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February 13, 2015

Canadian Nuclear Safety Commission (CNSC)  
280 Slater Street  
P.O. Box 1046  
Station B  
Ottawa, Ontario  
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Attention: Kimberly Mann

**Re: Regulatory Document REGDOC 3.2.2, Aboriginal Engagement  
Environment Canada review comments**

Thank you for the opportunity to review the draft REGDOC 3.2.2-Aboriginal Engagement.

The following comments are a compilation from Environment Canada (EC) – Environmental Protection Operations Directorate (EPOD) staff in Atlantic, Ontario and Prairie and Northern Region with expertise on aboriginal engagement. EPOD nuclear programs coordinated the review as lead for the Memorandum of Understanding (MOU) between EC and the CNSC. One of the obligations under the MOU is to review and provide advice to CNSC on proposed regulatory documents.

We welcome any questions that you may have concerning our comments on the regulatory document.

Sincerely,

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## CNSC REGDOC 3.2.2 Aboriginal Engagement – Environment Canada’s consolidated comments

### Section 1 – Introduction

EC recommends that the environmental effects that should be taken into account with respect to aboriginal peoples, as established in subsection 5(1)(c) of CEEA (2012), be included in the introduction to ensure that the environmental effects requiring aboriginal engagement are clear.

The draft REGDOC states in the preface that REGDOC will not “...replicate information provided in the Canadian Environmental Assessment Act, 2012 (CEEA 2012) or other environmental statutes or guidelines.” However, it may be useful to highlight in section 1.3, the environmental effects that are to be taken into account with respect to aboriginal peoples as established in subsection 5(1)(c) of CEEA (2012). Subsection 5(1)(c) states:

*(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on*

- *(i) health and socio-economic conditions,*
- *(ii) physical and cultural heritage,*
- *(iii) the current use of lands and resources for traditional purposes, or*
- *(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.*

### Section 2 – Background

#### Section 2, page 2 – 1<sup>st</sup> paragraph

EC recommends in 1<sup>st</sup> paragraph on page 2, the addition of the word “reconciliation” after “relationship building”. The AADNC justifies the Crown’s duty to consult as follows: “The purpose of Section 35 [of the *Constitution Act 1982*] based Crown consultation is the **reconciliation** of Aboriginal rights with the exercise of Crown sovereignty. Practically, it is the process of ensuring that Aboriginal peoples' rights are fairly considered in government conduct that could potentially affect those rights, particularly in the approval of developments involving land and resources.”  
Source: [www.aadnc-aandc.gc.ca/eng/1100100023526/1100100023528](http://www.aadnc-aandc.gc.ca/eng/1100100023526/1100100023528)

#### Section 2, page 3 – 1<sup>st</sup> paragraph

For clarity, EC also recommends the addition of the phrase “aboriginal engagement” for the 1<sup>st</sup> paragraph on page 3 as follows: “...CSNC may rely on **the aboriginal engagement conducted by** licensees...”

### Section 3 – Licensee Requirements for Aboriginal Engagement

#### Section 3, page 3 – Determination of significance

EC recommends that the REGDOC 3.2.2 include guidance or a reference to guidance on the determination of significance of potential impacts on Aboriginal rights and related interests including Aboriginal title. The draft REGDOC states in section 3 on page 3 that "...they [licensees] shall engage with potentially impacted Aboriginal groups at a level commensurate with the significance of the potential impact on those rights ..." but there is no guidance provided in the REGDOC on how to make a determination of significance. Such guidance would be helpful in assisting licensees (as well as the regulator) in determining the level of engagement appropriate to any potential impacts. When the federal Crown assesses the significance of potential adverse impacts on the exercise of Aboriginal and Treaty rights, the following factors may be considered in the initial assessment:

- a) Certainty of adverse impacts – what is the likelihood that the impact will occur?
- b) Magnitude of the adverse impacts - what is the nature and degree of the impact?
- c) Duration and frequency of the adverse impacts – how often will the impact occur? Will these occurrences be short or long term?
- d) Reversibility – is the adverse impact reversible?
- e) Spatial extent of the adverse impacts – will these be localized in nature or broader? How does the geographic extent of the adverse impact relate to the geographic extent of the right, as practiced?
- f) Context – What is the Aboriginal perspective on the importance, uniqueness or value of a particular use, area, activity or species?
- g) Historical context – have there been impacts to Aboriginal rights in the past?
- h) Accommodation – are there any accommodation measures proposed that would reduce the seriousness of the impact on the exercise of rights?

