Environmental Protection: Challenges and Prospects for First Nations under the *First Nations Land Management Act*

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Executive Summary

The *First Nations Lands Management Act* received Royal Assent in June 1999 and brought into effect the Framework Agreement on First Nation Land Management. Among other things the Agreement and the Act gave broad jurisdiction to the First Nations opting into the Agreement to develop a land management regime, including law making powers. However, First Nations under the *First Nation Land Management Act*, who wish to exercise their law making powers in this area, face some significant challenges.

Laws governing the provision of local services or those dealing with environmental protection tend to be regulatory in nature, complex and costly to develop, implement and enforce. The current regulatory regime for environmental management that applies to First Nations has many gaps, and while the federal government is working on addressing several of these gaps, including fuel tanks and effluent standards, many more remain.

It is important to note that the gap is not just about 'a set of rules.' An effective environmental management regime must also include a number of other elements, including approvals, standards, monitoring and inspection, enforcement, mechanisms to encourage compliance and raise public awareness, and the capacity within the First Nations to do all of these things.

For those First Nations who wish to undertake a regulatory approach to environmental management, there are a number of options available, including:

- Keeping the regulatory function with the First Nation;
- Delegating the regulatory function to a special purpose, aggregated First Nation body;
- Contracting with the province (or a regional/municipal government);
- Contracting with the province & including a special First Nations unit;
- Doing nothing & waiting for the federal government to fill voids; or,
- Adopting some combination of the above.

In exploring the opportunities and challenges associated with each option, there are a number of criteria that can be applied. Keeping in mind that the overall goal of the *FNLMA* and EMAs is to meet First Nations environmental management needs, First Nations may wish to consider a number of criteria, including separation of regulator and operator, economies of scale, ability to reflect First Nation values, harmony with surrounding jurisdictions, liability, capacity and pace of change, among others, when analyzing the various options and considering which is the best answer for them.

In the end it is likely that a combination of options will best serve the interests of First Nations, their citizens and their neighbouring jurisdictions.

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I. Introduction

Background

The *First Nations Lands Management Act* received Royal Assent in June 1999 and brought into effect the Framework Agreement on First Nation Land Management. Among other things the Agreement and the Act gave broad jurisdiction to the First Nations opting into the Agreement to develop a land management regime, including law making powers.

Laws governing the provision of local services such as wastewater or those dealing with environmental protection (e.g. solid waste management, fuel storage etc.) tend to be regulatory in nature and complex. This suggests that First Nations under the Act, who wish to exercise their law making powers in these areas, face formidable challenges. Not the least of these challenges is whether a government can successfully be both a regulator and operator in a particular area such as the provision of wastewater services. Another significant challenge is enforcement. Finally, regulation is a complex governance function requiring significant experience and capacity.

These and other challenges suggest the benefit of exploring both the challenges of exercising law-making authority that involves regulation and possible options for meeting them.

Purpose

The paper has three key objectives: (1) to describe existing regulatory voids and the law-making powers under the Act relating to environmental protection that might fill these voids; (2) to explore the nature of the regulatory function; and (3) to provide a description and analysis of regulatory options that are available to First Nations under the Act.

Organization

This paper is organized into six parts. Following the introduction (Part I), Part II outlines the current environmental management gap facing First Nations, including why it exists and the implications of the gap. Part III then provides a brief overview of the *First Nations Land Management Act* and Agreement, while Part IV explores the principles, opportunities, challenges and complexities of the regulatory function. Part V provides options for First Nations to consider, should they choose a regulatory approach, and some possible criteria for evaluating each option. Finally, Part VI provides some conclusions.

II. The Environmental Management Gap

Why a gap?

Off-reserve a comprehensive regime of laws, regulations and other public policy measures help to ensure effective environmental and risk management. The regime is primarily the responsibility of federal and provincial governments, with local governments playing a key role in implementation and other players, including academia, industry, NGOs and consumers, having some influence.

As one recent study commissioned by Environment Canada notes:

"Responsibility for environmental management off-reserve is divided between the federal and provincial governments, with the provinces playing important roles flowing from their responsibility for natural resources as well as their jurisdiction over most local issues, including facility licensing and waste management. Most of the federal government's environmental authority focuses on issues of national concern, such as toxic substances, cross-border pollution, and protection of fisheries and marine areas."[1]

On-reserve, however, First Nations residents do not benefit from the same level and types of protection, primarily because of gaps in the environmental management regime that applies on-reserve due to issues related to jurisdiction. The Environment Canada study states the dilemma succinctly: "The problem with respect to federal land in general and reserves in particular is that the extensive regime of provincial and municipal environmental and natural resource laws and regulations does not apply on these lands, including reserves. As such, except where the federal government has replicated provincial requirements in a parallel regime for federal lands, a "gap" exists in the scope of the rules that apply on reserve compared with what applies off-reserves." Some uncertainty continues to exist about whether provincial laws related to land apply on reserve; until this situation is clarified it is highly unlikely that a province would choose to try and apply provincial laws on First Nations land.

