May 21, 2013

Standing Committee on Aboriginal Affairs and Northern Development
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A6
Canada

RE: WRITTEN SUBMISSION TO STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT – BILL S-8: “SAFE DRINKING WATER FOR FIRST NATIONS ACT”

The Assembly of Manitoba Chiefs respectfully provides this letter and accompanying written submission for your careful review and study of Bill S-8: Safe Drinking Water for First Nations Act.

This is the third submission regarding the Safe Drinking Water for First Nations Act under both Bill S-8 and its predecessor Bill S-11. First Nations in Manitoba continue to have several issues and concerns pertaining to the proposed legislation and its potential infringement on our inherent Aboriginal and Treaty rights. Our submission wishes to provide context to our concerns and offers solutions on how we can move forward in a new relationship based on respectful and mutual understandings.

Thank you for the opportunity to provide our Manitoba position.

Sincerely,

ASSEMBLY OF MANITOBA CHIEFS

Derek J. Nepinak, LLB, B.A.(Hons.)
Grand Chief, Assembly of Manitoba Chiefs

Enclosure

cc Regional Chief Bill Traverse, AFN
Manitoba First Nations
Assembly of Manitoba Chiefs

Submission to the
Standing Committee on Aboriginal Affairs and Northern Development
Regarding Bill S-8, Safe Drinking Water for First Nations Act

May 21, 2013
The Assembly of Manitoba Chiefs

The Chiefs in Manitoba created the Assembly of Manitoba Chiefs (AMC) in 1988 in order to coordinate political action and technical work on common issues.

AMC represents 61 First Nation communities in Manitoba. AMC is structured and mandated to provide a forum for discussion, coordination and consensus building. It is intended to be comprehensive in terms of scope and issues and the integration of political and technical institutions of First Nations.

The main objectives of the AMC are:

- To protect our First Nations governments from further encroachment and to prevent any action by any Nation, group, jurisdiction or government from violating the integrity and freedoms of self-determination and from violating individual and collective rights of First Nations;

- To reaffirm our beliefs in the sovereign equality of Nations and the fundamental rights of First Nations peoples; and

- To promote and ensure social progress, harmony and the quality of life among our people.
Introduction
The AMC respectfully provides this written submission to the Standing Committee on Aboriginal Affairs and Northern Development with observations, comments and recommendations to ensure Manitoba’s position has been presented and considered on Bill S-8, the Safe Drinking Water for First Nations Act. This is the third submission pertaining to this piece of legislation and its predecessor Bill S-11.

Assembly of Manitoba Chiefs’ Position
We have watched with dismay as legislation after legislation continues to be drafted and passed with little regard or participation from First Nations while resulting in significant impacts over our lives. The process with which this Bill passed second reading on May 8th by invoking a time allocation is undemocratic and did not allow for proper debate.

First Nations in Manitoba have been vocal, strong and steadfast in our position on the proposed legislation:

“The Assembly of Manitoba Chiefs does not support a legislative measure as an option to address safe drinking water needs for First Nations. Our position is based on the unwavering assertion that water is a fundamental and integral part of our Inherent, Aboriginal and Treaty rights and must not be circumscribed by legislation”.

This rights based position has unfortunately fallen on deaf ears at the Senate level and in our previous presentations. First Nations have considerable rights to water, each Nation prior to European contact had water laws, rights and responsibilities that directed protection, use and management. Historically and today water is a sacred element and source that First Nations continue to honour and value. Water was never transferred to modern day governments to assume jurisdiction and control over.

AMC has listened to the scripted reasoning for this Bill as the need for safe and clean drinking water however this Bill is more than just providing a mechanism to create regulations, the underlying issues and impacts are in direct contradiction and an assault on our inherent and constitutional rights including:
• Inclusion of a conditional non-derogation clause
• Absolves the Crown of any liability and weakens fiduciary responsibility
• Opens First Nations up to third party and potential privatization of water
• Gives broad and excessive powers to the Minister and Governor in Council
• Harsh penalties and enforcement
• Failure to address the widening resource gap and
• Improper consultation and no free prior and informed consent

Reality of Manitoba First Nations
According to the 2011 National Assessment of First Nations Water and Wastewater Systems there are more than 20 Manitoba First Nations that have a water or wastewater treatment system at high risk of creating health, safety or environmental problems. This puts the people at great risk for poor health, disease and illness. This issue was highlighted in 2009 during the pandemic flu which hit First Nation community's hard and cited reasons of lack of clean running water, remoteness, poverty and overcrowded homes.

