



The Fluid State of Water Law  
 Kathleen Higgins & Olga  
 Rivkin June 22, 2016



## Overview

- Water quantity
  - Water Sustainability Act
- Water quality
  - Drinking Water Protection Act
  - Environmental Management Act
- Watershed protection



## Why talk about water law?

- New legislation
- Many current issues
- Multiple parties involved



## When the well is dry, we know the worth of water...





### Until recently...

- *Water Act*
- Regulated surface water licensing
  - Basis: First In Time, First In Right (FITFIR)
- No groundwater licensing
- No clear ownership of groundwater
- Modernization process since 2009



### *Water Sustainability Act (WSA)*

- Royal Assent: April 29, 2014
- In force: February 29, 2016
  - Section 18 – quick licensing process – not yet in force



### Regulations under the WSA

- *Water Sustainability Regulation*
- *Water Sustainability Fees, Rentals and Charges Regulation*
- *Water Districts Regulation*
- *Groundwater Protection Regulation*
- *Dam Safety Regulation*



### Future regulations and policies...

- Water Objectives
  - Water Sustainability Plans
  - Measuring and reporting
  - Licence reviews
  - Designated areas
  - Dedicated agricultural water
  - Alternative governance approaches
- <https://engage.gov.bc.ca/watersustainabilityact/regulations/>



### Ownership of water

- Surface and ground water vested in the Province
- A person must not divert water from a stream or an aquifer, or use water diverted from a stream or an aquifer, unless authorized or exempt under the WSA



### LG concerns during consultation

- Precedence
- Domestic wells
- Aquifer health



### Precedence

- FITFIR: the rights under an approval are subject to all prior approvals



### How does it work?

- License contains the following:
  - Date of precedence
  - Maximum quantity of water
  - Water use purpose
- License must be appurtenant to land or undertaking



## LG concerns

- Outdated concept
- If extended to groundwater, community needs may become secondary to industry
- Alternative: precedence by type of use



## Ground water/surface water

- Surface Water:
  - Precedence in relation to the rights of other authorization holders who divert water from: (a) the stream, (b) a tributary of the stream, or (c) a hydraulically connected aquifer
- Groundwater:
  - Precedence in relation to the rights of other authorization holders who divert water from: (a) the aquifer, or (b) another aquifer the decision maker considers is reasonable likely to be hydraulically connected to that aquifer



## Same date licenses

- If precedence is from the same date, ranking by purpose: domestic, waterworks, irrigation, mineralized water, mining, industrial, oil and gas, power, storage, conservation and land improvement



## What can LG's do?

- Power to expropriate water licenses
- Upon expropriation, date of precedence of license remains, purpose of use changes



### Transition to license groundwater

- Must apply by March 1, 2019 to retain precedence
- If apply before March 1, 2017, application fees are waived
- Precedence based on “date of first use”
- Fees are payable from February 29, 2016



### Domestic groundwater wells

- To license or not to license?
- Local government involvement



### LG concerns

- Proliferation of domestic groundwater wells
- Cumulative effect could be significant
- Lack of authority to regulate construction of wells



### Domestic purpose

- Drinking and food preparation
- Fire prevention
- Providing water to animals and poultry kept for household use or as pets
- Irrigation of a garden not exceeding 1000 square meters



### Domestic purposes

- Do not require a license for unrecorded stream water and for groundwater
- Precedence up to: 2000 litres of water per day for each private dwelling on a parcel
- In times of significant water shortage: 250 litres of water per day



### Concepts of note

- Decision maker **MUST** take into account the quantity of water diverted for domestic purposes
- Water must be beneficially used
- Requirements for well reports and well decommission reports



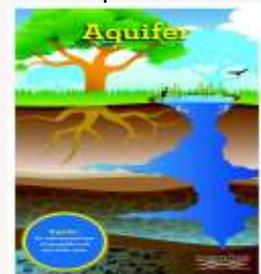
### What can LG's do?

- No authority to regulate groundwater wells
- Water sustainability plans (to be discussed)
- Water objectives (to be discussed)



### Aquifer health

- Out of site...





