



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

BRIEFING NOTE RE: Bill S-11
FIRST NATIONS SAFE DRINKING WATER ACT
October 5, 2010

Bill S-11, 'An Act Respecting the Safety of Drinking Water on First Nation Lands' is welcomed in its intent to improve the health and safety of First Nations through the development of federal regulations that govern drinking water and wastewater treatment in First Nations communities.

However, parliamentarians should be conscious of the bill's potential to undermine Aboriginal and treaty rights without significantly improving access to safe drinking water. Improved access to safe drinking water is urgently needed in many First Nations communities. In 2009, there were 48 communities whose systems remain classified as high risk. As of August 31, 2010, there were 117 First Nations communities under drinking water advisories—a number that has remained relatively constant for years, despite Canada's attempts to better manage access to safe drinking water in these areas.

In its current form, we recommend not supporting Bill S-11. The legislation requires amendments to address concerns outlined by First Nations groups (see attached resolutions) and to be consistent with government recommendations in the 2005 Annual Report of the Commissioner of the Environment and Sustainable Development, and the 2006 Expert Panel on Safe Drinking Water for First Nations Report.

This document outlines three key considerations that need to be incorporated into the legislation prior to its third reading in the Senate:

- 1) Constitutionally protected Aboriginal and treaty rights need to be protected
- 2) A long-term vision for First Nations water resources management should be incorporated
- 3) First Nations governance structures need to be respected

1. Aboriginal and Treaty Rights

In its current form, Bill S-11 does not respect constitutionally protected Aboriginal and treaty rights.

- In direct contradiction to s.35 of the Constitution, section 4(1)(r) gives Canada authority to determine the extent the Crown can abrogate and derogate treaty rights. It is unacceptable to merely state that rights will be impacted without addressing which rights, how and how they might be mediated. The Government of Canada has not consulted with First Nations communities and concerned organizations to determine the extent of those impacts and accommodate concerns in advance.

- The Crown had not satisfied its duty to consult and accommodate First Nations concerns about this legislation. They have failed to complete an analysis on all three recommendations made by the Expert Panel on Water.

To enact legislation which appears to contemplate and even condone impacts on First Nation's rights without first accommodating the known concerns of First Nations is in direct violation of the government's fiduciary duties and responsibilities, as well as the statements of the Supreme Court of Canada regarding the protections afforded First Nations rights by virtue of Section 35(1) of the Canadian Constitution.

2. Vision for Improving Access First Nations Water Resource Management

Bill S-11 begins to outline a legislative framework for managing drinking water and wastewater on First Nations reserves, but does so without proper consultation on legislative options or an adequate implementation plan. The legislation lacks detail, allocated resources and substance required to improve water resource management on First Nations' lands.

- Section 4(1) (b) states that the regulations may "confer any legislative, administrative, judicial or other power on any person or body" to carry out the Bill and regulations passed under it. This creates significant concern over the generic nature of this clause given that the expertise and professional qualification of "any person" is undefined. This represents a significant possible loss of First Nations ability to control and manage their lands and systems without knowing who could take over these powers (i.e., private companies).
- Many of the regulations are over-reaching, establishing unprecedented power of the Crown to have control over First Nations' water resources. Section 3 gives Canada the express authority to make regulations regarding the "provision of drinking of water", a phrase that is too broad to know its intentions (i.e., does this include new authority over land uses on reserves?).
- Bill S-11 enacts an approach that is contrary to the recommendations outlined by the Commissioner of Environment and Sustainable Development and the Expert Panel. These reports both emphasize the need to build the capacity of First Nations (i.e., by providing adequate training, education, and resources for First Nation leaders) to ensure they have financial resources and governance frameworks established for implementation.

3. Self Governance

Bill S-11 retracts from First Nations' right to have a central and meaningful place in the governance of water on reserve lands:

- The Preamble sets out the assumption that First Nations do not have the authority necessary to govern water on reserves, thereby not respecting First Nations governance systems.
- Section 6 states that Bill S-11 and its regulations will "prevail over the land claims agreements or self-government agreements." This could enable the Government of Canada to abrogate and derogate from the terms of modern Treaties and to significantly diminish the powers already being exercised by First Nation water boards and commissions under the terms of such agreements. It could also undermine powers First Nations have had under the *Indian Act* since 1951 and any authority First Nations have over water by the inherent right of self-government.

