



ENGAGEMENT SESSION ON THE DEVELOPMENT OF  
A PROPOSED FEDERAL LEGISLATIVE FRAMEWORK FOR  
DRINKING WATER AND WASTEWATER IN  
FIRST NATION COMMUNITIES

**SUMMARY REPORT – SASKATCHEWAN REGION**

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Institute On Governance  
February 26, 2009**



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Location: Saskatoon, SK

Date: February 26, 2009

**Opening Prayer & Introduction:**

Participants were welcomed by Senator Melvin Little Crow from White Cap First Nation, who gave the opening prayer.

Laura Edgar, facilitator, followed the opening prayer by introducing the session objectives, which were outline in the agenda. See Appendix 2 for a copy of the agenda.

**Session Objectives**

- To discuss with First Nations and regional First Nation organizations a proposed federal legislative framework for drinking water and wastewater in First Nation communities
- To better understand the possible impacts of developing federal regulations that are comparable to provincial or territorial regulatory regimes but are adapted to meet the needs of First Nation communities.
- To discuss and compare compliance options

Following the introduction of the objectives, she asked all participants to introduce themselves. For a full list of participants see Appendix 1.

Laura then turned the floor over to Karl Carisse from INAC.

**Opening Remarks:**

Karl Carisse, INAC, opened by reiterating the goals of the session. The primary role of INAC at these sessions is to listen to people on the ground and to get the views of the community members. He also highlighted the other ways that people can engage in the process, by submitting comments directly to the Minister of Indian and Northern Affairs by April 17<sup>th</sup>.

He acknowledged that on the ground things are generally running well in Saskatchewan and there is great work being done. However, there is also a regulatory gap, and that is what the purpose of the meeting was to address.

Karl next described some previous non-legislative water initiatives and protocols, as well as some relevant studies. Non-legislative water initiatives have included the First Nations Water Management Strategy (2003), the Plan of Action for Drinking Water on Reserve (2006) and the First Nations Water and Wastewater Action Plan (2008). Current non-legislative protocols and guidelines include the *Protocol for Safe Drinking Water for First Nations Communities* and Health Canada's *Guidelines for Canadian Drinking Water Quality*.

In terms of studies, the Report of the Commissioner of the Environment and Sustainable Development (Office of the Auditor General, 2005) observed that First Nations drinking water regimes were operating under a 'regulatory gap' and that funding arrangements and administrative guidelines lacked important elements of a safe water management regime. The report recommended the development and implementation of a regulatory regime for drinking water on First Nations reserves comparable to those of provinces/territories. Next, the Expert Panel on Safe Drinking Water for First Nations (2006) was established to examine options for a regulatory framework. The process included a series of public hearings across Canada and the Panel received written submissions from First Nations and other stakeholders. The Panel determined that there were three viable options for the establishment of a regulatory framework: (1) Parliament could enact a new statute referencing existing provincial regulatory regimes; (2) Parliament could enact uniform federal standards and requirements; or, (3) First Nations could develop a basis of customary law that could then be enacted in a new federal statute. Finally, the Senate Report on Safe Drinking Water for First Nations (2007) recommended: (1) a national assessment of water systems on reserve; and, (2) that Indian and Northern Affairs Canada undertake a comprehensive consultation process with First Nations regarding legislative options.

Karl next spoke to the need for a legislative framework. Currently there is no legislation governing drinking water in First Nations communities. While the *Protocol for Safe Drinking Water for First Nation Communities* sets out clear standards for the design, operation and maintenance of drinking water systems, there is no legislative base to ensure compliance. In terms of wastewater, Environment Canada has been consulting on a framework for new wastewater effluent regulations under the existing authority of the *Fisheries Act*. However, these regulations would not deal with important aspects of wastewater treatment such as the design and commissioning of plants or the certification of operators.

Karl then offered a brief overview of the process so far; in the spring and summer of 2008 INAC and Health Canada officials met with regional First Nation organizations, and provincial and territorial officials to share information. Following the positive feedback and participation at these meetings, engagement sessions with all First Nations, regional First Nation Organizations and provincial/territorial officials were scheduled for winter of 2009.

