

WATER LAW: THE *WATER SUSTAINABILITY ACT* AND MORE

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I. INTRODUCTION

Water is frequently making headlines in BC. Whether it is too much water—such as the recent flooding in the Okanagan this past spring—or the lack of water—such as the dry conditions in northern BC this past summer that perpetuated the growth of the largest wildfire on record in BC—water is increasingly impacting the daily lives and safety of local residents.

It almost feels that it was just in time that the Province enacted the new *Water Sustainability Act* (“WSA”)¹ to replace the outdated *Water Act* to govern and protect fresh water sources in BC. Under the WSA, the Province has expanded its abilities to react quickly to issues affecting water quality, water quantity and aquatic ecosystems in BC. Under this new legislation, the Province may now not only make orders, but it may also enact new regulations and revise water licences where necessary to protect valuable water sources and ensure limited water supplies are being used efficiently.

Although at first blush it appears the WSA does not significantly impact local governments, the WSA has significantly altered some of the structures by which water use is regulated and managed in BC. These altered structures impact the rights obtained by local governments to use water to provide works and services within their boundaries. Additionally, the WSA implements a whole new host of means to affect the use and protection of water in BC. Local governments that are interested in managing and protecting watersheds, streams or aquifers within their boundaries should be aware of these new means so that they may decide what options will best achieve their goals (with some options being to work with the Province to develop water objectives or water sustainability plans).

In this paper, we will set out the basic structures and concepts of the WSA, its impacts on local governments and their use of water, as well as the role local governments may play in ensuring local water sources are protected and sustained. Overall, the WSA does not greatly expand the authority of local governments to protect local water sources. However, the WSA does present several new opportunities to protect water, which local government entities may consider requesting to prevent local water users from adversely impacting water quality, water quantity or local aquatic ecosystems.

¹ SBC 2014, c 15, which came into force on February 29, 2016.

II. BASIC STRUCTURE OF THE WSA

A. Prohibition from Diverting or Using Water

The WSA governs the right to divert or use water from a stream or from groundwater sources in BC. Through the WSA, the Province vests all property, and rights to use, water in the Province and prohibits any person from diverting or using water from a stream or groundwater for any purpose unless the person is given authorization to do so under the WSA or the use is expressly exempted by the WSA.²

B. Scope of WSA

The scope of the WSA expands to water located in a “stream” or is “groundwater” in BC. The term “stream” refers to natural watercourses, natural bodies of water and natural sources of water. The term expressly includes natural glacier courses as well as natural lakes, ponds, rivers, creeks, springs, ravines, gulches, wetlands and glaciers whether or not those sources of water contain water year-round or on an occasional basis. Meanwhile, the term “groundwater” is defined as “water naturally occurring below the surface of the ground”, which would include naturally occurring aquifers.³ Both terms broadly encompass several types of natural sources of water that are present on the surface or below the ground. Therefore, if a source of water naturally occurs (is not human-made) and is either present on the ground or under the ground it is likely regulated by the WSA. If the source of water is not naturally occurring, however, such as a human-made pooling pond, the WSA does not apply. Arguably, the WSA also does not apply to rainwater or surface runoff until it enters a stream.

C. Exemptions

On a basic level, the WSA impacts local governments by requiring such entities to obtain authorization under the WSA to divert or use water that comes from a naturally occurring source on or below the ground unless the use is expressly exempted under the WSA.

The WSA and the *Water Sustainability Regulation* (“WSR”)⁴ do have exemptions for activities that local government entities undertake. For example, an exemption exists in the WSR for local governments to use works to divert water from an aquifer to lower the water table so long as

² WSA, *supra* note 1, ss. 5 and 6(1).

³ WSA, *supra* note 1, s. 1.

⁴ B.C. Reg. 36/2016

the local government entity makes no use of the water while it is passing through the drainage works and the discharged water does not cause significant harm to the public, the environment, land or other property.⁵ In addition, fire departments are given a limited exemption to divert or use water without authorization for activities related to training firefighters or maintaining and testing fire equipment.⁶

There are a few other exemptions listed in the WSA and WSR that may exempt other uses that apply to a particular situation. Generally, however, all other plans to divert or use water will require authorization under the WSA.

D. Authorizations

Three main types of authorization can be obtained under the WSA: (1) water licences, (2) water use approvals and (3) approvals to make changes in or about a stream.

