

**COMMENTS RELATED TO THE CNSC DRAFT ABORIGINAL ENGAGEMENT
REGULATORY DOCUMENT (REGDOC-3.2.2)**

**FOND DU LAC DENESULINE FIRST NATION
AND
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Introduction

- The following is a review of the October 15, 2014 draft of *Aboriginal Engagement: Regulatory Document REGDOC 3.2.2*. Black Lake Denesuline Nation (“Black Lake”) and Fond du Lac Denesuline Nation (“Fond du Lac”) are providing comments to inform the Canadian Nuclear Safety Commission (CNSC) of our concerns in regards to this draft regulatory document that has been designed to delegate procedural aspects of consultation to third parties involved in the CNSC licencing process.
- On October 15, 2015, the CNSC issued a call for public comment on a draft version of *Aboriginal Engagement: Regulatory Document REGDOC 3.2.2* (“REGDOC 3.2.2”). If referenced in a licence either directly or indirectly (such as through licensee-referenced documents), REGDOC 3.2.2 becomes part of the licensing basis for a regulated facility or activity. It appears that through this mechanism the CNSC seeks to delegate certain procedural aspects of the Crown’s duty to consult and accommodate to license applicants or licensees (“Licensees”).
- Black Lake and Fond du Lac provide the following technical review of REGDOC 3.2.2 and submit both requests for clarification and recommendations related to apparent gaps in the regulatory document.

Overview

- We note that the stated purpose of REGDOC 3.2.2 is to identify CNSC’s “requirements of licensees

related to Aboriginal engagement,” provide “guidance and information to licensees on conducting Aboriginal engagement activities,” and “to help ensure consistency in the information provided to the CNSC by applicants.” Further, it is noted that the CNSC does not intend to use REGDOC 3.2.2 to replace Crown consultation efforts with Aboriginal peoples, but rather to support “the broader approach to Aboriginal consultation implemented by the CNSC in cooperation with federal departments and agencies.” As noted previously, REGDOC 3.2.2 appears to have been drafted with the intent purpose of enabling the CNSC to delegate certain procedural aspects of the Crown’s legal duty to consult to license applicants or licensees (“Licensees”).

- REGDOC 3.2.2 primarily focuses on delegating four aspects of Aboriginal consultation to an industry proponent (company). REGDOC 3.2.2 makes the fulfillment of these aspects of consultation by the Licensee a legal requirement only if and when it is included in the licencing basis of project, facility or activity authorized by the CNSC. These aspects include the responsibility to:
 - Develop an Aboriginal engagement plan (“Plan”)
 - Develop a proposed schedule for interim reporting on Aboriginal engagement activities to the CNSC
 - Provide updates to the CNSC on any material changes to the Plan
 - Include an Aboriginal engagement section with the Licensee’s Commission Member Document (CMD)

Timing of Delegated Consultation Activities

- The preface to REGDOC 3.2.2 indicates that it is intended to serve as a delegation mechanism for procedural aspects of consultation, i.e., “...REGDOC-3.2.2 provides procedural direction for licensees, in support of the broader approach to Aboriginal consultation implemented by the CNSC in cooperation with federal departments and agencies....”
- In this regard, REGDOC 3.2.2 includes provisions related to the early stages of consultation, such as identifying Aboriginal groups to be consulted and Aboriginal Engagement planning. The inclusion of such provisions indicates the intention to use REGDOC 3.2.2 to delegate to Licensees certain consultation activities during the *pre-licencing decision phase*.
- Further, in REGDOC 3.2.2 it is noted, “The licensing basis sets the boundary conditions for acceptable performance at a regulated facility or activity and establishes the basis for the CNSC’s compliance program for that regulated facility or activity.”
- The preface of REGDOC 3.2.2 clearly states that it would form part of the licensing basis for a facility or activity regulated by the CNSC. It is from being part of the “licensing basis” - which sets the boundary conditions for acceptable performance and the forms the basis of CNSC’s compliance program – that it would appear the directive provisions in REGDOC 3.2.2 derive their force and effect.
- However, it is apparent that the terms of the licensing basis for a facility or activity would not come into effect before the licence has been issued.
- The Supreme Court of Canada (*Haida/Taku/Mikisew*) has indicated that consultation must occur early in the planning process, long before the Crown makes a decision on a project. Further, the courts have been clear that consultation must occur before the Crown's decision (in this case, the issuance of the Licence) has been made.
- Therefore, the timing of when the licence is issued appears to constrain its utility as a delegation instrument. Simply put, all consultation/engagement related to a project or activity should be either completed or well advanced by the time the licensing basis for a facility or activity would come into effect.
- Therefore, it is unclear how REGDOC 3.2.2, in its current form, can function beyond simply providing guidance and advice as the licence that it relies upon to compel the Licensee to undertake specific actions does not gain force and effect until after the licensing decision has been.

