

April 30, 2010

BY EMAIL

Ministry of Environment  
Water Stewardship Division  
PO Box 9362  
Stn Prov Govt  
Victoria, BC V8W 9M2

Dear Sirs and Mesdames:

Re: **Water Act Modernization Submission**

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First Nations Women Advocating Responsible Mining (“FNWARM”) is a coalition of First Nations women leaders located throughout northern BC. These leading female figures share extensive experience in dealing with mining issues and are united in their collaborative efforts to encourage environmental, social and legal responsibility amongst the mining industry.

FNWARM seeks to promote environmentally sound mining exploration and development processes that respects Aboriginal right and title and the principles of shared decision-making as set out in the New Relationship. While FNWARM does not oppose mining development, it firmly stands against mining development at the price of our environment. Destroyed lakes, polluted lands and rivers, and the destruction of integral fish and wildlife ecosystems are too high a price to pay for short-term, limited economic gains. FNWARM instead, encourages the development of genuine partnerships between First Nations and environmentally committed companies so as to give rise to environmentally and socially sustainable developments that respect the cultures, traditions and needs of First Nations.

We are pleased to offer our preliminary submissions on the BC Water Act Modernization – Discussion Paper (“WAM Paper”) as it demonstrates the importance of not only engaging First Nations in proposed amendment of the Water Act, but may serve as a precursor to consultation, a necessary legal requirement in this instance. Water is the lifeblood of all First Nations’ and, arguably, all BC

communities. Every Aboriginal right is integrally connected to water whether it be right to fish, hunt, gather, economic in nature or Aboriginal title-related. There is not a living species that does not require clean water to sustain itself. Our traditional economies have a food, social and ceremonial character and inadequate water supply with infringe our rights at the most fundamental levels.

FNWARM's position concerning the proposed principles and objectives is set out below.

### **Principles**

With respect to Principle 2 – *First Nations social and cultural practices associated with water must be respected and accommodated* – FNWARM overall supports the premise of respect for our Aboriginal social and cultural practices. However, it is the position of the FNWARM that this principle has received careful legal drafting to avoid recognition of substantive Aboriginal rights and the corresponding procedural obligations of the Crown regarding the duty to consult and accommodate. FNWARM submits that any changes to the current legislative framework should also be made in accordance with the minimum international standards for the protection and promotion of the rights of Indigenous Peoples as set out in the *United Nations Declaration on the Rights of Indigenous Peoples*. It is imperative that the Province be transparent and forthright. First Nations possess Aboriginal water rights. There are few, if any, Aboriginal rights that do not have an integral connection to clean water. Any amendment to the current water regulatory system necessarily has the potential for adverse effects upon Aboriginal rights and title, and, therefore, the duty to consult will be triggered.

With respect to Principle 3 – *Science informs water resource management and decision-making* – FNWARM submits that traditional knowledge must also necessarily inform water resource management and decision-making. We also note that while traditional knowledge and science may inform, respectful resource management and decision-making will give equal weight to Aboriginal self-governance and Crown jurisdiction.

### **Protecting Stream Health and Aquatic Environments**

□ Environmental flow needs are considered in all water allocation decisions to protect stream health

FNWARM submits that it prefers the hybrid option of both environmental flow guidelines and environmental flow standards. It is FNWARM's perspective that water management and allocations require both enforceability and flexibility. These guidelines and standards should be developed in conjunction with a First Nations-specific technical working group with nominated members from all applicable Aboriginal entities, including FNWARM. First Nations women play a substantive but distinct role in water management.

With respect to the protection of water quality, FNWARM strongly supports the strengthening of provisions within the legislative framework to restrict the dumping of substances into streams.

Watershed-based water allocation plans include environmental flow needs and the water available for consumptive use

FNWARM submits that water allocation plans should be required and decision-makers should have to consider such allocation plans. FNWARM considers a discretionary/optional model to create too low of a standard for the protection of a vital natural resource. We also submit that a First Nations technical working group should, at minimum, advise the Province on the development of such allocation plans and that traditional knowledge should be integrated on an equal basis with western science. In short, generations of knowledge of water flow is greater than any snapshot that science can advance.

FNWARM additionally submits that First Nations technical groups should be comprised of the most affected regional First Nations representation and make best efforts to have gender equity.

Finally, FNWARM supports the concerns raised by First Nations with respect to the Department of Fisheries and Oceans policy of “no net loss” and the destructive impacts that such a policy has effected on lakes of importance to First Nations around the province. FNWARM shares the position that revisions to the *Water Act* should include any provisions that would integrate a no net loss policy into the framework.

### **Improving Water Governance**

Indicate your level of support for the proposed objectives for improving water governance.

FNWARM strongly supports a water governance model that acknowledges the Aboriginal inherent right to self govern and the integration of true shared decision-making. FNWARM rejects simply categorizing First Nations’ constitutional rights alongside interested industry or public society groups. First Nations are not mere stakeholders and we require a distinctive process for consultation and accommodation of our rights. The objectives in the current draft implicitly acknowledge a substantive role for First Nations and allow for Aboriginal jurisdiction to be integrated into decision-making.

Which approach do you prefer, and why? Are there others?

FNWARM submits that a hybrid shared and delegated approach would be preferable as First Nations throughout BC are negotiating on a local and regional basis their own shared decision-making models in land and water use planning. FNWARM considers mutual and equal acknowledgement of Aboriginal jurisdiction to be

fundamental to a respectful relationship. Delegation to watershed agencies with equal First Nations representation from the affected region adopts both approaches. Gender equity should be given its due consideration in such appointments to watershed agencies.

□ What scale of watershed is most appropriate for water planning and management?

