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Final submission from the Kebaowek First Nation and the Kitigan Zibi Anishinabeg First Nation

Mémoire définitif de la Première nation de Kebaowek et de la Première Nation des Anishinabeg de Kitigan Zibi

In the Matter of the

À l'égard des

Canadian Nuclear Laboratories (CNL)

Laboratoires Nucléaires Canadiens (LNC)

Application from the CNL to amend its Chalk River Laboratories site licence to authorize the construction of a near surface disposal facility

Demande des LNC visant à modifier le permis du site des Laboratoires de Chalk River pour autoriser la construction d'une installation de gestion des déchets près de la surface

Commission Public Hearing
Part 2

Audience publique de la Commission
Partie 2

May and June 2022

Mai et juin 2022

Canada

In the Matter of
Canadian Nuclear Laboratories

Application to amend the Nuclear Research and Test Establishment Operating Licence for the Chalk River Laboratories site to authorize the construction of a Near Surface Disposal Facility

Final Submissions of the Kebaowek First Nation and Kitigan Zibi Anishinabeg First Nation

Pursuant to the *Revised Notice of Public Hearing and Procedural Guidance for Final Submissions (Rev. 2)*, dated May 17, 2023

June 6, 2023

0. INTRODUCTION

The Kebaowek First Nation ("**KFN**") and Kitigan Zibi Anishinabeg First Nation ("**KZA**") provide these joint final submissions as part of the Canadian Nuclear Safety Commission's ("**CNSC**")[1] hearings on Canadian Nuclear Laboratories' ("**CNL**") environmental assessment and licence amendment application for the proposed Near Surface Disposal Facility ("**NSDF**").

Throughout this matter, we have consistently expressed concerns with this CNSC review process, including: its timelines; CNL and CNSC staff objections to our work, rejecting our comments as "outside of the scope" (including our supplemental submissions and our own environmental monitoring of the NSDF's potential footprint at the Chalk River site); and the virtual format of the final hearing. Out of respect, in good faith, and to avoid prejudicing our submissions, we have worked diligently to adhere to these limitations throughout. At the same time, we raise these procedural concerns again and ask that our submissions be read in light of these challenging requirements.

We have also raised numerous concerns about the NSDF proposal itself, including that the Commission and CNSC Staff ("**Staff**") have failed to meaningfully consult with us on this project, and that they lack sufficient information from CNL on environmental effects to move forward with the environmental assessment ("**EA**"). Without sufficient information on the relevant rights and significance of potential impacts to those rights, we cannot comment on the efficacy of any mitigation measures.

We have made written and oral submissions on these issues, which remain live and relevant for the Commission.[2] We will not repeat those submissions here unless necessary.

In July 2022, in response to our arguments at Part 2 of the hearing, the Commission issued a Procedural Direction. Specifically, the Commission allowed the record to stay open until May 1, 2023[3] "to allow for the Commission to receive further evidence and/or for more engagement and consultation to take place in respect of [KFN] and [KZA]". We provide these final closing remarks, building on our May 1 supplemental submission.

KFN and KZA are independent First Nations that had different interactions with Staff and the CNL in the past several months. Having said that, we are both part of the broader Algonquin Nation, and we continue to share similar interests and serious concerns about the NSDF and its impacts on our rights and interests. Namely:

- the duty to consult has not been fulfilled;
- there is insufficient information to assess the NSDF's environmental effects or, in the alternative, the NSDF is likely to cause significant adverse environmental effects and the question of whether the adverse environmental effects are justified in the circumstance

[1] When referring to the decision-making tribunal, we use "**Commission**". When referring to CNSC staff, we use "**Staff**".
[2] For KFN: CMD22-H7-111, "Preliminary Written Submissions," (April 11, 2022); CMD22-H7-111A, "Written Submission – Part 2" (April 28, 2022); CMD22-H7-111C, "Supplementary Information," (May 1, 2023). For KZA: CMD 22-H7.113, "Written Submissions"; CMD22-H7.113B (May 8, 2023), "Supplementary Information".
[3] The Procedural Direction initially stated that additional evidence would be submitted by January 31, 2023. At the request of KFN and KZA, the Commission extended the Procedural Direction deadline to May 1, 2023.

must be referred to the Lieutenant Governor in Council as required under the *Canadian Environmental Assessment Act, 2012* ("**CEAA 2012**")[4];

- there is insufficient information to determine that CNL will "make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed", as required under the *Nuclear Safety and Control Act* ("**NSCA**");
- approving this project would violate the *United Nations Declaration on Rights of Indigenous People* ("**UNDRIP**"), which is a universal human rights instrument with application in Canadian law.[5]

1. BACKGROUND

At present, there are eleven federally recognized Algonquin communities. Nine of these communities are in Quebec and two in Ontario. Proceeding roughly from northwest to southeast, these are the Abitibiwinni, Timiskaming, Kebaowek, Wolf Lake, Long Point (Winneway), Lac Simon, Kitcisakik (Grand Lac), Mitcikinabik Inik (Algonquins of Barriere Lake) and Kitigan Zibi (River Desert). In Ontario, the communities are the Algonquins of Pikwàkanagàn (at Golden Lake) and Wagoshig (Lake Abitibi).

Our members can trace their ancestry, use, and occupation of the territory in and around the Kichi Sibi back to time immemorial. We have names, in our own language, for all the lakes, rivers, mountains, and features of our respective territories. These names are proof of our long relationship with the land.

Beginning in 1760 the Algonquins entered various treaties with Great Britain: at Swegatchy and Kahnawake in 1760, and at Niagara in 1764. These were not land surrender treaties. Rather, these agreements assured the British of our alliance, and in turn the British promised, among other things, to respect and protect our Aboriginal title and rights. In addition, the Royal Proclamation of 1763 applies to our traditional territory. It guaranteed that our lands would be protected from encroachment, and that they would only be shared with settlers if we provided our free and informed consent through treaty.

Unfortunately, despite these commitments, the British Crown, and later the Canadian government, took our lands by force, without our consent, and without any compensation. Our people suffered greatly as a result, even as those around them became rich from the furs, timber, minerals, and other resources. It is within this context that we must consider the proposed NSDF.

2. FAILURE TO FULFILL THE DUTY TO CONSULT

There is no dispute that the NSDF "has the potential to adversely impact potential or established Aboriginal treaty rights. As such, the Commission must be satisfied that this constitutional duty to meaningfully consult is satisfied prior to making…licensing decisions" regarding the NSDF.[6]

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[4] CEAA 2012, s 5, 7(b), 52(2)
[5] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s. 4(a).
[6] Procedural Direction, DIR 22-H7 (July 5, 2022), at para. 3.

To determine whether the duty to consult has been fulfilled, we believe the Commission must consider which rights of all communities in the Algonquin Nation will be negatively impacted; the seriousness of the negative impact to those rights; and the threshold of consultation and accommodation required.

