



Oral presentation

Exposé oral

**Written submission from
the Mississaugas of Scugog
Island First Nation**

**Mémoire de la Première Nation
des Mississaugas de Scugog
Island**

In the Matter of the

À l'égard d'

Ontario Power Generation Inc.

Ontario Power Generation Inc.

Application for a licence to construct one BWRX-300 reactor at the Darlington New Nuclear Project Site (DNNP)

Demande visant à construire 1 réacteur BWRX-300 sur le site du projet de nouvelle centrale nucléaire de Darlington (PNCND)

**Commission Public Hearing
Part-2**

**Audience publique de la Commission
Partie-2**

January 8, 2024

8 janvier 2024



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Written Intervenor Submission: Ontario Power Generation- Darlington New Nuclear Project Licence to Construct



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Mississaugas of Scugog Island First Nation

November 12, 2024



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November 12, 2024

**Re: Ontario Power Generation - Darlington New Nuclear Project Licence to Construct – Comments
from the Mississaugas of Scugog Island First Nation**

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Executive Summary

The nuclear industry is at a critical inflection point. The advancement of small modular reactors ("SMR") is set to transform the industry across the globe and Canada wishes to be world leaders. The proposed Darlington New Nuclear Project ("DNNP") is the first attempt of operationalizing SMRs in Canada. The DNNP encompasses the site preparation, construction, operation, decommissioning and abandonment of up to four new small modular nuclear reactors, approximately 1200MWs in total, at the existing Darlington Nuclear Generating site ("DNGS"). The DNGS is located within the treaty and traditional lands of the Mississaugas of Scugog Island First Nation ("MSIFN"). MSIFN supports the clean energy objectives of OPG, the federal government, and the Government of Ontario but requires that the implementation of those objectives, including the Canadian Nuclear Safety Commission's ("CNSC") review of the DNNP licensing process, be fully consistent with:

- Canadian law that includes MSIFN's s. 35 constitutionally protected Aboriginal and treaty rights and the legal requirements of consultation and accommodation with respect to potential impacts on those rights;
- *The United Nations Declaration of the Rights of Indigenous Peoples Act*¹ ("UNDRIPA") and the commitment of the federal government and its Ministries and agencies to respect the territorial rights of Indigenous peoples and to seek their free, prior and fully informed consent in decisions that affect them, their communities and territories;
- The findings of the Truth and Reconciliation Commission of Canada² ("TRC") with respect to the lasting impacts of the residential school system on First Nations peoples and families and in particular Call to Action No. 92 calling upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples*³ ("UNDRIP" or the "**Declaration**") as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources; and
- *The United Nations Declaration of the Rights of Indigenous Peoples Action Plan* ("UNDA Action Plan").⁴

MSIFN acknowledges efforts made by Ontario Power Generation ("OPG") to implement the TRC Call to Action No. 92. MSIFN and OPG are jointly developing agreements, policies and procedures which will serve to protect MSIFN's rights and provide meaningful opportunities for economic participation by MSIFN and its members in all phases of the DNNP, if it proceeds. MSIFN and OPG are developing a constructive and collaborative relationship. Based upon our current progress and relationship with OPG,

¹ SC 2021, c 14 [UNDRIPA].

² Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (2015), online (pdf): *National Centre for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

³ *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, A/RES/61/295 (2 October 2007).

⁴ Government of Canada, "The *United Nations Declaration on the Rights of Indigenous Peoples Act* Action Plan" (2023), online (pdf): Justice Canada < <https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf>>.

MSIFN is confident that continued good faith negotiations will result in agreements with OPG and will not hinder OPG's progress in completing the DNPP on its current schedule.

MSIFN is prepared to provide its consent for a CNSC Licence to Construct ("**LTC**") decision, on the basis of progress toward binding agreements with OPG, with the condition of regulatory holdpoints prior the envisioned License to Operate ("**LTO**") decision. MSIFN emphasizes that future binding agreements with OPG, while welcome, do not replace establishing a regulatory framework that complies with the current Canadian legal requirements of Indigenous consultation and upholds the federal mandate.

The CNSC has advised MSIFN that it has the responsibility to satisfy the Crown's duty to consult MSIFN with respect to the potential impacts of the DNPP on the First Nation's constitutionally protected rights (the "**DTC**"). The CNSC also has the responsibility of implementing UNDRIP in an expeditious manner. Through this proceeding, it has become clear to MSIFN that the CNSC's framework, policies and processes for fulfilling these responsibilities is at variance with current jurisprudence and with the express commitments of the Government of Canada and the CNSC itself. In particular, the CNSC's process fails by:

- Scoping the review of the project in phases, ignoring substantial risks on the basis that they will be dealt with in future regulatory approvals;
- not providing adequate notice, specifically in providing MSIFN with adequate time to review and consider all the materials;
- not collaborating with MSIFN or other Indigenous communities to develop a Rights Impact Assessment ("**RIA**") process to incorporate necessary timelines and resources;
- mischaracterizing MSIFN as a stakeholder rather than a rights holder; and
- not respecting MSIFN as a government of an Indigenous peoples and community with legitimate responsibilities to protect its member and internal processes requiring it to share information with its members.

In these submissions, MSIFN is seeking to have the CNSC:

FIND

1. that it is necessary to ensure MSIFN's rights are adequately recognized and protected through CNSC regulations or policies that hold proponents including OPG accountable;
2. that the CNSC's consultation to date has not upheld UNDRIP or the UNDA Action Plan;
3. that MSIFN has not been invited or permitted to be a participant during decision making phases including higher strategic consultation processes;
4. the current RIA process has been inadequate and has amounted to the providing of information and seeking responses which falls short of the legal requirements of meaningful consultation;
5. that MSIFN's concerns with the CNSC's review of cumulative effects, specific environmental concerns, the jurisdictional issue of the oversight of the lakebed, piecemealing the project and the lack of waste consideration are not satisfactorily addressed;

ORDER

6. the CNSC, OPG and MSIFN work together to develop a process to properly address such concerns;
7. the CNSC Staff to include MSIFN representation in the Review and Verification process to be implemented by the CNSC to confirm compliance with its decisions and orders in this hearing;
8. to ensure OPG fulfills the obligations set out in the Letters of Intent ("LOIs") and agreements between OPG and MSIFN by establishing regulatory holdpoints for consideration of the impact to Indigenous rights similar to technical holdpoints already used;
9. in conjunction with Indigenous Nations, (i) include the continuation of the RIA process as part of the review and verification process and (ii) the development of a better RIA guidance document for future applications;

COMMIT

10. to the immediate striking of a task force for the development of an Indigenous Advisory Committee and Indigenous Monitors for future proceedings similar to that of the CER;
11. to the CNSC undertaking a full strategic review, along side Indigenous Nations, of the CNSC's regulatory framework for Indigenous engagement to identify and fill regulatory gaps and updates to the CNSC REGDOC 3.2.2 to reflect UNDRIP and FPIC; and
12. to including a provision for the CNSC to seek MSIFN's consent for the DNNP and the LTC decision, and the envisioned LTO decision.

PART 1

Introduction, MSIFN, the DNNP Background and the Law

Introduction

MSIFN supports Canada's carbon reduction objectives in the energy sector and understands Ontario's need for additional supply which Ontario's Minister of Energy recently pegged at a 75% increase by 2050. However, those objectives must be implemented consistently with Canadian law, especially with UNDRIP, the TRC, the UNDA Action Plan and the CNSC's commitment to recognize and fulfill Canada's obligations to MSIFN's constitutionally-protected Aboriginal and treaty rights and advance reconciliation. Unfortunately, to date, the process has failed to ensure such rights will be protected. The root of the failure resides in the inadequate environmental assessment which continues an outdated regulatory framework that has not adapted to fulfill Canada's obligations to Indigenous rights. For example, CNSC's consultation process was unilaterally developed and forced upon MSIFN. It does not reflect the reconciliation roadmap of the federal government, or Natural Resources Canada ("NRCan") and the CNSC's stated commitments.

The Honourable Gary Anandasangaree, Minister of Crown-Indigenous Relations, stated:

*"The UN Declaration Act and the related Action Plan are key parts of the roadmap to reconciliation. They help guide Canada's collaborative efforts with Indigenous partners to address the harmful legacies of colonization, and build renewed relationships based on a fundamental respect for Indigenous rights."*⁵

The DNNP is the first of its kind, a 300 MW SMR, and is predicted to enhance Canada's international role as a nuclear energy leader. Just as the implantation of the SMR technology is generational work, Prime Minister Trudeau has stated so too is the implementation of UNDRIP.⁶ In 2021, Trudeau clearly instructed Canada's Ministers, including to the Minister of Natural Resources Minister Wilkinson, to move faster on the path of reconciliation.

*"As Ministers, each of us has a duty to further this work, both collectively and as individuals. Consequently, I am directing every Minister to implement the United Nations Declaration on the Rights of Indigenous Peoples and to work in partnership with Indigenous Peoples to advance their rights."*⁷

⁵ Department of Justice Canada, News Release, "Third annual progress report on the implementation of the *UN Declaration on the Rights of Indigenous Peoples Act* highlights progress and points to where further work is needed" (20 June 2024), online: *Department of Justice Canada* <<https://www.canada.ca/en/department-justice/news/2024/06/third-annual-progress-report-on-the-implementation-of-the-un-declaration-on-the-rights-of-indigenous-peoples-act-highlights-progress-and-points-to-.html>>.

⁶ Prime Minister of Canada, Justin Trudeau, Statement, "Statement by the Prime Minister of Canada on Human Rights Day" (10 December 2016), online: *Prime Minister of Canada* <<https://www.pm.gc.ca/en/news/statements/2016/12/10/statement-prime-minister-canada-human-rights-day>>.

⁷ Prime Minister of Canada, Justin Trudeau, Mandate Letter, "Minister of Natural Resources Mandate Letter" (10 December 2016), online: *Office of the Prime Minister* <<https://www.pm.gc.ca/en/mandate-letters/2021/12/16/minister-natural-resources-mandate-letter>>.

Pierre Tremblay, President and CEO of the CNSC, opened the October 2, 2024, Hearing Part 1 (the "**Hearing**") by stating that reconciliation is a priority for him.⁸ This echoes former President and CEP of the CNSC Rumina Velshi's 2022 statement:

*"Notably in Canada, the federal government is committed to reconciliation with Indigenous peoples, a commitment we at the CNSC embrace wholeheartedly. And federal legislation was adopted last year that provides a roadmap for implementing the United Nations Declaration on the Rights of Indigenous Peoples. In short, doing things as they were done before is no longer an option, and that should be welcome news."*⁹

MSIFN was pleased to hear President Tremblay's commitment to reconciliation, a process that requires amongst other things, the implementation of UNDRIP. During a 2024 keynote address Mr. Tremblay spoke about the CNSC's encouragement of Indigenous consultation and engagement. Under the topic of trust building he said, "[A]s an agent of the Crown, the CNSC has a responsibility and obligation to meet its Duty to Consult and Accommodate when decisions that the Commission makes could potentially impact Indigenous or treaty rights."¹⁰ He then went on to speak about funding options, creating terms of reference, and the responsibility on proponents to develop meaningful, long-term relationships with Indigenous Nations. He finished by drawing attention to REGDOC 3.2.2 which outlines CNSC Indigenous Engagement.

What was striking about Mr. Tremblay's keynote address was the absence of UNDRIP or the requirement of consent. The Prime Minister established this directive in 2021. In 2024, the President of a Crown agency has the responsibility to implement UNDRIP. Yet, concerningly, this was a glaring omission.

The CNSC's vision is to build trust and advance reconciliation which must be guided by UNDRIP, TRC and the principles respecting the Government of Canada's relationship with Indigenous peoples. The CNSC also claims to support the implementation of the UNDA Action Plan.¹¹ Up to this point, MSIFN believes the CNSC staff have mostly paid lip service to these claims.¹²

Upholding reconciliation requires the CNSC to overhaul its internal structure and consultation process. MSIFN has not been a part of creating the current consultation process nor have we consented to it. This fundamental flaw shows a continuation of the Crown's paternalistic practices. To this end, there is an urgent and imperative need for the CNSC to comply with the law.

⁸ Canada: Canadian Nuclear Safety Commission, *Public Hearing (Transcript)*, (2 October 2024) at pg. 1.

⁹ Canadian Nuclear Safety Commission, Speech, "Remarks by Rumina Velshi at the NEA Workshop on the Management of Spent Fuel, Radioactive Waste and Decommissioning in SMRs or Advanced Reactor Technologies" (8 November 2022), online: *Government of Canada* <<https://www.canada.ca/en/nuclear-safety-commission/news/2022/11/remarks-by-rumina-velshi-at-the-nea-workshop-on-the-management-of-spent-fuel-radioactive-waste-and-decommissioning-in-smrs-or-advanced-reactor-tech.html>>.

¹⁰ Canadian Nuclear Safety Commission, Speech, "Keynote address by Pierre Tremblay, President and CEO of CNSC at the 5th International Conference on Generation IV and Small Reactors" (3 October 2024), online: *Government of Canada* <<https://www.canada.ca/en/nuclear-safety-commission/news/2024/10/keynote-address-by-pierre-tremblay-president-and-ceo-of-cnsc-at-the-5th-international-conference-on-generation-iv-and-small-reactors.html>>.

¹¹ Canadian Nuclear Safety Commission, "Reconciliation" (25 September 2023), online: *Government of Canada* <<https://www.cnsccsn.gc.ca/eng/resources/aboriginal-consultation/reconciliation/>>.

¹² There has been no request for consent, no seeking of consent, no mechanism to enforce the Proponent's promises to MSIFN, no consultation on the process which seems to be ad hoc, and no real dialogue simply a one-way conversation. This is evident in the Rights Impact Assessment process described further below.

It is urgent and imperative for the following reasons:

1. governments across Canada have announced their intention to increase the use of nuclear generation, including the use of SMRs, to meet the needs of the new electrified economy in a manner that does not emit greenhouse gases thereby addressing climate change;
2. the DNNP is the first SMR to undergo a licencing and regulatory process since Canada launched its SMR Action Plan (aka SMR Roadmap) in 2018 which coincidentally coincides with the Williams Treaties Settlement Agreement of 2018;
3. the precedent created during the first SMR regulatory process will have long-lasting implications, both positive and possibly very negative, for which each government will be held to account; and
4. CNSC's current process is outdated and does not align with the federal government nor NRCan's legal obligations.

MSIFN is asking that the following UNDRIP Articles are upheld:

- Article 18 which provides for the right to partake in decision making on matters affecting their rights;
- Article 19 which provides that States will consult with Indigenous peoples and get their consent before adopting measures that will affect them;
- Article 26 which provides for Indigenous control over traditional lands and the States respect of those lands;
- Article 32(2), which provides that "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their land or territories and other resources..." ("**FPIC**"); and
- Article 29(2) which provides "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."

To achieve these goals, MSIFN is calling upon the Commissioners to commit to striking a task force to create an Indigenous Advisory Committee ("**IAC**"), with the first step being the creation of a Terms of Reference sheet. Meaningful dialogue starts with agreeing to the ground rules. The task force is a concrete step in repairing the trust relationship between the First Nations and the CNSC.

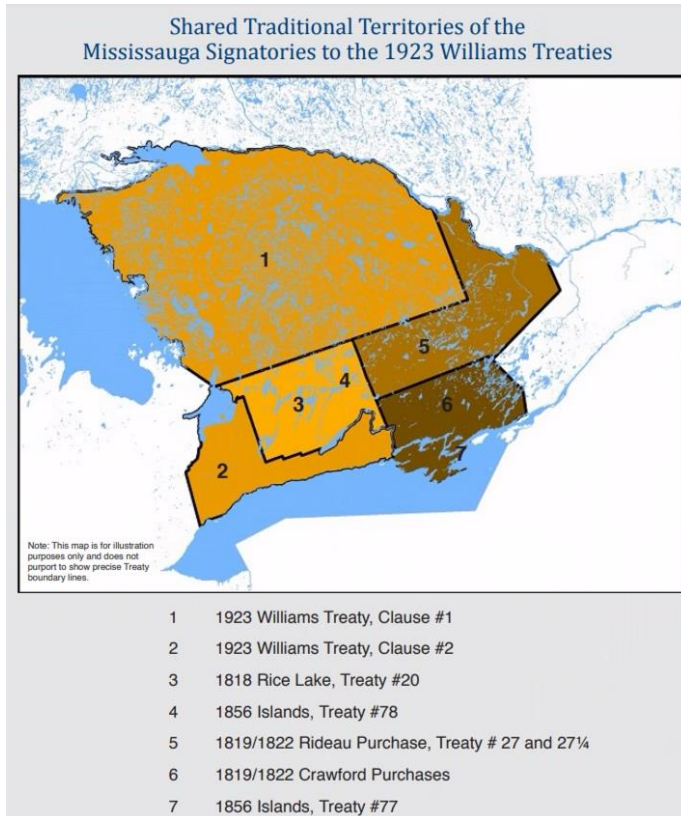
Advancing the current process in the absence of CNSC's alignment with UNDRIP risks creating new problems while trying to solve old ones. Granting the LTC without fixing CNSC's consultation process will have a ripple effect during subsequent licencing processes. Ensuring the Crown, the regulators, proponents and rights holders get the first attempt at this process correct is a responsibility all of us carry for current and future generations. Each party brings a unique and important perspective to this process. As such, it should be as iterative as possible. We should all have the shared vision of being nuclear energy world leaders with processes that fully align with UNDRIP and upholding all of Canada's international commitments beyond nuclear safety.

The legal and environmental landscape has drastically changed since the start of the DNNP almost 20 years ago. Canada and Ontario considered the rights of MSIFN and other Williams Treaties First Nations ("**WTFNs**") to be extinguish, until the Williams Treaties Settlement Agreement of 2018. Canada's SMR Action Plan did not exist, and UNDRIP had only recently been adopted by the UN General Assembly in

2007 with Canada initially opposing the declaration and only providing its full support for UNDRIP in 2016.

As the law and recognition of MSIFN and WTFN rights has so significantly changed since the start of the DNNP, so too must the CNSC's processes. One need only contrast the CNSC's legislation, regulations, policies, and procedures with that of the Canadian Energy Regulator ("**CER**") to see that the CNSC is in need of a consultation overhaul. MSIFN is committed to working with the CNSC so it can serve as an example of a tribunal transitioning to being able to discharge the Crown's obligations to Indigenous communities.

MSIFN is a Right's Holder with Inherent Jurisdiction



¹³ MSIFN is located on the shores of Lake Scugog in Durham, Ontario. MSIFN has a long history in this part of Ontario and is part of the "WTFNs". The WTFNs' territory extends from the shore of Lake Ontario in the south, Georgian Bay in the west, the Ottawa Valley in the east, and as far north as the French River. Within these treaty territories, MSIFN's priority is the protection and preservation of the lands, waters, wildlife, and fisheries that we rely on. The first Mississauga people settled in the basin of Lake Scugog around 1700. Game and fur animals, waterfowl and fish abounded, and wild rice grew in profusion in the shallow waters. The people flourished in this paradise for nearly a century until the British arrived with their insatiable appetite for Aboriginal land. Having just lost the American War of Independence, British refugees came flooding north into Upper Canada seeking new land.

Government officials were soon conducting land acquisition treaties, including the

"Gunshot Treaty" with Anishinaabe, including the Michi Saagiig and Chippewa people, who neither understood the language of these powerful strangers nor fully grasped the revolutionary concept of permanently selling their Mother Earth. Millions of acres of valuable native lands were given up through these treaties with very little received in return. Unfortunately, fair dealings were not the order of the day. In one instance, a 100 mile (160 kilometer) stretch of land about 20 kilometers wide along Lake Ontario from roughly Trenton to Toronto was ceded, but the treaty was so flawed, government officials later privately agreed that it was invalid. Mississauga people however were not so informed, and that land was quickly taken up by non-native settlers.

In another case, the Crown completely ignored and by-passed MSIFN when it granted the land west of Lake Scugog north to Lake Simcoe to non-native settlers who promptly chopped down the forest for their farms. With increasing settlement at Scugog, the only land available was an 800-acre landlocked parcel on Scugog Island. And despite the thousands of acres west of Lake Scugog earlier taken from them, Mississauga people were required to purchase these 800 acres with their own money.

