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Can the Water Act Prevent ‘Another Winter River?’

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(Picture of dry steam beds). This photo is from the Summer of 2012 when about 5 km of the Brackely Branch of the Winter River dried up. Please keep this image in mind as we consider such terms as “adverse effects”, “harm to water resources”, which are central to the Water Act. These dry stream beds were never regarded as a problem by any public official at any level of government, or seen as an ‘adverse effect’ resulting from unsustainable water extraction by the City of Charlottetown.

Thank you for the opportunity to present to you tonight.

My comments reflect long involvement with water, watershed and environmental issues. I’m an educator, and a founding member and the first coordinator of the Environmental Studies programme at UPEI. I was a board member and co-chair of the Winter River Tracadie Bay Watershed Association for a number of years and I’ve been a member of the Coalition for the Protection of PEI Water since it began, as well as a member of other groups that you will be hearing from in these consultations, like ECO-PEI and the Citizens’ Alliance. My remarks tonight reflect my own perspective.

There are two key questions for thinking about this draft of the Water Act .

- How effectively will it protect our water from unsustainable extraction?
- How effectively will it protect our waters from contamination?

These questions can help us think about whether this is an “upstream” or “downstream” water Act. An Upstream approach would address the root causes of the problems we have with water quantity (extraction issues) and water quality (contamination). It would be preventative, protective. A more downstream approach would focus on how we respond to these problems as they occur, without necessarily reducing these problems.

In his EAC presentation, Gary Schneider reviewed the many familiar problems that we have in our waters...e.g. nitrate contamination, anoxic conditions, fishkills, siltation and runoff, and reflected the opinion of many others when he concluded "Things are a mess."

And to meaningfully change things and address the "Upstream" causes, before anything else, we need to honestly acknowledge the problems in our waters. This seems to have been difficult for us to do. And I'm not sure the Act offers us much help in taking this first step.

At the very first Water Act consultation on Oct. 6, 2015, I made a presentation to the EAC, entitled "We Don't want another Winter River". The title was based on a passing remark from someone in the potato industry during the discussions about lifting the moratorium on high capacity (HC) wells for agriculture. Comments like this seem to be common these days. The Winter River has become something of a poster child for the negative impacts of unsustainable extraction, a cautionary tale about the collective failure to protect the health of an aquatic ecosystem.

The Winter River watershed has supplied all the water for the city of Charlottetown for more than 80 years, about 18 million litres per day. In my presentation, I reviewed the history and impacts of this extraction, the efforts of the watershed group to call attention to and get help in addressing these problems, suggested some of the contributing factors to the issues on the Winter River, and offered some ideas for a way forward.

What I came to see as the key factor in the problems on the Winter river....the unwillingness to acknowledge problems/the persistent refusal to acknowledge that there were problems with water extraction on the Winter River among public officials at all levels of government. If you don't name a problem, then there is no problem to solve.

The challenge I proposed to the EAC. Can we develop a Water Act that will prevent 'another Winter River?' I proposed that if we had an Act that took the steps to prevent another Winter River, we would also be taking actions to prevent many of the other problems in our waters -fishkills, anoxia, nitrate contamination.

So I return to this question... Can this Water Act prevent another Winter River?

There is some excellent in this draft of the Act, and includes many strong elements that address a number of concerns that many of us raised. There is movement to a more ecocentric view of water that sees it as more than just a resource for human use. An excellent purpose section recognizes the goal of ecosystem health, the importance of water for human and nonhuman life, and comes close to acknowledging water as a common good and a public trust, and a human right. The draft Act incorporates the precautionary principle and intergenerational equity as guiding key principles, and includes polluter pays provisions. The Act identifies some priorities for water use, provides the opportunity for Ministers to hold water in trust for future generations, restrict permits if activities are not for the common good or might harm the environment.

But I don't think that what's here is nearly enough to prevent another Winter River for several reasons.

First, there are no clear criteria for sustainable water extraction. Stream flow criteria are in the process of being developed, but how applicable they will be to each watershed, and how liberal they will be in preserving stream flow is uncertain. We know that decisions will be based on science based assessments (2i), but it is important to recognize that science is always interpreted in the context of values. Even the information the government presents in their Water Facts handout tonight, seems to reflect the assumption that there is plentiful and abundant groundwater. Why be concerned?. Of course, they could have prepared an alternative set of Water Facts that presented the number of fishkills, frequency of anoxic conditions, nitrate levels in the water, the amount of water extracted each year by Charlottetown and industrial users like AquaBounty. These are also clear facts, but their presentation is grounded in very different values.