The environmental management gap on reserves is the result of the interpretation of the application to reserves of federal and provincial environmental laws. Section 91(24) of the *Constitution Act* 1867 specifies that the legislative authority for "Indians and lands reserved for Indians" rests with the Parliament of Canada. Section 88 of the *Indian Act* specifies that all provincial laws of general application "are applicable to and in respect of Indians in the province." However, courts have ruled that because s.88 does not explicitly refer to "lands reserved for Indians", it does not enable provincial laws of general application to apply to reserve lands.[2] As a result, provincial laws relating to lands and their use may not apply of their own force.[3]

[1] Stratos, "The Environmental Management Gap on Reserves: An Overview of the Gap and An Assessment of Options to Resolve It," 2004. p. 3.

[2] Stratos, p. 2.

[3] Note that there is some disagreement as to whether provincial laws related to land and its use can be applied on

It is important to note that the gap is not just about 'a set of rules.' An effective environmental management regime must also include a number of other elements, including approvals, standards, monitoring and inspection, enforcement, mechanisms to encourage compliance and raise public awareness, and the capacity within the First Nations to do all of these things.

Typical Provincial Environmental Regimes

Most provincial environmental regimes address a range of environmental risks, including environmental protection, resource management, environmental assessment and health, safety and transportation.

In the area of environmental protection, most provinces control a wide range of contaminant and pollutant releases. Provincial regulations for air emissions tend to cover all significant process emissions and emissions from open burning and dust, and generally include a permitting process for discharges and releases. To protect water sources, most provinces regulate discharges to water bodies from sewer and septic systems. Most provinces also regulate releases to land that could result in impacts to the environment, including requirements related to contaminated sites, solid waste and hazardous waste landfills. Many also regulate the use and discharge of nutrients (particularly from agricultural operations), pesticide use and storage, and in some cases specific substances (e.g. PCBs).[4]

Provincial land use, resource development, conservation and management rules generally address issues related to land use, water use and natural resource extraction/harvest/use. All provinces have land use zoning and approval processes in place, usually administered at the municipal level. In most cases, these processes operate within a broader land use planning framework. Regulations for water use withdrawals (both surface and groundwater) usually require a permit. Most provinces also regulate other resource use and extraction activities (minerals, aggregates, forests, fisheries, etc.), as well as the environmental impacts of agricultural practices. [5]

The jurisdiction over environmental assessment requirements is shared between the federal and provincial governments. Most provinces have limited environmental assessment (EA) requirements that apply to some projects to help anticipate and avoid or mitigate the adverse environmental impacts of new developments. However, provincial requirements related to land do not apply on reserves. Federal requirements under the *Canadian Environmental Assessment Act* (CEAA) apply to proposed developments on reserves only where federal resources[6] or regulatory approvals are involved with the project.[7]

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reserve. However, until the issue is clarified and resolved, it is highly unlikely that a province would choose to try and apply provincial laws on First Nations land.

[4] Stratos, p. 4.

[5] Stratos, p. 4.

[6] Financial resources or assistance, such as loan guarantees, as per section 5 of the Act

[7] Stratos, p. 5.

The Workplace Hazardous Materials Information System (WHMIS) regime for managing hazardous materials in the workplace and the rules regarding the transportation of dangerous goods are both nationally consistent and implemented by federal and provincial laws.

Key Current and Upcoming Federal Laws Relevant to Environmental Management on Reserve

Various federal laws, which apply throughout Canada, address aspects of environmental management. These Acts also apply on reserve, though may be subject to limitations contained in self-government arrangements. Among the most significant of these Acts are the *Canadian Environmental Protection Act* 1999 and its regulations, which address various environmental issues of national concern, including toxic substances, nutrients, the export and import of hazardous wastes, and international air and water pollution, and the *Fisheries Act* includes the general prohibition on deposit of deleterious substances into fish bearing waters. Other federal laws, including the *Transportation of Dangerous Goods Act*, the *Canadian Environmental Assessment Act*, the *Species At Risk Act*, and the *Migratory Bird Convention Act*, also apply.[8]

It is also worth noting that, while Section 88 of the *Indian Act* provides that all provincial laws of general application "are applicable to and in respect of Indians in the province", it does not necessarily enable provincial laws of general application that relate to lands. For this reason, provincial regimes related to environmental protection and natural resource conservation do not, in practice, currently apply on reserves.