We outline these issues they relate to us below.

a. Rights that will be impacted

I. KFN'S RIGHTS

In 2013, KFN – along with two other Algonquin First Nations, the Wolf Lake First Nation, and Timiskaming First Nation – asserted rights and title over a broad area.[7] This territory is just upstream of the Chalk River Laboratories site and is where our legal claim to Aboriginal rights and title is the strongest. Having said that, KFN members, as members of the broader Algonquin Nation, can practice their rights throughout the entire Algonquin traditional territory (which includes the entire Chalk River Laboratories site).[8]

KFN identified three categories of rights potentially impacted by the NSDF:[9]

- **Rights to harvest**
    - KFN's community survey reflected significant proportions of respondents engaging in hunting (32%), fishing (42%), and harvesting/gathering/foraging (31%) around the Chalk River Laboratories site.[10] A wide range of resources are hunted, fished, or harvested, including moose, bear, trout, catfish, sturgeon, berries, mushrooms, cedar, sage, and sweetgrass. As one member succinctly put it, "all of our foods are in this area".
    - Consuming and sharing wild foods remain an important part of KFN's culture. About more than a third of respondents reported that wild foods make up either 25%-50% or more than 50% of their diet.[11] In a different community survey, about three quarters of respondents reported they that someone "often" or "sometimes" shared traditional foods with their household in the past year.[12]

- **Rights to govern and protect the territory**
    - This includes a right to apply KFN's customs and laws, and to make decisions about issues that will impact them. For instance, KFN (as well as KZA), as part of a conservation alliance of Algonquin communities, worked with the Nature Conservancy of Canada to support a land back transfer of Fitzpatrick Island (located approximately 40km south of the Chalk River Laboratories site). The

[7] KFN Procedural Direction Submissions, dated May 1, 2023 (CMD 22-H7.111C), Appendix A, at pp. 15-16 ("**KFN Procedural Direction Submissions**").
[8] KFN Procedural Direction Submissions, Appendix A, at p. 17.
[9] In addition to this submission, see also KFN's Rights Impact Assessment, at Section A.1, at pp. 34-35 of Staff's Procedural Direction Submissions, dated May 1, 2023 (CMD 22-H7.D).
[10] KFN Procedural Direction Submissions, Appendix B, at p. 36.
[11] KFN Procedural Direction Submissions, Appendix B, at p. 37. Between KFN's Procedural Submissions and these submissions, the survey data was reviewed and in fact, about 8% (not 1%) of respondents reported that more than 50% of their diet is made up of wild foods.
[12] KFN Procedural Direction Submissions, Appendix A, at p. 31.

alliance is working to establish an Indigenous Protected and Conserved Area, to ensure governance in accordance with Algonquin laws, protocols, and knowledge.
    - Almost all respondents in the community survey agreed that KFN and its members "are guardians of the land, water, animals, plants and resources in Algonquin territory." Many members wrote in answers that reflected a deep understanding of their sacred responsibility and right to speak on behalf of the water, animals, plants, and environment generally.[13]
    - As one member eloquently wrote: "As stewards of the land, water, and animals, we need to be the voice in order to ensure that these things are protected. The government and big businesses can't be left to assume that they will take care of the above mentioned…It is up to us to monitor what is happening in our territory."

- **Rights to maintain a cultural and spiritual relationship with the territory**
    - KFN depends on the territory to protect, revitalize, and pass on its way of life to future generations. As such, it should be able to use, travel through, and enjoy the territory in peace, without fear or trepidation.
    - Many KFN members expressed a cultural and spiritual relationship with animals on the territory, identifying them as spirits, ancestors, and/or teachers that must be protected. Animals like wolf and bear are important symbols in Algonquin culture, with some KFN members belonging to wolf or bear clans.[14]
    - Approximately 12% of respondents reported engaging in spiritual or ceremonial activities around the Chalk River Laboratories site, including visiting Oiseau Rock, offering tobacco, drumming, and picking medicine.[15]

II. KZA'S RIGHTS

In 1989, KZA presented a comprehensive land claim to the federal Crown. KZA's claimed territory is just downstream of the Chalk River Laboratories site. At its closest, the NSDF would be less than 38 kilometers from KZA's claimed territory.[16] At the same time, KZA members still enjoy and use the entire traditional territory of the Algonquin Nation, which includes the Chalk River Laboratories site.[17]

KZA identified four categories of rights potentially impacted by the NSDF:[18]

- **Rights to harvest**
    - This includes rights to hunt, fish, or gather food and plants, through KZA's preferred means and in KZA's preferred locations. Members hunt animals like moose; fish species like walleye, trout, bass, and lake sturgeon; and gather medicinal products, materials and wild foods like berries, nuts, and wild garlic.

[13] KFN Procedural Direction Submissions, Appendix A, at pp. 37-38.
[14] KFN Procedural Direction Submissions, Appendix B, at pp. 37-39.
[15] KFN Procedural Direction Submissions, Appendix B, at p. 36.
[16] KZA Procedural Direction Submissions, dated May 8, 2023 (CMD 22-H7.113B), at pp. 3-4 ("**KZA Procedural Direction Submissions**").
[17] KZA Procedural Direction Submissions, at p. 16.
[18] KZA Procedural Direction Submissions, at pp. 15-17.

- **Right to a safe and healthy environment**
  - KZA's way of life depends on the sustainability and health of the environment. KZA recognizes the importance maintain balance between the "Seven Nations": humans, animals, birds, fish, plants, trees, and insects. Health and diversity amongst the Seven Nations result in a healthy ecosystem.
  - As stewards, KZA has a right and responsibility to protect the environment from harm across generations.

- **Rights to access and occupy traditional territory**
  - As traditionally nomadic peoples, mobility on the territory is a key aspect of Anishinaabe and KZA's culture. Mobility means eliminating physical, environmental, legal, and psychological barriers (e.g., fear) to accessing the territory.
  - A right to access and occupy traditional territory is both a right in itself, and a necessary condition for exercising other rights (e.g., harvesting).

- **Rights to dignity of culture**
  - KZA's relationship with the territory is another crucial foundation for its culture and way of life. KZA's culture comes from the land, and from being on the land. This relationship, based on respect and gratitude, is expressed through cultural spiritual sites, as Oiseau Rock, a major spiritual site just next to the NSDF project site. The integrity of and the access to this site is a major concern to KZA.
  - As part of KZA's relationship with the territory, women are keepers of the waters and men are keepers of the fire. Men's fire keeping teachings include the Earth's internal fire. Traditional knowledges teaches that the heat from burying nuclear waste would change the Earth's internal fire. That the nuclear energy leeches into the water and then flows into livings forms, disturbing all life.[19]

b. Serious potential impact on rights

The NSDF has serious potential impacts to our rights.[20]

I. PERMANENT, IRREVERSIBLE LOSS OF HABITAT AND BIODIVERSITY

KFN's preliminary environmental field work identified over 600 high value components within the NSDF footprint, including eastern wolf, three active bear dens, and habitat for winter moose and deer.[21] Given the presence of these valued components, the NSDF footprint holds significant cultural and sacred value for us. More details on this Indigenous led NSDF environmental assessment can be found online.[22] KZA has also expressed that there are high value components important to their harvesting and traditional activities in and around the Chalk River Laboratories site.[23] In particular, moose is a key part of our diet and livelihood.[24]

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[19] KZA Procedural Direction Submissions, at p. 17.
[20] In addition to this submission, see also KFN's Rights Impact Assessment, at Section A.1, at pp. 36, 41-43 of Staff's Procedural Direction Submissions, dated May 1, 2023 (CMD 22-H7.D).
[21] KFN Procedural Direction Submissions, p. 9.
[22] https://storymaps.com/stories/59c9e394da1a4d4eb2a117566664a3f0
[23] KZA Procedural Direction Submissions, p. 16, 31.
[24] KZA Procedural Direction Submissions, p. 2.

