

## What might a Water Sustainability Act 2.0 look like? *Story behind the WSA Story as told by Donna Forsyth & Mike Wei*

### Why do Donna Forsyth and Mike Wei care so much about the WSA?

We are dedicated, now retired, public servants. We were part of the team that drafted the *Water Sustainability Act* (WSA) and regulations – we were **“in the room”** when the WSA was drafted.

We have intimate knowledge of the WSA and understood that the current WSA represents the first, highest initial priorities written into law and was only the first step in modernising BC’s water legislation.

We are therefore very aware that **“certain things were left behind”** in the first round and still need to be addressed. For example, under section 5 WSA the provincial jurisdiction over water is limited. There is no jurisdiction for any of the rules under the WSA for water that remains unvested.

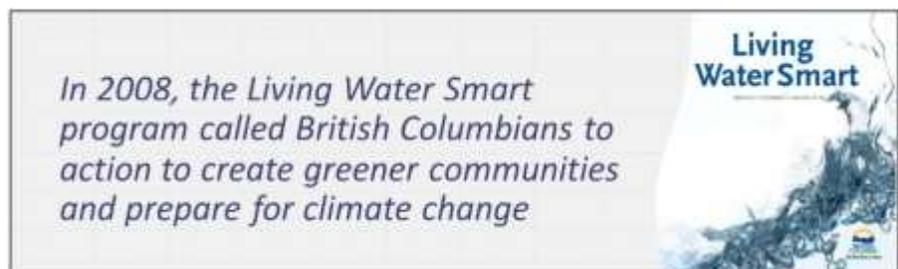
So far, the current engagement for the Watershed Security Strategy has prioritised the questions that relate to: **“what can First Nations and local organisations do to help with the management of BC’s water”**.

Our submission focused on government's actions that we believe need to be discussed and addressed in conjunction with the Watershed Security Strategy in order to unlock the full potential for sustainable water management in BC. Since climate change is all about water - too much or too little - these changes should fit into climate related initiatives as well.

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*The vision is to unlock the full potential for sustainable water management in BC.*

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## What were government's highest priorities when the WSA was brought into force?

Passed by the British Columbia Legislature in 2014, the *Water Sustainability Act* (WSA) came into force on February 29, 2016. It addressed the three highest priorities at the time.

First, the WSA finally gave government the authority to require licences for non-domestic groundwater use. Previously the authority to use groundwater was based on the common law concept of "right of capture", which meant that you could just drill a well and divert the groundwater for use, regardless of the impacts on your neighbours or the environment, including impacts from putting wells right beside water stressed streams,

Secondly, it provided clear legal authority to protect stream flows by considering environmental flows in water allocation decisions.

Thirdly, it addressed the long-standing issues with the **First-In-Time-First-In-Right (FITFIR)** allocation system by allowing essential household use and critical environmental flow thresholds to take priority above all other uses during a drought. The priorities established under FITFIR could also be modified in water stressed areas through Water Sustainability Plans.

Finally, the new legislation recognized the need for alternative governance arrangements. These options are being explored in pilot projects and are described in the recent Discussion Paper.

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*All parties involved in the Watershed Security Strategy engagement process need to know there are existing challenges inherent in implementation of the current WSA.*

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**Context for the Watershed Security Strategy:** So, we acknowledge the importance of the two tools that the Discussion Paper focused on: the potential for planning and Water Sustainability Plans and the flexible governance options. These tools clearly provide important opportunities to improve water management under the WSA.

However, in our submission it was important for us to ensure that all parties involved in the Watershed Security Strategy engagement are aware of the existing challenges with the implementation of the current WSA. These challenges are connected to the need to address the next round of priorities in WSA 2.0. This additional work will be critical to ensuring the success of the Watershed Security Strategy.

During development of the WSA, the stars appeared to be aligning and everything was pointing to water becoming a real priority for the government. That was our frame of reference in 2014.

We believed that the initial version of the WSA would not be the only kick at the can. Given that water is now being recognized as such a big priority, we could say to ourselves: **'we will be back for WSA 2.0 to deal with the things that we had to leave behind'**.

