Assembly of First Nations
National Chief Shawn A-in-chut Atleo

Standing Senate Committee on Aboriginal Peoples
Regarding *Bill S-11, Safe Drinking Water for First Nations Act*

February 8, 2011

ABOUT THE ASSEMBLY OF FIRST NATIONS

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

The role and function of the AFN 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 for advancing the aspirations of First Nations.

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INTRODUCTION

Mr. Chair, Honourable Senators, thank you for inviting us to discuss with you how we might make this bill become an Act to ensure safe drinking water in First Nations communities.

I want to begin by saying that my approach has been to be very open and positive in my relations with this federal government, including the Department of Indian Affairs; and I am very positive in my relations with this Parliament and this Committee in particular. This Committee was instrumental in the development of *The Specific Claims Tribunal Act,* which I believe represented a major shift in policy, and if properly implemented has the potential to be transformative.

I am hopeful that this Committee can bring the same energy, influence and progressive thinking to bear on this Bill.

As you know, my stated intention is to transform the current relationship between the Crown and First Nations to one which is <u>not</u> characterized by the paternalistic policies inherent in the current *Indian Act*. Indeed, the leadership from across Canada have affirmed by resolution our resolve to advance First Nation governments and to work together to eliminate the *Indian Act* at a rate and pace of change directed by First Nations. But it is not just about the *Indian Act*, it is about changing the relationship – what some have called a paradigmatic shift.

We are greatly assisted in our effort towards this "policy shift" by the *UN Declaration on the Rights of Indigenous Peoples*, which was recently endorsed by Canada. The *Declaration* is an articulation of high global standards on the human rights of Indigenous peoples. We applauded Canada's endorsement, but the endorsement must be more than "lip-service". Indeed, as set out in the Declaration itself – it is a **standard of achievement to be pursued in a spirit of partnership and mutual respect**. The AFN is fully prepared to engage in this work and we expect the

government of Canada, Parliament and this Committee to join us in this work.

If the *UN Declaration* is to have any meaningful impact, then governments need to measure their current and proposed policies, legislation and conduct against the standards in the *Declaration*. I urge this Committee to review Bill S-11 against the standards in the *UN Declaration*. I think what you will find, regrettably, is that that proposed legislation is infected by the age-old paternalistic policies inherent in the *Indian Act*. But this is where we have an important opportunity, to correct these flaws and to chart a new path forward, based on recognition, collaboration and implementation, and moreover focused on delivering real results.

I want to acknowledge and express appreciation for the fact that the Minister has signaled a willingness to work with First Nations to improve this Bill.

Safe drinking water is a paramount concern for our communities. And we are ever mindful that a failure to address basic needs will forever inhibit and hold back the broader reform and change that is needed. When children and their families are not able to trust the drinking water, there is no safety and security. We have ambitious priorities in education, in job creation and economic development– but all of this requires that we first take care of basic needs.

Quite simply, failing to meet basic needs robs the potential of our families and communities.

This underlines the importance of the work before us. **The bottom-line is we must get it right.**

I will briefly outline current conditions and current concerns which continue to point to a troubling reality facing our communities. I will then set out AFN's position which reflects national level dialogue at the political and technical level. I would point out that our presentation here today is

governed by strict mandate and direction, as a national advocacy body, our role is to bring together perspectives and to bring forward consensus. This is not consultation. **It is facilitation of constructive solutions to urgent problems.**

CURRENT CONDITIONS

In referencing current conditions, I would like to respond particularly to the statements you heard from federal witnesses on February 2nd.

In 2008, when Minister Strahl announced at the Special Chiefs Assembly that INAC would reduce by half the number of high risk drinking water systems, 85 at that time, our hopes were raised that First Nations water systems would finally be addressed. Today, we still have 49 communities with high risk high-risk drinking water systems. As of December 2010, there were still 117 communities with Drinking Water Advisories. There is concern that this number is on an increasing trend. Records from Health Canada show that there were 82 DWAS in April 2008. Many of these have been in place for years. This is unacceptable. And it certainly shows the current approaches – despite some apparent good intentions are not addressing root problems.

