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**Panel on the Right to Water
Submission by the Council of Canadians
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The Council of Canadians would like to make a submission to the panel on the right to water at the Tenth Session of the United Nations Permanent Forum on Indigenous Issues for the members of the Permanent Forum to consider.

The Council of Canadians, which was founded in 1985, is Canada's largest member-based advocacy organization. We have tens of thousands of members and over 60 community-based chapters across the country. The Council of Canadians focuses on water, climate and trade issues from a social justice perspective. Maude Barlow, the National Chairperson of the Council of Canadians, also served as Senior Advisor on Water to the 63rd President of the United Nations General Assembly (2008-2009).

This submission focuses on the concerning situation of drinking water in First Nation communities in Canada and Canada's obligations to uphold the human right to water and sanitation under international law.

Drinking Water on First Nation Reserves

According to Health Canada, as of April 30th, 2011, there were 122 First Nations communities across Canada under a Drinking Water Advisory. Some of these communities have been under water advisories for over a decade.

In 2010, 49 communities were identified as 'high-risk,' which means the systems have "major deficiencies in several aspects, such as water source, design, operation, reporting and operator training or certification." In relation to wastewater systems, 61 communities were identified as high-risk, which means the systems have "major deficiencies in several aspects such as effluent receiver, design, operation, reporting and operator training or certification." However, the categorization of 'high-risk' is based on the quality of the water and wastewater systems. So this assessment does not include communities that are in need of water and wastewater treatment plants.

In the Public Health Agency of Canada's report Towards a Healthy Future: Second Report on the Health of Canadians, it is noted that "The incidence of waterborne diseases is several times higher in First Nations communities than in the general population, in part because of inadequate or non-existent water treatment systems."

Canada's International Obligations

On July 28, 2010, the United Nations (UN) General Assembly passed a resolution recognizing the right to safe and clean drinking water and sanitation. 122 countries voted in favour of the resolution, no country opposed the resolution and 41 countries abstained. The countries that abstained included several wealthy countries including Canada and the United States.

On September 30, 2010, the UN Human Rights Council passed a second resolution recognizing the right to water and sanitation. The then-UN Independent Expert on human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, noted the significance of the HRC resolution and said that "this means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding."

The Canadian government has had a long standing position that the human right to water does not exist. However, with these two UN resolutions the Canadian government is obligated to respect, protect and fulfill the human right to water and sanitation.

Canada's Funding for First Nations Drinking Water and Sanitation

The UN General Assembly's resolution "calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all."

Despite Canada's international obligations, the Canadian government has failed to address adequately the alarming condition of drinking water on First Nation reserves. On March 22, Stephen Harper's government released the proposed federal budget. Despite being released on World Water Day, it was a great disappointment for drinking water for First Nation communities. It failed to allocate any new funding for drinking water on First nation reserves. The only new funding for First Nations infrastructure included "\$22 million over two years to help First Nations ensure that the fuel tanks that power their essential community services...meet new environmental safety standards." In the 2010 Budget, \$330 million was allocated over two years for the First Nation Water and Wastewater Action plan (FNWWAP). The five key areas under the FNWWAP are: Infrastructure investments; Operations and maintenance; Training; Monitoring and awareness; and Standards, which means First Nations have to fund all of these five areas with a meagre \$165 million this year.

Federal funding for water on First Nation reserves has been atrocious in past years. The following are the government's commitments for First Nations water and water systems since 2003:

- In Budget 2003, \$600 million in new funding for the First Nations Water Management Strategy was committed to improving the quality of water and waste water treatment in First Nations communities.
- In Budget 2006, the federal government committed \$60 million over two years to support the Plan of Action for Drinking Water in First Nations Communities.
- In Budget 2008, an additional \$330 million over two years was committed for the First Nations Water and Wastewater Action Plan to improve access to safe drinking water on reserves (coinciding with the termination of the FNWMS).
- In Budget 2009, \$165 million was committed to build or upgrade 18 water and waste water infrastructure projects on reserves.
- In Budget 2010, \$330 million over two years was committed to continue the First Nations Water and Wastewater Action Plan to improve access to safe drinking water on reserves.