Water licences are useful when water is required to be diverted or used on an ongoing basis or for a period of more than two years. A licence is required to:⁷

- Divert or use water from a stream or from a groundwater source;
- Construct, maintain or operate works that are necessary for diversion or use of water or use the power generated by water;
- Make changes in or about a stream in order to construct, maintain or operate a work that is authorized by the water licence; and,
- Construct fences, screens or fish or game guards across a stream in order to conserve fish or wildlife.

There are several limits and restrictions to the rights granted under a water licence. For example, implicit in all water licences for the use of water is to use water as efficiently as practicable and only for the use stipulated in the licence.⁸ Various terms and conditions may be stipulated as part of the licence, which will usually include how much water may be diverted or used and the manner and times under which water may be diverted or used. There are also various restrictions or requirements set out in the WSA or related regulations that will apply,

⁵ WSR, *supra* note 4, s. 32.

⁶ WSR, *supra* note 4, s. 35.1.

⁷ WSA, *supra* note 1, s. 7(1).

⁸ WSA, *supra* note 1, s. 1, “beneficial use” and ss. 7(1) and (2).

depending on the context, that may not be stated on the licence.⁹ For that reason, local governments that divert or use water will need to pay attention not only to the specific terms and conditions of their licences, but also to any changes to the WSA and its regulations and how efficiently the local government is using water.

Usually only owners of land are able to obtain a water licence. However, unlike other water users, municipalities, regional districts, improvement districts, development districts and water users' communities may obtain a water licence without being an owner of land.¹⁰

If a local government needs to divert or use water for a short period of time, the local government may want to obtain a water use approval rather than a licence. Water use approvals authorize the diversion or use of water for a period up to two years. Water use approvals may provide similar rights as a water licence for a short period of time.¹¹

If a local government requires authorization to make only a change in or about a stream—for example, to develop municipal-owned land—the local government may also apply for an approval to make changes in or about a stream instead of applying for a licence.¹²

E. Priority Between Water Users

Similar to the former *Water Act*, the WSA establishes the priority between different water users using the “first in time, first in right” system in which water users that obtain authorization on an earlier date have priority over all other water users that obtain their licence or use approval on a later date.¹³ Put simply, this means that, in times of water shortages, the water user with the oldest licence or use approval for a particular water source has the right to divert or use all the water that is authorized by its licence or use approval before another water user of the same water source may divert or use any water authorized by its licence or use approval. The precedence applies regardless of the use to be made of the water or the identity of the person using the water.

F. Process to Obtain an Authorization

Applications to obtain water licences or use approvals are submitted through FrontCounterBC and are normally issued by “water managers” who are part of the Ministry of Forests, Lands, Natural Resource Operations & Rural Development.¹⁴

⁹ WSA, *supra* note 1, ss. 7(2) and 8.

¹⁰ WSA, *supra* note 1, s. 9(c).

¹¹ WSA, *supra* note 1, s. 10.

¹² WSA, *supra* note 1, s. 11.

¹³ WSA, *supra* note 1, s. 22.

¹⁴ WSA, *supra* note 1, s. 12; FrontCounterBC, “What happens after you apply”, *Guide: Water Licence Application*, online: FrontCounterBC <http://www.frontcounterbc.ca/guides/surface-water/new-water-licence/what-happens-after-you-apply/>.

As part of the application process, plans, specifications, reports of assessments and other information required by regulation must be submitted,¹⁵ and a water manager may require certain assessments to be completed by a person who has certain qualifications.¹⁶ Water managers that review applications must consider the environmental flow needs of a stream that may be hydraulically connected to the stream or aquifer related to the application.¹⁷ Therefore, a local government may be required to provide information about the environmental flow needs of a stream if directed by the water manager.¹⁸ For that reason, it is important to gather as much information about the water source you plan to use, including potentially connected streams.

Once an application is submitted, the water manager will require the applicant to give notice of the application to third parties that the water manager specifies.¹⁹ This will include any person the water manager determines is likely to be detrimentally affected if the application is granted, such as existing water users or other applicants, and to land owners whose land is likely to be physically affected if the application is granted. Any person who receives notice of the application may raise an objection to the water manager and, if warranted, the water manager may require a written or oral hearing to take place to address the objection.²⁰ Both the applicant and the objector must be given the opportunity to make submissions, after which both the applicant and objector will receive notice of the water manager's decision.²¹

III. IMPACT ON LOCAL GOVERNMENTS AS WATER USERS

A. Review of Water Licences

One of the major changes implemented through the WSA is the ability of the water comptroller or a water manager to conduct a review of the terms and conditions of a water licence. Under the former *Water Act*, the water comptroller and water managers did not have explicit authority to regularly review the terms and conditions of licences. Now, under the WSA, a licence may be reviewed as frequently as every 30 years to ensure water is being used efficiently.²² This change will impact water licences held by local governments.