Groundwater licensing is a foundation piece for the WSA and the biggest endeavour the Province of BC has taken on in its water management history. Yet, commitment by government to follow through decisively and make it happen was lacking during the years 2016 through 2021. This failure transcends successive administrations. The lessons learned would inform the strategy for "WSA 2.0".

## What is the concern about what happened during the post-2016 period?

Before retiring, we observed with concern how, once the WSA was brought into force and the fanfare subsided, the provincial government stopped prioritising the implementation of even the most fundamental piece of this new law which was groundwater licensing.

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Remarkably, responsibility for the implementation of groundwater licensing, the largest water-related undertaking in a century, was not listed in any minister's mandate letter.

Is it any wonder that we are eager to reach out to the new minister of Land, Water and Resource Stewardship, as well as her staff, and share what we know? At the same time, we also recognize the huge potential benefit of providing this information to any British Columbian interested in water management and engaging with the Watershed Security Strategy process.

Accordingly, our submission for the Discussion Paper engagement process focused on the key insights and background knowledge we gained from being involved with round one of the WSA. We also wanted to provide insight into the follow-up work that we believe will be needed to ensure the success of the Watershed Security Strategy.



## What challenges and gaps need to be addressed in WSA 2.0?

Drawing on our experience and our knowledge of the "**story behind the WSA story**", we have identified five challenges and gaps in our submission that we believe should be front-and-centre in the next round of government priorities. Addressing them would ensure the success of the important work being proposed in the Watershed Security Strategy.

**A Look Ahead:** In the coming weeks and months, we will delve deeper into those challenges with a series of articles on:

**Why we need to vest all water in BC.**

**Why the FITFIR priority system was retained, and the basis for the modifications for household needs and stream flow protections as well as the focused review of FITFIR enabled under the Water Sustainability Plans.**

**Why it's time to re-evaluate the industry-driven exemptions regarding water use.**

**Why it's time to re-evaluate the special water authorities given to the industry funded Oil and Gas Commission.**

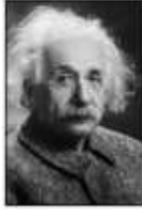
**The need for significant compliance and enforcement actions, including requiring measuring and reporting of actual water use.**

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*Addressing these five challenges and gaps is necessary to achieve the full potential of the WSA.*

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Addressing these challenges and gaps will bring the WSA to the next level, **we are calling this "WSA 2.0"**. In doing this work, the government would have an opportunity to improve the foundations of water law in BC and to demonstrate that government has the political and institutional will to follow through on the full potential of the WSA, to improve the management of water in BC.

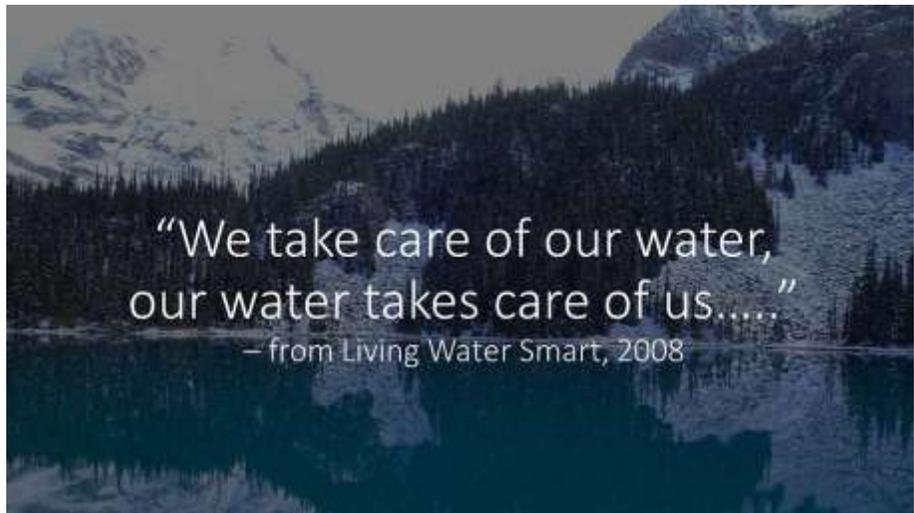


*“Every kind of peaceful cooperation among men is primarily based on mutual trust.” – Albert Einstein*

***An over-arching issue is trust:*** Completion of all of the above would also go a long way to address the current and widespread lack of trust in the government's capacity and will to properly manage our water.

