



ATLANTIC POLICY CONGRESS OF FIRST NATION CHIEFS SECRETARIAT INC.

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**Presentation to the Panel of Expert on Water
Delta Halifax, NS
August 14, 2006**

Good Afternoon

My name is Simon Osmond. I am a Policy Analyst for the Atlantic Policy Congress of First Nation Chiefs Sect.

Thank you for giving me this time to address the panel on this important issue.

I would like to start by stating that it is the position of the Atlantic Policy Congress that every First Nation water treatment and wastewater treatment system within the Atlantic Region must first be brought up to an acceptable National standard before any National Regulatory regime can be fully implemented within this Region.

We are deeply concerned with many potential issues associated with a hasty implementation of such a strategy.

While in general terms the goals of the First Nations Water Management Strategy and the Municipal Wastewater Effluent (MWW) limits can be viewed as a positive initiative, a hasty or ill-conceived implementation of these may not only confuse and alienate those most effected- First Nations persons on reserve- but it may in fact inadvertently result in regulatory non-compliance and enforcement action.

Basically, what we are saying is that we need to take the time to get this right, and that we should not, indeed we must not, be so concerned with haste (however well intentioned) that we miss critical details associated with this process.

It must be said that the current state of affairs has developed over decades, and while we are hopeful for the future in light of Minister Prentice's recent statements, we must temper this hope with a realistic view of the task ahead of us, and in the context of our historical experiences of dealing with the Crown on this issue, and others.

When asked what kind of a regulatory model to use, we don't have enough information to provide an answer. The option of looking at Federal, Provincial, Municipal or First Nation models could not be evaluated within the short timeframes.

Your mandate could be included to determine what is really needed to better understand the full impacts of actions on First Nations. The Protocol for Safe Drinking Water is one glimpse into your process to determine its viability. The Protocols set out important processes, such as certification, transportation of water, source water protection, and emergency response plans, to name a few items included within the document.

From my understanding, these protocols will not be part of First Nations funding agreements until next year. For First Nations to address the many items included within the document; First Nations will need funding and jurisdiction to deal with such issues as source water protection. There is no process or support mechanism in place for First Nations when the protocols come into effect. This process is another effort done without full consultation of First Nations, but yet expected to be implemented next year.

When identifying whether protocols or regulatory regime are necessary; many questions and legal liabilities must be first addressed before thinking of a regulatory regime.

1. Are First Nation communities in a position to implement a regulatory regime?
2. At the end of the day, who is liable for the water system?
3. Even Federal Departments (excluding INAC) do not want to debate the question of who is defined as the owner of these Facilities.
4. Are First Nation systems up to standard, if so at what level?
5. How long will it take to bring First Nation communities up to standard? If a regulatory regime is decided as an option.
6. Who will fund to bring these systems up to standard?

I know this is not within the Panel's Mandate but has to be considered as part of this process. The Panel's Mandate has to include long term effects on First Nation communities. Water is but one component and the panel has to keep in mind that water is the essence of life and it does affect other parts within a community.

You cannot separate one aspect of water when you consider its flow process. It begins from the water source - to water treatment - water distribution - wastewater collection - wastewater treatment – then back to the environment.

Wastewater has to be apart of this process. Wastewater becomes apart of this picture through many areas, such as source water protection. Right now there is no process that determines the layout of systems, other than common sense. One community within the Atlantic gets its water from a surface source. Both a wastewater lagoon and lift station is within the boundaries of their water source. In this case wastewater could affect their water source and yet it is not regulated.

It must be kept in mind that any First Nation system must first be brought up to clear standard before any discussions or developments on a Regulatory regime. Do not put the cart before the horse in implementing a regulatory regime that would leave many First Nation communities in a bad or worst position.

Simply put, many First Nation systems nation-wide are typically not up to National standards, and most communities do not have the capacity and adequate resources to operate their systems efficiently. Before any regulatory regime is to be implemented, all First Nations communities must be brought up to an acceptable National standard and provided with much needed funding resources and capacity to properly maintain these systems for the next 50 – 100 years.

We have been given indications from some federal officials that any regulatory regime would be phased in over time giving First Nations time to bring them up to a new Standard. Well, trying to solve water issues and concerns via on an interim approach has been on going problem for many First Nations since 1995 and again most recently with the First Nation Water Management Strategy 2002 that was supposed to address our water issues and most recently the Auditor General's Report 2005.

