONS (SECTION 39)

What is it? A Water Reservation sets aside unrecorded (unlicensed) water in a stream or aquifer for a specific purpose, such as: future or ongoing treaty negotiations and agreements; accommodating future demand for municipal water supply; power production; or environmental protection. A Water Reservation prohibits the diversion of that water for other purposes.

What problem does it solve? A Water Reservation is primarily a tool to address water supply/flow issues to retain adequate water for, for example, fish, future treaty negotiations, or municipal use.¹⁴ Reserves could also provide a means for Indigenous water rights and uses (in-stream flow and/or diversion) to be better recognized in the provincial water licensing regime. In the past, such reserves have been used in a number of situations, such as retaining water in a stream for fish, future treaty obligations, or possible municipal growth.

How does it work? Authority to reserve water rests with the Lieutenant Governor in Council through an Order in Council. A Water Reservation could be established separately or as part of a Water Sustainability Planning process.

Roles for watershed group/entity? A local watershed entity could seek to have such a reservation created to protect flows for fish and for other important ecological, cultural, and social water uses.

WATER RESERVATIONS KEY CONSIDERATIONS/RISKS

- This is not a means to “claw back” water from an overallocated system. It can only apply to “unreserved” water for future options.

ADVISORY BOARDS (SECTION 115)

What is it? Advisory Boards can be established to provide advice to the Province (and statutory decision-makers) on several aspects of the Act or regions in the Province, including but not limited to: establishing Water Objectives; methods for determining environmental flow needs; and standards and best practices for diversion/water use. Advisory Boards can be local or provincewide in scope. They do not have decision-making authority, but allow for a formalized and rigorous role to provide local expertise and knowledge into statutory decision-making.

What problem does it solve? Advisory Boards provide a formal vehicle through which expertise and local “advice” and input can help create the standards, methods, and water management approaches under the Act. This strengthens accountability and allows greater diversity, knowledge, and perspectives to shape the statutory decision-making process.

ADVISORY BOARDS

KEY CONSIDERATIONS/RISKS

- Requires Government interest to initiate and appoint board members.
- Scope of impacts on decision-makers uncertain, as boards are only advisory in nature.
- May involve resources and costs to the Province.
- Ensuring statutory decisions are not fettered and are unbiased

How does it work? Creation of Advisory Boards requires action by the Minister of Forests, Lands, Natural Resource Operations and Rural Development (FLNRORD), who appoints the Board Chair and members.

Roles for watershed group/entity? Local water entities could provide recommendations on appointing Advisory Board members and developing the terms of reference or scope of consideration. A local watershed entity could potentially be designated as an Advisory Board itself.

PAUSE

The Importance of Unbiased Decisions

Fettering is an Old English term meaning to shackle or restrain. In the realm of statutory decisions and governance, fettering occurs when a formal decision-maker allows themselves to be constrained in some way. Any statutory decision-maker—as set out in legislation such as the *Water Sustainability Act* or as part of administrative law—is required to come to their decisions with an open mind and ensure they are taking into account relevant considerations and not irrelevant information. These types of formal decisions would be bound by fundamental aspects of administrative law and should follow some core concepts including:

- decisions follow the legislation
- the designated decision-maker must be the one making the decision and be unbiased
- decisions must be procedurally fair

It is perfectly acceptable for decision-makers to take advice and consider all the relevant facts, including local context, priorities, and any specific technical or expert knowledge. The key point is that a decision must be reached with an open mind and not be predetermined or prejudiced and should avoid any perception of bias.



DELEGATED AUTHORITY (SECTION 126)

What is it? This section of the Act introduces the possibility to delegate certain statutory decisions under the WSA to another “person or entity.” Decisions available for delegation include those made by the comptroller, water manager, engineer, or officer (but not Orders in Council, such as regulations, or decisions made by the Minister). Examples might include approvals or water licensing.

