



**Assembly of First Nations  
Submission to the  
Standing Senate Committee on Aboriginal Peoples**

***Bill S-8: Safe Drinking Water for First Nations Act***

**May 16, 2012**

## **About the Assembly of First Nations**

The Assembly of First Nations (AFN) is the national, political representative of First Nation governments and their citizens in Canada, including those living on reserves and in urban and rural areas. The National Chief is elected by the Chiefs, who in turn are elected by their citizens.

The role and function of the Assembly is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action, and ultimately for advancing the aspirations of First Nations.

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## INTRODUCTION

The Assembly of First Nations respectfully provides this submission on Bill S-8, *Safe Drinking Water for First Nations Act*. The Committee has before it all evidence submitted in the review of previous legislation on First Nations Drinking Water, Bill S-11. Consequently, this submission will not repeat in detail information already provided to the Committee, but will reflect on whether the changes made in Bill S-8 adequately respond to the concerns raised by First Nation and other witnesses during the Bill S-11 hearings.

In January 2012, First Nations and representatives of the Crown and the Government of Canada, participated in the historic Crown-First Nations Gathering (CFNG). The intent of the CFNG was to strengthen and reset the relationship between the Crown and First Nations, and to move away from unilateral imposition of policies or laws that have impacts on First Nation peoples and territories to one that recaptures a mutual respect and partnership.

The CFNG was predicated in this commitment between Canada and First Nations: “improving relationships and strong partnerships between Canada and First Nations, respectful of Aboriginal and Treaty rights as recognized and affirmed in the *Constitution Act, 1982*.”

A renewed relationship would ensure First Nations are active partners in the design, development and implementation of the laws and policies in their territories. It would **recognize** the clear jurisdiction of First Nations over their territories, and support their full implementation of this jurisdiction.

Bill S-8, as part of ongoing process started with Bill S-11 prior to the CFNG, continues a pattern of unilaterally imposed legislation and does not meet the standards of joint development and clear recognition of First Nation jurisdiction. The engagement of some First Nations and the modest changes made to the Bill do not respond to the commitment to mutual respect and partnership envisioned by the CFNG.

## ABORIGINAL AND TREATY RIGHTS

There have been several amendments made in Bill S-8 in response to concerns raised by First Nations about Bill S-11.

Removal of section 4(1)r from the main body of the bill and replacing it with the amended clause section 3 in the Interpretation section in Bill S-8 is an improvement, however, it does not recognize First Nation jurisdiction over matters related to water,

and is weakened by the added phrase “...except to the extent necessary to ensure the safety of drinking water on First Nation lands.” This clause suggests, contrary to the Constitution, that the statute could authorize actions that abrogate Treaty or Aboriginal rights “to the extent necessary to ensure the safety of drinking water on First Nation lands”.

Clause 7 also provides reason for concern for conflict with Section 35 of the *Constitution Act, 1982*, as it states: “Regulations made under this Act prevail over any laws or by-laws made by a First Nation to the extent of any conflict or inconsistency between them, unless those regulations provide otherwise.”

Bill S-8 needs to clearly recognize and respect First Nation Inherent and Treaty rights, to advance innovation and deliver a critical measure of health and safety in their communities. Clean drinking water is also essential to greater economic and social development in First Nation communities.

The AFN also recommends that accommodation be provided in the legislation that will recognize those First Nations or their duly created and mandated institutions that have the capacity and capability to develop, administer and enforce their own water laws. This accommodation could be provided under an exemption clause or some other instrument.

## **RESOURCE REQUIREMENTS**

The Expert Panel on Safe Drinking Water for First Nations (2006) said the federal government must close the resource gap and identified this as a precondition to the development and implementation of regulations. The rationale identified by the Panel bears repeating:

First, and most critically, it is not credible to go forward with any regulatory regime without adequate capacity to satisfy the regulatory requirements. While it is tempting to assume that putting a regulatory regime in place would reduce the dangers associated with water systems, exactly the opposite might happen. This is because creating and enforcing a regulatory regime would take time, attention and money that might be better invested in systems, operators, management and governance.