MSIFN are cultural partners of the Michi Saagiig (Mississauga) Nation, with traditional territories expanding through most of southeastern Ontario, including lakebeds, tributaries, and watersheds. MSIFN is signatory to the Williams Treaties of 1923, which after 90 years of dispute came to a final settlement agreement in 2018 that reaffirmed our pre-confederation treaty rights to harvest. MSIFN is also signatory

¹³ This map is based on information available to MSIFN as at the date of this submission, and such information may change over time; this depiction is without prejudice to MSIFN's rights to represent its Aboriginal Lands in any other proceeding, forum or engagement in a different way.

to the Framework Agreement for First Nations Lands Management,¹⁴ the *First Nations Fiscal Management Act*,¹⁵ and other political Aboriginal arrangements all of which support our Inherent Right as a self-governing authority. After a 90-year fight to have our rights recognized, MSIFN insists the CNSC respects the weight of this recognition in how it deals with us.

For several decades MSIFN has lived with the DNGS. The proposed DNNP is located within the recognized treaty and traditional territory of the WTFNs, giving MSIFN a rights holding position in the project. MSIFN's reserve community is about 37 km from the project and members have expressed direct concerns and uncertainty surrounding the safety, management, and security of the nuclear reactors and waste stored on site, as well as impacts to the environment. MSIFN is the only First Nation community located within the Ingestion Planning Zone (50 km) for distribution of potassium iodide pills in the event of an emergency at the Pickering Nuclear Generating Station ("**PNGS**") which is approximately 40 kilometres from the MSIFN reserve community.

Without ever providing consent, MSIFN must continue living with the risks associated with the nuclear sites and the future DNNP. Our traditional territory is where it is. Contamination of this area is an infringement which cannot be undone or satisfactorily accommodated. Nuclear safety is paramount to MSIFN. Nearly every aspect of the nuclear fuel lifecycle occurs within our territory, except for uranium mining. These post-colonial activities will continually impact our community. It is the future generations who will bare this burden and MSIFN, along with the CNSC and OPG has a legal obligation to ensure their safety.

MSIFN's Chief and Council, in conjunction with their teams, act as their community's regulatory body. The process MSIFN must undertake to discharge their legal obligations to their citizens and the WTFN community is complex and not something that the Crown can legally rush or disregard. UNDRIP exists to protect this, and our duty is to ensure it is upheld.


¹⁴ Framework Agreement on First Nation Land Management, WESTBANK, MUSQUEAM, LHEIDLI T'ENNEH (formerly known as "LHEITLIT'EN"), N'QUATQUA, SQUAMISH, SIKSIKA, MUSKODAY, COWESSESS, OPASKWAYAK CREE, NIPISSING, MISSISSAUGAS OF SCUGOG ISLAND, CHIPPEWAS OF MNJIKANING, CHIPPEWAS OF GEORGINA ISLAND, SAINT MARY'S, as represented by their Chiefs and all other First Nations that have adhered to the Agreement and, as represented by the Minister of Indian Affairs and Northern Development, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, 12 February 1996 [FA].

¹⁵ SC 2005, c 9 [FNFMA].

Background on the Project

To fully grasp the misalignment of the current legal framework and the DNNP consultation process, it is important for the Commission to understand that while the project sat idle for a decade, the law continued to advance. The SMR technology may not be fundamentally dissimilar to the traditional reactors but the world of Indigenous consultation since 2006 is.

YEAR	ENVIRONMENTAL LEGISLATION ADVANCEMENTS	DNNP	KEY LEGAL INDIGENOUS CONSULTATION ADVANCEMENTS
1990	<i>Canadian Environmental Assessment Act ("CEAA")</i> in force		
1997	<i>Nuclear Safety and Control Act</i> in force		
2003	CEAA amended for certainty, predictability, and public participation		
2004			<i>Haida, Taku River</i> Decisions Duty to Consult & Accommodate ("DTCA") becomes law – not reflected in CEAA
2005			<i>Mikisew Cree</i> Decision – Crown must consult First Nations who have historical treaty rights
2006		Licence to Prepare Site application (" LPS ") EA started	
2007			UNDRIP resolution at the UN Federal Action Plan on the DTCA announced
2008			DTCA Action Plan Guidelines released
2009		EA Completed	

2010	<i>CEAA</i> amended – Agency is responsible for most comprehensive studies – little mention of Indigenous consultation		Canada issues a Statement of Support endorsing UNDRIP
2011		JRP Panel Report	Fukushima Disaster
2012	<i>CEAA</i> repealed and replaced with new <i>CEAA</i> – encourages consultation with Indigenous peoples	LPS issued	
2013		DNNP on hold indefinitely 	
2015			Truth and Reconciliation Calls to Action released
2016			Canada endorses UNDRIP
2018			WTFN Settlement Agreement Signed
2019	<i>Impact Assessment Act ("IAA") replaces CEAA</i> <i>IAA</i> looks at both positive and negative environmental impacts, economic, social and health impacts of potential projects, upholds UNDRIP, cumulative effects assessments and protection of s. 35 Aboriginal and Treaty rights.		UNDRIPA becomes law
2021			<i>Yahey</i> decision – cumulative effects must be assessed

2022		LTC application Extension of LPS for 10 more years	
2023	NCSA amendment to include upholding Indigenous sec. 35 rights – no mention of UNDRIP		UNDA Action Plan in force

Crown land within the Gunshot Treaty at the Darlington Provincial Park on the shores of Lake Ontario was identified as a potential site for the DNGS in the late 1960s, and former Crown Corporation Ontario Hydro purchased the plot in 1971 as an "energy centre." The Ontario Crown announced approval of the construction of the four-unit, 3500 MW DNGS on April 18, 1977.¹⁶ MSIFN was not consulted at all during this period or subsequently.

On September 2006, OPG applied to the CNSC for a LPS for the DNNP. The *Nuclear Safety and Control Act*¹⁷ is the constating legislation for the CNSC and provides the frameworks for the rights and process for regulating and licencing OPG's nuclear facilities. The process for applying for any licence falls under s. 26 of the NSCA and is laid out in the [Canadian Nuclear Safety Commission Rules of Procedure](#) along with [Class 1 Nuclear Facilities Regulations](#) and [REGDOC 3.2.2](#) which is specifically for Aboriginal Engagement.

An environmental assessment was required for the LPS, and was referred by the Federal Minister of Environment to a Joint Review Panel ("JRP") which produced the Joint Review Panel Environmental Assessment Report Summary for the project. The Environmental Assessment ("EA") was completed in 2009. On August 17, 2012, the JRP of the Commission announced its decision to issue the LPS for the DNNP for a period of 10 years. In 2022, the CNSC granted a 10-year extension.

The JRP Environmental Assessment Report made Recommendation #4 that the CNSC exercises regulatory oversight of OPG so that they comply with all applicable laws and regulations at all jurisdictional levels.¹⁸ In 2024, this now includes UNDRIP.

MSIFN documented the lack of Indigenous participation in the EA in their November 2023 "Intervenor Submission: Ontario Power Generation's DNNP." The boundary of the EA's Regional Study Area interestingly stops just shy of MSIFN and Hiawatha First Nation's reserve boundary. There is no direct evidence of meaningful consultation with MSIFN regarding any aspect of the EA or the Regional Study Area. Despite being the closest First Nation to the DNNP, MSIFN was denied participation funding for the EA.

¹⁶ John McCredie, "Ontario Hydro's Nuclear Program Design and Construction Status" (3-6 June 1984), online (pdf): <https://inis.iaea.org/collection/NCLCollectionStore/Public/22/069/22069685.pdf>.

¹⁷ SC 1997, c 9 [NSCA].

¹⁸ Canada: Darlington New Nuclear Power Plant Project Joint Review Panel "Environmental Assessment Report" (August 2011) at pg. vii.

Switch to SMR

In recent years the global nuclear industry and the Canadian government have been exploring SMR opportunities. SMRs are nuclear fission reactors designed to be built at a smaller size, but in larger numbers than most of the world's current nuclear fleet. They are small, in both power output and physical size, modular, portable and scalable, reactors, meaning that they use nuclear fission to produce energy for the following: "electricity, hybrid energy systems, district heating, water desalination, and high-quality steam for heavy industry applications."¹⁹ Since the original EA, the choice of technology for the project shifted from the large conventional reactor to the BWRX-300 reactor, an SMR.

The belief is that Canada's regulatory framework and nuclear waste management regime is well positioned for a shift towards SMR. In 2022, the President and CEO of the CNSC reported, "Canada's federal government has made important investments in SMRs this year, including \$50 million for the CNSC through Budget 2022 and almost \$1 billion a couple of weeks ago in a proposed project at Darlington in Ontario that makes Canada a G-7 leader in the deployment of grid-scale SMRs."²⁰ Four provinces, Ontario, New Brunswick, Saskatchewan and Alberta have a Memorandum of Understanding ("MOU") to collaborate on the development and deployment of SMRs.²¹

The size, manufacturing and movability of SMRs make them unique. but these differences are not clearly contemplated under the current regulatory scheme which considers large-scale and immovable nuclear facilities. While most of the regulatory language appears to be technologically agnostic, this does not detract from the fact that SMRs raise entirely new practical considerations such as liability during transportation or the possibility of abandonment of a single SMR which may go unnoticed.²²

Mr. Tremblay addressed this when he reported that the CNSC "...undertook a full strategic review of their regulatory framework to identify gaps and opportunities for improvement to ensure clarity of requirements for SMRs, such as shifting from a prescriptive approach to a technology-neutral performance-based approach."²³ MSIFN is aware that a waste table has recently been established with OPG but is not aware of what changed to permanently ensure regulatory gaps between the old and new technology are filled.

The CNSC has a placeholder in 2025 for a strategic review, but no funding for participation. MSIFN asks the Commission to make this review a condition of the LTC and part of the IAC task force's mandate.

The CNSC established timelines for the licencing application of each phase of the project ranging from 24-36 months. Currently, there is a 36-month timeline for the LTC application. These tight timelines are purposefully established as the concern is that it may defeat the purpose of having modular (movable and scalable) technology at your disposal if you must wait more than two years to move your reactor.²⁴ These timelines may work for the purpose of the SMR but are counterproductive to meaningful consultation with Indigenous rights holders.

The nature of this project requires enhanced due diligence and consultation. Nuclear matter is of the highest concern and SMR technology involves different benefits and risks such as transportation and waste issues.

¹⁹ Rosa Twyman, Laura-Marie Berg & Marle Riley, "Recent Legislative and Regulatory Developments of Interest to Energy Lawyers" (2021) 59:2 Alberta LR 527 at 542.

²⁰ *Supra* note 9.

²¹ *Supra* note 19 at 543.

²² *Ibid* at 545.

²³ *Supra* note 10.

²⁴ *Supra* note 19 at 546.

The project is also the start of a long-term Canada-wide investment into SMRs. These benefits and risks of will be borne by generations to come.

Ms. Velshi stated in 2022 "The fact that SMR designs and some wastes will be different is well known."²⁵ She went on to emphasize a concerted effort to plan together and to do things differently is required to maintain Canada's historical safety record into the future. Despite acknowledging this, the licensing process has been permitted to move along without the strategic review of key documents and processes. We have put the cart before the horse and, from an Indigenous consultation perspective, the CNSC is scrambling to make an outdated process work within the current legal framework.

The Current Law

UNDRIP and FPIC

UNDRIPA came into force in June 2021. *UNDRIPA* brings the intent and objectives of the UN Declaration into Canadian law and provides a statutory foundation for the proper implementation and operationalizing of UNDRIP.²⁶ *UNDRIPA* also provides a framework to advance implementation of the Declaration at the federal level.²⁷

In the *C-92 Reference* from the Supreme Court of Canada ("SCC"), the Court said that *UNDRIPA* is incorporated into the country's domestic positive law.²⁸ The Court explained that *UNDRIPA* exists in law regardless of whether it is contained in a statute. Paragraph 15's French translation breaks the word "law" down into "loi" and "droit". The French translation distinguishes between the two types of laws, "loi" being statutory and "droit" which refers to the deeper law that exists and is practiced in a country, or common law.²⁹ The French translation provides a more precise understanding and is as valid as the English translation.

The practical implications of *UNDRIPA* in the energy sector have been addressed through legislation, such as the *IAA*. If there is no legislation that explicitly deals with the Declaration, or if the law is perceived as not aligned with the Declaration, as the case is for the DNNP LTC, there is no automatic repeal, nor does it create any new obligations or regulatory requirements. Regardless of whether or not a specific reference to the Declaration is made in legislation, Canada continues to have a constitutional duty to uphold it including operationalizing FPIC. This requires the Crown to fill legislative gaps with different processes or new creative ways to ensure meaningful and effective participation of Indigenous rights holder in decision-making.³⁰

²⁵ *Supra* note 9.

²⁶ *Supra* note 3.

²⁷ Department of Justice Canada "Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*" (10 December 2021) online: *Department of Justice Canada* <<https://www.justice.gc.ca/eng/declaration/about-apropos.html>>.

²⁸ *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, [2024 SCC 5](#) at para 15 [*C-92 Reference*].

²⁹ Senwung Luk, "UNDRIP is now part of Canada's 'domestic positive law'. What does this mean?" (4 April 2024), online (blog): *OKT* <<https://www.oktlaw.com/undrip-is-now-part-of-canadas-domestic-positive-law-what-does-this-mean/>>.

³⁰ Department of Justice Canada, "Backgrounder – Natural Resource Sector" (19 April 4 2022), online: *Department of Justice Canada* <<https://www.justice.gc.ca/eng/declaration/bgnrcan-bgnrcan.html>>.

FPIC was discussed in the *Reference to the Court of Appeal for Quebec*. This case was concerned with the constitutionality of *An Act respecting First Nations, Inuit and Metis children, youth and families* which was affirmed by the SCC.³¹ Justice Mainville of the QCCA stated at para 193:

In July 2017, the federal government (under the aegis of the then Minister of Justice, the Honourable Jody Wilson-Raybould) announced a set of principles designed to govern its relationship with Aboriginal peoples from that point forward. The policy that followed in 2018 did more than merely strengthen the 1995 policy, refashioning it on the basis of [s. 35 of the Constitution Act, 1982](#) and the UN Declaration. The ten principles affirmed therein "are a necessary starting point for the Crown to engage in partnership, and a significant move away from the status quo to a fundamental change in the relationship with indigenous peoples".²⁴² These principles, which are set out here, together with some of their accompanying comments, are based on recognition of the right to self-determination of Aboriginal peoples, which becomes the foundation for government-Aboriginal relations:

1. The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government...

6. The Government of Canada recognizes that meaningful engagement with indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

On slide 30 of the CNSC Hearing submission, Adam Levine characterized the CNSC's approach to consultation as being mindful of the articles in the Declaration including FPIC.³² Being mindful of the Declaration is not the required standard. The CNSC must recognize and respond accordingly to the SCC's interpretation of the *UNDRIPA* as a pre-existing set of rights that must continue to animate Canadian law. MSIFN is concerned that current and near-future CNSC decisions including this LTC decision may not be informed by the Declaration as "domestic positive law." Future aspirations of the CNSC should not prevent the Commission from requiring the CNSC from applying the law now.

UNDRIP has also been called an international "obligation" by the Federal Court, one which creates a presumption that Canadian legislation is enacted in conformity to it.³³ The Canadian Human Rights Tribunal relied on UNDRIP to find that equality is to be substantive and not merely formal.³⁴ The Tribunal said "Substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve, including that they be sufficiently funded to meet the real needs of First Nations children and families and do not perpetuate historical disadvantage" (emphasis added).³⁵

³¹ *Supra* note 28.

³² Canadian Nuclear Safety Commission October 2nd, 2024, Hearing Part I Submission Download #2 at 42:02.

³³ *Elsipogtog First Nation v Canada (Attorney General)*, [2013 FC 1117](#) at para 121 aff'd on other grounds [2015 FCA 18](#).

³⁴ *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 2](#) at para 453.

³⁵ *Ibid* at para 455.

The Quebec courts have taken a much more vigorous approach to the use of UNDRIP as an interpretive aid. The Quebec Court of Appeal confirmed that while UNDRIP does not impose international law obligations on Canada, it is nevertheless a universal human rights instrument whose values, principles and rights are a source for the interpretation of Canadian law.³⁶ The Court of Appeal went on to find that while UNDRIP is non-binding internationally, it “has been implemented as part of the federal normative order” via the UNDRIP Act.³⁷ On appeal, the Supreme Court of Canada similarly observed that “...the Declaration has been incorporated into the country's positive law by the [UNDRIP Act], s. 4(a).”³⁸ While the Court of Appeal did not elaborate in detail on what it meant by UNDRIP being “implemented as part of the federal normative order”, it did rely on this conclusion to bolster and confirm its interpretation of [s. 35 of the Constitution Act, 1982](#) as recognizing and affirming the right of Aboriginal peoples to regulate child and family services, which the Court of Appeal considered to be “entirely consistent with the principles set out in [UNDRIP]”.³⁹ The Quebec Superior Court, following the Court of Appeal's decision, went even further. After reviewing the history of Canada's relationship with UNDRIP, the Court concluded that “UNDRIP, despite being a declaration of the General Assembly, should be given the same weight as a binding international instrument in the constitutional interpretation of [s. 35\(1\)](#)”.⁴⁰ The practical effect of this would be that when interpreting [s. 35\(1\)](#), courts should generally presume that the protections it offers are at least as great as the rights set out under UNDRIP.⁴¹

UNDA Action Plan

The CNSC continues to acknowledge its commitment to consultation and cooperation with Indigenous partners, as well as aligning the implementation of the UNDA Action Plan, particularly FPIC on natural resource projects, which includes both existing and proposed nuclear initiatives. Nevertheless, the ongoing absence of FPIC for project activities is notable within the CNSC's Hearing submission⁴² despite MSIFN having raised this request on several occasions. MSIFN is calling on the Commission to require the CNSC to enact concrete measures that implement the UNDA Action Plan.

As part of the TRC's Calls to Action, the UNDA Action Plan was established by the federal government in 2023. The UNDA Action Plan speaks to collaborative decision making, supporting Indigenous leadership in conservation, respect for Indigenous rights, culture and jurisdiction weaving Indigenous science with western science to inform decision-making, consideration of health, social and economic factors, including impacts to women, youth, and Elders, among other things.⁴³

The UNDA Action Plan specifically addresses NRCAN and tasked the CER to complete a number of action items, many which the CNSC can easily adopt:

- Develop regulations respecting the Minister of NRCAN's power to enter into arrangements enabling Indigenous governing bodies to exercise specific powers, duties and functions under the Canadian Energy Regulator Act.
- Incorporates specific localized knowledge held by Indigenous peoples, as well as Indigenous laws, policies, practices, protocols, and knowledge.

³⁶ *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, [2022 QCCA 185](#) at para 507 rev'd in part on other grounds [2024 SCC 5](#).

³⁷ *Ibid* at para 512 aff'd [2024 SCC 5](#).

³⁸ *Supra* note 28 at para. 4; see also para 15.

³⁹ *Supra* note 36 at para 61.

⁴⁰ *R v Montour*, [2023 QCCS 4154](#) at paras 1175-1201.

⁴¹ Woodward 2:38 United Nations Declaration on the Rights of Indigenous Peoples para 2.1085

⁴² Canada: Canadian Nuclear Safety Commission, *Public Hearing (Transcript)*, (2 October 2024).

⁴³ *Supra* note 4.

- Strengthens measures to prevent and address impacts to Indigenous rights and interests, including in relation to heritage resources and sites of Indigenous significance.
- Develop a systemic model to enhance Indigenous peoples' involvement in compliance and oversight over the lifecycle (design, construction, operation and abandonment) of CER-regulated infrastructure. The model should integrate learnings from existing structures and relationships.
- Consult and cooperate to identify and take the measures needed to support Indigenous governing bodies, and/or the potential establishment of new Indigenous decision-making institutions, to exercise regulatory authority on projects and matters regulated by the Canada Energy Regulator, including:
 - Co-develop with First Nation, Métis and Inuit communities, governments and organizations and relevant federal department and regulators the mandate of such bodies or institutions, as well as the mechanisms required for empowering them with certain regulatory authorities.
 - Identify the actions and allocate the resources required to further develop capacity and expertise for the exercise of regulatory authority by such bodies or institutions.
 - This work could lead to other federal departments, regulators or institutions, similarly working in consultation and cooperation with First Nations, Métis and Inuit communities, governments and organizations, to:
 - Enhance the participation of Indigenous peoples.
 - Set the measures that could enable them to exercise regulatory authority, in respect of federally regulated natural resource projects.