Discussions today on Proposed Water Regulatory Regime are as a result of Minister Prentice's announcement from earlier this year. As I stated earlier, this announcement, while significant, must also be tempered with our view of reality. After 10 years, many of our communities are still no further ahead in addressing the core issues behind water and wastewater system failures within the Atlantic Region, and the proposed regulations will not bring First Nation communities any closer to developing real and lasting solutions to our critical infrastructure and operational funding issues.

This is not to say that the goals of the proposed regulations (to improve public safety and environmental quality) are not viewed as positive.

We believe that First Nations communities have much to contribute as we work towards addressing these critical issues.

To that end, we were directed by all our Chiefs to investigate community views and prepare a submission to the Water Panel. It is under that direction we provide the following submission to the Panel.

FUNDAMENTAL ISSUES

1. Funding and Sustainability

The adequacy of existing water assets on-reserve is directly linked to the adequacy of, and incentives in, the funding regime now and in the future. Without changes to the funding system, no new regulatory system interim or permanent solution will work any better that was proposed to date.

Indeed we believe that any new responsibilities built onto an old funding regime will only make things worse. A long term solution is needed that is sustainable and realistic.

The Panel should review all the assumptions and funding regime that is in place and recommend the correction of deficiencies as a prerequisite to a new regulatory regime. Make sure all the money at all levels was used for what it was intended.

Items of concern with the funding regime include

Operations and Maintenance.

The O&M Manual of INAC; (full name: Indian Programs Manual; Volume 1 Capital Facilities and Maintenance; Operation and Maintenance) Appendix C clearly describes the approach to funding:

“5.1 ... O&M funding contributions are a subsidy toward the total expected O&M cost. First Nations are expected to make up any difference in funding through user fees or other sources.”

This is elaborated on in section 8.1 of the same appendix of the manual:

“The Net Funding Requirement (NFR) is the amount of money, varying between 20 and 100 percent of the average cost required to operate and maintain a capital asset to generally accepted standards, which DIAND provides to First Nations for the O&M funding assistance of a capital asset. The NFR is based on the concept that First Nations are responsible for a partial cost of the O&M funding of the capital asset. These amounts are established in the context of user fee rates being paid for similar services off reserve.”

The table of O&M calculations in that appendix shows that water supply, treatment and distribution facilities (as well as waste treatment/disposal facilities) are to be funded at 80% of formula. In other words O&M policy is based on the assumption that each community is expected to come up with 20% of O&M costs of water facilities, each and every year.

Other points that First Nation staff wish the Panel to hear are as follows.

- Safe drinking water is a fundamental basic need as are the facilities required to provide it. DIAND providing education facilities 100% of O&M, but water facilities only 80%, is not defensible or logical.
- Determinations of funding levels based on a municipal practices makes little sense as economic facts such as low incomes i.e. poverty and no tax base are dramatically different than the average non-native community. Many First Nations have no ability to pay such a costs or even a portion.
- The existing O&M formula is outdated and not adequate. While uncertain, it appears that the formula is based on a 1983 calculation. Given the nature of price increases in some of the components, this calculation should be updated to 2006 current real costs.
- Regular updating of funding based on price and community growth changes in formula components were eliminated some years ago to align with capped First Nations funding approach. Again the exact time frame is uncertain, but it is our belief it was over 10 years ago that O&M funding increases became linked solely to appropriation increases instead of any related costs of formula components. A comparison of those cost differences over the time period would undoubtedly reveal another shortfall in O&M funding to First Nations.

Other concerns with the funding regime include:

First Nations with satellite communities may not be funded for all sites and thus are at risk.

Remote First Nations will also not be well served by application of the remoteness index to an already outdated funding level.

O&M for water may also have to be used on other urgent capital priorities in communities as there are many pressing needs and priorities and very few facilities receive funds sufficient to meet actual costs.

Major DIAND capital funding in the Atlantic region is so far behind current project needs that even emergency situations are often not addressed in a timely manner.

Major capital funding to the Atlantic DIAND region is so low that the costs for any one project will often only be met over one or more fiscal years. Not only is this dangerous, it is inefficient and requires First Nations to carry cost and interest charges to offset the practice.

Although public funds are inadequate, attempts to introduce private funds (a trend increasingly common in municipalities) or even own source funds are frustrated by the existing O&M policy. It notes that only departmentally funded community infrastructure is eligible and that indeed any asset constructed ahead of schedule by using an alternative funding mechanism is not considered to be eligible. (sections 5.4 and 5.2) The long term inability to maintain such new facilities clearly limits the ability and desire to pursue alternative financing.

On-reserve population growth has been a constant growth year over year so that facilities which, when built were adequate at the time, are now outdated years before expected.

