BRIEFING NOTE

DATE: October 26, 2010
SUBJECT: **Bill S-11, *Safe drinking water for First Nations Act***

OVERVIEW:

Bill S-11, titled "*Safe Drinking Water for First Nations Act*" was tabled in Parliament on May 26, 2010 by Senator Patrick Brazeau. The bill was left at second reading when Senate recessed for the summer. The Senate reconvened on September 27, 2010.

On June 9, 2010 the National Chief issued a national bulletin on the issue stating that "*Bill S-11, does not guarantee that First Nations will have access to safe drinking water. Without funding for infrastructure/facilities, skills, resources, training and support, safe drinking water for First Nations will not be guaranteed. … the AFN is calling on the federal government to engage in real action to address the capacity gap as well as working towards a regulatory regime that reflects our rights, jurisdiction and delivers equitable and guaranteed access to safe drinking water.*"

On September 30, 2010 the National Chief sent a letter to the Chair of the Senate Committee on Aboriginal Peoples with copies to the Senate Committee on Legal and Constitutional Affairs and to Senators Watts and Banks. Similar letters were sent to the Leader of the Senate and to the Leader of the Opposition in the Senate. A key issues document was attached to the National Chief's letter and to two follow up letters requesting that this bill be referred to the Senate Committee on Aboriginal Peoples in order for there to be full consideration and engagement with First Nation witnesses as much as possible.

On Tuesday October 19th, 2010, AFN officials met with Senator Watts to discuss First Nation concerns about the bill. The following day, Senator Watts spoke in the Senate to express his concerns, raising specifically the impacts on First Nation constitutional rights.

Alberta Chiefs met with Minister Duncan on October 7, 2010 and the Minister expressed interest in meeting with regional representatives to discuss potential changes to the bill. Ontario Regional Chief Toulouse also met with Minister Duncan at which time the Minister also indicated that there is time for further discussion and consideration on the bill.

KEY ISSUES/FACTS:
The Expert Panel recommended 3 options including a First Nations regulatory regime. Instead, the bill follows the government's preferred option of developing regulations incorporating provincial regulations.

The expert panel also recommended that "the federal government close the resource gap". Indeed this has been further emphasized and elaborated by First Nations through their Impact Analyses reports.

In its current form, the Bill displaces First Nation jurisdiction and does not reflect First Nation Aboriginal title and Treaty rights. The government has expressed the view that this is not a rights issue but one of health and safety.

INAC staff have been soliciting interest from regions to consider working with the legislation. INAC staff have also prepared a terms of reference for the development of federal regulations governing drinking water for On-Reserve Lands in Canada. The terms of reference contains the scope of work that a regional First Nation organization could consider in the preparation of the regional regulatory development model. In fact, two regional organizations have passed resolutions to 1) "start an exploratory exercise, on a regional level, to developing water/wastewater regulations and 2) to initiate discussions with INAC in order to explore this window of opportunity."

AFN Resolution 43-2010 calls for the provision of adequate financial resources to each region to conduct a thorough impact analysis to determine the financial, technical, and policy development needs for each region, and secondly, directs the AFN to urge Canada that any further discussion on Bill S-11 be suspended until the full economic impacts of this bill are identified and presented to Parliament.

In summary, the AFN position is that S-11 is not acceptable in its current form. At the same time, there are clear areas of work that can advance this issue including:

- examining legal mechanisms to respect First Nation constitutional rights and;
- examining options to support First Nation capacity including additions to the Bill relating to reports to Parliament on infrastructure, the creation of institutional capacity such as a First Nations water commission
- supporting First Nations to engage in the Parliamentary process through coordination / facilitation of appearances
- AFN convening dialogue sessions with First Nation water technicians to develop common framework that is mutually acceptable
- AFN Executive to consider proposed amendments to the legislation emerging from regional discussions
- AFN to bring forward resolution for debate and consideration at Special Chiefs Assembly

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An Act respecting the safety of Drinking Water on First Nation lands

What are the key areas of contention from a First Nation perspective?

- **Failure of the Crown to abide by laws respecting consultation and accommodation in the lead up to and drafting of Bill S-11.** There was no comprehensive consultation process with First Nations communities and organizations regarding legislative options, including those found in the reports of the Expert Panel on Safe Drinking Water and the Standing Senate Committee on Aboriginal Peoples.
    - In *Musqueam Indian Band v. British Columbia,* 2005 BCCA 128 at paras. 18 and 19, the Court stated that the duty to consult and accommodate is "**an overarching constitutional imperative**" that is "**upstream**" government decisions and actions [Emphasis added]
    - The Court in *Haida,* at para 35, as follows:

        > [W]hen precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that **the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it**: [Emphasis added. References omitted].