The CER, in collaboration with NRCan, co-develop with Indigenous partners Action Plan Measure 34 ("APM").

*"This APM is a result of strong leadership and vision from the TMX IAMC Indigenous Caucus and I truly appreciate their willingness to partner through the co-development process," says Cassie Doyle, Chairperson, CER Board of Directors. "The implementation of the United Nations Declaration on the Rights of Indigenous People is a priority for the CER and this APM is important in identifying the direction our work needs to take."*⁴⁴

APM 34 is a concrete example of CER upholding the Declaration and the Action Plan. It is evidence of the political will to include Indigenous nations as regulators in energy project. The CER's approach is in stark contrast to the CNSC's who is proceeding as if the advancements with the law and our collective understanding of partnerships with sovereign Indigenous nations don't exist.

CNSC has the authority to follow the CER's precedent and enable Indigenous governing bodies to exercise regulatory authority in conjunction with the nuclear decisions and matters given that the Commission has existing powers to (i) enter into arrangements, (ii) establish advisory, standing and other committees, and (iii) certify persons to carry out duties under the NSCA. Furthermore, the Commission has the authority to issue, renew, suspend in whole or in part, amend, revoke, replace or redetermine a licence to carry out any activity described in the NSCA. The authority to create an IAC already exists in the NSCA.

⁴⁴ Canada Energy Regulator, "Collaboration and co-development – walking the talk toward Reconciliation" (22 June 2023), online: *Canada Energy Regulator* <<https://www.cer-rec.gc.ca/en/about/news-room/feature-articles/2023/collaboration-co-development-walking-talk-toward-reconciliation/>>.

The IAA

The governing environmental assessment legislation at the start of the DNNP was the *CEAA*. That legislation was created prior to the *Haida* decision and did not include Indigenous consultation requirements. Canada transitioned from *CEAA* to the *Impact Assessment Act*.⁴⁵ The progression of environmental and impact assessment regimes marked significant shifts in environmental assessments in Canada, now encompassing health, social, and economic impacts alongside environmental factors, together with enhanced focus on Indigenous individual and collective rights and Indigenous knowledge. The *IAA* also considers how climate change could impact the project's feasibility and environmental impact over its lifespan.

The *IAA* incorporates the most recent and fundamental legal developments of Indigenous consultation, including UNDRIP, respect and accounting for Indigenous and community knowledge, encouraging the assessment of cumulative effects on impact assessments (which became law in 2021), and prohibits impact on Indigenous peoples cultural heritage, use of lands and structures without the consent of the Indigenous group.

Another important distinction in the *IAA* was the planning requirements when a project became a "Designated Project meaning a project which may cause adverse effects within federal jurisdiction, including 109(d)(i) on reserve lands and (ii) on lands covered by land claim agreements referred to in section 35 of the *Constitution Act, 1982*. Once a project becomes "designated" a number of provisions step in to protect the Indigenous group, including the need for an assessment and the participation of Indigenous groups in a number of areas including the very important planning phase. These protections are absent in the DNNP process.

However, sidestepping the *IAA* through reliance upon the *CEAA* does not absolve the CNSC from its UNDRIP and DTC obligations and upholding the honour of the Crown. These obligations form part of Canadian law. It means the CNSC must ensure it creates processes to address these obligations even in the absence of express language in *CEAA* and *NSCA*.

As the law stands today, it would be an anomaly for an EA not to include detailed inputs from impacted First Nations, and related health, socio-economic, climate change, avoidance, mitigation, and compensation considerations with regard to those inputs. Implementing the requested task force and IAC, with relevant Indigenous monitoring programs, represents a valuable best practice that should be adopted to address these gaps. This approach will facilitate more informed and equitable decision-making between OPG, CNSC and interested WTFN.

MSIFN is encouraged by current dialogue with OPG concerning the gap analysis and is optimistic that this may provide appropriate accommodation for outstanding impact assessment issues. However, the CNSC must retain an element of control over OPG's adherence to any of its commitments to MSIFN which is best done by including such compliance as a condition of the order. MSIFN requires the Commission to create holdpoints to ensure OPG meets its promises under the negotiated LOIs. This ensures compliance by OPG but permits the continued development of the DNNP while protecting MSIFN's rights. Such a condition, while novel for Indigenous rights, is exactly the same approach used by the CNSC to ensure technical compliance.

This negotiated approach is a stop-gap measure to prevent delays in the current licensing application but must be replaced with a permanent regulatory process to ensure proponent compliance. MSIFN has taken

⁴⁵ SC 2019, c 28, s 1 [*IAA*].

a very practical approach to ensure protection of its rights in the immediate matter while providing a road map for the CNSC to alter its framework and approach for future applications.

PART 2

The Federal Government's Obligations to Indigenous Consultation

The articulation and process of fulfilling the Government of Canada's ("Canada" or the "Crown") obligations to the Indigenous community has evolved over the past several decades. The obligations have arisen through court decisions involving the duty to consult and accommodate, FPIC, treaty and settlement negotiations, legislative enactments and Canada's commitments adopted through policies and plans.

Canada endorsed UNDRIP in 2016 without qualification and committed to its full and effective implementation.⁴⁶ This endorsement confirmed Canada's commitment to a relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership.⁴⁷

On June 21, 2021, *UNDRIPA* came into force. *UNDRIPA* requires, in consultation and cooperation with Indigenous peoples, to, among other things take all measures necessary to ensure federal laws are consistent with the UN Declaration, including FPIC.⁴⁸

Passing *UNDRIPA* provided Indigenous consent the strength of the constitution through s. 35 of the *Constitution Act 1982*. Consent is a continuous obligation, not a one-time decision and creates a strong healthy relationship between parties. Requiring consent on projects of overlapping jurisdictions is common practice. Understood correctly consent is a powerful tool for proponents to ensure projects proceed expeditiously.

On June 21, 2023, the Government of Canada released the UNDA Action Plan.⁴⁹ UNDA includes 181 measures to be led by over 25 federal departments and agencies, provides a roadmap of actions Canada will take with Indigenous peoples to implement the rights and principles set out in the UN Declaration and to further advance reconciliation in a tangible way. The Action Plan imposes obligations on the federal government. Part of Justice Canada's initiatives is to ensure consistency of federal laws with the UN Declaration.⁵⁰

Courts are to interpret legislation consistently, in a manner that achieves the purpose and intent of the legislation. After having made the legislative enactments described above, Canada included an amendment to the *NCSA*, which is reproduced below.

Rights of Indigenous peoples

72.1 (1) The provisions enacted by this Act are to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

Definition of *Indigenous peoples*

⁴⁶ Crown-Indigenous Relations and Northern Affairs Canada, "Canadian governments and the United Nations Declaration on the Rights of Indigenous Peoples" (April 2024), online: *Crown-Indigenous Relations and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1524502914394/1557512757504>>.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Supra* note 4.

⁵⁰ *Supra* note 46.

(2) In subsection (1), *Indigenous peoples* has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*.⁵¹

Therefore, the CNSC's actions, processes, licensing regimes and decision-making provisions under the authority of this Act must be consistent with Canada's obligations in respect to upholding s. 35 of the *Constitution Act, 1982*, which includes upholding UNDRIP. While it does not provide explicit direction as to how such are to be accomplished, the existence of Canada's obligations is undeniable.

The federal government's DTC process is set out in their Consultation and Accommodation Guidelines ("**Guidelines**") which includes the role of federal agencies.⁵² The Crown may delegate the procedural aspects to a Crown agency such as the CNSC.⁵³ In 2024, the federal DTC is only part of the dialogue.

The federal government states:

*There is considerable recognition that effective consultation and cooperation processes require adequate timeframes through appropriate channels, in addition to adequate and timely funding for Indigenous partners. A recurrent consideration is potential 'consultation fatigue' and the need for greater collaboration across and between federal departments and agencies, including with respect to consultation and cooperation on legislative and regulatory measures.*⁵⁴

The Crown's fiduciary duty to Indigenous peoples and communities is grounded in the honour of the Crown. Parliament has mandated that Crown agencies expediently implement UNDRIP, integrate the UNDA Action Plan, be responsive to the Calls to Action from the TRC and discharge their duty to consult and if appropriate, accommodate. Failure to adhere to these commitments would be inconsistent with the honour of the Crown. Therefore, the CNSC is obligated to discharge these duties in this proceeding.

NRCan's Position on Indigenous Consultation and Relationships

NRCan is the federal ministry responsible for improving the quality of life of Canadians by ensuring the country's abundant natural resources are developed sustainably, competitively and inclusively.⁵⁵ NRCan states that partnering with Indigenous Peoples, communities, and businesses is critical to building an inclusive, sustainable and resilient natural resource sector in Canada. NRCan is committed to working *together with* Indigenous Peoples to build nation-to-nation relationships founded in mutual respect, partnership and recognition of rights and stated: "[A]dvancing reconciliation means not only transforming

⁵¹ 2023, c 32, s 72.1.

⁵² Crown-Indigenous Relations and Northern Affairs Canada, "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011" (29 January 2024), online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729#chp1_6_3>.

⁵³ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida].

⁵⁴ Department of Justice Canada, "Second annual progress report on the implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act" (July 2023), online: *Department of Justice Canada* <<https://www.justice.gc.ca/eng/declaration/report-rapport/2023/p2.html>> at 2.

⁵⁵ Natural Resources Canada, online: *Natural Resources Canada* <<https://natural-resources.canada.ca/home>>.

our words but our actions, particularly when it comes to the development of projects related to resource extraction" (emphasis added).⁵⁶

NRCan states the relationship between the ministry and Indigenous Peoples and communities is to be achieved through continuous consultation and cooperation to secure FPIC for decisions that impact Indigenous communities and their rights.⁵⁷ This statement is inline with the federal government's policies.

The ministry is also leading/co-leading the implementation of four measures in the UNDA Action Plan related to federally regulated natural resources projects, with commitments to make progress in the following areas:

- safety and security of Indigenous women, girls and 2SLGBTQIA+ people;
- guidance for achieving free, prior and informed consent with Indigenous Peoples on natural resources projects;
- economic participation of Indigenous Peoples and their communities in natural resource development (including through the National Benefit Sharing Framework); and
- increasing Indigenous participation in decision-making.⁵⁸

NRCan boasts being the first federal department with a sector, the Indigenous Affairs and Reconciliation and Major Management Sector, named in an Indigenous language - Nòkwewahk. Nòkwewahk is the Algonquin word for sweetgrass, and this name provides a multitude of interwoven meaning, including a unique reminder for public servants to refresh and nourish themselves so that they can continue to transform relationships with Indigenous Peoples.⁵⁹

NRCan has embraced the federal mandate and has the political will and authority to require the CNSC to implement UNDRIP. These actions have yet to be realized at the CNSC but do exist at the CER, the CNSC's sister agency. In MSIFN's view, NRCan should be providing further explicit direction, and if necessary, resources, to CNSC to develop Indigenous engagement model similar to what CER has implemented.

CER, A Contrasting Approach to Indigenous Consultation and Relationships

To understand MSIFN's concerns about NSCA it is helpful to consider the approach of parliament and NRCan with the CER who is responsible for reviewing energy development projects such as pipelines, power lines and offshore renewable energy projects. The approach is strikingly different from the express direction in the legislation to operationalizing consultation as part of the structure and fabric of the organization in a consultative manner not the paternalistic approach that has been previously used to deal with Indigenous matters.

The governing statute, the 2019 *Canadian Energy Regulatory Act*⁶⁰ preamble states:

⁵⁶ Natural Resources Canada, "Reconciliation and natural resources" (21 November 2023), online: *Natural Resources Canada* <<https://natural-resources.canada.ca/our-natural-resources/indigenous-peoples-and-natural-resources/reconciliation-and-natural-resources/25147>>.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Natural Resources Canada, "NRCan honours reconciliation as first federal department with a sector named in an Indigenous language" (24 May 2022), online: *Natural Resources Canada* <<https://natural-resources.canada.ca/our-natural-resources/indigenous-peoples-and-natural-resources/federal-department-first-ever-give-its-own-sector-indigenous-name/24314>>.

⁶⁰ SC 2019, c 28, s 10 [CERA].

Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;

Whereas the Government of Canada is committed to using transparent processes that are built on early engagement and inclusive participation and under which the best available scientific information and data as well as Indigenous knowledge are taken into account in decision-making;

Under s. 57 of the *CERA*, the CER must establish an advisory committee for the purpose of enhancing involvement of the Indigenous peoples of Canada and Indigenous organizations in respect of CER-regulated projects. The CER created the Indigenous Advisory Committee⁶¹ in August 2020, Indigenous Monitors⁶² and Training Sessions⁶³ to give effect to UNDRIP. As such, the speed with which the federal government can move forward on these initiatives is clear and the delay in progress at the CNSC becomes equally obvious.

The IAC is an integral part of the CER's formal governance structure, works directly with the Board of Directors and is a key part of the CER's commitment to advance reconciliation. The overarching mandate of the IAC is to advise the Board on how the CER can build a renewed relationship with Indigenous peoples. The diversity of the IAC members helps the Board "raise the bar" when shaping the organization's strategy for integrating Indigenous rights, knowledge, interests and values into the CER's work and processes.⁶⁴

*Indigenous Advisory and Monitoring Committees*⁶⁵

Indigenous peoples, the Government of Canada, and the CER worked together to create the Indigenous Advisory and Monitoring Committees ("IAMCs"). IAMCs operate independently to increase Indigenous involvement in the federal monitoring and oversight of projects. The Committees allows for Indigenous peoples to participate meaningfully in oversight activities along pipeline corridors while companies do work to build and operate the projects. Indigenous monitors participate with the CER in:

- inspections;
- emergency response exercises; and
- compliance verification meetings.

Training sessions

Indigenous Monitors and CER Inspection Officers have participated in joint training sessions. Elders also participated in the training, providing oral knowledge in addition to opening each session with prayers and

⁶¹ Canada Energy Regulator, "Indigenous Advisory Committee" (29 March 2023), online: *Canada Energy Regulator* <<https://www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/organization-structure/indigenous-advisory-committee/>>; See Canada Energy Regulator "Indigenous Advisory Committee – Terms of Reference" (17 September 2021) online: *Canada Energy Regulator* <<https://www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/organization-structure/indigenous-advisory-committee/terms-reference.html>>.

⁶² Canada Energy Regulator, "Indigenous Monitoring" (1 December 2021), online: *Canada Energy Regulator* <<https://www.cer-rec.gc.ca/en/consultation-engagement/indigenous-engagement/indigenous-monitoring.html>>.

⁶³ *Ibid.*

⁶⁴ *Indigenous Advisory Committee*, *supra* note 61.

⁶⁵ *Supra* note 62.

ceremonies. In some cases, the Inspection Teams participated in walks lead by Elders and a sweat lodge. These training sessions build capacity for both Indigenous Monitors and CER staff.

The approach taken at the CER is markedly different both in what has been done and in how it has been accomplished. Not only is it consistent with the intent of UNDRIP and Canadian law, but it's also a step forward in the process of reconciliation. The impacts of the CER initiatives can be found in this [Report](#).

MSIFN's position is seeking to move forward with respect to this Application through an order including MSIFN in the review and verification process with regulatory holdpoints to ensure MSIFN's rights are being protected. However, MSIFN is seeking to have the CNSC commit to pursue a restructuring of its organization in a manner similar to that used by the CER to include Indigenous peoples so that it may better comply with Canada's legal obligations to Indigenous peoples.

CNSC's Position on Indigenous Consultation and Relationships

CNSC acknowledges its obligation to discharge Canada's DTCA in this proceeding. The CNSC has developed some welcomed programs to help Indigenous peoples and communities meaningfully participate in regulatory activities. These include the Participant Funding Program and the Indigenous and Stakeholder Capacity Fund.⁶⁶ Having the programs is good but funding must flow in a timely manner. Furthermore, the general process and structure of consultation with Indigenous rights holders falls short of upholding parliament's mandate or the law. Specifically, the CNSC has failed to integrate Indigenous rights holders within the regulatory process – including the development of the regulatory process.

The question remains as to whether CNSC processes, policies and actions have fulfilled Canada's obligations.

While the *NSCA* does not provide explicit direction to CNSC as to how it must discharge its duties, the 2023 amendment requires the CNSC to uphold the rights of Indigenous peoples as affirmed by s. 35 of the *Constitution Act, 1982* and according to the mandate of the federal government this requires upholding UNDRIP.

The Court in *Gixtaala Nation v Canada* considered a similar legislative gap in the *National Energy Board Act's* legislation. They found that it is inconceivable that the legislation could operate in a manner that ousts Crown obligations. The Court stated "[I]t is a well-recognized principle of statutory interpretation that statutory provisions that are capable of multiple meanings should be interpreted in a manner that preserves their constitutionality..." and that the legislation "...can be interpreted in such a way as to respect Canada's duty to consult and to remain valid."⁶⁷ This reasoning must also apply to upholding Canada's positive domestic law in UNDRIP.

Despite the overarching obligations on Canada and CNSC's acknowledgement that it is responsible for discharging obligations, the CNSC claims to lack the legislative authority or regulatory tools to require consent on projects under their mandate.⁶⁸ CNSC does not require any greater mandate that is already provided. Regulatory bodies must have the authority necessary to meet their express and necessarily implied

⁶⁶ Canada Nuclear Safety Commission, "Funding programs" (12 March 2024), online: *Canada Nuclear Safety Commission* <<https://www.cnsccsn.gc.ca/eng/funding-opportunities/>>.

⁶⁷ *Gixtaala Nation v Canada*, 2016 FCA 187 at paras 159-163 [*Gixtaala*].

⁶⁸ Canadian Nuclear Safety Commission, "Supplementary Information: Written submission from CNSC Staff" (2 February 2024) at 14-15, online (pdf): *Canadian Nuclear Safety Commission* <<https://api.cnsccsn.gc.ca/dms/digital-medias/CMD24-H2-B.pdf/object?subscription-key=3ff0910c6c54489abc34bc5b7d773be0>>.

authority. It would be antithetical to the CNSC's obligation if it did not possess the authority to make decisions compliant with constitutional and other legal requirements. As the courts have indicated, additional avenues may be required.

However, any pre-existing decision-making process must allow for meaningful consultation with Indigenous groups who may have s. 35 rights at stake. In particular, the existing regulatory processes may allow for Crown consultation on some issues and for certain types of accommodations, but not others. In such cases, the Crown will need to establish an additional avenue for consultation to address outstanding matters.⁶⁹

Aboriginal and/or treaty rights are considered in [REGDOC 3.2.2: Aboriginal Engagement](#) which is part of the CNSC's public and Aboriginal engagement series of regulatory documents. The rules, procedures and regulatory documents are generic in that they apply to all nuclear licencing matters that fall under the jurisdiction of the NSCA and are not tailored to the unique nature and risks of SMRs nor were they developed with the input of MSIFN.

As well, these regulatory documents speak only to engagement with Indigenous peoples and not communities. This is inconsistent with the Declaration which establishes consideration for both impacts upon Indigenous people and impacts on the community as a whole. This is particularly important for MSIFN as they are part of the WTFNs community which is currently contemplating a shared governance structure.

For the reasons explained in Part 3, MSIFN submits the CNSC must: (i) incorporate protections into its order to ensure the protection of MSIFN's rights; and (ii) commit to evolving its structure and policies to be able to ensure future proceedings will fulfill Canada's obligations to Indigenous peoples. There should be no doubt CNSC must have the authority to fulfill Canada's obligations, even where detailed direction has not been provided.

⁶⁹ *Brokenhead Ojibway Nation v Canada (Attorney General)*, [2009 FC 484](#) at paras 27, 29, 44.

PART 3

Consultation Process, Requirements and Short Comings

The CNSC stated in its April 2024 DEC 24-H2:

The common law duty to consult is grounded in the key principle of the honour of the Crown. The duty is engaged when the Crown contemplates conduct that may adversely affect established or potential Aboriginal and/or treaty rights of which the Crown has real or constructive knowledge. The Commission acknowledges its obligation to fulfill the duty to consult and ensure that it considers impacts to Aboriginal and/or treaty rights, pursuant to section 35 of the Constitution Act, 1982 in the matter before it.⁷⁰

In its decision to use the 2009 EA, the Commission also stated:

The Government of Canada has indicated the implementation of the UN Declaration through UNDA will inform how the Government approaches meeting its legal duties going forward. The Commission also acknowledges, as OPG did during the oral hearing, that in light of the Williams Treaties First Nations 2018 settlement agreement, an assessment of the impact of the Darlington New Nuclear Project on their Indigenous and treaty rights must be commenced.