The NSDF requires cutting down 37 hectares of forest, excavation, and blasting approximately 170,000 m3 of rock. The permanent conversion of this area into a nuclear waste dump – without our consent or even input in the early stages of planning – violates our governance and stewardship rights.

More plainly, the clearcutting and rock blasting means a permanent loss of biodiversity including chigwatik, mukwa, mahingan and the many other relations. Staff and CNL argue that there is no public access to the NSDF currently, so there is no impact if the forest is cut down. We reject using the current lack of access to the NSDF footprint as a baseline when it effectively legitimizes ongoing land dispossession, our access to the land, and allows previous infringements to justify continued infringements.

Even if the current lack of physical access is accepted as a baseline, the permanent loss of this mountain and all its biodiversity is a serious impact to our inherent rights and responsibilities. It means there is no possibility of returning access or control over the territory to Algonquin peoples. Practically speaking, the conversion of the forest into a waste dump extinguishes our inherent rights in that area. The biodiversity at risk is not outlined in the in the Environmental Impact Statement ("**EIS**"), since CNL did not undertake mammal population counts in the footprint for the proposed NSDF.

II. CONTAMINATION OF THE ENVIRONMENT

As an above ground project, the NSDF allows contaminants to leak more readily into the environment than alternative designs, such as a subterranean geologic waste management facility ("**GWMF**"). CNL has acknowledged that GWMFs have a "natural geologic barrier" that the NSDF lacks and can be considered "more robust against surface activities and therefore is more favourable".[25]

We are also generally concerned about effluent during the construction and operation of the NSDF.

- For instance, tritium concentration is estimated to be 140,000 Bq/L in wastewater prior to treatment, and there is a 360,000 Bq/L effluent discharge limit for tritium.[26] Both these concentrations far surpass Health Canada's Canadian Drinking Water Guideline of 7,000 Bq/L[27] and the Ontario Drinking Water Advisory Council's recommendation of 20 Bq/L.[28]

- Once released in the environment, tritium is incorporated in organisms as organically bound tritium. The EIS contains some data about organically bound tritium but does not discuss the associated risks and uncertainties (e.g., longer retention in the body or possible accumulation in the environment).

[25] CNL Final Environmental Impact Statement ("**EIS**"), 2-19.
[26] EIS, 3-58, Table 3.2.4-2.
[27] https://www.canada.ca/content/dam/hc-sc/migration/hc-sc/ewh-semt/alt_formats/pdf/pubs/water-eau/sum_guide-res_recom/summary-tables-sept-2022-eng.pdf, at p. 33.
[28] http://ccnr.org/ODWAC_tritium_2009.pdf, at p. 5.

- It is also unclear in the EIS what effects non-radiological waste will have on the environment.

Contamination of the environment and bioaccumulation of toxins has a serious impact on our harvesting rights. It limits the resources available to us for gathering and consumption and poses a health risk for members consuming wild foods. The presence of tritium or other contaminants in the environment is not limited to the NSDF footprint, as water, animals, and plants move and spread throughout the territory.

Our communities are also concerned about the increased risk of climate change events sending above threshold contaminants flooding from Perch Lake into Perch Creek lowlands and into the Kichi Sibi. This risk will be exacerbated by the removal of 37 hectares of old growth forest on the mountain and the replacement of the full suite of ecosystem forest services with a waste mound covered with geomembrane and shallow vegetation. After witnessing the 2023 flood conditions of Perch Lake, Perch Creek and the Kichi Sibi, our communities request further climate change related flood and drought event modelling for review. Given the increasing severity of climate change events including flooding, drought, ice storms, tornadoes and forest fires our communities are uncertain how the water treatment plant could effectively remain in operation during a disaster.

Finally, the risk of contamination and presence of nuclear waste also negatively impacts our ability to maintain a spiritual connection with the land and water. As one KFN member described, they would know they are "walking on soil that's poison. How can we feel sacred knowing that our walk there is not in balance or harmony."[29] And, as KZA highlighted in previous submissions, the burying of nuclear waste is contrary to certain traditional knowledge regarding protection of the Earth's internal fire.[30]

III. INCREASED AVOIDANCE

The NSDF also has a high impact on our right to use and travel through the area peacefully, freely, and without fear. There is a history of exclusion from and opaqueness around Chalk River Laboratories. The nuclear industry is also one that invokes fear and skepticism in many people.

In this context, KFN and KZA members repeatedly expressed concern about the risk of contamination or accident, with a particular emphasis on protecting future generations. Approximately 60% of respondents in a KFN community survey said they would not hunt, fish, trap, or forage (or consume game, fish, or plants that were taken) within a 10km radius of the Chalk River Laboratories. Most answers cited concerns around contamination.[31] Similarly, for KZA, perceived and actual risks of contamination mean members are reluctant to practice traditional activities around Chalk River Laboratories.[32]

The NSDF, as an above ground landfill for nuclear waste, will cause heightened concerns about nuclear malfunction or contamination. This is especially given the NSDF's proximity to the Kichi Sibi, and the lack of meaningful consultation with KFN and KZA earlier in the process. As required

[29] KFN Procedural Direction Submissions, Appendix B, at p. 39.
[30] KZA Procedural Direction Submissions, at p. 17.
[31] KFN Procedural Direction Submissions, Appendix B, at p. 39.
[32] KZA Procedural Direction Submissions, at p.36.

by section 19(1)(a) of CEAA 2012, the Commission's review of environmental effects from malfunctions or accidents must be reviewed in line with the definition of environmental effects, which includes impacts to Indigenous land use and access for traditional purposes. These consequences have not been adequately considered by CNL whose EIS assesses environmental effects in a piecemeal and not synergistic fashion.

IV. CUMULATIVE EFFECTS

One purpose of CEAA 2012 is to encourage "the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments."[33] Indeed, there is a mandatory factor that "any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out" be accounted for in the EA, as well as a review of the significance of those effects.[34]

At the heart of cumulative effects assessment is understanding the effects of other past, proposed, and reasonably foreseeable future activities.[35] As the Canadian Council of Ministers of the Environment explain:

> Cumulative effects denote the combined impacts of past, present, and reasonably foreseeable future human activities on the region's environmental objectives. It requires a broader, forward-looking approach to planning and management that balances environmental factors with economic and social (may include cultural and spiritual) considerations.[36]

Regarding past and present events at the site, we have previously detailed how colonialism, land dispossession, legal oppression, industrial encroachment, and nuclear accidents (among other things) have severely curtailed our ability to exercise our rights in and around the Chalk River Laboratories site.[37] Notably:

- More than three quarters of KFN members reported not being able to practice traditional activities as much as they would like to. Many identified being denied access to their traditional territory by various actors or factors, including private landowners and environmental contamination.[38]

- In KZA's case, the community has also been exposed to abnormal levels of (naturally occurring) uranium and radium in their drinking water for several decades. Members could not drink their tap water and were constantly worrying for their health and safety using tainted water in their everyday life (showering, gardening, etc.). Some community members continue to receive weekly deliveries of bottled water, given the unsafe levels of

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[33] CEAA 2012, s 4(1)(i)
[34] CEAA 2012, s 19(1)(a), (b)
[35] Impact Assessment Agency of Canada, "Cumulative Effects Assessment Practitioners' Guide," (1999).
[36] Canadian Council of Ministers of the Environment, Canada-wide Definitions and Principles for Cumulative Effects, PN 1541 (2014).
[37] KFN Procedural Direction Submissions, Appendix A, at pp. 18-27 and KZA Procedural Direction Submissions, pp. 10-15.
[38] KFN Procedural Direction Submissions, Appendix A, at pp. 28-29.

uranium found in their well water still to this day.[39] This first-hand experience with water contamination means a heightened awareness of and aversion to further environmental contamination and radioactive risk.

