

ADMINISTRATIVE

2015 FEB 19 AM 11:09

February 13, 2015

CD#: N-CORR-00531-07378

CNSC CCSN



4658873

**MR. BRIAN TORRIE**  
Director General  
Regulatory Policy Directorate

1.01.02

E DOSSIER	1-8-8-0
REFERRED TO REFÈRÉ À	TORRIE, B.

Canadian Nuclear Safety Commission  
280 Slater Street  
Ottawa, Ontario K1P 5S9

Dear Mr. Torrie:

**OPG Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

The purpose of this letter is to provide Ontario Power Generation (OPG) comments on Draft REGDOC-3.2.2, Aboriginal Engagement. OPG appreciates the opportunity to provide comments during the development of this regulatory document.

OPG has an Aboriginal engagement program guided by a board-level First Nations and Métis Relations Policy. OPG endeavours to build long term mutually-beneficial working relationships with First Nations and Métis communities proximate to its present and future operations. OPG is committed to developing these relationships on a foundation of respect for the languages, customs, and political, social and cultural institutions of Aboriginal communities.

While the guidance document is welcomed as guidance on how to engage with Aboriginal communities, there are some areas of concern.

The following points summarize our major comments:

- There needs to be a clear purpose or statement up front as to what the document is intended to address. It should distinguish between Section 35 Consultation, which is the responsibility of the Crown, the procedural aspects of consultation which have been delegated to the licensee, and how the two activities should work in tandem. As a guidance document, it should clearly articulate the roles and responsibilities of each of the parties to the consultation process: the Crown, being responsible for section 35 Consultation, upholding the honour of the Crown and meeting its fiduciary obligations; the licensee, who is required to comply with regulatory requirements and the delegation of procedural aspects as contained in any directions from the CNSC, and finally, the Aboriginal communities, who are expected to participate in the regulatory processes established and provide the licensee or Crown with information with respect to potential impacts associated with the application on their Aboriginal and Treaty Rights.

- Consistent with the Crown's responsibility, the document should confirm which situations trigger the duty to consult, and which projects do not. If triggered, it should confirm that the Crown will provide a list of which Aboriginal communities should be consulted, a preliminary assessment of the nature of their Aboriginal and Treaty Rights and its rationale for including those communities and the scope of consultation required. It should also include a process of feedback whereby the Crown can advise the licensee of any new issues which can arise during its consultation process that might assist with the licensee's engagement process, and what is required by the Crown to make a determination as to whether consultation is adequate. The timing of the request to submit detailed Aboriginal plans are not always appropriate.
- Consistent with the licensee's responsibilities, the document should expressly indicate what types of information must be submitted to the Crown to support and inform the Crown's obligation with respect to consultation. The document should recognize and distinguish between the information required to support this objective. In this respect, the current draft is at times inconsistent with the Supreme Court of Canada's principles on consultation.
- There are some concerns with the current draft over the timing and level of information to be shared with the regulator in the future and the extent to which it may become public given the sensitivity of each unique relationship. The document should reflect when it is appropriate to share information to ensure that there are no unexpected delays with respect to consultation and approvals. Additionally, information exchanged or discussed between the licensee and the Aboriginal communities may be commercial in nature or otherwise confidential.
- The document should also clearly articulate for the Aboriginal communities that will be consulted, which processes are available for them to participate in, and distinguish between the role of the Crown and the licensee in conducting the consultation and engagement activities during the regulatory process. The communities should be expected to participate and share their concerns with either the licensee or the Crown.

OPG's review of the document was conducted in conjunction with other licensees. OPG will provide detailed comments directly to [consultation@cnsccsn.gc.ca](mailto:consultation@cnsccsn.gc.ca).

OPG's objective is to build strong relationships on a foundation of openness, transparency and trust with all communities. The document should not create barriers or conflict with OPG's existing relationships and engagement processes.

If you require further information or have any questions regarding this submission, please contact me at (905) 839-6747, extension 5264.

