WATER WITHDRAWAL REGULATIONS
Comments by the Coalition for Protection of PEI Water
October 9, 2019

Comments in **bold**

Pursuant to section 76 of *Water Act* R.S.P.E.I. 1988, Cap. W-1.1, Council made the following regulations:

Interpretation

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;

(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;

This section in conjunction with section 1(d) raises several issues and questions:

-the thresholds are problematic. Why is 345 the chosen number? On what basis was it chosen?

-how would this hard number address a number of wells, each pumping 340 cubic metres a day (which remain in accordance with 4(2))?

-decisions of "low" and "high" should consider the use to which the water would be directed particularly if the proposed use is agricultural and especially in light of the moratorium

-the terms "low" and "high" capacity are somewhat misleading. 25 cubic metres-345 cubic metres is not an insignificant amount of water. To label them "low capacity" is inaccurate and may arguably lead to false assurances regarding the actual amount of water being drawn. Low capacity wells are those under 25 cubic metres. "Low" as it is presently defined should be renamed.

Groundwater Exploration Permit

2. (1) For the purpose of section 48 of the Act, a person may undertake the drilling, construction or reconstruction of a high capacity well or a well that supplies or is designed to supply water to a water supply system, if the person holds a groundwater exploration permit.

For absolute clarity, this section should perhaps specifically state that the exploration permit does not permit the pumping of water.

(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 policies and objectives of the Minister with respect to managing water resources in the watershed in which the well is or is to be located.

The Act specifically states in section 7(2) that departmental and government objectives are to be considered within the legislation. See also section 2(i) for further context for decision-making. We posit therefore that the policies and objectives of the Minister with respect to the watershed should therefore not be the only consideration.

More importantly, the objectives and goals set out in the Act should provide the context for decision-making of the minister in the permitting process (and throughout the Act). The inclusion of section 2 in the legislation was crucial to the endorsement of the legislation by many stakeholders. This section provides the overarching framework to govern the spirit and direction of the Act and its implementation. Reference to the applicable subsections should be included in the regulations where appropriate.

(4) In determining whether the drilling, construction or reconstruction of the well will have an unacceptable adverse effect, the Minister may 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.

Should the section not state, the Minister "shall" consider factors….including "but not limited to"…?

We believe, the consideration of these factors should be mandatory and not permissive. The word "may" should be replaced by the word "shall".

This decision is fundamental to the success and functioning of the legislation and the Minister should be required to address each of the named critieria.

Arguably, additional factors should be included to allow an informed and fulsome consideration prior to decision-making. These include specific reference to the precautionary principle in determining whether or not a permit should be issued AND consideration of interests mentioned in section2(a) and 2(i) of the legislation such as conservation, and accommodation of supporting ecosystems.

(5) Notwithstanding subsection (3), a groundwater exploration permit shall not be issued for the drilling, construction or reconstruction of a high capacity well for the purpose of agricultural irrigation, except in respect of the reconstruction of a high capacity well from which the withdrawal of water for the purpose of agricultural irrigation was authorized

under the *Environmental Protection Act* R.S.P.E.I. 1988, Cap. E-9, immediately before the coming into force of the Act.

Should the section include (the soon to be renamed) "low capacity" wells? ie "…shall not be issued for the drilling, construction or reconstruction of a "low capacity" or high capacity ". Or simply change it to "any well with a capacity greater than 25 cubic metres per day".

We are actually wondering why this section is here in light of s. 2(1)? Is it not redundant?

(6) A groundwater exploration permit authorizes the permit holder to drill, construct or reconstruct a high capacity well or a well that supplies or is designed to supply water to a water supply system to explore its viability and the possible effects of the withdrawal of water from the well on water resources and related

aspects of human or animal health or on an aquatic ecosystem.

Should there be a change from "a high capacity well or a well that supplies or is designed to supply water to a water supply system" to any well greater than 25 cubic metres per day" or "other than a domestic well"?

(10) The holder of a groundwater exploration permit shall ensure that a copy of all data, reports and other information obtained pursuant to an activity conducted under the permit are submitted to the Minister within 30 days of the completion of the activity.

Should not all of this application information and departmental response be posted on the Registry and available to the public in a timely fashion? Again, the objectives and goals specifically mandate access to information, public participation and transparency in s. 2 of the Act. The requirement to make the information public should be added to this subsection.