- The federal government's control over nuclear development and environmental assessments has historically excluded us. In the few instances where we have been consulted, we are constrained by externally imposed deadlines and a legislative structure that fails to recognize our inherent rights and authority, and does not protect or recognize our traditional knowledge, methods, and laws.

Regarding ongoing and future developments in and around the Chalk River Laboratories site, many impactful nuclear projects have been proposed at the Chalk River Site, including:

1. The Advanced New Materials Research Centre facility to develop small scale nuclear reactors for use in places like remote mines, and to research and undertake the reprocessing of radioactive fuel.

2. The decommissioning of the Nuclear Power Demonstration Project at Rolphton which contemplates entombing radioactive materials from the site in concrete and leaving them beside the Kichi Sibi in perpetuity or alternatively putting the reactor waste in the NSDF.

3. The Global First Power/OPG Micro Modular Nuclear Reactor Demonstration Project.

4. Plans to develop, manufacture and process fuel for multiple nuclear reactor vendors, including with (1) ARC Canada, with whom CNL signed an MOU in July 2022[40] and (2) Clean Core with whom CNL signed an MOU in April 2023.[41]

5. Leaving the NRX Ottawa River Contaminants in situ in the Ottawa River.

All the above projects ought to be reflected in CNL's cumulative effects assessment ("**CEA**"). Currently, projects 4 and 5, above, are not discussed, nor the various proposals for project 3 which remains undecided. In considering these potential future activities, it would have been helpful had CNL provided future looking development scenarios that identify a range of possible outcomes and interactions, based on best available information. This is a recommended approach as set out by the IAAC's Technical Advisory Committee on cumulative effects subcommittee.[42]

CNL's cumulative effects assessment is neither credible nor in keeping with best practice as CNL has narrowly defined the spatial boundary for the CEA, limiting the review of cumulative effects from reasonably foreseeable projects (like the Global First Power SMR project) to effects which "spatially overlap" with the NSDF project site. As CNL finds that none of the effects from the reasonably foreseeable activities are "expected to spatially overlap" with the NSDF project site,

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[39] KZA Procedural Direction Submissions, pp. 13-15.
[40] Canadian Nuclear Laboratories, "CNL Partners with ARC Canada to Advance Fuel Development," (27 July 2022)
[41] The Recorder & Times, "Clean Core and Canadian Nuclear Laboratories sign strategic partnership on advanced nuclear fuel development," (14 April 2023)

they can conclude that there will be no potential cumulative impacts to valued components, including hydrogeology, surface water, aquatic and terrestrial biodiversity.[43]

A narrow spatial boundary for the CEA (which is defined by the project's physical footprint) is not appropriate in the circumstances. Natural boundaries (including the river, watershed, and ecosystem considerations) are broader and more inclusive of synergistic effects, and as such would have been more appropriate. As a result of this narrow scope, the CEA data was unduly restricted and CNL's conclusions of no anticipated cumulative effects is neither well characterized nor supportable.

CNL and Staff's lack of meaningful attention to cumulative effects means it is impossible to understand the seriousness of the impacts of the NSDF project on our rights, which is necessary to then address the consequences.

Considering cumulative effects when assessing the scope of the duty to consult "is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the NSDF.[44] Indeed, the above-mentioned cumulative effects can cause death by a thousand cuts. Our ability to exercise rights in and around the Chalk River Laboratories site is already vulnerable due these cumulative effects. Any additional impacts on our rights in light of past, present, and future activities is very serious and cumulative effects must first be properly ascertained before it can be determined if KFN and KZA's rights can be upheld.

b. The duty to consult is on the high end of the spectrum

There is a strong prima facie case for our rights. The right and potential impacts are of high significance to us. The risk of non-compensable damage is high, particularly given the permanent conversion of a forest – specifically, a forest with valuable habitats, which is next to meaningful cultural areas – into a nuclear waste dump. In these circumstances, deep consultation is required.[45]

c. The duty to consult has not been met

There are several reasons why the duty to consult has not been met in this case.

I. "CONSULTATION" OCCURRED TOO LATE IN THE PROCESS

Consultation should occur early, before a project has moved too far along. As proponents finalize details of a project, secure financing, conduct studies, and obtain approvals, the project gains momentum and it becomes more difficult to change course. Consultation will be meaningless if the project has progressed so far that there is effectively only one outcome. As one court aptly noted:

> "The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions[.] Once important preliminary decisions have

[43] EIS, 5-156, 5-226, 5-267, 5-324, 5-602.
[44] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, at para. 119, leave to appeal dismissed.
[45] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 44; see also KFN's written submissions dated April 28, 2022, at p. 14.

> been made and relied upon by the proponent and others, there is clear momentum to allow a project."[46]

Unfortunately, such delayed consultation is exactly what has happened here.

The Commission attempted consultation too late, right before the last decision-making points. As outlined in previous submissions, prior to 2022, Staff had not effectively consulted with us. With KFN, Staff did not seriously pursue consultation as we had requested until very recently (e.g., under a general consultation framework agreement, to ensure a meaningful nation-to-nation relationship). With KZA, capacity issues made it difficult to fully participate in consultation processes.[47] As a result, at the hearings in June 2022, even Staff's own materials acknowledged it has not obtained "reliable information" about our exercise of rights.

Under the pressure of the Procedural Direction, in the last 10 months, Staff was eager to seek feedback from us on the NSDF. Yet, at this point in the process, key preliminary decisions have already been made, relied upon, and deemed complete or final by the proponent and others, including:

- site selection and design;
- the scope of CNL's Environmental Impact Statement;
- baseline environmental assessment work;
- technical approval of CNL's Environmental Impact Statement; and
- Staff's conclusions that the proposed NSDF would not have significant adverse environmental effects.

The failure to consult during these early decisions means we were unable to suggest alternatives that would have had less impact on our rights. Once we became involved, Staff and CNL had already assumed crucial aspects of the NSDF were going forward. This was particularly problematic for site selection and design, given our continuing concerns about the NSDF's above-ground placement and proximity to the Kichi Sibi.

Staff insists that they have no authority to affect the location and type of project proposed, despite 'alternatives' to the project, including other locations, being a required assessment under CEAA 2012.[48] It is true that consultation in the early phases of project planning is not required under CEAA 2012. However, the duty to consult is upstream of statutory obligations and "cannot be boxed in by legislation"[49]. In other words, strict compliance with a statutory process does not necessarily mean the duty to consult has been fulfilled.[50] Rather, the Crown must exercise its powers in a manner that fulfills the honour of the Crown.