I see the impact and the reality behind these statistics every week as I am privileged to travel in First Nation territories across the country. Just a few days ago Chief Garrison Settee met with me and reminded us of the 1000 homes in northern Manitoba that are without running water. In traveling through the country, Chiefs and Grand Chiefs raise this with me constantly – Grand Chief Evans is spear-heading a campaign about the human right to water. Elders and Chiefs reflect on the Treaties and their knowledge that the ancestors advanced Treaties as a means to create viable communities. A fundamental interest like drinking water would have certainly been part of expectations on both sides of the Treaty process.

Just a few months ago – the women from our communities led us in a water ceremony during our Special Chiefs Assembly in December praying for the protection and security of our people and the life forces of water.

AFN POSITION ON BILL S-11

I would like to now move to outlining the AFN position on Bill S-11. Overall, we have said that the Bill, in its current form, is not acceptable.

At our Special Chiefs Assembly, held in December, 2010, the Chiefs adopted Resolution no. 58/2010, a copy of which is annexed to this presentation. This Resolution states the position of the AFN on Bill S-11 and speaks for itself. I will not review it in detail, but will highlight some of our main concerns with Bill S-11.

1. Financial Issues

The Expert Panel on Safe Drinking Water for First Nations said the **federal government must close the resource gap** and identified this as a precondition. The rationale behind it 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.*

So, the first major deficiency in Bill S-11 is the lack of financial provisions. If all the other deficiencies were cured the Bill would not be acceptable without a firm, clear and continuing plan for the commitment of funds. The funds needed to ensure safe drinking water on First Nations lands fall into four categories: (1) new construction and upgrading of deficient facilities; (2) operation and maintenance of existing equipment so as to ensure the longest possible life for facilities; (3) training of operators and other staff, including circuit riders; and, (4) routine expenses of operators, e.g.,

adequate salaries, ongoing provision of circuit riders, backup operators or other supernumerary staff and for management oversight.

I understand that INAC has said that it will not be in a position to state its financial plan until after the completion of its national assessment this Spring. Yet it is our understanding that all of the reports have been completed and that INAC is working now to compile this information. First Nations are very anxious to see this information and in fact fail to understand why this information is not made public or at least provided to this committee in your study of this Bill.

I understand that the Minister is able to introduce financial provisions when the Bill is before a committee of the House of Commons. If we are able to construct a clear financial and implementation plan for this Bill, we will arrive at first base towards an important solution here. First Nations need clear assurance that the resources are going to be there to ensure that regulations and standards can be achieved. Without this assurance, First Nations have every reason to be fearful of and reject accepting the liability and responsibility due to the current state of infrastructure and with no guarantee of resources to remedy current problems. Ensuring safe drinking water is a matter of addressing critical needs but it is also an important governance matter. **We must ensure that First Nation jurisdiction is respected, that effective coordination is in place and that the regime is sustainable, stable and accountable.**

2. Consultation

Resolution 58/2010 identifies consultation as a problem. The federal witnesses that came before you glossed over the issue. I point out that as in this resolution, First Nations have said that they feel they have not been properly consulted.

The federal witnesses pointed to the Expert Panel's Report as well as the engagement sessions as evidence of consultation. They also named specifically some collaborative initiatives with the Atlantic Policy Congress, the AFNQL and the FSIN, which were mainly project proposals for funding

to develop draft regulations. Clearly, this may be useful work but it is a far cry from the "meaningful consultation", which the Supreme Court of Canada talked about in the *Haida* decision.

According to *Haida*, consultation involves listening and being prepared to change your plans based on what you hear. The problem with Bill S-11 is that it does not reflect what INAC has heard, from the Expert Panel or in the engagement sessions or from First Nations in any forum. That is why First Nations say consultations have been a problem. Insisting that INAC provide the national assessment and develop a financial plan, will give us all an opportunity to fix the consultation problems. It will show that Canada has listened and reflected on Experts Panel and the initial engagement process.