## LG concerns

- Lack of information about aquifer health or mapping of aquifers
- Information on wells is patchy
- Mapping is costly

BC.COM

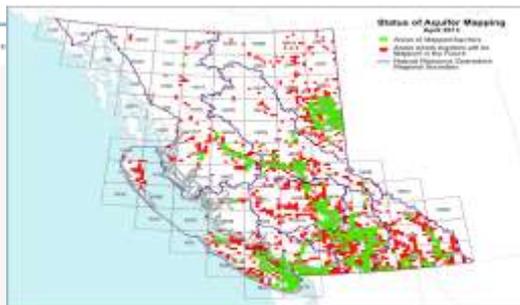


## Existing databases

- Aquifers
- Wells
- Groundwater observation well network

<http://www2.gov.bc.ca/gov/content/environment/air-land-water/water/water-science-data/water-data-tools>

BC.COM



BC.COM



## Other options

- Water objectives
- Water Sustainability Plans
- Temporary protection orders
- Advisory boards
- Restricting withdrawal by regulation (more on some of these later...)

BC.COM



## Environmental flow needs

- Decision maker must consider the environmental flow needs of a stream in deciding an application in relation to the stream or a hydraulically connected aquifer
- In relation to a stream, means the volume and timing of water flow required for proper functioning of the aquatic ecosystem of the stream. "Aquatic ecosystem" in relation to a stream, means the natural environment of the stream



## Exemptions...

- New authorization for a domestic purpose
- Change approval
- Drilling authorization for an aquifer not hydraulically connected to the stream
- Amendments, transfers, abandonments
- Final license



## Discretion

- Decision maker may consider environmental flow needs of any stream the decision maker considers may be affected by granting the application
- Transition period: decision maker may consider environmental flow



- A few recent water licensing decisions...





### Water license apportionment

- *Bridge Creek Estate Ltd.* (EAB, 2016)
- Apportionment should reflect actual irrigable land in the circumstances



### Due diligence

- *Michael and Joaney Lindelauf* (EAB, 2015)
- Any person buying rural property should do their research regarding water rights and water availability, just as they would investigate and confirm where the property boundaries are...



### Sufficiency of water

- *Southeast Kelowna Irrigation District* (EAB, 2013)
  - Licenses may be issued even if water is “fully recorded”
  - Whether there is sufficient water is a factual determination by the decision maker



## Drinking Water Protection Act

- Obligations of water suppliers – persons who own or operate a water supply system
- Must provide water that is:
  - Potable and
  - Meets any additional requirements established by the regulations or by operating permit

## What is potable water?

- Water provided by a domestic water system that:
  - Meets the standards prescribed by regulation, and
  - Is safe to drink and fit for domestic purposes without further treatment

## Regulations

- *Drinking Water Protection Regulation*
  - Standards for coliform bacteria and E-Coli

Fecal coliform bacteria	No detectable fecal coliform bacteria per 100 ml
<i>Escherichia coli</i>	No detectable <i>Escherichia coli</i> per 100 ml
Total coliform bacteria	No detectable total coliform bacteria per 100 ml
(a) 1 sample in a 30 day period	
(b) more than 1 sample in a 30 day period	At least 90% of samples have no detectable total coliform bacteria per 100 ml and no sample has more than 10 total coliform bacteria per 100 ml



## Policies

- *Guidelines for Canadian Drinking Water Quality*
- *Drinking Water Treatment Objectives (Microbiological) for Surface Water Supplies in British Columbia (Version 1.1 / November 2012)*
  - 4-3-2-1-0 – treatment objectives
- *Decision Tree for Responding to a Turbidity Event in Unfiltered Drinking Water (April 2013)*
- *Drinking Water Officers' Guide*



## Current issues

- Turbidity
- Filtration
- Standard of remediation (revising the *Environmental Management Act*)
- Small water systems/large water systems