FNWARM submits that the current 26 water districts should be used as a basis but evaluated on both First Nations' traditional knowledge and science-based means to set appropriate watershed boundaries. First Nations knowledge of species migration and the interrelationship of multiple watersheds are fundamental to getting a full and accurate picture of watershed management. Neither water nor the species dependent on water abide by the lines on the Provincial map dividing one water district from the next. FNWARM submits that greater consideration needs to be given as to the planning and management approach to be taken for those water bodies crossing multiple traditional territories and regions.

□ What funding solutions might help to implement the approaches?

First Nations will require financial capacity to participate in any given approach.

□ What are the important considerations for accountability, transparency and dispute resolution processes in any delegated or shared approach?

FNWARM submits that in a shared and delegated model, First Nations representatives that are appointed to decision-making roles must be accountable to their own community through a requirement to produce reports to their nominator. A written reporting mechanism would be preferable, but there may be a need for appropriate accommodation for verbal reporting, if it is customary. This reporting mechanism would be internal and confidential between the First Nation and their representative.

For clarity, FNWARM submits that on the consideration of Aboriginal rights and associated traditional knowledge in deliberation processes, it is advisable for all written decisions to specifically address how the applicable First Nations were consulted and accommodated and generally how Aboriginal issues and concerns were given their required consideration. A separate section and heading of any decision would appear sufficient.

With regard to dispute resolution, FNWARM submits that there may be many Aboriginal alternative dispute resolution models that may be integrated into specific delegated watershed agencies. Such integration, as simple as having an advisory Elder or Elders Council, will bolster decisions and create a level of legitimacy to the affect First Nation community. FNWARM notes that the Nisga'a Final Agreement sets out a variety of accommodating mechanisms in the dispute resolution area and, of course, this has been approved by the Governments of British Columbia and Canada as an applicable model.

□ What are the benefits and implications of sharing roles for water stewardship?

FNWARM submits that decisions that represent the entire affected community, Aboriginal and non-Aboriginal alike, are always more acceptable to a larger majority. If First Nations see their values and rights accommodated in each watershed decision, they are likely to be more deferential to the delegated watershed agencies. FNWARM notes with respect, it is clear that First Nations have a historical role in maintaining watersheds in their custodial capacity. There is wisdom in inclusive sharing of responsibility for future generations.

**Introducing More Flexibility and Efficiency into the Water Allocation System**

□ Indicate your level of support for the proposed objectives for introducing more flexibility and efficiency into the water allocation system.

FNWARM respectfully disagrees with the proposed objectives for introducing greater flexibility and efficiency into the water allocation system. FNWARM has concerns that this theme of amendment may be an attempt to streamline and create lower environmental standards and thresholds. Flexibility and efficiency are not necessarily ill concerns, but they must be approached with careful appreciation of the rights affected by giving greater discretion on exempted uses. This theme needs to be further elaborated upon to achieve a level of comfort with its implicit meaning. FNWARM has particular concerns with respect to the granting of water licence applications for development projects, including mining projects, located within First Nation traditional territories. The terms and conditions of water licences must be subject to greater review so as to respond appropriately to changes in the environmental, economic and social conditions. Such a review process must incorporate the proper consultation and accommodation of Aboriginal rights and title.

□ Which options do you prefer, and why? Are there others?

FNWARM submits that a multiple tool approach is the best approach and submits that there needs to be an elaboration of the codes, incentives and economic instruments.

□ What considerations would help determine which water uses and extraction rates could be a permitted use (no water licence required)? What controls are needed? How should permitted use status be protected?

FNWARM has serious concerns that “permitted use” has the potential for abuse and deregulation of this vital natural resource. We note that exempting particular regulation seems counter intuitive to the general theme of water conservation found elsewhere in the Discussion Paper. At minimum, there needs to be a thorough discussion on potential criteria for “permitted use”. As a basic concept, permitted use appears to be weakening the modernized regulatory theme of the discussion paper. FNWA

### **Regulating Groundwater Extraction and Use**

Indicate your level of support for the objective proposed for regulating groundwater extraction and use.

FNWARM strongly supports this objective with the condition that groundwater regulation should not only occur on “priority/critical” areas. Regulation should occur before the environmental circumstance become critical. A severely damaged critical groundwater supply can be prevented if monitored more readily.

FNWARM shares the concern with other First Nations that revision to the current legislative framework should include a cumulative impact assessment of multiple groundwater extractions. Further, the participation of First Nations within the regulation of groundwater extraction and use will require greater resources to enable First Nations to gain an understanding of groundwater resources and the potential impacts.

Which thresholds do you prefer, and why?

FNWARM requires outside environmental consultant advice to properly answer such a question.

What are the appropriate criteria for determining the priority areas for groundwater extraction and use?

FNWARM requires outside environmental consultant advice to properly answer such a question.

### **Additional Input**

At the multi-sector workshop held in Vancouver on April 21, 2010, FNWARM Chair Anne Marie Sam raised concerns as to the reliance of government upon industry to set standards with regards to water quality rather than conducting independent assessments.

Further, FNWARM submits that legislative revision to other outdated statutes such as the B.C. *Forest Act* and *Mines Act* is imperative to adequately protect lands and water and ensure appropriate consultation and accommodation of Aboriginal rights and title.

Finally, FNWARM views the recent approval of the Site C project to commence the regulatory process in the absence of adequate consultation and accommodation with affected First Nations as a clear example of the failure of the current legislative framework governing water resources.

Yours truly,

**FIRST NATIONS WOMEN ADVOCATING RESPONSIBLE MINING**

Per:



Tamara Olding

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