



December 30, 2014

**TO:** Executive Committee

**FROM:** John Shurts

**SUBJECT:** Yukon River Watershed Plan/Implementation in Yukon Territory and British Columbia:

Model Water Quality Legislation for consideration by First Nations governments that would adopt specific water quality objectives and standards derived from the Yukon River Watershed Plan

At the Watershed Council's Summit in Mayo, Yukon, in August 2013, representatives from the First Nations and Tribes of the Council approved the Yukon River Watershed Plan. The purpose of the Watershed Plan is to protect and improve the water quality in the Yukon River and its tributaries, to assure that the Yukon River will continue to sustain the coming generations of all the people, fish, wildlife and plants of the Yukon. The plan combines modern science and policy with the traditional knowledge of the indigenous governments and people of the Yukon River. The centerpiece of the plan is a set of specific, enforceable water quality objectives and standards to protect the quality, quantity and flow of the water in the river.

After the Watershed Council representatives approved the Watershed Plan, they directed the Watershed Council staff and its legal advisers to "continue working on the water quality planning and governance effort under the on-going direction of the Executive Committee." This work is to include "continuing to consult with ... and familiarize the Yukon communities about the Water Quality Plan." More important, the Watershed Council representatives agreed to:

- "Recommend the Water Quality Plan for consideration by the individual First Nation and Tribal governments for the purpose of (a) endorsement of the plan and (b) additional authorization to the Watershed Council to engage in discussion about improved governance with the other sovereign governments in the basin. To be completed by the 2015 Summit, with a ceremony at that Summit."

With a memorandum dated December 10, 2014, I gave the Executive Committee a model Ordinance for consideration by the Alaskan Tribal governments of the Yukon River watershed. The purpose of this memorandum is to present a model form of water quality legislation for the First Nations to consider, using their legislative powers to further the protection of water quality by approving specific water quality objectives and standards derived from the Watershed Plan.

The legal and legislative context is different in Yukon Territory and British Columbia for the First Nations than in Alaska for the Tribes. By virtue of the Yukon Umbrella Final Agreement and the associated individual land settlement agreements, water rights held by the Yukon First Nations have been recognized clearly in law and, more important, the First Nations are actively governing a significant portion of the lands, waters and other resources within the Yukon River watershed. This is also true for those First Nations without land settlement agreements in Yukon and in British Columbia, if less-well defined. The Canadian Constitution and the recent *Tsilhqot'in Nation* decision from Canada's Supreme Court recognize that First Nations without land settlement agreements have aboriginal title, sovereignty, rights, and governing powers, just less defined as of now in relationship to the same powers and etc. held by the other governments than those First Nations with agreements. (This point is also recognized in the Yukon UFA itself, as it acknowledges that the UFA is not the source of First Nations rights and powers and sovereignty, but is instead just a vehicle for the expression of pre-existing aboriginal rights and powers and sovereignty.)

In previous memoranda this year to the Watershed Council Executive Committee and to the First Nations leaders, we have detailed how much legal power there is, at least potentially, in water quality legislation by the First Nations that combines specific water quality objectives and standards with the statement of water rights and objectives recognized in the UFA and with the governing power of the First Nations over lands and water – that is, legislation that describes precisely what the First Nations mean by water that is maintained “in a natural condition while providing for its sustainable use” and water that “remain[s] substantially unaltered as to quantity, quality and rate of flow.” (This would be true even without the work of the Watershed Council in approving the Watershed Plan; in fact, the staff designed and the Council approved the Watershed Plan in part to help the First Nations take advantage of the opportunity presented by the legal rights and legislative powers held by the First Nations.) If a significant number of the First Nations take similar action to protect water quality, the result can be (1) protection of the quality of the water throughout a significant amount of the Canadian portion of the Yukon River and (2) the basis for a strong legal, policy and litigation strategy aimed at true co-management or shared governance of the Canadian portion of the river basin with the other governments that effectively protects water quality throughout the entirety of the basin in Canada.

Thus our recommendation continues to be that the First Nations governments use their legislative authority to enact a Water Quality Act of some sort to adopt the baseline water quality objectives and standards in the Watershed Plan, and then also authorize further executive actions and discussions with regard to implementation and governance. The Watershed Council is a collective association of the Tribal and First Nations governments, not a sovereign government itself – we need the actual governments to endorse the path taken by the Watershed Council to be able to work further, collectively and individually, on implementation strategies, including discussions on cooperative implementation and cooperative or co-management and shared governance with the other governments in the river basin.

Every First Nations government has a distinct approach to legislation – its own understanding of its authority to legislate and its own legislative forms and procedures. So the staff recognizes that even if individual governments are willing to consider such legislation, the model Water Quality Act attached here may need to be tailored by each government to its own legislative forms and authorities. Also attached after the model Water Quality Act is a short set of talking points to accompany and explain the purpose for the model Water Quality Act.