Failing to engage in early consultation is inconsistent with common law obligations. Canada appears to acknowledge this, as it has codified early consultation in the new *Impact Assessment*

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[46] *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320, at para. 74.
[47] KZA Procedural Direction Submissions, at p. 18.
[48] KZA Procedural Direction Submissions, at p. 24; CEAA 2012, 19(1)(g); Impact Assessment Agency of Canada, Addressing "Purpose of" and "Alternative Means" under the Canadian Environmental Assessment Act, 2012 (March 2015)
[49] *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, at para. 121.
[50] *Aboriginal Law in Canada*, Jack Woodward (Carswell, Toronto: 2022) (looseleaf), § 5:37, para. 5.1400.

Act ("**IAA**"),[51] which replaced CEAA 2012. Specifically, under the heading of "Planning Phase", sections 10-15 of the *IAA* require:

- the proponent to provide an initial description of the project, including a summary of any engagement taken with Indigenous groups and any plan for future engagement[52];
- the responsible agency to consult with the public and "any Indigenous group that may be affected by the carrying out of the designated project";
- the responsible agency to provide the proponent a summary of issues raised through consultation with the public and Indigenous groups; and
- the proponent to provide a notice describing how it intends to deal with the raised issues.

Once the responsible agency is satisfied the proponent's responding notice contains all the information required under the IAA, it will post the proponent's notice online. Only after that point will the agency decide whether an impact assessment is required.

Even though this process is not mandated under CEAA 2012, it reflects an understanding that early consultation with Indigenous groups is required. Early engagement is a recognized best practice, and we encourage the Commission to exercise their discretion and abide by the highest and most modern impact assessment standards and practices. Yet, in this process, we were not given opportunity to participate in these preliminary decisions or processes. To now seek KFN's and KZA's input at this late stage of the process leaves very little room, if any, for meaningful consultation.

II. LACK OF OPEN-MINDEDNESS

Indeed, CNSC staff explicitly admitted they were not prepared to reconsider past decisions or underlying baseline information on the NSDF.[53] Instead, Staff was fixated on obtaining information about where we practiced our rights. Staff wanted this information so it could conclude that existing mitigation measures would be sufficient to address any impacts to our rights.

KFN explained multiple times that it needed to review past decisions and underlying baseline information, to meaningfully assess any impacts on our rights and responsibilities. For example, without ground truthing CNL's conclusions on the NSDF's effects on the terrestrial environment and mammal populations in the surrounding area, KFN would not be able assess the NSDF's impact on their harvesting rights and inherent responsibilities to the mammals and aquatic species they typically harvest. In their RIA and previous submission, KZA also stated that the assessment scope was too narrow and needed to be redefined with KZA.

We experienced Staff being uninterested in KFN independently collecting or grounding truth relevant Species at Risk ("**SAR**") baseline information for their EIS and questioning the proposed mitigation measures.[54] This reflected Staff had closed its mind to the possibility that the NSDF could potentially impact KFN's or SAR rights in a way that was not (or could not be) mitigated or accommodated.

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[51] *Impact Assessment Act*, SC 2019, c 28, s 1.
[52] *Information and Management of Time Limits Regulations*, SOR/2019-283, s. 3.
[53] KFN Procedural Direction Submissions, at p.4.
[54] KFN Procedural Direction Submissions, at pp.4-5.

Both CNL and CNSC staff treated the NSDF approval as a foregone conclusion.[55]

CNSC staff's hollow approach to consultation falls short of their constitutional obligations. The Crown must always engage in consultation in good faith, with an open mind. Consultation is not an opportunity for an Indigenous group to simply air their grievances before the Crown just "proceeds to do what [it] intended to do all along".[56] Specifically, the Crown cannot discharge its duty to consult if it begins with the assumption that a project "should proceed and that some sort of mitigation plan would suffice…[T]o commence consultation on that basis does not recognize the full range of possible outcomes, and amounts to nothing more than an opportunity for the First Nations 'to blow off steam'".[57]

The Crown's job goes beyond simply listening and recording the concerns of Indigenous groups.[58] Rather, the Crown must be willing to change its mind and potentially say "no" to a proposed project, based on what it hears from the Indigenous group.[59] Yet, Staff entered consultations with a closed mind, on the assumption that this project would be approved and that existing mitigation measures would be sufficient.

III. THE RECORD IS INSUFFICIENT TO ASSESS IMPACTS TO RIGHTS, ENVIRONMENTAL EFFECTS AND PROPOSED MITIGATION MEASURES

Staff's closed mind meant they failed to acknowledge the gaps in the existing record. Staff's conclusion that the NSDF does not cause any significant adverse environmental effects depends in large part on proposed future and yet to be developed mitigation and monitoring measures. For instance:

- in response to concerns about changes in surface water quality, Staff wrote that CNL has committed to a Surface Water Management Plan;[60]
- in response to concerns about species at risk, Staff wrote that CNL intends to work closely with Canadian Wildlife Services with regards to permit requirements;[61] and
- in response to concerns about the loss of forest and habitat, Staff wrote that CNL has committed to offsetting the loss through a site wide Sustainable Forest Management Plan ("**SFMP**").[62]

It is unclear whether, and to what extent, Staff have independently verified the efficacy of these mitigation measures.

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[55] For instance, CNL stated they simply would exercise the precautionary principle for all SAR onsite. Yet, the precautionary principle has four components: "taking preventative action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making.": David Kreibel et al, The Precautionary Principle in Environmental Science, 109 Envtl.Health Persp.071 (2001). KFN demonstrated in its field ground truthing that in no way has CNL fulfilled its burden of proof for SAR, and indeed, blatantly avoided undertaking the necessary actions to meet its obligations as required by the precautionary principle.

[56] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para. 54.

[57] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, at para. 149.

[58] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, at para. 558.

[59] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 46.

[60] Staff Submissions dated January 24, 2022 (CMD 22-H7), section F. Environmental Assessment Report, at p. 60.

[61] Staff Submissions dated January 24, 2022 (CMD 22-H7), section F. Environmental Assessment Report, at p. 67.

[62] Staff Submissions dated January 24, 2022 (CMD 22-H7), section F. Environmental Assessment Report, at p. 67.

Most notably, Staff have not yet reviewed the SFMP and proposed offsetting measures. In their conversations with KFN, Staff was opaque about the process by which they will review and approve the SFMP. They did not believe it was their role to facilitate public consultation on the SFMP and deferred to CNL's process for gathering input.[63] Yet, if the SFMP is crucial mitigation measure, Staff have a duty to consult with Indigenous communities like us when deciding whether to approve or reject the SFMP.

More generally, we are concerned with gaps or inaccuracies in the EIS and EA, as outlined below.

Lack of internal expert capacity at CNSC

- We were particularly disturbed by the lack of expert review capacity internally at CNSC. Rather than relying on their Memorandums of Understanding with the Department of Fisheries and Oceans ("**DFO**") and Environmental and Climate Change Canada ("**ECCC**") for subject expertise, they relied on internal persons without such subject expertise. For example, CNSC did not follow DFO protocols for species at risk mussels' presence absence studies in the project area of influence for Hickory nut mussels. This is despite the Perch Creek outlet to the Ottawa River is their ideal habitat.