Based on these figures the federal government has spent under \$1.5 billion since 2003. In the 2011 Alternative Federal Budget, the Council of Canadians called for \$ 1 billion to build, upgrade and maintain water and wastewater infrastructure in First Nation communities.

It is important to examine how much \$165 million contributes towards water and wastewater to First Nation communities living on reserves. Costs for water and wastewater infrastructure depend on a number of variables including the size of community and type of facility. Indian and Northern Affairs Canada has conducted a comprehensive assessment on water and wastewater infrastructure. However, they have been slow to release the results. Hopefully, the assessment will include estimates of costs to build, upgrade and maintain. However, in the meantime, it may be useful to examine what \$165 million has purchased in past years. Under Canada's Economic Action Plan, \$165 million was allocated to build or upgrade 18 water and wastewater plants, which averages to about \$ 9.17 million per plant.

It is important to note that there have been consistently over 100 communities under water advisories. There are also communities with water so polluted with chemicals that boiling the water does not render it potable.

The Department of National Defence just ordered 1,300 laser-guided smart bombs estimated to cost \$130 million. It is also important to note that the Canadian government is poised to purchase 65 F-35 fighter jets estimated to cost over \$100 million each. So to be clear, the

purchase of two of these fighter jets would exceed what is being allocated to First Nation communities for drinking water. These purchases signal a need for a significant shift in the Canadian government's spending priorities to include First Nation communities.

An election was called shortly after the federal budget was introduced in March. However, Stephen Harper's Conservative party won a majority government on May 2, 2011. Therefore, they will likely re-introduce the federal budget with minimal changes shortly after the Throne Speech schedule for June 2, 2011. The Council of Canadians is calling for a significant increase in funding to First Nation reserves particularly for water and wastewater systems as well as a national water policy that recognizes water as a human right. However, while the water quality in some of these communities would improve with water and wastewater infrastructure upgrades or maintenance, some of the water advisories are in place because of pollution and toxic chemicals. The federal government also needs to include a comprehensive strategy to address water pollution and degradation on First Nation reserves in the national water policy.

A Bill on First Nations Drinking Water

On May 26, 2010, Bill S-11, An Act respecting the safety of drinking water on first nation lands (short title: Safe Drinking Water for First Nations Act), was introduced in the Senate of Canada. The Council of Canadians strongly supports the creation of legislation in consultation with First Nations that recognizes First Nation communities' right to water and ensures safe drinking water for First Nation communities. The stated aim of the bill was to improve the safety of drinking water in First Nation communities. While we commended the stated aim, we had several concerns regarding the bill which are outlined below. While Bill S-11 died on the order paper because an election was called, another bill similar to Bill S-11 will likely be introduced again by the Conservative government. We highlight these points because they were significant concerns for the Council of Canadians during the hearings on Bill S-11. We hope the Canadian government will consider these concerns when developing another bill on First Nations drinking water.

First, Bill S-11 did not stipulate funding commitments and funding roles for the three government departments responsible for water on First Nation reserves (Indian and Northern Affairs Canada, Health Canada and Environment Canada). With a lack of funding commitments, trends toward privatization in Canada will force some communities to privatize their water systems. Finally, in developing Bill S-11 many First Nation communities were not consulted and the bill did not require consultation in developing regulations on safe drinking water for First Nation communities.

Funding

While Bill S-11 created a regulatory framework for water on First Nation reserves, it did not allocate financial responsibility to any of the government departments currently responsible for water and wastewater on First Nation reserves. The failure to mandate funding roles and commitments is a glaring gap in legislation aimed at ensuring safe drinking water on First Nation reserves.

As highlighted by the Union of B.C. Indian Chiefs, “The lack of safe drinking water to First Nation communities is not caused by a lack of regulations. The lack of safe drinking water is caused by a lack of infrastructure, financial resources and technical expertise to ensure the safety of the water supply.”

