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The Honourable Brad Trivers
Minister of Environment, Water and Climate Change
Government of Prince Edward Island
MinisterEWCC@gov.pe.ca

SUBMITTED ONLINE

November 8, 2019

Dear Minister Trivers,

Re: Water Act Regulations Consultation

The East Coast Environmental Law Association is a public interest environmental law charity based in Halifax, Nova Scotia, that advocates for the development and fair application of strong environmental laws throughout Atlantic Canada.

As a public interest organization with a mandate to support the development of effective environmental laws throughout Atlantic Canada, and in light of our work with organizations on PEI, including the PEI Water Coalition, we appreciate the opportunity to contribute to the public consultation process concerning the proposed regulations under the Water Act.

We have been engaged in the consultation process around the *Water Act* since 2016, including a submission on the Bill and a successful workshop in Charlottetown in the fall of 2018. We have also written a Guide to PEI's Water Act which we provide free of charge through our website.

Our attached submission focuses on the proposed Water Withdrawal Regulations. Our submission includes a number of recommendations which we believe will ensure that the Regulations are in line with the stated purpose and goals of the Water Act and are able to address public and environmental concerns effectively.

Sincerely,



Lisa Mitchell, Executive Director
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**Submission to the Public Consultation on the Water Withdrawal Regulations
Proposed under the Prince Edward Island *Water Act***

Table of Contents

1.0	Introductory Comments	1
2.0	Defining High and Low Capacity Wells	1
2.1	Recommendation for Amendment	3
3.0	Consistency with the Stated Purpose and Goals of the Water Act	3
3.1	Recommendation for Amendments	3
4.0	Obliging the Minister to Consider Relevant Factors	5
4.1	Recommendation for Amendments	5
5.0	Defining “Acceptable” Adverse Effects	6
5.1	Recommendation for Amendment	6
6.0	Comment on the Department of Environment, Water and Climate Change “ <i>Water Act</i> Regulations: Q& A for Water Withdrawal Regulations” Document	7

1.0 Introductory Comments

The East Coast Environmental Law Association is a public interest environmental law charity based in Halifax, Nova Scotia, that advocates for the development and fair application of strong environmental laws throughout Atlantic Canada.

In September of 2014, we partnered with the Citizens’ Alliance of PEI to host a workshop in Charlottetown entitled “Environmental Rights in the Maritimes: It’s Time.” We continued to engage with groups on PEI throughout 2015 and in 2016, and that engagement included a collaboration with the PEI Environmental Rights Working Group (“PEI ERWG”) to focus on the creation of legally based environmental rights in provincial law. The PEI ERWG included representatives from Protection of PEI Water, Citizens’ Alliance, Pesticide Free PEI, Don’t Frack PEI, ECO-PEI, and others. We provided support to the members of the PEI ERWG throughout the consultation period on the PEI *Water Act*, and we provided a submission on the Bill during the second round of consultations in 2017.

We were pleased to see Bill No. 13 pass in December 2017. We were particularly pleased to find that the new *Water Act* includes a strong purpose section with identified goals, including a goal to ensure that present and future generations have sufficient, safe, affordable, and accessible water (s. 2(f)).

Although this does not necessarily represent a “right to a healthy environment”, it does recognize a right to clean water framed in the pursuit of intergenerational equity. From an ecological and societal perspective, these are important legislative steps for which, in our opinion, the government of PEI should be proud.

The proposed Water Withdrawal Regulations have been anxiously anticipated by many. We have reviewed the draft Regulations in some detail and wish to submit the following recommendations and amendments.

2.0 Defining High and Low Capacity Wells

The Interpretation section of any statute or set of regulations identifies parameters upon which governments, courts, and members of the public will rely. Government definitions of key terms, activities, and concepts can empower or disable the effectiveness of any legislation, and two crucial definitions in the proposed Water Withdrawal Regulations give us cause for concern.

The proposed Interpretation section defines “high capacity well” and “low capacity well” as follows:

1(1)(d) “high capacity well” means a well that is or is designed to be pumped at a rate of 345 cubic metres per day or more;

1(1)(e) “low capacity well” means a well that is or is designed to be pumped at a rate greater than 25 cubic metres per day but less than 345 cubic metres per day[.]

These definitions create a regulatory regime in which a well that is or is designed to be pumped at a rate of 344 cubic metres per day will undergo the same assessment and permitting process as a well that is or is designed to be pumped at a rate of 26 cubic metres per day. The difference between 25 cubic metres and 345 cubic metres is vast, and it is difficult to imagine how a regulatory regime designed to protect and conserve water resources could treat such vastly different withdrawal activities as though they were the same.