Recommendation

- **If the CNSC intends to delegate procedural aspects of consultation to third parties, the CNSC needs to develop an additional regulatory mechanism, other than the Licence, one that comes into effect *at the beginning* of the licencing/EA process. For example, in British Columbia, Section 11 of the BC Environmental Assessment Act that sets out the scope, procedures and methods of an EA, enables the British Columbia Environmental Assessment Office, *at the beginning* of an Environmental Assessment (“EA”), to set out legally-binding direction to industry proponents to undertake certain delegated aspects of consultation on behalf of the provincial Crown.**

Other Issues of Concern

- Notwithstanding the above noted question of timing that constrains REGDOC 3.2.2 from functioning as a delegation instrument for the main portion of Crown consultation that is legally required to occur prior to the licence being issued, Black Lake and Fond du Lac have additional comments regarding the intended content of REGDOC 3.2.2 as a *guidance document*.
- Generally REGDOC 3.2.2 is process focused, without a clear vision of how substantive issues raised will be tracked, how they result in material change to the Plan, how traditional knowledge and land use has emerged and likewise contributed to project changes or required mitigation, and how the CNSC’s oversight of the Licensee’s activities will occur.

Exclusion of Consultation Related to Environmental Assessment

- The purposeful exclusion of any reference to the *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”) and environmental assessment (EA) processes in REGDOC 3.2.2 is a serious weakness. This creates the false impression that Aboriginal consultation and engagement related to an EA might possibly occur in a process that is different and separate from the consultation that occurs during a concurrent licence application. However, in reality, given that many of the CNSC’s licensing processes are either integrated into, or run concurrently with, federal environmental assessment processes that are in fact led by the CNSC as the responsible authority, it is clear that consultation processes for the Licence and EA of a project would be largely, if not completely, integrated.
- Unless REGDOC 3.2.2 includes reference to environmental assessment processes, it is unclear how the CNSC will direct the Licensee to consider linkages between consultation processes and EA requirements under CEAA 2012 that relate to effects on Aboriginal peoples (e.g., assessment of effects on “socio-economic and health conditions”, “current use of lands and resources for traditional purposes”, “cultural heritage” and the incorporation of traditional knowledge into the EA).
- Further, without reference to environmental assessment in REGDOC 3.2.2 it is unclear how the CNSC intends to direct a Licensee to consult with Aboriginal groups during the course of an EA. For example, will the CNSC develop a separate form of Aboriginal engagement regulatory guidance for Licensees specific to EAs? It is noted that current CNSC regulatory guidance related to EA is very limited in its reference to Aboriginal Consultation, and no CNSC regulatory documents (other than REGDOC 3.2.2) appear to address how procedural aspects of consultation would be delegated to a Licensee during the conduct of an EA.

Request for Clarification

- **We seek clarification on whether the CNSC’s intends to develop Aboriginal engagement regulatory guidance for Licensees specific to EAs.**

Recommendation

- **If this is not planned, we recommend that the CNSC revise REGDOC 3.2.2 to include an approach to Aboriginal consultation and engagement that integrates the Crown’s expectations for both EA and Licencing processes. This will ensure clarity and reduce likelihood of unnecessary confusion and duplication.**

Oversight and Verification of Consultation on Substantive Issues

- REGDOC 3.2.2 proposes that Licensees should collect information to help the CNSC assess both the “breadth” (e.g., identification of which First Nations to consult) and the “depth” (i.e., the seriousness of impacts on rights, extent of consult activities) of the legal duty to consult. Although REGDOC 3.2.2 indicates that these assessments would be also conducted by the CNSC, this requirement in itself suggests that the CNSC could be potentially be relying upon the Licensee to undertake not only procedural, but substantive decision-making regarding the scope of consultation on behalf of the Crown. Although the courts have indicated that procedural aspects of the Crown’s duty to consult can be delegated to third parties, ultimate responsibility for consultation on substantive matters rests with the Crown. Arguably, the determination of the *scope of consultation* sits outside of the procedural realm and therefore any attempt to delegate this responsibility to a Licensee risks blurring the line between the Crown and third parties in the conduct of substantive aspects of consultation.