During these reviews, the water comptroller or water manager may direct a licence holder to provide information, plans or reports of assessments, including reports of assessments conducted and prepared by a person with certain qualifications.²³ The purpose of the review is to consider new information that was not available at the time the water licence was issued,

¹⁵ WSA, *supra* note 1, s. 12(1)(b)(iii).

¹⁶ WSA, *supra* note 1, s. 12(2).

¹⁷ WSA, *supra* note 1, s. 15(1).

¹⁸ WSA, *supra* note 1, s. 15(2).

¹⁹ WSA, *supra* note 1, s. 13(1).

²⁰ WSA, *supra* note 1, ss. 13(3) and (4).

²¹ WSA, *supra* note 1, ss. 13(5) and (7).

²² WSA, *supra* note 1, s. 23(1) and (2).

²³ WSA, *supra* note 1, s. 23(3) and (4).

such as new technology, new industry best practices or the effects of climate change, and determine whether the licence uses water efficiently. As a result of a review, the water comptroller or a water manager may require the licence holder to adopt more efficient practices or even construct, alter, replace, deactivate or remove works that use water.²⁴

The impact of such a review on a local government which does not keep up with current best practices or which does not regularly maintain and update its water infrastructure may be costly since theoretically a local government could be required to adopt new technologies or construct new works. For this reason, local governments should endeavour to keep on top of emerging best practices related to its water use and ensure its infrastructure is regularly maintained and updated to avoid large, unplanned expenditures.

B. Liability of Water Licence Holders

The WSA also imposes liability on persons who have, or apply to have, an authorization issued under the WSA, including local governments that hold, or apply to hold, such authorizations. Under the WSA, such local governments must:²⁵

- Exercise reasonable care not to damage land, works, trees or other property when making changes in or about a stream;
- Inspect, maintain and repair authorized works so that the works do not cause significant harm to the public, the environment, land or other property; and,
- Ensure that any authorized works are deactivated or decommissioned according to any orders or regulations under the WSA when the authorization is abandoned, cancelled or expired.

If a local government as a holder of an authorization or as an applicant fails to meet these obligations, the local government will be liable for any resulting damage or loss incurred by affected land and property owners.

IV. ROLE OF LOCAL GOVERNMENTS IN REGULATING WATER IN BC

The WSA, like the former *Water Act*, retains all authority to regulate the use and diversion of water with the Province. The Province, or a person acting with authorization by the Province to make a decision, is the final decision-maker for all decisions that arise under the WSA. The WSA does not expressly provide additional authorities to local governments to regulate the use of water.

²⁴ WSA, *supra* note 1, s. 23(7).

²⁵ WSA, *supra* note 1, s. 29.

Local governments, however, have a role to play in the regulation of water. Local governments may advocate on behalf of local water issues that arise and ensure provincial decision-makers are adequately informed of issues or information affecting local water sources or ecosystems. At its core, the regulation of water under the WSA relies on administrative action in which several actors have abilities to require mitigation measures to be taken, to make orders or develop new regulations. Such a structure requires these decision makers to be and stay informed on issues affecting all streams and groundwater sources in BC. Keeping continually informed of these issues will require assistance from those who have information, which is where local governments that are interested in protecting local water sources may assist.

One of the strengths of the WSA is its ability to adapt to changing circumstances: the WSA offers numerous opportunities for the Province to develop water objectives or water sustainability plans. Short-term orders may also be issued to ensure the Province may react quickly to risks to water sources and fish populations. There is also the ability of local government bodies to secure adequate water supplies for municipal uses by expropriation of water licences and works where required. Below, we describe a few options that are available to local governments to impact water regulation and the role local governments may play in those processes.

