



**Commentary from the Prince Edward Island Potato Board on Revised Water Withdrawal Regulations
Submitted to the Standing Committee on Natural Resources and Environmental Sustainability**

April 16, 2021

The Prince Edward Island Potato Board is the industry organization that represents 177 potato farms of P.E.I. The Board and its members have been actively following the development of the new Water Act as well as the regulations related to the Act.

The Prince Edward Island Potato Board, on behalf of the Island's potato industry, continues to advocate for fair and responsible access to groundwater for agricultural irrigation for those farmers that choose to invest in supplemental irrigation, provided that it is sustainable based on local watershed considerations. Our farmers live in the communities in which they farm and are equally committed to conservation of our groundwater resources. Farmers are open to transparent, science-based measurement of groundwater extraction and a rigorous permitting process for all high capacity well users, including farmers, ensuring that water extraction can be sustainably allowed within a specific watershed. However, if these conditions are met, it is unfair that the people who produce food in our province are the only Islanders that are automatically excluded from access to groundwater.

The Board welcomes additional opportunities for dialogue with elected officials and personnel from the Department of Environment, Water and Climate Change on these proposed regulations and other regulations that directly impact farmers. The Board fundamentally believes that public policy should be informed by science-based decision making as well as equal and fair access to public resources with environmental sustainability at the forefront. Please feel free to contact us if questions arise from anything contained in this submission. This submission was developed with the assistance of independent third party expertise, as follows:

Conclusions

Our starting point is our Province's new Water Act. It provides a strong foundation for the regulation of high-capacity water wells. This Act makes individual permits the core legal instrument to govern all high-capacity water withdrawals. Further, this Act identifies the watershed as the key context for water management decisions, including decisions on water withdrawal permits.

The current draft regulations released under the Water Act provide detailed direction on the test for approving any new high-capacity water withdrawal. The test is two-part: (1) an impact test – demanding

that the withdrawal not cause any unacceptable impact; and (2) a policy test – demanding that the withdrawal be consistent with applicable policies and objectives in the watershed subject to the withdrawal. As currently written, the draft regulations strengthen the foundation of the Water Act, with one exception.

We except subsection 5(7) from our support for the draft regulations. In light of the two-part impact test for all high-capacity withdrawals, there is no need to also prohibit certain withdrawals without any regard to impact. Nor is there any rationale for this prohibition under the purposes of the Water Act. To the contrary, deleting s.5 (7) and relying on the two-part test implements the Water Act's commitments to consistency, transparency, and science-based decision-making.

Next Steps

There is also room for the Province to strengthen the draft regulations to require use of leading science and technology. Two options could improve the regulation of high-capacity water wells by building on the excellent foundation provided by the Water Act:

- *First, these regulations should require that over time every watershed have a provincially-approved, publicly-available watershed plan and water budget that governs all water resource decisions, including decisions on permits.*

- *Second, these regulations should recognize and promote leading ground and surface water monitoring methods and technologies to efficiently and appropriately measure, monitor and assess the impacts of all significant human activities on the watershed, including all high-capacity water withdrawals.*

The first improvement seeks to improve transparency about the state of all watersheds in the Province. We have not been able to identify science-based water budgets for each watershed. Publicly-available water budgets would advance the Water Act's purpose of managing water in the public good. Water budgets would also allow the public and permit holders to understand and discuss the impact of all existing and proposed water uses on the sustainability of each watershed. Based on provincial data that estimates human use of two percent of the precipitation falling on the Province, it seems likely that water budgets will demonstrate good management by the Province, but this should strengthen public trust. This appears to us to be an important reform to advance the purpose of the Water Act and improve water management decisions, including decisions on future high-capacity water withdrawal permits.

The second improvement seeks to require use of leading technologies to monitor water use across the Province. In particular, we recommend increased use of leading water monitoring methods and technologies to assess existing and proposed activities that may affect the Province's watersheds and deepest aquifer.

Background

Topic 1 – Excellent foundation provided by the Water Act and existing draft regulations, with one deletion

With one exception, the draft regulations appear to implement rules that are consistent with the purpose of powers provided under the Water Act.