CNSC's own words acknowledge their obligations, and the constating legislation provides express authority to meet the expectations, but the CNSC has failed to create the structures necessary to achieve these legal obligations.

Both the Crown and Indigenous groups must always engage in consultations in good faith.⁷¹ For the Crown, this will mean sharing all necessary information, giving the Indigenous group the opportunity to respond to that information, listening to the Indigenous group's concerns, and being willing to respond to those concerns and modify the proposed decision or course of action where it is reasonable to do so based on the strength of the rights claim and the severity of the potential infringement.⁷²

In short, the Crown must intend for the consultation process to be meaningful, and not just an opportunity for the Indigenous nation to "blow off steam."⁷³ It must be willing to alter its proposed course of action based on what it hears from the Nation.⁷⁴ For similar reasons, the CNSC consultation team must have an

⁷⁰ CNSC Record of Decision DEC 24-H2, April 19, 2024 at para 165 → <https://api.cnscccsn.gc.ca/dms/digital-medias/Decision-OPG-DNNP-Applicability-of-EA-24-H2-e.pdf/object>

⁷¹ *Supra* note 53 at para 42.

⁷² *Ibid*; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#) at para 64 [*Mikisew*].

⁷³ *Mikisew*, *ibid* at para 54. Paragraph 54 of *Mikisew* was quoted and relied upon in *Squamish Nation v British Columbia (Minister of Community, Sport and Cultural Development)*, [2014 BCSC 991](#) at para 212. The FCA articulated a similar principle in *Tsleil-Waututh Nation v Canada (Attorney General)*, [2018 FCA 153](#) at paras 558-561, 564, leave to appeal refused [2019 CarswellNat 1516](#), [2019 CarswellNat 1517](#) [*Tsleil-Waututh*]: The Crown is required to do more than receive and document concerns and complaints. It must engage in a considered, meaningful two-way dialogue. Where deep consultation is required, this dialogue should lead to a demonstrably serious consideration of accommodation.

⁷⁴ *Supra* note 53 at para 46; *Tsleil-Waututh*, *ibid* at para 564.

adequate mandate to engage in meaningful dialogue, and must not limit itself to listening to and recording the concerns of Indigenous peoples before transmitting those concerns to decision-makers.⁷⁵ Unfortunately MSIFN's experience with the DNNP consultation has been little more than receiving information and reporting our concerns. There has not been meaningful dialogue.

The re-start of the DNNP is not a fluid extension of the original project from the perspective of Indigenous consultation, especially when the original process was fundamentally flawed. It engages new considerations particularly around waste and the increased potential for adverse impacts on our rights. This triggers both a new duty to consult process and also the need to take a precautionary approach. We are encouraging the CNSC to take the same precautionary approach to Indigenous consultation as they have to nuclear safety.

The Crown has failed, thus far to meaningfully consult, accommodate and uphold the Crown's honour in the following ways:

- 1) No meaningful consultation on the 2009 EA
- 2) Improper Project scoping
- 3) Piecemealing the project
- 4) Improper DTC scoping
- 5) No cumulative effects assessment due to missing:
 - a. Nuclear Waste plan
 - b. SAR information
 - c. Indigenous knowledge and land use studies
- 6) Neglecting the rights of Indigenous Governance
- 7) Neglecting the need for MSIFN consent
- 8) Document dumping
- 9) Inadequate timeframes

1. 2009 EA

The April 2024's CNSC decision on the appropriateness of 2009 EA for the DNNP outlined the Indigenous consultation steps taken by OPG and the CNSC during the EA.⁷⁶ Every item listed detailed a paternalistic process of supplying information, asking for comments and listening. That process is not meaningful consultation and is what the Court warned against in *Tsleil-Waututh Nation v Canada (Attorney General)*.⁷⁷

The constitutional protection afforded to MSIFN under s. 35(1) of the *Constitution Act, 1982*, is a critical aspect that demands attention in this context. Section 35 recognizes and affirms the existing Aboriginal and treaty rights of MSIFN, thereby imposing a duty of careful consideration on regulatory processes for projects like those proposed by OPG. In parallel, UNDRIPA has introduced new legal perspectives that were absent in the deliberations of the Joint Review Panel Environmental Assessment ("**JRPEA**"), marking a significant evolution in Aboriginal law in Canada. Specifically, it underscores the recognition of Indigenous peoples as sovereign entities, thereby reshaping their legal and constitutional landscape.

On June 9, 2008, the CEAA approved up to \$100,000 to facilitate Aboriginal participation in the environmental assessment and related consultation activities. The Committee did not award MSIFN participant funding for consultation on the environmental assessment.

⁷⁵ *Tsleil-Waututh*, *ibid* at paras 558-559, 564.

⁷⁶ *Supra* note 68 at 15.

⁷⁷ *Tsleil-Waututh*, *supra* note 73.

There is no evidence MSIFN was asked to specifically comment on the Regional Study Area boundaries or specifically comment on Valued Ecosystem Components ("VECs"). Furthermore, the Environmental Impact Statement ("EIS") provides no evidence of OPG dispositioning any comments from MSIFN. To be clear, the 2009 OPG Environmental Impact Statement New Nuclear – Darlington Environmental Assessment does not include direct evidence of comments from MSIFN. Consultation with MSIFN appears to have been limited to the distribution of letters and documents.

MSIFN and other WTFNs were never consulted by the Crown or facility operators when decisions were made to build and operate the DNGS or the Darlington Waste Management Facility or most other facilities built, operated, and regulated by the CNSC in our treaty lands.

2. *Scoping the Project*

The requirement for early consultation may include the duty to consult about the decision-making process that will be used to decide whether to approve a project. This was held to be the case in [*Dene Tha' First Nation v. Canada \(Minister of Environment\)*](#), where Canada and Alberta had developed a unique regulatory and environmental review process for the proposed Mackenzie Gas Pipeline, a project of a significant size.⁷⁸ Thus, at least in the case of major projects with customized review processes, Indigenous groups who stand to see their s. 35 rights affected by the proposed activity are entitled to help design those processes. DNNP should be considered such a major project.

Best practice for scoping major projects is to establish a consultation protocol at the project's start. This is part of the federal government's whole-of-government approach which has been successfully implemented across the country,⁷⁹ and which the CNSC endorses.⁸⁰ This did not happen with the DNNP. The project moved ahead unilaterally and missed the crucial step of integrating the Indigenous perspective. This misstep has tainted every consultation action since.

Our understanding of collaborative planning is rooted in the International Association for Public Participation's ("IAP2") spectrum of public participation.⁸¹ Collaborative planning requires the proponent to partner with MSIFN in each aspect of its decision-making process for major projects and the operation of major facilities, including the development of alternatives and the preferred solutions. Collaborative planning also means the proponent looking to MSIFN for advice and innovation in formulating solutions, and incorporating MSIFN's advice and recommendations into its decisions to the maximum extent possible. OPG has demonstrated that it is interested in true collaborative planning with MSIFN. The CNSC needs to include an order with holdpoints to ensure OPG follows through.

Even if there is no legal requirement for a consultation protocol, such agreements may have benefits, including the following: they may clarify the parameters of the discussion, manage expectations about the process, set a timeline for the consultation process, and clarify the roles of different government officials

⁷⁸ *Dene Tha' First Nation v Canada (Minister of Environment)*, [2006 FC 1354](#) at paras 107-110.

⁷⁹ Crown-Indigenous Relations and Northern Affairs Canada, "Government of Canada and the duty to consult" (26 July 2024), online: *Crown-Indigenous Relations and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810>>.

⁸⁰ Consultation protocols have been established multiple times across Canada: see *Consultation Process Interim Measures Agreement*, online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100032101/1539789040430>. and *Mississaugas of the New Credit First Nations: Consultation Protocol Agreement*, online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1638458201025/1638458226709>.

⁸¹ International Association for Public Participation, "The 3 Pillars of Public Participation", online: *IAP2 Canada* <<https://iap2canada.ca/Pillars>>.

and/or the project proponent. Moreover, in at least one case, the Court identified the development of a consultation protocol as one of the factors demonstrating that the Crown had discharged its obligation of meaningful consultation. Thus, consultation protocols are desirable, particularly where there is a major, complex proposed activity at issue.⁸²

3. *Piecemealing (Phasing) the DNNP*

The Crown must initiate the consultation processes early in its decision-making process, before that process has moved too far along.⁸³ This makes sense, particularly for projects proposed by third parties, which will gain momentum as the proponent begins to interact with government officials, develops the details of the project, and secures financing and preliminary approvals. This fact was recognized by the British Columbia Supreme Court in [*Squamish Indian Band v. British Columbia \(Minister of Sustainable Resource Management\)*](#):

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 been made and relied upon by the proponent and others, there is clear momentum to allow a project.⁸⁴

Piecemealing refers to the breaking up a larger project into smaller component parts to reduce environmental assessment requirements. The Municipal Engineers Association published a report which addressed the inappropriateness of piecemealing projects.⁸⁵ The principles are applicable to the DNNP. They state:

"In assessing the magnitude and extent of a problem, therefore the scope of the project, it is important that the projects not be broken down or piecemealed into component parts or phases, with each part being addressed as a separate project. If the component parts are dependent on each other, then all of the components must be combined and dealt with as a single project."⁸⁶

Project planning best practices requires proponents to plan large or extended projects in their entirety and the project schedule should be determined accordingly. Projects which are to be implemented in stages over an extended period of time must be planned in their entirety at the time when the first stage is to be undertaken and must not be broken up, or piecemealed, into smaller components.⁸⁷

Section 5(i) of the [Class 1 Nuclear Facilities Regulations](#) requires the licensee to identify the effects on the environment and the health and safety of persons *that may result from the construction, operation and*

⁸² *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, [2012 FC 297](#) at para 112.

⁸³ *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, [2005 BCCA 128](#) at para 95.

⁸⁴ *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, [2004 BCSC 1320](#) at para 74 aff'd in *Sambaa K'e Dene Band v Canada (Minister of Indian Affairs & Northern Development)*, [2012 FC 204](#) at para 165 [Applicants included Nahanni Butte Dene Band, Respondents included Acho Dene Koe First Nation].

⁸⁵ Municipal Engineers Association, "Municipal Class Environmental Assessment" (March 2023), online (pdf): *Municipal Engineers Association* <www.municipalengineers.on.ca/files/MCEA_Updates/2023%20Amended%20Municipal%20Class%20Environmental%20Assessment.pdf>.

⁸⁶ *Ibid* at 44.

⁸⁷ *Ibid* at 157-158.

decommissioning of the nuclear facility, and the measures that will be taken to prevent or mitigate those effects.

This is the same for the DNNP. To realize the DNNP each component part is dependent on each other, therefore all of the components must be combined and dealt with as a single project. As discussed in *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*⁸⁸ phasing the assessment into segments may be inappropriate when the latter phases impact the rights of the Indigenous group. The most pressing aspect of the Project and its impact on MSIFN's rights is nuclear waste. Issuing the LTC without consideration of this vital aspect is, in our submission, wrong.

As the regulator CNSC will be permitting OPG to spend vast amounts of money for a project that will ultimately require the consent of the First Nations to operate. Yet multiple sources cite the operation of BWRX-300 at Darlington by 2027-2028 as a *fait accompli*.⁸⁹ How much faith should MSIFN and the citizens of Ontario place on the CNSC's processes being no more than a show?

The decision to permit phasing of the project and the DTC also triggers a consultation requirement as it is considered a strategic, higher-level decision. The Court stated at paragraph 44 of *Rio Tinto*:⁹⁰

Examples [of strategic, higher level decisions] include the transfer of licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); **the establishment of a review process for a major gas pipeline** (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)).

The entirety of the project must be considered for the Crown and MSIFN to have meaningful consultation. In *Rio Tinto*, and as articulated in *Halalt*, current Crown conduct may constrain the ability of the Crown to respond appropriately in the future; it "may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions."⁹¹

The issue of phasing consultation was considered in *Adams Lake*. Justice Low overturned the Chamber judge's finding that the Province did not discharge its duty to consult because it did not look at the project entirety but focused only on the particular phase of the project. Justice Low found that the latter stages of the project had little impact on the Aboriginal rights of the claimants. Unlike *Adams Lake*, the opposite is true for the DNNP. The greatest impact on MSIFN's rights will be realized at the latter stages of the Project,

⁸⁸ *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2021 BCCA 333 [*Adams Lake*].

⁸⁹ World Nuclear News, "OPG chooses BWRX-300 SMR for Darlington new build" (2 December 2021) <https://www.world-nuclear-news.org/Articles/OPG-chooses-BWRX-300-SMR-for-Darlington-new-build>; John Adkins, "Canada/Darlington BWRX-300 TO Receive Construction Permit 'By End 2024'" (11 July 2023) NUCNET <https://www.nucnet.org/news/darlington-bwrx-300-to-receive-construction-permit-by-end-2024-7-2-2023>; Kevin Clark, "OPG expects nuclear construction on first SMR to begin in 2025" (9 May 2024) Power Engineering, <https://www.power-eng.com/nuclear/opg-expects-nuclear-construction-on-first-smr-to-begin-in-2025/>.

⁹⁰ *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44 [*Rio Tinto*].

⁹¹ *Halalt First Nation v. British Columbia*, 2012 BCCA 472 at para 132 [*Halalt*].

specifically when the proponent must consider waste. Also unlike in *Adams Lake*, MSIFN's consent to the handling of the DNNP waste is a legal requirement.

4. Scoping the DTC

Properly scoping the level of consultation once the duty has been triggered is based on the strength of Aboriginal and/or treaty rights and the severity of potential impacts on those rights. To understand the severity of the potential impacts, it is necessary to properly scope the extent of the project. The role of administrative bodies in relation to scoping the DTC was considered at paragraph 174 in *Gixtaala*.⁹²

*When a strong prima facie case for the [title] claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, in this type of case a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Aboriginal concerns were considered and how those concerns were factored into the decision: *Haida Nation*, at paragraph 44.*

Paragraph 20 in *Clyde River* found:⁹³

*Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida Nation*, at paras. 39 and 43-45).*

Flexibility in the current process is required as both the project's technology and MSIFN treaty rights, while existing for over 100 years, were formally recognized in 2018.

OPG and CNSC acknowledge that the proposed project impacts the rights of the WTFNs both through the historic 1923 Williams Treaties and the modern 2018 Williams Treaties Agreement. Any Crown action upon WTFN lands will trigger the duty to consult as it is a *prima facie* infringement of MSIFN's title rights.

Despite MSIFN holding title to the land prior to the existence of the DNGS, there was no involvement of MSIFN in the decisions around the station; this includes the creation of the 2009 EA. The JRP Environmental Assessment report of 2011 incorrectly limited MSIFN's title to lands outside the DNGS.:

“OPG documented the asserted and established Aboriginal rights, Aboriginal title and treaty rights through a description of the content and background of the Williams Treaties (1923), including extinguishment of rights. OPG also described the Nanfan Treaty (1701), indicating that the boundaries of the Treaty fall outside of the regional study area and that the Treaty represented a surrender of title.”

In s. 6.4 – Current Use of Land and Resources by Aboriginal Persons, CNSC staff concluded that the DNNP is not likely to result in significant adverse effects on current use of land and resources for traditional purposes by Aboriginal persons, based on rather limited information and outcomes of engagement with Aboriginal groups OPG provided to the CNSC. Furthermore, this information was presented to the Panel, which led them to conclude that Aboriginal persons do not currently use land and resources at the Project site for traditional purposes. This is misleading.

⁹² *Supra* note 67 at para 174.

⁹³ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 20.

MSIFN citizens and other WTFN are currently unable to use land and resources at the Darlington site, not by choice, but because it is inaccessible to the public and has been under Ontario's and OPG's site control for over the past fifty years. Once the site is decommissioned, MSIFN and likely other WTFN want the land back for future generations. Furthermore, MSIFN citizens and other WTFN *currently* use the waters and aquatic resources surrounding the Darlington site, and fully intend to use those resources for future generations.

When nuclear energy fails, the consequences are severe, with the most severe impacts to the communities within its vicinity. It is improper to scope the project based on the statistical chance of something going wrong and not based on what may happen if it does go wrong. The potential severity of impacts in addition to holding title to the land should scope the DTC at the highest end of the spectrum. *Actual* impacts are not what is considered in scoping but severity of *potential* impacts.⁹⁴

The misclassification of title, by choosing to piecemeal the project, misinformation on use of land by the WTFNs and relying on the obsolete *CEAA* led the CNSC has incorrectly scoped the DTC. The CNSC claim that the switch to SMRs has lowered the potential adverse impacts however they neglected to deal with the real potential for adverse effects from the SMR, the waste.

5. *Cumulative Effects*

The Court in *Yahey v British Columbia*⁹⁵ recognized meaningful consultation needs to include cumulative effects. Considering the effects of one project in isolation of the rest of the development area misses crucial impacts upon Indigenous rights. The Court found that the Crown was obligated to consider the cumulative impacts on the Blueberry River First Nation's treaty rights. Cumulative effects are considered, among other things, changes to the environmental, social and economic values caused by the combined impact of past, present and potential future human activities and natural processes.⁹⁶

When determining the impact of Crown conduct, a particular project is to be considering in relation to all impacts, past, present and future upon those rights. The law requires the Crown to act with diligence and integrity to implement, uphold and protect the purpose and promises of a treaty and the honour of the Crown depends on it.⁹⁷

In consideration of the DNNP, the Crown must consider the impacts of the current DNGS and the PNGS in relation to the future impacts of the DNNP. From MSIFN's perspective this has not been done, especially in light of the new waste considerations for the PNGS. The WTFNs were not duly considered in the original decisions of the two nuclear stations, they were not meaningfully consulted during the 2009 EA and the current consultation process is an affront to their status as title holders. The Crown's conduct continually denies MSIFN's inherent jurisdiction.

At the hearing regarding the appropriateness of the 2009 EA, the Commission probed OPG on the issue of cumulative impacts as reported in paragraph 54:

The OPG representative expressed the view that, "while the assessment of environmental effects has been satisfied from the Western perspective, it may not fully address the impact of the Darlington New Nuclear Project on Aboriginal and treaty rights, as they are

⁹⁴ *Supra* note 90 at para 49.

⁹⁵ *Yahey v British Columbia*, [2021 BCSC 1287](#) [*Yahey*].

⁹⁶ *Ibid* at para 1587.

⁹⁷ *Ibid* at para 1724.

understood today, particularly in light of the Williams Treaties First Nations 2018 settlement agreement.”

The most up to date process and regulations for assessing cumulative effects are found in the IAA. Currently the CNSC process has not used these standards which includes assessing adverse impacts on Indigenous peoples *and* communities.

The Crown must consult with the Indigenous treaty nations to understand, assess and determine the cumulative impacts of their projects. Consultation on a permit-by-permit (or piecemeal) basis has not served as an appropriate way of addressing concerns about cumulative impacts.⁹⁸ Acting with ordinary prudence required the Crown to investigate the concerns regarding cumulative impacts and develop ways of managing and mitigating these effects.⁹⁹ As the SCC stated in *Restoule v Ontario (Attorney General)* "The duty of honour must find its application in concrete practices and in legally enforceable duties."¹⁰⁰ MSIFN's concerns on cumulative impacts have not been adequately addressed, particularly with waste.

Nuclear Waste - No plan for existing, imminent or future waste

Conducting a proper cumulative impacts assessment requires full disclosure of pertinent information and the tools for assessing the information. Failing to provide information required by an Indigenous community to permit meaningful consultation is a breach of the Crown's duty.¹⁰¹ The DNNP is missing crucial decisions on the plan for nuclear waste. Three years ago, the CNSC highlighted the need to deal with the waste in present, not holding it off until the future. In 2022, Ms. Velshi stated:¹⁰²

"Radioactive waste must be managed to ensure there is no undue burden on future generations. Its management must be based on a lifecycle responsibility approach.

