

NB's Water Classification Regulation defines classification as " ...a water management method used to harmonize the use and protection of watercourses. In general, it involves categorizing watercourses into classes, and then managing those watercourses according to goals or standards set for each class".

(NBDELG)

The classification process involves six steps:

1. Identify & involve residents & stakeholders;
2. Evaluate the river system - gather and analyze water quality info, land & water use information;
3. Reach, through consensus, a vision and a plan for classifying surface water in the watershed;
4. Develop an action plan that addresses issues and promotes the vision;
5. Recommend the water classification to the Minister and get designation order;
6. Begin to implement the action plan.

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB**

## **Liberal Government**

**1986—Clean Water Act (CWA), Private  
Member's Bill**

**1989---Clean Water Act Point Source  
Runoff approach**

**1992-1994---NB Env. & Municipal Affairs  
write policy paper on CWA regulations**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (2)**

## **PC Government**

**1999-2000---Government conducts  
extensive consultations re new  
Classification regulation**

**2000---Wellfield Designation Order  
Regulation 2000-47 (drinking water)**

**2001—Wellfield Designation Order  
Regulation 2001-83 (drinking water)**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (3)**

## **PC Government (cont'd)**

**2002—Water Classification Regulation in effect March 1, 2002**

**2002-3--- Lakes, ponds & impoundments classified class 'A' across province**

## **Liberal Government**

**2008---Govt amends S.K of CWA/ powers of classification system (adds 12 new regulatory powers related to water classification)**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (4)**

## **Liberal Government**

**2009---Publication of “A Guide for Integration of Water Classification in the Planning Process.” Full cooperation by NBDELG promised.**

## **PC Government**

**2011---Minister of NBDELG: Justice Dept says difficulty with enforcement. NBDELG refers to program as “suspended.”**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (5)**

## **PC Government (cont'd)**

**Sept. 2011---Minister of NBDELG informs Dept to consult on new “Land & Water Management Framework” (never done)**

**Jan. 2012---M.A.Blaney states she'll meet with stakeholders; mtg held with Acting DM**

**June 2012---Coalition of 5 groups files request to NBDELG to classify Nashwaak**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (6)**

## **PC Government (cont'd)**

**Feb. 2013---Complaint to Ombudsman for Investigation into government inaction**

**Aug. 2013 NBDELG says “new reg by 2016”**

**Aug. 2014---Ombudsman’s report released. Condemns government and NBDELG for obstructing water classification regulation: No progress in 12 years.**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (7)**

## **Liberal Government**

**Aug. 2015---Telegraph Journal editorial says “River protection long overdue,” calls for water classification program to be enacted**

**Feb. 2016---NBDELG announces “Water Strategy” and holds consultation meetings around NB.**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (8)**

## **Liberal Government (cont'd)**

**June 2016---NBDELG hosts watershed group meeting; announces putting water classification “to bed” (K. Simmonds)**

**July 2016---Heavily redacted Right to information response received on legal justification re “vagueness, unenforceability” of water classification regulation**

# **CHRONOLOGY OF WATER CLASSIFICATION IN NB (9)**

## **Liberal Government (cont'd)**

**Aug. 2016---NBDELG releases written legal arguments for abandoning water class'n**

**Aug. 2016---Legal opinion contrary to NBDELG's is obtained**

**Sept. 2016---meeting of watershed groups to discuss future options**

**October 14, 2016—Govt releases “What We Heard” document. Contains same legal rationale as before.**

# **MEANWHILE...FROM 2000-12**

**Nineteen (19) Watershed Groups complete requirements and/or submit applications for classifying their watersheds. Included are:**

- Cap-Pele area watersheds;**
- Westerly watersheds of Caraquet Bay;**
- Chaleur Bay Watersheds;**
- Bay of Fundy composite watersheds(ECW)**
- Hammond River;**
- Kennebecasis River;**
- Kent County Watersheds;**

## **Classification efforts 2000-12 (cont'd)**

- Kouchibouguac R., Black R., Kouchibouguacsis R.;**
- Madawaska River;**
- Meduxnekeag River;**
- Miramichi River;**
- Nashwaak River;**
- Petitcodiac River and Memramcook River;**
- Pokemouche River;**
- Richibucto River;**
- Shediac and Scoudouc Rivers;**

## **Classification efforts 2000-12 (cont'd)**

- St. Croix River (already classified on ME side);**
- Tabusintac River;**
- Big and Little Tracadie Rivers.**

**AND over the same period of time, NBDELG staff have developed papers and implementation tools for the water classification program, including:**

**March 1995: River Classification: Protecting Lakes and Rivers in New Brunswick, A Discussion Paper (20 pgs)**

## **NBDELG Guidance documents (cont'd)**

**2000 onward (no dates on documents)**

### **The Water Classification Guidebook (64 pgs)**

- Module 1: An Intro to Water Classification**
- Module 2: What is a Watershed:**
- Module 3: Multi-Stakeholders**
- Module 4: Evaluating a Local Watershed**
- Module 5: Watershed Workbook**
- Module 6: The Outstanding Class**
- Module 7: Community Lake Education Monitoring**

