

Report of the Ombudsman into the Department of Environment's Management of the Provincial Water Classification Program

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FOREWORD

In February of 2013, the Office of the Ombudsman was contacted by citizens and representatives of the citizen's group the *Nashwaak Watershed Association*. The complainants indicated their dissatisfaction with the Department of Environment's management of the provincial Water Classification Program, specifically as mandated under *Regulation 2002-13 the Water Classification Regulation – Clean Water Act*. The complaints alleged failure or refusal of the Minister to classify waters as contemplated by the Regulation, despite the extensive effort those groups engaged in to complete all requirements for classification. In addition, the complainants indicated that they were unable to get timely or sufficient explanations of why their applications were not being approved.

Following initial inquiries, and given its mandate to probe matters related to administrative fairness within provincial public agencies, the Office of the Ombudsman determined that there were sufficient administrative grounds to investigate these complaints further. On 19 August 2013 the Office of the Ombudsman provided the Department of Environment with notice that we would be proceeding with an investigation pursuant to section 16 of the *Ombudsman Act*. In April of 2014 we provided the Department with a list of recommendations based upon our preliminary findings and provided them an opportunity to respond.

While the Department has acknowledged to both our Office and the complainants that there are outstanding issues around the Water Classification Regulation, it has not found itself in a position where it could accept our preliminary recommendations for remedial measures. Our Office has concluded that, independent of the good intentions of the Department, the nature of the issues involved and the history of the file are such that effective resolution is unlikely to occur in a timely manner without the direct interest of the Legislative Assembly.

Further, it is our conclusion that this matter may have value for other governmental departments and agencies which face similar challenges. Our Office has concluded that it is necessary to provide a detailed report in order to establish the grounds for our conclusions and recommendations and in the public interest to do so. Where practical, we have used excerpts from documents already in the public record (such as transcripts of Debates in the New Brunswick Legislative Assembly) rather than internal documents provided to us from the Department of Environment, from which we received co-operation throughout our investigation. Accordingly, we are providing this Special Report to the Legislative Assembly regarding our investigation into the Department of Environment's discharge of its responsibilities under Regulation 2002-13.

EARLY HISTORY OF REGULATION 2002-13

On 5 February 2002, New Brunswick Regulation 2002-13 under the *Clean Water Act* was filed. The last section of the Regulation (s.19) provided that the Regulation in its entirety would come into force on 1 March 2002.

A delay between filing and commencement is not unusual in Regulation, and is typically designed to provide the government department and/or affected parties the opportunity to prepare for the change in the province's law. In cases where the time needed for such preparation is uncertain, a commencement section may decline to list a specific date for coming into force, instead providing that it shall be come into force upon order of the Lieutenant Governor in Council. In the case of Regulation 2002-13 the fixed date proclamation less than a month after filing suggests that little additional

preliminary work or notice was seen to be needed, and the evidence of our investigation supports that conclusion. Indeed, the Water Classification Regulation was a much anticipated step in the province's Clean Water program. The *Clean Water Act* had been passed in 1989 and was followed in 1990 by regulations for water wells, watercourse and wetland alteration, and protected area exemption. Ten years later the province updated its regulatory regime through the Wellfield Protect Area Designation Regulation in 2000 and the Watershed Protected Areas Designation Regulation in 2001.

The Water Classification Regulation in 2002 was the third part of this newly updated regulatory scheme. It had been developed both in response to pressure from, and in co-operation and consultation with, a number of local environmental groups, which the Department of Environment regards as key stakeholders and important partners in fostering sound environmental stewardship. The Water Classification Program had been anticipated for some time, such that a number of years prior to its coming into force, citizen environmental groups had received substantial funding from the Environmental Trust Fund to conduct monitoring of water quality in various river systems to establish baseline scientific data to determine at what level (A, B, or C) various branches of such watercourses should be classified. For example, the Nashwaak River Association had received \$89,000 in Environmental Trust Funds in July of 2001.