There is a need for clarity of the responsibilities of third party and co-management interveners in dealing with infrastructure matters. The terms of engagement does not make it clear that there is a role they play. Accordingly, infrastructure staff advised that during their experiences with financial intervention, they felt their issues are not dealt with adequately or with any level of importance.

As I note, many facets of the funding regime provide no incentives to good management of water facilities. These must be corrected before any new regulatory regime is imposed.

2. Roles – Responsibilities – Accountability

Water systems involve multiple agencies and jurisdictions with little common understanding of roles, responsibilities and who exactly is accountable for what. There are of course, unilateral declarations by INAC of First Nation responsibility backed by the “take-it-or-

leave-it” terms of funding agreements or decisions. This approach avoids the provisions of the *Indian Act* which leave First Nations with little control over natural resources (water) and no ownership of facilities on a reserve.

While this situation deserves immediate clarification, it should also not prejudice the long term opportunity for self-governing First Nations to resume jurisdiction over water and facilities. However, this should come through a choice during self-government negotiations; a choice that must remain open no matter what regulatory regime is produced in the interim.

Various federal agencies are not clear on their own responsibilities now. Uncertainty means that enforcement actions tend to be directed at both First Nations and INAC. The “finger pointing” that accompanies these situations is not helpful in resolving urgent issues. In matters of public safety, this ambiguity of roles and responsibilities is unacceptable and it needs to be addressed as part of any regulatory change.

Other items of concern that this Panel should consider during your deliberations include:

- Many First Nations use water services of nearby jurisdictions. These might be simple transport services or could include contract operations on reserve. As events have shown, these off-reserve systems are not immune to problems. What needs clarity is how to use service agreements to limit problems and how to respond to the variety of events that might arise such as source emergencies and changes in quality during transport to the reserve, in holding tanks and towers and in distribution systems.
- Tribal Council support is an important element in water management for some First Nations. Others reported dissatisfaction with supports and still others suggest that limited funds require Tribal Councils to make choices between priorities. Examination of the role expected of tribal councils, the practical limits on them, and recommendations for improvements should be examined.
- Small communities don't have sufficient resources to pay full time operators let alone back-up one. Further, they may not even have a qualified individual at all. Water safety is a service that does not stop for vacations. Who is responsible to assure that these gaps in services are filled both now and in any new regulatory regime? There must be service and safety coverage all the time and in all communities.

3. Capacity

The third pre-requisite to action is in capacity. This is not only the capacity of front line operators but also includes the entire range of supporting agencies or Departments. The items that First Nation staff highlighted during our consultations as needing attention include:

- Communities need both a primary and backup certified operators. Few presently have this internal capacity.
- A generic detailed job description for operators and monitors would help as many were inventing their own.

- A water monitor and water operator are two different positions that complement each other and are both needed. By their nature, these positions are a check and balance and should not be performed by the same person. However, in quite a few Atlantic communities, they are carried out by the same person.
- Water operators often have to do other public works as well. Too many duties lead to too many priorities that can compromise water specific duties.
- Operators would benefit (as do other First Nation service providers) from a regional or national peer network. Support for an Operators Association should be part of core funding and the system should ensure access to professionals for guidance in unusual situations.
- Both water operators and monitors should be certified for their jobs. Appropriately developed training should award meaningful certificates that can also be considered a credit toward further education. This type of system with incentives to continue learning, should be supported by any management regime.
- Monitor's training should include education on facilities and distribution in order to better understand monitoring results and effectiveness of actions.
- All key federal contacts should better understand the broader system in which a First Nation operates its water systems. Enforcement measures in one area can create problems in another area of federal relations.
- High turnover among federal employees mean that the history of issues can often be lost on the federal side. The frustration among First Nations is high due to the need to re-orient federal staff, re-submit past work, and being told to undertake actions already tried; but this fact is mostly unrecognized on the federal side.

4. Resources/Equipment

To better carry out even the existing jobs in the on-reserve water system, current equipment and related resources are needed. This is particularly a concern if sewage responsibilities are to be addressed by the panel.

- Back-up equipment is not part of regular yearly funding and so most communities do not have back-up equipment in the event of equipment or power failures.
- Professional back-up for operators is mostly lacking at the community level. While some Tribal Councils are able to provide this service, others are not.
- Provision of state-of-the-art equipment to carry out duties as part of any new regulations must be part of the regime.
- Where existing equipment is not up to standard, there needs to be a mechanism and process to report it, confirm need, and initiate purchases.
- The facilities and equipment needed to produce sufficient water for Fire Fighting requirements throughout a community may need to be addressed.
- Gas monitors within wastewater treatment facilities and water treatment plants need to be in proper working condition, to protect the occupational health and safety of workers..
- Related resources like the professional association, technical support, and upgraded accredited certification in the event of an expanded facility, all need to be addressed.