What problem does it solve? This provision of the WSA provides a way to shift the locus of decision-making—shifting away from top-down government approaches and bringing increased authority closer to local communities and those impacted by decisions and more familiar with watershed issues and consequences. This could help create more durable decisions based on local expertise, leadership, and buy-in. This provision does not necessarily mean the Province will have *no role*, but rather that authority for some decisions could be shared, strengthening the potential for partnerships and local participation and buy-in.

How does it work? It is not yet clear how this delegated authority process would work. Clear criteria, resources, and accountability measures will absolutely be required to ensure legitimacy and capacity to take on formal (and legally defensible) statutory decision-making.¹⁵ Importantly, clarity is also needed on how this process would interact with Indigenous law and authority. For example, a co-governed local watershed by the Province and Indigenous nations could be empowered by both the Provincial authority in the *Water Sustainability Act* and through Indigenous authority and laws.¹⁶

DELEGATED AUTHORITY KEY CONSIDERATIONS/RISKS

- Which decisions are going to be delegated, and which actors can legitimately *make* those decisions, would need to be clearly specified.
- Does not include the ability to delegate Minister decisions or those requiring Cabinet approval (Order in Council), such as setting Water Objectives or initiating Water Sustainability Plans.
- Resource/accountability/enforcement mechanisms needed.
- Legal liability and risk—statutory decisions can be appealed.
- Would need to be explicit of the complementing Indigenous Law framework.

Roles for watershed group/entity? Section 126 could provide (in the long term) an avenue through which a local watershed entity—with the appropriate institutional structure, capacity, and accountability and legal support—could directly draw down authority for specific aspects of WSA decision-making. The institutional form of the watershed entity will be critical. For example, a bilateral government-to-government decision-making table—between the Province and Indigenous nations—with supporting stakeholder/advisory committees is one possible approach that respects the government-to-government nature of the Crown-Indigenous relationship. Even with this kind of bilateral model, roles will still exist for other groups in supporting, informing, and participating in the process (e.g. data/information, advice, capacity).

