

DATE: May 10, 2019**FILE:** 5600-20/Denman Island**TO:** Chair and Directors
Electoral Areas Services Committee**FROM:** Russell Dyson
Chief Administrative OfficerSupported by Russell Dyson
Chief Administrative Officer*R. Dyson***RE: Denman Island –Bulk Water Service Review**

Purpose

To provide a recommendation relating to the Comox Valley Regional District (CVRD) providing a bulk water service on Denman Island.

Recommendation from the Chief Administrative Officer:

THAT staff be directed to set up a temporary bulk water filling station as part of the Denman Island Water Local Service Area system to provide bulk water to licensed haulers on Denman Island on a trial basis for summer 2019;

AND FURTHER THAT staff be directed to investigate other alternatives for bulk water sale on Denman Island to inform a recommendation back to the Electoral Areas Services Committee in late 2019.

Executive Summary

In late 2018, the Graham Lake Improvement District (GLID) changed their position of supplying water in bulk to haulers located on Denman Island and no longer supply water to haulers due to concerns surrounding GLID's liability. GLID made the CVRD aware of this change in early January 2019.

Water haulers located on Denman Island have limited alternative options and as a result may be required to develop costly alternatives or possibly stop providing service entirely. Residents that depend on bulk water may face dire circumstances this summer if alternative sources are not secured.

Staff have confirmed that the existing Denman Island Water Local Service Area (DIWLSA) water license and establishment bylaw do not preclude sale of bulk water. To ensure adequate water supply on Denman this summer, staff are recommending that bulk water sales be provided from the DIWLSA to licensed water haulers on a temporary basis while the full legal ramifications of sale of bulk water from this service and other potential alternatives are explored.

While a preliminary legal review indicates similar liability concerns identified by GLID could exist for DIWLSA, these risks are likely very low and should be balanced against the impact to health and safety of those members of the Denman Island community reliant on bulk water delivery. If this recommendation is approved, staff will be mitigating risk to the service by putting in place a robust indemnification agreement with the water hauler(s) and ensuring that they follow all required licensing requirements under Island Health regulations.

If the Electoral Areas Services Committee supports these recommendations, staff will report back to the committee in late 2019 with a recommended path forward for a more permanent solution.

Concurrence:

K. La Rose

Kris La Rose, P.Eng
Senior Manager of Water/
Wastewater Services

Concurrence:

M. Rutten

Marc Rutten, P.Eng
General Manager of
Engineering Services

Stakeholder Distribution (Upon Agenda Publication)

Graham Lake Improvement District	✓
Island Trust, CAO	✓



Email Transmission

PRIVILEGED AND CONFIDENTIAL

January 31, 2019

File No.: 281 016

Email: zberkey@comoxvalleyrd.ca

Ms. Zoe Berkey
Engineering Analyst
Engineering Services Branch
Comox Valley Regional District
600 Comox Rd
Courtenay, BC V9N 3P6

Dear Ms. Berkey:

RE: Legal and Liability Implications Arising from Sale of Bulk Water

You have asked for advice with respect to the potential liability exposure for the supply of bulk water through the Denman Island Water water service of the Comox Valley Regional District ("CVRD") to water haulers given that the Graham Lake Improvement District, ("GLID") is discontinuing that service.

There are three main potential sources of liability for bulk water supply:

1. Common law;
2. *Drinking Water Protection Act*; and
3. Agreement liabilities.

In addition, there is the threshold question of whether the CVRD is currently authorized to provide the service of supplying water in this fashion.

1.0 Authority for the Service: Role of the Denman Island Water Service

At present, the Denman Island Service would be established for the purpose of providing water supply within the service area. In order to provide the additional service of supplying water in bulk to water haulers, the service bylaw should be reviewed and amended as necessary to expand the scope of the service to include supply of water to bulk water haulers for redistribution to consumers beyond the boundaries of the service area. Such an amendment would require the Inspector's approval, and such approval should not necessarily be taken for granted.