Evidencing both the extended timeline for the Water Classification Regulation and the relationship with stakeholder groups, a government member made the following statement in the Legislative Assembly on 18 May 2000:

Another example of extensive consultation in preparation of a new regulation is that of the proposed water classification regulations. In 1995, a discussion paper on the water classification initiative was distributed to 52 stakeholders. Approximately 45 meetings with various interested associations were held. There were also 13 open houses held across the province to provide information to the public regarding water classification. In 1999, an overview of the proposed water classification regulation was distributed to 80 stakeholders and to 55 watershed groups. In addition to this consultation, which was led by this department, the watershed groups themselves also carry out an important amount of consultation with the assistance of department representatives. These consultations include open houses, public meetings, and the preparation of newsletters.

On 22 November 2000, the Minister of Environment stated in the Legislative Assembly:

In the near future, government also expects to review the draft water classification regulation, which will set goals and standards for all water bodies. In advance of this regulation, many local watershed groups throughout the province have already begun an inventory of water quality data with the support of the New Brunswick Environmental Trust Fund and with the technical assistance of staff in my department.

At the time of its coming into force, the province's 24 page Water Classification Regulation gave every appearance of being comprehensive and "good to go" from both a legal and administrative perspective. The Department of Environment produced a training module to guide groups through the process of obtaining classification for the watercourses of interest to them. Complete with an official logo, these publications directed interested groups to where they could obtain the form the Department had created in January 2002 to apply for classification. Additional information and guidance, and assistance in applying for funding for the detailed scientific testing needed to establish the watercourse's present

quality over an extended period of time if such had not been already completed (as it was for the Nashwaak) was provided. In due course, 19 separate proposals for classification were received from groups around the province.

The Nashwaak Watershed Association, having been interested and pro-active, was among the very first to complete the substantial work required and submit its request for classification, along with numerous detailed supporting documentation which gives every appearance of meeting or exceeding the Department's or the Regulation's requirement. Although there is substantial back-and-forth between the Department and the Nashwaak Watershed Association as various aspects of the proposal are discussed and expanded amongst other issues, the evidence of our investigation indicates the Department of Environment was in possession of all that it needed to process the Nashwaak Watershed Association's application by 2003 at the latest.

As there was a long-standing and ongoing relationship between the Department and the Association, they continued to correspond on a wide number of issues relating to environmental policy in general and the Nashwaak in particular. The Association continued to hold meetings and produce reports, but from the perspective of the Water Classification Regulation it does not appear the Association's application was lacking or required further steps to proceed. The evidential record does not demonstrate that the Department contacted the Association to indicate that their application was incomplete or inadequate in any manner. Indeed, at some point the Department began to refer, both internally and to the public, to a number of watercourses in the province as having been "provisionally" classified. Although the Regulation makes no mention of such a possibility, the usage in this context would suggest to anyone dealing with the matter that official classification was only a matter of time. In the document "A Guide for the Integration of Water Classification in the Planning Process" produced in July of 2009, the Department refers to "provisionally classified" watercourses and instructs those concerned with planning to give them full consideration.

To sum up the situation in 2003: the Nashwaak Watershed Association had an ongoing relationship with the Department for many years. It had received tens of thousands of dollars from the Environmental Trust Fund to conduct detailed multi-year water quality testing, held many public meetings, produced a number of detailed reports, and corresponded and met regularly with Departmental officials. Using materials provided by the Department, Association members invested many hours of volunteer work to prepare an application for classification of the Nashwaak watershed under the province's in force Regulation 2002-13. They did so with the full confidence and expectation that their application was complete, acceptable to the Department, and would be given due consideration. They were neither informed that their application was in any aspect faulty or insufficient, nor were they informed it had been rejected and told the reasons for the rejection and given an opportunity to respond or appeal. To the contrary, they were given every indication that they could expect formal approval in due course.

IMMEDIATE FAILURE OF REGULATION 2002-13

What followed within the Department is not easily ascertained and the passage of time and nature of the issues clouds the "why"s of any forensic investigation. However, a number of matters are certain. One is that, after the coming into force of Regulation 2002-13, not a single watercourse for which an application has been received was classified by the Minister as contemplated by section 3 of the Regulation. There is no evidence that this due to inadequacy of any kind on the part of the applicants. If anything, their conduct throughout has been co-operative, first seeking clarification as to what more they needed to do, then questioning why the Department has not proceeded with classification.

The Department's explanations over the intervening years have been vague, perhaps due to uncertainty on the Department's part, perhaps due to reticence to disclose matters which staff have been instructed form part of confidential legal advice, and perhaps due to the Department's reticence to admit error. Various statements have been made to the public at various times, and differing timelines have been given.