    - To be meaningful, the Crown must begin to meet the duty at the early stages, when the Crown is contemplating action that might impact Aboriginal and Treaty rights, and before there is a clear momentum to the decision or action in question. It cannot be postponed to the last and final point in a series of decisions: *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 34 B.C.L.R. (4th) 280, 2004 BCSC 1320, at para. 74; See also *Musqueam,* at para. 95
- **The Bill gives Canada the authority to make any provincial law, as amended from time to time, apply to First Nations as federal law** - at the sole discretion of the federal cabinet, without any limitations and **without any role for First Nations**.
- **The Bill will trump all First Nations' "laws and by-law",** undermining powers First Nations have had under the *Indian Act* since 1951 and any authority First Nations have over water pursuant to the inherent right of self-government [s.6(1)].
- Bill says Cabinet has authority to determine **the extent to which the Crown may abrogate and derogate Treaty rights** - in direct contradiction to s.35 of the Constitution [s4.1(r)]

- **Canada will have the authority to force First Nations into agreements with third parties** to operate First Nation water systems. The terms of those agreements can be determined by Canada under the Bill.
    - Consider the example of municipal – First Nation partnerships – there is no national template for such partnerships, as such there are varying elements of type and scope of partnership across the country – resulting in some inequality.
    - A related concern is that the private sector will have the ability to enter First Nations as owners and operators of water and wastewater facilities due to lack of infrastructure, resources and training within First Nations. Private operation of public facilities can lead to higher costs of service and user fees downloaded to First Nation on reserve members - resulting in further inequality.
- Canada will have the **authority to give "judicial, legislative, and administrative power" to "any person"** to carry out the Bill and regulations passed under it.
- Practically no liability for Canada – all on First Nation governments.
- Canada will be able to “deem” a First Nation to be the owner of water systems that are not owned by a First Nation.
- Canada will have the authority to determine the fees that are payable for drinking water on reserve - with no role for First Nation governments or members in this decision [4.1(d)].
- Indications in the Bill that Canada may make provincial water allocation laws apply to First Nations:
    - wells
    - “provision of drinking water”
    - “any provincial laws” Cabinet “deems necessary”
- Unlikely to improve drinking water: First Nations primarily use wells and cisterns – provincial laws are mostly voluntary or non-existent.
- The glass is less than half full – no firm commitment to raise the 40% funding level currently in place.
- No policy paper or implementation plan.

How can the Bill be improved upon?

- Remove section 4.1(r) altogether, or at the very least replace it / re-word it with a non-derogation clause which is satisfactory and compliant with existing models of legislative non-derogations clauses fully protecting Aboriginal and Treaty rights.

- Replace section 4(3) (the incorporation by reference clause) with something similar to that found in, for example, the *First Nations Commercial and Industrial Development Act*, S.C. 2005, c.53:

> Incorporation by reference
> 3. (3) The regulations may incorporate by reference any laws of the province, as amended from time to time, with any adaptations that the Governor in Council considers necessary.
> ….
> **5.** Regulations may not be made under section 3 in respect of undertakings on reserve lands of a first nation unless
> (*a*) the Minister has received a resolution of the council of the first nation requesting that the Minister recommend to the Governor in Council the making of those regulations; and
> (*b*) if the regulations specify a provincial official by whom, or body by which, a power may be exercised or a duty must be performed, an agreement has been concluded between the Minister, the province and the council of the first nation for the administration and enforcement of the regulations by that official or body.

What should be done to mitigate the impact(s) of the Bill?

- Clarify the proper allocation of funds and resources to support the training and certification of First Nations water operators and to improve the operations, maintenance, upgrade and construction of "at risk" or new water facilities
- Provide adequate training, education, and resources for First Nation leaders to enable them to take ownership of potential improved and effective infrastructure on reserves. There is a need for high quality training, certification and advocates for operator training that can be accessed without financial or other barriers
    - Gather input from First Nations at a grass root level to develop a design, operation and approval process that have the specific needs and training requirements of First Nations communities and plant operators in mind
- Implement more effective water treatment processes as a responsibility of the federal government, not First Nations
- Ensure adequate education and training for First Nations to enable decision-making processes regarding the treatment of their own water