

# Protecting environmental flows via *B.C.'s Water Sustainability Act*

Rosie Simms & Oliver M. Brandes



POLIS Project on Ecological Governance

**watersustainabilityproject**

[poliswaterproject.org](http://poliswaterproject.org)

# Overview

- **Take stock:** *where is B.C. at with implementing a legal/policy regime for environmental flows?*
- **Background and opportunities in the WSA**
- **What are the key elements of a robust approach?**
  - Policy AND regulation

# 2008: Laying the foundation for eflows protections in law

## Living Water Smart

BRITISH COLUMBIA'S  
WATER PLAN



- **Water laws will improve the protection of ecological values**, provide for more community involvement, and provide incentives to be water efficient
- **Legislation will recognize water flow requirements for ecosystem and species**
- Government will **regulate groundwater use** and support communities to do watershed management planning

# Until 2016...

- Limited legal protection - regional policies, fish focused mechanisms

Forests, Lands, Natural Resource Operations and Rural Development

## Water use reduction order to protect fish

Share



### Information Bulletin

**Victoria**

Friday, July 31, 2015 10:30 AM

### Media Contacts

#### Media Relations

Ministry of Forests, Lands and Natural  
Resource Operations  
250 356-5261

### More from this Ministry

- [Factsheets & Opinion Editorials](#)
- [Visit Ministry Website](#)



(flickr.com)



POLIS Project on Ecological Governance  
watersustainabilityproject

## FORUM ON ENVIRONMENTAL FLOW NEEDS IN BRITISH COLUMBIA

HOSTS' STATEMENT AND SUMMARY

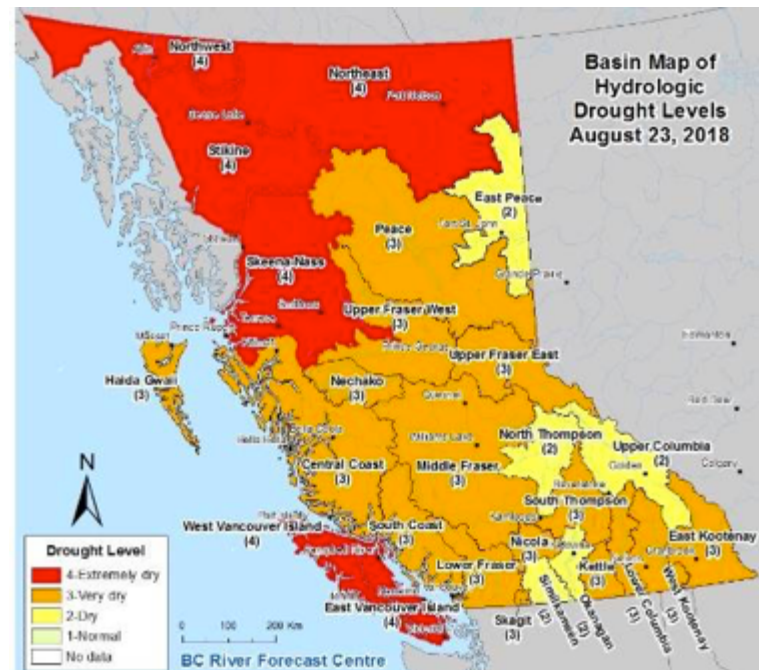
MORRIS J. WOSK CENTRE FOR DIALOGUE, FEBRUARY 1-2, 2016



A RIVER FLOWS THROUGH A TEMPERATE RAINFOREST IN NORTHERN B.C. © NINA NABACH/WWF-CANADA

# The world has changed:

- ✓ WSA now in place
- ✓ Some initial eflows provisions 'switched on'
- ✓ 3X drought seasons
- ✓ Government mandate: UNDRIP, reconciliation, land use planning



**BUT... MORE WORK TO DO: CHALLENGES  
IDENTIFIED AND KEY ACTIONS GENERATED AT  
2016 FORUM STILL STAND**



# 2016 forum – identified gaps & conclusions

- “Significant gaps exist in understanding **how WSA’s various mechanisms can work together in a comprehensive way**”
- It is not enough to “**consider**” environmental flows
- Limited mechanisms exist to address **current licences and overallocation**.
- Need for a **presumptive standard** to guide water allocation decisions as a placeholder
- Government faces **capacity and implementation challenges** in operationalizing the WSA
- Actors outside government need **clarity in how they can engage** in development & implementation of eflows regime
- “**Don’t let the perfect be the enemy of the good**”