A. Developing Water Objectives

The WSA enables Cabinet to make regulations to establish “water objectives” for a particular watershed, stream, aquifer or other specified area or environmental feature or matter for the purposes of sustaining water quantity, water quality and aquatic ecosystems.²⁶ The legislative intent behind “water objectives” is to provide a mechanism for the Province to coordinate and provide strategic direction to decision-makers who make decisions regarding land and water activities that may impact a water resource, such as those in the natural resource sector and local governments.²⁷ To provide a consistent approach to considering water issues, the regulation may require that water objectives be considered by a public officer and authorize or require a public officer to impose terms and conditions on any instrument it issues to promote the achievement of water objectives. The definition of a “public officer” in the WSA is broad²⁸ and would include a local government. Of particular note, a regional district may be specifically required to consider specified water objectives when developing, amending or adopting a regional growth strategy and a municipality may be specifically required to consider specified water objectives when developing, amending or adopting an official community plan.²⁹

²⁶ WSA, *supra* note 1, s. 43.

²⁷ BC Government, “A Water Sustainability Act for B.C.: Legislative Proposal” (October 2013), at 26 online: https://engage.gov.bc.ca/app/uploads/sites/71/2013/10/WSA_legislative-proposal_web-doc.pdf.

²⁸ The term “public officer” includes any person, other than a judicial officer, who “has authority to make a decision affecting the rights of another person”.

²⁹ WSA, *supra* note 1, s. 43(5)

Although not expressly accounted for in the WSA, there is no reason why a local government which is interested in protecting a particular watershed, stream, aquifer or aquatic ecosystem could not recommend to Cabinet that a water objective regulation be adopted, and the form such water objective should take. Of course, Cabinet would ultimately decide whether the water objective will be enacted, and the final form such a water objective will take, but local governments may play a role in drawing the Province's attention to local water issues.

B. Water Sustainability Plans

In addition to water objectives, the WSA also authorizes the minister to by order designate an area for the purpose of the development of a "water sustainability plan" ("WSP").³⁰ An area for the development of a WSP may be designated upon the Minister of Forests, Lands, Natural Resource Operations & Rural Development's own initiative or upon request by another person. WSPs replace plans that were known as "water managements plans" under the former *Water Act*. The intention behind WSPs is to develop WSPs when other area-based tools (such as water objectives) are not able to adequately respond to a local watershed issue.³¹ WSPs may be used to address conflicts between different water users or between water users and the health and wellbeing of a source of water or an aquatic ecosystem. Specifically, WSPs may prevent or address:

- Conflicts that may arise between different water users;
- Conflicts between water users and environmental flow needs;
- Risks to water quality; or,
- Risks to the health of an aquatic ecosystem.

A WSP may also be developed to identify measures to restore a damaged aquatic ecosystem.³² WSPs are a useful tool if a local government is experiencing conflicts with one or more water users within its jurisdiction. For example, if a local government believes that a particular water user in its jurisdiction is imposing risks to a particular stream or is adversely impacting the environmental flow needs of a stream, the local government may request that a WSP be developed. WSPs will also be useful to manage conflicts between various water users in times of severe water shortages.

Requests to develop a WSP are made to the Minister of Forests, Lands, Natural Resource Operations & Rural Development who may by order establish the process by which the WSP will be developed including who will be responsible for developing the WSP.³³ In the

³⁰ WSA, *supra* note 1, s. 65.

³¹ "A Water Sustainability Act for B.C.: Legislative Proposal", *supra* note 27, at 28-29.

³² WSA, *supra* note 1, s. 65(1)

³³ WSA, *supra* note 1, s. 66(1).

development of the WSP, consideration may be given to the results of other planning processes including a local government's planning processes in relation to land or water within or adjacent to the WSP area.³⁴ Once the WSP has been developed, the Minister may accept all or part of the WSP. If the WSP contains a recommendation that a regulation or order be made in relation to the WSP, the Minister may place the WSP before Cabinet to accept all or part of the WSP by regulation.³⁵

The impact and effect of a WSP could be significant. For the purposes of a WSP, an implementation regulation could direct the water comptroller or a water manager to amend the terms and conditions of specific licences or to cancel identified licences.³⁶ It could also greatly affect the authority of a local government since a regulation could require a local government to consider the WSP when making a decision; require, restrict or prohibit³⁷ a local government from issuing certain land instruments; or require, restrict or prohibit³⁸ a local government from exercising a power.³⁹ In respect of approving officers, a regulation could restrict the approval of a subdivision plan or other plan, establish conditions for the approval of such a plan, or require the rejection of such a plan, within the WSP area.⁴⁰

Furthermore, for the purposes of a WSP, a regulation may require that a local government consider the WSP in its planning processes.⁴¹ A regulation may also restrict or prohibit a use of land or natural resources, an activity in relation to land or natural resources or the use of works, whether or not the use or activity is authorized under another enactment such as a zoning bylaw.⁴²

Nonetheless, WSPs are an option when a local government is experiencing issues with a particular water user or is concerned there is a risk to water quality or an aquatic ecosystem.