Requests for Clarification

- **REGDOC 3.2.2 does not clearly define the nature and extent of CNSC’s oversight and verification of the Licensee’s consultation/engagement activities that would be required and carried out. We request clarification regarding how the CNSC will address this gap.**
- **Specifically, we require clarification from the CNSC regarding its role in providing oversight and verification of information provided by the Licensee (related to rights and potential impacts on rights) when making its determination of the *scope of consultation*.**
- **In addition, our communities require additional information regarding the CNSC’s oversight role in tracking information related to *impacts to our treaty rights*, in particular those that result in material changes, that surface through the Licensee’s engagement with our communities during either or both EA and licensing processes.**

Treaty Rights Analysis

- Although REGDOC 3.2.2 sets out requirements for the Licensee to identify potentially affected Aboriginal groups, it does not include any requirement for the Licensee to undertake a treaty-rights analysis (or where treaties don’t exist, a strength-of-claim analysis). Since REGDOC 3.2.2 has explicitly stated that the CNSC will be relying upon the Licensee’s information for “a list of Aboriginal groups identified for engagement, and the methodology and rationale for identification” and “a description of planned future engagement activities” based upon the relative severity of potential impacts, the absence of treaty rights analysis is a serious gap. Identification, avoidance, reduction or accommodation for potential infringements of treaty rights is one of the main drivers of consultation; without more explicit guidance and a requirement for inclusion of treaty rights considerations in the scope of consultation, the delegated consultation may not be considered meaningful.

Recommendation

- **For our communities, it is essential that the CNSC and the Licensee being delegated procedural aspects of consultation by the Crown, both fully comprehend the scope of Athabasca communities’ treaty rights and how they may be affected by a project or activity. If the CNSC plans to rely upon the Licensee to identify impacts to treaty rights, REGDOC 3.2.2 should require a Licensee to undertake a proper treaty-rights impact analysis with any potentially affected Aboriginal group and provide guidance – developed in concert with Aboriginal groups – as to what constitutes an adequate level and scope of effort toward this end.**

Communicating Outcomes: Reporting

- The reporting of the Licensee’s engagement activities is as equally important to our communities as it is to Crown entities such as the CNSC. However, we note that the requirement for interim status reports on Aboriginal engagement activities, noted on p. 7 of REGDOC 3.2.2, only includes reporting to the CNSC (i.e., and not communities).

Recommendation

- **All interim reports on Aboriginal engagement related to Aboriginal consultation should be required to report on the progress of consultations aimed at evaluating potential impacts to rights and interests, and identifying effective means to avoid, reduce and/or accommodate potential impacts to treaty rights and related interests (including socio-economic and health concerns).**
- **All reports must be required to be sent to Athabasca communities for comment prior to their filing for verification (specific sections relevant to that Aboriginal group only) and upon their filing with CNSC. In addition, the CNSC should provide Aboriginal groups with adequate time and opportunity within the regulatory timeline to provide such comments on the Licensee's reports.**

Ensuring Meaningful Aboriginal Consultation

- REGDOC 3.2.2 states on pp. 5-6 that Licensees, “*should* ask the (Aboriginal) groups how they would like to be engaged, as preferences may vary by community. The CNSC *encourages* the development of an engagement work plan that is reasonable to both parties.”

Recommendations

- **For this section cited above, we recommend that the term “should” be changed to “shall”. Further, we recommend that the CNSC, which has the ultimate responsibility for completion of meaningful crown consultation, require the Licensee to inform the CNSC in a timely fashion of any instances where an agreeable engagement work plan has not been reached**
- **In addition, we recommend adding to the list on p. 6 of potential content for a Plan to include:**
 - **“Mutually agreed upon timelines”,**
 - **“Adequate resources for enable meaningful participation of Aboriginal groups”, and**
 - **“Mutually agreed upon studies, monitoring processes and follow-up measures that are required to properly assess effects of the project or activity on Aboriginal groups”.**

Post-Licensing Engagement Requirements

- The guidance provided in the Guide for, “keeping Aboriginal groups and the [CNSC] informed after a Commission decision”, falls below requirements for communication/engagement related to monitoring and follow-up measures that have been set out in other CEAA 2012 decision statement conditions.

Request for Clarification

- **We request the CNSC clarify whether its intention is to supplement communication requirements set out in REGDOC 3.2.2 with additional conditions either in the Licence or EA decision statement.**

Recommendation

- **If not, then it is strongly recommended that this section of REGDOC 3.2.2 related to post-Licensing engagement be strengthened by making all post-decision communication/engagement with Aboriginal groups related to monitoring and follow-up measures mandatory, with clearly established reporting scheduling and timelines, to be captured in License conditions.**