

14 March, 2013

Att'n: Brittany Young  
Office of the Ombudsman  
P.O. Box 6000 P.O. Box 6000  
Fredericton, NB E3B 5H1

On June 12, 2012, five citizens groups from the Nashwaak Valley made an official request to the Minister of Environment and Local Government for final classification of the waters of the Nashwaak Watershed under section 8.2 of Classification Regulation 2002-13 (The Regulation) of the Clean Water Act (CWA) 2002-56. The requested pattern of classification was documented in the 2003 report "*WATER QUALITY OF THE NASHWAAK RIVER WATERSHED*" compiled by the Nashwaak Watershed Association. The spirit of the law and the regulation was the empowerment of residents of watersheds to maintain and protect a quality of surface waters, consistent with existing water quality, and consistent with the aspirations of the public for future water quality within their jurisdiction. The Regulation clearly spells out the right to request a classification or re-classification of a portion of the watershed. Under The Regulation, the minister must report his reasons for denial or acceptance of the request. Once classified, the regulation is clear about the "onus of proof" for any re-classification request or any compromise of the existing quality.

In a letter to the five requesting groups, the Minister of Environment has maintained that he has no authority to protect the water quality of the province's watersheds. He specifically states:

"As you may be aware, a Regulation is 'subordinate' legislation which must be authorized and enabled by an Act in order to be valid. The Water Classification Regulation is a regulation made under the Clean Water Act, and therefore must derive its authority in law from that enabling piece of legislation. The Minister's authority, as established in the Act, does not include the authority to classify water."

In the same letter, the minister cites the vagueness and lack of enforceability of the Classification Regulation of the CWA as a reason for his inaction on the community request. Our groups take issue with several aspects of these statements:

- The minister creates a very serious issue because lakes are currently officially classified as Class AL within the regulation. This classification provides restrictions on the developments that can occur in proximity to those lakes in the province. Are we to assume that these classifications are rendered null and void by the minister's statement? Clearly the minister is picking and choosing where he will or will not exercise his ministerial authority under the Regulation and the Act. This is blatantly unfair and discriminatory with respect to the Nashwaak requests.
- There is currently a proposal for an open-pit mine in the watershed. The trajectory of the environmental Impact Assessment of this project is highly dependent on the state of the classification of the watershed under the CWA. The mine will create a new point source of emissions into the watershed. Under the Regulation, the public of the watershed have a right to be consulted about a change in the quality of the waters within their jurisdiction. To deny this right is unfair.
- The minister has not acted in good faith with the watershed groups who contracted to do the field work associated with the classification initiative of 2001. This work was completed with the expectation that the work would assist in the implementation of the regulation for the protection of their respective watersheds. Subsequent delays in finalization of the classifications has constituted a breach of faith with these watershed groups, and exposed the watersheds to possible degradation. The delay also represents a breach of trust with the Environmental Trust Fund whose monies (\$7.5 million as of 2008) were used to fund the river sampling

- The original work by the watershed groups involved public consultation to gauge public acceptance and approval of the proposed classification pattern. Before, and subsequent to abandonment of the classification program, there was no governmental consultation on public acceptance of the indefinite suspension of the classification program.
- In February, 2012, DELG promised watershed organizations and conservation groups a clarification of the current state of water classification within 6 weeks. A year later and there has been no clarification. But to gauge the delay in action by this timeframe is misleading. The delays and inaction date to 2003. The watershed groups were given every indication that the classification had been finalized. It was not until 2008 that the disregard for the Regulation became apparent.; inaction that continues in 2013 Ten years of denial of legislated rights is blatantly unfair.
- Given the possible consequences for the watershed , the lack of a decision, predicated on a cloak of insufficient legal rigour is tantamount to a denial of the official classification request,. Further ministerial delay will impede the ability of the public of the watershed to effectively participate in the EIA process to ensure respect for their interests in water quality. Delay will also mean the possible inappropriate acceptance of the open-pit mine. After the fact, any final classification would be powerless to reverse an inappropriate acceptance of the mine resulting from a flawed EIA. Clearly in this instance, fairness delayed is fairness denied.

In response to questions posed in the Ombudsman's document "What's Fair? Government Decisions and Your Rights" we offer these insights into this case:

- Were you told that a decision was going to be made which might affect you?

*NO, we were informed that no decision would be forthcoming.*

- Were you told what information the decision was based on?

*We were informed that there were legal "difficulties" associated with final classification by the minister. The minister did not deny the classification request, nor did he approve the request. He has simply left the request and the public in a state of suspended animation.*

- You may have the right to provide oral or written input.

*We did provide the technical and scientific basis of our request, and we did provide evidence of public support for the request to the minister. The minister has never responded to any of these documents.*

- You may sometimes have a right to have advance notice of a decision being made. Did you have reasonable time and opportunity to respond effectively to the decision?

*No ministerial decision has been made, except for the decision not to follow the act and regulation. This does not constitute a decision to classify or not to classify. The time factor is crucial because a milestone in the EIA process is imminent and the public is handicapped by a lack of a decision on classification. This is unfair to the public of the watershed.*

- Were decisions made within a reasonable time?