There are several regulations under the *Indian Act*, including the *Indian Reserve Waste Disposal Regulations*, the *Indian Timber Regulations* and the Indian *Mining Regulations*, which provide very limited rules for some aspects of environmental management. However, these rules have had a negligible impact due to human resource capacity issues, limited resourcing, ineffective monitoring and enforcement, and small penalties that provide no incentive to comply. Under Section 81 of the *Indian Act* First Nations are authorized to develop by-laws, but their ability to effectively implement an environmental management regime through this by-law power is extremely limited.

The federal government also uses non-regulatory measures, such as contracts and funding agreements, to ensure effective environmental management. For example, any projects undertaken by a First Nation that are funded in whole or in part by INAC or another federal department must undertake an environmental assessment as part of the approval process.

Finally, there are a number of current federal initiatives to address some of the current gaps. First, a new fuel tank regulation under the *Canadian Environmental Protection Act* will come into force in January 2008. Second, Environment Canada is leading work on the development of

[8] Stratos, p. 12.

new effluent standards for wastewater under the *Fisheries Act*. Consultations related to this initiative are underway.

The Scope of the Gap and Implications of these Voids

Although federal legislation and regulations address some aspects of environmental management, some significant gaps result from provincial environmental laws not applying on reserve. Specifically, in terms of environmental protection, the gap includes wastewater; solid waste; contaminated sites; hazardous waste; some air emissions; and pesticide use and storage. In the area of resource development, gaps exist in regulations related to water withdrawal, source water protection, and all natural resources (with the exception of fish habitat, and oil and gas). There are gaps in environmental assessment, particularly if there is no federal funding trigger. Finally, there are gaps in effectively addressing health, safety and transportation, including dangerous goods, ferries and docks, building codes and public buildings.

The implications of these voids are significant, and can include undesirable environmental impacts, risks to human health, and the undermining of economic development which might otherwise occur if an effective environmental management regime existed. In addition, the lack of a clear and comprehensive regime increases the legal liabilities linked to regulation and leaves First Nations residents without the protection to themselves and their communities that other non-reserve communities enjoy. Finally, the gap creates a governance challenge for First Nations, who must consider options and weigh the risks, develop and implement policies, and provide oversight and direction on a range of diverse and complex environmental management issues resulting from their contractual obligations.

III. The *First Nations Land Management Act* and Agreement

The Framework Agreement on First Nation Land Management concluded on February 12, 1996, and the *First Nations Land Management Act* became law on June 17, 1999. The Act and Agreement provide the opportunity for participating First Nations to fill the principal elements of the environmental management void, but the challenges of developing and operating an effective regulatory regime – a critical element of any management regime - should not be underestimated.

Law Making Powers Under the Act

The *First Nations Land Management Act* ratified and brought into effect the provisions outlined in the Framework Agreement on First Nations Land Management. In particular, sections 20(1) and 20(2) outline specific powers relevant to environmental management.

Section 20 (1) of the Act provides for the power for First Nation to enact laws respecting:

a) Interests in and licenses in relation to First Nation land;
b) The development, conservation, protection, management, use and possession of First Nation land; and,
c) Any matter arising out of or ancillary to the exercise of that power.

Section 20 (2) provides for particular powers, including:

a) The regulation, control or prohibition of land use and development including zoning & subdivision control;
b) Subject to section 5, the creation, acquisition & granting of interests in and licenses in relation to first nation land and prohibitions in relation thereto;
c) Environmental assessment and environmental protection;
d) The provision of local services in relation to first nation land and the imposition of equitable user charges for those services; and,
e) The provision of services for the resolution of disputes in relation to first nation land.

Points (a), (c), (d) and (e) are of particular interest in terms of environmental management, as they provide the opportunity for First Nations to address many of the current regulatory gaps, including environmental protection, environmental assessment and the many issues, including wastewater and solid waste, related to land use. This section also give First Nations the power to provide services related to the land and to charge users fees – something that all other governments do to a greater or lesser extent to cover the costs associated with service delivery. Finally, the Act provides First Nations with the opportunity to create and provide services for dispute resolution, a key element of any effective regulatory regime.

Other Key Provisions and Aspects of the Act and Agreement

There are a number of additional provisions under the Act and Agreement that are important to the issue of environmental management, provisions relating to delegation, enforcement and standards. First, section 18(3) states that any First Nation can delegate its powers to manage First Nations land. For example, power could be delegated to a Tribal Council or other specially-created First Nations organization, to a provincial government or to another body. Section 20 (3) indicates that laws created by First Nations may provide for "enforcement measures, consistent with federal laws, such as the power to inspect, search and seize and to order compulsory sampling, testing and for the production of information."