Attachments

- Assembly of First Nations resolution 43/2010
- Union of British Columbia Indian Chiefs resolution 2010-36
- Assembly of Manitoba Chiefs resolution AUG-08.02
- Chiefs of Ontario resolution 09/19

CELA Publication 753

TITLE: Impact Analysis of Proposed Federal Legislation Bill S-11

SUBJECT: Safe Drinking Water

MOVED BY: Ron Lameman, Proxy, Beaver Lake Cree Nation, AB

SECONDED BY: Chief R. Don Maracle, Tyendinaga Mohawk Territory, ON

DECISION: Carried by Consensus

WHEREAS:

- A. 115 First Nation communities are under Drinking Water Advisories and another 49 have water facilities under high risk.
- B. First Nations lack adequate resources for training, operations, and management of their water resources.
- C. The regulations contained in proposed Bill S-11 will require significant financial and technical resources to implement for each region.
- D. The total cost to implement the regulations is not known.
- E. The federal Government has stated they are facing a capital crisis.
- F. First Nations are concerned that there will not be adequate resources to support the implementation of the regulations developed under Bill S-11.

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THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Mandate the AFN to advocate that the Government of Canada provide adequate financial resources to each region to conduct a thorough impact analysis to determine the financial, technical, and policy development needs for each region.
2. Direct the AFN to urge Canada that any further discussion on Bill S-11 be suspended until the estimated full economic impacts of this Bill are identified and presented to Parliament.

Certified copy of a resolution adopted on the 21st day of July, 2010 in Winnipeg, Manitoba

OUR LAND IS OUR FUTURE

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UNION OF BC INDIAN CHIEFS
42ND ANNUAL GENERAL ASSEMBLY
SEPTEMBER 15TH - 17TH, 2010
VANCOUVER, BC

Resolution no. 2010-36

RE: Action on Bill S-11, "Safe Drinking Water for First Nations"

WHEREAS as Indigenous Peoples, we have a sacred relationship with water, and have exercised our inherent jurisdiction over water since time immemorial. Our rights to water are included in our Aboriginal Title, Rights, and Treaty Rights. Water is the source of all life, and we must act to ensure its protection and ensure that all First Nations have access to safe drinking water;

WHEREAS the *United Nations' Declaration on the Rights of Indigenous Peoples* states:

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources;
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources;

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Grand Chief Stewart Phillip, President

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3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact;

WHEREAS on July 28, 2010, the United Nations General Assembly declared that safe and clean drinking water and sanitation is a human right to the full enjoyment of life and all other human rights;

WHEREAS First Nations recognize that there is currently a crisis in drinking water in First Nations communities; in March 2010, 115 First Nations communities were under Drinking Water Advisories, and 49 First Nations water systems were classified as “high risk;”

WHEREAS by Resolution 2010-03, the Union of BC Indian Chiefs Council supports the right of a First Nation to protect their territory and the health of their community and directed the UBCIC Executive and staff to work with First Nations and/or like-minded Indigenous Nations who are actively involved in defending or working to protect this precious natural resource;

WHEREAS Bill S-11 “Safe Drinking Water for First Nations” was introduced in Parliament on May 25, 2010, and stands to create a regulatory framework for First Nations drinking water, and will potentially infringe on Aboriginal Title and Rights and Treaty Rights;

WHEREAS the regulations in Bill S-11 will require significant financial and technical resources to implement for each region, and the total cost is not known. First Nations are concerned that there will not be adequate resources to support the implementation of the regulations developed under Bill S-11;

WHEREAS by Resolution 08/2010 the Assembly of First Nations (AFN) Chiefs-in-Assembly mandated the AFN to advocate that the Government of Canada provide adequate financial resources to each region to conduct a thorough impact analysis for each region, and directed the AFN to urge Canada that any further discussion on Bill S-11 be suspended until the estimated full economic impacts of this Bill are identified and presented to Parliament;

THEREFORE BE IT RESOLVED that the Union of BC Indian Chiefs-in-Assembly direct the UBCIC Executive and Staff to work with First Nations and/or like-minded Indigenous Nations or organizations including the national Assembly of First Nations that are actively working to protect safe drinking water for First Nations;

THEREFORE BE IT FURTHER RESOLVED that the Union of BC Indian Chiefs-in-Assembly call on the federal government to either abandon Bill S-11, or severely amend Bill S-11 by incorporating input from First Nations as well as the recommendations from the Expert Panel on Safe Drinking Water and a full impact analysis for each region;

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THEREFORE BE IT FINALLY RESOLVED that the Union of BC Indian Chiefs-in-Assembly direct the Executive to communicate opposition to Bill S-11 in its current form to the federal government, and specifically contest Bill S-11's potential to infringe on Title and Rights and Treaty Rights.