Through subsection 5(3), the draft regulations provide a two-part test to apply to any application for a new high-capacity well. The first part of the test is an impact test: it allows the Minister to issue a permit only if the withdrawal will not have an unacceptable adverse effect. The second part of the test is a policy test: it allows the Minister to issue a permit only if the withdrawal is consistent with the policies and objectives of

the Minister with respect to managing water resources in the watershed where the withdrawal would be located.

The use of this two-part test is appropriate: decisions on new water withdrawal permits should consider both specific impacts and policy consistency.

Given the merits of subsection 5(3), there is no need or rationale for this regulation to also contain the absolute prohibition on new high-capacity wells for the purpose of agricultural irrigation set out in subsection 5(7). Whereas subsection 5(3) demands review of specific information and supports use of the best science, subsection 5(7) imposes a blanket prohibition that has no regard to any information or science. Subsection 5(7) also raises fundamental legal questions. Every provision in every regulation must respect the applicable guidance set out in its governing statute, particularly its purpose section. Yet subsection 5(7) does not do this. To the contrary, its terms are inconsistent with the stated purposes of the Water Act. Overall, the prohibition set out in subsection 5(7) of the draft regulations is unnecessary to protect water resources and inconsistent with the purposes of the Water Act. Moreover, because of the detailed subsection 5(3) test applicable to all new high-capacity permit decisions, the deletion of s.5(7) would result in no loss of water resource protection in the Province.

Topic 2 – Amending the draft regulations to improve watershed protection

As noted above, the draft regulations contain a policy test that demands consistency with the policies and objectives of the Minister with respect to managing water resources in the affected watershed. We support this focus on the watershed. It is certainly appropriate to ensure that any new high-capacity water withdrawal is consistent with managing the water resources of the watershed in which it is located.

In other jurisdictions, governments use watershed plans to ensure broader public responsibility and accountability for water resources. A core requirement of any watershed plan is use of the best science to calculate the watershed water balance. To date, it is our understanding that across the Province generally, human activities use approximately two percent of the water that falls on the Province every year. Yet there may be important variability in human usage across different watersheds.

Mandating the development and use of plans and water balances for each watershed in the Province would allow all Islanders, particularly the residents of each watershed, to know how much water people now use and how much additional water could be used without impact. Considering the example of high-capacity water withdrawals, watershed plans and water budgets would allow everyone to assess any new high-capacity water withdrawal for its impact on water resources in the watershed.

There are also options on the best way to administer watershed plans. It is certainly possible for the Minister or the Province to be the sole custodian of such plans. However, in other jurisdictions, watersheds are regulated locally or regionally. One advantage of having others responsible for creating and updating watershed plans is that this would allow the Minister to have independent regulatory oversight over such plans.

Topic 3 – Amending the draft regulations to recognize and promote leading water monitoring methods and technologies

No one can see groundwater or an aquifer. This is one reason why it can be challenging to manage and protect groundwater resources. An essential tool of water resource management is ensuring use of the best

methods and technologies to measure and assess existing groundwater resources as well as any human actions that may affect those resources.

Particularly because groundwater and aquifers are not visible, the only way to protect them is to monitor them through monitoring wells. It is our understanding that the Province has a network of monitoring wells across the Province. There is clear importance for this Province to have a robust and efficient monitoring system since, at surface, the Province has a number of different watersheds and, at depth, the Province has one bedrock aquifer. Both require careful attention to cumulative effects.

To support watershed plans, it is also recommended that the draft regulations be amended to ensure that every watershed has an efficient system of ground and surface water monitoring locations across the watershed. This may require additional monitoring wells beyond the existing provincial wells and additions to the existing system of surface water monitoring stations that are strategically and efficiently located and designed to protect all surface water resources, particularly cold water streams that depend on groundwater flow to provide the best fish habitat.

Third, the draft regulations could be amended to ensure that all monitoring information is made publicly available so that the most current scientific data and information informs all watershed plans and future withdrawal permit decisions.

Respectfully submitted by:



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