# WSA a piece – *but not all* – of the legislative framework for water

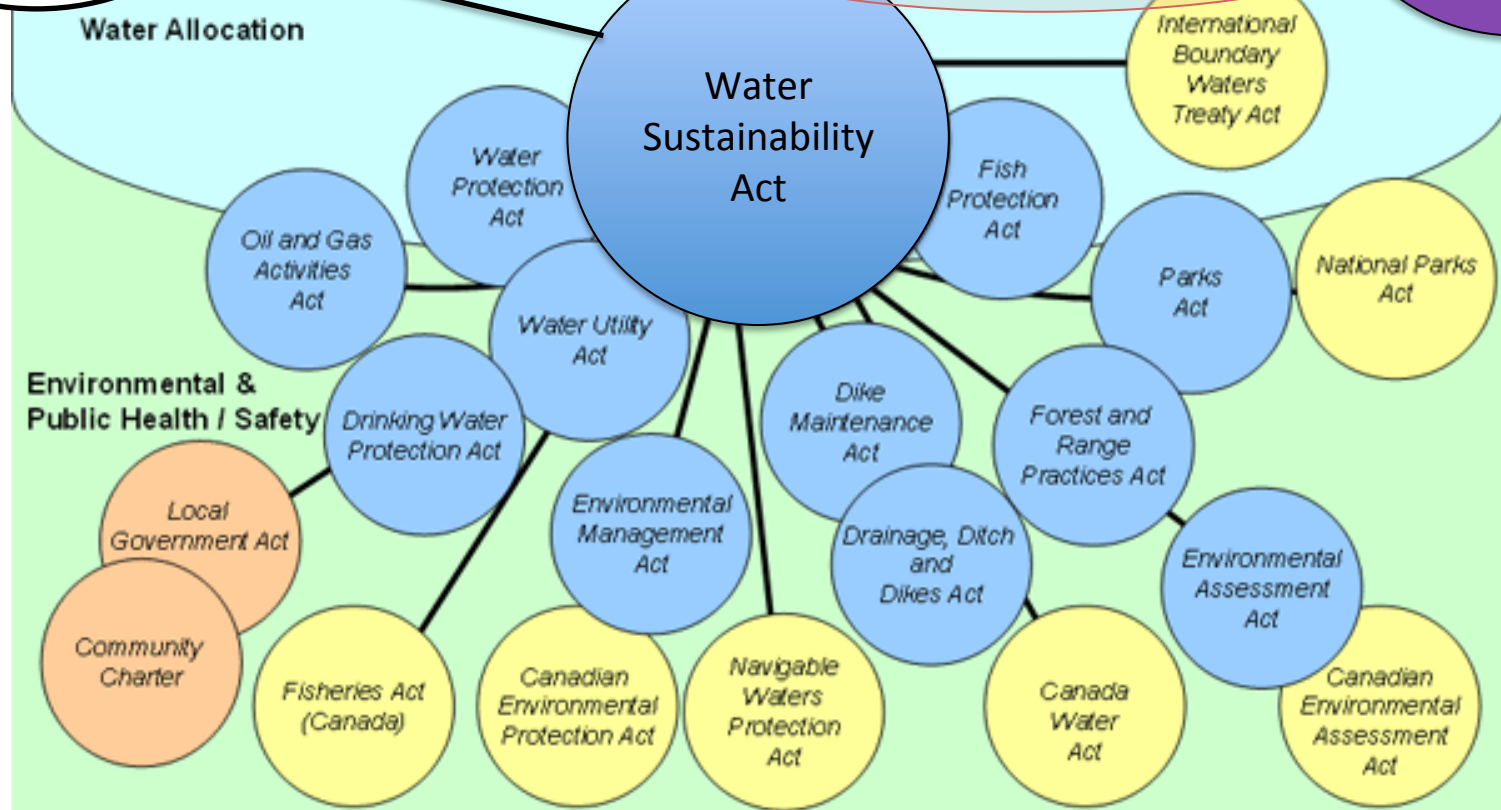


s. 35 R&T  
Constitutional  
protections

Legislation Associated with Water in BC

**Treaties**

Indigenous  
Water Laws

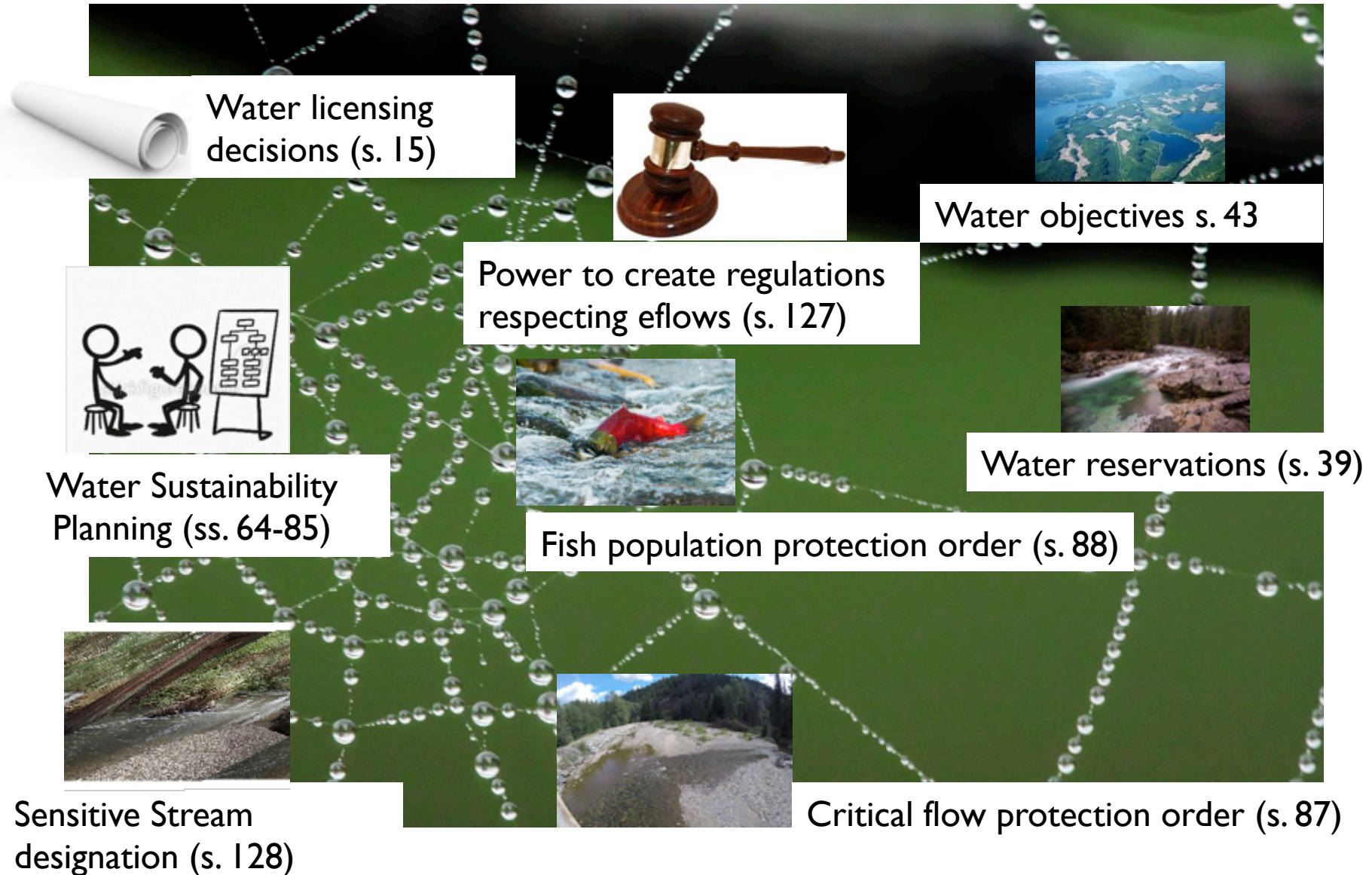


# Key linkages between environmental flows watershed health & Aboriginal Rights



"Sacred Water Spirits" – Artist Mark Anthony Jacobson

# WSA “web” of eflows protections



# s. 15 in action

## Key considerations:

- Critical flow levels in connected surface water sources.
- (Temporary) Critical flow orders “not meant to be used as justification for the issuance of new licences on creeks that are already fully allocated for environmental reasons,”
- No guarantee that an application for a water licence will be granted.
- Significant technical reports available in this instance to support decision-making