Furthermore on this same subject, the Standing Senate Committee of Aboriginal Peoples final report on “Safe Drinking Water for First Nations” released May 2007 stated in Recommendation 1:

*“That the Department of Indian Affairs and Northern Development provide for a professional audit of water system facilities, as well as an independent needs assessment, with First Nations representation, provide for a professional audit of water system facilities, as well as an independent needs assessment, with First Nations representation, of both the physical assets and human resource needs of individual First Nations communities in relation to the delivery of safe drinking water prior to the March 2008 expiration of the First Nations Water Management Strategy;*

*That, upon completion of the independent needs assessment, the Department dedicate the necessary funds to provide for all identified resource needs of First Nations communities in relation to the delivery of safe drinking water;*

*That a comprehensive plan for the allocation of monies from said funds be completed by June 2008; and*

*That, upon completion of the comprehensive plan, the Department provide a copy to this Committee and appear before it to report on its contents”.*

Concerns about the provision of adequate resources has repeatedly been raised to the Senate committee. It is clear to the AFN that Bill S-8 will impose substantial new costs and responsibilities on First Nations without a committed transfer of resources. Currently, there are no legislative guarantees that an adequate level of funding will be provided to address dire needs of First Nations. And there are no transition provisions for delaying the application of the legislation before the resource gap has been addressed.

The National Engineering Assessment of Water and Wastewater Systems in First Nations released July 2011 identified \$4.7 billion in servicing needs over a 10 year period. The Department of Aboriginal Affairs and Northern Development has not yet provided a comprehensive financial plan to respond to this assessment.

In light of this, the implementation of a complex source-to-tap water regulation regime, as proposed by Bill S-8, will be a costly undertaking that must have clear commitment to adequate resources and supports if it is to succeed.

## THE WAY FORWARD

Several First Nation regional organizations have declared that they support Bill S-8. At the same time, the majority of First Nations and their organizations, as you are aware, continue to express opposition to S-8. The AFN respects all positions taken by First Nations directly as the rights, Treaty and title-holders. It is through the authority and mandate of First Nation governments that AFN carries out its work.

It is important to note that the support that has been expressed is in most cases qualified on the basis that there would be full involvement of First Nations as partners in the development of regulations, and that adequate resources would be provided for their implementation.

For example, Treaty 7 Grand Chief Charles Weaselhead, cautioned that without funding for infrastructure and staff training, the act may prove to be impotent against the challenge of improving water standards on reserves. "It's a good first step, but regulations without capacity and financial resources to support them will only set up First Nations to fail ... We must address the capacity gap as well as the regulatory gap. The Safe Drinking Water for First Nations Act alone cannot and will not ensure the safety of First Nations drinking water."

In light of clear commitments of Canada to renew the relationship with First Nations at the Crown-First Nations Gathering, and initial responses to First Nation concerns that are reflected in amendments in S-8, the AFN remains hopeful that a respectful way forward can be achieved.

When National Chief Atleo appeared before the Committee on S-11, he referred to the United Nations Declaration on the Rights of Indigenous Peoples, and how it compels all of us to work together to find new ways to work in partnership to establish basic standards for indigenous peoples. The AFN again urges this Committee to review Bill S-8 against the standards in the UN Declaration. We have an important opportunity to chart a new path forward, based on recognition, collaboration and implementation, and moreover focused on delivering real results.

While amendments to the Bill are positive, they are only partial measures, and do not fully affirm and respect the authority of First Nation governments. This legislation has not affirmed a clear and meaningful role for First Nations nor outlined a respectful path forward.

First Nations are actively looking across the country at the best ways to advance First Nation regulatory development and the capacity needed to achieve clean drinking water. The AFN calls upon the Committee to ensure First Nations can rely upon the Crown as a supportive partner, to work with them to fulfill their responsibilities to their citizens.