The presentation highlighted the purpose of these sessions. First, the sessions are to provide First Nations with an opportunity to discuss and provide comments on the federal

government's proposed option of reproducing provincial/territorial regulations and adapting them, as required, to meet the needs of First Nations communities. This does not mean that jurisdiction would rest with the province or territories. Rather, the idea is to draw on and base legislation and regulations for First Nations on laws and regulations that currently exist in provinces and territories, adapted to meet the First Nations context. The legislation and regulations will be federal.

Second, the sessions will allow the Minister of Indian Affairs and Northern Development and the Federal Interlocutor for Métis and non-status Indians to receive input from First Nations, regional First Nation organizations and provincial/territorial officials on how best to address the regulatory gap. In addition, Regional Impact Analyses are being undertaken concurrently. These impact analyses will examine the implications of basing federal regulations on existing provincial/territorial regulations, suitably adapted for First Nation communities. Karl noted that the proposed legislation will be 'enabling' legislation; it will not have much detail, but will give authority to move forward with the development of regulations for water, wastewater and source water protection. Later, with regulations, there will be a lot more detail. Further engagement will be required at that time.

Participants in the Engagement Sessions will receive a report on their water engagement session, a wrap up report of all of the engagement sessions, the impact analysis developed for their region and a wrap up summary report of all of the impact analyses. The reports will all be tabled to the Minister which will summarize all of the comments raised by participants in the engagement sessions.

The presentation concluded with an outline of the proposed legislative and regulatory process. Karl reiterated the need to further engage with First Nation communities on the development of regulations, assuming that legislation is developed and passed by Parliament. The Engagement sessions will deal with access to safe drinking water, which is different from Aboriginal and/or Treaty Rights to water. INAC recognizes that claims to Aboriginal and/or treaty rights to water may need to be addressed at a later date in a different forum.

Following the presentation, participants posed questions and made comments, leading to the following points and a number of clarifications from officials.

**Comments from participants:**

- Participants were receptive to addressing the water situation in First Nations communities. Participants recognized that First Nations people are currently facing a gap in terms of legislation and regulation for drinking water on their lands.
- A representative from the AFN suggested that the options being proposed by the government may have an effect on treaty rights and on self-governing rights. The AFN commissioned a legal study and informed the Minister regarding the issues raised by the study but the engagement process has still continued. There is

concern that the consultations are focusing on a predetermined option, rather than allowing participants the chance to discuss all of the options.

- Participants generally agreed that they wanted stringent standards on reserve to ensure the quality of water. Some felt that a national approach to legislation and regulation might be more effective since there was a sense of inconsistency in standards across provinces and a concern that provincial standards might not be as high as federal standards.
- Participants expressed concerns about parity between First Nations and non-First Nations communities with respect to the quality of water, including the taste and odor of drinking water, but also with respect to training and wages for operators working in First Nations communities. Retention of workers continues to be a problem and increased wage parity with provincial systems might help increase retention.
- Multiple participants raised the issue of funding. Bringing water plants and systems up to the new standards would require increased funding to allow plants and other facilities to achieve and maintain the new standards.
- One participant raised the issue of the proximity of plants to schools and worried about the effect of the chemicals used in plants on children in communities. Similarly, a participant suggested that in addition to water and wastewater, these consultations needed to address the water being used in homes that was unsafe to drink but was still being used for cooking, washing and cleaning, and the possible implications of that water use for community residents.
- There were concerns expressed by participants about the need for immediate action; water is being contaminated right now. There is a need for a long term plan but also a plan for dealing with immediate issues.
- Participants highlighted the need for licensing and enforcement to ensure that operators are taking their role seriously and are fully qualified to do the job.
- One participant wanted to ensure that any legislation or regulation would not affect the ability of any First Nation to generate revenue in communities through taxation, user fees or alternative funding mechanisms.
- Participants also raised concerns about liability under new legislation. Many wanted to make sure that liability would not rest solely on operators who may not have all the tools or resources necessary to do their job.