Finally, section 21 (2) requires that the standards and enforcement measures (including penalties) "must be at least equivalent in their effect to any standard established and punishment imposed by the laws of the province." The term "equivalent in their effect" is of particular importance; it indicates that while standards and enforcement may be adapted to reflect a First Nations context, the impact of the standards and enforcement measures must be the same.

Environmental Management Agreements

In addition to the above provisions, section 21 (1) requires that before exercising law-making power respecting environmental protection, "...a First Nation shall enter into an agreement with the Minister and the Minister of the Environment … in accordance with the Framework Agreement." The Framework Agreement on First Nations Land Management requires that First Nations enter into Environmental Management Agreements (EMAs) with the federal government before they may take on the powers outlined in the *FNLMA*. An EMA is a plan on how the First Nation will enact environmental protection legislation to include timing, resources, inspection and enforcement requirements and to identify areas "essential" for each First Nation.

The Agreement also outlines a number of characteristics and requirements for EMAs, each plan must include provisions for periodic review and updating. Further, federal laws will prevail if there are inconsistencies with First Nations laws. The Agreement also provides the parties to invite the provinces to be invited to participate. Finally, the Agreement identifies four areas that were considered essential for all First Nations (at the time of the signing of the Agreement). These four essential areas are:

- Solid waste management
- Fuel storage tank management
- Sewage treatment and disposal
- Environmental emergencies

Note that the list of essential areas in no way limits a First Nations from addressing additional areas of concern specific to its interests and needs.[9]

IV. Environmental Management and the Regulatory Function

There are a number of tools available to First Nations to support environmental management. These tools include land use plans, zoning bylaws, environmental assessments and environmental audits. In addition, a range of site-specific tools are available to manage risk, including land tenure instruments like leases and permits, or requiring letters of credit or bonds from contractors and licensees. Guidelines and procedures can be developed (though may not be legally enforceable) and raising community awareness in areas where they are engaged with the environment (eg. recycling) can be effective. Finally, legislation can be an effective way to address environmental management.

Why and when First Nations might need Legislation

[9] Note that drinking water is considered to be primarily an issue of health and safety, and as such is not covered under the *FNLMA*.

While legislation may not always be the preferred approach, it can be particularly effective when there is a need to clearly define the roles, responsibilities and powers of all the key players. In addition, legislation has the ability to give inspectors and investigators the police-like powers they require to inspect and search and seize. Legislation will also likely be the preferred option if there needs to be a legal basis for enforcement, such as enforceable orders to rectify problems and penalties, or if a greater variety of enforcement instruments are needed (oral warnings, written warnings, orders to rectify problems, the power to shut down a facility, fines & other penalties). Finally, legislation can be effective tool for addressing areas where they may be concerns about inappropriate political interference, as laws leave little room for personal choice and penalties can be an effective deterrent.

Despite the many strengths and advantages to a legislative approach, there are also some limitations and challenges. First, developing legislation takes time, and effort is also required to keep it up-to-date. Because legislation is time consuming to develop and implement, it can also reduce the flexibility to respond to changing conditions. Finally, legislation can be costly, both in terms of development and implementation, as it requires a range of capacities, including inspections, enforcement and appeal mechanisms.

Key Elements of a Regulatory System

Effective regulation is all about making choices and exercising discretion. There are seldom enough resources to inspect or monitor the range of activities to be regulated. Choices have to be made. Further, regulators exercise discretion in choosing among the range of sanctions from warning letters to civil or criminal proceedings to suspension of licenses. Such discretion, if not carefully managed, can lead to serious inequities or worse, corruption.

The essence of a regulatory system is about managing and reducing risk to acceptable levels to protect the public or the environment. Much of what regulatory agencies do is preventive. Specific concrete results are hard to demonstrate. On the other hand, the level of risk can never be reduced to zero. 'Accidents' may occur, leaving the agency open to immense criticism and even legal action for 'regulatory negligence'.

The principal elements of a regulatory system are normally outlined in legislation to ensure among other things that the powers to be exercised by the regulatory authority have the force of law. It is also important to note that First Nations have their own unique approaches to regulation, particularly with regard to compliance activities, and these need to be considered in the design of the regulatory system.

There are a number of elements to any regulatory system. The overarching element is the key objective that the regulatory system is trying to achieve. Such an objective may also be complimented by a statement of the core principles[10] that will guide the operations of the regulatory system. Defining the **organizational structure** for accomplishing the regulatory

[10] For example, one of the core principles of Alberta Environment is "legislative requirements will be clear, enforceable and widely known within the regulated community and the public.", Alberta Environment, June 2000

objective - to include the roles, responsibilities and powers of the various players - is another important step in developing a regulatory system.

