

Memorandum

To Gerry Lucas, General Manager BC Fruit Growers' Association

From Aaron Singer & Cheryl Kornder

Date January 6, 2016

Re **Summary of new regime for water regulation in British Columbia**

British Columbia's new *Water Sustainability Act*¹ received Royal Assent in May 2014 and is expected to come into force in early 2016. There are some significant changes in the new legislative regime that we anticipate may affect your business. This memo provides you with a summary of the the new legislation, focusing on changes from the old legislation to the new legislation and what you can do now to prepare in advance of the new regime coming into force.

For ease of reading, this memo will refer to the new *Water Sustainability Act* as the "**New Act**" and the former *Water Act*² as the "**Old Act**". This memo will similarly refer to the *Water Sustainability Act* Regulations as the "**New Regulations**" and the *Water Act* Regulations as the "**Old Regulations**".

When the New Act comes into force, the Old Act and the Old Regulations will be repealed. The New Act will feature the New Regulations, which are not yet available. The government released four papers in the summer of 2015 that discuss key policies that are being considered for incorporation into the New Regulations. Some of the key points in the policies are outlined in this memo, but they are subject to change depending on the actual content of the New Regulations once they are published. We can provide you with more information once the New Regulations are published.

Changes between the Old Act and the New Act

Definitions and Regulation of Types of Water (ground and surface)

One of the major changes between the Old Act and the New Act is that the Old Act only charged fees for use of surface water whereas the New Act charges users for using both surface and groundwater. The Old Act regulated surface water, focusing on the definition of a "stream":

"**stream**" includes a natural watercourse or source of water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp and gulch.

The New Act expands this definition and states:

"**stream**" means

(a) a natural watercourse, including a natural glacier course, or a natural body of water, whether or not the stream channel of the stream has been modified, or

¹ Bill 18 – 2014, available at: https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#%2Fcontent%2Flegacy%2Fweb%2F40th2nd%2F3rd_read%2Fgov18-3.htm.

² RSBC 1996, c. 483.

(b) a natural source of water supply,

including, without limitation, a lake, pond, river, creek, spring, ravine, gulch, wetland or glacier, whether or not usually containing water, including ice, but does not include an aquifer.

As noted above, the Old Act did not regulate groundwater use, even though it provided a definition of “ground water” and had the authority to regulate groundwater. In fact, under the Old Act, BC was the only Canadian jurisdiction that did not regulate groundwater use. The New Act changes this by regulating both surface and groundwater, and increasing the fees for using both.

The Old Act defined “ground water” as:

“ground water” means water below the surface of the ground.

The New Act alters this definition:

“groundwater” means water naturally occurring below the surface of the ground.

All non-domestic users of water will be required to obtain a license and begin paying water licensing fees, as discussed below. Whether water is being used for a “domestic purpose” or for another purpose is outlined in the below section of the New Act:

"conservation purpose" means the diversion, retention or use of water for the purpose of conserving fish or wildlife and includes the construction of works for that purpose;

"domestic purpose" means the use of water for household purposes by the occupants of, subject to the regulations, one or more private dwellings, other than multi-family apartment buildings, including, without limitation, hotels and strata titled or cooperative buildings, located on a single parcel, including, without limitation, the following uses:

(a) drinking water, food preparation and sanitation;

(b) fire prevention;

(c) providing water to animals or poultry kept

(i) for household use, or

(ii) as pets;

(d) irrigation of a garden not exceeding 1 000 m² that is adjoining and occupied with a dwelling;

"industrial purpose" means a use of water designated by regulation as a use for an industrial purpose, but does not include the use of water for any other water use purpose;

"irrigation purpose" means the use of water on cultivated land or hay meadows to nourish crops or on pasture to nourish forage;

"land improvement purpose" means the diversion or impounding of water to

- (a) protect land,
- (b) facilitate the development of a recreational facility or of a park or other protected area,
- (c) facilitate the reclamation, drainage or other improvement of land, or
- (d) carry out a project of a nature similar to a project described in paragraph (b) or (c);

"mineralized water purpose" means

- (a) the bottling and commercial distribution of water so impregnated with mineral salts, elements or gases as to potentially give the water therapeutic properties, or
- (b) the use in commercial bathing pools of water that is
 - (i) impregnated with mineral salts, elements or gases, or
 - (ii) naturally at a temperature suitable for that use;

"mining purpose" means

- (a) the use of water, including the use of water under pressure, for recovering minerals from the ground or from ore, or
- (b) the use of water under pressure to move earth, sand, gravel or rock;

"oil and gas purpose" means the use of water in the development of petroleum or natural gas wells or the production of petroleum or natural gas resources;

"power purpose" means the use of water in the production of electricity or other power;

"storage purpose" means the impounding and retention of water for subsequent use for a water use purpose;

"waterworks purpose" means the carriage or supply of water by one person or entity for the use in British Columbia of another person or entity.