Summary of Priorities

The four priority areas described above, illustrate problems with the existing system that the Panel is asked to consider before designing a new regulatory regime. Our consultations revealed five additional topic areas that technical staff saw as significant items that could affect a new regulatory regime. These follow below.

Additional Items of Concern

5. Liability

The transfer of liability to First Nation water operators and deemed “owners” is not fair. There are a number of responsibilities that when not fulfilled can lead to issues with water systems, many of which are beyond the control of anyone in First Nation communities. As noted in the beginning of this submission, the fiduciary relationship between the Crown and First Nation People requires that sufficient resources and opportunities are available for First Nations to succeed. The present system does not meet that test, and a new system must ensure sufficient proactive steps are in place to avoid liabilities.

Another issue is the ability to secure adequate liability insurance. All forms of insurance are getting more costly and First Nations already have difficulty getting coverage for some items. Insurance for operators and “owners” liability insurance will only increase further if new liabilities are added to water. Further complexity is added to this when collective agreements (in place in some communities) may require liability insurance to be in place, and that the federal government does not appreciate the cost of insurance premiums, as it self-insures. At this time, all people we spoke with felt that no community is ready for the type of liability being suggested, and that a great deal of attention to this topic is required.

6. Source water protection

Atlantic First Nations are small and water usually does not respect our reserve boundaries. As a result our water quality can be very dependent on activities in other jurisdictions. In some cases our need for water quality may not be afforded as high a priority as we might like. This seems particularly true in watersheds where other uses such as mining, forestry, agriculture, towns and landfills exist. We cannot be left to assume that water issues will be adequately dealt with by other jurisdictions. Any new regulatory regime must address cross border protection issues.

Besides drinking water, First Nations people also have other uses dependent on water that other communities do not. For instance, traditional plants may be very dependent on water in certain areas and times of years, traditional medicines are often based on mixing with clean spring water, sacred sites are often found on shorelines, and of course, transport along traditional routes were water-based.

All that said, First Nations have a right and responsibility to manage water beyond the borders of its reserve and beyond drinking water. Reliance on other governments will not sufficiently protect the waters for us. Adequate source water protection needs First Nations

as full partners in planning and protection. We need adequate on-reserve tools and controls that our government could implement for our community.

First Nations will need funding to identify watershed boundaries, develop planning model and finally implement source water protection plans. When you protect one area, it affects First Nation community boundaries. For communities that are already small and implementing you source water protection, you are taking away land from First Nations, there has to be a process in place to ensure First Nations can make up for its lose, through additions to reserve.

With internal management systems in place, we could then negotiate from a position of strength for harmonized regimes with other jurisdictions. In the absence of any such leverage, there will be little incentive for other parties to harmonize approaches, or to negotiate appropriate protection of watersheds for First Nation uses.

7. Private Wells/Septic Systems

The federal government steadfastly insists that resources on and under reserves are federal assets. While First Nations may well disagree with the assertion, it seems that when it comes to water in wells on-reserve, the federal position is inconsistent. In this case, the federal approach suggests that the collective interest in reserve land, has been replaced by a “private” one, such that a well which services a house, is “owned” by the householder even though the individual cannot “own” the house itself nor the land on which it rests.

The present approach to individual wells is so inconsistent with other federal policies and positions, that it seems to have been adopted more as a matter of administrative convenience. The Panel must investigate the basis of this policy and introduce real measures that are consistent with other resources on-reserve.

Please know that we are not necessarily advocating for increased federal control of individual wells, but for transparency and accountability of INAC’s position, and then examination of realistic alternatives to the present policy of making people defend for themselves.

Other concerns with individual wells include those below.

- Who actually “owns” groundwater, particularly that under federal land?
- How should the health and safety of well users be protected if it remains outside the water management regime?
- Are not most wells at least partly paid for by federal housing subsidies and other housing programs?
- How is a well which is an integral part of a house’s plumbing system, detached from that unit? Similarly for septic fields and tanks?
- If wells and septic systems are left out of a funding and management regime as they are now, how can we go to adjacent jurisdictions like a province, and ask them to deal with cross border matters when, we do not even have the ability to address water quality issues that cross internal lot borders inside the reserve?