Sincerely,



Robin Manley  
Director  
Nuclear Regulatory Affairs and Stakeholder Relations

cc: [consultation@cnsccsn.gc.ca](mailto:consultation@cnsccsn.gc.ca)

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
1.	<b>Cover Page/Preface</b>	<p>Use of word the word and associated definition of “Engagement” verses “consultation”.</p> <p>Need to clarify/ provide a definition of both consultation and engagement and in the context of “shall” verses “should”.</p> <p>Engagement generally deals with relationships, best addressed by licensee through its internal company policy and program for First Nations and Métis. The document may be specific in relation to aspects of consultation that are delegated to the licensee, which may be in addition to the company’s engagement policy.</p>	<p>Provide explanation in the document to describe and distinguish expectations of “Engagement” verses “Consultation”.</p> <p>The Preface should describe what role the CNSC plays in consulting with Aboriginal peoples and what role the licensee is expected to fulfill, i.e., engagement with Aboriginal peoples that will serve to inform the CNSC consultation process as to whether consultation was reasonable and adequate.</p>	Major	Leads to unnecessary expenditure of resources with no benefit and may result in delay to projects. May lead to unnecessary use of consultation for projects which do not require consultation.
2.	<b>Preface</b>	<p>The Preface states “REGDOC-3.2.2 is intended to form part of the licensing basis for a regulated facility or activity within the scope of the document.”</p> <p>Industry questions whether a duty of the Crown can become a part of the licensing basis. The delegation of procedural aspects are best left to the</p>	Delete this statement.	Major	This is an example of increased burden on the licensees with no resultant safety benefit. It should be up to the licensee to determine its stakeholder interaction requirements, not have them forced upon them by the regulator.

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
		Guidelines and more appropriately, any mitigation of impacts that are identified as part of the environmental assessment process may form part of the licensing conditions.			
3.	<b>Preface</b>	<p>The Preface states “Licensees are expected to review and consider guidance; should they choose not to follow it, they should explain how their chosen alternate approach meets regulatory requirements.”</p> <p>If the guidance is a “regulatory requirement” and the licensee needs to explain how it meets the guidance, then it is not guidance at all.</p>	Delete this statement.	Major	Requiring the licensee to provide an explanation adds unnecessary regulatory burden to the licensee. This does not align with the explanation of “Should” in the document (i.e. “Should” is used to express guidance or that which is advised). By definition, guidance is not a regulatory requirement.
4.	<b>Table1 Consultation activity spectrum</b>	Table does not adequately identify scale. What is missing is the “strength” of the Right and/or the trigger, i.e. Right against potential impact.	Need to deal with “Assertions” within areas where known Aboriginal /Treaty Rights are known to exist for First Nations. CNSC needs to apply the applicable federal guidelines	Major	An issue exists where there are strong (confirmed) Aboriginal /Treaty Rights and where other groups “Assert” Aboriginal Rights. This grows in complexity where more than one Aboriginal group “Asserts” Aboriginal Rights and Aboriginal Rights exist for another group within the same geographic area. The responsibility to identify impact on existing Rights is not simply a licensee responsibility.
5.	<b>Sect 2 Background</b>	Crown may “procedurally delegate aspects of the consultation process” to third parties.	Provide clarity for aspects to be delegated.	Major	The impact of Provinces (i.e. Ontario) and the Federal governments not providing an upfront policy that clearly sets out what exactly what in the process is delegated causes undue project

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
		<p>This does not reflect the words of the Supreme Court of Canada (SCC) which states the Crown can delegate procedural aspects of consultation. The duty to consult cannot be delegated nor are licensees conducting consultation. This section should reflect what is expected of the licensee with respect to the procedural aspects. Where activities may impact Aboriginal or Treaty Rights, the licensee may be required to mitigate or accommodate these impacts, as identified through the environmental assessment process. Paragraph one should be clear that the CNSC has the duty to consult and where appropriate accommodate Aboriginal and Treaty Rights.</p>			<p>delay and costs.</p>
6.	<b>Sect 2 3<sup>rd</sup> para (Page 3)</b>	<p>It s not the Aboriginal engagement activities that determines impacts – it is through the CNSC consultation process related to the proposed undertaking.</p>	<p>Clarity on roles and activities of licensee and timing of process to identify Aboriginal interests needed.</p>	<p>Clarification</p>	