In conclusion, our recommendation is that the Executive Committee continue to recommend to the individual First Nations governments the consideration and adoption of water quality legislation that endorses the Yukon River Watershed Plan and adopts the plan's baseline water quality objectives and standards. And that the Executive Committee direct the staff and its advisers to work with the First Nations governments and communities in 2015 to secure action by as many First Nations governments as possible by the time of the Watershed Council's 2015 Summit in Minto, Alaska, and to continue this effort beyond the Summit.

# **Yukon River Inter-Tribal Watershed Council**

**December 2014**

## **MODEL WATER QUALITY ACT for FIRST NATIONS in the YUKON RIVER BASIN**

<b>Section 1</b>	<b>Title</b>
<b>Section 2</b>	<b>Purpose</b>
<b>Section 3</b>	<b>Authority</b>
<b>Section 4</b>	<b>Water Quality Objectives and Standards from the Yukon River Watershed Plan approved by the Yukon River Inter-Tribal Watershed Council in 2013</b>
<b>Section 5</b>	<b>Water Quality Objectives</b>
<b>Section 6</b>	<b>Water Quality Standards</b>
<b>Section 7</b>	
<b>Section 8</b>	<b>Implementation, including Cooperative Agreements</b>

### **Section 1 Title**

This Act may be cited as the [First Nation name] *Water Quality Act*.

### **Section 2 Purpose**

The purpose of this Act is to protect and improve the water quality of the Yukon River and its tributaries in order to protect, sustain, and enhance the health, welfare, prosperity, ways of life, culture and values of the people of [First Nation]. This includes regulating, monitoring, protecting, improving, and maintaining the waters at the highest possible standards for drinking water quality, for economic, traditional, cultural, spiritual and recreational purposes, and for the protection, enhancement and sustained health of the plants, fish and wildlife that the people of [First Nation] depend on to live. The water quality objectives and standards are intended to improve and protect the chemical, physical, biological and cultural integrity of the waters of the Yukon River and its tributaries so as to promote the health, safety, welfare and well-being of the people of the Yukon basin and to provide the necessary conditions for healthy, productive, and abundant populations of fish, wildlife and plants dependent on the water of the river.

In this Water Quality Act, the [First Nation] adopts water quality objectives and standards that are consistent with and implement the water rights of the [First Nation] as described in Chapter 14 of the 1993 Yukon Umbrella Final Agreement and associated [First Nation] Final Agreement, with intent to realize the Objective of Chapter 14 of the Final Agreement, mutually agreed-upon by all three governments:

The objective of this chapter is to maintain the Water of the Yukon in a natural condition while providing for its sustainable use.

### **Section 3     Authority**

[First Nation legislative body] approves this legislation as an exercise of its inherent sovereignty and governmental powers set forth in the [First Nation] Constitution to protect the health, safety and welfare of the Nation and its Citizens and the land, air, water, and natural resources used by the Citizens. This Act is approved in particular under [xxx – any particular section of the constitution on legislating for these purposes]

This [First Nation] governmental authority to legislate in this manner is recognized also by the governments of Canada and Yukon Territory, as described in the [First Nation] Final Agreement and [First Nation] Self-Government Agreement.

### **Section 4     Water Quality Objectives and Standards from the Yukon River Watershed Plan approved by the Yukon River Inter-Tribal Watershed Council in 2013**

The Yukon River Inter-Tribal Watershed Council is an international inter-tribal organization formed in 1997 and comprised of representatives from the governments of 72 First Nations and Alaskan Tribes in the Yukon River Basin, from the headwaters to the mouth. The mission of the Watershed Council is to assist the First Nations and Tribes in protecting and improving the water quality of the Yukon River and its tributaries. In August 2013 the Watershed Council approved the Yukon River Watershed Plan with the vision of ensuring Yukon River water of such quality that it sustains the health of the people and communities of the basin and the fish, wildlife and plants important to the ways of life of the people. The Watershed Plan includes specific, measureable objectives and standards to protect the quality, quantity and flow of the water in the Yukon River and its tributaries, to ensure that the Yukon River will continue to sustain the coming generations of all the people, fish, wildlife and plants of the Yukon. The Watershed Council's Watershed Plan is attached as an appendix to this Act. By adopting this Water Quality Act, the [First Nation] adopts the water quality objectives and standards in the Watershed Plan as the law of the [First Nation], with the intent that these objectives and standards be implemented, applied and enforced to protect the quality of the waters of the Yukon River and its tributaries. These water quality objectives and standards will remain the law of the [First Nation] unless and until superseded by further legislation of the [First Nation].