Moved: Chief Jonathan Kruger, Penticton Indian Band
Seconded: Maureen Chapman, Proxy, Lew'a:mel First Nation
Disposition: Carried
Date: September 15, 2010

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**ASSEMBLY OF MANITOBA CHIEFS
20th ANNUAL GENERAL ASSEMBLY
BROKENHEAD OJIBWAY NATION
AUGUST 12, 13 & 14, 2008**

CERTIFIED RESOLUTION

**AUG-08.02
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RE: CANADA'S PROPOSED DRINKING WATER LEGISLATION

Moved by:

Chief Glenn Hudson
Peguis First Nation

Seconded by:

Chief Dennis Meeches
Long Plain First Nation

CARRIED

WHEREAS, the Expert Panel identified three options: introducing a statute incorporating by reference existing provincial regulatory regimes; setting out uniform federal standards and requirements; and recognizing First Nations customary laws regulating water; and

WHEREAS, in 2006 Indian and Northern Affairs Canada (INAC) launched the Plan of Action to address the most serious water quality problems on reserve, establish national standards for the operation of treatment facilities, and ensure mandatory training for all water operators; and

WHEREAS, the Plan of Action established an Expert Panel on Safe Drinking Water for First Nations to hold regional hearings and provide in a final report options to the Minister of Indian Affairs that would enhance First Nations drinking water safety; and further recommended before moving forward on any of the options, that the federal government must provide adequate resources to close the resource gap; and

WHEREAS, the Government of Canada has indicated its support and received mandate for incorporating by reference existing provincial and territorial regulations and adapting them, as required, to meet the needs of First Nation communities; and

WHEREAS, INAC proposes to engage First Nations this Fall on the elements of a legislative framework in accordance with the incorporation by reference, the results of which will be provided to the Minister of Indian Affairs along with the recommendation for moving forward with legislation; and

WHEREAS, a preliminary Impact Analysis for each region is to be completed prior to INAC's engagement session with First Nations; and

**ASSEMBLY OF MANITOBA CHIEFS
20TH ANNUAL GENERAL ASSEMBLY
BROKENHEAD OJIBWAY NATION
AUGUST 12, 13 & 14, 2008**

CERTIFIED RESOLUTION

**AUG-08.02
Page 2 of 2**

**RE: CANADA'S PROPOSED DRINKING WATER LEGISLATION
(cont'd)**

WHEREAS, Assembly of First Nation (AFN) resolution *Canada's Proposed Water and Wastewater Legislation* expresses concern on the federal government approach that has extensive impacts on First Nation rights, including land rights, the inherent right to self government, water regulation and environmental protection and the process does not meet the Crown's duty to consult and accommodate Aboriginal and Treaty Rights.

THEREFORE BE IT RESOLVED, that the Chiefs-in-Assembly demand the Government of Canada conduct meaningful consultations with First Nations prior to development of any legislation or regulations regarding First Nations' water resources.

FURTHER BE IT RESOLVED, that the Chiefs-in-Assembly demand that the Government of Canada review all of the options identified in the Expert Panel report and to consider other potential options that First Nations may identify as part of the process to establish a new Government of Canada mandate for water legislation.

FINALLY BE IT RESOLVED, that the Chiefs-in-Assembly demand the Government of Canada provide adequate resources to First Nations to enable their full participation in all stages of a consultation process.