Allocation of Water

The Old Act's approach to regulating surface water is the same approach being carried on in the New Act. The difference is that the New Act applies to both surface and groundwater. The regime is a "first-in-time, first-in-right" system of water allocation. This means that in times of water scarcity, users with earlier priority dates will have the right to use their full allocation of water before newer licensees. It is thus very important to apply early for water licenses and to collect information to use as evidence for the earliest date of use possible.

Changes to Licensing

As noted above, the New Act requires licenses for using both surface and groundwater. Stream water and groundwater rights will thus be integrated under the New Act. The New Act allows people and businesses to drill a new well without a groundwater license. However, it requires a license before using water from that well for a non-domestic purpose. Users will also need a license to use water from an old well.

Once the New Act is in force, irrigators, industries, waterworks and others who use groundwater for non-domestic purposes will need to obtain a water license and to start paying for their use. Non-domestic purposes are any purposes except those that fall under the definition of “domestic purposes”, as defined above.

All well owners, whether they use water for domestic or non-domestic purposes, will have to comply with the New Regulations regarding groundwater protection. Licenses grant users an allocated amount of water they can use. Non-domestic users will specify in their license application how much water they use and be charged fees accordingly, as discussed below. The government deems owners of domestic wells to have a water right of up to 2,000 litres per day. The New Act makes it possible in the future to license domestic use in areas of the province where there are shortages or conflicts.

As noted above, the New Act maintains the first-in-time, first-in-right system: senior licensees (those with the earliest priority dates) have precedence under junior licensees, regardless of the purpose for which the water is used. During times of scarcity, senior licensees are able to use their full allocation of water, even if this means that junior licensees cannot use *any* of their licensed allocation.

The New Act recognizes three exceptions to the first-in-time, first-in-right system:

- (a) During times of water scarcity, those who use stream water and groundwater for domestic purposes are allowed to divert water for “essential household uses” – established as 250 litres per day for each private dwelling.
- (b) Under a temporary Critical Environmental Flow Protection Order, the Comptroller defines a minimum flow required to avoid significant or irreversible harm to a specific stream. That minimum flow has precedence over licensed water users of the stream and any hydraulically connector aquifer. Any water in excess of the minimum flow can be used by licensed water users in accordance with their precedence under the first-in-time, first-in-right scheme.
- (c) Under a Fish Population Protection Order, the Minister can order any licensee (regardless of their priority date) to temporarily reduce or stop using water in order to save a population of fish.

The New Act directs the statutory decision maker to consider the environmental flow needs of a stream when reviewing an application for the use of water from an aquifer that is reasonably likely to be hydraulically connected to the stream. Precedence of water use is established relative to the priority dates of all other users of the stream, a tributary of that stream, and any aquifer reasonably likely to be hydraulically connected to the stream.

Owners of existing wells will have three years from the date the New Act comes into force in which to apply for a water license. While their license application is under review, applicants are able to continue to divert, use, and store groundwater.

To encourage users to apply early for a license, the proposed New Regulations waive the application fee for owners of existing wells who apply within 12 months of the New Act coming into force. If owners of existing wells apply after the 12 month period, they would have to pay the full application fee (see chart below for the rates). Owners of new wells who apply for a groundwater license during the first 12 months must pay the full application fee.

Owners of existing wells who apply after the three-year transition period would *not* qualify for a historic priority date based on date of first using the well. Instead, they would be treated as a new applicant and receive a new priority date, generally based on their date of application. Owners of new wells would receive a new priority date based on their date of application.

License fees will vary depending on how much water is allowed to be used under the license. We have attached a full chart of the proposed fee structure. We also include the following chart for a summary:

APPLICATION PERIOD – FOR LICENSING OF EXISTING NON-DOMESTIC GROUNDWATER USERS ONLY				
	Year 1	Year 2	Year 3	Year 4 and later
Application Fee	Exempted	Required (\$250 to \$10,000)		Required (\$250 to \$10,000)
Priority Date	Applicants would be able to obtain a priority date based on date of first use of groundwater.			Priority date is generally the date of application. All users treated as ‘new’ users (regardless of how long they have actually used groundwater).
Water Rentals	Licensees would pay water rentals from the date the <i>Water Sustainability Act</i> comes into force.			Licensees would pay water rentals from the date government issues their licence.

There is also a “Water Rent Estimator” provided by the government which can be accessed at http://www.env.gov.bc.ca/wsd/water_rights/water_rental_rates/calculator/index.html. This estimates application fees and water rental fees, allowing users to put in their information to get an individualized estimate of what fees they will pay.

Note that if you apply for your license within the three year transition period of the New Act coming into force, you will get priority based on your first use of groundwater rather than your application date. This priority will be lost if you wait to apply after the three year transition period.

It is important to now begin to collect any evidence of first use to establish the earliest priority date possible in order to receive the most benefit possible from the first-in-time, first-in-right priority system.

Some examples of possible evidence that could be used might include a construction contract to build the well, any permits issued to allow the well to be dug or dated records noting water use.

The new regime provides for the creation of “water objectives” which are considerations that will be taken into account in decision-making affecting water. The New Act provides for more considerations to do with water sustainability and environmental protection.