On 6 June 2006 the Minister of Environment stated in the Legislative Assembly:

The Water Classification Regulation of the Clean Water Act was enacted March 1, 2002. This regulation sets water quality goals and standards for all surface water in the province. The regulation provides a framework for water quality protection and classification of surface waters in the province. It also provides a framework and process for stakeholder involvement in the setting of water quality goals.

However technically accurate that statement was, the reality in 2006 was that Regulation 2002-13 had not led to any directly measurable results. Not a single watercourse had been classified from the many applications received.

POSSIBLE LEGAL DEFICIENCIES: THE LEGISLATURE AMENDS THE CLEAN WATER ACT

Chief amongst the explanations for the Department's failure to classify has been the suggestion that the Regulation lacks sufficient legal authority. This has been referred to in various public contexts. Clearly at some point the issue of whether the Act contained sufficient authority to support the Regulatory scheme was raised, and the matter was referred to the Office of the Attorney General for advice. These concerns were noted by officials within the Department of Environment on multiple occasions. It should be noted that if, as some conclude, there was an error made from the very beginning in 2002, that error has not been specifically identified. Standard procedure for all regulation for many years is that they are drafted by expert staff within the Legislative Services Branch of the Office of the Attorney General. Standard procedure for any new regulation includes an expert legal analysis of whether it can be supported by the Act on which it relies for authority. Either an error was made in the drafting before the coming into force of 2002-13 or the government proceeded to bring into force a regulation against legal advice. In any event, by 2007 the matter had been referred to the Office of the Attorney General and the Department of Environment had concerns whether there was authority in the Act to support the Regulation. Given these concerns, the Department went back to the Legislative Assembly in 2008 and had the *Clean Water Act* amended. The Minister was very explicit as to the faults in the Regulation, the fact that remedial action was being taken, and that there was no change in policy underlying the amendment to the Act, only the establishment of proper authority to support the existing program.

On 2 December 2008, Minister of Environment stated in the Legislative Assembly:

What was brought to our attention was that, in the Clean Water Act, we did not have enough authority to run the Water Classification Program...

I think what is important to understand is that, right now, under the Act, neither the minister nor the government has the legal capacity to run the program. We do not have the authority. That is all. The only thing that we are asking for is to legalize it here in the House, so that the department and the government have authority to act. That is all.

Right now, there are certain activities, for instance, that are not permitted. The minister cannot prohibit those activities because it would not be legal to do so. We could and would be challenged in court. The only thing that we are asking for is to make it legal. That is all...

The Department of Justice told us: Well, if you are challenged in court, it is highly likely you will lose.

I must attempt to be clearer and explain things better. The existing classification has not changed – not at all. Nothing is changed with regards to the classification which your government brought before the House in 2002. The only thing is that this gives us the legality to make classifications. That is all; absolutely nothing else has changed in all of this.

Bill 9, *An Act to Amend the Clean Water Act* was introduced on 26 November 2008, received third reading on 3 December 2008 and was given Royal Assent on 19 December 2008. It explicitly gave 12 new regulatory making powers, all directly related to aspects of the provincial Water Classification Program.

POST 2008: NOTHING CHANGES

The 2008 amendment to the *Clean Water Act* has done nothing to improve the Water Classification Program's functionality. To this day not a single application to the program has been approved.

In the aftermath of the amendments to the *Clean Water Act*, a number of applicants reached out to the Department to obtain clarification as to the status of their applications. On 6 January 2009, the President of the Nashwaak Water Association wrote to the Manager of the Department of Environment's Water Planning Section and requested to have the classification of the Nashwaak Watershed finalized. Although the Department has at various times contemplated which scientific protocols should be used to assess water quality, there is no indication that the Nashwaak Watershed Association's application was in any way deficient or outdated. The Association continued to hold meetings and conduct other activities both on its own and in co-operation with the Department.

Since the 2008 amendments, the Department of Environment remained in contact with groups and has considered a number of options, including 'retooling' the regulation or restarting the entire process from the beginning with a general canvass and a series of public meetings to rethink the scheme in its entirety. In March of 2010 the Department anticipated amendments to the Regulation which would take effect that June. At various times staff created schedules to roll out approvals of classification of the 19 applications the Department had received in a systemic manner. In 2011 the Department began to refer to the Water Classification Program as 'suspended'. In September of 2011 the Minister of Environment acknowledged the continuing concerns with the program, but indicated that the Department viewed them as "an opportunity rather than an obstacle."