Compliance is critical to the effectiveness of any regulatory system and consequently a well-designed **compliance program** is a first order priority. Such a program will generally include public awareness activities and efforts to ensure voluntary compliance, inspections by the regulator or an independent inspector, a progressive series of enforcement responses (including penalties outlined in legislation) and a process for follow-up. An independent **redress mechanism** to address concerns related to the compliance program is also essential to ensure that the program is perceived to be fair and equitable.

In addition to a redress mechanism, **public reporting** is another essential element to ensure not only public awareness of the policies and regulations, but also the transparency and accountability of the regulatory systems. Finally, an **evaluation** of the entire regulatory framework on a periodic basis is useful to give confidence that the core principles and policy objectives that form the base of the regulatory regime are being respected.

Examples of Regulatory Systems, including standards, penalties and associated costs

Example of a Regulatory Regime for Wastewater

While every regulation is a reflection of the jurisdiction it was created in, the regulations for wastewater in Ontario provide a good example of the complexities and costs of a regulatory regime.

In Ontario, the regulatory regime for wastewater applies a multi-barrier approach, and includes standards for:

- System design and approval
- Treatment of wastewater
- Sampling and testing of wastewater
- Maintenance of equipment
- Hauled sewage
- Record keeping
- Regular reporting
- Certified operators
- Inspections
- Enforcement
- Redress mechanisms

This multi-barrier approach is defined in a series of Acts and Regulations. For example, the *Ontario Water Resources Act* addresses the duties, powers, roles and responsibilities of those involved in the collection and treatment of wastewater, wastewater collection and treatment plant

owners and/or operating authorities, operators and inspectors. Subjects covered include sewage works approvals, fees, inspections, enforcement and penalties.

The *Licensing of Sewage Works Operators* regulation under the *OWRA* identifies the certification and ongoing training requirements for operators of Class I-IV wastewater treatment and wastewater collection systems. This regulation also outlines the criteria for the 4 classes of wastewater collection facilities and 4 classes of wastewater treatment facilities.

Under the *Environmental Protection Act*, the *Sewage Systems* regulation lays out standards common to all sewage systems and construction and operation standards for each of 10 types of sewage systems (also referred to as "classes" of systems in the regulation). These 10 classes range from a chemical toilet (class 1) to sewage works dealt with under the *Ontario Water Resources Act* (classes 9 and 10).

The *Building Code Act, 1992* and its related regulation (O.R. 350/06) address construction requirements for most individual sewage systems. Finally, a number of additional regulations, including the *Fees-Approvals*, the *Fees-Certificates of Approval*, the *General-Waste Management*, and the *Discharge of Sewage from Pleasure Boats* regulation, are also part of the regulatory regime for wastewater in Ontario.

It is worth noting that the Ontario Ministry of the Environment also applies at least six guidelines for wastewater, including *Guidelines for the Design Sewage Treatment Works* (MOE, July 1982), the *Manual of Policy, Procedures and Guidelines for Onsite Sewage Systems* (MOE, May 1982), and the *Recommended Standards for Wastewater Facilities* (GLUMRB, 1997).

Examples of Penalties

Under the *Safe Drinking Water Act* of Ontario, every corporation convicted of an offence under the *Act* is liable, on a first conviction, for each day on which the offence occurs or continues to occur, to a fine of not more than $100,000. In terms of wastewater, the *Ontario Water Resources Act* allows for an administrative penalty of a maximum of $10,000 per day.

In Saskatchewan, offences, including knowingly operating a waterworks "in contravention of the operational requirements set out in the operating permit for the waterworks or in the regulations," are punishable by fines of up to $1,000,000 and possible prison time. For more minor contraventions that do not involve the courts, *The Water Regulations* prescribe administrative penalties ranging from $1,000 to $5,000

Examples of Regulatory Costs

While the costs associated with regulation can vary greatly depending on the function being regulated, the costs associated with water systems in Ontario and Saskatchewan are illustrative.

In Ontario, there is one inspector for every 7-10 facilities, while in Saskatchewan there is one inspector for every 40-50 systems. The significant difference between the two provinces can be linked to population, population density, and the relative complexity of systems in each province. Nonetheless, it is clear that provinces seek to gain as many economies of scale as possible, in large part due to the costs associated with inspections.

In Ontario, the salary level for inspectors ranges from $63,000 to $75,000 annually, with 13 % for benefits, and additional costs associated with accommodation, training and other personnel costs. Saskatchewan's salary range is a very similar $59,000 to $72,000 (plus benefits), and Saskatchewan stated that annual costs for training were $3,000 per person.

There are also the travel costs associated with inspections. The average cost for an inspection site visit is $500 if it does not include flying to a fly-in location, and where a fly-in location is involved, an additional cost of $1,500 per visit is incurred.