- When considering a new regulatory regime the panel needs to consider how new regulations effecting private wells and septics should: support safety for those dependent on private wells; how testing should be carried out; how monitoring should proceed; how abandoned wells should be handled; and how larger jurisdictional goals will be affected.

8. **Emergency Preparedness**

Public safety requires that public systems be prepared to respond to emergency situations. Although not all sources of emergencies can be anticipated, many can. Extreme weather, system breaches, power outages, equipment failure, and contaminant entry are some of those that we should be prepared for. Unfortunately, most of our operators tell us that they worry their community is not ready. We are aware work is beginning to address emergencies and emergency planning water must be a key part of any plan. Among the points are those that follow:

- Communities have Emergency Response Plans in general, but many operators do not know if there are provisions for water facilities, nor what role the operator is supposed to play.
- Very few operators knew of any back-up power or back-up equipment for water facilities. Where water is to be pumped up into a tower this lack of back-up was felt to be most acute.
- Where back-up wells exist, there was concern over the quality of the both the water and the system.

In summary, operators felt that any new regulations need to address the inadequate preparations for emergencies on reserves and that much of that un-readiness was due to the lack of funding to develop and to monitor plans and the equipment that could be needed to carry out the emergency response plan for water facilities.

9. Planning

Although planning is covered in several other topics (ie; source water protection, funding, emergency response) it was felt to warrant specific mention as well. Items of note are as follows:

- The present capital planning process leaves little possibility of a response to water facility needs. The small budget, large cost of water systems, and other competing capital items mean few water projects will get onto the regional priority list and fewer still will be built in the next couple of years.
- Some capital facilities like schools, are only considered based on five year demands. The planning horizon for new water and sewer infrastructure must be sufficient that a new plant can meet demand for many years. There is a concern that with a small regional capital budget there may be incentives to under-build facilities in order to maximize chances of funding being approved.
- Rightly or wrongly, the fact that systems need to be upgraded to meet population growth tend to be seen as confirmation that the planning horizon is too short and under-build incentives are at work;
- The role of water and sewer facilities is felt to be given insufficient consideration under the comprehensive community planning process and other program-based strategic plans.

CONCLUSION

The Panel faces a difficult challenge. So too do First Nation communities. Years of an inappropriate funding model with unclear performance standards and one-sided accountability, has led to facility shortfalls and underinvestment in capital and O&M costs. The threat to our members' health and safety is real and it is one that our leaders and staff take seriously.

Before any regulatory regime is to be implemented, the areas below first must be dealt with, in order to have a smooth transition to a regulatory regime.

1. Funding must be updated to meet the current and growing First Nation communities.
2. Roles-Responsibilities-accountability must be identified.
3. Ensure adequate Capacity within First Nation Communities and INAC.
4. Resources/Equipment must be up to date and backup equipment on site.
5. Liability has to be clearly identified, and appropriate steps in place to ensure the Health and Safety of First Nation Communities.
6. Jurisdiction, funding and planning have to be address to ensuring Source Water protection. Consideration must be given to additions to reserve for land lose due to protecting water sources.
7. Private wells/septic systems must be apart of any proposed regulations. The Federal Government cannot at its own will, pick and choose without consistency what will fall within its policy.
8. Emergency Preparedness must be properly funded and communities need to be educated on the importance of this process, also they need to know what to do in an emergency.

9. Capital Planning, including regional budgets must be updated to ensure that one project would not use all its money in one shot. INAC has to ensure that water and wastewater designs are included within comprehensive community planning designs.

We are concerned that others do not take this seriously and/or apply their own assumptions about the situation to it. This cannot underlie any new regulatory regime and is why we suggest that pre-requisite actions to fix problems with the old regime are paramount. This Panel has the opportunity to investigate and provide commentary and recommendations on the present system that will be taken seriously. And yes, this includes funding and investments. Only then can realistic options for a new regulatory regime have a chance to succeed.

The Panel is urged to consider the big picture of regulatory changes. The fiduciary context must be clear. The implications for on-reserve land use deserve attention. The funding process needs to be mapped out from appropriations to monitoring. And roles, responsibilities must be compatible throughout and all parties should be held openly accountable.

Transparency and fairness must rule and an impartial appeal system must work.

Wherever possible, First Nation communities should be the ones with tools to implement new regimes. This includes real authority to plan and to enter negotiations with nearby jurisdictions on harmonization measures.

This process will affect First Nations; therefore, First Nations must be included in every aspect of the discussions to implementation of proposed regulations.

In closing, we thank the Panel for this opportunity and wish you the best of luck in moving forward. At any time if you wish to speak with us about any item, please know that we will be available.