

LAW THAT INTRODUCES MODIFICATIONS TO THE REGULATORY FRAMEWORK THAT RULES WATER ON INSPECTION AND SANCTIONS MATTERS

On January 27, 2018, five years after being presented before the National Congress, **Law 21,064 that “Introduces modifications to the regulatory framework that rules water on inspection and sanctions matters”, was enacted and published** in the Official Gazette (Bulletin 8149-09) (the Law).

The **main modifications** introduced by the Law to the current regulatory framework are the following:

- The **General Water Bureau (Dirección General de Aguas, DGA)**, at its own initiative or at the request of one or more individuals, **is allowed to establish a temporary reduction of the exercise of underground water rights**, not only when the exploitation of the underground waters causes damages to other water rights owners, but also when the aquifer’s sustainability could be affected.
- The Law **requires the owners of water rights** granted in **prohibition zones and restricted areas, to install and maintain systems to measure flow and other information**. It also gives the DGA the power to, through a founded resolution, determine the deadlines and technical conditions to fulfill this obligation.
- Regarding **sanctions, the Law establishes five different degrees of fines** (1st degree: USD780 up to USD3,900; 2nd degree: USD3,980 up to USD7,800; 3rd degree: USD7,880 up to USD39,000; 4th degree: USD39,100 up to USD78,000; and 5th degree: USD78,100 up to USD156,000), and specifies the conducts that generate the implementation of those fines.
- Regarding the **definition of misappropriation of water**, the Law establishes that **both surface and underground waters are included in the definition of this crime**. Also, the penalties were increased to 61 days up to 3 years of imprisonment, and a fine ranging from US\$1,560 up to US\$390,000 approximately, and, in cases where the crime is executed using violence or intimidation, the penalty is 61 days up to 5 years of imprisonment, and a fine ranging from US\$3,900 up to

Esta alerta legal es proporcionada por Carey y Cía. Ltda. con fines educativos e informativos únicamente y no pretende ni debe interpretarse como asesoría legal.

Carey y Cía. Ltda.
Isidora Goyenechea 2800, Piso 43.
Las Condes, Santiago, Chile.
www.carey.cl

US\$390,000 approximately.

- It also, **incorporates a new crime**, establishing that anyone that deliberately **duplicates a water right ownership registration** at the Water Property Registry at the Custodian of Real Estate, **will be sanctioned with the penalty of 61 days up to 540 days of imprisonment**, a fine ranging from US\$860 up to US\$1,560 approximately, the withdrawing of the duplicate title and the cancelation of the duplicated water right registration.

Even though the bill was **approved by the National Congress last October**, on December 26, 2017, the **Chilean Constitutional Court ruled** on the procedure of preventive control of constitutionality of the Law, **declaring the following rules as unconstitutional**:

- The rule that would **allow the DGA, without prior judicial authorization, to enlist the help of law enforcement agencies** in enforcing compliance with the Water Code rules, and, in particular, to provide support in the suspension of unauthorized works that could damage third parties. The ruling stated that this new power would **infringe on the guarantee that Government acts must be assessed by the judiciary** in order to prevent authorities from taking arbitrary actions.
- The provision that would allow **finest established under the Water Code to be implemented by the competent Civil Court** with just a resolution from the DGA. This rule would have left the Civil Courts with only the power to decide the payment date of the fine, leaving the determination of the amount to the total discretion of the DGA, and preventing the offender from presenting any defense before the court in this regard. This rule **violated the guarantee of due process and the right of an affected person to file a complaint** against any public administration act that violates their rights.
- The rules that would **give the DGA the power to apply fines in case of noncompliance with the sanctions imposed by the same authority**, according to the DGA's inspection abilities, on those works that are insecure (e.g. the destruction of provisional works and the closure of intake points, among others), removing the power that the competent Local Court had to determine that fine. These rules **would have undermined the right to access an impartial and independent Court** that has the power to resolve conflicts between the Government and individuals.

All other modifications of the bill were deemed constitutional by the

Constitutional Court and passed as law.

Autores: Alberto Cardemil