*No, it has been nine months since the request was made and there has still been no action to finalize the classification or to change the regulation or the regulation protocol, or to clarify the whole issue of water classification. But the inaction actually dates to 2003. Ten years is an unreasonable time.*

- Once a decision was made, were you told of the outcome of the decision and how it would affect you? *We were not informed about the effects of "No Decision". The minister has not*

*expressed any concern about his quoted lack of power to classify, nor has he communicated any plan to address the reputed legal inadequacies of the legislation. This lack of concern seems to reflect a tacit approval of an ambiguous status quo.*

- Were you given reasons for decisions? In some situations procedural fairness requires that the decision-makers provide written explanations of their decisions. Decisions involving complex considerations are more likely to require written reasons. In these cases, providing written reasons helps to ensure fairness and transparency.

*Again, the reasons given for inaction on the part of the minister were only related to the failure to act, and not related to the merit of the request. In this case a failure to act is tantamount to a refusal to classify. The failure to act also skirts around the requirement to state the substantive reasons for the refusal of the classification. A statement of reasons is required under the regulation. The minister seems conveniently confused about his responsibilities under the Regulation.*

## **2) The decision-maker must be impartial**

- Did the decision-maker make decisions that were impartial and appeared to be impartial?

*No, the minister appears to be in gridlock, afraid to approve or deny with cause, and afraid to revise the legislation. This inaction gives the appearance of a bias toward potentially polluting industry.*

- Did the decision-makers have any personal interest in the outcome of the cases they decided?

*The minister of environment is refusing to make a decision because his position to protect the environment is in conflict with his political responsibilities to his party.*

- Were the decision-makers connected to the parties involved in the dispute.

*The minister of environment is the interface between the public and the rest of cabinet on matters of environment, and between the public and industry with respect to environmental impact. He is thus connected to several parties potentially impacted and influenced by the dispute.*

- Did the people involved in a dispute, and the general public, feel that the process and actions of the decision-maker were fair.

*No, please note the petitions with respect public views on the fairness of the process.*

- Did the people affected by the decision have concerns about the decision-maker's ability to make fair decisions? If they did, this undermines confidence in the process.

*The public believes that the minister of Environment is unduly and inappropriately influenced by his party and industry on matters of environment.*

## **3) To Assess the Fairness of Appeal, Review, and Complaint Procedures, consider the following:**

- At the time of the decisions, were people told of any possible appeal or review procedures?

*No appeals process was suggested.*

- Were complaint procedures clearly defined? **NO**

- Was the public asked for ideas on improvements in service? **NO**

Was the decision premised upon a mistake of fact arising from errors in statistical analysis and other factual errors

*Yes, the minister and civil servants have stated that there are scientific and legal obstacles to a decision on classification. We have provided documentation of the scientific validity of the requested classification. We have also provided evidence that the requested classification has legal standing in another jurisdiction with similar standards of water quality. The minister has been unable to refute those contentions yet refuses to act.*

Was there a failure to consider all the evidence before the Commissioners and before the Minister

*The minister has not expressed any substantive problem with the technical and scientific evidence provided. He has simply ignored the request.*

Was there bias arising from an alleged pre-determination of the consultation outcomes

*Yes, it is in the government's interest to promote mining through relaxed water regulation while simultaneously being able to say that it has stringent water quality regulations on the books. Clearly an unenforced law has great benefit to the government's agenda on two fronts. The advancement of the government's agenda at the expense of legislated civil rights is blatantly unfair.*

Was DELG policy decided on the basis of irrelevant grounds or considerations, or for an improper purpose

*DELG is attempting to create the appearance of a province friendly to mineral and petroleum interests while maintaining regulations that give the appearance of concern for the environment. These goals are potentially contradictory and reflect confused and improper purpose on the part of government.*

Failure to consider commitments of citizen engagement in the government response to the Commission on Legislative Democracy

Did those affected by a decision have a chance to give information and evidence to support their position?

*Yes technical documents and public petitions have been submitted, but the documents have not elicited any response from the minister*

Was the public told that a decision was going to be made which might affect them?

*The five requesting groups were told that no decision would be forthcoming in the indefinite future.*

Was the public told what information the decision was based on?

*No specific reasons have been given for inaction on classification of watersheds, only vague reasons about the lack of power to classify. These reasons are contradicted by government action on other fronts, e.g. classification of lakes.*

Did the public have reasonable time and opportunity to respond effectively to the decision?

*As stated above, time is running out for the decision to have substantive impact in the EIA process currently underway on the mining project.*

Once a decision was made, was the public informed of the outcome of the decision and how it

would affect them?

*Nothing has been communicated to the public about the impacts of inaction on the classification request or the classification regulation*

Did the decision-maker make decisions that were impartial and appeared to be impartial?

*The lack of a decision gives the appearance of a bias toward industry on matters of the environment*

Did the people involved in the dispute, and the general public, feel that the process and actions of the decision-maker were fair.

*The petitions provide evidence that there is a widespread perception of bias in favor of industry on the part of the minister.*

Did the people affected by the decision have concerns about the decision-maker's ability to make fair decisions?

*The petitions provide evidence that there is a widespread perception of bias toward industry interest on the part of the minister*

Signed

---

---

---

---

---