### **Points of Clarification from Officials**

- Karl reiterated the goal of the session today was to listen and explore all of the options on the table. Although the government has proposed a preferred option, which carries a lot of benefits, the government is willing to listen to any proposal.
- Karl also highlighted the engineering assessment, which will help to fully establish the situation in communities. The assessment will address water being used for a range of purposes, including drinking water.
- The government is aware that with new legislation and regulation there will be a need for increased resources out to communities. The goal is not to set communities up for failure but to ensure that everyone has access to safe drinking water.

- Under the new system First Nations will still have the authority to look at options like user fees or taxation. The legislation will also help establish shared obligations, so less of the responsibility for systems will fall on operators. A regulatory regime will help identify and clarify liabilities.

## **Session One: Proposed Federal Legislation**

### Principal Discussion Questions:

- Will a regulatory regime for drinking water and wastewater, developed through federal legislation, improve the health and safety of First Nation residents and better protect the environment? If not, what is your preferred solution?
- Assuming federal legislation is adopted, should it contain the sixteen elements proposed by the Expert Panel?

The facilitator broke people up into small groups to discuss the questions for session one.

## **Comments from Participants**

### General

- There was consensus that legislation and regulations were important for First Nations communities. There was no consensus from groups about how the legislation should be constructed or what proposed option was preferable.
- One group wanted to see regulations regarding the decommissioning of wells included in the regulatory regime. This group also wanted to see a First Nation led appeals board.
- Legislation would need to address water, wastewater and the environment. One group felt that it would be important that any legislation deal with each of these issues separately.
- One participant also expressed concern over how legislation and regulation might affect self-governing First Nations, who have already developed constitutions of their own and established their own jurisdiction.

### Compliance and Jurisdiction

- Groups raised concern about the funding that would be necessary to ensure that water systems could meet the new legislation and regulations. Although stringent standards had support within the group there was some concern that many communities did not have the necessary funding to ensure their systems could be compliant with higher standards. The lack of necessary O&M was identified as a concern for some participants.
- Multiple groups raised issues regarding compliance, particularly about where liability would rest. Many were concerned that too much liability was placed on the operator in systems. This was especially relevant when dealing with system

design; it was important that systems be designed to meet or exceed standards so operators would have the right tools to ensure compliance.

- One group expressed concern about how provincial regulations might affect the jurisdiction and enforcement between First Nations communities and the province. There was also concern that the federal government had not sought the appropriate consent from communities in the process.
- With respect to an administrative tribunal, there was concern raised about where the laws of enforcement would stem from (provincial or federal) and whether there would be a First Nations administrative tribunal to undertake enforcement.

#### Support for Operators

- Groups were concerned about the required training, system design, human resources and third party support and oversight that would be required to allow systems to achieve the necessary compliance. Wage parity was also identified as important to helping train and keep qualified operators in communities.
- Many participants expressed a desire to have the elements in the regulatory regime address issues around operator safety, including a process or regulatory framework to deal with worker injury. Participants also wanted a system to measure operator exposure to chemical and regulation regarding levels of exposure.
- Currently, operators and technicians are being overseen by commissions that do not have the appropriate expertise to administer the systems. There is a need to develop a First Nations commission of regional agencies that would carry the authority of a regulatory commission. The authority would need to be separate from the regional agencies.

#### **Points of Clarification from INAC Officials**

- The goal of these sessions is to establish whether there is support to go forward with the proposed model of regulation. Once the support has been established, the process can move forward toward creating legislation and the subsequent regulations.
- The regulations will be federal regulations, passed by the federal government. The federal government will use the regulations that exist in the province as a guide or model for the creation of federal regulations, making the appropriate changes to ensure that the regulations are suitable for First Nations. Adaptations will be made in consultation with First Nations.
- Self-governing First Nations would have the opportunity to opt in to regulations that they felt were a good fit for their community.
- Issues regarding worker safety and health will have to be addressed as well. This is a theme that has been heard in other sessions and it is being raised in Saskatchewan as well.