Regulating Wells

The New Act regulates all wells, including those for domestic purposes. A “well” is defined in the New Act as:

"well" means an artificial opening in the ground made for the purpose of

- (a) exploring for or diverting groundwater,
- (b) testing or measuring groundwater,
- (c) recharging or dewatering an aquifer,
- (d) groundwater remediation,
- (e) use as a monitoring well,
- (f) use as a closed-loop geoexchange well, or
- (g) use as a geotechnical well,

but does not include

- (h) an artificial opening, other than a water source well, to which the *Geothermal Resources Act* or the *Oil and Gas Activities Act* applies, or
- (i) an artificial opening of a prescribed class, made for a prescribed purpose or in prescribed circumstances;

The New Act allows the government to:

- (a) recognize professionals qualified to provide well drilling, well pump installation and related services;
- (b) establish rules regarding the introduction of foreign substances in wells;
- (c) control activities related to wells that may impact hydraulically-connected streams and aquifers; and
- (d) regulate all other aspects of groundwater protection and use.

The government proposes that one of the New Regulations would:

- (a) require that new wells be set back at least 15 metres from existing water supply wells (excluding existing wells not in use and not intended to be used in the future);
- (b) permit the owner of an existing water supply well to drill one additional well within 15 metres of the existing well; and
- (c) allow a smaller setback proposed by a professional if the new well would not significantly increase the risk of interference with an existing well, and if the proposed setback is accepted by the statutory decision maker.

The New Act also applies to wells used for the underground infiltration of urban runoff to an aquifer. The New Regulations propose to have specific requirements for artesian water situations (where groundwater is confined under pressure below layers of relatively impermeable rock or soil, such as clay). The New Regulations will likely restrict the use of well pits.

The New Regulations will likely require owners of wells (even wells not in use) to:

- (a) maintain access to the wellhead and keep the area clear of obstructions;
- (b) promptly undertake any repairs and maintain the well's surface seal, casing stick up, caps/covers, drainage, etc.;
- (c) prevent entry of contamination into the well and store potential contaminants more than three metres away;
- (d) protect equipment for controlling artesian flow; and
- (e) orient surface drainage away from the wellhead.

The New Regulations will also likely have requirements for deactivating and decommissioning wells.

Regulating Dams

There will likely be New Regulations on dam safety.³ Dam safety is not likely to change drastically from the Old Act and Old Regulations, except for it will apply to dams built to capture groundwater. There are also plans for new requirements for dam owners to review downstream conditions on an annual basis, to re-assess the appropriateness of the dam's classification, to notify the provincial Dam Safety Officer of any changes in dam classification and to meet the relevant safety requirements.

³ Note that these likely will not apply to dikes and sea walls, particular types of off-stream artificial storage (such as tanks, swimming pools, dugouts with berms), underground structures including aquifers, cisterns, caverns and caves and barriers created by beavers, ice jams, landslides and other natural causes. These also may not apply to mine-related dams, such as sediment control or sludge ponds, diversion channels or tailings storage facilities; these are regulated under the *British Columbia Mines Act* and the Ministry of Energy and Mines.

Compliance and Enforcement

The New Act features more enforcement options including administrative monetary penalties and compliance agreements. The New Act gives government authority to impose and collect fines and to order site remediation or prosecution as an alternative to fines. The New Act also recognizes that employees, officers, directors, or agents of a corporation can be fined if they authorize, permit or agree to a contravention or failure. Further, the New Act allows the courts to impose additional penalties if an offender benefitted financially from committing an offence. Many of the actual offences in the New Act are the same as the Old Act, but the severity of punishment has been adjusted.

How to Prepare for the New Act

At this point, you should begin to prepare for the licensing process. We recommend that you:

1. Ensure that you apply for your license within the first 12 months of the New Act coming into force to ensure that you qualify for the waived application fee.
2. If you miss the 12 month window, ensure that you apply for your license within the first three years of the New Act coming into force or you will lose your priority date.
3. Begin to assemble the following information, if available, which is anticipated to be the information required for a license application:
 - (a) Name or description of the aquifer, and of any streams known to be hydraulically connected with it;
 - (b) Details of the reservoir, if storage is proposed;
 - (c) Water use purpose(s) and the quantity and period of use for each water use purpose;
 - (d) Legal description of the land, mine or location where the water is to be used, including the applicant's title or other interested in it;
 - (e) Area of land irrigated;
 - (f) Description of the works, including the location of the well, the well record, construction report, well ID number, or tag number;
 - (g) Legal description of any lands affected by works;
 - (h) An accurate labelled drawing (standards) of the proposed works; and
 - (i) Consent for the collection, use and verification of public personal information, including permission to contact relevant third parties.
4. Begin to look for any information to prove your earliest use possible of your well, as this will ensure your priority under the first-in-time, first-in-right system.
5. Use the Water Rent Estimator to get a sense of what you will likely be paying for fees:
http://www.env.gov.bc.ca/wsd/water_rights/water_rental_rates/calculator/index.html.

Questions?

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