All steps in waste management – from generation to disposal – must be taken into account as part of an integrated waste management system. And it must account for the interdependencies among all steps in managing radioactive wastes, particularly the long-term plans. The onus is now on industry, in collaboration with policy makers, to develop an integrated plan.

This plan must be developed with full engagement and consultation of the public and Indigenous Nations and communities. Developing an integrated plan will be crucial to earning the trust of the public and Indigenous Nations and communities, and the approval of decision makers.

It is neither possible nor appropriate to shy away from any issues of concern. And it is irresponsible and unacceptable to punt-off answering these questions to “sometime in the future”.

The Nuclear Waste Management Organization ("NWMO") is driving toward a decision on a Deep Geological Repository ("DGR") site for used nuclear fuel within months from now (although it is possible

⁹⁸ *Ibid* at paras 1802, 1804-1805.

⁹⁹ *Ibid* at para 1805.

¹⁰⁰ *Restoule v Ontario (Attorney General)*, [2021 ONCA 779](#) at para 567.

¹⁰¹ *Moulton Contracting Ltd v British Columbia*, [2013 BCSC 2348](#) at para 294 ("*Moulton*"); Jack Woodward, KC and Ethan Krindle, *Aboriginal Law in Canada*, (Thomson Reuters Canada, 2024) at §5:48 para 5.1950.

¹⁰² *Supra* note 9.

that the timeline will be extended). In a sense this is understandable, since they have been at this effort since 2002 and OPG has spent a small fortune paying its costs. While the NWMO says it is committed to "Adaptive Phased Management," which implies some flexibility and adaptability, the NWMO is committed to building a DGR at one of two specific sites and is now locked into this project goal and has full organizational momentum in this direction.

However, for a variety of reasons the Crown approval for a DGR site may never happen because there are several unknown and un-examined risks. The risks include, but are not limited to, the following: (a) repackaging used nuclear fuel at Darlington, Pickering and proposed OPG sites; (b) transporting repackaged used nuclear fuel to a DGR at Ignace 1,650 km northwest in Treaty 3 or near Kincardine in South Bruce, 260 km west in Saugeen Ojibway Nation ("**SON**") treaty area; and (c), securing consent from all rights-holding First Nations between several nuclear reactors on the shore of Lake Ontario and a site in Treaty 3 or a site in SON's treaty area.

OPG, which is defined in federal legislation as the primary waste owner in Ontario, has allocated a great deal of money in the single strategy in terms of a DGR for more than two decades. OPG would therefore have to come to an agreement with the federal government to spend more time and money on engineering design in order to develop any alternative strategy, such as for an on-site, near-surface "rock cavern" disposal method.

MSIFN and other Michi Saagiig Nations have no idea what final decision SON is going to make, since they say they are "considering" supporting a DGR in their treaty area in South Bruce. All of this uncertainty affects MSIFN's ability to assess the impacts of any stage of the DNNP properly. This is an infringement on our inherent jurisdiction as full disclosure is required for an impacts assessment.

MSIFN would like to emphasize that the evaluation of alternative on-site locations for the used fuel dry storage facility is considered in the framework of the bounding site development, so long as OPG does not exceed its used fuel storage and processing specifications. Given the higher solid waste volumetric activity generated during the BWRX-300 operation, there is a possibility that OPG may exceed these specifications. This issue should be further evaluated and mitigated through meaningful collaboration between interested WTFN and OPG, as they are the primary rights holders of OPG's lands and waters on the Darlington site. It is essential to note that MSIFN has never consented to storing any on-site waste at the Darlington site.

The lack of nuclear waste information is a systemic failure of CNSC and OPG. SON's written submission for the DNGS license to amend application stressed this. SON commented that despite the importation of nuclear waste into their territory the lack of information around OPG's current plans is a "symptom of a much larger and very significant problem. OPG continues to exploit decisions and authorizations made decades ago...These decisions and authorizations were made without any consultation with SON, and certainly without SON's consent."¹⁰³ The lack of consultation and consent of First Nations is an ongoing problem.

The recently approved license extension for the PNGS will result in the generation of more solid radioactive waste than initially anticipated. This is because Units 5 to 8 would continue to operate until 2026 instead of being decommissioned. Again, it should be emphasized that MSIFN never provided consent to the PNGS, Pickering Waste Management Facility, or future on-site storage of nuclear waste at the Pickering site. We are now faced with the associated risks. There is still no established long-term plan for managing

¹⁰³ Written submission from the Saugeen Ojibway Nation in the Matter of Ontario Power Generation – License amendment application for the Darlington Nuclear Generating Station regarding the commercial production of Cobalt-60. May 1, 2024, at pages 2-3.

and storing used nuclear fuel in Canada. Given the risks associated with the storage of radioactive waste in the Treaty Territory, possibly indefinitely, MSIFN underscores the necessity of securing consent. **MSIFN suggests that a First Nation consent provision should be formulated and enforced by the Commission for the management of nuclear waste at all sites.**

MSIFN was not consulted regarding the new waste structure for the refurbishment extension at the PNGS. MSIFN only learned about the plans for a new structure at Pickering during a March 20th, 2024, OPG “Pickering Kickoff Meeting” with WTFNs, and was informed about the actual letter of intent and its submission during an April 9th, 2024, meeting with the CNSC.

The requirement for additional waste storage at the PNGS is absent in CMD 24-H5.1 s. 6.11 – Waste Management. The lack of Indigenous engagement, consultation and collaboration from both OPG and CNSC staff for additional nuclear waste storage facilities should be of urgent concern to the Commission. The CNSC cannot state their commitment to reconciliation and implementing UNDRIP while at the same time ignoring the Declaration's Article 29 (2) which requires MSIFN's consent on waste.

The CNSC staff stated they are implementing UNDRIP and FPIC but then framed their Indigenous engagements for the DNNP as ensuring that MSIFN's issues and concerns are considered.¹⁰⁴ Those two statements are at odds. Implementing UNDRIP and FPIC means MSIFN's consent is required not that their views will be considered. The CNSC cannot sit in a position of discretionary power over decisions that affect our inherent jurisdiction. That is not consent.

One of the main problems highlighted in *Yahey* was the lack of tools established to assess the cumulative impacts.¹⁰⁵ Nuclear waste for the existing sites has no long-term plan and now the Crown is putting off dealing with waste on the DNNP until later phases. This is improper. "Ordinary prudence requires long-term planning, looking ahead and considering the likely future effects of current decisions, as opposed to simply stubbornly 'staying the course'."¹⁰⁶ As noted in *Yahey*, the Crown has all the power and it is not an answer to MSIFN's concerns to maintain the status quo indefinitely.¹⁰⁷ The Court declared:

*The parties must act with diligence to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights, and to ensure these constitutional rights are respected.*¹⁰⁸

The tools nor the information exists to conduct a meaningful cumulative impact assessment.

Species at Risk

OPG has acknowledged impacts on Species at Risk (“SAR”) in the DNNP area and state they are committed to involving First Nations in on-site restoration activities and providing for alternatives for beneficial habitat for SAR. However a co-planning approach addressing SAR impacts and potential mitigation and offsets has not been developed.

¹⁰⁴ *Supra* note 68 at 12.

¹⁰⁵ *Supra* note 95 at para 1587.

¹⁰⁶ *Ibid* at para 1805.

¹⁰⁷ *Ibid* at para 1806.

¹⁰⁸ *Ibid* at para 1894.

OPG is pursuing beneficial habitat alternatives for terrestrial and aquatic species which the First Nations have opposed given that the aquatic offset falls outside MSIFN's Treaty territory, and the proposed terrestrial offset does not benefit MSIFN from a rights assertion perspective. OPG has responded with a proposed separate aquatic beneficial habitat offset that better suits the needs of the Nations and addresses the shortcomings of the aquatic offset to cold water fish, but no details have been confirmed and consultation is ongoing. Furthermore, OPG has not responded to MSIFN's request to pursue a separate terrestrial beneficial habitat offset that aligns more closely with the Nations; however, consultation is ongoing.

MSIFN has also not heard back if OPG will establish a restoration fund to facilitate projects on lands within and outside OPG's Darlington site control in collaboration with the First Nations. Nor has OPG committed to having the non-retainable Butternut trees replaced at the requested ratio or committed to a Harvesting Agreement for MSIFN members to have access to natural features on the Darlington site.

The recommendation made by the Panel for the Raby Head site, the headland on which the DNNP sits, regarding 'environmental protection' and 'project certainty' serves as a valuable example of best practices that can and should be implemented for the DNNP Project.

Recommendation #5 from the EA states:

"To avoid any unnecessary environmental damage to the bluff at Raby Head and fish habitat, the Panel recommends that no bluff removal or lake infill occur during the site preparation stage, unless a reactor technology has been selected and there is certainty that the Project will proceed."

This recommendation is not only prudent but also environmentally responsible. It recognizes the importance of ensuring that significant environmental impacts, such as bluff removal and lake infilling, are avoided until there is a clear commitment to proceed with the project. If there is certainty the DNNP will move ahead then the lack of waste information is even more concerning.

The OPG EIS Review Report states that as of 2022 there have been several changes to species listed as SAR under the federal *Species at Risk Act*¹⁰⁹ or the Ontario *Endangered Species Act, 2007*.¹¹⁰ The CNSC concluded the proposed mitigation measures to protect the identified SAR are adequate. This conclusion is troubling as the Request for Review has yet to be submitted to the Department of Fisheries, and therefore the offsetting and mitigation measures have not been reviewed. The CNSC's primary role is on nuclear safety not assessing SAR.

As well MSIFN has yet to see these mitigation measures put into place. OPG has continued to ignore MSIFN's request to apply a binding conservation easement for the three on site habitat creation areas. The purpose of these creation areas is intended to create habitat for Bank Swallow and SAR Bats, but without protection measures, such as conservation easements, OPG may be able to destroy these creation areas once established. Effectively, the *ESA* permit application for Unit 1 site preparation activities does not prevent OPG from removing these beneficial areas in the future by or include a restrictive covenant. It is not possible for MSIFN to assess the impacts of the DNNP on SAR with so many outstanding issues.

¹⁰⁹ SC 2002, c 29.

¹¹⁰ SO 2007, c 6. ("*ESA*").

Indigenous Knowledge and Land Use Study

Incorporating Indigenous Knowledge ("IK") became a legal requirement in 1997 with the *Delgamuukw* decision.¹¹¹ WTFNs have stressed the need and requirement for IK with CNSC and OPG for years. The Commission acknowledged in February 2024 that the CNSC will work with WTFNs on supporting an Indigenous Knowledge Study ("IKS") and Land Use Study ("LUS").¹¹² Despite years of discussion and promises of an IKS and LUS specific to the DNNP, a funding opportunity for the IKS was only put forward in April 2024. The CNSC incorrectly reported the existence of the studies during the Hearing.¹¹³

Currently, there is no IKS or LUS. This is in stark contrast to what was submitted by Adam Levine at the Hearing. MSIFN raised concerns about the lack of this study many times, including in December 2023 during a meeting with CNSC staff regarding the Environmental Protection Review Report that will be used to support the upcoming DNGS licence renewal application. From MSIFN's perspective these studies do not exist.

The Crown must share all necessary and available information openly with MFISN.¹¹⁴ This includes information on the possible impacts on our s. 35 rights, the nature of the disruption to the land and the expected environmental impact. A statutory decision may be found to be unreasonable for being made prior to completion of studies which are underway or requested and integral to the decision being made.¹¹⁵ We do not have the environmental studies required to assess the impacts on our rights including: the offsets for the fisheries, how the current waste is being handled now that SON is no longer accepting it or how future waste will be dealt with.

6. Governance Issues

MSIFN's recognized legal position has significantly changed since 2009 as a signatory of the Williams Treaties Settlement Agreement 2018. The 2009 EA considered the project envelope outside the boundary of MSIFN's reserve but failed to acknowledge it was on our traditional territory. The 2018 Agreement solidifies our title to the project's land.

Section 22 (1) (c) of the *IAA* distinguishes between impacts on Indigenous *groups* and any adverse impact that the project may have on the rights of the Indigenous *peoples*. This creates a two-prong test for assessing adverse impacts.¹¹⁶

This two-pronged assessment is missing in the CNSC's current process. There is no mechanism for consultation on an Indigenous group's rights. This is particularly concerning for the MSIFN as they take their responsibility over shared rights with the WTFN seriously.

The Michi Saagiig WTFNs have yet to approach a project from the perspective of a collective Mississaugas governance structure. The Michi Saagiig WTFNs are working with experts in multi-Nation Indigenous knowledge studies to figure out what this type of governance structure would look like. The Michi Saagiig WTFNs are making reasonable efforts to move this process forward. However, each nation needs time to

¹¹¹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 [*Delgamuukw*].

¹¹² *Supra* note 68 at 8.

¹¹³ Please refer to the Hearing Response section.

¹¹⁴ *Mikisew*, *supra* note 72.

¹¹⁵ *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2014 BCSC 924 at para 114.

¹¹⁶ *Supra* note 45 at s 22(1)(c).

receive the consultant's report, discuss it with Chief and Council and seek guidance from Elders. This process cannot be rushed and will impact future collaboration with the CNSC.

7. Consent

Where an Indigenous nation has proven Aboriginal title, the courts may consider it acceptable for the Indigenous Nation to flatly object to a project that would infringe that right. Infringements of Aboriginal title may require the consent of the Aboriginal group holding the right.¹¹⁷

Similarly, if a proposed activity would infringe an established treaty right (modern or historical), it would be entirely reasonable for an Indigenous Nation to object to that infringement: treaty rights are the product of negotiations and compromise by both parties, and they represent explicit commitments by each party to the other. Infringements of treaty rights therefore amount to a second round of compromise, and a reneging by the Crown on its deliberate promises. MSIFN as a WTFN signatory should not be subjected to infringements of our treaty rights.¹¹⁸

Article 29 (2) of the Declaration also requires MSIFN's consent when hazardous materials will impact our land.

MSIFN highlighted in its March 20, 2023, submission to the CNSC regarding OPG's DNNP, the absence of an approved long-term plan for the management and storage of nuclear waste in Ontario. Given the risks associated with the storage of radioactive waste in the Treaty Territory, possibly indefinitely, MSIFN emphasized the necessity of securing consent before proceeding with the construction of the BWRX-300 reactor.

Despite highlighting this crucial point, MSIFN's request has been met with silence from the Commission. Yet, the CNSC continues to acknowledge its commitment to consultation and cooperation with Indigenous partners, as well as aligning the implementation of the UNDA Action Plan particularly concerning free, prior, and informed consent on natural resource projects, which includes both existing and proposed nuclear initiatives. The CNSC's words and actions do not align.

Nuclear technology can be safe but as historical events have shown, it can also have devastating results on the environment, land and people.¹¹⁹ MSIFN appreciates OPG's safety record, but this doesn't negate the need for a precautionary approach as the consequences can be catastrophic, a sentiment shared by Ms. Velshi. SMRs will produce immediate waste issues that the CNSC is refusing to deal with. Should contamination happen on the site, MSIFN cannot relocate their traditional territory; there is no alternative site for us.

¹¹⁷ *Supra* note 111 at para 168. Given that *Delgamuukw* states that Aboriginal title is a right to exclusively occupy the land and to use its resources, one would expect aboriginal consent to be required for almost any infringement of this right. Due to the limited litigation regarding proven s. 35 rights, it remains to be seen how high a bar the courts set for justifying the infringement of s. 35 rights.

¹¹⁸ *Aboriginal Law in Canada*, *supra* note 101 at §5:46.

¹¹⁹ "Backgrounder on the Three Mile Island Accident" (28 March, 2024), online: *United States Nuclear Regulatory Commission* <www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html>; "Frequently Asked Chernobyl Questions," online: *International Atomic Energy Agency* <www.iaea.org/newscenter/focus/chernobyl/faqs>; "Fukushima Daiichi Accident" (29 April, 2024), online: *World Nuclear Association* <www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-daiichi-accident>.

8. Document Dumping

Information shared with impacted First Nations must be shared in an accessible and practical manner with the goal of mutual understanding. MSIFN received 4100 hyper-linked pages of potentially confidential material and given a two-week timeline to respond. That timeline was further reduced due to the improper submission of the materials to MSIFN by CNSC. The Request cited commercial, technical and security as reasons information should be treated confidentially. MSIFN responded with a request for an extension. We are not going to repeat the details of our communication of September 18, 2024, here but rely upon the submissions contained therein as part of these submissions.

The nature of this request highlights the importance of the materials. To perform a proper review, a person must review the nature of the information and the basis or bases for the claim for confidentiality, item by item, as it may impact the nature of the remedy that the CNSC determines to be appropriate in these circumstances under the Rules, Subsection 12(3). Given the circumstances, such a review was not able to be performed.

Both the inadequate provision of information and failing to provide an adequate time to consider issues are fatal to the Crown's ability to fulfil its legal duty. The SCC clearly indicated that document dumping is inappropriate. In *Clyde River*, the SCC found that providing a 3,926-page electronic document and in an inappropriate time frame is not true consultation.¹²⁰

The Request for Confidentiality is in itself concerning. The general rule is that evidence before a tribunal is to be filed on the public record. Sections 12(1) and (2) of the Rules make it clear that excluding evidence from the public is the exception – not the rule. The ability to remove evidence from public access is only available when the requirements of s.12(1) are satisfied and only to the extent s.12(2) permits. We would submit given MSIFN's rights and status that the obligation to disclose is even greater in dealing with Indigenous rights holders. Courts have affirmed the Crown must share available and necessary information openly with all impacted Indigenous communities concerning the proposed decision or course of action.¹²¹

An overly broad claim for confidentiality that precludes MSIFN's access to information that is relevant to the potential impact on its rights leaves the Crown as being the only entity with the information and eliminating the Indigenous community's ability to consider and assess the potential impact of its rights. This paternalistic approach to the relationship between the Crown and Indigenous communities has been rejected as being neither legal nor appropriate. As such, decisions regarding the confidentiality of information that may impact an Indigenous community's rights must be as narrow as possible. The decision to file the Request at the last-minute cannot be the norm and an accepted practice.

9. Inadequate Timeframes

The Crown must give a reasonable amount of time to respond to and engage in consultation. The Crown must be prepared to let consultation run its course and not abort the process because of other time pressures where MSIFN is actively engaged in the process, there are remaining outstanding issues and there is value

¹²⁰ *Supra* note 93 at para 49.

¹²¹ *Mikisew*, *supra* note 72.

to further discussions.¹²² The timelines for the DNNP consultation were unilaterally established by the Crown to meet their and OPG's needs. They do not meet MSIFN's requirements.

Specifically, MSIFN was provided inadequate timelines to conduct the requested RIA and to provide comments on OPG's Request for Confidentiality. It is impossible for our consultation team to read, let alone decide, what constitutes necessary information of over 4000 pages without adequate time to review the materials.

MSIFN is a sophisticated First Nation with a competent consultation team. The DNNP is one of many projects that we must consult on. Our Consultation team must meet with Chief and Council who then must consult with Elders, MSIFN citizens, as well as the wider WTFN community. This is a time-consuming process, and the consultation timelines should be based on the First Nations' process not on the Crown's objectives. The capacity of MSIFN must be appreciated and accommodated.¹²³

The Michi Saagiig WTFNs are working towards a shared governance structure to reflect their shared territory. This is an important development that will dictate much of the direction the Michi Saagiig WTFNs take over projects in the territory. This governance structure is progressing well but yet to be established. CNSC needs to respect the process required by the First Nations.

Requests for Time Extension Denied

The provided timelines weren't adequate to understand the issue, seek legal counsel and formulate a response, let alone go through each page. MSIFN requested a 3-day extension to respond to the Request for Confidentiality of 4100 pages. We were given 1.5 days.

MSIFN requested a time extension to properly conduct a Rights Impact Assessment. We were denied.

Funding Timelines

The Court will look at an Indigenous Nation's ability to be on an even playing ground with the Crown during consultation. One of the considerations is the capacity of the Nation to fully participate including having the time and funds.¹²⁴ During the Hearing CNSC staff stated the CNSC *made* funding to participate in Hearing #2 available through its Participant Funding Program.¹²⁵ This is inaccurate. To participate in Hearing #2 written submissions were due on November 4th, 2024. MSIFN participant funding was not confirmed until a week before.