- Similarly, for Eastern wolf, Staff failed to use the expertise of the Canadian Wildlife Service. They did not require CNL to define presence or absence of the species in the NSDF footprint. This is despite Eastern wolf being highly assigned to the region and is a threatened species in Ontario and of Special Concern federally.

Questionable conclusions on environmental issues

- In correspondence with KFN, CNL represented that the NSDF footprint "currently does not have any Milkweed as it is mainly forested". However, KFN's fieldwork identified milkweed within the NSDF footprint. Milkweed is the only host plant for monarch butterfly caterpillars, which is a species of special concern under the *Species at Risk Act*.

- CNL claimed that records of Blanding's turtles nesting in active sand and gravel pits along roadsides suggests they "can tolerate some level of anthropogenic sensory disturbances". Yet, a turtle found in an active sandpit does not speak to whether that turtle was highly disturbed or distressed, and what the impacts of that stress on the species is. The turtles may have been so conditioned by their habits that they went to the sandpit to forage despite heightened stress and disturbance, potentially affective their reproductive capabilities. This is because a stressed animal will put less energy into choosing the best micro-habitat or might limit its foraging.[64]

- CNL opted for engineered solutions versus nature-based Indigenous solutions. For example, CNL's proposed turtle fencing and turtle crossings making it easier for predators to kill species at risk turtles. CNL's proposed relocation of endangered bats to bat boxes CNL's lack of methodology and baseline on NSDF mammal populations and prey-predator use of the NSDF became more evident are CNL more suspect of having completely

[63] KFN Procedural Direction Submissions, at p. 13.
[64] KZA's Procedural Direction Submissions, p. 32.

avoided this work since 2016. And, when KFN attempted to become involved fieldwork, we felt CNL was, at times, obstructing or, at the very least, unnecessarily delaying our work.[65]

Failure to take an ecosystem approach

- The CNSC's *Generic Guidelines for the Preparation of an EIS under CEAA, 2012* requires all EISs to "provide a rationale for selecting specific VCs and for excluding any VCs".[66] However, the EIS lacks such rationale. Notably:

    - Lower trophic level species are hardly represented in the EIS– despite forming the base of the aquatic food web and thus serving crucial ecosystem functions. More specifically, algae, phytoplankton, and diatoms are excluded from the EIS with no rationale for this choice, despite their potential sensitivity to radioactivity.

    - The presence or absence of benthic species at risk around Chalk River (including Rapids Clubtail, Riverine Clubtail, and Skillet Clubtail – all known to live around the Ottawa area) is never established in the EIS. Benthic organisms are hardly represented as VCs, even though they frequently consume sediments when feeding, thus comprising a unique category of species susceptible to lakebed and riverbed contamination.

    - Terrestrial and aquatic flora are excluded as VCs, despite their significance as food sources for other species of fauna and for Indigenous picking practices.

- CNL's discussions of potential impacts to species does not consider how species interact with each other. The EIS considers each VC in a vacuum, rather than in relation (and constant interaction) with other species.

    - For example, there is no consideration for increased competition between species, including increased competition for food resource or habitat, because of the removal of 37 hectares of forest. There is also no consideration given to the potential for noise-sensitive species to leave the area or alter their foraging habits (e.g., bats) and how that would affect the food-web. The 37 hectares proposed for removal also contains critical habitat for bears as well as a major wildlife corridor that if removed, will alter the activity of many species.

General lack of information and transparency

- Generally, the EIS and several supporting documents are long but contain little information. They are repetitive and key findings relating to the significance of identified potential environmental effects tend to reference other reports, plans, and documents rather than provide clear descriptions, analysis, and supported findings. The extensive references

[65] KFN Procedural Direction Submissions, at pp. 6-8.

[66] Canadian Nuclear Safety Commission, "Generic Guidelines for the Preparation of an Environmental Impact Statement – Pursuant to the *Canadian Environmental Assessment Act, 2012*", at s. 5.2.1, online: https://nuclearsafety.gc.ca/eng/resources/environmental-protection/ceaa-2012-generic-eis-guidelines.cfm.

(without sufficient explanation and analysis of these sources in the EIS itself) makes an already unwieldy document more difficult to understand and navigate.

- For example, CNL discussions of drilling mud refer to a DFO Ontario Operational Statement, a Frac-out Response Plan, and Spill Contingency Plan, none of which are summarized with much detail in the EIS.[67] As will be expanded upon below, the EIS does not provide information relating to specific reviews of drilling mud's potential effects on specific species or habitat, nor does the EIS discuss assessments of *Fisheries Act* authorizations relating to drilling mud.

- Further, some description of the Environmental Assessment Follow Up Monitoring Plan is provided in Table 11.0-1. However, this description again refers to other documents for crucial details, such as Waste Water Treatment Plant ("**WWTP**") effluent verification monitoring, where CNL just asserts the monitoring will be conducted in keeping with CSA Standard N288.5-11.[68] Further analysis relating to how exactly CNL will apply the CSA standard, and the assumptions and calculations relied on to support CNL's ultimate proposals relating to the frequency and types of monitoring for each contaminant have not been included in the EIS.

Given these above gaps and inaccuracies, the conclusions in the EIS and EA are unreliable. In turn, we cannot trust Staff's assessment that there are no residual impacts to our rights. For these reasons, the Commission should find that the duty to consult has not been satisfied.

IV. AUTHORIZATIONS UNDER THE *FISHERIES ACT*

One particularly large area of lacking information in the EIS is regarding *Fisheries Act* reviews.

CNL's EIS notes the physical changes to fish habitat and temporary riparian area disturbances predicted to result from the installation of the diffuser and transfer line into Perch Lake as well as wetland disturbances resulting from the construction of the WWTP.[69] This discussion is paired with a set of proposed mitigation activities (including references to DFO guidelines). However, the EIS does not include any detailed discussion of DFO permits for drilling, blasting/use of explosives, excavating and grading activities. Rather, it assures that DFO guidelines for mitigation of these activities will be followed.[70]

Section 35 of the *Fisheries Act* prohibits anyone from carrying on any work, undertaking, or activity that results in the harmful alteration, disruption, or destruction of fish habitat, unless it has been approved via permit or Ministerial authorization. It remains unclear from the EIS and CNSC staff's CMD how much work has been undertaken to determine whether DFO authorization for these activities will be pursued.

Additionally, CNL's EIS does not contain a detailed assessment of potential impacts to fish or fish habitat from each of the expected contaminants that will be present in WWTP effluent. Such an evaluation is not performed in the EIS for drilling mud either. Rather, CNL again relies on

[67] EIS, Table 5.4.2-7 at p.5-275.
[68] EIS, Table 11.0-1 at p. 11-6.
[69] CNL 2020 EIS at p. 5-336 and Table 5.6.5-1 on p. 5-472.
[70] CNL 2020 EIS, Table 5.4.2-7 on p. 5-276 and p. 5-291

assurances to adhere to Canadian Council of Ministers for the Environment release limits, Ontario Provincial Water Quality Objectives, and DFO guidelines to support its argument that the NSDF will avoid significant future environmental harm.[71]

Section 36(3) of the *Fisheries Act* prohibits the release of "deleterious substances" into waters frequented by fish. Deleterious substances are defined broadly as anything that would degrade or alter water quality to such an extent that it could harm fish or fish habitat (s. 34(a), and there are established toxicity thresholds for various species for reference). The potential for harm of a given substance can be measured by quantity or concentration, and the legislative language is clear that the substance being released must be sampled/measured at the point of discharge and not once it has been released and diluted into receiving waters (s. 34(1)(b)). Deleterious substances can include releases of treated wastes and thus potentially apply to contaminants in effluent from the WWTP (s. 34(1)(e)). CNL also notes drilling mud is considered a deleterious substance that can adversely affect aquatic species and habitat.[72] It remains unclear from the EIS and CNSC staff's CMD how much work has been undertaken to determine whether specific ECCC authorization for these activities under the Act will be pursued.

