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September 8, 2014

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BY EMAIL

Paul Bachand

Dear Dr. Thompson,

Honourary Counsel:

RE: Consultation on Draft REGDOC-2.9.1 *Environmental Protection: Environmental Assessments*

Arthur C. Pape

(1942 – 2012)

Jennie Jack

(Non-Practicing)

This letter is sent on behalf of the Saugeen Ojibway Nations (the “SON”) and follows letter correspondence on this matter in which SON set out a general concern that CNSC’s process for developing its *REGDOC 2.9.1 Environmental Protection: Environmental Assessment* (the “REGDOC”) was out of step with the consultation relationship established between SON and the CNSC for nuclear issues within the SON Territory (attached). At a recent meeting between CNSC and SON on August 26, 2014, you indicated that a comment window was open until September 8, 2014 and that CNSC would only consider follow up consultation on the development of the REGDOC with those parties that submitted comments. SON does not accept this determination of CNSC’s consultation obligations to SON, or the procedures it believes will discharge those obligations. We submit the following comments to ensure that a continued consultation process between SON and CNSC will occur expeditiously with respect to the continued development of the REGDOC.

The comments below are focused on what SON has identified as procedural shortcomings of the REGDOC and are specific to the review of projects, either under the NSCA or CEAA, that have the potential to impact SON Rights and interests.

Unilateral Determination of Scope of Consultations in EA Reviews

Generally, the REGDOC suffers from many of the flaws that SON has identified over the course of the past several years in relation to the implementation of the Crown's duty to consult and accommodate. In particular, the REGDOC fails to focus on the primary outcome of any consultative process - the protection of Aboriginal and Treaty rights and the facilitation of reconciliation - as it fails to take into consideration, at preliminary stages, the perspectives of SON (or any potentially affected Aboriginal group) in the scope and objectives of the review, or the determination of significance of potential impacts. Instead, the REGDOC continues to reflect a unilateral, "check box" approach to the Crown's duty to consult and accommodate where critical early determinations of potential impacts are made by the Crown, in this case the CNSC, without the requirement of early consultation or engagement on the scope of the consultation itself. This inevitably will lead to significant disagreement between CNSC and SON on the requirements of consultation for a given review and leave SON with the impression that consultation has been reduced to a hollow series of meetings, telephone calls and emails. It is unclear how unilateral determinations by the CNSC on the scope of consultations efforts could effectively address SON concerns, protect SON Rights and interests, or ultimately, promote reconciliation with SON. CNSC must seek out, understand and incorporate SON's perspective on the requirements of consultation in the review of a project *prior* to establishing or implementing its review process.

This failing is most apparent in the REGDOC sections dealing with "determination of participation opportunities", under both NSCA reviews and CEAA 2012 and as more fully articulated in the appendices. For example, in "step 3" under the NSCA process, it is suggested that Aboriginal participation opportunities will be determined on a case-by-case basis, which will be determined according to a process set out in Appendix B. The process set out in the appendix appears to describe a process fully internal to the CNSC without any consultation with potentially affected Aboriginal groups. The CNSC's internal review and assessment is supposed to consider, among other things: an understanding of "aboriginal interest", potential for "conflict between environmental and social or economic values of concern to...Aboriginal groups", whether the project "could be perceived as having significant adverse environmental effects", or "potential to learn from...Aboriginal traditional knowledge". It is inconceivable that CNSC could make such determinations without an effective and early consultation process with the affected groups, on these very issues, prior to making its determination of Aboriginal interests and, consequently, opportunities for participation.

Early Engagement and Role of Proponent Engagement Activities

The REGDOC anticipates that a proponent will carry out "pre-project consultation" with the CNSC. It is not clear from the draft document whether, and to what extent, CNSC will require evidence of "pre-project consultation" with potentially affected aboriginal groups. It is SON's expectation that proponents will engage SON directly on matters that may impact on its Rights and interests at the earliest possible stages, and while the greatest opportunities exist for mitigation of impacts and other necessary accommodations. It must be made clear what

expectations CNSC will have regarding early engagement by a proponent and how CNSC will treat such a record in its assessment of a project application. Furthermore, all parties, including SON must know in advance if, and to what extent, the CNSC intends to delegate any procedural aspects of the Crown's duty to consult and accommodate, or rely on proponent – SON engagement as activities applicable to the discharge of CNSC's duty to SON.