C. Emergency Orders

Local governments do not have any authority to issue emergency orders under the WSA. However, if immediate action is needed to protect the flow of water during a water shortage or to protect a population of fish, the local government may make a request to the Minister to issue an order. Under the WSA, the Minister may make an order declaring a significant water shortage if a stream has fallen or is at risk at falling below a critical environmental flow threshold.⁴³ This temporary protection order may be in effect for up to 90 days, after which

³⁴ WSA, *supra* note 1, s. 69(2).

³⁵ WSA, *supra* note 1, s. 75.

³⁶ WSA, *supra* note 1, s. 79(1). ³⁷ Unless the enactment requires the land instrument to be issued.

³⁷ Unless the enactment requires the land instrument to be issued.

³⁸ Unless the enactment requires the power to be exercised.

³⁹ WSA, *supra* note 1, s. 76(2).

⁴⁰ WSA, *supra* note 1, s. 77.

⁴¹ WSA, *supra* note 1, s. 81(a).

⁴² WSA, *supra* note 1, s. 78.

⁴³ WSA, *supra* note 1, s. 86.

Cabinet will need to make a more permanent order. Additionally, if the flow of a stream becomes so low that a fish population may be threatened, the Minister may make an order relating to the diversion or use of water from that stream or a hydraulically connected stream or aquifer.⁴⁴

D. Expropriation of Water Licences

When necessary, local governments are expressly given the authority to expropriate water licences and works under the *Local Government Act* and the *Community Charter*.⁴⁵ This ability may be used to secure the priority of local governments to use water for government-related purposes. If a licence is expropriated, the water comptroller is authorized to issue the licence to the local government for the use required by the local government, with the same priority date.⁴⁶

E. Options to Regulate Water Use Outside of the WSA

As discussed above, the WSA does not expand the role of local governments to protect and regulate water in BC. However, there are several options outside of the WSA for local governments to protect and regulate the use of water. These options include:

- Zoning and land use regulation;
- Floodplain regulation; or,
- Designation of development permit areas such as to protect the natural environment and to promote water conservation.

All of these options are still available to local governments, even with the enactment of the new WSA.

V. CONCLUSION

The WSA marks a significant shift in water regulation and management in BC. One of the major strengths of this new Act is the new flexibility provided in the WSA to react and take action on various water issues as they arise in BC, including the flexibility to review and amend licences for the diversion or use of water.

The WSA impacts the water rights of local governments, as any other user of water. An authorization or exemption is required under the WSA to divert or use any water in a stream or from a groundwater source. Authorizations obtained by a local government, such as water

⁴⁴ WSA, *supra* note 1, s. 88.

⁴⁵ *Community Charter*, SBC 2003, c 26, s. 31(2) and *Local Government Act*, RSBC 2015, c 1, ss. 289(2). See also s. 704 of the LGA for improvement districts.

⁴⁶ WSA, *supra* note 1, s. 42.

licences or water use approvals, are subject to the WSA just as any other authorization issued under the WSA. This means that local government water licences and use approvals are subject to review and amendment by the water comptroller or a water manager. For this reason, local governments should stay on top of industry best practices and the maintenance of water works to avoid possibly large, unexpected expenditures in the future.

The WSA does not expand the role of local governments to regulate water use or to protect water. However, there are various creative ways local governments may secure abilities to regulate or protect local water sources. For instance, local governments may make recommendations for regulations for water objectives or WSPs or it may urge emergency action to be taken to protect the flow of water during a water shortage or to protect a population of fish.

Just as the flexibility in the WSA is a great strength, it could also become a great weakness since the protection of water ultimately depends on administrative action. Effective administrative action will depend on provincial decision-makers staying informed on issues related to streams and groundwater. For that reason, if a local government is interested in protecting local water sources, it may wish to be proactive and work with the Province to secure adequate protection for local water.

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