In 2012, the CNSC and (then) Environment Canada entered into a memorandum of understanding (MOU) for their shared cooperation, coordination, and consultation in meeting the relevant requirements of the *Canadian Environmental Protection Act* (CEPA), s. 36(3) of the *Fisheries Act*, *Migratory Birds Convention*, *Species at Risk Act* (SARA), and the CEAA 2012.[73] The MOU also ensures the CNSC and ECCC will consult with one another over reviews of licence applications and environmental assessments (ss. 3(b) and (c)). In 2013, a more prescriptive MOU was signed between the DFO and CNSC.[74] This MOU applies to Class 1 nuclear facilities which would include the NSDF (as it is classified as a "Class 1B" nuclear facility under s. 19(a) of the *General Nuclear Safety and Control Regulations*).[75]

This second MOU sets out the required work of both the DFO and CNSC and distinguishes their respective roles when meeting the requirements of the NSCA, SARA, and the *Fisheries Act*. Importantly, the MOU is clear that both government agencies/departments are responsible for ensuring "Aboriginal consultation" requirements are met in all given cases (s.2(a)(iii) and s. 4(a)(v)). Further, the preamble of the MOU requires the Government of Canada (via the DFO and CNSC) to undertake:

> "a process of early, effective and meaningful engagement and consultation concerning contemplated Crown conduct that may adversely affect established or potential and treaty rights in relation to regulatory decisions under the *Fisheries Act* (e.g., issuance of

[71] See for example: CNL 2020 EIS at p. 3-64, 5-279, and 5-291.
[72] CNL 2020 EIS at p. 5-486.
[73] Memorandum of Understanding (MOU) Between The Canadian Nuclear Safety Commission And Environment Canada, June 2012, online: https://nuclearsafety.gc.ca/eng/pdfs/MoU-Agreements/June-2012-MOU-between-CNSC-and-Environment-Canada_e.pdf.
[74] Memorandum of Understanding (MOU) Between Fisheries and Oceans Canada and Canadian Nuclear Safety Commission For Cooperation and Administration of the *Fisheries Act* Related to Regulating Nuclear Materials and Energy Developments, December 16, 2013, online: https://nuclearsafety.gc.ca/eng/pdfs/MoU-Agreements/2014-02-27-mou-cnsc-fisheries-oceans-eng.pdf.
[75] As confirmed in CNSC staff's CMD for this matter: https://www.nuclearsafety.gc.ca/eng/the-commission/hearings/cmd/pdf/CMD22/CMD22-H7.pdf.

> Authorizations), *SARA* (e.g., issuances of permits) and/or the *Nuclear Safety and Control Act* (e.g., issuance of licenses for nuclear facilities)" (s. 1(f)).

Both parties are required to prepare work plans and protocols to guide their review and assessment of applications, and ultimately ensure intents of the NSCA, *Fisheries Act*, and SARA are adhered to. They must also "coordinate Aboriginal consultation activities" (s. 3(a)). To date, neither KFN nor KZA have been informed of any *Fisheries Act*-specific consultation by either CNSC, DFO, or ECCC staff.

All reviews under the *Fisheries Act* should have been completed and clearly communicated as part of the evidentiary record in this hearing process as they speak directly to predicted environmental impacts of the NSDF and their mitigation. This review should have been undertaken in a collaborative way with KFN and KZA who should also have been given the opportunity to contribute their own Indigenous (traditional and ecological) knowledge to the review.

3. FAILURE TO FULFILL THE CONDITIONS UNDER THE CEAA 2012

Under section 5 of *CEAA 2012*, the Commission must consider the NSDF's "environmental effects", which include:

> (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 19 of *CEAA 2012* likewise sets out the factors that must be taken account in an EA. For the same reasons that the Commission has failed to fulfill their duty to consult with us, there is insufficient information to determine CNL has fulfilled the requirements under sections 5 and 19 of CEAA 2012. Without sufficient information on environmental effects, together with mitigation measures which flow from the understandings of these effects, the Commission is not able to reliably assess the NSDF's effects within the parameters required in CEAA 2012.

We remain of the view that the Commission has insufficient evidence to assess the environmental effects of the NSDF, as required under CEAA 2012. In the alternative, the unreliability of CNL and Staff's conclusions means that the NSDF is likely to cause significant adverse environmental effects. This would align with the precautionary principle, wherein the Commission's own guidance recognizes the proponent bears the burden of showing the project will not cause irreversible damages to people or the environment.[76]

Notably, CNL's approach has been contrary to section 19(1)(g) of CEAA 2012, as they have not conducted an adequate 'alternative means' assessment that reviews, among other factors, other locations for the proposed project what would not require the permanent destruction of this forest

[76] Canadian Nuclear Safety Commission, "Implementation of the Precautionary and Sustainable Development Principles in Nuclear Law – A Canadian Perspective" (2009).

ecosystem and wildlife habitat, next to the Kichi Sibi, a significant waterway for KZA and KFN and a clean water source.[77]

Furthermore, among the purposes of CEAA 2012 is to "take actions that promote sustainable development."[78] Mounting evidence of biodiversity's persistent degradation around the world, as well as its critical role for humanity, makes biodiversity a key element of sustainability. On this basis, we submit the Kunming-Montreal Global Biodiversity Framework ("**Biodiversity Framework**"), as agreed to at the 15th meeting of the Conference of the Parties to the *United Nations Convention on Biological Diversity*, ought to inform the Commission's EA decision.[79] This is especially so given the Frameworks' emphasis on 'mainstreaming,' which posits biodiversity, and the services it provides, be appropriately and adequately integrated in decision-making, where a decision stands to have an impact on biodiversity.[80]

Central to the Biodiversity Framework is a recognition of the dependency of Indigenous peoples and local communities on biological diversity and their unique role in conserving life on Earth.[81] While KFN has asked both CNL and CNSC to comment on their respective efforts to uphold commitments in the Biodiversity Framework, including the full, equitable and inclusive participation of Indigenous peoples in decision-making as set out at Target 22, no response has been received to date.

4. FAILURE TO FULFILL THE CONDITIONS UNDER THE NSCA

Under section 24(4) of the *NSCA*, to approve CNL's licence amendment application, the Commission must be satisfied that CNL:

(a) is qualified to carry on the activity that the licence will authorize the licensee to carry on; and

(b) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed. [Emphasis added.]

For the same reasons that the Commission failed to fulfill their duty to consult with us, there is insufficient information to determine that CNL can meet the criteria of s. 24(4). The lack of adequate baseline information in the EIS means the Commission cannot reliably assess whether CNL's will develop the NSDF in accordance with the requirements of s. 24(4).