Because the water would be supplied by the CVRD under the auspices of the Denman Island Water Service, the effect of the expansion of the service would be to place a potential liability on

the ratepayers within the boundaries of the existing service area in order to provide a domestic water supply to persons whose properties are outside the service area and who have not contributed to any of the costs of the capital infrastructure of the existing service. Section 379(2) of the *Local Government Act* provides that all costs of a service, including amounts required to satisfy a judgment or other order of a court against the regional district, are deemed to be costs of the service. The only exception provided for under section 379(3) is where the action or other proceedings arose "from the negligence of the board". There is limited scope for the board itself to be negligent in a manner that could create liability in negligence---the problem would have to arise from some type of wilful or negligent action or omission of the regional board itself, and not from the operational shortcomings of the system related to improper maintenance, monitoring, or supervision of the water system by the regional district's staff or third party contractors hired to operate the system. Most liability in negligence against local governments is founded in some form of operational negligence, and it would be an unusual set of circumstances that place the regional board itself in a decision-making capacity that might be characterized as actual "negligence" rather than as a legislative or policy choice of a type that is not subject to liability in negligence.

The result would be that the property owners in the Denman Island water service area could be responsible financially for liability arising from the service of supplying water in bulk for transport to other residents of Denman Island.

2.0 Liability Concerns

2.1 Common Law

At common law, a local government that undertakes to provide a service must do so without negligence and may be liable for the foreseeable damages that arise from a failure to operate a utility system in a manner that meets the appropriate standard of care. There is no reason why a water supplier might not be liable in negligence for supplying contaminated drinking water. In *Grave v Fort Erie*, 2003 CarswellOnt 3366, a court refused to summarily dismiss a claim in negligence brought against a municipality and a regional government in Ontario for supply of contaminated water. The failure of the municipality of Walkerton, Ontario to supply potable water to its residents was a notorious example of when can happen when a water system is not properly operated, and the water supply becomes contaminated.

2.2 *Drinking Water Protection Act*

In the aftermath of the Walkerton water contamination incident in Ontario, provinces like Ontario and British Columbia moved to enact new statutory regimes to govern drinking water.

The *Drinking Water Protection Act* applies to all water systems other than domestic water systems that serve only single-family residences. The basic requirements of the Act are that a water supplier must supply drinking water that:

- (a) is potable; and
- (b) meets any additional requirements established by the regulations, or

the water supplier's operating to the users is served by its water system.

"Water supply system" is defined as:

"means a domestic water system other than

- (a) a domestic water system that serves only one single family residence; and
- (b) equipment, works or facilities prescribed as being excluded."

"Domestic water system" is defined as:

"means a system by which water is provided or offered for domestic purposes, including

- (b) equipment, works and facilities used for treatment, diversion, storage, pumping, transmission and distribution,...
- (c)...N/A
- (d) a tank truck, vehicle water tank or other prescribed means of transporting water, whether or not there are any related works or facilities"

The Drinking Water Protection Regulation provides exemptions from this requirement for small systems:

- (a) that do not provide water for human consumption or food preparation (and are not connected to a water supply system that does); or
- (b) where each person receiving water from the system has a point of entry or point of use treatment system that makes the water potable.

There is an additional exemption under section 3(d) of the Drinking Water Protection Regulation B.C. Reg 200/2003 for a "system within a system" that allows for an exemption where a system receives water from a water supply system operating under a permit and the water does not require further treatment. This would exempt GLID if it received potable water from the CVRD and simply passed it on to its consumers without the need for further treatment. It would not exempt CVRD if CVRD were to supply water to haulers.

In my opinion, for purposes of the *Drinking Water Protection Act*, the CVRD would be considered a water supplier if it were to supply water to haulers for redistribution, and I recommend that the CVRD start from an assumption that its supply of water to the haulers would be subject to the provisions of the *Drinking Water Protection Act*.