We note that the Department reports on the high capacity wells in the province along with the permitted withdrawal rates. This information is very useful and is appreciated. From this information, we note that the average high capacity well extracts significantly more than 345 cubic metres of water per day. [Based on departmental reporting](#), the highest reported freshwater extraction rate in recent years was an astounding 1375 igpm (extracted by Aquabounty Canada, Rollo Bay, in 2016), which equals 9001 cubic metres per day. The following table helps to put recorded extraction rates into context:

Sector (from highest to lowest user)	Imperial gallons per minute (igpm)	Cubic metres per day (m ³ /d)
Aquaculture (freshwater only)	675	4419
Municipal central supply	359	2350
Agricultural irrigation	297	1944
Irrigation – other	225	1473
Industrial/commercial	177	1158
Heat transfer, fire	158	1034
Private central supply	108	707

2.1 Recommendation for Amendment

East Coast Environmental Law recommends a more staggered regime that is better able to distinguish the impacts of wells that are designed to be pumped at relatively low daily rates and wells that are designed to be pumped at much higher daily rates. We further recommend that there be a distinction for high capacity wells that withdraw greater than 1500 cubic metres of fresh water per day.

Low capacity wells	25-160 cubic metres per day
Mid-capacity wells	160-345 cubic metres per day
High capacity wells	345-1500 cubic metres per day
Super high capacity wells	1500+ cubic metres per day

The information required and the assessment undertaken should increase as the well capacity type increases, and, for wells that fall into the “super high capacity wells” category, public engagement should be required before a permit is issued.

3.0 Consistency with the Stated Purpose and Goals of the *Water Act*

Multiple provisions throughout the proposed Water Withdrawal Regulations indicate that Ministerial decision-making under the Regulations must be consistent with “the policies and objectives of the Minister”. This language is not sufficient to ensure that Ministerial decision-making under the Regulations is consistent with the stated purpose and goals of the *Water Act*.

To give effect to the stated purpose and goals of the *Water Act*, regulations under the Act must ensure that the Minister’s discretion is delineated expressly by the Act itself. To this end, we recommend the following amendments to provisions located throughout the proposed Water Withdrawal Regulations:

3.1 Recommendation for Amendments

East Coast Environmental Law recommends that the Regulations specifically reference the purposes and goals of the *Water Act* to be considered by the Minister as a factor in their decision-making.

Specific Amendments:

Groundwater Exploration Permit

2.(3) On receipt of an application in the form required by the Minister and any fee required in the Schedule to these regulations, the Minister may issue a groundwater exploration permit to the applicant if the Minister is satisfied that the drilling, construction or reconstruction of the well

- (a) will not have an unacceptable adverse effect; and
- (b) is consistent with the purpose and goals of the Act and the policies and objectives established by ~~of~~ the Minister with respect to managing water resources in the watershed in which the well is or is to be located.

Water Withdrawal Permit

5.(3) On receipt of an application in the form required by the Minister, any test results, data or information required under subsection (2) and any fee required under the Schedule to these regulations, the Minister may issue a water withdrawal permit to the applicant if the Minister is satisfied that the withdrawal of water from the well, watercourse or wetland for the purpose of supplying a water supply system or at a rate that exceeds 25 cubic metres per day, as the case may be,

- (a) will not have an unacceptable adverse effect; and
- (b) is consistent with the purpose and goals of the Act and the policies and objectives established by ~~of~~ the Minister with respect to managing water resources in the watershed in which the well, watercourse or wetland is located.

Renewal of Water Withdrawal Permit

8.(3) On receipt of an application in the form required by the Minister, any test results, data or information required under subsection (2) and any fee required under the Schedule to these regulations, the Minister may renew a water withdrawal permit if the Minister is satisfied that the continued withdrawal of water from the well, watercourse or wetland, as the case may be, up to the same maximum rate and amount and for the same purpose,

- (a) will not have an unacceptable adverse effect; and
- (b) is consistent with the purpose and goals of the Act and the policies and objectives established by ~~of~~ the Minister with respect to managing water resources in the watershed in which the well, watercourse or wetland is located and subsections 5(4) and (5) apply, with any necessary changes.

Amendment of Water Withdrawal Permit (maximum rate or purpose)

9.(3) On receipt of an application in the form required by the Minister, any test results, data or information required under subsection (2) and any fee required under the Schedule to these regulations, the Minister may amend a water withdrawal permit if the Minister is satisfied that the withdrawal of water from the well, watercourse or wetland at the requested maximum rate, in the requested maximum amount or for the requested purpose

- (a) will not have an unacceptable adverse effect; and
- (b) is consistent with the purpose and goals of the Act and the policies and objectives established by ~~of~~ the Minister with respect to managing water resources in the watershed in which the well, watercourse or wetland is located and subsections 5(4) and (5) apply with any necessary changes.