### **Section 5     Water Quality Objectives**

The following water quality objectives, derived from the Yukon River Watershed Plan identified in Section 4 above, describe the conditions of the river necessary to realize the purposes of this Act and the [First Nations] rights and objective of the 1993 Final Agreement with regard to water quality:

- (a) The Yukon River will be of such quality as to support and sustain the traditional and subsistence uses of the people of the First Nations and Tribes of the Yukon, including customary commercial uses.
- (b) The Yukon River will be substantially unaltered from natural conditions in terms of quantity, quality and rate of flow, including seasonal and daily rates of flow and flow patterns, within normal environmental variation over time.
- (c) The quality of the Yukon River will be consistent with, and support and sustain over time, the habitat characteristics and ecological functions necessary for abundant, productive and diverse populations of fish, wildlife and plants important to the Tribes and First Nations of the Yukon.
- (d) The quality of the Yukon River will be consistent with, and support and sustain over time, the health of all the people, communities, and nations who drink or come into contact with the waters of the Yukon River.

## **Section 6    Water Quality Standards**

The water quality standards adopted in this Act are found at pages 7 to 26 of the attached Watershed Plan, incorporated here by reference. These are specific, measurable water quality standards designed to protect and improve the quality, quantity and flows of the river as necessary to achieve the purposes and objectives of this Act.

## **Section 7    Waters to which the Water Quality Objectives and Standards Apply**

The water quality objectives and standards in this Act apply to:

- (a) all surface and ground waters on or flowing through or adjacent to the lands of the [First Nation];
- (b) all waters so connected hydrologically to the waters identified in subsection (a) above that the quality must be maintained therein to the same standards or the waters identified in subsection (a) cannot meet the standards; and
- (c) all waters recognized as used by right or agreement by the people of the [First Nation] for fishing, hunting, other food sources, and drinking.

## **Section 8    Implementation, enforcement and monitoring, including through cooperative management agreements**

To implement the water quality objectives and standards in this Act, the [executive officers of First Nation], with the assistance of the [land and water resources department of First Nation], are authorized to take such actions as necessary to implement, enforce, and monitor the water quality objectives and standards in this Act. This includes, among other activities:

- (a) developing and implementing a strategic plan and regulations to implement, enforce and monitor the water quality objectives and standards in the Act;

- (b) developing a budget and seeking and expending funds for implementation, enforcement and monitoring;
- (c) entering into discussions with representatives of the other governments of the Yukon River Basin about implementing, enforcing and monitoring the water quality objectives and standards in this Act and in general about cooperating in the management of the waters of the Yukon River Basin consistent with the purpose, objectives and standards in this Act and the objective of the 1993 Final Agreement.
- (d) entering into cooperative agreements on behalf of the [First Nation], by itself or in combination with other First Nations and Tribes of the Yukon River Basin, with any agency of the government of Canada, Yukon or British Columbia; any agency of the United States or Alaska; other indigenous nations in the Yukon River Basin; Native organizations such as the Yukon River Inter-Tribal Watershed Council, Native corporations, or non-governmental organizations to protect and improve the quality of the waters of the Yukon River basin consistent with the purpose, objectives and standards of this Act.

## **Yukon River Inter-Tribal Watershed Council**

### **December 2014**

#### **Talking Points on: Model Water Quality Act recommended to the individual First Nations governments of the Yukon River Basin**

Summary: Representatives from First Nations and Alaskan Tribes in the Yukon River Basin approved the Yukon River Watershed Plan at the Yukon River Inter-Tribal Watershed Council's August 2013 Summit in Mayo, Yukon. The purpose of the Watershed Plan is to protect and improve water quality throughout the Yukon River, from the headwaters to the mouth. The key to the Watershed Plan is a set of specific objectives for Yukon River water quality, objectives then matched by a set of specific, measurable standards to protect the quality, quantity and flow of the water in the river.

Legislative action by the First Nations to incorporate the water quality objectives and standards into First Nations law is a critical step in the implementation of the Watershed Plan and the protection of the water quality of the Yukon River.

Legislation by the First Nations to adopt specific water quality objectives and standards is also a critical step in implementing the water rights and governing powers over land and water held by the First Nations. To that end, the Watershed Council is recommending to the governments of First Nations of the Yukon River Basin a model Water Quality Act for consideration and adoption as legislation.



**(1) Yukon River Inter-Tribal Watershed Council:**

- 72 Alaskan Tribes and First Nations are members, with offices and technical staff in Anchorage, Fairbanks and Whitehorse. Organized in 1997.
- Mission to protect and improve water quality in the Yukon River, to achieve a 50-year vision of a Yukon River clean enough from which to drink.

