



Métis Nation of Ontario
Lands, Resources and Consultations

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VIA ELECTRONIC MAIL TO:
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Dear Mr. Moses:

Re: Métis Nation of Ontario's Concerns, Questions and Recommendations on the Review of the Canadian Nuclear Safety Commission's Aboriginal Engagement Regulatory Document (REGDOC-3.2.2)

Canadian Nuclear Safety Commission (CNSC) requested comments on its draft *Aboriginal Engagement Regulatory Document, REGDOC-3.2.2* (the Regulatory Document). Métis Nation of Ontario (MNO), as the representative government of regional rights-bearing Métis Nation communities in Ontario, has undertaken a review of the Regulatory Document and provides, by way of this letter, concerns, questions and recommendations.

MNO emphasizes that the capacity with which it has undertaken this review is severely deficient; further, no capacity has been provided to MNO for the purpose of meaningfully engaging its citizens in the review of this Regulatory Document. Therefore, CNSC should interpret the contents of this letter as being limited and not a complete or an exhaustive delineation of the concerns, questions and recommendations that MNO wishes to communicate to the CNSC.

Despite the capacity-deficient conditions existing during MNO's review of the Regulatory Document, MNO is compelled to submit its review out of concern for the seriousness of potential adverse impacts to MNO citizens' rights, interests and way of life arising from the number of potential future CNSC-authorized projects. MNO can only assume that proponents' consultation for these projects' will be directed by the Regulatory Document as is currently drafted – a draft that maintains the capacity-deficient circumstances historically faced by MNO as part of CNSC's regulatory process for projects.

Concern #1: Inappropriate Preconditions for Aboriginal Consultation, Disregard of the Métis Nation of Ontario's Established Consultation System, and Inaccurate Duty to Consult Trigger for the Métis Nation of Ontario per se

Inappropriate Preconditions for Aboriginal Consultation

The Regulatory Document states that an Aboriginal engagement plan and report (AEPR) are required, "[f]or any regulated facility or activity that could adversely impact potential or established Aboriginal and/or treaty rights and related interests, including Aboriginal title" (page 4, Regulatory Document). MNO interprets this to mean that the requirement for a proponent developing an AEPR and consulting the MNO, per se, is conditional upon the potential for adverse impacts from the proponent's project on MNO citizens being identified *prior* to the proponent in fact consulting the MNO. Therefore, as it currently stands, a proponent who inaccurately, and consequently, incorrectly derives an impact determination that its project could *not* adversely impact MNO citizens' rights, interests and way of life, will be able to deny the development of an MNO-relevant AEPR and deny consultation that is owed to MNO citizens.

With respect to the MNO, the proponent/CNSC have the same consultation obligations that they have to all other Aboriginal peoples – they must take steps to inform the MNO about the proposed project and contemplated Crown action; and, they must inform themselves about MNO in order to understand *if and how* the project might affect MNO citizens.

With respect to the latter obligation, *consultation* with the MNO is, *in itself*, the precondition necessary for a proponent to *accurately* and therefore *correctly* determine the seriousness of impacts of its project on MNO citizens' rights, interests and way of life. The value of this consultation is inescapable because potential effects to MNO citizens uniquely involve the biological, ecological, economic, social, cultural, spiritual, harvesting, and other traditional knowledge areas of the Métis Nation people. Consequently, MNO-effects identification is a robust and culturally-sensitive process that requires the involvement of Métis in multiple areas of Métis society, and involves the disclosure of traditional knowledge by Métis people. Furthermore, this traditional knowledge is held in the highest regard by Métis people and, when and where available, is entrusted to MNO officials – officials of the Métis Nation people's elected representative government in Ontario.

Disregard of the Métis Nation of Ontario's Established Consultation System

MNO has dedicated many resources to developing and establishing its consultation system that provides accurate project- and MNO-relevant information to proponents to aid them in determining if and how MNO citizens may be affected by a proposed project. At the core of this established system are MNO consultation protocols – for each Métis Nation Region in Ontario – that have defined boundaries according to MNO citizens' rights, interests and way of life.