Transitional

12. Where water is being withdrawn from a well, watercourse or wetland pursuant to authorization continued under subsection 77(5) of the Act and, in the opinion of the Minister, the withdrawal contravenes or does not comply with the Act, or these regulations or the policies and objectives established by ~~of~~ the Minister with respect to managing water resources, the Minister may require the holder of the authorization to submit a plan indicating how the holder will bring the water withdrawal into compliance on the expiry of the authorization or five years after the date subsection 77(5) of the Act came into force, whichever occurs first.

4.0 Obliging the Minister to Consider Relevant Factors

Within the proposed Water Withdrawal Regulations, certain provisions list factors that the Minister “may” consider when determining whether to issue or refuse permits for water withdrawal activities.

To properly give effect to the stated purpose and goals of the *Water Act*, the Regulations should oblige the Minister to consider relevant factors: they should not give the Minister discretion not to consider factors that are relevant to any assessment.

4.1 Recommendation for Amendments

East Coast Environmental Law recommends that the word “may” be replaced with “shall” in each of the following provisions. We also recommend that the stated purpose and goals of the Act be included expressly as relevant factors to be considered.

Specific Amendments:

Groundwater Exploration Permits

- 2.(4) In determining whether the drilling, construction or reconstruction of the well will have an unacceptable adverse effect, the Minister ~~may~~ shall consider factors including, in respect of the watershed in which the well is or is proposed to be located,
- (a) the availability of water in the watershed;
 - (b) the proximity of the well to other wells, watercourses and wetlands in the watershed; ~~and~~
 - (c) the potential impact of the well on the watershed and on other wells, watercourses and wetlands in the watershed; and
 - (d) the stated purpose and goals of the Act.

Water Withdrawal Permit

- 5.(4) In determining whether the withdrawal of water will have an unacceptable adverse effect, the Minister ~~may~~ shall consider factors including
- (a) in respect of the watershed in which the well, watercourse or wetland is located,
 - (i) the cumulative effect on the watershed of the withdrawal of water from all sources within the watershed,

- (ii) the potential effect of the withdrawal of the water on fish populations in the watershed,
- (iii) the sufficiency of water available to support the withdrawal of water from the watershed under existing permits and the permit under application,
- (iv) the potential effect of the withdrawal of the water on water flow in any watercourse or wetland within the watershed; ~~and~~
- (b) where the well, watershed or wetland is located in a water management area, the contents of any plan for the water management area; and
- (c) the stated purpose and goals of the Act.

5.0 Defining “Acceptable” Adverse Effects

The term “adverse effect” is defined in subsection 1(a) of the *Water Act* as “an effect that impairs or damages water resources or changes water resources in a manner that negatively affects related aspects of human or animal health or an aquatic ecosystem”.

The *Water Act* appears to give the Minister some discretion to determine that a potential adverse effect is acceptable. For example, subsection 7(2) of the Act states:

When deciding, pursuant to subsection (1), whether a proposed activity, matter or thing should not proceed, the Minister and the Lieutenant Governor in Council shall take into consideration such matters as whether the proposed activity, matter or thing contravenes a policy of the Government or the Department, whether the location of the proposed activity, matter or thing is unacceptable and whether adverse effects that may result from the proposed activity, matter or thing are unacceptable.

Although this provision speaks of the Minister and the Lieutenant Governor in Council inquiring whether potential adverse effects are unacceptable, the necessary implication is that such inquiries will also consider whether potential adverse effects are acceptable.

The proposed Water Withdrawal Regulations incorporate this language as well. Within the proposed Regulations, subsections 2(3), 2(4), 5(3), 5(4), 8(3), and 9(3) refer to Ministerial determinations that proposed activities will not have “unacceptable” adverse effects.

Although governments often empower themselves to accept adverse effects when the benefits of doing so are deemed to outweigh the detriments, we are troubled that neither the *Water Act* nor the proposed Water Withdrawal Regulations offer meaningful guidance as to what is meant by “unacceptable” adverse effect. Without factors to guide the Minister in determining whether a potential adverse effect is acceptable or unacceptable, the proposed Regulations give the Minister a concerningly broad discretion to decide that the benefits of allowing environmental impairment or damage outweigh the human and ecological costs.

5.1 Recommendation for Amendment

East Coast Environmental Law recommends that the proposed Water Withdrawal Regulations be amended to include a stand-alone section identifying considerations that the Minister must take into account when deciding whether an adverse effect is acceptable or unacceptable.