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(<i>if applicable</i>)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, <i>if major comment</i></b>
		CNSC should provide direction to licensee on roles and responsibilities early on in the planning stage, who are the appropriate parties with which to engage and the kind of information being sought.			
7.	<b>Sect 3 (Page 3/4)</b>	<p>The first sentence does not reflect the language of the SCC. It should refer to activities that could potentially impact Aboriginal or Treaty Rights. It is not “potential rights” ( also used in other sections of the document). Again, there is some confusion as to the consultation obligations of the CNSC and the Licensee’s responsibilities. The level of consultation is proportionate to the strength of Right and degree of impact. This is based on a preliminary assessment by the Crown. The CNSC should advise the licensee as to what is expected in terms of procedural aspects.</p> <p>The document refers to a draft document. The contents of the draft document are subject to change, this document should not be issued with reference to</p>	Revise language and delete reference to the draft REGDOC.	Clarification	

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
		a draft of another document.			
8.	<b>Sect 3.0 Guidance 1<sup>st</sup> paragraph (Page 4)</b>	<p>Information shared should pertain to those Aboriginal concerns with respect to potential impacts and recommended mitigation measures identified throughout the Licensee’s engagement efforts.</p> <p>Information provided to CNSC should be framed around any necessary and relevant information to aid in determination of effectiveness of adherence to guidance and pertaining to licence decisions and fulfilling the procedural aspects, if delegated.</p>	<p>Replace “accurate, complete information” with:</p> <p>“all necessary and relevant information gathered pursuant to the engagement plan”</p>	Major	Significant level of detail required. The requirement of submitting “all information” is ambiguous, wide-ranging and an unreasonable burden and requirement. “All information” relating to Aboriginal engagement would require submitting information which may be confidential and sensitive and provide an unnecessary level of information pertaining to status and nature of relationship and agreements formed.
9.	<b>Sect 3.1</b>	<p>None of the required submissions have suggested timings attached indicated.</p> <p>Are the requirements to submit related to the applications being made?</p>		Clarification	
10.	<b>Sect 3.2 and 3.2.1</b>	<p>List of groups, methodology and rationale for selection of Aboriginal Groups needs to be provided to licensee.</p> <p>The Crown should be responsible for identifying the list of Aboriginal communities</p>	The Crown should be undertaking this activity.	Major	This point has been a consistent challenge for industry for a number of reasons. Industry neither affirms nor denies the existence of Aboriginal or Treaty Right – the Minister of Aboriginal Affairs does that on behalf of Canada. There may be an issue of overlapping “claims of Rights” in same geographic location. Challenge

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
		that the licensee should engage with, and should provide this information as well as the rationale for identification to the licensee.			on industry is that the incorrect group may or may not be engaged in the federal review process.
11.	<b>Sect 3.2 (page 4) and Sect 3.2.2 1<sup>st</sup> para (Page 7)</b>	Submitting an Aboriginal plan as part of a project description is premature in the process and should not be disclosed as a public document as part of the public project description submission.	For each of these sections the following word change is required. Remove first bullet – “as part of a project description if an EA decision is sought separately from a licensing decision”	Major	The Aboriginal consultation plan should not be combined with the Project Description. Development of consultation plan should follow. Current direction would result in the submission of a plan prior to any meaningful discussion with Aboriginal communities on an agreed upon small “c” consultation process. A detailed consultation and engagement activity plan with all details should not be submitted as part of the broader public record or on the registry. Plan should be specific to procedural aspects the crown delegated at a high level. Detailed plans outlining broader engagement activities to be undertaken will be developed as an agreed upon process will be unique and given the sensitivity of each unique relationship should not be provided as a public document and may not be material to assist CNCS in licensing decisions.
12.	<b>Sect 3.2.1 (Page 6)</b>	CNSC may request an additional study to be conducted that may fall outside of the initial scope. Guidance should be provided with respect to: (i) studies being requested by multiple Aboriginal groups with overlapping territories, (ii) the	This needs to be clear as to when this can be requested during the federal reviews process.	Major	Potential requirement for additional studies and work to be identified late in the process. This could result in additional costs and unreasonable delays to the process.