The *Drinking Water Protection Act* provides in section 8(b)(1) that a water supplier must comply with all terms and conditions of its operating permit. Sections 8(3) and (4) of the Act authorize the drinking water officer to amend the terms and conditions of an operating permit, if the officer "considers this advisable". Section 8(3) of the Act expressly contemplates treatment and

monitoring requirements, and section 8(5) authorizes terms and conditions that are more onerous than those set out under the Act.

Section 4 of the Regulation expressly makes section 8 of the Act apply to all water systems. A water supplier is technically bound to meet all operating permit and monitoring requirements even if one of the exemptions set out above applies. This means that any liability exposure would need to be addressed through an agreement between the CVRD and the haulers, and some of the challenges of doing this will be discussed below.

3.0 Agreement Liability

In addition to the potential liability exposure if the CVRD chooses to proceed with this arrangement we would recommend that the relationship of bulk water supplier-bulk water recipient be documented through a formal service agreement setting out the terms and conditions of the bulk water supply. Typically, a supply agreement places responsibility for quality and quantity on the supplier and it is unlikely that the haulers would agree to indemnify the CVRD if it supplied contaminated water, and would only agree to indemnify and hold harmless the CVRD from liability if the contamination to the extent it had been actually caused by the hauler. Moreover, the CVRD would also be dealing with small businesses, without assets and without the means to effectively indemnify the CVRD if there were an issue.

3.1 Water Licences

Any water licences held by the Regional District in connection with the Denman Island water system that would provide the basis for supply of water in bulk outside the boundaries of the service area should be reviewed to ensure that they would allow the supply of water beyond the service area boundaries. It is recommended that any agreement to supply water be made subject to any amendments to licences necessary to allow for such supply.

3.2 Ministry of Municipal Affairs

Because the existing water service was not constituted to be a bulk water service for Denman Island, an amendment to the service bylaw would likely be required and this would require the approval of the Inspector. Alternatively, the CVRD could consider the policy implications of establishing a bulk water supply service as a separate regional service, so that the actual service area is broader and includes the area that is actually going to be served by the delivery of water. I am not, however, aware of any other local governments that operate small water systems that serve as bulk suppliers to water haulers, so this point I don't know with certainty whether the Ministry might have concerns about the CVRD engaging in this type of service. It is not the usual water service provided by local authorities of any type, whether municipal, regional or improvement districts.

4.0 Conclusion

While it would be possible for the CVRD to engage in the business of supply of water to bulk water suppliers there are a number of legal matters to consider:

1. Authority for the service, which will likely require an amendment to the existing water service, or the creation of an entirely new service;
2. Authority to use water obtained under any water licence for this purpose;
3. Challenges of meeting the requirements of the *Drinking Water Protection Act* when the actual distribution would be conducted through a third party hauler; and
4. Potential for any liability to be borne by property owners within the actual service area.

If you wish us to review the service bylaw or the conditions attached to any water licence, please advise.

STEWART McDANNOLD STUART

Per:

A handwritten signature in black ink, appearing to read 'Colin Stewart', with a stylized flourish at the end.