That lack of trust exists for many water stakeholders, members of the public, local municipalities and indigenous communities needs to be regained for the WSS to succeed. It will take time and commitment on the part of elected representatives and provincial staff to build the necessary relationships that restore trust and respect.

Clearly, prioritizing the actions described in our submission would demonstrate that the government remains committed to modernizing and implementing BC's water laws, to allow for the successful protection and management of water in BC, including the initiatives developed under the Watershed Security Strategy.



*“We take care of our water,  
our water takes care of us....”*  
– from Living Water Smart, 2008

**To read the joint submission to the Province by  
Donna Forsyth and Mike Wei, continue reading....**

# **Comments on the Watershed Security Strategy Discussion Paper**

**Submitted to the Government of  
British Columbia by Mike Wei  
and Donna Forsyth**

**March 18, 2022**

As former members of the government team that supported the Water Sustainability Act (WSA), we have a unique perspective regarding the development of the Watershed Security Strategy (WSS) and the keys to its success.

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## **A. Fundamental roadblocks to water management, reconciliation, and modern land use planning (MLUP) remain**

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Since the WSA was brought into force in 2016, there has been a lack of implementation of the tools that were provided. One of the key jurisdictional gaps that the WSA was meant to address was the lack of regulation of groundwater use. The new requirement for non-domestic groundwater users to obtain authorizations brought BC's water legislation into the 21st century and aligned it with licensing of stream water in BC. But there was a failure to communicate (at the highest level of the ministry) in a way that addressed the lack of trust with government regulations in general, the lack of understanding of the benefits of licensing and the risks of missing the deadline.

All of this was complicated by public suspicions surrounding the “true motives” behind the new groundwater licensing requirements. The failure to recognize and address this lack of trust was compounded by the failure to enforce the illegal water use from wells drilled after the WSA came into force. In addition, once the WSA came into force, not one of the premier's mandate letters to the ministers even mentioned the need to implement this historic change to BC's water law, despite the resulting impacts to thousands of local businesses. As of March 2, 2022, this lack of trust has now resulted in these businesses using water illegally, being vulnerable to having it shut off as well as having a higher likelihood that their application for groundwater use will ultimately be refused. The government has now said that they “do not intend to be unreasonable” to this illegal water use, but has not communicated what the actual plan is. The public is left confused and so far, those who did the right thing and applied for licences are seeing no benefit. In the context of the WSS, this will become another anecdote to justify a lack of trust in the government's latest water initiative. The lack of knowledge and data around groundwater use in the province will also become a potential roadblock to most, if not all, of the outcomes listed in the discussion paper.

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So, while the concepts and ideas reflected in the WSS discussion paper are important, the effectiveness of their implementation remains vulnerable to a lack of trust by the public and lack of clarity around the prioritisation of water by the government.

## **The following discussion identifies the changes that could help remove or reduce the roadblocks that lay ahead for the WSS**

***One, provide clear messaging of the government’s level of commitment to prioritise water going forward:*** The WSA was meant to establish the government’s prioritisation of water management in the province, but the government has failed to follow through.

The use of the word “security” here, can indicate a recognition of the increased urgency to deal with climate change and water, but like “sustainability”, it is a generic term that will mean different things to different people. “Security” can be defined as: “the state of being free from danger or threat” (Oxford). It is crucial that there be a consensus on what the primary focus is going to be: prioritising the protection of water and aquatic ecosystems or ensuring that there will be adequate water for human activities.

This lack of clarity is especially concerning since there are numerous parallel initiatives being put forward by the government at this time - including clean energy, strong economy, MLUP and DRIPA implementation. These initiatives will potentially have conflicting priorities and the government must clarify, in partnership with First Nations, which goals will have the highest priority.