## **NBDELG Guidance documents (cont'd)**

**2002**

**Understanding The Law: A Guide to New Brunswick's Water Classification Regulation (19 pgs)**

**2009**

**A Guide for Integration of Water Classification in the Planning Process (refers to “provision-ally classified” watercourses and urges due consideration be taken)**

## **The result?**

**Despite all this effort, and despite the use of many millions of ETF \$\$ and millions of \$\$ in staff time, as well as having the necessary legislative and programmatic elements in place, THE NEW BRUNSWICK GOVERNMENT HAS DONE NOTHING TO IMPLEMENT WATER CLASSIFICATION.**

# **SOME QUOTES FROM OMBUDSMAN'S REPORT**

**“...the use of Minister’s discretion as a blanket refusal to classify...has been pernicious and counter-productive.”**

**“If, as the Dept. contends, the Regulation is unworkable and unenforceable as presently drafted, the provisions purporting to protect lakes and ponds are as ineffectual...”**

**“...the ongoing conduct of this file has...”**

# **SOME QUOTES FROM THE OMBUDSMAN'S REPORT (2)**

**“severely eroded the Department’s credibility and its ability to work with...key partners”**

**“Focused political will is the missing element to resolve this matter.”**

**“The history of this file leads us to conclude that the Legislative Assembly must take a more direct interest if it wishes...to have an effective water classification program...”**

# **SOME OBSERVATIONS FROM BYSTANDERS (WHAT WE HAVE HEARD)**

**Government is courting industrial & forestry interests while not implementing its own regulations for non-point source pollution.**

**Over the years foot-dragging has overwhelmed and demoralized NBDELG staff.**

**Questionable legal “arguments” create a smoke-screen for government’s unwillingness to dedicate resources to NBDELG and to the people of NB.**

**Ontario and Maine have effectively used similar classification processes. Why not NB?**

**With the Fisheries Act gutted under the Harper administration, there is little to protect fish habitat and threats have therefore increased. Water classification could fill this gap to some extent.**

**Government is shifting away from a proactive, pollution prevention approach in favour of mitigation after-the-fact. This is regressive.**

**Water classification is a critical planning tool.**

**Quote attributed to Serge Rousselle, Minister of Environment, in GNB press release Oct 14, 2016, following release of the “What We Heard” document, on consultation on a water strategy for NB:**

“The current status of the Water Classification Regulation under the *Clean Water Act* was a frequently raised concern. That is why we are establishing a technical working group to look at this particular issue in depth and provide recommendations as we develop the overall water strategy.”

The article goes on to say the working group will be comprised of up to 12 representatives, including members of watershed groups, non-governmental organizations, industry, First Nations, regional service commissions and departmental staff.

[http://www2.gnb.ca/content/gnb/en/news/news\\_release.2016.10.0982.html](http://www2.gnb.ca/content/gnb/en/news/news_release.2016.10.0982.html)

# **GNB LEGAL ARGUMENTS REFUTED**

**Q1: Is the water classification regulation *ultra vires* (not properly authorized in legislation) as maintained by GNB?**

A: No. Section 40 of the *Clean Water Act* and S. 3 of the *Water Classification Regulation* provide clear direction to the Lieutenant Governor in Council (LGIC, in other words, Cabinet) to, along with the Minister, develop and implement a water classification program. Thus the LGIC is not removing itself from the decision-making process. (For full rationale, refer to the legal opinion, September 23, 2016):

# **GNB LEGAL ARGUMENTS REFUTED (2)**

**Q2: Is the regulation unconstitutional due to vagueness?**

A: No. In determining if a law is unconstitutionally vague, the Court must consider the law or regulation's purpose, subject matter and nature as well as societal values, related provisions and prior judicial interpretations of the provision. The Supreme Court of Canada has concluded that legislators must "have considerable room to manoeuvre in the field of environmental regulation, and S. 7 [of the Charter] must not be employed to hinder flexible and ambitious legislative approaches to environmental protection."

# **GNB LEGAL ARGUMENTS REFUTED (3)**

**Q3: Is the water classification regulation unenforceable, as maintained by GNB?**

A: No. The water classification regulation defines “naturally occurring,” which the government claims is vague to the point where the public cannot know whether or not they are committing an offense under the regulation. The use of terms like “naturally occurring” is consistent with the Court’s view that environmental legislation requires a certain amount of flexibility in order to protect the environment. The term “contaminant” appears in the *Clean Water Act* as well as the *Clean Environment Act*, and similar concerns on clarity of this term could be argued. Yet GNB has not identified an issue with the inconsistency in their position regarding both Clean Water Act and Clean Environment Act, in that the definition of “contaminant” in both Acts is defined. (“Contaminant” means any solid, liquid, gas, micro-organism, odour, heat, sound, vibration, radiation or combination of any of them , present in the environment, that is foreign to, or in excess of “natural constituents” of the environment.) For additional clarity, the Minister is well able to prepare technical guidance documents for its staff, watershed groups and the public.

Thank you!