A related issue involves the treatment of accommodation measures arrived at between an aboriginal group and a proponent. It has been SON's experience, that increasingly the Crown has relied on proponent activities to discharge its constitutional duties, including the conclusion of appropriate accommodation measures¹. The REGDOC 2.9.1 makes little reference to accommodation measures, how CNSC will act to promote the development of such measures or how CNSC will treat and act to implement accommodation measures arrived at through proponent engagement. The CNSC ought to articulate what it perceives to be its role, as representative of the Crown, in the development and implementation of appropriate accommodation measures.

Lastly, it is extremely disappointed that the REGDOC fails to incorporate, or even acknowledge, the principle of free, prior and informed consent. Canada is a signatory to the *United Declaration on the Rights of Indigenous Peoples*, which expressly articulates the principle and identifies its application in circumstances in which the CNSC may have regulatory authority (e.g. the burial of toxic substances on aboriginal lands). Yet, we have seen no effort by Canada, or the CNSC, to begin the implementation of the declaration or the principle of consent. At a minimum we would have expected some recognition or acknowledgement that consent *may* be required for some projects or developments.

SON Specific Process

SON has expressed its concern to the CNSC that consultation efforts within the SON Territory must be specific to SON. This is also consistent with the long engagement history between CNSC and SON on previous nuclear project reviews, including Bruce Power's application to build new nuclear reactors, as well as the current and ongoing review of OPG's DGR Project.

Many aspects of the REGDOC seem to be inconsistent with the past practice between SON and the CNSC on these matters. It is for this reason that in our letter of June 27, 2014, we indicated the need for meetings to understand how the REGDOC would be implemented within the SON Territory and in a manner consistent with our previous consultation relationship. Some of the issues that will need to be addressed include: (1) whether and how proponent guidelines under a NSCA review will be made available for review by SON; (2) how the notification process and early engagement between SON and CNSC will occur; (3) opportunities for SON participation in

¹ It is worth noting that the *Codification of Current Practices: Canadian Nuclear Safety Commission Commitment to Aboriginal Consultation*, which the REGDOC relies on in support of the outlined EA process, anticipates that any proposed accommodation measures by proponents/licensee will form part of the evidence presented by licensees for consideration by the CNSC.

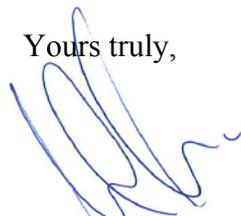
CNSC technical reviews; (4) opportunities for consultation prior to finalization of reports, including determination of appropriate accommodations in report recommendations; (5) opportunities for consultation on the implementation of report recommendations, including specific accommodation measures and related licence conditions; (6) ongoing consultations activities required for follow-up.

Scope of Consultation not limited to environmental impacts

We understand that the REGDOC focuses on the conduct of environmental assessments under the NSCA and CEAA. However, as SON has stated previously, including in our recent meetings, SON does not accept that all potential impacts from a project can be fully assessed in the context of an environmental assessment. For this reason, we believe that CNSC, or any other responsible federal agency, has consultation obligations that go beyond the implementation of an environmental review process or the assessment of impacts as circumscribed by environmental assessment legislation. A full and proper consultation process must address all potential impacts a project could have on SON Rights, interests and way of life. This will include more general impacts on SON and its spiritual and cultural identity to its Territory and its ongoing ability to rely on its Territory to sustain itself in the future. The REGDOC does not provide enough flexibility or scope to analyze and address the full range of risks and potential impacts of a project or development on SON's Rights, interests and way of life. If this is beyond the scope of the REGDOC, SON must understand how the CNSC will fulfill its broader consultation obligations and under which policy documents or arrangements this will be conducted.

Again, as indicated in our June 27, 2014 letter and meeting of August 26, 2014, we look forward to the opportunity to discuss our concerns in greater detail in an in-person meeting so that we can ensure that the development of the REGDOC, and its implementation in the SON Territory, is consistent with the previous consultation relationship between SON and CNSC and is responsive to the needs of SON.

Yours truly,



Alex Monem