We recommend that this section include the factors proposed in subsections 2(4) and 5(4) of the Regulations, as follows:

- (a) the availability of water in the relevant watershed;
- (b) the proximity of the proposed well to other wells, watercourses, and wetlands in the relevant watershed,
- (c) the potential impact of the proposed well on the relevant watershed and on other wells, watercourses, and wetlands within it;
- (d) the cumulative effect on the relevant watershed of the withdrawal of water from all sources within it;
- (e) the potential effect of the withdrawal of water on fish populations within the relevant watershed;
- (f) the sufficiency of water available to support the withdrawal of water from the relevant watershed under existing permits and the permit under application;
- (g) the potential effect of the withdrawal of the water on other users of water in the relevant watershed; and
- (h) the potential effect of the withdrawal of water on water flow in any watercourse or wetland within the watershed.

In addition to the factors listed above, we propose that the Regulations include factors for the Minister and the Lieutenant Governor in Council to consider that reflect the stated purpose and goals of the *Water Act*. Sustainability, conservation, protection, and precaution, among others, should be mandatory considerations in Ministerial decision-making under the proposed Regulations, and those considerations should inform the distinction between acceptable and unacceptable adverse effects.

East Coast Environmental Law recommends that the following factor be added to the list of factors to be considered by the Minister in determining whether an adverse effect is acceptable or unacceptable.

- (i) the extent to which the proposed well will contribute to meeting the purposes and goals of the *Water Act*.

6.0 Comment on the Department of Environment, Water and Climate Change “*Water Act* Regulations: Q & A for Water Withdrawal Regulations” Document

We wish to express our concerns regarding language used in the public “[Water Act Regulations: Q & A for Water Withdrawal Regulations](#)” document. Specifically, we wish to draw your attention to two questions and the corresponding answers that the document provides:

Q20 Will high capacity wells deplete our groundwater supply?

In our view, the answer provided by the Q&A document is misleading, as it does not offer insight into the distribution of water withdrawn from the groundwater supply. The answer emphasizes that a high capacity municipal well serving multiple domestic users does not deplete the groundwater supply any more than the combined force of multiple low capacity wells serving domestic users in rural areas. We agree; however, the answer fails to acknowledge the impacts of industrial high capacity wells—those used for aquaculture purposes in particular—

and explain the effects of their disproportionately high rates of withdrawal compared to municipal high capacity wells.

Q26 What about climate change? Are we accounting for it when we set the rules for water withdrawal?

Part of the answer provided to this question is not only misleading but also flies in the face of reports issued by the Government of Prince Edward Island itself. Specifically, we refer you to this passage:

“Also, while some areas of the country are expected to be drier, in PEI overall annual precipitation is actually expected to increase slightly.”

It is not clear where the evidence for this statement may be found, and the answer runs counter to [statements on the website of Government of Prince Edward Island that address questions concerning “Our Changing Climate”](#). On that website and in response to the question “Is our climate changing?”, the following statement is made:

“Yes, temperatures are about 0.5 °C warmer than they were 100 years ago. Most of this increase is happening in the winter. Prince Edward Island has also been drier in recent years, with less rain and snow falling.”

In response to the question, “What will our climate be in the future?”, the website goes on to state:

“Based on the latest climate scenarios (from the Intergovernmental Panel on Climate Change Assessment and the UPEI Climate Lab), over the next 40 years we can expect:

- Warmer Temperatures: Warmer weather is on the way. Temperatures are expected to be, on average, 1.6 °C warmer by the 2050s.
- More Rain and Less Snow: It is likely that this rain and snow will fall less often than it does now. This means that on those days when it does come—we may experience heavy rainfall or snow rather than smaller accumulations over many days. Annual total precipitation (rain, snow, sleet) is expected to decrease, on average, by 6% by the 2020s, making it drier and more susceptible to drought conditions. Models show precipitation returning to today's normal by the 2080s.”

East Coast Environmental Law was unable to undertake a comprehensive review of the “*Water Act* Regulations: Q & A for Water Withdrawal Regulations” document in order to assess whether the statements contained within it are in accordance with other information and commentary that the Government of Prince Edward Island has published, but the questions and answers that we have flagged for your attention here are concerning. The stated purpose and goals of the *Water Act* express an intention to provide Islanders with information about provincial water resources, and they also reflect a governmental commitment to applying science-based assessment processes that take climate change considerations into account. Fulfilling these goals will require clarity, transparency, and the provision and use of accurate data and information. Mixed and misleading messaging about the long-

term security of water resources will frustrate the stated purpose and goals of the Act, and we recommend that the public record be edited appropriately so that its contents are both clear and accurate.