In addition, federal officials may differentiate between high, medium and low impacts as follows (source: [www.ceaa-acee.gc.ca/050/documents/p80054/100180E.pdf](http://www.ceaa-acee.gc.ca/050/documents/p80054/100180E.pdf)):

- a) High impact – ability to exercise that right has been significantly diminished
- b) Moderate impact – ability to exercise that right has been diminished or disrupted
- c) Low impact – ability to exercise the right is minimally disrupted

### Section 3, page 4 – Guidance

EC recommends that CNSC consider identifying the benefits to all parties when the licensee supports the Crown's whole of government approach to aboriginal engagement. In addition to the need to determine the appropriate level of Aboriginal engagement for an EA or licensing process under the NSCA, Aboriginal engagement for other Crown authorizations should be coordinated concurrently or in parallel as part of a "whole of government" approach as directed under the MPMO initiative for natural resource projects. The licensee should be encouraged to engage potentially affected Aboriginal groups on all related Crown authorizations (e.g. MMER Schedule 2 amendments) to ensure that all potential impacts on aboriginal rights and related interests including aboriginal title are appropriately addressed.

Section 3.2.1, page 5 – bullet on settled or ongoing land claims

EC recommends that in the consideration of land claims in the determination of Aboriginal groups to engage, there should be a differentiation between specific (Treaty based) vs. comprehensive (no Treaty) claims.

Section 3.2.1, page 5 – bullet on Governance structure

EC recommends that in the consideration of governance structures in the determination of Aboriginal groups to engage, additional considerations should be given to a community operating under self-government agreement. This may be a critical consideration since depending on the self-government agreement (SGA), a First Nation may no longer be captured under the Indian Act and therefore certain acts of parliament and their associated regulations (i.e. CEPA, NSCA etc.) may no longer apply. Additionally, SGAs may have specific conditions for Crown consultation & engagement.

Section 3.2.1, page 6 - bullet on schedules and workloads of the Aboriginal groups

EC recommends that in the development of an Aboriginal engagement workplan, in addition to schedules and workloads, the internal capacity (technical and administrative) of the Aboriginal community should be taken into consideration since this is one of the greatest challenges for communities to participate in reviews.

Section 3.4, page 8 – Guidance, bullet on summary of mitigation measures

EC recommends that accommodation is included with mitigation measures in the summaries required for the licensee CMD. The bullet might be edited as follows: “a summary of **accommodation and** mitigation measures or plans and proposed timing for **accommodation and** mitigation measures, to address adverse impacts”.

Section 3.6.1, page 10 – non-applicability of Aboriginal engagement

EC recommends that where a determination of non-applicability of Aboriginal engagement is likely, the CNSC should examine whether the Aboriginal engagement undertaken previously has adequately fulfilled the responsibilities and maintained the honour of the Crown. If the examination confirms that prior engagement was not adequate then the CNSC should inform the licensee to consider augmenting with additional Aboriginal engagement.

Appendix A, page 11 – 3<sup>rd</sup> bullet

EC recommends the word “near” is defined in this guidance for identifying potentially impacted Aboriginal groups. The scale of proximity (or nearness) to the proposed facility or activity is dependent on the potential effect being considered. For example air transport and deposition of contaminants would likely occur over much greater geographic scale than potential contamination of drinking water wells or potential effects on a culturally important area.

Appendix A, pages 11,12 – General comment

EC recommends that previous and established relationships between the Aboriginal community and the licensee and/or the CNSC should be well understood and taken into consideration when developing a consultation and/or engagement plan (i.e., history of engagement with the licensee both positive and negative).

Appendix B, page 14 - Other Resources, 2nd bullet

EC recommends that the reference to "umbrella organizations" be more explicit. Umbrella organizations may include regional organizations, provincial/territorial organizations and tribal councils. Explicitly listing the types of "umbrella organizations" would likely be more effective in guiding licensees to consider communicating with appropriate umbrella organizations in the determination of Aboriginal communities or groups to engage.

Appendix B, page 14 - Other Resources - bullet on Aboriginal traditional knowledge

EC recommends deleting the words "considering studies about" and "(if available to the public)" and leave "Aboriginal traditional knowledge" on its own. These qualifiers seem to unnecessarily narrow the use of this resource. Aboriginal traditional knowledge may be available in many forms (written, oral tradition, direct communication etc.) not just in studies and as part of engagement/consultation activities, traditional knowledge - irrespective of public availability, may be accessible.