There is also insufficient information to demonstrate whether CNL has considered the targets set out in the Biodiversity Framework. Reviewing the application in line with the Biodiversity Framework would be in keeping with the objects of the Commission, which requires they uphold international obligations to which Canada has agreed.[82]

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[77] https://storymaps.com/stories/59c9e394da1a4d4eb2a117566664a3f0

[78] CEAA 2012, s 4(1)(h)

[79] United Nations Environment Program, *Convention on Biological Diversity – Kunming-Montreal Global Biodiversity Framework*, CBD/COP/15/L.25 (2022) [**Global Biodiversity Framework**]

[80] Global Biodiversity Framework, Targets 14 -23

[81] United Nations Environment Programme (1992). Convention on biological diversity, June 1992. https://wedocs.unep.org/20.500.11822/8340.

[82] NSCA, s 9(a)(iii); REGDOC-2.9.1, Environmental Principles, Assessments and Protection Measures, s 2.1

Notably, as will be outlined in more detail below, if the Commission approves CNL's licence application without the consent of Indigenous nations affected, it will violate UNDRIP and contrary to "international obligations to which Canada has agreed", per s. 24(4)(b) of the *NSCA*.

5. APPROVING THE PROJECT VIOLATES UNDRIP

Finally, approving the NSDF on this record would violate UNDRIP. The *United Nations Declaration on the Rights of Indigenous Peoples Act* confirms that UNDRIP is a universal human rights instrument with application in Canadian law.[83]

We have previously outlined the various UNDRIP articles that are relevant to the NSDF.[84] Many of the rights we outlined in Section 2a are consistent and reflected in UNDRIP. Notably, Indigenous peoples have the right to maintain, protect, and have access in privacy to their religious and cultural sites (Article 12), as well as a right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied lands, and to uphold their responsibilities to future generations in this regard (Article 25). By deforesting and blasting a significant area with multiple valued components, the NSDF would violate these articles.

Both Staff and CNL insist that the application of UNDRIP in this process is unknown. They say the federal government is still consulting with Indigenous groups on an action plan to implement UNDRIP. It is debatable how some of UNDRIP's articles might translate into practice and discrete obligations.

Having said that, Article 29.2 of UNDRIP is unequivocal. It reads:

> States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

The language is clear, without qualification. This provision leads to only one interpretation: free, prior, and informed consent is not merely a process of consultation with Indigenous groups. Rather, Indigenous groups have a substantive right to say "no". Specifically, the storage or disposal of hazardous waste – like that proposed in the NSDF – cannot occur until Indigenous peoples provide their free, prior, and informed consent.

If Canada is serious about implementing UNDRIP, then Article 29.2 requires Staff to abide by a "willing host" model for proposed nuclear development on Indigenous territories. In this case, there does not appear to be a willing host for the NSDF. The NSDF is within the Algonquins of Pikwàkanagàn First Nation's ("**Pikwàkanagàn**") unceded traditional territory. As of their May 19, 2022, submission, Pikwàkanagàn had not made an official "FPIC" decision regarding the NSDF. They stated they did "not see enough Project revisions, commitments, and conditions in place to offset" their concerns.[85]

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[83] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s. 4(a).
[84] KFN's written submissions dated April 28, 2022 (CMD 22-H7.111A), at pp. 2-4.
[85] Algonquins of Pikwàkanagàn First Nation written submissions, dated April 11, 2022 (CMD 22-H7.109), at p. 74.

As two neighbouring communities to Pikwàkanagàn, with territory very near to the proposed NSDF footprint, we are not willing hosts at this time (for all the reasons outlined above). The lack of a willing host for the NSDF should be sufficient basis to deny this project from moving forward. If the Commission decides that Article 29.2 and a "willing host" model is not applicable, then it must – at a minimum – ensure that the safest and least harmful proposal is under consideration. Overriding the express wishes of Indigenous communities means the Commission is effectively the sole gatekeeper of the project. As such, Indigenous groups depend on the Commission's utmost vigilance and scrutiny of a proposed project.

In this case, CNL had safer alternative means available to it. It could have pursued a subterranean GWMF, or a different location, farther away from the Kichi Sibi. Yet, CNL chose not to do so, citing high costs (among other things). To add insult to injury, there are gaps in the environmental baseline work to suggest Staff and CNL's conclusions are not reliable.

In these circumstances, allowing the NSDF to move forward would violate both the letter and spirit of UNDRIP. The Commission should decline to do so.

6. NEED FOR AN ENVIRONMENTAL JUSTICE LENS

The Commission should review the NSDF with an environmental justice lens.

Environmental justice requires that a project's impacts be borne equitably amongst all people. However, due to colonialism, racism, and economic inequality, many Indigenous communities are disproportionately located near contaminated and degraded industrial sites.

No Algonquin communities were ever consulted about the construction of the Chalk River Laboratories. Now, communities are expected to permanently accept in their territories the wastes this facility has generated as well as other wastes brought in from elsewhere (namely Whiteshell Laboratories, the Nuclear Power Demonstration reactor, and Port Hope). These Algonquin communities have been excluded from many of the benefits of these projects, and disproportionately shoulder the burdens of contamination and other risks associated with the safe operation of on-site facilities and their impacts.

Other jurisdictions have laws that require government agencies to consider environmental justice factors when carrying out their mandates.[86] A proposed bill in Canada has similar aims to counter environmental injustice.

Specifically, Bill C-226 ("*An Act respecting the development of a national strategy to assess, prevent and address environmental racism and to advance environmental justice*"),[87] has passed in the House of Commons and is receiving its second reading in the Senate. The Bill recognizes

[86] See: US Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations", online: https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf; and US Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All, April 21, 2023, online: https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/21/executive-order-on-revitalizing-our-nations-commitment-to-environmental-justice-for-all/

[87] Canada, Bill C-266, *An Act respecting the development of a national strategy to assess, prevent and address environmental racism and to advance environmental justice*, 1st Sess, 44th Parl, 2023 (first reading in Senate March 30, 2023), online: https://www.parl.ca/legisinfo/en/bill/44-1/c-226.

that “a disproportionate number of people who live in environmentally hazardous areas are members of an Indigenous, racialized or other marginalized community” and that “establishing environmentally hazardous sites, including landfills and polluting industries, in areas inhabited primarily by members of those communities could be considered a form of racial discrimination”.

The Bill would require the Canadian government to meaningfully involve marginalized communities in finding solutions to issues of environmental racism. The spirit and intent of these sort of laws is harmonious with the purposes of existing jurisprudence in Canada, such as that arising from the duty to consult, and the *Charter of Rights and Freedoms* (e.g., section 7 regarding the right to life, liberty, and security of the person, and s. 15 regarding the right to equality under the law).[88]

7. CONCLUSION AND ORDER REQUESTED

KFN and KZA submit that in the circumstance:

- the Commission has not fulfilled the duty to consult;
- CNL’s EIS and licensing application lack essential information necessary to fulfill the requirements of CEAA 2012 and the NSCA; and
- approving CNL’s licence amendment in these circumstances, without a willing host for the NSDF, would violate Article 29.2 of UNDRIP.

For these reasons, the Commission should find there is insufficient information to assess the NSDF’s environmental effects or, in the alternative, the NSDF is likely to cause significant adverse environmental effects and the question of whether the adverse environmental effects are justified in the circumstance must be referred to the Lieutenant Governor in Council as required under CEAA 2012.

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