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
		scope of reference for study, (iii) responsibility for costs and (iv) usage of the report as part of the regulatory process.			
13.	<b>Sect 3.2.1 (Page7)</b>	<p>“Licenses are encouraged to provide...”</p> <p>There is the risk that licensee could be requested to release confidential and proprietary information that should remain protected.</p> <p>Likewise, some aspects of the licensee’s engagement plan may include commercial negotiations that the communities may request that be kept confidential.</p>	<p>The wording of potential useful information on Aboriginal engagement should be reworded to say “provide relevant and necessary information on Aboriginal engagement”.</p> <p>Delete “including agreements with Aboriginal groups.”</p> <p>The word “encouraged” should be replaced by “can “.</p>	Major	The potential impact of releasing material to other groups could impact relationships with communities. Confidential agreements must be respected. Risk of information of a sensitive, confidential or proprietary or commercial value could be released publicly.
14.	<b>Sect 3.2.1 (Page7)</b>	<p>CNSC may participate in licensee’s Aboriginal ...activities.</p> <p>Crown should undertake its own consultation process to ensure they meet their fiduciary obligation towards Aboriginal peoples and should respect the wishes of the Aboriginal community’ with respect to its engagement with the licensee and its consultation with the Crown. The Crown may attend</p>	<p>Include statement. “Upon agreement between CNSC, licensee and Aboriginal community, CNSC may participate.....</p>	Major	Licensee and Crown must maintain a separate and arms- length relationship in order for each party to maintain confidence in the process and that obligations of all parties are clear. It is important that this tenant be applied to Aboriginal engagement and consultation.

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
		where invited.			
15.	<b>Sect 3.2.1 (Page 5)</b>	Important for licensees to be given direction by CNSC on appropriate Aboriginal groups/communities to consult with early in the planning stage.	In the list for identification of Aboriginal groups include the following point: <ul style="list-style-type: none"> <li>Review list of recommended Aboriginal groups and rationale by the CNSC</li> </ul>	Clarification	
16.	<b>Sect 3.2.1 (Page 6)</b>	Involving an Aboriginal group in the development or implementation and review of mitigation measures is NOT a mitigation measure but a strategy. Impacts need to be identified and agreed to first and then followed by mitigation measures that may be developed by the licensee and may or may not include broader discussion or agreement.  This requirement is too premature in the engagement process. It is reasonable to discuss a process for identification of possible mitigation but not the resolution of mitigation at this stage.	Remove "possible mitigation measures": in second bullet.	Clarification	
17.	<b>Sect 3.2.1 last para</b>	CNSC guidance should provide for concurrence on appropriate	Remove the following: .."and to show ongoing	Major	The word: "responsiveness" is subjective, open to interpretation and suggests that CNSC's

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
	<b>(Page 6 )</b>	process and planning of Aboriginal consultation and should not be assessed on projected/desired outcomes re: “responsiveness”.	responsiveness”.		evaluation of the effectiveness of plan will be based on achieving desired resolution or outcomes.  While all possible attempts will be made for resolution of potential or probable impacts, agreement and resolution is not always possible.
18.	<b>Sect 3.2.1 (Page 7)</b>	<p>”all potentially useful information” is outside the scope of Regulatory requirements.</p> <p>Information provided by licensee should be in support of regulatory decisions and consultation.</p>	<p>Remove the wording “all potentially useful information” and replace with “relevant”</p> <p>Sentence should read as: Licensees can provide relevant information on Aboriginal engagement...</p>	Major	<p>The ability the Crown to protect certain information. The cost of releasing material to other groups in terms of relationship building etc. Confidentiality of confidential agreements must be respected.</p> <p>Additional work carried out by the licensee (beyond federal decisions processes) is at the discretion of the licensee and as agreed to by the Aboriginal community.</p> <p>Much of this work may also be confidential and proprietary.</p>
19.	<b>3.2.2</b>	“..the CNSC will also conduct its own analysis to determine if Aboriginal consultation activities are required by the Crown...”	This should be the very first step in process and owned by the Crown.	Major	The CNSC should not conduct its own analysis after it receives industry material (plan). This costs industry in terms of both time and moneyadding delays.
20.	<b>3.2.2. (Page 7/8)</b>	Licensee requires clarity on CNSC role in Aboriginal consultation.. This document is for licensees – a section on CNSC activities is not warranted. Question the relevance of including this section.	Recommend removal of this section.	Clarification	