If a proponent's project is proposed within these protocol boundaries, or if transboundary effects from a project outside these boundaries are suspected to affect the biophysical or socio-economic environments within these boundaries, then the duty to consult the MNO

is *triggered*. Upon triggering, the proponent must consult the MNO and develop an MNO-relevant AEPR.

Recommendation #1:

If a regulated facility or activity is proposed within any of the boundaries defined by MNO Regional Consultation Protocols, or if transboundary effects from a project outside these boundaries are suspected to affect the biophysical or socio-economic environment within any of these boundaries, licensees must be required to consult the MNO and develop an MNO-relevant AEPR that must be included within its project description or licence application.

Recommendation #2:

Following from the circumstances under Recommendation #1 being in the affirmative, MNO recommends licensees also consult the MNO early (i.e., prior to project-description or application-submission phases) and frequently in order to provide adequate time for the MNO to consult its citizens in order to collect accurate project- and MNO-relevant traditional knowledge and land use information.

Following this duty being triggered, the proponent and/or Crown are to notify MNO of the proposed project. Upon receiving this notice, MNO's Lands, Resources, and Consultations Branch will work with the appropriate MNO Regional Consultation Committee to determine if there are any concerns regarding the project. In scenario one, where the Consultation Committee has no concerns, the proponent will receive a letter notifying it that the committee does not believe that the project will have a significant effect on MNO citizens' rights, interests and way of life.

In the alternative scenario, scenario two, where the Committee has a concern regarding the project, the proponent will receive a letter notifying it that the Committee has decided to partake in consultation with the proponent on its proposed project. The purpose of this consultation will be for the Committee to identify its concerns and establish a process for providing the proponent as much project- and MNO-relevant information as possible in order for the proponent to execute an accurate and correct effects assessment vis-à-vis MNO citizens' rights, interests and way of life.

Both these scenarios, whether resulting in affirmative or negative identification of concerns, necessitate consultation and an MNO-relevant AEPR, but each scenario will involve different degrees of consultation – i.e., each scenario will be observably different in the *content* of the duty to consult the MNO based on the potential seriousness of project impacts to MNO citizens' rights, interests and way of life.

Recommendation #3:

In conjunction with Recommendation #1, an MNO-relevant AEPR must detail the agreed-upon *process* for determining the *content* of consultation between the proponent and MNO that is required for, and appropriate to, ascertaining the seriousness of the particular project's potential impacts on MNO citizens' rights, interests and way of life.

Inaccurate Duty to Consult Trigger for the Métis Nation of Ontario

In light of Recommendation #1 and Recommendation #3, the precondition for an AEPR, as is currently drafted in the Regulatory Document, fails to draw a distinction between what *triggers* the Crown's duty to consult the MNO and the *content* of the duty itself vis-à-vis the MNO. As previously noted, knowledge of a project potentially affecting MNO consultation-protocol areas – areas based on MNO citizens' rights, interests and way of life – is sufficient in itself to *trigger* the duty; the *content* of this duty will be based on the potential seriousness of project impacts to MNO citizens' rights, interests and way of life. However, Crown/proponent assessment of the seriousness of this impact is determined on a standard of *correctness*. This therefore begs the following questions:

Question #1:

Without the explicit implementation of Recommendation #1 and Recommendation #3, how can the seriousness of adverse impacts on MNO citizens' rights, interests and way of life in scenarios one and two, described previously, be *accurately* and *correctly* determined by a proponent/CNSC without the MNO *first* being consulted on its citizens' rights, interests and way of life?

Question #2:

Following from the previous question and referenced scenarios, how can the MNO be consulted without its inclusion in an AEPR?