4 (2) For the purpose of subsection (1), where a person withdraws water from more than one well, watercourse location or wetland location, or from a combination of these and

(a) the water is directed to a single water supply or water storage structure;
(b) in the case of multiple wells, the wells are within a radius of 15 metres of each other; or

(c) the effect of the water withdrawal on groundwater is similar to

that which would occur as a result of withdrawal from a single well, the total water withdrawn by the person from all of these sources shall be included in calculating the rate of withdrawal per day from each source.

A subsection should be added to specifically address holding ponds.

Subsection 4(2)(c) might not be not sufficiently strong enough to avoid efforts to circumvent the Act.

(5) Notwithstanding subsection (1), but subject to subsection (6), a water withdrawal permit is not required to withdraw water from a well, watercourse or wetland at a rate that exceeds 25 cubic metres per day for any of the following purposes:

(d) to remediate contaminated water, provided the remediation is approved by the Minister.

We are wondering what section 4(5)(d) is designed to address?

Should there not be a section addressing movement between watersheds?

(6) A person shall not withdraw water from a watercourse at a rate that exceeds 25 cubic metres per day for a purpose described in subsection (5) without a permit where the minimum width of the water in the watercourse at the time and location of the withdrawal is less than one metre.

Where did 1 metre come from? Where is it measured? Why is flow and volume not a consideration? Does it not seem odd to allow a swimming pool to be filled if the stream source is only one metre wide?

5. (2) The Minister may require an applicant to conduct tests, collect data or obtain information and submit the results, data or information to the Minister in support of an application for a water withdrawal permit.

Should this subsection be mandatory – "shall" require, not "may" require. Should the "or" not be "and/or" in both uses?

(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 policies and objectives of the Minister with respect to managing water resources in the watershed in which the well, watercourse or wetland is located.

5(3)(b) should state that the permit is contingent on the application being consistent with the "policies and objectives of the Act" not just the "Minister".

(4) In determining whether the withdrawal of water will have an unacceptable adverse effect, the Minister may consider factors including

This consideration should be mandatory. ie The Minister "shall" consider factors including, "but not limited to" . . .

(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,

Could we possibly change "fish populations" to "wildlife populations" which allows a more fulsome consideration of the aquatic ecosystem and everything that depends upon it, as mandated in the definition section 1(d) the legislation?

(iv) the potential effect of the withdrawal of the water on other users of water in the watershed, and

(v) the potential effect of the withdrawal of the water on water flow in any watercourse or wetland within the watershed;

Why not include consideration of non-consumptive uses in these watersheds throughout these subsections to ensure all users are within the decision-making purview?

(5) Where there is insufficient water in a watershed to permit the withdrawal of water for all purposes and meet the environmental flow needs of the aquatic environment in the watershed, the Minister shall prioritize the purposes for which water may be withdrawn from the watershed in descending order as follows:
(a) fire suppression;
(b) domestic water use by individual household wells or through municipal water supply systems;
(c) industrial, commercial or other water uses prioritized based on the degree to which the use serves the public interest.

Section 5 (5)(c) is highly problematic in that it allows a very broad category of activities (activities that may not be in the public interest) to trump flow in times of shortage . . . a period when flow considerations should be given high priority (subject to 5(a) and 5(b)). Section 5 (5)(c) should be removed.

Consideration should be given to including a section that outlines how priority will be addressed in time of shortage more generally: if shortages are predicted how do we manage use? Do we mandate conservation? Is water allocated beyond domestic use to first in time, first in right? Do we cut back usage across all permit holders on a percentage basis? These questions should be answered prior to specific issues arising and incorporated into the regulations as well as the terms and conditions of (publically accessible) permits. (See also section 6(1))

(6) Notwithstanding subsection (3), a water withdrawal permit shall not be issued for the withdrawal of water from a high capacity well for the purpose of agricultural irrigation, except in respect of a high capacity well from which the withdrawal of water for the purpose of agricultural irrigation was authorized under the *Environmental Protection Act* immediately before the coming into force of the Act.

Arguably, this section should apply to any agricultural irrigation well.

6. (1) A water withdrawal permit shall state in respect of the withdrawal of water under the permit

(a) the maximum rate at which the water may be withdrawn;
(b) the maximum amount of water that may be withdrawn within a specified period; and

(c) the purpose for which the water may be withdrawn.