In our view, for example, the WSS will be very helpful in establishing ways to classify those areas that are most vulnerable to impacts on water from development activities, but there must also be clarity around what those classifications will actually trigger, in terms of future development opportunities or requirements. Ultimately, only a clear prioritisation of water protection will be effective to ensure the security of the most vulnerable areas of the province. For example, there must be a commitment to establishing “no go” zones or to insisting on additional measures with increased costs of development in vulnerable areas. The reality of the impacts on the other government initiatives will need to be discussed and addressed.

***Two, create a water champion by assigning accountability for water protection to a water secretariat:***

It is unfortunate that the recent organisational structure has now split water policy and water management into at least 5 agencies: the new ministry Land, Water and Resource Stewardship, the ministries of Environment, Forestry, and Health as well as the Oil and Gas Commission (OGC).

This structure illustrates the clear need to establish a water secretariat under the new ministry. The role of the secretariat would include the following mandates:

- **Act as the water champion** and in that role provide water related input for all the other government initiatives – inviting and acting on advice from water policy experts inside and outside of government.
- **Provide clear roles, responsibilities and priorities** for all water staff and have the authority to ensure executive direction is clearly communicating the need for cooperation, aligning priorities in planning, authorisation and science and monitoring and open lines of communication and data sharing, as well as consistency in decision making policies and requirements for all water authorizations, enforcements and regulatory requirements.
- **Immediately create regulatory development teams** across ministries accountable for developing the regulations needed to implement the tools in the WSA - including Water Sustainability Plans, measuring and reporting, water objectives, closing or restricting access to further water use in fully allocated basins, establishing environmental flow needs (EFNs) and critical environmental flow thresholds (CEFTs) and requiring drilling authorizations in high risk areas.
- **Establish deadlines for implementing** these high priority regulations and create accountabilities for meeting those deadlines.
- **Establish a water compliance team** mandated to develop outreach programs, assisting compliance officers with identifying illegal water use, and establishing an inspection and audit program focusing on activities in high risk areas.

Ultimately, in order to ensure true reconciliation and co-governance of water there will likely be a need to establish a new, independent water ministry. In the future, the water champion could be responsible for the smooth transition to a Ministry of Water.

In the meantime, the water secretariat must also be accountable for increasing the knowledge of water in the public and within government, and the responsibilities that come with the rights to use this resource that is owned by all of us. Trust has been lost through the lack of information clearly stating the legal implications of not having a water right during the groundwater licensing transition period, the lack of enforcement of illegal water use, and the lack of auditing and inspecting authorised water use. A water secretariat would have authority and be accountable for coordinating actions to improve the messaging to address the current anger and the attitude in many parts of the province that the government should “keep its hands off my water”.

We do not feel that a Provincial Water Officer role is appropriate in BC until there is an existing Ministry of Water and an organisational structure that supports it. The Provincial Health Officer (PHO) analogy suggested by Polis and others is inappropriate because it ignores the reality that the PHO is supporting and is supported by a Minister of Health clearly mandated to be accountable for health in the province and ministry staff who are focused on health issues.

### ***Three, improve the fairness of BC’s water management:***

#### **Step #1 is to remove language barriers.**

“Watershed” - this word is defined by Miriam Webster : “a region or area bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water”, which limits the analysis to surface (stream) water and the groundwater that is known to be hydraulically connected. We caution that maintaining this reference to “watershed” will create the same confusion that currently exists in the WSA through the use of “stream” as a defined term for all surface water sources. Instead, consider using “water body” or “surface water” instead of stream and use “water security” to clarify the intention to protect and preserve the security of all water. There will be more examples of opportunities to make the language used in water law more accessible to all; these are just a starting point.

#### **Step #2 is to treat all water users the same.**

Both fairness and science come into question when the following jurisdictional gaps in the WSA are analysed:

**Unvested water** - The rules under the WSA only apply to “vested” water as described in s. 4 WSA. Every other province and territory in Canada (other than Nova Scotia) has vested “all water”. In BC, vested water is limited to water in “streams” (as defined in the WSA to include all surface water sources) and water under the ground, or groundwater. “Overland flow” is the term generally used for this “unvested” water and the diversion and storage of this water remains unregulated, despite the potential impacts of these activities to the environment and to other water users. The diversion and private sale or use of significant amounts of potentially unvested water in NE BC for the oil and gas industry is an example of the loophole that has been created. This lack of jurisdiction has resulted in significant challenges for staff as well as a continuing inability to regulate with potential impacts on stream and groundwater recharge. In short, the lack of jurisdiction over the capture and storage of unvested water maintains the “wild west” of the past and staff is wasting time trying to determine whether the water is or is not under the WSA.