## The bigger picture...



## Decision making in the watershed

- Local governments – planning/zoning
- Province - water licensing (Ministry of Environment); water quality (Ministry of Health/Health authorities); spill response, oil and gas, forestry, mining...
- Federal Government – First Nation lands, DND, federal lands



## Water sustainability plans

- None exist currently in British Columbia
- Township of Langley submitted a water management plan under the *Water Act*, which will be considered as water sustainability plan under the *Water Sustainability Act*
- Responsible ministry: Ministry of Environment under the WSA



## Water sustainability plans

- Minister may order an area designated for the purpose of developing a water sustainability plan.
- Purposes:
  - preventing or addressing conflicts between water users; the needs of water users and environmental flow needs; risks to water quality; or risks to aquatic ecosystem health
  - identifying restoration measures in relation to a damaged aquatic ecosystem
  - prescribed circumstances (not yet in place)



## Process

- To be established by minister's order:
  - Designate a person responsible to prepare plan
  - Establish terms of reference
  - Establish technical advisory committees
- May be prepared together with drinking water protection plan



## Terms of reference

- Terms of reference:
  - May be limited by an order
  - Must include purpose, scope, issues, description of the organizational structure, process of consultation, estimate of resources required to prepare, time limit, other prescribed elements



## Implementing regulations

- **Crown land and resources:** By regulation, plan may restrict or prohibit issuance of resource instruments.
- **Subdivision of land:** By regulation, must consider plan when considering subdivision of land.
- **Use of land and resources:** By regulation, may restrict use of land and natural resources, specified activities, and specified works.
- **Water rights:** By regulation, may reduce or cancel water rights (including groundwater wells).
- **Planning process:** By regulation, may restrict planning authority.



## Drinking water protection plans

- None currently exist in British Columbia
- Responsible ministry: Ministry of Health under the DWPA



## Drinking water protection plans

- Minister must state the purpose of plan, the issues to be addressed, the process and consultation and time limit for completing plan
- The Provincial health officer may recommend plan if: (a) will assist in addressing or preventing a threat to drinking water, and (b) no other practicable measures available under this Act are sufficient to address or prevent the drinking water health hazard



## Implementing regulations

- **Water quality standards:** By regulation, prescribed standards for an area
- **Authority to local governments:** By regulation, terms and conditions that must be included in specified authorizations, and restrict exercise of powers, BUT: local government must consult with decision maker and in each case must have reason to believe authority is necessary
- **Other regulatory restrictions:** By regulation, require various planning and resource processes to be consistent with the plan (including forestry, land use, and groundwater use)



## Advantages and disadvantages of WSP and/or DWPP

- **Advantages:** Additional authority and harmonization of water, land and resource use and development
- **Disadvantages:** Difficult to say how plans will be enforced or implemented, and may restrict local government authority over land use
- **Weakness:** Lack of clarity about application to first nation lands, or to federal undertakings (military exercises, shipping, and aeronautics)



## Other tools for harmonizing decisions

- Consultation respecting drinking water: (under DWPA)
  - By regulation of Province (none in place)
  - Prescribe enactments and decisions which must include consultation with identified persons
- Water objectives: (under the WSA)
  - By regulation of Province (none in place)
  - To sustain water quality, quantity, and aquatic ecosystem
  - Set factors to be considered in land and resource use



## What have LGs been doing?

- Acquiring lands in the watershed – costly
- Zoning lands in the watershed – not always effective (for example, limited control over mining and forestry)
- Commissioning informal watershed protection plans and putting in place watershed protection programs – lack regulatory strength



- Questions?
- Discussions?

**BILL HOUSSE**

Bill Housse is a leading tax firm with expertise in key industries across British Columbia, serving both Canadian and international clients. We are also one of the largest law firms in Western Canada, with a professional complement of more than 100 lawyers, patent and trade-mark agents and paralegals, and over 400 support staff. We advise Canadian and international corporations, financial institutions and emerging businesses, as well as governments and private individuals, in connection with their legal affairs in Canada and abroad. We bring to our practice a commitment to understand our clients' needs and to work with them in achieving and implementing timely and efficient solutions to their commercial and legal objectives.