### Environmental Appeal Board

Fourth Floor, 747 Fort Street  
Victoria BC V8W 3E9  
Telephone: (250) 387-3454  
Facsimile: (250) 396-8923  
Mailing Address:  
PO Box 9425 Stn Prov Govt  
Victoria BC V8W 9V1  
Website: [www.eab.gov.bc.ca](http://www.eab.gov.bc.ca)  
Email: [eabinfo@gov.bc.ca](mailto:eabinfo@gov.bc.ca)

#### DECISION NO. 2017-WAT-007(a)

In the matter of an appeal under section 105 of the Water Sustainability Act, S.B.C. 2014, c. 15.

<b>BETWEEN:</b>	Doug Halstead and Donna Halstead	<b>APPELLANTS</b>
<b>AND:</b>	Robert Warner, Water Manager	<b>RESPONDENT</b>
<b>AND:</b>	Patricia Frass	<b>PARTICIPANT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board James S. Mattison, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on December 18, 2017	
<b>APPEARING:</b>	For the Appellants: Douglas Geller For the Respondent: Cory Bergen and Stephen E. King, Counsel	

#### APPEAL

(11) Doug and Donna Halstead (the "Appellants") appealed the June 26, 2017

# WSA & Environmental flows ctd.

## Outstanding concerns:

- Failed to acknowledge Aboriginal rights
- Limited opportunities to amend *existing* licences
- Exemption for existing groundwater users

## What's needed?

- Specific eFlow regulation, not just policy
- Rapidly pilot different approaches to eflows protections throughout the province
- Learn by doing in partnership with First Nations and communities

# Regulation versus Policy

REGULATION	POLICY
ENFORCEABLE LAWS	PROVIDES GUIDANCE
MORE PUBLIC INPUT	LESS TRANSPARENCY
LEGALLY BINDING	NOT LEGALLY BINDING



adopted for the  
expediency, facili  
**pol·i·cy** - a cours  
adopted and pur  
government, rul  
action of

# Current eflows policy elements

- Provides coarse screen for assessing risk to eflows in licensing decisions
- Not a *method* to determine eflows – a risk assessment framework
- Components of risk framework:
  - ✓ fish/non-fish bearing
  - ✓ flow sensitivity & stream size
  - ✓ cumulative withdrawals & hydrologic variability

# Elements of robust eflows regulation

- **Clarify core concepts:** “environmental flows” “proper functioning of aquatic ecosystem”
  - **Process and criteria** for EFN consideration – what “must consider” means
  - Requirement for attention to **cumulative impact assessment** in sensitive/high risk areas
  - Create space for **indigenous water laws** and potential for shared authorities in decision making
  - Provide better clarity on **triggering critical flow protections** to deal with uncooperative users (when voluntary systems fail)
-