By May of 2012 the Department was again citing possible deficiencies or shortcoming in the legal authority for the Regulation. At this point, it should be noted that no court has ruled upon the Regulation. Accordingly, the suggestions that the Regulation is void or unenforceable are thus far opinion – perhaps correct, but not having the force of law. Any legal deficiencies which still exist persist despite the standard drafting and review procedures leading up to the coming into force of Regulation

2002-13, and despite an amendment of the *Clean Water Act* in 2008 explicitly designed solely to address perceived shortcomings in statutory authority. The suggestion that there continues to be unaddressed issues about the legality of Regulation 2002-13 12 years after its coming into force strains credulity.

The most recent hesitation regarding Regulation 2002-13 seems to originate not in the Office of the Attorney General but the Department of Environment, and speaks more to the Department's broader uncertainty as to policy direction. It must be understood that at all stages of the process, the drafters in the Office of the Attorney General take their instructions from the Department as to the intention of the Act, Regulation, or amendment(s) thereof. The Department with the policy expertise is the architect; the drafters in the Legislative Services branch of the Office of the Attorney General are the engineers. The Department's concerns that the entire scheme for Water Classification is vague, unworkable, or unenforceable some 12 years after Regulation 2002-13's coming into force speaks to a much deeper issue than can be corrected by mere legal draftsmanship.

Despite its best intentions, the Department of Environment has been unable to determine a clear course of action or make any measurable progress in this matter. Today, over 12 years after Regulation 2002-13 became the law of the Province of New Brunswick and 25 years after the passing of *the Clean Water Act*, the Province still does not have a working Water Classification Scheme. During that time the Province has had 6 different Premiers, and there have been multiple changes in personnel to the Minister and Deputy Minister of the Department of Environment. Each one of those changes has, in the absence of clear direction, threatened to reset progress in correcting this problem to zero. Indeed, as the problem has persisted year after year, it has become increasingly difficult for the Department to address this issue without risking embarrassment to itself or its Minister.

A TROUBLING USE OF MINISTERIAL DISCRETION

To finesse the shortcomings surrounding Regulation 2002-13 the Department has employed the device of withholding Ministerial approval for applications. Regulation 2002-13 states at section 3 (emphasis added):

Water Classification Order

3 The Minister may, in the Minister's discretion, with the approval of the Lieutenant-Governor in Council and in accordance with this Regulation, by a Water Classification Order classify all or any portion of the water of a watercourse as one of the classes set out in paragraph 4(a), (c), (d), (e) or (f).

At times, the Department has characterized the ongoing situation as: applications have been not been rejected, the Minister has simply not proceeded with classification - and is under no obligation to do so. With respect, we are in strong disagreement with this construction of Ministerial discretion. When there are unique or temporary circumstances, or specific issues with individual applications which require special consideration, a case arises for the use of Ministerial discretion. It cannot have been the intention of the Lieutenant Governor in Council in 2002 or the Legislative Assembly in 2008 to create an entire Regulatory Scheme which will then be rendered null by a blanket refusal to classify by the Minister of the very Department which sponsored the Act and the Regulation. However, in the absence of a workable program, this is what has arisen. Since 2002, none of the Ministers who have been in this portfolio have placed themselves in a position where they might exercise discretion to approve applications based on their merits.

In our opinion, this use of Ministerial discretion has been pernicious and counter-productive. It has perpetuated the illusion that the province has a Water Classification Program. This has had a number of very deleterious effects. It has allowed the problem to persist by deflecting public pressure and making it easier for the Department to focus on other priorities. From the outside, the appearance has been maintained that, “it ain’t broke, so don’t fix it”, but Regulation 2002-13’s complete ineffectiveness is in some respects worse than having no regulation at all. Like a smoke detector without batteries, it provides no protection and may induce less vigilance. It appears to address and remedy a problem when in reality it does nothing of the sort.