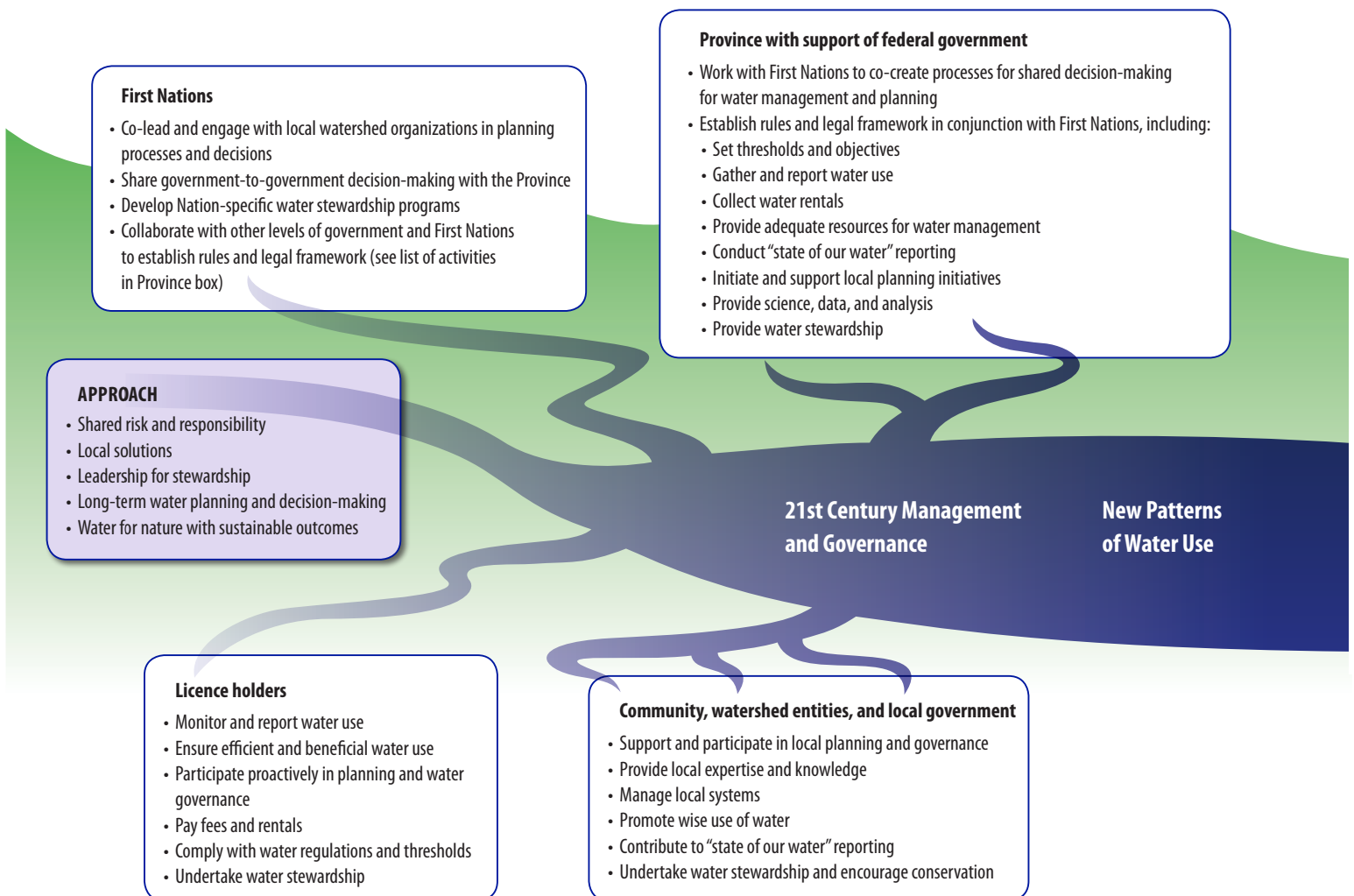


5. Conclusion: Moving Forward with a Partnership Approach

As water managers and communities grapple with British Columbia’s increasing water challenges, the need for a partnership approach is more clear now than ever. Senior governments will continue to play an important role in water management and implementing their water laws, such as the *Water Sustainability Act*, but top-down management approaches are no longer sufficient. Many sources of authority and expertise—and creativity and innovation—are needed to create a resilient and sustainable water future.

Implementing the WSA to its fullest potential to address the very real problems emerging in B.C. watersheds will only happen with the leadership of Indigenous nations, communities, and watershed entities working together with the Province to deploy the Act’s keys tools and levers for change.

All partners will be required to contribute and, ultimately, will need to work together in each watershed under a shared risk and responsibility approach to water management and governance. The partnership model diagram below illustrates the kind of relationships needed to fulfil the potential of this approach. Moving from today’s status quo to a more robust and sustainable system will require significant effort, but the possibilities do exist now.