The facilitator concluded the session by summarizing participant comments. Although there was general support for the regime there were also concerns about how best to make use of First Nations knowledge and expertise. Participants also raised issues around appeals, compliance, operator health and safety as well as funding issues.

## Session Two: Developing Federal Regulations comparable to Provincial/Territorial Regulatory Regimes

### Principal Discussion Questions:

- Assuming a transition period of several years, what are the pros and cons of basing federal regulations on provincial/territorial regulations, suitably adapted to meet First Nation needs?
- How should federal regulations be developed so that provincial standards are suitably adapted and the capacity needs of First Nations met?

Laura Edgar provided a brief presentation on the rationale for the preferred option as outlined in the Discussion Paper. Providing a similar legislative environment region by region:

- Is fair
- Provides the opportunity for collaboration
  - Training opportunities
  - Hiring contractors
  - Sharing of systems
- Provides a common base to evaluate effectiveness
- Allows for a ‘made in Saskatchewan’ solution

The facilitator asked participants to work in small groups and discuss the two questions proposed for this section.

### **Comments from Participants**

Participants identified the following pros to the proposed federal regulations:

- Regulation would offer higher standards for water quality and waste water treatment as well as an accountability framework to ensure that those standards are being met.
- Basing standards on provincial regulations makes sense because the regulations already exist. Time has already been spent creating these regulations and to some extent they have been proven to work.
- Using provincial standards as a basis for legislation will ensure that there is an equal playing field between First Nation and non-First Nation communities in Saskatchewan. These regulations should also help with disease control regulations under the *Health Act*.
- Using this approach will allow regulations to meet provincial and territorial standards which can be adapted to meet First Nation needs.
- Using provincial regulations as a basis should also make it easier for operators to get certification and training since training and certification will be based on the same standards.

Participants identified the following cons to the proposed federal regulations:

- There is a need to ensure that money is available to communities to meet the higher standards and to ensure compliance.
- Currently, provincial regulations do not address issues with wells or cisterns; regulations for such systems would need to be developed.
- The current provincial guidelines are not high enough; some participants would like to see stricter guidelines. One group also felt that the *Canadian Drinking Water Guidelines* were not stringent enough and that California's drinking water standards should be used.
- There was a lot of confusion regarding the distinction between a guideline and regulations or standards. Regulations must be enshrined in law while guidelines are not.
- Some groups were concerned that if they were unable to maintain compliance they would be at risk for losing funding
- Saskatchewan has two regulatory frameworks, one for larger systems and one for smaller systems, which need to be better understood.
- When provincial regulations were developed they did not evaluate the conditions on-reserve as part of the process. Using this framework would require considerable reworking to make the regulations suitable for First Nation communities.

Participant made the following comments regarding the process for establishing regulations:

Process and Involvement:

- The process should involve leadership at the band level and the technicians who are also working at that level. Engineering experts, health experts and technical experts should also be involved in the process. There is a need to engage Elders in the process to try and incorporate traditional knowledge and traditional ways.
- With regard to the engineering assessment process, several participants suggested that First Nations community members should have input in setting the standards for data collection to ensure that the data is of high quality and that the process is not haphazard. There should be a system in place to monitor where and when surveys are sent to communities and who is tasked with completing the surveys. Participants expressed concern about information control and felt that it was important to make sure that the appropriate people were being engaged in the process.
- Discussing the proposed legislation on a community-by-community basis would be helpful for engagement in the process.
- There is a need in communities to get more information out in advance of the meeting. The process should also allow time for participants to establish an adequate understanding of what is being proposed as well as the time to create a system for information sharing between communities and to share the information collected through the engineering assessment.

- There is a process of dialogue and consultation already established through FSIN. FSIN holds legislative assemblies two or three times a year. The process in place with FSIN could be used as a foundation to get the process going and ensure community participation.
- The group felt that in addition to the proposed model under discussion it was important not to exclude other potential regulatory regimes that have been developed in other communities or countries.
- The process should examine existing infrastructure, the current challenges faced by operators and any issues raised by the community.