Second. The most glaring shortcoming of this Act is the absence of any meaningful framework for public engagement as a key ingredient in how we make decisions about water. What this act requires is a strong statement about public engagement as a guiding principle in Section 2. Such a statement would incorporate such elements access to information, transparency, standing for citizens to make appeals and to question decisions. But it should also provide citizens, and watershed and community groups an ongoing role in making decisions about water.

We require participatory models of water governance to help prevent the kinds of problems in our water that this act was meant to address.

The Coalition proposed these ideas in the EAC consultations and in a written brief. We suggested that the valuable collaborative spirit that began with this process could continue with citizen involvement in the development of the Act, and then with collaboration water governance. None of these ideas were evident in the EAC report or in the Act.

Water governance is very different from the system of water management that we continue to have. Water management is a system based on centralized decision making where there is a single government bureaucratic structure that is seen as the major stakeholder, and where a small and often longstanding group of experts, administrators, and managers work to develop, implement and interpret policy. To illustrate, the members of this panel worked to develop this policy, have a long history of administering previous environmental policies, and will be the same people that will help develop regulations and administer the new Act. In this familiar model of management, decision making power is vested in a small group of well qualified government people.

Water Governance is a more collaborative and decentralized approach, that broadens the range of actors to include a range of community stakeholders in the process of planning and making decisions about water. In water governance, there are a “range of political, organizational and administrative processes through which interests are articulated, input is absorbed, decisions are made and implemented, and decision makers are held accountable in the development and management of water resources and delivery of water services”.

The proposals for Water Management Areas represent the best opportunity to systematically incorporate models for Participatory Water Governance. And this is also the way to include a much needed, formalized and important role for watershed groups, who have been doing virtually all the front line environmental work for many years, while having no influence on policy. This is the chance to change that. This section is the clearest evidence of watershed and water area planning, something that watershed groups know how to do well. Watershed groups and other community members could be essential members of ‘water councils’ that collaborate in the process outlined in Sec. 4 required to develop

and implement plans, seek technical assistance, define and consult with stakeholders. I have no doubt that the participation of the Winter River watershed group in decisions about what happens in their watershed would go a long way to prevent ‘another Winter River’.

A **third** reason for my concern: The issues in protecting the Winter River start from the very beginning of the Act. 1(a) Definitions..."adverse effects" is open to wide interpretation. This is the only term related to environmental harm defined in the Act. The Act allows the Minister many opportunities for action when an adverse effect occurs : there are also other related (but undefined) terms like "serious or irreparable damage to water resources" (2e), "harm to water resources" . It also provides the Minister a great deal of latitude and discretion for taking such actions: there are many "mays" but fewer "shalls."

But the key question is: Who decides /defines "adverse effects" or "irreparable damage" or "harm" to water resources?

The problems on the Winter River relate to just that question. What's an adverse effect? The major contributing factor to the degradation of the Winter River was the unwillingness of any public official to acknowledge that there were problems on the Winter River. That, those dry stream beds that you see in this picture, were a problem, an 'adverse effect.' And it's ironic that the public officials who are the hearing these consultations, who have a major responsibility for drafting this Act were among the people who normalized and minimized these conditions, and no reasons not to act to reduce water extraction.

So all the responses available to government in the Act, such as the approval or rejection of permits are contingent upon acknowledging and defining problems. In a participatory model of water governance, the network for defining problems (and making decisions) would be broadened to include citizens, watershed groups and other stakeholders. Defining problems would distributed, debated and contended, and based in communities.

As AA suggest, the first step does have to do with the willingness to acknowledge problems, if we are going to protect our waters. But this is where we seem to be

stuck. We need to address this key starting point if this if this Act will have any meaningful impact.

My fourth concern: The clearest evidence of the failure of this Act to protect in Winter River is in the creation of Municipal Water Supply Area. And most troubling of all is Section 35(b), that gives the minister the authority to permit municipalities to exceed the limits on water extraction permitted by the Act, with neither reasons, nor time limits –perhaps this will be in the regulations. In my earlier brief I talked about the impacts of big interests, like municipalities and corporations which the government would be reluctant to regulate. This is clear example of this influence.

This is a disturbing and perplexing provision. It seems to reflect how government will try to balance the human demand for water with the need for water for healthy ecosystems and fish life. It indicates a willingness to not protect some waterways if the City requires the water. Perhaps, ‘you just can’t protect them all.’