Moving forward with MLUP and the WSS without vesting all water would also jeopardise the process by creating an incentive to remain outside the regulations by intercepting overland flow water. This will result in lack of knowledge at the planning table, and impacts to “streams” and groundwater recharge can’t be addressed using the tools in the WSA. Needless to say, it will also create significant challenges for reconciliation and cumulative impact assessments.

**Special treatment for certain industries or types of water users** - There are 4 other significant ways that the legislation creates “favourites” (and consequently creates jurisdictional gaps) that must also be addressed through amendments.

The specified enactment authorities under the Oil and Gas Activities Act (OGAA). Under the OGAA, the Oil and Gas Commission(OGC) is given exclusive jurisdiction over water for oil and gas activities. The OGC was established in the 1990’s to provide a single, industry funded agency that could provide this industry with every permit they needed. This initially included only limited water authorisations, but it has been expanded to include all of them.

The exclusive jurisdiction given to the OGC has undermined the public confidence in government, resulted in a lack of coordination of water data, impeded reconciliation and prevented the hiring and training of water staff in areas where oil and gas activities are occurring. If this water use authority continues to be parcelled off, the lack of jurisdiction over oil and gas water use will significantly undermine the WSS and

MLUP. Water decisions for all activities in the province must ultimately be moved to a single water agency, but in the meantime, the new water secretariat must have oversight over the decisions of the OGC staff and the OGC must be accountable to the new water secretariat.

Regulations that replace authorizations or change approvals. Many of the existing regulations that create exemptions from authorisations remove a decision point that was previously in the Water Act or the WSA. While the government is relying on consultation on these regulations to meet their constitutional duty, this may not hold up in court. These regulations also create jurisdictional and informational gaps in water management that will undermine assessments of cumulative effects and MLUP processes. The water use under these regulations is not reported and cannot be quantified.

Regulations that replace WSA requirements with other legislation due to “duplication”. These exemptions are based on the presumption that the regulatory requirements in the sector specific legislation are the same as the WSA requirements (they are not). This is at best an exaggeration and at worst this results in both the removal of the WSA requirements and roadblocks to the use of the tools in the WSA for certain industries. In addition, these exemptions create a confusing inconsistency around the rules for water users in the province and create unjustified built in biases favouring certain industrial users of water over both other water users and water security in general. It must be noted that the water management tools of the WSA are not available when these water users are legally obligated to comply with their legislation instead of the WSA. The sector legislation also focuses on increasing development opportunities with the protection of water as an afterthought or “necessary evil”. Instead, the WSS should ensure that the rules that protect our water are consistent for all sectors and the so-called “duplicate” sector legislation is amended to require that the WSA requirements must be met.

Domestic groundwater users. An exemption from the authorisation requirement is currently in place for the whole province for all domestic groundwater users. This creates unfairness because licences are required for both domestic use of water from a “stream” and for the small volumes of groundwater used by small businesses. One option to discuss would be to bring all small water users into the system using a “light” form of authorisation. This would be a huge benefit to the MLUP and cumulative effects processes and would also address a sense of unfairness that not all small water users are treated the same. In the meantime, in vulnerable areas licensing can be required for all groundwater users using area based regulations.

***Four, ensure that vulnerable areas of the province are truly protected:***

True water “security”, as clarified and quantified through the consultation on the WSS, cannot be attained without water becoming the first, higher level consideration in all development processes. Under the new LWRS ministry, there will be an opportunity to establish a coordinated approach in all legislation and program practices. Currently, there is limited opportunity to provide input around risks to water and potential impacts based on area vulnerabilities prior to the actions of other ministries providing opportunities for exploration and other initial activities, including for mining, forestry and oil and gas activities. In order to ensure water security is realised and the new ministry is successful, this needs to change.