#### Jurisdiction

- A participant raised the issue of the potential infringement on treaty rights and that the Chiefs need to discuss this in great detail. The process for developing regulations could involve people from the Lands and Resource commissions, made up of Chiefs and Grand Chiefs. These people could consent to a process that would not compromise jurisdiction with respect to treaty rights.

#### Funding and Other Resources

- Participants stressed the need to ensure systems and technicians have the necessary resources.
- One participant suggested that instead of operators having to take whatever training was provided for certification, they should be involved in planning their own training. That way operators could identify the training sessions that would be most helpful for them in doing their work.
- There would need to be a process whereby setting a high standard for water regulations would also allow communities to advocate for increased funding to help meet those standards.
- The process should also address source water issues. Many regulations have requirements around source water quality. In the case of some Saskatchewan First Nations, some water is being used the source water is not good. The regulations should address this issue as well.

### Session 3: Compliance Options

Principal Discussion Question:

What are the principal compliance options under federal legislation and what is your preferred approach?

Laura Edgar began this session by outlining possible compliance options described in the Discussion Paper and the elements of a sound compliance program.

Compliance means conforming with legislation and regulations. For water, there are usually two regulatory agencies: an environment department and medical officers of health.

A sound compliance program consists of:

- Promotion activities (public awareness, technical assistance)
- Inspections
- A progressive series of enforcement responses
- Process for follow up
- Penalties
- Redress mechanisms

Options described in the Discussion Paper include:

1. An independent First Nation organization
2. Contracting with the province/territory (to include a possible First Nation unit)
3. Federal Government organization(s)
4. A combination of the above

Following a brief presentation on compliance options, the facilitator broke the participants up into groups. Following are the issues raised by participants.

### **Comments from Participants**

- Some participants felt that a compliance system should have involvement from all three proposed options with the proper funding for each level. This would help with job creation and ensure that funding would not get lost in bureaucracy. Such a system would help to identify problems and solve them quickly, with responsibilities regarding compliance clearly identified.
- Many groups felt that a First Nations compliance body was the best option, because First Nations organizations would have the best understanding of First Nations issues. The group also felt that such a body may get better responses from the bands. One group felt that a body like the Saskatoon Tribal Council (STC) would be an ideal body for compliance as they are already involved. However, several small groups identified the need to keep the regulator (responsible for enforcement), operator and support mechanisms (such as Tribal Councils) separate.
- Another group suggested that an independent body could be created from the existing Operation and Maintenance committee and the Health committee. Each committee could provide one or two representatives who would sit on a representative, independent body tasked with compliance and enforcement.
- One group felt that because the federal government was already involved as a stakeholder it may be hard for it to also be responsible for enforcement.
- Another group initially felt that a federal government organization tasked with enforcement might be preferable, but after more debate the group decided that such a model might not sit well with some First Nation communities. The solution

might be more apparent when the regulatory framework is more clearly established.

- Any appeals process should be set up to correctly identify where failures were occurring in systems and who was responsible. This system would ensure that not all responsibility was placed with the operator
- One group asked a question about how First Nations that currently receive water from municipalities would be affected by new regulations. Would the municipality be under the authority of the new regulations?
- Participants also felt that it was important that water treatment plants and operators be brought up to the new standards prior to any enforcement being undertaken. Further, participants felt that it was important that the plants be designed so that they could meet the standards of a regulatory regime. Compliance must take into account many things: operators, plant structure, resource capacity and others.
- One group suggested looking at the Indian Gaming regulatory body that exists, which could be used as a model. That entity, which was set up through FSIN, has the role of overseeing all gaming on-reserve in Saskatchewan. The organization has regulations in place as well as an enforcement process and might be an effective model.
- One group suggested that an awareness campaign regarding compliance expectations was necessary.
- Another group asked questions regarding how regulations would be defined at a regional level across Canada with all First Nations, and how those regulations would reflect existing provincial standards. The group also raised questions about who is liable in situations where there is a lack of compliance
- Liability was a concern for many participants, particularly in communities which struggle with a lack of resources.