This left us in a precarious situation: wait for funding confirmation and risk not having a properly researched and written submission or proceed with the expense of preparing the submission with no guarantee of funding. On October 28, 2024, one week prior to this submission's deadline, we finally received a commitment of the requested funds.

MSIFN's responsibility to protect our citizen's treaty and aboriginal rights is a top priority. We made the decision to proceed with a proper submission without the CNSC providing funds appropriately ahead of the submission deadline.

¹²² *Squamish Nation*, *supra* note 73 at para 214; *Homalco Indian Band v British Columbia (Minister of Agriculture, Food & Fisheries)*, [2005 NCSC 283](#) at para 108 [*Homalco*]; *Eabametoong First Nation v Minister of Northern Development and Mines*, [2018 ONSC 4316](#) at para 114 [*Eabametoong First Nation*].

¹²³ *Moulton*, *supra* note 101 at para 293; *Xeni Gwet'in First Nations v British Columbia*, [2007 BCSC 1700](#) at para 1138 [*Xeni Gwet'in First Nations*].

¹²⁴ *Supra* note 82.

¹²⁵ Canada: Canadian Nuclear Safety Commission, *Public Hearing (Transcript)*, (2 October 2024) at pg. 8.

Consultation Conclusion

The Commission must look at the consultation activities and decide if, from MSIFN's perspective not the CNSC's perspective, these actions meet the common law standard of meaningful consultation. MSIFN's position is that they do not. We have negotiated directly with OPG for this phase of the project to overcome the Crown's failings. MSIFN asks the Commission to find the CNSC failed to conduct *meaningful* consultation, order the CNSC to create a process of holding OPG accountable to the negotiated consultation process and commit to overhauling its REGDOC 3.2.2 to ensure proper consultation protocols, including at IAC and Monitors are enshrined into the authorizing documents.

PART 4

Rights Impact Assessment

A Rights Impact Assessment ("RIA") is one tool available to assess impacts of a project upon Aboriginal and Treaty rights. If the framework and timelines required to properly conduct an RIA are consented to by the Indigenous nations and fit with the project's timelines, then it can be an effective tool. This is not the case with the current RIA request. MSIFN has been clear since the CNSC first presented their desire for an RIA on October 10, 2023,¹²⁶ that neither the framework nor the timelines proposed are appropriate for this RIA and no consensus from MSIFN or the other WTFNs has been sought or given.

Any RIA submitted during the DNNP LTC is precedent setting and has the potential to freeze the impact assessment at this particular point in time. This is evidenced by the CNSC's acceptance of the 15-year-old EA process as appropriate for 2024 despite the lack of Indigenous consultation and the other shortcomings already highlighted. It is further evidenced by Mr. Levine's statement that during the EA no concern from MSIFN or other WTFNs about impacts on their rights were raised during the process.¹²⁷ Mr. Levine neglected to mention that MSIFN was denied consultation funding in order to allow them to participate in the EA and that no meaningful consultation actually occurred.

This RIA would be the first impact assessment conducted since the WTFN's Settlement Agreement in 2018. It will therefore be precedent setting in terms of being the first RIA for both the DNNP and for the shared rights of the WTFNs. Due to the gravity of the requested RIA and the scope of the DNNP, MSIFN is unable and unwilling in the circumstances to provide an incomplete and inaccurate assessment simply to meet the CNSC's timelines.

During a recent meeting between MSIFN and the CNSC, the CNSC staff seemed aggravated and alluded to MSIFN's actions as frustrating its process. MSIFN vehemently rejects any insinuation that we are frustrating the process. Our consultation team and Chief and Council have engaged with the CNSC regarding the RIA over 30 times in a 13-month period. Again, the law is clear that MSIFN must be involved in setting the process, including both content and timelines. Something which CNSC staff have ignored.

MSIFN's engagement includes: monthly CNSC-MSIFN check-in meetings, written responses to CNSC presentations, oral submission to the Commission by Chief LaRocca, multiple internal WTFN meetings, providing consistent and timely feedback and responses to CNSC, among many other things. We have also initiated a Mississauga WTFN shared governance structure consultation process which CNSC has not provided funding or tangible support for. Please see **Appendix "A"** for a list of MSIFN's RIA documentation.

¹²⁶ E-DOCS.-#7203425 Canadian Nuclear Safety Commission letter to MSIFN January 24, 2024 at Pg. 1; MSIFN consultation staff reported their concerns directly to the CNSC staff during the October 10, 2023; MSIFN's Letter to CNSC-OPG re: RIA Framework 2024-01-11 reiterated their concerns; Chief LaRocca reiterated the concerns again in her oral submission during the Public Commission Hearing CNSC-DNNP January 23, 2024.

¹²⁷ *Ibid* at Pg. 2

Good faith consultation requires us to respond to the Crown's notices and engage in the consultation process, share relevant information and discuss the proposed course of action with an open mind about the likely impacts and how it can be accommodated.¹²⁸ We have done that.

MSIFN believes that the CNSC has not taken our concerns seriously and has presented an inappropriate framework and timeline from which they refuse to deviate. As such, we are in our right not to conduct an RIA which in our opinion will be harmful to our rights. The Crown's obligation is not to provide a process, but a process that is meaningful. The RIA process presented to MSIFN is not meaningful.

On January 11, 2024, MSIFN submitted a letter to the CNSC outlining their comments and concerns with the CNSC's RIA framework.¹²⁹ CNSC staff responded to this letter on January 24, 2024, and characterized the RIA as a best-practice approach that provides clear and complete information and analysis regarding potential impacts to Indigenous rights to help inform the Commission's decision.¹³⁰ The RIA process forced upon MSIFN cannot achieve the stated RIA goals.

MSIFN has consistently indicated that an appropriate timeframe is required to conduct the RIA and has asked for extensions. The CNSC denied these requests despite the Aboriginal Consultation and Accommodation Guidelines, Guiding Principle No. 4 which highlights changing of timelines as an acceptable accommodation.¹³¹ CNSC has cited the inability to extend the timelines because of needing to have the RIA by December 2024 to meet the Hearing Part 2 submission timeline. This is a Crown established timeline and has no reflection on the true time requirements for an RIA. As discussed above the Crown must be flexible with timelines to allow for meaningful consultation.

MSIFN is unable to conduct an RIA in the given timelines due to inadequate information including multiple incomplete studies (SAR, IK, LUS, Mississaugas' governance structure etc.), the absence of a waste plan as well as current consultation on a WTFN governance structure. UNDRIP requires the CNSC to consider impacts on Indigenous peoples and communities.¹³² As Chief LaRocca stated to the Commission in her oral submission on January 23, 2024:

As it currently stands, there is no mutual understanding between OPG, CNSC staff, and our communities regarding the full scope of the project, or its potential impacts on our Aboriginal and Treaty rights. In fact, much of the requisite information remains to be shared or discussed, with significant gaps in the information required to fully evaluate, understand, and address impacts to rights.

We require council review, community-based meetings, and discussion with our technical advisors to meaningfully consider the efficacy and applicability of the Rights Impact Assessment framework. At a minimum, we were reassured that this

¹²⁸ *Nlaka'pamux Nation Tribal Council v British Columbia (Environmental Assessment Office)*, [2011 BCCA 78](#) at para 79; *Mikisew*, *supra* note 72 at para 65. Paragraph 65 in *Mikisew* was applied in *Fort McKay First Nation v Alberta (Minister of Environment and Sustainable Resource Development)*, [2014 ABQB 32](#) at para 19.

¹²⁹ MSIFN Letter to CNSC-OPG re: RIA Framework 2024-01-11.

¹³⁰ *Supra* note 126 at pg. 2.

¹³¹ Crown-Indigenous Relations and Northern Affairs Canada "Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" (2011) online (pdf): *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirmac.gc.ca/eng/1100100014664/1609421824729#chp1_6>

¹³² UNDRIP's Annex and Article 1 recognizes and affirms the collective and individual rights of Indigenous individuals. The CNSC's current process does not recognize the collective rights of WTFNs.

process would respect the governance process requirements of each of the impacted First Nations.

[W]e wish to make it clear that the request should have come years earlier with time to collaboratively design the scope and process for such a significant undertaking...We assert that a comprehensive and co-designed Rights Impact Assessment is required to be able to fully identify, understand, and address impacts to the Mississauga Nation communities, and the Williams Treaties First Nations.

MSIFN's experience is that the RIA process has not respected our governance process. Without all the pieces in place it is not possible for MSIFN or other WTFNs to provide a clear and complete RIA. MSIFN believes submitting an incomplete RIA based on missing information and rushed timelines is a dangerous precedent and is a disservice to the Commissioners as their decision will be based on incomplete and unclear information. It would be a disservice to the members for whom we have the obligation of representing and protecting of MSIFN and the other WTFNs.

The CNSC staff committed to a collaborative RIA but have consistently ignored the importance of a proper RIA process and repeatedly pushed MSIFN for an RIA in any form. During the Hearing the CNSC staff presented their openness to receiving the RIA in any level of detail as collaboration.¹³³ But the level of detail and format doesn't matter when the resulting RIA is incomplete, unclear and potentially harmful to the WTFNs. This is not an accommodation and misses the point.

A reasonable consultation period is required to give aboriginal groups time to consider the proposed decision, gather any internal information, and seek any outside advice on technical issues. A reasonable time period must also take into account the volume of referrals that the aboriginal group is handling (which in some cases is extremely high) as well as its capacity level. The British Columbia Supreme Court recognized in *Tsilhqot'in v British Columbia* that even where an aboriginal group has adequate resources, the volume of referrals may make it impossible for the group to respond in a timely fashion.¹³⁴ In [Moulton Contracting Ltd. v British Columbia](#), the Court found that British Columbia breached the duty to consult by failing to extend consultation timelines on a forestry referral.¹³⁵

The Crown must be prepared to let consultation run its course; it cannot abort the consultation process because of other time pressures where the Indigenous group is actively engaged in the consultation process, there remain outstanding issues, and there is value to further discussions.¹³⁶

Despite the sense that the CNSC Staff is simply going through the motions, MSIFN has not frustrated the process, even though we would be in the right to refuse to participate in futile exercises. The Court in *Ignace v British Columbia (Chief Inspector of Mines)* articulated this well at paragraph 143:¹³⁷

Further insight into the problem is offered by the judgment of Willcock J.A. in [Chartrand v. British Columbia \(Forests, Lands and Natural Resource Operations\)](#), 2015 BCCA 345 [Chartrand]. In [Chartrand](#), the Crown inappropriately offered only limited consultation. A chambers judge erred in finding that the duty to consult was nevertheless satisfied

¹³³ Canada: Canadian Nuclear Safety Commission, *Public Hearing (Transcript)*, (2 October 2024) at pg. 240.

¹³⁴ *Xeni Gwet'in First Nations*, *supra* note 123.

¹³⁵ *Aboriginal Law in Canada*, *supra* note 101 at §5:49.

¹³⁶ *Squamish Nation*, *supra* note 73; *Homalco*, *supra* note 122; *Eabametoong First Nation*, *supra* note 122.

¹³⁷ [2021 BCSC 1989](#) [*Ignace*].

because the First Nation had failed to take advantage of that opportunity. Speaking for the Court, Willcock J.A. stated, at para. 77:

There must be more than an available process; the process must be meaningful. In this regard, I agree with the views of Neilson J. in [Wii'litswx \[v. British Columbia \(Minister of Forests\), 2008 BCSC 1139\]](#) at para. 178: "The Crown's obligation to reasonably consult is not fulfilled simply by providing a process within which to exchange and discuss information". That obligation was described by Finch J.A. (as he then was) in [Halfway River \[First Nation v. British Columbia \(Minister of Forests\), 1999 BCCA 470\]](#) at para. 160 as "a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action". [Emphasis added.]

MSIFN believes the RIA framework and consultation have provided a meaningless process. Even more, the courts have found that Indigenous Nations with proven title may legally refuse projects that infringe their rights, as we believe the current RIA process will do to MSIFN.¹³⁸ Without the complete information and appropriate timeframes to conduct an impact assessment, it is irresponsible governance to produce and rely upon an incomplete and inaccurate RIA.

Jurisdictional Issues around the Lakebed and Water

The current common law has yet to grant Aboriginal title to submerged land or water, however both *SON* and *Rio Tinto* have left the door open for this possibility.

To sufficiently occupy the land for the purposes of title, the Aboriginal claimant group must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. The occupation cannot be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.¹³⁹

The Williams Treaties are silent on the lakebed and water in the WTFN's traditional territory. The CNSC has acknowledged Crown-Indigenous Relations and Northern Affairs Canada affirmation of this, and that Canada does not have a position on this. The CNSC recognized our jurisdiction over the water.¹⁴⁰ The waters and lakebeds in the WTFNs have never been ceded. As such MSIFN claims jurisdiction to the lakebed and water at the DNNP. Any activity which impacts those lands and water requires consultation, not simply a process of sharing information, and consent of MSIFN. As was the case in *Haida*, the Crown cannot conduct activities that will permanently alter that which the First Nation is claiming title to but has yet to be proven.¹⁴¹

¹³⁸ *Delgamuukw*, *supra* note 111 at para 168. "Given that *Delgamuukw* states that aboriginal title is a right to exclusively occupy the land and to use its resources, one would expect aboriginal consent to be required for almost any infringement of this right."; *Aboriginal Law in Canada*, *supra* note 101 at § 5:46 para 5.1910.

¹³⁹ *Chippewas of Nawash Unceded First Nation v Canada (Attorney General)*, [2023 ONCA 565](#) at para 15.

¹⁴⁰ Canada: Canadian Nuclear Safety Commission, *Public Hearing (Transcript)*, (2 October 2024) at pg. 78.

¹⁴¹ *Aboriginal Law in Canada*, *supra* note 101 § 5:34.

The momentum in the courts is inching towards the finding of Aboriginal Title to water and submerged lands. Currently the Ontario Court of Appeal has sent the SON Aboriginal Title Claim to submerged lands back to the trial court. Currently there are other active claims for Aboriginal title to water and submerged lands in Southern Central Ontario from multiple First Nations. The possibility of granting this title may become a reality and impact the DNNP.

Hearing Part 1 Responses – Setting the Record Straight

The WTFNs were not participants in the Hearing Part 1 on October 2, 2024. Despite other governmental agencies being invited to participate, the treaty-holding Nations were sidelined. Laura DeCoste stated in her Hearing submission that part of the CNSC's Indigenous consultations was the invitation to the WTFNs to participate in the Hearing Part 2.¹⁴²

This conduct is indicative of the colonial gatekeeping position the CNSC has implemented during consultation. As title holders we should be a party to the licensing applications especially as many of the Hearing submissions directly affected us, MSIFN *should* have been a party to the Hearing. Instead, we are reliant on the good graces of the CNSC to decide which aspects of the process we should and should not be invited to.

There were inaccurate statements regarding Indigenous consultation that were submitted during the Hearing. As MSIFN was not invited to participate, we were unable to correct those statements. We are setting the record straight here.

Page	STATEMENT	CORRECTION
8	<i>The CNSC made funding to participate in this public hearing available through its Participant Funding Program. A funding review committee, independent of the CNSC, reviewed the funding applications received and made recommendations on the allocation of funds. Based on recommendations from the Funding Review Committee, the CNSC awarded funding to 11 applicants.</i>	When funding was initially made available, only one hearing was planned. MSIFN was awarded funding to participate in the Hearing Part 1, and later had to request the opportunity to apply for additional funding to participate in the Hearing Part 2 and retain legal counsel, once details were released. MSIFN's application for the Part 2 hearing was not confirmed until October 28, 2024. This is one week prior to the submission due date.
19	<i>As committed in January 2024, OPG is funding a long-term Indigenous knowledge study or IKS. The intention is that this information gathered through the IKS will help to inform a rights impact assessment, a cumulative effects study, and enhanced environmental monitoring programming. OPG is committed to working with the Nations to undertake this work. The IKS is being led by the Michi Saagiig rights-holding</i>	We have received a commitment from OPG to fund proposed studies, but we have not actually seen any funding nor is there an avenue to invoice for costs incurred. As above, our consultant, Firelight, is not scoping the study, they are only drafting a potential multi First Nation Michi Saagiig Nation governance Framework.

¹⁴² Canada: Canadian Nuclear Safety Commission, *Public Hearing (Transcript)*, (2 October 2024) at pg. 84.

	<i>Nations and is being scoped by them, with the support of a consultant.</i>	
20	<i>As committed in January 2024, OPG is funding a long-term IK study or IKS. The intention is that this information gathered through the IKS will help to inform a rights impact assessment, a cumulative effects study, and enhanced environmental monitoring programming.”</i>	There is currently no Indigenous Knowledge Study that CNSC or OPG are supporting with. MSIFN has told OPG that we would not be moving forward with any other studies until a Michi Saagiig guiding framework is in place.
57	<i>Should the Commission issue a construction licence, CNSC staff will implement a compliance verification program spanning all aspects of the project. CNSC staff also acknowledge that should the DNNP proceed through to subsequent licensing stages, there will be a continued obligation on the CNSC to hear and understand perspectives and concerns of Indigenous Nations and communities, and we will continue to consult and engage over the lifecycle of the DNNP.</i>	This statement is indicative of the consultation failures. CNSC's legal obligations go beyond listening and understanding MWIFN's perspectives and concerns. That is not meaningful consultation. CNSC is obligated to uphold our treaty and Aboriginal Rights as protected by s. 35 of the <i>Constitution Act, 1982</i> , as well as upholding the Declaration which requires MSIFN's consent
90	<i>CNSC staff are also committed to supporting MSIFN in conducting a broader Rights Impact Assessment covering all CNSC-regulated facilities within the Treaty Territory, as proposed in a recent funding application CNSC staff have received under the Indigenous and Stakeholder Capacity Fund."</i>	CNSC has not indicated to us that they are committed to supporting this broader study, nor have we heard back regarding the funding proposal submitted on June 14, 2024.
93	<i>This includes committing to collaborating with interested Williams Treaties First Nations and OPG on supporting an Indigenous Knowledge study and cumulative effects assessment to gather more information and data regarding the Williams Treaties First Nations rights and interests as it relates to the DNNP and surrounding territory. CNSC staff have been informed that the Mississauga Nations of the Williams Treaties First Nations are working on a governance model for the studies and that the studies could take multiple years to complete. CNSC staff are able to provide funding and support for the studies when requested by the First Nations.</i>	Same as above. Funding and support have been requested without a response or commitment from CNSC.
124	<i>“[...] as part of the DNNP environmental assessment, we did conduct an assessment to determine the potential cumulative effects that may be caused by the</i>	We told OPG that we would not be moving forward with any studies (i.e., IKS, RIA, cumulative effects

	<p><i>combined impacts of DNNP and other existing or planned projects within the site, but in order to fully understand what cumulative effects will look like, we do understand that the Indigenous Knowledge needs to be better understood in this area, so we – part of that scope by the Michi Saagiig Nations right now – part of that scope is going to include how that information will inform cumulative effects.”</i></p>	<p>assessment) until a Michi Saagiig guiding framework is in place. It cannot be assumed that Indigenous Knowledge will be given to OPG to assess cumulative impacts. Furthermore, we haven’t received any funding from the CNSC to support broader studies.</p> <p>Also, it should be noted here that the cumulative effects assessment completed by OPG did not consider Michi Saagiig VECs, which are crucial to determining cumulative impacts on Rights.</p> <p>In our opinion, OPG’s cumulative effects study benefits OPG and industry, leaving a significant knowledge gap that First Nations must uncover for themselves.</p>
<p>130</p>	<p><i>So there’s the Indigenous Knowledge Study that ourselves and OPG are supporting the Michi Saagig Nations in completing as well as the commitment to complete a broader cumulative effects study in the region with a focus on OPG’s nuclear projects and activities in the area and as well as we’re working with Indigenous Nations and communities, including the Mississaugas of Scugog Island First Nation, Curve Lake and Hiawatha First Nation to fund and support their own studies and initiatives around monitoring to gather data closer to their communities around the state of the environment and as it relates to nuclear activities in the territory as well as getting a broader view of cumulative effects, as it’s not just nuclear activities in the territory.”</i></p>	<p>There is currently no Indigenous Knowledge Study that CNSC or OPG are supporting with. MSIFN contracted Firelight to create an initial draft of a framework for an Indigenous Knowledge Study incorporating traditional governance structures. We told OPG that we would not be moving forward with any other studies (i.e. IKS, RIA, cumulative effects assessment) until a guiding framework is in place. We have not contracted Firelight to lead the proposed studies, we are simply seeking assistance to draft a framework to assist the Nations in moving forward. This whole statement is inaccurate.</p>

PART 5

Remedy

Condition on the Order

Should CNSC not want to delay the issuance of the LTC by properly assessing the full impacts of the project, specifically the waste, MSIFN requests the issuance of a LTC be conditional on the following:

FIND

1. that it is necessary to ensure MSIFN's rights are adequately recognized and protected through CNSC regulations or policies that hold proponents including OPG accountable;
2. that the CNSC's consultation to date has not upheld UNDRIP or the UNDA Action Plan;
3. that MSIFN has not been invited or permitted to be a participant during decision making phases including higher strategic consultation processes;
4. the current RIA process has been inadequate and has amounted to providing of information and seeking responses which falls short of the legal requirements for meaningful consultation;
5. that MSIFN's concerns with the CNSC's review of cumulative effects, specific environmental concerns, the jurisdictional issue of the oversight of the lakebed, piecemealing the project and the lack of waste consideration are not satisfactorily addressed;

ORDER

6. the CNSC, OPG and MSIFN work together to develop a process to properly address such concerns;
7. the CNSC Staff to include MSIFN representation in the Review and Verification process to be implemented by the CNSC to confirm compliance with its decision and order in this hearing;
8. to fulfill the obligations set out in the LOIs and agreements between OPG and MSIFN by establishing regulatory holdpoints for consideration of the impact to Indigenous rights similar to technical holdpoints already used;
9. in conjunction with Indigenous Nations, (i) include the continuation of the RIA process as part of the review and verification process and (ii) the development of a better RIA guidance document for future applications;

COMMIT

10. to the immediate striking of a task force for the development of an Indigenous Advisory Committee and Indigenous Monitors for future proceedings similar to that of the CER; and
11. the CNSC to undertake a full strategic review, along side Indigenous Nations, of the CNSC's regulatory framework for Indigenous engagement to identify and fill regulatory gaps and updates to the CNSC REGDOC 3.2.2 to reflect UNDRIP and FPIC; and

12. to including a provision for the CNSC to seek MSIFN's consent for the DNNP and the LTC decision.