ADDITIONAL PROBLEMS ARISING FROM THE FAILURE OF 2002-13

While the Department has continued to maintain this Regulation, it perpetuates a situation which risks two-tier results. All environmental regulation balances the interest of specific landowners with those of the general public. The Department has communicated with planning boards, speaking of “provisional approvals” and urging those to be given the same guiding effect as binding legal classifications under the Regulation. Citizens with limited resources may well accept what they are being told at face value, and refrain from development of the land under the mistaken impression that it would be illegal to do so. Commercial enterprises or persons with large financial resources are more likely to retain counsel, ascertain the true nature of the situation from a legal perspective (i.e that no watercourses have been classified under the Regulation) and proceed.

Finally, the ongoing conduct of this file has, not surprisingly, severely eroded the Department’s credibility and its ability to work with the citizen groups which the Department explicitly recognizes as key partners in accomplishing its aims of environmental protection. Recall that these are in large part volunteer groups who invested many volunteer hours in conducting monitoring, public meetings, and preparing reports – all in expectation of a successful classification and in reliance upon the Department’s assurances that their work was not in vain. The tone of their correspondence over the intervening years bears witness to the decay of trust and goodwill between these citizens and their government.

OUR RECOMMENDATIONS, THE DEPARTMENT’S RESPONSE, AND PROSPECTS FOR REMEDY

After examining this matter the Office of the Ombudsman has made three primary recommendations to the Department. These were:

1. If the Department has determined that Regulation 2002-13 is unenforceable then it should be repealed without delay.
2. Those individuals and groups who have submitted a request for classification should be advised of the reasons why their application is being rejected
3. The Department website and other communication forms should reflect the fact that they will not be classifying watercourses.

The Department of Environment has indicated that it does not wish to repeal the Regulation immediately because the Regulation may have some residual legal effect in its automatic classification of lakes and ponds – bodies of water with unique classifications which do not depend on approved applications or Ministerial approval. With respect, we do not regard this as sufficient rationale to maintain Regulation 2002-13 on the books as a whole. The pond and lakes provision make up only a very

small portion of Regulation 2002-13. If, as the Department contends, the Regulation is unworkable and unenforceable as presently drafted, the provisions purporting to protect lakes and ponds are as ineffectual as those dealing with watercourses. Finally, the Department has been explicit many times that the shortcomings in Regulation 2002-13 are not fatal to proper environmental protection of watercourses, as that rests on much sounder provisions in the *Clean Water Act* itself. That being the case, the same would be expected to hold for lakes and ponds.

When first contacted by our Office, the Department indicated that it planned to have a new Regulation in place by 2016. With respect, we considered that timeline to be so distant as to amount to little more than aspirational thinking. Since our intervention, we have become convinced that the Department's leadership is seized of the issue and has created a detailed and credible plan to address this issue in a timely manner and in concert with stakeholder groups. It is clear that the Department has the best of intentions, and has sought guidance for this file repeatedly since 2002. In our opinion, focused political will is the missing element needed to resolve this matter.

There comes a point when extended delay in implementing the provisions of an Act or Regulation thwarts the expressed will of the Legislative Assembly or the Lieutenant Governor in Council. For the purposes of this investigation, our office does not take a position on whether the province should have a Water Classification Regulation. However, a reading of Regulation 2002-13 leaves no doubt that the Lieutenant Governor in Council directed that one should exist, and provided detailed instructions as to how it should be enforced. Over 12 years have passed, and the Clean Water Act has been amended, yet Regulation 2002-13 exists primarily as a mirage, misleading observers to their detriment. The history of this file leads us to conclude that the Legislative Assembly must take a more direct interest if it wishes the province of New Brunswick to have an effective Water Classification Program rather than an illusory one.

With respect to other Departments of government, we would make the following recommendations based on our investigation into Regulation 2002-13:

1. Where Departments are unclear as to statutory authority, they should seek detailed clarification from the Office of the Attorney General before setting a date for the Regulation coming into force.
2. Regulations should not be brought into force until the Department responsible for their enforcement has confidence that the provisions are sufficiently clear, workable, and enforceable.
3. Introduction of new regulatory schemes should be accompanied by clear and measurable outcomes to evaluate their effectiveness.
4. Ministerial discretion should not be applied over an extended period of time in a blanket manner to nullify Regulation. The better practice is to delay coming into force or, if that is too late, to repeal the Regulation. This leads to more open communication with the public, decreases risks of misleading or encouraging adverse reliance, and incentivizes swifter resolution.