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

BRIEFING NOTE TO THE STANDING COMMITTEE ON ABORIGINAL PEOPLES RE: Bill S-8[i]

FIRST NATIONS SAFE DRINKING WATER ACT

June 6, 2012

Bill S-8, '*Safe Drinking Water for First Nations Bill*' is welcomed in its intent to improve the health and safety of First Nations through the development of a federal legal regime that governs drinking water and wastewater treatment in First Nations communities.

We agree that improved access to safe drinking water is urgently needed in many First Nations communities. In 2009, there were 48 communities whose systems remained 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.

Signficant earlier reports, including the 2005 Annual Report of the Commissioner of the Environment and Sustainable Development to the House of Commons, and the 2006 Expert Panel on Safe Drinking Water for First Nations Report, outlined many of the key concerns.

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

Bill S-8 has an amended version of the non-derogation clause that was contained in Bill S-11. Bill S-11 as it was framed, did not respect constitutionally protected Aboriginal and treaty rights. In direct contradiction to s.35 of the Constitution, section 4(1)*(r)* of the former Bill gave Canada authority to determine the extent to which the Crown could abrogate and derogate treaty rights.

The new Bill, Bill S-8 presently before the Committee has changed the non-derogation clause (now Section 3) to read as follows (our emphasis added):

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3. For greater certainty, nothing in this Act or the regulations is to be construed so as to abrogate or derogate from any existing Aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*, **except to the extent necessary to ensure the safety of drinking water on First Nation lands.**

CELA will not provide an opinion in this submission as to the extent of or legal adequacy of the government's consultation obligations with aboriginal peoples in respect of this amended non-derogation clause, and will leave that to others to do, including the extent to which Section 35 rights might be impacted and how such impacts may be mediated and accommodated in advance. We will merely flag that the non-derogation clause has changed from the earlier version, and that its acceptability to aboriginal peoples as well as the issues of consultation and accommodation are important issues for the Committee to hear about and to consider. However, as we submitted before this Committee in respect of Bill S-11, we prefer the form of non-derogation clause found in Ontario's *Clean Water Act*, which was designed for protection of sources of drinking water:

> **Existing Aboriginal or Treaty Rights**
>
> 82. For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in Section 35 of the *Constitution Act*, 1982. 2006, c. 22, s. 82.

2. Vision for Improving Access to First Nations Water Resource Management

Bill S-8 outlines a legislative framework for managing drinking water and wastewater on First Nations reserves, still lacks an adequate implementation plan. The legislation still lacks detail and substance required to improve water resource management on First Nations' lands. Bill S-8 is too vague to understand its implementation plan.

- Section 5(1) *(b)* states that the regulations may "confer on any person or body any legislative, administrative, judicial or other power that the Governor in Council considers necessary to effectively regulate drinking water systems and waste water systems." 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.
- On the other hand, in the revised Bill S-8, many of the regulation making powers are more clearly limited to matters directly relating to provision of safe drinking water and appear to address some of the initial concerns that they were over-reaching as formulated in the formerly proposed Bill S-11.

The kinds of matters that are appropriately part of a multi-barrier, appropriate approach to protection of drinking water include the following. These are the types of matters that should be thoroughly discussed among all concerned before legislation is passed, such that there is a clear vision for protecting drinking water. These are the types of recommendations that both the Walkerton and the North Battleford Inquiries into those respective drinking water tragedies made:

- The drinking water protection system should follow a multi-barrier approach to drinking water protection paradigm
- It should include source water protection
- It should provide binding drinking water standards
- It should include reliable certification of operators
- It should include reliable certification of labs
- It should include clear oversight and reporting responsibilities
- It should include clear delineation of the roles of health, environment, water officials including First Nations officials and their governments
- It should include clear and comprehensive monitoring and testing of drinking water
- It should include reporting of adverse events
- It should clearly delineate responsibility for responding to adverse events; and clear protocols
- It should provide for public involvement of community members, disclosure and transparency
- It should provide a means of receiving expert third party advice such as in Ontario the Ontario Drinking Water Advisory Committee
- It should clearly outline resources and funding mechanisms including for remote and small systems and provide for infrastructure planning over time

While there may be plans to develop such a vision, it is not evident that it has yet been done, and this gives rise to many of the concerns in respect of this brief, vague enabling legislation. We agree that the Bill does not need to be one-size-fits-all; at the same time, we do need a robust system of safety. This vision should be articulated before legislation is passed.

3. Self Governance

Drinking water is one of the core values of any peopl. The ability to make decisions to manage drinking water but with adequate resources is core. Bill S-8 continues to raise concerns in terms of its vision and its apparent lack of respect for First Nations' right to have a central and meaningful place in the governance of water on reserve lands.

- On the one hand, the former provision in the Preamble that previously set out in Bill S-11 an assumption that First Nations do not have the authority necessary to govern water on reserves has been omitted from Bill S-8, which is an improvement.

- However, Section 3 (the non-derogation clause) and section 7 (a conflict clause) in Bill S-8 both provide that regulations may prevail over laws or by-laws made by a First Nation to the extent of the conflict in respect of protection of drinking water.
- The prior section 6 which stated that Bill S-11 and its regulations will "prevail over the land claims agreements or self-government agreements" was a provision which we previously criticized as we're of the opinion that such a provision could enable the Government of Canada to abrogate and derogate from the terms of modern Treaties and significantly diminish the powers already being exercised by First Nation water boards and commissions under the terms of such agreements. It could also have undermined 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. We note that this prior section 6 has been omitted from the current version of Bill S-8, which is a significant improvement to the Bill.

We hope these brief comments are of assistance and would be pleased to discuss same with the Committee at any time.

Yours truly,
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[i] This is an updated version of a briefing note previously prepared in relation to Bill S-11, an earlier version of a proposed Safe Drinking Water Act for First Nations introduced in a previous Parliament.