NOTES

- 1 This document will be updated periodically to reflect ongoing developments as aspects of the WSA are implemented over time.
- 2 See <https://poliswaterproject.org/polis-research-publication/awash-opportunity-ensuring-sustainability-british-columbias-new-water-law/>
- 3 See https://www.freshwateralliance.ca/bc_drought_message_guide
- 4 See https://www.fnfisheriescouncil.ca/wp-content/uploads/2018/09/FNFC-ProtectingWaterOurWaySingles_FINAL-updated-by-AA.pdf
- 5 To date, one Provincial Watershed Governance Pilot has been initiated in the Nicola Watershed. For details, see the news release about the Memorandum of Understanding signed by the Province and five Nicola Chiefs in March 2018: <https://news.gov.bc.ca/releases/2018ENV0012-000484>
- 6 The WSA specifies that water objectives can be applied to “a watershed, stream, aquifer or other specified area or environmental feature or matter.” See section 43(a). <http://www.bclaws.ca/civix/document/id/lc/statreg/14015#section43>
- 7 See *Water Sustainability Act* section 43(5)(d). <http://www.bclaws.ca/civix/document/id/lc/statreg/14015#section43>
- 8 See *Water Sustainability Act* section 43(4). <http://www.bclaws.ca/civix/document/id/lc/statreg/14015#section43>
- 9 Environmental flow needs are defined in the WSA as, “the volume and timing of water flow required for the proper functioning of the aquatic ecosystem of the stream.” A critical environmental flow is defined as “the volume of water flow below which significant or irreversible harm to the aquatic ecosystem of the stream is likely to occur.” See <http://www.bclaws.ca/civix/document/id/lc/statreg/14015#section1>
- 10 The Okanagan Basin Water Board’s Environmental Flow Needs Project is a leading example in B.C. of a collaborative initiative to develop and customize robust methods for determining environmental flow needs in local streams. See <http://www.obwb.ca/efn/>
- 11 Curran, Deborah and Oliver M. Brandes. (2018, forthcoming). *Water Sustainability Plans: Potential, Options, and Essential Content*. Innovation Discussion Brief.
- 12 A Water Sustainability Plan is being contemplated for the Nicola Watershed according to the terms of the March 2018 Nicola Watershed Pilot Memorandum of Understanding between the Province and Five Nicola Chiefs. See <https://news.gov.bc.ca/releases/2018ENV0012-000484>
- 13 For a list of the 15 previously designated Sensitive Streams, see http://www.bclaws.ca/civix/document/id/complete/statreg/36_2016#ScheduleB
- 14 For details on Water Reserves and list of current Water Reservations, see: http://www.env.gov.bc.ca/wsd/water_rights/scanned_lic_dir/Water%20Act%20Reserves/
- 15 Persons or entities would need to fully understand their obligations as a decision-maker, including the necessity of being neutral and unbiased, and allow themselves to be fettered in their decisions (see Box p. 12). These types of decisions can be appealed and the decision-maker would need to be able to rigorously defend their decision before a tribunal or the courts.
- 16 This type of dual authority approach is modelled in the Haida Gwaii Management Council, created under the 2009 *Kunst’aa Guu – Kunst’aayah Haida Reconciliation Protocol*. The Management Council is a permanent table to which both the Crown and the Haida Nation delegated their respective authorities to make joint, consensus decisions on strategic land and resource management issues. See <http://www.haidagwaiimanagementcouncil.ca/index.php/faqs/>.
- 17 Diagram originally published in: Brandes, O.M., Carr-Wilson, S., Curran, D., & Simms, R. (2015, November). *Awash with Opportunity: Ensuring the Sustainability of B.C.’s New Water Sustainability Act*. Victoria, Canada: POLIS Project on Ecological Governance, University of Victoria. Available at <https://poliswaterproject.org/polis-research-publication/awash-opportunity-ensuring-sustainability-british-columbias-new-water-law/>

POLIS Water Sustainability Project

The POLIS Water Sustainability Project develops cutting-edge research to improve freshwater decision-making and management. We share solutions with those working on the ground (and in the water), including communities, experts, government (local, Indigenous, provincial, federal), and non-governmental and Indigenous organizations. By combining practical expert research with community action, it works to increase understanding of freshwater issues and to drive law, policy, and governance reform to generate change towards a sustainable freshwater future.

The POLIS Water Sustainability Project is a focused initiative of the University of Victoria's POLIS Project on Ecological Governance. It is housed at the University of Victoria's Centre for Global Studies as one of its ongoing interdisciplinary projects.

www.poliswaterproject.org
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**University
of Victoria**

POLIS Project on Ecological Governance

Centre for Global Studies, University of Victoria

PO Box 1700 STN CSC

Victoria, BC V8W 2Y2 Canada

Tel: 250-721-8800

Email: polis@uvic.ca

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