Concern #2: Negligence with respect to MNO-capacity requirements per se

CNSC outlines factors a proponent should consider when consulting Aboriginal communities:

"When developing an Aboriginal engagement work plan, licensees should consider the following:

- assignment of a consistent representative;
- face-to-face meetings;
- incorporation of a variety of engagement forums and techniques (e.g., letters, phone calls, presentations, working groups);
- schedules and workloads of the Aboriginal groups involved;
- potential engagement protocols;
- translation of information into the native languages of the Aboriginal groups engaged, where appropriate; [and,]
- communication with identified Aboriginal groups throughout the licensing period of the regulated facility or activity" (page 6, Regulatory Document).

However, CNSC fails to note the *capacity* required by the Aboriginal communities *in order to be consulted*. The importance of capacity is highlighted in federal guidelines, where capacity with respect to the duty to consult is defined as, "...the ability of Aboriginal groups to *understand* the nature of the activity the Crown or proponent is contemplating and how that activity might adversely impact their

potential or established Aboriginal or Treaty rights” (emphasis added; page 61, *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011*). Capacity, directly related to *understanding*, is therefore essential for *meaningful* consultation; the converse of this being, *without* the MNO, per se, having capacity, Crown or proponent consultation efforts are rendered *meaningless* as MNO citizens are *unable* to understand the nature of the activity being contemplated.

Ultimately, CNSC providing few mandatory requirements and many optional considerations for proponents throughout the Regulatory Document, all while being absent in addressing critical capacity issues affecting Aboriginal communities, and the MNO per se, renders the Regulatory Document as a token with respect to the duty to consult and, unfortunately, meaningless when it comes to the execution of this Crown duty.

Question #3:

How does CNSC expect meaningful consultation to take place between the MNO per se and proponents/CNSC when CNSC has made no requirements for consultation-capacity delivery in the Regulatory Document?

In the Regulatory Document, CNSC goes on further to state the value of traditional knowledge and land use in the context of proponents consulting Aboriginal communities early:

“Early engagement provides Aboriginal groups with an opportunity to share information on local and Aboriginal traditional knowledge that helps to identify potential impacts from the regulated facility or activity on traditional land use, treaty rights, Aboriginal rights, and culturally important sites, including archaeological sites” (page 6, Regulatory Document).

Again, however, CNSC fails to identify and obligate proponent’s to provide the resources required by said Aboriginal communities who provide this critical information through the collection of project-relevant traditional knowledge information. In the case of the MNO, some of the resource-demanding tasks required to be undertaken in the development of a Crown-, project-, and MNO-relevant traditional knowledge and land use study (TKLUS) include the MNO carrying-out the following:

- Selecting qualified MNO citizen(s) to support and facilitate delivery;
- Developing an interview protocol and question guide that is Crown-, project- and MNO-relevant;
- Selecting MNO-citizen interviewees;
- Scheduling interviews;
- Coordinating meetings/interviews;
- Conducting interviews;
- Preparing baseline information in relation to valued ecosystem components for incorporation into the project’s effects assessment;
- Transcribing interviews;

- Actual technical drafting and development of the TKLUS report and summary presentation;
- Submitting the report to the proponent, and where required, to appropriate Crown decision-makers; and
- Presenting and providing advice on the TKLUS report where requested and required.

Fundamentally, proponent and/or Crown consultation, in itself, demands capacity for Aboriginal communities; otherwise, the consultation is rendered meaningless. MNO developing applicable and accurate TKLUS reports for the proponent/Crown is one of several cases in point of consultation activities that underline the extraordinary requirement for capacity. CNSC notes the value and applicability of traditional knowledge and land use in helping a proponent identify the potential impacts of its project on Aboriginal rights, yet CNSC fails to provide *necessary* conditions for proponents provisioning capacity to support these Aboriginal communities in the development of such valuable consultation information – information that is critical to CNSC’s regulatory process and, ultimately, the Crown’s duty to consult.

Recommendation #4:

Following from Recommendation #3, CNSC requires proponents to provision capacity in a manner appropriate to the content of consultation required for the proponent/CNSC to assess the potential impacts of the proposed project on, per se, MNO citizens’ rights, interests and way of life, so that consultation activities are rendered meaningful as part of the duty to consult.