The authority for the CNSC to fulfill the requests already exists. The NSCA provides for:

The establishment of a panel

22 (1) The President may establish a panel of the Commission consisting of one or more members and, subject to subsection (3), the panel may, as directed by the President, exercise or perform any or all of the powers, duties and functions of the Commission.

Act of a panel

(2) An act of a panel is deemed to be an act of the Commission.

Exceptions

(3) A panel may not make by-laws or regulations or review a decision or order of the Commission.

Licences

24 (1) The Commission may establish classes of licences authorizing the licensee to carry on any activity described in any of paragraphs 26(a) to (f) that is specified in the licence for the period that is specified in the licence.

Application

(2) The Commission may issue, renew, suspend in whole or in part, amend, revoke or replace a licence, or authorize its transfer, on receipt of an application

- **(a)** in the prescribed form;
- **(b)** containing the prescribed information and undertakings and accompanied by the prescribed documents; and
- **(c)** accompanied by the prescribed fee.

Terms and conditions of licences

- **(5)** A licence may contain any term or condition that the Commission considers necessary for the purposes of this Act, including a condition that the applicant provide a financial guarantee in a form that is acceptable to the Commission.

Commission to provide opportunity to be heard

40 (1) Subject to subsection (2), the Commission shall provide an opportunity to be heard in accordance with the prescribed rules of procedure to:

(c) any person named in or subject to the order, before confirming, amending, revoking or replacing an order of an inspector under subsection 35(3);

(d) any person named in or subject to the order, before confirming, amending, revoking or replacing an order of a designated officer under subsection 37(6);

(h) any person named in or subject to the order, before taking any measure under any of paragraphs 43(4)(g) to (j); and

(i) any person named in or subject to the order, before making any other order under this Act.

Regulations

44 (5) The Governor in Council may make regulations generally as the Governor in Council considers necessary for carrying out the purposes of this Act.

Starting in 2023-24, the 2023 federal budget provides \$11.4 million over 3 years to Crown-Indigenous Relations Northern Affairs Canada to engage with Indigenous communities. Engagement activities will inform the development of new federal guidelines for federal officials to fulfil the Crown's duty to consult Indigenous Peoples and accommodate impacts on their rights. This will support the implementation of the *UNDRIPA* and provide more clarity on how the government will proceed to ensure an effective and efficient whole-of-government approach to consultation and accommodation.¹⁴³

Considering the above and CNSC's priority for reconciliation including UNDRIP and FPIC, MSIFN requests that the Commission requires the CNSC staff to immediately initiate APM #34 specific discussions with MSIFN and other interested Indigenous communities. Furthermore, MSIFN requests that CNSC staff initiate discussion with the Treasure Board of Canada Secretariat, given that they oversee the Cabinet Directive on Regulations and set out the expectations and requirements for the development, management, and review of federal regulations.

¹⁴³ *Supra* note 79.

Appendix "A"

RIA documentation.

1. 2024-01-11_ MSIFN Letter to CNSC re RIA Framework.
2. E-Docs - #7203425 CNSC Response to MSIFN's January 11, 2024, Letter on the CNSCs RIA Framework.
3. Chief LaRocca Speaking notes for January 23, 2024.
4. E-Docs-#7252982 CNSC staff responses to MSIFN's concerns DNNP.
5. E-Docs - #71440452 Draft Rights Impact Assessment for MSIFN DNNP LTC.
6. Meeting Minutes MSIFN DNNP RIA Discussion May 13, 2024.
7. CNSC staff's Indigenous Consultation Report for the DNNP LTC Application for MSIFN Review.
8. Meeting notes – MSIFN and CNSC Staff 09 03 2024.
9. MSIFN Draft Speaking notes for slides in CNSC staff's presentation at the Part 1 DNNP LTC Hearing on October 2.



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January 11, 2024

Canadian Nuclear Safety Commission
280 Slater Street, P.O. Box 1046, Station B
Ottawa, ON K1P 5S91

Ontario Power Generation Inc.
700 University Avenue
Toronto, ON M5G 1X6

To the Attention of:

Adam Levine
Team Leader
Aboriginal Consultation and Participant Funding
via Email: adam.levine@cnscccsn.gc.ca

Ian Jacobsen
Director, Indigenous Relations

ian.jacobsen@opg.com

Re: Preliminary Response to CNSC Rights Impact Assessment Framework

This is further to the Mississaugas of Scugog Island First Nation's (MSIFN) commitment to provide our response to CNSC's Rights Impact Assessment ("RIA") Framework as provided to MSIFN on October 10, 2023. We set out our response below as a series of discussion points and suggested revisions. This letter has been reviewed and approved for transmission by MSIFN Chief and Council.

MSIFN is also in receipt of CNSC staff's email of January 11, 2024 indicating that the CNSC's proposed RIA for the Darlington New Nuclear Project (DNNP) is "not precedent setting as the RIA framework would be flexible and tailored to each specific future project or decision as well as the Indigenous Nation or community that is being consulted". MSIFN respectfully disagrees with CNSC staff's assertion. The act of conducting an RIA for the DNNP twelve years after the EA for the project was approved, in the absence of meaningful consultation on the development of the RIA, is most definitely precedent setting.

1) Consultation on the development of the RIA

Based on *Morton v. Canada (Fisheries and Oceans)*¹ and given the potential of the RIA Framework to confine the discussion of impacts on protected aboriginal and treaty rights to environmental concerns, we believe that CNSC was legally obligated to develop the RIA Framework in consultation with our First Nation and others. We are not aware that any such consultation took place, and certainly there was no consultation with MSIFN. Based on the CNSC and OPG commitments reflected in the Policy Statement: CNSC's Commitment to Indigenous

¹ *Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143.



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Consultation and Engagement², and OPG Reconciliation Action Plan,³ we hope the present dialogue is an opportunity to incorporate what we see as essential revisions to the RIA Framework.

2) Variance of the CNSC RIA Framework from the Impact Assessment Agency of Canada's Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples⁴?

Natural Resources and Climate Change Canada provides guidance and a methodology for addressing potential impacts on the rights of Indigenous peoples as required in an impact assessment of a designated project under the *Impact Assessment Act*. Under that statute, physical activities that are regulated under the *Nuclear Safety and Control Act* and the *Canadian Energy Regulator Act* are “designated projects” to which the IAA guidelines apply. Furthermore, on October 21, 2019, the CNSC signed a Memorandum of Understanding on Integrated Impact Assessments Under the *Impact Assessment Act* with the Impact Assessment Agency of Canada.⁵

While we do not fully endorse the IAA guidelines, we ask that you provide the authority and rationale for the development and adoption of an alternative framework.

3) Missing First Task

Both the NCCC and CNSC methodologies omit what, in our view, should be Step 1 in any consultation: Seeking a consensus with potentially-affected First Nations on the project description. If the proponent and the Indigenous parties disagree on the proper description of the proposed Crown and proponent conduct which may have impact on protected Indigenous rights and valued components and the objectives of the project and the potential for future projects which could expand those impacts, any consultation is likely to be at cross purposes. Please confirm that this initial step will be added to the CNSC RIA Framework.

4) RIA Step 1: Identification of potentially impacted rights and interests

This step is out of sequence: we submit that it is essential to define the baseline conditions before potential impacts can be identified.

² <https://nuclearsafety.gc.ca/eng/resources/aboriginal-consultation/indigenous-policy-statement.cfm>

³ <https://www.opg.com/about-us/our-commitments/indigenous-relations/reconciliation-action-plan/>

⁴ <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html>

⁵ <https://nuclearsafety.gc.ca/eng/acts-and-regulations/memorandums-of-understanding/mou-impact-assessment-agency-canada.cfm#sec17>



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5) RIA Step 2: Identification of current baseline conditions including cumulative effects, current territorial capacity and historical context

The RIA characterization of baseline conditions for an Indigenous consultation is extremely problematic and requires extensive revision.

Issue 1: The term “current baseline conditions” confuses at least three separate issues: (1) the environmental conditions baseline; (2) the impacts on the protected rights of the affected First Nations, and (3) the impacts on IAA “VC’s” – valued components including environmental, health, social, economic and potentially other elements of the natural and human environment. In other words, there are three separate baselines to consider, which is of particular importance with respect to any project which may have health impacts. These three baselines may differ – in fact they are almost certain to differ because, as the caselaw establishes, cumulative effects must be taken into account in assessing impacts on rights.⁶

Furthermore, a description of the past state of a VC should be included in the baseline description of each VC, inclusive of Indigenous Knowledge of that past state, demonstrating how the state of the VC has evolved over time. Setting past temporal boundaries for gathering of past data and Indigenous knowledge will provide a more meaningful picture of the VC allowing understanding of whether the baseline condition is representative or is at a particular point in a cycle or trend. Relevant past information includes scientific information, historical data and maps, and Indigenous knowledge about the natural variability, drivers of change and historical shifts to provide an understanding of VCs from past points in time to the present, showing the evolution of the VC and providing important information for decommissioning and site repurposing scenarios.

The Canadian Impact Assessment Agency’s guidelines on tailored impact statements provides:

All interconnections between human health and other VCs and interactions between effects must be described. A detailed HIA [health impact assessment] inclusive of other reasonably foreseeable future projects *[emphasis added]* would be appropriate to capture potential positive and adverse effects on social factors and economic factors (and where applicable cultural factors) in addition to the biophysical environmental factors.

(<https://iaac-aeic.gc.ca/050/documents/p80184/137378E.pdf>)

Issue 2: A similar conceptual confusion is evident in the reference in this step to “current territorial capacity”: just as there are separate baselines for environmental conditions, rights impacts, and VC’s, the “territorial capacity” in each of these three contexts should be separately considered.

⁶ *Yahey v. British Columbia*, 2021 BCSC 1287.



Issue 3: CNSC's references to “mitigation and accommodation” – which effectively treats accommodation as an alternative to environmental mitigation – suggests a misunderstanding of the accommodation concept. The requirement to accommodate does not arise from residual impacts on the environment: it arises from impacts on protected rights and VC's, regardless of whether there are residual effects after mitigation. We suggest reserving the concept of accommodation for measures to compensate the affected First Nation for the totality of project impacts on rights and VC's, and deleting it from this step, and others, where it is intended as a remedy for deltas from the environmental baseline.

Issue 4: While the reference to "cumulative effects" in this step is positive, the language used does not show that the concept has been fully integrated into the proposed approach. For example, CNSC does not appear to have contemplated that mitigation may restore the environmental baseline but, because of cumulative effects, impacts on VC's and protected rights may still require accommodation. Mitigation itself is capable of having an impact. Further, all anticipated future projects which may add impacts must be added as perspective to the evaluation. This is especially important for multi-dimensional nuclear sites in the Greater Golden Horseshoe (GGH) provincial planning area and the western portion of Lake Ontario where a multitude of current activities and future projects create complex cumulative effects scenarios, and impacts on VC's and impacts on protected rights.

We request that CNSC amend Step 2 in its RIA Framework to correct all of these defects. Note that changes to Step 2 will need to be reflected in corresponding changes to subsequent steps.

6) RIA Step 4: Identification of severity of potential project interactions with identified rights and interests

All the comments above on separate baselines for environmental conditions, VC's and protected rights apply to this step. We recommend adding "including cumulative effects" immediately before the closing parenthesis mark.

Secondly, the terminology "Identification of severity" is completely inappropriate. Questions of severity are matters of judgment, not identification, and that the word "Determination" should be substituted for "Identification." Further, we recommend expressly adding that severity must be addressed from the First Nation's perspective.⁷

⁷ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511



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7) RIA Step 5: Identification of potential mitigation and/or accommodation measures to address identified potential project interactions with identified rights and interests

As noted above re Step 2, taking both mitigation and accommodation into account before determining whether there are residual project effects makes sense only in the context of a single baseline – environmental conditions. We recommend broadening the impact statement to include impacts on VC's and protected rights in addition to residual environmental impacts, and reserving the concept of accommodation for the remedy to all those residual effects collectively. We suggest deleting the reference to accommodation in this section, making similar changes to slides 6 and 7.

Example Sections of an RIA

All of the comments above apply to the Examples slides in the RIA Framework.

Please let us know if you have any questions with respect to the issues and solutions that we have outlined above for the CNSC's RIA Framework and we are pleased to discuss the same with you.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Richardson".

Don Richardson, Ph.D.
Consultation Advisor
Mississaugas of Scugog Island First Nation
www.scugogfirstnation.com
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January 24, 2024

e-Doc 7203425

Don Richardson, Ph.D
Consultation Advisor
Mississaugas of Scugog Island First Nation
drichardson@scugogfirstnation.com

Dear Don Richardson:

Thank you for your letter dated January 11, 2024, regarding the Mississaugas of Scugog Island First Nation's (MSIFN) concerns and comments related to the Canadian Nuclear Safety Commission's (CNSC) Rights Impact Assessment (RIA) Framework and approach for the Darlington New Nuclear Project (DNNP). The CNSC appreciates the ongoing dialogue around the approach to assessing impacts on Indigenous and /or Treaty rights and appropriately documenting and assessing MSIFN's specific concerns with regards to potential impacts on their rights and interests as it relates to Ontario Power Generation's (OPG) Licence to Construct application for the DNNP.

CNSC staff presented the CNSC's RIA framework during the October 2023 MSIFN/CNSC monthly meeting, in relation to the DNNP. The RIA framework is meant to be flexible and was presented as a way to start discussions on the approach to assessing the specific concerns MSIFN has recently raised regarding the DNNP's potential impacts on MSIFN rights and interests. Following this meeting, CNSC staff shared examples of RIAs that the CNSC had previously conducted and information on next steps for a DNNP specific RIA with MSIFN. CNSC staff have continued to raise and discuss the approach to conducting an RIA, the expected timelines and how MSIFN would like to collaborate on the process for the DNNP during each subsequent MSIFN/CNSC monthly meeting, as well as at a separate meeting on October 17th, 2023, regarding the DNNP and at the November in-person meeting with MSIFN's leadership in MSIFN's community. CNSC staff shared additional information in writing about the CNSC's perspective on the DNNP RIA and a proposed path forward on January 10, 2024.

CNSC staff's assessment and recommendations related to any potential impacts on rights from a Commission decision regarding a nuclear project and license application are typically included or appended to the CNSC's Commission Member Documents which are submitted to the Commission to support their decision-making process. RIAs are a new best practice across the Federal Government for major projects, decisions and actions that could potentially impact Indigenous and/or treaty rights. They are an

analytical tool to pull together existing information and put a specific focus on a projects or decisions potential impacts on rights, as opposed to just impacts on the biophysical environment and human health. The RIA is not a specific regulatory or legal requirement, but rather a process and report to provide the Commission with clear and complete information and analysis regarding potential impacts to rights to inform their decisions. The RIA process provides greater opportunity for collaboration with the potentially impacted Indigenous Nation or community on the content of the assessment and recommendations to the Commission. The CNSC's approach to RIAs is consistent with the Government of Canada's commitments with respect to recognition, protection, and upholding of the rights of Indigenous peoples and is in line with best practices and approaches already developed and used by other Departments and Agencies, including the Impact Assessment Agency of Canada: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html>.

CNSC staff acknowledge MSIFN's view that the RIA should have been conducted during the Environmental Assessment (EA) for the DNNP, which was completed in 2011. Potential impacts on rights were considered during the EA by the CNSC, the Canadian Environmental Assessment Agency of Canada and the Joint Review Panel. At the time of the EA and JRP hearings, no concerns about potential impacts on rights were raised by MSIFN and other Williams Treaties First Nations, and the JRP's assessment based on the EA and all facts and evidence brought forward during the hearing process was that they did not expect the DNNP to result in significant adverse effects on current use of land and resources for traditional purposes by "Aboriginal" persons as per section 6.4 of the JRP environmental assessment report for the DNNP. . CNSC staff acknowledge that consultation and engagement expectations and requirements have changed since the EA, including the signing of the Williams Treaties Settlement Agreement in 2018. In addition, as part of the consultation process for the applicability of the EA to OPG's chosen technology and the Licence to Construct application for the DNNP, MSIFN and other Williams Treaties First Nations have now more recently raised specific concerns regarding the potential for the construction and operation of the DNNP to lead to new impacts on their rights and interests. As a result, CNSC staff are offering to collaborate on RIAs with potentially impacted Williams Treaties First Nations, including MSIFN, at this stage of the process to ensure that the CNSC is able to better understand and assess these concerns based on the information available at this time. This proposed approach is part of the CNSC's commitment to consider current best practices as part of the DNNP regulatory and consultation processes.

If the DNNP proceeds to a Licence to Construct hearing, CNSC staff will be required to include a recommendation in the Commission Member Document on whether the

DNNP is expected to cause impacts to Indigenous and/or treaty rights and an effective, transparent and collaborative way to do so is through the proposed approach to RIA. CNSC staff remain committed to working collaboratively with MSIFN on this assessment. In addition, as previously discussed, CNSC staff are fully committed to working with MSIFN and other Williams Treaties First Nations on supporting an Indigenous Knowledge and Land Use study specific to the DNNP to help gather more specific information and data regarding Williams Treaties First Nations rights and interests that could be potentially impacted by the DNNP and other projects in the treaty territory. As discussed, this approach would ensure that in the current RIA, both CNSC staff and MSIFN would be able to summarize the specific concerns regarding any existing gaps or limitations in knowledge and data about rights practiced, with the recommendation to move forward together, with OPG, to complete these studies. The results of these studies can then help to inform an adaptive management approach and EA follow-up monitoring program, which will ensure the DNNP project and related activities would be protective of rights and interests. Including the RIA in CNSC staff's CMD is an appropriate approach and tool to capture this information and collectively submit this recommendation to the Commission.

As mentioned in the CNSC's January 11th email, CNSC staff propose that CNSC staff draft the first version of the assessment, based on all of the information received and available to date and then share an initial draft with MSIFN for review, comment and for MSIFN add in any additional information, in order to guide further discussion. CNSC staff would aim to have this initial draft to MSIFN by early February 2024. CNSC staff are open to having a DNNP specific meeting prior to then, to discuss MSIFN's concerns and any additional information MSIFN currently has regarding specific impacts on rights in relation to the DNNP.