The permit should also include monitoring and reporting requirements re (a) and (b). See also section 5(5)

(2) No holder of a water withdrawal permit shall withdraw water from the well, watercourse or wetland covered by the permit at a rate, in an amount or for a purpose not authorized by the permit.

"Nor in any other manner contrary to the terms and conditions of the permit" (a permit which should include monitoring and reporting within a set number of days of gathering the information).

See suggestions under section 5 (5) discussion.

(4) A water withdrawal permit ceases to be valid when, in respect of the land adjacent to the watercourse or on which the well or wetland is located from which water is being withdrawn under the permit,

(a) there is a change in ownership of the land; or
(b) where the holder of the permit is not the owner of the land, the owner of the land rescinds his or her permission, in writing, for the holder of the permit to withdraw water from the well, watercourse or wetland.

Permits should also cease to be valid if the permit holder violates the terms and conditions of the permit. It should also cease to be valid if the water is wasted. (see Australian legislation)

GENERAL QUESTION: Will permits be available for non-consumptive uses such as recreational users (who may have property values or businesses contingent on water availability in some cases)? If not, how will these users be protected?

7. The holder of a water withdrawal permit shall provide data collected from any flow measuring device or water level measuring device, or data respecting the calibration of these devices, to the Minister, on request.

We suggest that you delete "on request". Providing data should be a condition of the permit and the (timely submitted) information should be posted on the Registry within a stated number of days.

8. (1) The holder of a water withdrawal permit may apply to the Minister, within the 60 days preceding or following the expiry of the permit, to renew the permit.

(2) The Minister may require an applicant to conduct tests, collect data or obtain information and submit the results, data or information to the Minister in support of an application to renew a water withdrawal permit.

(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 policies and objectives 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.

Please see comments in Sections 2 and 5 above to consistently include placing this information on the Registry, mandatory requirements re the Minister in receipt of a request, extension of the factors to include the objectives of the Act etc.

9. (1) The holder of a water withdrawal permit may apply to the Minister to amend the permit with respect to the maximum rate at which water may be withdrawn, the maximum amount of water that may be withdrawn within a specified period or the purpose for which the water may be withdrawn under the permit.

(2) The Minister may require an applicant to conduct tests, collect data or obtain information and submit the results, data or information to the Minister in support of an application to amend a water withdrawal permit.

Again, we would change "may" to "shall".

This section, when combined with section 36(b) of the Act creates something of a slippery slope. At a minimum, in keeping with Section 2 of the Act (and pretty much every subsection therein), no increase in the amount or rate should be granted in the absence of a fully documented and publically available conservation plan submitted by the applicant.

(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 policies and objectives of the Minister with respect to managing water resources in the watershed in which the well, watercourse or wetland is located,

See comments under section 2(3) and subsections 5(4) and (5) apply with any necessary changes.

10. (1) The holder of a water withdrawal permit may apply to the Minister to transfer the permit to the owner of the land adjacent to the watercourse or on which the well or wetland is located from which water may be withdrawn under the permit, or to a person with the written permission of the owner of the land.

(2) On receipt of an application from the holder of the water withdrawal permit, in the form required by the Minister, and any fee required under the Schedule to these regulations, the Minister may transfer the water withdrawal permit if the transferee undertakes, in writing, to accept the transfer and abide by the terms and conditions of the permit.

(3) For greater certainty, on transfer, the terms and conditions of a permit, including the expiry date, remain as they were immediately before the transfer unless altered by the Minister.

Should there be a provision banning the buying and selling of water permits? This would reflect the Government commitment to the "common good" and the public guardianship role they have assumed.

GENERAL QUESTION. As is the case with land holdings, did the province consider a limit on the maximum permitted quantity of water that might be held by a person? This might address one of the concerns of many Islanders regarding concentration of resource use in a few hands. Like the comment immediately above this would also ensure that water is not commoditised and that the common good is paramount.

12. Where water is being withdrawn from a well, watercourse or wetland pursuant to an 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, these regulations or the policies and objectives 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.

. . . the Minister "shall" require the holder, not "may". Then require it immediately when the Act comes into force

Also, is it clear that the authorization holder shall submit this plan so that they DO comply within the stated time periods, or just that they submit a plan to do so within the time period?

13. These regulations come into force on .....