So while the ‘scientific criteria’ for stream flow are being developed by the Canadian River Institute and Dr .Mike van den Heuvel, we can see how this provision illustrates the role moral/value judgments and priorities in how water should be allocated. This is not surprising since values play a critical role in all of our decisions about water. Certainly, the best science based assessments are essential for water decisions, but science is always used in the context of particular interests.

This is what I believe happened with the Act’s position to ban bottled water for export, a very good idea. This proposal was rejected not just because of questions about the impact of this plant on the ecosystems around Brookvale, but also because citizens in the Brookvale community, and other Islanders simply did not want it. We were concerned about the broader environmental impacts, about the possible commodification of water, about whether such a plant would expose us to the risk of larger corporate influence on what happens on PEI.

The reason for 35(b) was explained to us tonight by the Director for the Environment. It is clear that the government doesn’t want to pass an act that makes Charlottetown an instant outlaw because the City will then be taking unlawful amounts of water. Better to write the Act so that their outlaw behavior

is within the law.

To me, this is just as perplexing as one of my favorite bumper stickers: “When guns are outlawed, only outlaws will have guns.” For years, the government has permitted Charlottetown to degrade the Winter River ecosystem by withdrawing water far beyond sustainable amounts required to maintain ecosystem health. Lawful, but unsustainable extraction. And so, the City has never been asked to reduce their water use. On occasion Charlottetown has exceeded its permitted amount at the Brackley and Union wellfields. At that point, the City actually was an outlaw. But that has not led to any government actions, and was even regarded as helping with a needed ‘rebalancing’ of water extraction in the watershed.

There should be no absolutely no place in law that gives any user the legal right to harm the ecosystem. This provision is the clearest indicator of the continued failure to protect the Winter River and other watersheds from the unsustainable extraction by municipalities.

Furthermore, Charlottetown has 5 years with the grandfather clause to make themselves into law abiding citizens. The Winter River watershed group issued a water challenge 5 years ago to the City to reduce their water consumption to sustainable amounts in 3 years. They did not respond, or reduce their usage. Nor did you request them to do so. The permit issued to the City in 2010 required them to have a plan in place in 5 years. The legislation/regulations should certainly require them to be compliant by the end of this very generous grandfathering period.

Fifth, and finally. There is little in this draft on water conservation and efficient use of water. It seems ironic that the government would permit Charlottetown and other municipalities to have environmentally harmful levels of extraction without systematic requirements to reduce water use.

So, in summary, returning to our starting questions: I don’t see how this Act, as it stands, will prevent another Winter River and unsustainable extraction of our waters -or contamination either, since there are no references to agriculture’s role in the issues in our water quality, or to the possibility of fracking.

I am very encouraged by the strong purpose section to provide direction for what follows. The question remains: Could we make this an Upstream document, that could prevent 'another Winter River' and address the issues in water quality that lead to fishkills, anoxia, and nitrate contamination?

The best hope for this is to provide a place for strong, consistent and valued public engagement. A clear statement in the purposes section; The development of systems of participatory water governance that would engage stakeholders, watershed and community groups in the process of making decisions about what happen in their communities. Share power with people who care deeply about their water. Widen the funnel, bring more people to the table in a transparent process with full information. There are many capable, engaged, experienced and knowledgeable people who are already working to protect their water resources and watersheds.

Diversity is the key to healthy ecosystem. It is also the key to healthy human systems and developing healthy public policy.

This was the collaborative road we were on in the initial consultations. It's a shame to see the excellent process go off the rails, and now, once again, we are rushing toward the finish line for no clear reason other than getting this law passed this session,. There is little opportunity for concerned citizens and groups to carefully study the Act, consult, organize their thoughts, and even for government to thoughtfully incorporate the ideas that are brought here into the Act that goes forward. Today is 25 days since the Act was publically released. The last consult in Montague will be on Day 27. This for what many regard as the most significant piece of environmental legislation that PEI has ever had.

We have often been encouraged to trust you, to trust government to address the serious issues that we've had in our water for many years. But these problems have persisted. Now, it's time for you to trust us. Not just to listen to us in consultations that you choose to organize. But to include us as members at the table who participate in all the decisions related to what happens with the waters on PEI. This would be a very different system of governance, and I think it would be taking us pretty far Upstream in addressing the problems in our waters.

Thank you.