There are 32 First Nations in Manitoba considered remote and northern with 23 of those only accessible by air, water or winter road. The First Nations in these communities face additional challenges in maintaining water and wastewater systems when there is no access to essential stores and service and the higher costs of freight and transportation. These communities are also included the list of Manitoba First Nations in need of new or upgraded water and wastewater infrastructure that is not being built as a result of ongoing funding disparities due to funding caps and unwillingness to address the social inequities between our citizens and the rest of Canada.

There are more than 800 homes on First Nation's reserves in Manitoba with no water or wastewater infrastructure many of these in the Island Lakes region of northeastern Manitoba. Half the homes not hooked up to water treatment plants get their water delivered once a week to holding tanks or cisterns and if they run out between deliveries have to retrieve water from the community well or from the lake. Homes that have no water infrastructure (taps) are forced
to haul water in pail by pail. In this day and age this is simply unacceptable and not within the
human right to water and sanitation.

We ask the Committee to study how these affected First Nations with no water infrastructure will
be able to meet future regulations. The monies spent on promoting legislation would be best
spent on water and wastewater infrastructure.

In 2011 AMC launched the “Water is a Human Right Campaign”, necessitated by the realities on
Manitoba First Nations. Also in 2011, AMC formed a Water Rights Research Consortium with
the University of Manitoba, Centre for Human Rights Research and others to develop research
projects related to drinking water and sanitation as a human right. It is recommended that
Canada support this type of research to expeditiously deal with ways to improve water and
sanitation services on Manitoba First Nations.

Lack of Consultation
On May 8th in the House of Commons Minister Valcourt provided a timeline of consultation since
2006 to affirm that consultation has been achieved on their part, we do not agree and report the
following:

- AMC made presentation to the Expert Water Panel in 2006 however their mandate was
  narrow and excluded overall issues;
- AMC received a short update from an INAC representative in May 2008 on their First
  Nation Water Management Strategy. Following this a Resolution was passed by the
  Chiefs in Assembly that Canada conduct meaningful consultations, to review all options
  set out by the Expert Water Panel and to provide adequate resources for full
  participation;
- In 2009 a one day engagement session was held in Winnipeg with primarily water
  operators and some First Nation leadership. INAC representatives rolled out a “Made in
  Manitoba” approach to incorporate existing provincial regulations. Questions were
  technical in nature and this was hardly a meaningful consultation session as most were
  hearing content for the first time;
- In September 2009 INAC representatives requested a meeting with AMC to hear First
Nation regional concerns and instead presented a document on elements of a Safe Drinking Water Act. AMC in return wrote a letter to then Minister Strahl outlining a process for true consultation and accommodation with First Nations. First Nations are rights holders and meetings with regional organizations cannot be construed as consultation; and

- More recently AMC invited federal government representatives to provide an update on water initiatives to a First Nations Water and Legislation Forum in March however they declined. AMC for very good reasons has been vocal to protect our water and our inherent and constitutional rights. For the federal government to turn away from a good discussion and debate shows lack of accountability and transparency to the process.

**Lack of Resources**

AMC believes the Expert Water Panel was on the right track in recommending the need to close the resource gap as a precondition to legislation:

"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."

AMC has stated several times the fundamental problem is a financial resource one. First Nations have been underfunded since the mid 1990’s operating under a 2% cap with a growing population. The federal government funds existing water and wastewater at 80% and insists the rest come from user fees in an already cash strapped system. The unilaterally imposed policies on First Nations are not a long term sustainable answer, it is recommended this Committee seek to have Canada end its funding cap and adequately fund First Nations to ensure access to clean water and sewer services.
Accountability

In its May 1, 2012 presentation, Aboriginal Affairs and Northern Development Canada (AANDC) stated that “legally enforceable regulations and standards lead to accountability”, however First Nations counter that accountability is achieved through the duty to consult, meaningful consultations, the Crown meeting its fiduciary responsibilities, providing accurate and significant resources, and ensuring a full and transparent processes for participation in decision making processes.