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
21.	<b>Sect 3.2.2 (Page 8)</b>	<p>At the early planning stages it is important for the licensee to be given direction by the CNSC on the appropriate Aboriginal groups to consult. Licensee requires a review and confirmation by the CNSC early in the process that the submitted Aboriginal plan is appropriate and that the correct groups are being engaged or if not that proper direction by given in writing.</p> <p>“Coordinating” activities is not always prudent with Aboriginal groups. The Crown holds a very specific duty and there needs to be a clear division between licensee and Crown.</p>	<p>Remove “as the consultation process evolves”.</p> <p>Remove last sentence “If the CNSC identifies additional Aboriginal groups a coordinated approach to ongoing engagement and consultation activities will be discussed with the licensee.</p> <p>Replace this line with: “The CNSC, upon receipt of the Aboriginal plan will review and provide written comments on the appropriateness of the activities to be undertaken by the licensee.”</p>	Major	<p>Requests from the regulator to adjust or modify the Aboriginal plan late in the process could trigger additional regulatory burdens or delay federal review decisions or approvals. Direction from CNSC in early stages is required to ensure that during a future decision making stage, the regulator does not request or apply conditions to the Aboriginal efforts after the fact.</p> <ol style="list-style-type: none"> <li>1. Identification of appropriate Aboriginal groups to consult needs to be determined early in the process.</li> <li>2. It is not always appropriate for licensee and CNSC to undertake a “coordinated approach” with Aboriginal consultation. The Crown and licensee need to establish separate and unique relationships relative to each individual accountability and role. An arm’s length relationship must be clearly maintained.</li> <li>3. In order to ensure licensee is in compliance with the Aboriginal Guidance the licensee requires a review of the plan by the CNSC for concurrence and effectiveness.</li> </ol>
22.	<b>Section 3.4 Aboriginal Engagement Section within the CMD</b>	Information provided in Section 3.4 should be contained in the CNSC’s GD-379 Guide for Applications and Interveners Writing CNSC CMDs.	Delete section 3.4.	Major	This document does not require this direction – licensee should seek direction from GD-379 of what to include in CMD. The Regulatory framework is an integrated system. Duplicating information in various documents can be expected to lead to future inconsistency. Licensees should take direction from GD-379 for CMD submissions.
23.	<b>3.5</b>	Licensees are not required to submit an Aboriginal		Clarification	

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(if applicable)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, if major comment</b>
		engagement plan and report if..."Licence renewal with no changes..." Clarification required - would this be an "inform" only exercise?			
24.	<p><b>Preface</b></p> <p><b>Section 2 page 3</b></p> <p><b>Section 3 page 4</b></p> <p><b>Section 3 page 4 "Guidance"</b></p> <p><b>Section 3.2.1 "Summary of aboriginal engagement"</b></p> <p><b>Section 3.4</b></p> <p><b>Sect 3.5 (Page 9) Second and third paragraph</b></p> <p><b>Section 3.6.1</b></p>	Mitigation is appropriate for impacts for established rights or interests but not for potential future practices or rights. Need to deal with facts only and current determination of any impacts. Unnecessary requirement and unrealistic request made of licensee.	<p>Revise this phrase which is repeated throughout the draft REGDOC, as follows:</p> <p><del>"...its potential or established Aboriginal and/or treaty rights and related interests, including Aboriginal title..."</del></p>	Major	Unnecessary requirement and unrealistic request made of licensee. For practical application, licensee cannot be required to speculate.

**OPG Detailed Comments on Draft REGDOC-3.2.2, Aboriginal Engagement**

	<b>Document Section/ Excerpt</b>	<b>Industry Issue</b>	<b>Suggested Change(<i>if applicable</i>)</b>	<b>Major Comment/ Request for Clarification</b>	<b>Impact on Industry, <i>if major comment</i></b>
	<p><b>Appendix B (Second and third bullet)</b></p> <p><b>Appendix B Under “Other resources “</b></p>				
25.	<b>3.6.1</b>	This section should be moved to under 3.2 where it states when an engagement plan is required.	Move information from section 3.6.1 to section 3.2.	Clarification	