**CERTIFIED COPY
of a resolution adopted
on August 12, 13 & 14, 2008
Brokenhead Ojibway Nation, Manitoba**



Grand Chief Ron Evans

**ASSEMBLY OF MANITOBA CHIEFS
20TH ANNUAL GENERAL ASSEMBLY
AUGUST 12, 13, 14, 2008 – BROKENHEAD OJIBWAY NATION**

RESOLUTION, TITLE AND DECISION:	STRATEGY:
<p>AUG-08.02 CANADA'S PROPOSED DRINKING WATER LEGISLATION</p> <p>THEREFORE BE IT RESOLVED, that the Chiefs-in-Assembly demand the Government of Canada conduct meaningful consultations with First Nations prior to development of any legislation or regulations regarding First Nations' water resources.</p> <p>FURTHER BE IT RESOLVED, that the Chiefs-in-Assembly demand that the Government of Canada review all of the options identified in the Expert Panel report and to consider other potential options that First Nations may identify as part of the process to establish a new Government of Canada mandate for water legislation.</p> <p>FINALLY BE IT RESOLVED, that the Chiefs-in-Assembly demand the Government of Canada provide adequate resources to First Nations to enable their full participation in all stages of a consultation process.</p> <p><i>Updated June 23, 2009 by Melissa Hotain, Environmental Policy Analyst.</i></p>	<p>Responsible: Melissa Hotain, Environmental Policy Analyst / Darcy Wood, Sr. Housing Policy Analyst</p> <p>Action Required: As set out in Resolution.</p> <p>Action Taken: August 14/08 Chiefs in Assembly Presentation on water update delivered by Chief Hudson and Melissa Hotain outlining INAC's plans to propose drinking water legislation, regional impact analysis, national water and wastewater assessment.</p> <p>Update provided at January 2009 Chiefs in Assembly. Ongoing updates with AFN and regional organizations via the First Nations Water Technical Advisory Group.</p> <p>INAC national engagement process with First Nations on drinking water legislation was held in Winnipeg February 24, 2009. Summary of session was prepared by Institute on Governance (independent body contracted by INAC).</p> <p>Impact analysis of proposed legislation on First Nation's communities was prepared by R4B Consulting. Regional reports were rolled into a national report by IOG.</p> <p>IOG to draft final report with recommendations to Minister of Indian Affairs who will determine next steps of proposed legislation.</p> <p>On May 25th, 2009 Minister Strahl announced the awarding of a contract to Neegan Burnside Ltd. (Winnipeg) to conduct a national engineering assessment of existing public and private water and wastewater systems providing services to First Nation communities. The assessment will take 2 years to complete.</p> <p>Status: Ongoing.</p>



CHIEFS OF ONTARIO

35th All Ontario Chiefs Conference
July 7-8-9, 2009
Batchewana First Nation

**INAC'S PROPOSED LEGISLATIVE
FRAMEWORK FOR DRINKING WATER
AND WASTEWATER IN FIRST NATION
COMMUNITIES**

RESOLUTION 09/19
Page 1 of 3

WHEREAS:

- The Government of Canada conducted "consultations" on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nation communities
- The Government of Canada funded regional First Nation organizations to carry out Impact Analysis reports on the Impacts of a Proposed Federal Legislative Framework for Drinking Water and Wastewater in First Nation Communities;
- The Institute on Governance (IOG) *Summary Report of the Impact Analyses of the Proposed Federal Legislative Framework for Drinking Water and Wastewater in First Nations Communities* roll-up report submitted to INAC on April 17, 2009 concluded that "First Nations generally are no where near meeting provincial standards. Therefore, applying these standards now would be calamitous."
- During the "consultation" sessions First Nation leadership and technical participants voiced their objections very clearly to the process that was followed and concluded that:

MOVED BY:

Chief Joel Abram
Oneida Nation of the Thames

SECONDED BY:

Chief Isadore Day
Serpent River First Nation

CONSENSUS

Certified Copy of a Resolution adopted on July 8, 2009.

Angus Toulouse,
Ontario Regional Chief

1. The Crown failed to engage in any meaningful consultation with First Nations regarding the options and recommendations in the Report of the Expert Panel on Safe Drinking Water for First Nations dated November 2006.
 2. The 2006 "*Report of the Expert Panel on Safe Drinking Water on First Nations*" recommended three options which First Nations have not had benefit of consideration in this current round of engagement session – one of which begins to respect the jurisdictions of First Nations over Water and the other considers national standards as the more appropriate basis for new First Nation water regulations;
 3. The Crown breached its duty to consult and accommodate First Nations by making a unilateral decision to proceed with the engagement sessions and impact analysis solely on the basis of incorporation by provincial/territorial reference.
 4. The Crown did not genuinely listen to the concerns of First Nations regarding a process for the development of a new drinking and wastewater legislative framework.
 5. The Crown failed to provide adequate time and resources to enable meaningful consultation.
 6. The Crown has clearly communicated that it is unwilling to engage in discussion of any inherent, Treaty and Aboriginal rights related issues. This is an infringement of inherent, Treaty and Aboriginal rights, the right to self-determination, and is a fundamental flaw in Canada's attempted efforts to consult.
- This process does not respect the legal duty to consult, accommodate and seek prior consent on matters that impact First Nations' inherent, treaty and aboriginal rights.

THEREFORE BE IT RESOLVED that:

**Resolution 09/19
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1. We do not accept the government's legislation to the development of drinking water and waste water
2. We demand that Canada co-develop a meaningful consultation process with First Nation communities
3. Direct the Chiefs in Ontario office to seek resources to take immediate legal action if deemed necessary.