Crown lands should no longer be made available for any applications for exploration or other permitted activities and investment by industry, until an assessment of the vulnerability of the watershed has been made. Additional requirements to protect our most vulnerable areas can then be established as part of access to these areas. In addition, given the uncertain nature of hydrologic systems and climate change, authorizations should be enabled to incorporate new science and have the flexibility to adjust authorizations over time to protect the water.

Industry should be made fully aware of this prior to any investment, to reduce the risk of the government being sued for compensation when additional requirements or adjustments must be made to protect these vulnerable areas.

To ensure compliance, additional requirements for financial securities in the form of financial bonds must also become the norm.. This change to the government process at the front end will ensure that limits can be identified and placed on development in the most vulnerable watersheds and industry will be fully informed of the risks. While there will need to be “no go” zones, most areas can be protected through additional requirements coupled with meaningful enforcement authorities and accountabilities.

For true water security, the assessment of watershed vulnerabilities must be the starting point for all development decisions, including initial exploration and assessment activities by industry. The water secretariat would be accountable for prioritising these watershed assessments as well as ensuring that monitoring and reporting is backed by authority to enforce and make adjustments to requirements in these areas as conditions change.

Through these authorities, the water secretariat would be accountable for ensuring that all development and MLUP decisions really do treat water security as the highest priority.

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## **B. Summary of Recommendations**

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Many challenges that have contributed significantly to a lack of public trust on the ability and will of the BC government to manage and protect our water since the WSA was passed.

### **There is an opportunity for the WSS to rebuild that trust by:**

***Establishing a water secretariat as a provincial water champion responsible for ensuring the prioritisation of water in MLUP and mandated to ensure the prioritization of the protection of water:*** The water secretariat must be accountable for establishing and protecting vulnerable watersheds, through assessments, development of enhanced regulatory requirements and following up with enforcement authorities and authorities to adjust access when conditions change. Initially, the water secretariat would also be accountable for the coordination of all water management staff under the various ministries, ultimately setting the stage for a transition to one independent water authority.

### ***Addressing fundamental jurisdictional gaps and treating all water users fairly by:***

- Vesting all water to remove the lack of jurisdiction over water that is captured as “overland flow”.
- Removing the exclusive water authorities given to the industry-funded OGC. All water decisions, including for oil and gas activities, should be located in an independent agency accountable to the water secretariat.
- Removing all of the sector based exemptions that remove water authorization and approval decision points (e.g., placer mining and mining exploration, oil and gas use of deep groundwater). These regulations undermine both the Crown’s duty to consult and the DRIPA legislation and create gaps in knowledge of supply and demand that will impact water management, planning and cumulative effects assessments.

- Removing the regulations that allow for deferrals to so-called “duplicate requirements” in sector based legislation, such as forestry, mining and oil and gas. Allowing specific sectors to opt out of the water focused provisions in the WSA and replacing the general requirements with industry specific requirements undermines the public trust because it is unfair and does not protect the security of water.

***Ensuring that both the development approval and the MLUP processes are revised*** to prioritise assessments of watersheds prior to access to Crown lands even for exploration or other initial activities. Additional requirements for any development in vulnerable watersheds must be established up front and reviewed and adjusted as conditions change. Water must be the first thought, not an afterthought.

***Prioritising the use of term licences for all new water users*** and review the current 30 year review for existing licences under s.23 WSA (i.e. 30 years is too long). This will provide flexibility required for climate change adaptation and will “hard wire” the obligation to assess actual water use.

***Prioritising the enforcement of compliance*** of all water authorization and approval requirements, including bringing into force the monitoring and reporting regulation for all large industrial users.

***Requesting the commitment of the government to additional funding*** for the establishment of a water secretariat and for all aspects of the water program. There has been significant additional funding provided to the ministry of environment to tackle climate adaptation. Since the majority of climate change impacts will be focused on too much or too little water, funding to all water-related management and planning activities must be increased.

## **Closing Remarks**

We are grateful for the opportunity to provide this perspective and to share what we have learned from being involved in the development of the WSA and the struggles with its implementation. There are clearly significant challenges ahead for the management of water in BC and we hope that this information will be useful to highlight the changes that will be needed to ensure the success of the WSS.