**(2) Yukon River Watershed Plan:** Watershed Plan asserts the sovereign rights of the First Nation and Alaskan Tribes to participate in governing the Yukon River to protect our people, communities and way of life. Highlights include:

- **Vision** for the Yukon River Watershed: Yukon River water of such quality that it sustains the health of the people, communities, fish, wildlife and plants important to the ways of life of the people.
- **Objectives:** Consistent with the Plan's Vision. The main objective is to have water quality, water quantity and river flows that remain **substantially unaltered from natural conditions** (an objective mirroring the water rights of the First Nations recognized in Chapter 14 of the Yukon Final Agreements), so as to:
  - Sustain the health of all the people and communities who drink or come into contact with any water in the Yukon watershed.
  - Sustain the habitat conditions and ecological functions necessary for productive fish and wildlife populations in the Yukon River Basin.
  - Sustain the traditional and subsistence uses of the watershed by the people of the Yukon River.
- **Water Quality Standards:**
  - Specific, measurable water quality standards designed to protect and improve the water quality, water quantity and flows necessary to achieve the plan's Vision and Objectives.
  - Standards for the entire river, from the headwaters to the mouth, mainstem and tributaries, to protect human health and aquatic life.
  - Standards combine the best of modern science and policy and the traditional knowledge of the indigenous people of the Yukon.
  - Based in the most protective standards of Tribes and States in the Pacific Northwest and the guidelines of the U.S. Environmental Protection Agency and the Canadian Council of Ministers of Environment.
  - Based also in the Watershed Council's extensive compilation of water quality monitoring information, the technical expertise of the staffs of the Council and of the First Nations and Alaska Tribes, and the traditional knowledge of the people and communities.

**(3a) Watershed Plan implementation in general, including model Water Quality Act for consideration by individual First Nations governments:**

- Implementation of the Watershed Plan and protection of water quality will not happen just because of the Watershed Council's approval of the plan. Approval of the plan is but an important step in a long-term, consistent, patient effort to improve governance of the river to protect water quality, including the role of the First Nations in that governance. Plan implementation thus includes an expectation of the right of the First Nations to participate in watershed governance as sovereign governments and full partners with national, territorial, provincial and state governments.
- Legislative action by the individual First Nations to endorse the Watershed Plan and adopt the water quality objectives and standards is an important part of this long-term strategy to improve the protection of water quality and the governance of the Yukon River. The Watershed Council is a collective association of the First Nations and Tribal governments, not a sovereign government itself. The individual governments need to endorse the path taken by the Watershed Council to be able to work further on implementation strategies, including discussions on cooperative implementation with the other governments in the river basin.
- The governments of the First Nations of the Yukon River basin, whether in Yukon Territory, or British Columbia, or both have the authority to enact laws governing the health, safety, and welfare of their citizens, including laws governing and protecting the quality of the waters of their Nations.
- Thus, the Watershed Council's recommendation is that the individual First Nations governments of the Yukon River basin adopt water quality legislation to approve baseline water quality objectives and standards derived from the Watershed Plan.
- That is the purpose for the **model Water Quality Act** that accompanies these talking points. The model Act should be seen as a recommendation for the substantive content of legislation by individual governments. It may be tailored by each government to its own legislative forms and authorities.

**(3b) More details on the governance strategy to protect water quality in the Canadian portion of the Yukon River basin, including water quality legislation by the First Nations:**

- Water rights recognized in Chapter 14 of the Yukon Final Agreements -- including **“the right to have water which is on or flowing through or adjacent to its Settlement Land remain substantially unaltered as to quantity, quality and rate of flow”** -- are part of the governing law in Yukon. First Nations in Yukon and British Columbia without settlement agreements have similar aboriginal water rights, less defined at this point.
- Chapter 14 also states as a mutual objective of all the governments -- Canada, Yukon, and First Nations -- to **“maintain the Water of the Yukon in a natural condition while providing for its sustainable use.”**
- Decisions by agencies and boards in Yukon Territory (and by agencies in British Columbia) that affect water should give effect to these rights and objectives. (Decisions by agencies in British Columbia should similarly give effect to the governing powers and aboriginal title and rights of British Columbia First Nations along similar lines.)
- There is, however, an obvious need for the adoption through legislation of specific water quality objectives and standards to express in enforceable, measurable ways what these rights and objectives mean.
- The Watershed Council designed the Yukon River Watershed Plan to be consistent with -- and an expression of -- these water rights and rights of self-determination and self-government of the First Nations of the Yukon basin. The Watershed Plan describes a set of objectives and specific, measurable water quality standards that, among other things, are based in and implement these water rights and objectives.
- Thus the recommendation is that the individual First Nations governments should use their legislative powers to approve the water quality objectives and standards as legislative implementation of the rights. In doing so, these objectives standards become part of the law governing the river in Yukon.
- Decisions made by all governments and governing agencies and boards -- First Nations and Yukon governments -- then would need to be made in a way that is consistent with or at least cognizant of these objectives and standards as applicable law.