Moreover, and as I will introduce in my concluding notes, there is an opportunity to reflect principles from the UNDRIP within the Bill that will further address this matter.

3. **Aboriginal and Treaty Rights**

The third major concern is the potential impact of Bill S-11 on Aboriginal and Treaty Rights.

Canada appears to give itself the authority to determine the extent to which the Crown can abrogate and derogate Aboriginal and Treaty rights - in direct contradiction to s.35 of the Constitution. Paragraph 4 (1)(r) gives authority for the regulations to:

> provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982,* **including the extent to which the regulations <u>may</u> abrogate and derogate from those aboriginal and treaty rights …**

Such uncontrolled discretion contradicts directly what the Supreme Court of Canada said in the *R. v. Adams*, [1996] 3 S.C.R. 101. In that case, the Court held, at paragraph 54:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.

Bill S-11, and the regulations enacted under the Bill, will also **prevail over comprehensive land claims agreements and self-government agreements** as well as any Act of Parliament giving effect to such agreements [s.6(2)]. 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.

The power to referentially incorporate provincial regulations in subsection 4(3) is also worrisome for First Nations in provincial jurisdictions whose regulatory regimes involve allocation and water licensing. Bill S-11 gives the federal cabinet broad and sole authority to incorporate by reference "any provincial law" that cabinet "considers necessary". There is nothing to suggest a limit on this authority with respect to provincial water allocation and licensing laws. Indeed, if cabinet considers it necessary, it can make such provincial laws apply to First Nations. The Bill is unnecessarily broad and over-reaching.

CONCLUSION

I want to conclude my presentation by referring to the matter I introduced at the beginning, namely the *UN Declaration on the Rights of Indigenous Peoples*. As you know, one of the central principles of the *Declaration* is "free, prior and informed consent". In the statements by federal officials to this Committee on February 2nd, there was continual reference to collaboration with First Nations with regard to the development and enactment of proposed regulations.

Yet, if you look at the so-called enabling provisions, there is no reference to any "collaboration" with First Nations, let alone free, prior and informed

consent. In fact, if you look at those provisions, all the power and sole discretion is granted to the Minister or the Governor in Council. With all due respect, it looks to me to be more of the same paternalistic approaches contained in the *Indian Act*. This approach is also evident in subsection 6(1), which says regulations may override First Nation laws and bylaws.

In my view, Bill S-11, in its current form, is a step backwards. Can the Bill be fixed and is AFN prepared to assist in this regard? The Assembly of First Nations is fully willing to work with the Minister, in a manner consistent with our mandate to fix Bill S-11 and deliver real results for our people. Safe drinking water is a paramount concern and one to which we bring our focused energy and attention to achieve resolution.

Are there amendments that this Committee must consider in reviewing the Bill, particularly in light of the *UN Declaration*? First and foremost, the financial resource issues need to be addressed. Secondly, the infringements on Aboriginal and Treaty Rights must be completely eliminated from the Bill. Finally, the principle of free, prior and informed consent needs to be reflected in the Bill as a precondition to the exercise of any authority by the Minister or the Governor in Council regarding the enactment of any regulations under the proposed legislation.

Indeed what is required is a collaborative approach throughout the Bill and in particular with regard to the development of regulatory systems. We feel it is essential to reorient the entire Bill with a view to establishing necessary cooperation and collaboration, at the regional level, throughout. Only through respectful processes that bring all jurisdictions to the table, including First Nations, as well as a clear and mutually acceptable financial plan on behalf of the federal government, can we proceed with regulatory development that will successfully achieve the objective of delivering First Nation safe drinking water regimes.

I will now turn to David Nahwegahbow, senior legal counsel to the Assembly of First Nations to walk through some of the very constructive

proposals that we are suggesting to the Government of Canada to advance our mutual interests of delivering safe drinking water for First Nations.

Thank you.