Moreover, it is hard to determine how accountability can be assured by way of legislation when Canada intentionally underfunds First Nations – leaving Chiefs and Councils having to deal with insufficient levels of funding while trying to ensure clean water and sewer services. It is recommended that the Committee examine how Canada’s ongoing underfunding for water infrastructure improves and impacts accountability (or the lack thereof) on reserve.

Canada's International Commitments to Indigenous People

The AMC’s concerns extend to the international arena, which includes the negotiation between Canada and the European Union (EU) of a Comprehensive Economic and Trade Agreement (CETA). CETA has been noted as the most far reaching trade agreement to date. Drinking and sanitation services are being negotiated and, if included, would be the first time drinking water services were included in a trade agreement. This is particularly concerning as multi-nationals such as Suez and Veolia would be within reach of First Nation communities and open to privatization, as noted in the Council of Canadians report, Public Water for Sale: How Canada Will Privatize our Public Water Systems.

CETA and Bill S-8 are potentially disastrous for First Nations. A loss of own water and wastewater plants and the inability to pay for water services is a direct violation of the human right to water and the United Nations Declaration on the Rights of Indigenous Peoples (UNDPRIP). The AMC is not satisfied that Canada does not intend to privatize water and wastewater plants on Manitoba First Nations.

The UNDRIP confirms the rights of indigenous peoples with respect to their water resources and their access to safe drinking water, while recognizing the inherent, constitutionally and
internationally protected rights of First Nations. Article 19 of UNDRIP requires that First Nations free, prior and informed consent be obtained prior to making decisions, including adopting legislation, that may affect them. Bill S-8 proposes to impact on Aboriginal and Treaty rights, in contravention of the requirements of free, prior and informed consent.

Manitoba Chiefs have consistently sought to preserve and protect their people’s distinctive spiritual relationships with the land, which includes water. Article 25 of UNDRIP ensures the right to maintain and to strengthen those relationships in order to uphold their responsibilities to future generations. Bill S-8 strips First Nation governments of their ability to ensure the maintenance and strengthening of those relationships by subjecting their decision making authority to regulations and superceding their authority to enact laws and by-laws and to generally act in the best interests of their people in their exercise of self-governance.

Additional Recommendations

We remain alarmed and concerned with the federal government’s continued approach and insistence that legislation is the answer for First Nations. We question why the current Canadian Government must be compelled to legislate as opposed to doing what is humane and just by providing adequate resources to ensure comparable water systems as the rest of Canada. We believe the answer lies in working collaboratively with First Nations for a solution that is mutual, beneficial and respects our inherent right to use, protect and manage our water sources.

We have heard the Government of Canada state the main reason for Bill S-8 is for the health and safety of First Nations people: that first comes legislation then comes negotiation and money, and ultimately we must trust the system to work. It is unfortunate that historical actions from the Government of Canada with and on behalf of First Nations have proven and perpetuated a continued culture of distrust. Trust is earned through respectful, reciprocal and honourable actions and good faith negotiations.

We respectfully recommend that this Committee seriously take into account the historical relationship that has resulted in the situation First Nations are in today. The creation of legislation and policy without seeking and meeting the realistic needs of First Nations will not create success or the accountability that government is seeking for its investments.
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It is also recommended that the Committee take a position in favour of First Nations that Bill S-8 be abandoned or tabled to establish a good faith and honourable process that explores the Custom Water Law option from the Expert Water Panel. A Custom Water Law would include recognition and incorporation of inherent First Nations jurisdiction, customs and law and development of policies. We believe there is real opportunity to set a new relationship in Canada that envisions First Nations as true partners in the development and implementation of own laws that respects and recognizes our inherent Aboriginal and treaty rights.