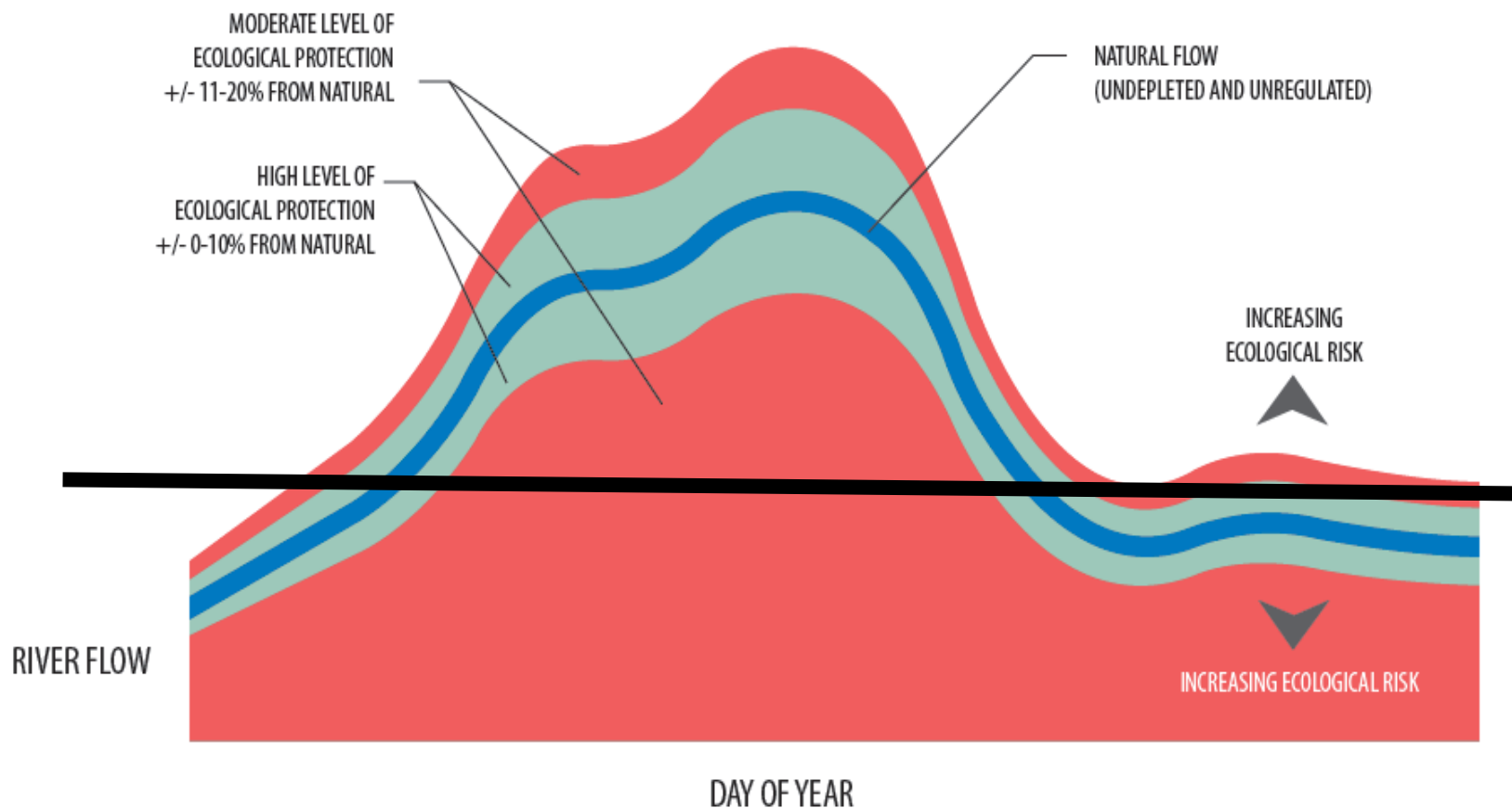
# Elements of robust eflows regulation (2)

- Set a precautionary **presumptive standard** unless region/ water source-specific method selected (to avoid overallocation)
- Enable different knowledge systems (Indigenous and western) to inform local decisions
- More holistically incorporating the **importance of groundwater**, e.g.:
  - explicitly include the assessment of the flux of groundwater's contribution to EFN
  - Incorporate the potential long term (decades or centuries) impact of groundwater pumping. (\*Forstner, Gleeson, et al. 2018)

---

\*\*\* See ongoing work & forthcoming POLIS Briefing Note on key elements of eflows regulation and directions for reform

# Presumptive standard approach for interim protection (& avoid overallocation)



# International Examples & Case Studies



- Australia and New Zealand
  - Sustainable boundaries and Rights for rivers



- U.K. government establishing Watershed Trusts
  - Water Ambassadors



- South Africa has constitutional priority for eflows
  - Human and ecosystem rights fundamental



- California and Hawaii (and many western states) eflows protected through Public Trust Doctrine and Species at Risk Legislation

# 3 key takeaways

- B.C. is improving, but needs to expedite implementation of environmental and critical flows regime
- WSA provides many tools that can be used together to create a “web” of protections
- Regulation not just policy will provide clarity for decision makers and improve sustainable outcomes