The Expert Panel on Safe Drinking Water for First Nations stated that “adequate resources – for plants and piping, training and monitoring, and operations and maintenance – are more critical to ensuring safe drinking water than is regulation alone.” Although the federal government spends over \$1 billion in infrastructure including on water and wastewater systems, the Expert Panel pointed out that “the federal government has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities.” More specifically, the Panel noted that for the five-year capital plan covering 2002-07, “INAC officials acknowledge[d] that the federal government’s initial estimates of the capital needed to invest in First Nations water and wastewater systems turned out to be one-third to one-half of what was actually needed.”

The Expert Panel’s report outlined components of “What a New Law Might Look Like” and highlighted that, “Given resource concerns of First Nations, it would be useful, almost necessary for INAC’s funding role to be mandated in legislation.”

Indian and Northern Affairs Canada (INAC) has conducted a comprehensive assessment of First Nation water and sanitation systems, which they have been slow to release to communities. INAC claims that the assessment enables them “to develop an investment plan on water” including infrastructure, capacity, training, operation and maintenance requirements. As some have noted, it is puzzling why this assessment was not included in the discussion of Bill S-11. We hope that a future bill on First Nations drinking water will include this assessment.

Considering that funding is a key barrier to upholding the right to water for First Nation communities, we recommend that any bill aimed at ensuring safe drinking water for First Nations include clear funding roles and commitments.

Risk of Water Privatization in First Nation Communities

Subsection 4. (1)(c)(iii) of Bill S-11 stated that “regulations may confer on any person or body the power, exercisable in specified circumstances and subject to specified conditions, to require a first nation to enter into an agreement for the management of its drinking water system or waste water system in cooperation with a third party.”

We are extremely concerned that such a clause in a bill on drinking water in First Nations could open the door to water privatization in First Nation communities. This subsection would provide the Canadian government with the power to force a First Nation community to allow a private, for-profit entity to build, operate and/or manage its water and wastewater services. To be clear this clause alone does not guarantee the privatization of water and wastewater services in First Nation communities. However, given the lack of funding commitments in Bill S-11, this clause would have facilitated water privatization on reserves. Given federal financing trends and the negotiation of a trade agreement between Canada and the European Union, it is possible that the operationalization of such a clause in the current economic and political context in Canada will lead to privatization of water services by foreign corporations in some First Nation communities.

P3 Fund

In 2007, the Federal government began the Public Private Partnership (P3) Fund under the Building Canada Plan. The P3 Fund explicitly promotes privatization by offering massive subsidies to P3 projects. The P3 Fund accepts applications for provincial, territorial, municipal and First Nation P3 projects. In the last round of applications, there were 12 proposals for First Nations projects. Without explicit commitments for funding in a bill on safe drinking water on First Nation reserves, communities may be forced to enter into a P3 project even if they oppose treating water as a commodity because they lack financing to build, upgrade or maintain infrastructure for drinking water.

Canada-EU Comprehensive Economic and Trade Agreement

Canada and the European Union (EU) are currently negotiating the Comprehensive Economic and Trade Agreement (CETA). Canada and the EU concluded their seventh round of negotiations in April. CETA has been noted as the most far-reaching trade agreement to date. Drinking and sanitation services are being negotiated and if included, it would be the first time that drinking water services were included in a trade agreement. This is particularly concerning because the world’s two largest water multinationals, Suez and Veolia, are headquartered in

France. Water services in First Nation communities would also be open to European corporations. Water privatization around the world, which has resulted in price increases, job losses and decreases in water quality, have violated peoples' right to water.