Finally, an inspection staff must be supported by a number of other employees providing scientific, legal, supervisory and management services, support services, and more sophisticated inspection and enforcement services. For example, Saskatchewan's 20 inspectors are supported by a further 13.7 FTEs (a 68.5% increment over the number of inspectors).

V. Options for First Nations Under the *FNLMA*

The Options in Brief

Keeping in mind that the overall goal of the *First Nations Land Management Act* and EMAs is to meet First Nations environmental management needs, there are at least six options available to First Nations for exercising their regulatory responsibilities.

1. Keeping the regulatory function with the First Nation;
2. Delegating the regulatory function to a special purpose, aggregated First Nation body;
3. Contracting with the province (or a regional/municipal government);
4. Contracting with the province & including a special First Nations unit;
5. Doing nothing & waiting for the federal government to fill voids; or,
6. Adopting some combination of the above.

Prior to exploring each of these options in turn, it is useful to consider what criteria might be useful for evaluating them.

A Tool for Evaluating the Options

In exploring the opportunities and challenges associated with each option, there are a number of criteria that can be applied. Below is a list of possible criteria the Institute On Governance developed to analyze the various options.

1. **Separation of regulator and operator** - Good governance requires that the power of the regulator, including inspections, enforcement and the issuing of penalties, be separate and independent from the role of operator to avoid conflict of interest. The operators of sewage treatment plants, solid waste disposal sites etc. cannot and should not be expected to regulate themselves. The extent to which an option supports separation of regulator and operator must be a criterion for evaluating the options.

2. **Economies of scale** – Given the significant costs associated with a regulatory regime, achieving cost effectiveness through economies of scale is very important. Achieving economies of scale can also help groups access the expertise they need to effectively regulate, particularly if that expertise is in demand or in short supply. Therefore, an option's ability to achieve economies of scale should be a criterion for evaluation.

3. **Ability to reflect First Nation Values** – While some elements of a regulatory regime, including elements like effluent standards and rules regarding the disposal of solid waste, may be readily transferable to a First Nations context, other aspects of regulation, including enforcement and penalties, benefit from adaptation. Therefore, an option's ability to reflect First Nation values (where these differ from the mainstream) must be considered.

4. **Harmony with Surrounding Jurisdictions** – Harmony with surrounding jurisdictions is a requirement under the Framework Agreement on First Nations Land Management. This does not mean that the regulations must be exactly the same, but they must have the same affect as those of surrounding jurisdictions. On a very practical level, using the same standards as surrounding jurisdictions, even if some of the processes and procedures are different, allows for easier hiring of contractors (and possibly inspectors) to work on reserve, since they will already understand the standards to be met. Another advantage is that First Nations can access existing training and education programs within their provinces. Harmony with surrounding jurisdictions must therefore be a criterion for evaluation of the options.

5. **Regulatory Liability** – As noted earlier, there is no way to reduce risk to zero. The government or organization that undertakes regulation also takes on the risks and liabilities associated with regulation.

6. **Governance Capacity** – As First Nations are governments, the extent to which a particular approach builds the governance capacity of First Nations or bolsters future self-government initiatives should be a criterion.

7. **Speed at filling the Gap** – Given the many gaps that currently exist, and the risks to environmental and human health associated with them, the pace at which gaps can be filled should be considered a criterion for evaluating the options.

An Analysis of the Options Using the Tool

The following analysis is the Institute's assessment of the options, using the criteria proposed above. The analysis does make a number of generalizations in an effort to find the common ground among all key identified areas of environmental management; it is therefore possible that an analysis of the options for a specific function, such as zoning, might have a somewhat different result than what is outlined here.

Note also there are six options, and the rating we give for each criteria is relative to the other options, and is not an absolute.

Option 1 – Regulatory Control is with the First Nation

In this option, the First Nation has responsibility for the regulatory function, including approvals, inspections, enforcement and penalties. This option has a number of strengths, including its ability to reflect First Nation values and its ability to build First Nation capacity and support self-government. However, the option also presents a number of significant challenges. Of all the options, this option has the least opportunity for creating economies of scale. In addition, while it does build capacity, the pace at which the environmental management gap can be filled is likely to be slow. This presents a significant risk to both the environment and human health, a risk that the First Nations assume because liability under this option primarily remains with the First Nation. There are also challenges associated with achieving harmony with surrounding jurisdictions. Since a First Nation would have the power to regulate itself, it could decide on different approaches and standards than those of jurisdictions that surround it, creating inconsistencies and potentially significant implementation challenges. That said, it is also possible that First Nations may choose to incorporate key elements of provincial regulations, thereby increasing the potential for harmony.