### **Comments from INAC Officials**

- When sharing water with a municipality, having different standards would be almost impossible to enforce. Consistency in regulations on and off-reserve is another reason it would be good to have the regulations for First Nations be similar to provincial regulations.
- The department is aware of the concerns around funding and knows that there will be more funding needed to ensure that communities can reach and maintain the new standards.
- Regulations will also bring shared obligations, which may reduce the liability of operators and help to ensure that all stakeholders are fulfilling their required roles.

### **Conclusions, Next Steps & Closing Prayer**

Karl Carisse from INAC thanked everyone for participating and engaging. He highlighted the need for engagement to provide legitimacy to the process. He again thanked Senator Little Crow for the closing prayer he had offered in the morning and wished everyone a safe trip home.

## Appendix 1: List of Participants

Name	Organization	Email Address
<b>First Nations Representatives</b>		
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## Appendix 2: Agenda

### AGENDA

#### ENGAGEMENT SESSIONS ON THE DEVELOPMENT OF A PROPOSED FEDERAL LEGISLATIVE FRAMEWORK FOR DRINKING WATER AND WASTEWATER IN FIRST NATION COMMUNITIES

##### Session Objectives

- To discuss with First Nations and regional First Nation organizations a proposed federal legislative framework for drinking water and wastewater in First Nation communities.
- To better understand the possible impacts of basing federal regulations on provincial/territorial regulations, suitably modified to meet the needs of First Nation communities.
- To discuss and compare compliance options.

<b>8:00 – 9:00</b>	<b>Registration &amp; Continental Breakfast</b>
<b>9:00 – 9:15</b>	<b>Opening Prayer &amp; Introductions</b> <ul style="list-style-type: none"><li>▪ meeting objectives &amp; agenda - facilitator</li></ul>
<b>9:15 – 10:15</b>	<b>Opening Remarks &amp; Context</b> <ul style="list-style-type: none"><li>▪ Regional First Nation representative</li><li>▪ Karl Carisse, INAC</li></ul>
<b>10:15 – 10:30</b>	<b><i>Health Break</i></b>
<b>10:30 – 12:00</b>	<b>Session #1: Proposed Federal Legislation</b> <ul style="list-style-type: none"><li>▪ small group discussions &amp; plenary</li></ul>
<b>12:00 – 1:00</b>	<b><i>Lunch</i></b>
<b>1:00 – 2:30</b>	<b>Session #2: Basing Federal Regulations on Provincial/Territorial Regulations</b> <ul style="list-style-type: none"><li>▪ small group discussions &amp; plenary</li></ul>
<b>2:30 – 2:45</b>	<b><i>Health Break</i></b>
<b>2:45 – 4:15</b>	<b>Session #3: Compliance Options</b> <ul style="list-style-type: none"><li>▪ presentation &amp; plenary</li></ul>
<b>4:15 – 4:30</b>	<b>Conclusions, Next Steps &amp; Closing Prayer</b>

## **PRINCIPAL QUESTIONS FOR EACH SESSION**

### **Session #1:**

#### **Proposed Federal Legislation**

Will a regulatory regime for drinking water and wastewater, developed through federal legislation, improve the health and safety of First Nation residents and better protect the environment? If not, what is your preferred solution?

Are the elements in the Discussion Paper, as proposed by the Expert Panel, the appropriate ones to include in federal legislation?

### **Session #2:**

#### **Basing Federal Regulations on Provincial/Territorial Regulations, with modifications to meet the needs of First Nation communities**

Assuming a transition period of several years, what are the pros and cons of basing federal regulations on provincial regulations, suitably modified, to meet the needs of First Nation communities?

How should federal regulations be developed so that provincial regulations are suitably modified and the capacity needs of First Nations met?

### **Session #3:**

#### **Compliance Options**

What are the principal compliance options under federal legislation and what is your preferred approach (the Discussion Paper outlines several possible options)?