Colin Stewart*

CS/ce

* Law Corporation

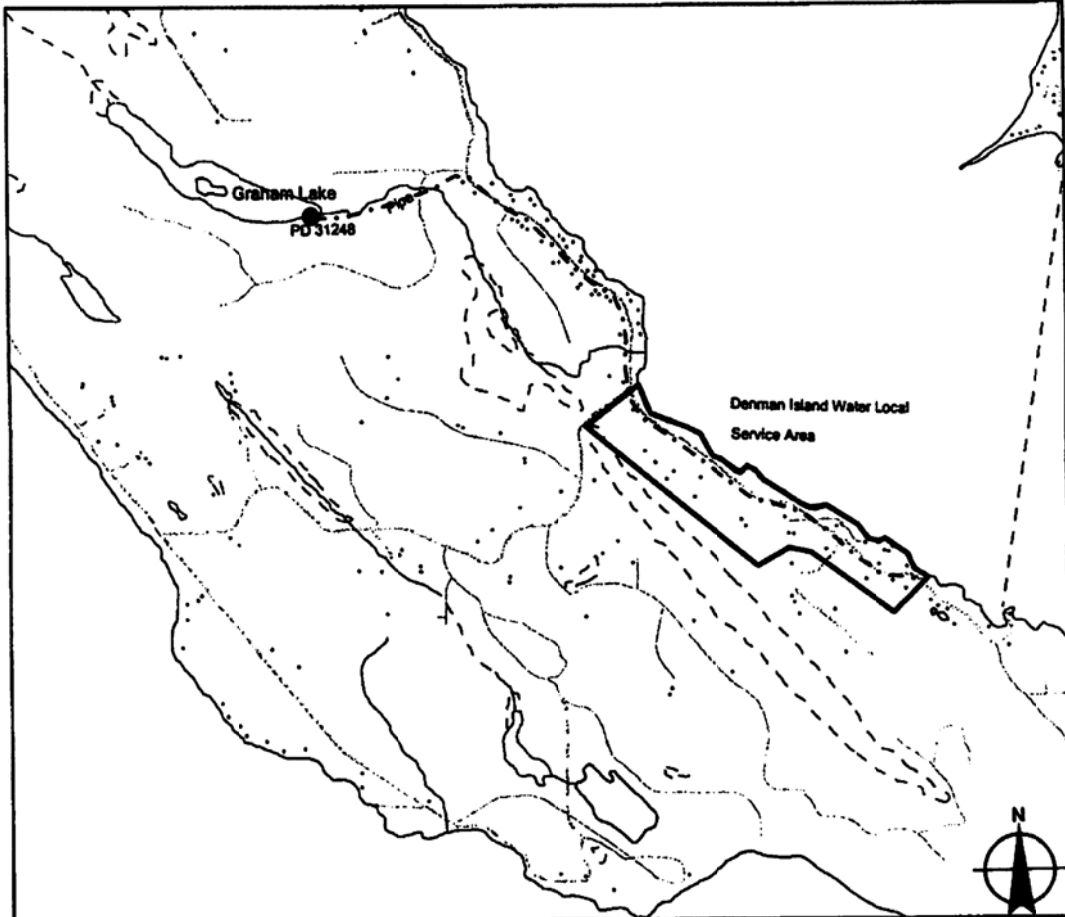
CONDITIONAL WATER LICENCE

The Comox Valley Regional District is hereby authorized to divert and use water as follows:


- a) The stream on which the rights are granted is Graham Lake.
- b) The point of diversion is located as shown on the attached plan.
- c) The date from which this licence shall have precedence is 17th April, 2009.
- d) The purpose for which this licence is issued is waterworks.
- e) The maximum quantity of water which may be diverted is 15,350 cubic metres (3,376,528 gallons) per year, at a rate not to exceed 83 cubic metres (18,257 gallons) per day.
- f) The period of the year during which the water may be used is the whole year.
- g) The land upon which the water is to be used and to which this licence is appurtenant is the land currently serviced by the Denman Island Water Local Service and the 14 lots that lie between this parcel of land and the area serviced by the Graham Lake Improvement District.
- h) The works authorized to be constructed are distribution pipes and water meters, which shall be located approximately as shown on the attached plan.
- i) The construction of the said works shall be completed and the water beneficially used, prior to the 31st day of December, 2013.



Larry Barr
Regional Water Manager



WATER DISTRICT: Nanaimo
 PRECINCT: Courtenay
 LAND DISTRICT: Nanaimo

Signature: 
 Date: NOV 17 2009

LEGEND:
 Scale: 1:25,130
 Point of Diversion: ●
 Map Number: 92 F 57.1.2
 Pipe: - - - - -

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 File 1002692