Finally, the ability of this option to achieve separation of regulator and operator will vary by activity. If the First Nation is the operator, as in the case of wastewater facilities for example, then they should not also be the regulator - this would create an inherent conflict. However, in areas where the First Nation is not the operator (such as zoning) this option may be viable, as businesses and others could be regulated by the First Nations. Finally, whether First Nations have the current capacity to undertake regulation would need to be decided on a case by case basis. Contracting out may be a way to address shorter term capacity issues.

Option 1: Regulatory Function Rests with First Nation	
Criteria	Evaluation
Separation of regulator and operator	Depends on whether FN is operator

Economies of Scale	Likely no – depends on size of FN and area
Ability to reflect FN values	High
Harmony with Surrounding Jurisdictions	Low, unless provincial incorporation
Regulatory Liability	With the FNs
Builds FN capacity and supports self-government	High, but with significant cost and capacity challenges
How fast the gap can be filled	Slow and incremental

Option 2 – Regulatory Function is Delegated to a Special Purpose, Aggregated First Nations Body

In this option, one or more First Nations delegate the power to regulate to a special purpose, aggregated First Nations body, such as a Tribal Council, Technical Corps or other. The strengths of this option include its ability to reflect First Nation values, the opportunity to build capacity, and the possibility of some economies of scale. In terms of capacity and economies of scale, the First Nations involved would need to determine whether the group is large enough to access the expertise it needs (e.g. legal, technical, scientific and other). Again, contracting out in the short term may be a partial solution. This option creates harmony among the First Nations being regulated by the special purpose body, but the challenge of harmony with surrounding jurisdictions still exists unless the special purpose body chooses to incorporate provincial regulations. Liability under this option would likely be shared by the First Nations and the Special Purpose body they create, depending on agreed upon roles and responsibilities and decision-making authority. The pace of filling the existing gaps would likely still be slow, though faster than option one.

This option would create a degree of separation between the regulator and the operator. That said, there is an issue around regulatory independence, as any special purpose body would, in the end, be accountable to the First Nations for its work.

Option 2 – Regulatory Function Delegated to a Special Purpose, Aggregated First Nations Body	
Criteria	Evaluation
Separation of regulator and operator	Yes, but with limitations
Economies of Scale	Will vary, but generally some
Ability to reflect FN values	High
Harmony with Surrounding Jurisdictions	Low, unless provincial

	incorporation
Regulatory Liability	With the FNs / FN body
Builds FN capacity and supports self-government	High
How fast the gap can be filled	Slow

Option 3 – Regulatory Function is Given to the Province through Contracting

Under this option, First Nations would incorporate provincial regulations, with the possibility of some tailoring to a First Nations context, and then contract with the province to do approvals, inspections and enforcement. Strengths of this option include separation of the regulator and operator and a high degree of harmony with surrounding jurisdictions. In addition, because the provinces already have systems in place for most regulatory functions linked to environmental management, any regulatory gaps for First Nations could be filled very quickly, and the First Nations could take advantage of the economies of scale that a province-wide approach enjoys. Finally, this approach contracts out the regulatory liability to the province.

The key challenges associated with this option include its very limited ability to reflect First Nation values (where these differ from the mainstream), and that it does not build First Nations regulatory capacity or support self-government. There would also likely be challenges related to buy in from First Nation citizens, who may question the legitimacy of a provincial government undertaking a regulatory role on First Nations land.

The *Indian Oil and Gas Act* and its supporting regulations provide an example of elements of this option in practice. The regulations establish *Indian Oil and Gas Canada* (IOGC) as a Special Operating Agency within the Department of Indian and Northern Affairs Canada. IOGC controls the oil and gas developments on reserves primarily through the use of contracts. The *Indian Oil and Gas Regulations* authorize IOGC to include conditions in these contracts to require oil and gas operators to comply with stipulated provincial laws and regulations. IOGC also works with provinces and First Nations to help ensure that the contractual conditions are implemented. The *Indian Oil and Gas Act* provides a number of useful features that merit consideration in ongoing efforts to fill the environmental management gap, including explicit authority to incorporate by reference provincial requirements and the establishment of arms length implementation bodies.[11]

Option 3 – Regulatory Function is Given to the Province through Contracting	
Criteria	Evaluation
Separation of regulator and operator	Yes
Economies of Scale	High
Ability to reflect FN values	Low

[11] Stratos, p.6.

Harmony with Surrounding Jurisdictions	High
Regulatory Liability	With the province
Builds FN capacity and supports self-government	Very low
How fast the gap can be filled	quickly

Option 4 – Regulatory Function is Given to the Province through Contracting, but including the Creation of a Special First Nations Unit

This option has the same elements as Option 3, but with the addition of the establishment of a special First Nations Unit within the provincial regulatory structure - a unit that would have the principal responsibility for inspections and enforcement on First Nation lands. This option has all of the advantages of Option 3, including separation of regulator and operator, economies of scale, harmony with surrounding jurisdictions, a quick pace for filling the gap and regulatory liability assumed by the province. This option also has the added advantage of allowing some ability to reflect First Nations values and, in the longer-term, to build the overall capacity of First Nations.