Last December, the Council of Canadians released a report entitled *Public Water for Sale: How Canada Will Privatize Our Public Water Systems* warning of the potential impacts of the CETA on water systems in Canada. The report noted that, "The private sector will have the ability to enter First Nations as owners and operators of water and wastewater facilities due to a lack of infrastructure, resources and training within First Nations. Private operation of public facilities can lead to higher costs of service and user fees downloaded to First Nations resulting in further inequality. An added problem is that set-asides for First Nations companies, an important means for provincial-territorial governments to encourage economic development, may be lost to the CETA procurement chapter." CETA and Bill S-11 combined would have prevented First Nations from building, owning and operating their own water and wastewater plants.

If bill such as Bill S-11 passes without funding commitments, communities already lacking funding will have no alternative other than to turn to the private sector. People who cannot afford to pay for water services may be denied access to water thus violating their human right to water.

Section 4(1) of Bill S-11 contained clauses that enabled regulations to:

- (d) establish offences punishable on summary conviction for contraventions of the regulations and set fines or terms of imprisonment or both for such offences;
- (g) establish a system of administrative monetary penalties;
- (h) confer on any person the power to verify compliance with the regulations, including the power to seize and detain things found in the exercise of that power;
- (i) confer on any person the power to apply for a warrant to conduct a search of a place;

It is concerning that a community could be fined for violating regulations if the reason for the violation is lack of funding. We are also very concerned that subsections such as these could be used to fine, seize and detain things or search a place for non-payment of water services. It remains unclear as to why these subsections were included in a bill pertaining to safe drinking water for First Nation communities.

What was also troubling was that Bill S-11 could have been interpreted as eliminating responsibility or liability of third party. Section 4.(1)(o) stated that regulations may "establish

defences and immunities for, any person or body exercising a power or performing a duty under the regulations.”

If a community resorts to privatizing their water system because they lack funding, some members may not be able to pay for water services. Cut-offs for non-payment have been common in privatization cases as well as ensuing health problems, illnesses and even deaths. Section 4.(1)(o) may have absolved the private entity from responsibility for health problems, illnesses and deaths due to lack of clean drinking water. Based on the UN resolutions passed last year, the human right to water is legally binding. In 2006, the then-High Commissioner for Human Rights, Louise Arbour, released the Report on Indicators for Monitoring Compliance with International Human Rights Instruments and pointed to the State as primary duty bearers. However, the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, noted that corporations have a duty to respect human rights and to apply due diligence. In order to uphold the human right to water, any bill ensuring safe clean drinking water must outline clear liabilities and responsibilities for governments and private companies.

Lack of Consultation

Despite INAC's claim to have consulted with First Nations in developing Bill S-11, the Chiefs of Ontario and the Union of B.C. Indians Chief asserted that they were not consulted.

Bill S-11 also did not require consultation with First Nation communities in developing regulations. In fact, a couple of clauses affirmed that the regulations made under Bill S-11 would take precedence over aboriginal and treaty rights and First Nation laws or by-laws. Subsection 4. (1)(r) stated that the regulations may “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 may abrogate or derogate from those aboriginal and treaty rights.” In Section 6. (1) 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.”

The UN Declaration on the Rights of Indigenous People, which Canada endorsed last November, requires free, prior and informed consent to any decisions affecting indigenous lands and resources. Article 32 states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The lack of stipulations for free, prior and informed consent in Bill S-11 is troubling. Any bill or regulations involving safe drinking water in First Nation communities should be developed alongside First Nation communities and must include their concerns.

Conclusion

Water is a human right, public trust and global commons. We recommend the following:

- The Canadian government must significantly increase its funding to water and wastewater on First Nation reserves. The Council of Canadians calls for the Canadian government to allocate \$1 billion to build, upgrade and maintain water and wastewater infrastructure in First Nation communities.
- For any bill on safe drinking water for First Nation communities, we recommend that:
 - Funding commitments and roles must be stipulated.
 - The right of First Nation communities to build, own and operate their own water systems should be explicitly stated.
 - Clear liabilities and responsibilities for governments and private companies must be outlined.
 - A clause on free, prior and informed consent on any decisions affecting water systems should be included.

We thank the United Nations Permanent Forum on Indigenous Issues for considering our concerns on the human right to water in First Nation communities in Canada.