Otherwise, it is MNO’s view that CNSC may determine that the duty to consult is inadequate when it is required to evaluate questions such as:

- “Were the affected Aboriginal groups able to participate in the consultation and accommodation process?”
- How were issues of capacity addressed? Was it through monetary or non monetary means or both?
- Were funding authorities in place? Was funding available in the department or agency to support capacity? Is a funding agreement in place?
- Were other departments and agencies or governments contributing to support capacity?” (page 58, *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011*).

Concern #3: Inappropriateness of Optional Requirement for Consultation Workplans and Memoranda of Understanding

Concern #1 separated and distinguished between the *trigger for* and *content of* the Crown’s duty to consult. It followed therein, by way of Recommendation #1, that proponent/CNSC’s knowledge of MNO citizens’ rights, interests and way of life, per se, as embodied in the boundaries described in existing MNO Regional Consultation Protocols vis-à-vis a project’s footprint or potential transboundary-effects locations, is *sufficient* to trigger the duty to consult the MNO.

Upon this duty being triggered, the Crown, its agent(s) or delegated proponent actors must ascertain the seriousness of potential adverse impacts to MNO citizens. A systematically defensible approach to developing an accurate, and ultimately correct, assessment of this seriousness inescapably relies upon precise and mutually agreed-upon instruments that describe and guide the execution of content for the consultation required.

Workplans and memoranda of understanding (MOUs) are the industry-standard instruments. These instruments, with respect to the MNO per se:

- Foster trust between proponents and the MNO;
- Establish, in relation to the project, mutually beneficial, cooperative, productive and ongoing working relationships between proponents and the MNO;
- Establish clear and distinct processes as they pertain to the content of consultation;
- Provide a process for proponent's to consult MNO citizens at the local and regional levels;
- Create appropriate expectations for required MNO consultation capacity;
- Facilitate the identification of impacts that a project may have on MNO citizens' rights, interests and way of life;
- Create an arena for determining appropriate mitigation; and
- Enable the MNO to participate in the development of a proponent's environmental studies and regulatory reviews.

Recommendation #5:

CNSC require proponents to develop workplan and MOU instruments with Aboriginal communities, and with the MNO per se when the duty to consult MNO citizens is triggered as detailed in Concern #1, Recommendation #1, and Recommendation #3.

Recommendation #6:

CNSC require the proponent to utilize workplan and MOU instruments to address the issues related to MNO consultation capacity as per Recommendation #4.

Concern #4: No Reference to Métis Nation of Ontario Consultation Resources

Appendix B of the Regulatory Document lists resource tools available to support the implementation of the CNSC's Aboriginal consultation approach and that can assist proponents in planning their Aboriginal consultation. This list of resources, however, does not include MNO resources that advise the proponent/the Crown on when the duty to consult the MNO is triggered, nor does it include resources on the MNO's established consultation system.

Recommendation #7:

CNSC add the follow resources to Appendix B:

- MNO Lands, Resources and Consultations Branch's duty to consult homepage: <http://www.metisnation.org/programs/lands,-resources--consultations/duty-to-consult>
- MNO's duty to consult guide: http://www.metisnation.org/media/51974/duty_to_consult_guide.pdf
- MNO's contact information for proponent/the Crown's consultation: <http://www.metisnation.org/programs/lands,-resources--consultations/duty-to-consult/contact>

Conclusion:

The MNO is concerned that the outcomes, as a result of the Regulatory Document as currently drafted, will jeopardize CNSC/the Crown's ability to identify when the duty to consult the MNO has been triggered and to perform accurate and correct evaluations of the potential for project impacts on MNO citizens' rights, interests and way of life during its determinations on the adequacy of its duty to consult the MNO for future CNSC- authorizations.

Ultimately, MNO wishes to work with CNSC to address its concerns in an expeditious and reasonable manner. MNO kindly requests that CNSC provide a response to the concerns, questions and recommendations set out herein.

Yours very truly,



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cc.

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