To be viable this option would likely require the participation of a number of First Nations within the province. And again, the biggest challenge may be buy in from First Nations citizens. That said, this option could be promoted as an interim step toward self-government; once sufficient capacity had been built within the First Nations Unit and the First Nations it regulates, the Unit may be able to become a totally separate First Nations-run, regulatory agency.

Option 4 – Regulatory Function Given to Province, but with Creation of a Special, First Nations Unit	
Criteria	Evaluation
Separation of regulator and operator	Yes
Economies of Scale	High
Ability to reflect FN values	Medium
Harmony with Surrounding Jurisdictions	High
Regulatory Liability	With the province
Builds FN capacity and supports self-government	Medium
How fast the gap can be filled	Relatively quickly

Option 5 – Do nothing and Wait for Federal Government to Fill Gaps

Under this option, First Nations wait for the federal government to fill the gaps in the regulatory framework. While there would continue to be separation of regulator and operator, the regulatory liability for First Nations who are 'operational communities' under the *FNLMA* would

lie primarily with the First Nation. In addition, likely the biggest downside to this option is the slow pace for filling the gaps. The rating of the other criteria, including economies of scale, ability to reflect First Nation values, harmony with surrounding jurisdictions and building First Nations capacity, are all unclear, as they are dependent on the approach the federal government might take on any particular regulatory issue.

Under this option, First Nations do not gain regulatory control over environmental management, and it is unclear whether whatever option was decided upon by the federal government would meet their needs. It is worth noting that it may be possible for the federal government to contract with a First Nations body to do inspections and enforcement (if/when regulations are in place), and this would better support First Nations capacity building.

Option 5 – Do Nothing and Wait for Federal Government to Fill Gaps	
Criteria	Evaluation
Separation of regulator and operator	Yes
Economies of Scale	Varies depending on approach
Ability to reflect FN values	Likely limited
Harmony with Surrounding Jurisdictions	Unclear – varies by approach
Regulatory Liability	With the First Nation
Builds FN capacity and supports self-government	Unclear – could be some contracting out
How fast the gap can be filled	Very slow

Option 6 – Some Combination

It is possible, and likely advisable, to take different approaches for different areas of responsibility. For example, a First Nation may wish to take on regulatory responsibility for zoning, where there is clear separation of regulator and operator, First Nations values can be reflected and capacity built, and where the potential advantages to economies of scale are limited.

In contrast, a First Nation may choose to contract with the province for wastewater, which would allow the First Nation to maintain the separation of regulator and operator, and to make use of the regulatory expertise and economies of scale available from the province in this high risk, complex area. An added advantage results from the province taking on the liability associated with regulation.

A First Nation could choose to create its own regulations for fuel tanks, but may be more inclined to wait for federal regulations for fuel tanks, which should be ready in early 2008. Waiting for federal regulations in this area would allow for harmony with surrounding jurisdictions, the gap would be filled quickly and the federal government would take on primary responsibility and liability associated with regulation.

VI. Conclusions

Laws governing the provision of local services or those dealing with environmental protection tend to be regulatory in nature, complex and costly to develop, implement and enforce. The current regulatory regime for environmental management that applies to First Nations has many gaps, and while the federal government is working on addressing several of these gaps, including fuel tanks and effluent standards, many more remain. This suggests that First Nations under the *First Nation Land Management Act*, who wish to exercise their law making powers in these areas, face some significant challenges.

For those First Nations who wish to undertake a regulatory approach to environmental management, there are a number of options available, including:

- Keeping the regulatory function with the First Nation;
- Delegating the regulatory function to a special purpose, aggregated First Nation body;
- Contracting with the province (or a regional/municipal government);
- Contracting with the province & including a special First Nations unit;
- Doing nothing & waiting for the federal government to fill voids; or,
- Adopting some combination of the above.

In exploring the opportunities and challenges associated with each option, there are a number of criteria that can be applied. Keeping in mind that the overall goal of the *FNLMA* and EMAs is to meet First Nations environmental management needs, First Nations may wish to consider a number of criteria, including separation of regulator and operator, economies of scale, ability to reflect First Nation values, harmony with surrounding jurisdictions, liability, capacity and pace of change, among others, when analyzing the various options and considering which is the best answer for them.

In the end it is likely that a combination of options will best serve the interests of First Nations, their citizens and their neighbouring jurisdictions, and will best protect the environment they all share.