In the attachment to this letter, CNSC staff have provided responses to MSIFN's key themes and concerns raised in MSIFN's letter. CNSC staff look forward to continuing to discuss the RIA process and collaborating on a path forward for the RIA and consultations on the DNNP.

Sincerely,

Adam Levine,
Team Lead, Indigenous Consultation and Participant Funding
Canadian Nuclear Safety Commission
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Cc:

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**Appendix A: Detailed Responses to MSIFN’s Comments and Concerns Regarding the CNSC’s
Approach and Process for Rights Impact Assessments**

MSIFN Comment or Concern	CNSC Response
<p>MSIFN raised the concern that the CNSC was legally obligated to develop the RIA Framework in consultation with MSIFN and other Indigenous Nations and communities, noting the concern that the RIA may confine discussions of impacts to environmental concerns.</p> <p>MSIFN raised concerns regarding the difference between the CNSC’s RIA framework compared to the Impact Assessment Agency of Canada’s guidance for assessing potential impacts on rights.</p> <p>MSIFN noted that physical activities that are regulated under the NSCA are designated projects to which the IAA guidelines apply. Furthermore, on October 21, 2019, the CNSC signed a Memorandum of Understanding on Integrated Impact Assessments Under the <i>Impact Assessment Act</i> with the Impact Assessment Agency of Canada</p>	<p>The Impact Assessment Act only applies in cases where the projects are designated under the Physical Activities Regulations (Physical Activities Regulations (justice.gc.ca)), or by the Impact Assessment Agency of Canada. Any nuclear projects that are not considered "designated" are regulated by the CNSC as per the Nuclear Safety and Control Act (NSCA) and its regulations. The CNSC has the authority to maintain its own framework to govern the regulation of non-designated nuclear projects.</p> <p>Specifically with regards to the DNNP, the <i>Impact Assessment Act</i> does not apply, as this project has already undergone an Environmental Assessment under the former <i>Canadian Environmental Assessment Act</i> of 1992. The EA for the project is still valid and therefore, there is no obligation to undertake the requirements under the IAA. If the DNNP project proceeds and undergoes a licensing process for a licence to construct , it will be regulated under the NSCA.</p> <p>The CNSC conducts RIAs in relation to projects and regulatory processes that may impact the exercise of potential or established Indigenous and/or treaty rights, <u>for which the CNSC is the lead Crown Agency and decision-maker.</u> This includes decisions being contemplated by the Commission under the Canadian Environmental Assessment Act (2012) and the NSCA. The CNSC has developed an approach to RIAs that is based on best practices across the Federal Government for the assessment of potential impacts to rights in relation to projects, including the Impact Assessment Agency of Canada’s guidance found here: https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html</p>

	<p>As an agent of the Crown, the CNSC is committed to upholding the honour of the Crown and fulfilling its duty to consult and accommodate obligations for decisions and activities that could potentially impact the exercise of Indigenous and/or treaty rights. RIAs are not a regulatory or legal requirement under the NSCA or CEAA 2012, rather they are a policy tool that are used to collaboratively assess if there are expected to be any significant adverse impacts to Indigenous and/or Treaty rights due to a proposed project or activity and help inform the Commission’s decision-making. The RIA process is meant to be flexible and tailored to each specific project or decision as well as the Indigenous Nation or community that is being consulted.</p> <p>The scope of potential impacts considered in the RIA may go beyond the scope of legislative frameworks for assessing environmental impacts depending on the specific concerns being raised by the potentially impacted Indigenous Nation or community. Impacts to Indigenous and/or treaty rights are not restricted to the definition of environmental effects in CEAA 2012 or other legislation, as a result of the proposed project or licence application. The purpose of the RIA is to ensure that the CNSC is able to conduct a specific analysis based on available information related to a project’s potential impacts on Indigenous and/or treaty rights and not just on the project’s potential impacts on the environment or people. RIAs are a way to document and assess the concerns being raised by Indigenous Nations and communities regarding potential impacts on their rights as a result of a proposed nuclear project and communicate that assessment to the Commission in a clear, transparent and collaborative way.</p>
<p>MSIFN comments that Indigenous Nations and communities should be first consulted</p>	<p>As per the requirements and guidance in REGDOC 3.2.2: Indigenous Engagement, proponents are encouraged to conduct early engagement and provide information to Indigenous Nations and communities about the nature</p>

<p>on the project description of a proposed project.</p> <p>MSIFN notes that if there is disagreement on the proper description of the proposed Crown and proponent conduct which may have impact on protected Indigenous rights and valued components and the objectives of the project and the potential for future projects which could expand those impacts, any consultation is likely to be at cross purposes.</p>	<p>and scope of the activity described in the licence application and its potential impact on the environment, Indigenous and/or treaty rights and possible mitigation measures if identified. As a best practice it is expected that proponents engage with potentially impacted Indigenous Nations and communities on their proposed project to ensure that the communities perspectives, rights, interests and priorities can be incorporated into the project description, plan and design before a licence application and project description is submitted to the CNSC.</p> <p>When the CNSC receives a licence application/project description the CNSC will review the submissions and ensure that the proponent has conducted early engagement, identified the appropriate Indigenous Nations and communities, started to build relationships and partnerships and identified any potential issues and concerns raised by Indigenous Nations and communities, as per the requirements and guidance of REGDOC 3.2.2.</p> <p>In the RIA report, a brief project description is included in the introduction chapter, which is a summary based on the project description that was submitted to the CNSC early on in the regulatory review process.</p>
<p>MSIFN indicates that Step 1 Identification of potentially impacted rights and interests is out of sequence: we submit that it is essential to define the baseline conditions before potential impacts can be identified.</p>	<p>CNSC staff would like to clarify that the objective of Step 1 of an RIA is to identify and understand the rights and interests in the area of the proposed project. This could include through publicly available information such as treaties, agreements and previous regulatory processes as well as information provided by the rights-holding Indigenous Nation and community about their rights and how the community exercises its rights. The goal is for the potentially impacted Indigenous Nation to provide a summary of their rights and interests in the vicinity of the project to help CNSC staff understand the</p>

	<p>nature, scope and extent of rights. This is important context and information to include the report before talking about project specific impact pathways.</p> <p>This initial step does not include an assessment of the project’s potential impacts on the identified rights and interests, which is the focus and purpose of step 3 of the RIA process.</p>
<p>MSIFN raises concerns that the current baseline conditions confused at least three separate issues: (1) the environmental conditions baseline; (2) the impacts on the protected rights of the affected First Nations, and (3) the impacts on IAA “VC’s” – valued components including environmental, health, social, economic and potentially other elements of the natural and human environment.</p> <p>MSIFN comments that territorial capacity should be considered for each of the above contexts.</p>	<p>The baseline being considered in an RIA is defined as: the current environmental conditions, present-day exercise of rights by the Indigenous Nation or community, and existing activities that have affected or could affect the conditions that support or limit the Indigenous Nation or community’s meaningful exercise of rights. The baseline for an RIA should consider the conditions necessary to allow a community to continue to exercise its rights and how historical and current cumulative effects may already impact those conditions, or how future foreseeable projects may have an impact (i.e. Territorial capacity).</p> <p>This can include additional context such as the Nation’s perspectives on the importance, value, uniqueness of an area as well as territorial capacity – which refers to the ability of the Indigenous Nation or community to exercise their rights in their preferred manner. An RIA should also consider the historical and future context in which rights are practiced when evaluating the magnitude of potential project impacts relative to the established baseline.</p> <p>The RIA and consultation process to fulfill the Duty to Consult is triggered by the decisions being contemplated by the Commission under CEAA 2012 and/or the NSCA. It is separate but complementary to these processes and decisions; the Commission makes its decision/recommendations on the Duty to Consult as part of the same Record of Decision as the CEAA 2012 and/or NSCA decision.</p>

	<ul style="list-style-type: none"> - Environmental assessments are conducted to assess if there are any significant adverse environmental effects due to the project - Technical assessments for licensing are conducted to determine if an applicant is qualified and that humans and the environment are protected - Rights Impact Assessments are conducted to assess if there are any significant adverse impacts to Indigenous and/or Treaty rights due to a proposed project or activity based on existing information from the EA/technical assessments, as well as information provided by potentially impacted Indigenous Nations and communities <p>The purpose of the RIA is to consider all information available (such as publicly available information, information shared from the Indigenous Nation or community, Indigenous knowledge, traditional land use studies, baseline biophysical information) to identify and understand what conditions are required for the Indigenous Nation or community to exercise their rights and then assess how those conditions may be impacted by a specific project, in order to protect the ability to practice rights. The RIA is not meant to be a completely separate environmental impact assessment, it is an analytical tool and summary report to help support the Commission’s decision making with regards to fulfilling the Duty to Consult and where appropriate Accommodate obligations for any project/licensing application that could potentially impact Indigenous and/or treaty rights.</p>
<p>MSIFN is concerned that CNSC’s references to “mitigation and accommodation” – which effectively treats accommodation as an alternative to environmental mitigation – suggests a misunderstanding of the</p>	<p>The Crown has a Duty to Consult, and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Indigenous and/ or treaty rights. Accommodation refers specifically to a measure to avoid, minimize or compensate for adverse impacts on rights that is owed based on the Crown’s Duty to Consult.</p>

<p>accommodation concept. The requirement to accommodate does not arise from residual impacts on the environment: it arises from impacts on protected rights and VC's, regardless of whether there are residual effects after mitigation. We suggest reserving the concept of accommodation for measures to compensate the affected First Nation for the totality of project impacts on rights and VC's</p> <p>MSIFN raises concerns that CNSC does not appear to have contemplated that mitigation may restore the environmental baseline but, because of cumulative effects, impacts on VC's and protected rights may still require accommodation.</p>	<p>Accommodation is part of the Duty to Consult, grounded in the constitutional obligations of the Crown. There is no one agreed upon definition of accommodations and can include mitigation, off-sets, changes in the timing, location and scope of projects, commitments for ongoing engagement and collaboration, ongoing collaborative monitoring activities, capacity building and funding/compensation.</p> <p>CNSC staff's view is that the steps in the RIA process are meant to be iterative, with discussions being had about any potential mitigation or accommodation measures throughout the process, as impacts to Indigenous and/or Treaty rights are identified and as appropriate.</p> <p>CNSC staff note that in identifying mitigation measures the following strategy of a sequential identification of mitigation and/ or accommodation measures to address potential impacts to Indigenous and/ or Treaty rights are typically undertaken:</p> <ul style="list-style-type: none"> • Primary mitigation: those that are identified by proponents in their licence application/and or EIS documentation to address biophysical and environmental impacts (e.g. adjusting the timing of construction work to avoid important harvesting events and activities). • Secondary mitigation: additional measures offered by the proponent and/or the Crown (including the CNSC) in consultation and collaboration with potentially impacted Indigenous Nations and communities to address concerns raised by Indigenous Nations and communities including potential impacts on rights (e.g. engagement and collaboration with Indigenous Nations and communities on follow-up and monitoring programs/activities).
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	<ul style="list-style-type: none"> • Tertiary mitigation/accommodation: complementary measures to address potential impacts on rights that go beyond the mandate and powers of the CNSC. Requires leadership and coordination from other government departments and agencies. This may happen outside of the RIA process but should not impact processes or timelines for a specific EA or regulatory process (e.g. the establishment of a new protected area in collaboration with an Indigenous Nation or community). <p>The first two tiers of accommodations/mitigations are typically within the CNSC’s mandate and oversight capabilities and would therefore be considered first in the assessment and through discussions with potentially impacted Indigenous Nation and the proponent, determine if those measures are adequate to manage and address the identified impacts on rights identified by the Nation. However, should the Indigenous Nation indicate that those measures are still inadequate to address their concerns and the impacts to their rights are so severe that there remains residual impacts as a result of the proposed project, that is when there is the option to explore the third tier of accommodations, which would go beyond the CNSC’s mandate and need to involve potentially other Government Departments and Agencies, Provincial Governments, industry and others to identify solutions and accommodations as appropriate.</p>
<p>MSIFN raises concern about the terminology “identification of severity” and requests that “determination should be used instead.</p> <p>MSIFN notes that that severity must be addressed from the First Nation's perspective</p>	<p>CNSC staff are open to using the term “determination” as opposed to identification in this context in the RIA.</p> <p>The goal of the RIA is to come to a mutual understanding of the severity of any identified potential impacts on potential or established rights and interests, as a result of a proposed project, as well as to identify any potential mitigation and/or accommodation measures that could help to avoid, reduce, or compensate for any identified impacts, and communicate the process,</p>

	<p>outcomes and recommendations in a collaborative, mutually agreeable way to the Commission as part of its decision-making process.</p> <p>In cases where the CNSC and the Indigenous Nation and community have differing views, both perspectives would be included in the report and submitted to the Commission to help inform their decision making.</p>
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Speaking Notes – Public Commission Hearing CNSC - DNNP

January 23rd, 2024 -9am to 12pm

Location: Ajax Convention Centre, 550 Beck Crescent, Ajax, Ontario - Rooms Westney and Kingston

Chief LaRocca - Gap Analysis & Cumulative Effects

1. Introduction for the record

Hello to all Commission members, CNSC staff, OPG Staff, and members of the Public. For the record, I am Chief Kelly LaRocca, and I am present to deliver a submission on behalf of the Mississaugas of Scugog Island First Nation which is the community I so proudly serve as the Chief.

2. Background of MSIFN

The Mississaugas of Scugog Island First Nation (also referred to as “MSIFN”) is a small but strong Indigenous Anishabek First Nation community that is in Port Perry, Ontario. Given our geographic location, our First Nation is the one community of the Williams Treaties First Nations that is directly located within the “zone of influence” in the event of a nuclear incident at Darlington and Pickering Nuclear Generating Stations. Alongside of the other Williams Treaties First Nations, our community is one that enjoys Constitutionally Protected Rights to Hunt and Fish that after 90 years of resistance, were finally formally recognized by Federal and Provincial governments as of 2018.

3. Rights Impact Assessment

- i. As it currently stands, there is no mutual understanding between OPG, CNSC staff, and our communities regarding the full scope of the project, or its potential impacts on our Aboriginal and Treaty rights. In fact, much of the requisite information remains to be shared or discussed, with significant gaps in the information required to fully evaluate, understand, and address impacts to rights.

- ii. MSIFN and the Williams Treaties First Nations have asked for comprehensive information regarding the scope, methodology, and results of the baseline and subsequent studies that have been conducted and relied on by OPG in relation to the DNNP, which were only shared in late November 2023, and as such there hasn't been sufficient time to review. Therefore, we question the ability of any of the parties to assess the impact of this project on our Aboriginal and Treaty rights.
- iii. The CNSC's proposed "Rights Impact Assessment" framework, was only presented to us in mid-October, 2023. This provided little time to meaningfully evaluate and understand the framework, and its applicability to such a complex situation. We require council review, community-based meetings, and discussion with our technical advisors to meaningfully consider the efficacy and applicability of the Rights Impact Assessment framework. At a minimum, we were reassured that this process would respect the governance process requirements of each of the impacted First Nations.
- iv. Each Nation will be responding further to the CNSC regarding the Rights Impacts Assessment request, but for the purposes of this intervention, we wish to make it clear that the request should have come years earlier with time to collaboratively design the scope and process for such a significant undertaking.
- v. We assert that a comprehensive and co-designed Rights Impact Assessment is required to be able to fully identify, understand, and address impacts to the Mississauga Nation communities, and the Williams Treaties First Nations.
- vi. An effective Rights Impact Assessment requires different sources of information to be gathered and analyzed through an Indigenous and Rights-based lens, including, but not limited to:
 - a. regional or territorial Indigenous Knowledge Studies.
 - b. comprehensive cumulative impact assessments.
 - c. rights-informed approaches to mitigations, compensations, and restorations, and,
 - d. rights-based offsets, needs, requirements, and improvements.

- vii. Therefore, as a measure of accommodation, we respectfully submit that the Commission undertake the following:
 - i. Directs OPG to provide MSIFN, CLFN and HFN with any information that has or will be requested towards the completion of a gap analysis and a collaborative development of a Rights Impact Assessment framework.
 - ii. Directs the CNSC and OPG to support the development of an Indigenous Knowledge Study, which is to be led and directed by the impacted First Nations communities.
 - iii. Directs the CNSC and OPG to ensure that a cumulative impact assessment be co-developed and conducted, and,
 - iv. Directs the CNSC and OPG to ensure Rights-based approaches to mitigations, compensations, and improvements.

- viii. Appreciating that these studies and analysis will take a significant amount of time and resources from all parties, Scugog Island, Curve Lake and Hiawatha First Nation are prepared to discuss with the CNSC a framework for a preliminary review of Treaties, First Nation Regulations and Rights Impacts, acknowledging that such a review cannot identify impacts to our rights at this time.

- ix. A necessary condition of such an undertaking is a commitment from the CSNC and OPG to support our Nations to undertake a co-developed and comprehensive Rights Impact Assessment.

- x. We are of the view that we can reach an agreement with the CNSC and OPG to take the care and time to conduct an appropriate Rights Impact Assessment in conjunction with the EA Follow-up Program we have proposed.

4. Gap Analysis

- i. We remain concerned regarding the lack of consideration for impacts to our rights in the original “EIS” _____ and “PPE” _____. Particularly concerning are the significant changes in environmental and archaeological standards that have occurred since the original EIS and PPE, and we note the age of the studies and data provided to date.

- ii. The original Joint Review Panel Environmental Assessment did not consider the rights of Scugog Island, Curve Lake or Hiawatha First Nations, nor the cultural and spiritual values of the environment which are essential to our communities and protected through Treaty as well as by Section 35 of the Canadian Constitution.
- iii. Important to note is that had the Darlington New Nuclear Project been fully reassessed in 2021, it would have been done through the 2019 Federal Impact Assessment standards. These standards include consideration of Indigenous rights, values, and knowledge, including a mandatory Follow-up Program that is inclusive of considerations such as Indigenous knowledge, and a comprehensive consideration of sustainability encompassing positive and negative impacts on the environment, economics, social aspects, health and climate change.
- iv. It is our submission that because the Crown has a duty to act honorably to protect and minimize impacts to Aboriginal and Treaty rights, the highest standards of environmental assessment and protections must be employed.
- v. As a minimum requirement, we respectfully request that the Commission directs that OPG work collaboratively with our Nations to develop, implement, and participate in an Overall EA Follow-up Program as well as any Environmental Monitoring Plans or Programs for the Darlington New Nuclear Project.
- vi. Furthermore, we wish to note that the Standards and guidance documents in relation to Archaeological practice in Ontario were updated in 2011, to include the need to engage and consult with First Nations at all stages of archaeology. Since the original Joint Review Panel Environmental Assessment for DNNP took place between 2006 and 2009, we question the validity of the archaeological assessments that have been relied upon by OPG when contemplating, planning, and evaluating the project, since they did not involve our participation.

- vii. Therefore, we are requesting, as accommodation, that the Commission require OPG to work collaboratively with our Nations to develop and undertake a Comprehensive Gap Analysis. The purpose of this analysis is to understand how the impacts of the Darlington New Nuclear Project, including the BWRX-300 SMR technology, would be understood through current standards and the Treaty rights of the Williams Treaties First Nations. This gap analysis would employ the *Impact Assessment Act, 2019* as a foundational standard for the inclusion of Indigenous Knowledge into the analysis and ensure Indigenous participation in decision-making.

- viii. One of the foundational defenses for the applicability of the original Environmental Impact Statement to the selected reactor technology frequently noted by OPG is the fact that that more lands will be retained than originally assessed because the BWRX-300 technology has a smaller footprint.

- ix. OPG argues that this helps to offset or even lessen the environmental impacts of the Darlington New Nuclear Project, and that retained environmental features will be relied upon as areas which can be enhanced and offset some of the impacts of the project.

- x. During meetings with our Nations in 2023, OPG indicated they anticipated a larger than originally planned soil spoils pile which would impact the soil placement footprint at the DNNP site. This could potentially include areas that were previously thought to be retained and utilized for beneficial actions that were arrived at through extensive collaboration with our Nations on the *Endangered Species Act* permit and required under its conditions.

- xi. We are now uncertain as to what extent the potential to conserve some on-site wetlands and woodlands that are vital to species of importance to our Nations is, or what the quality of whatever is retained will be.

- xii. Part of our conversations with OPG regarding the *Endangered Species Act* Permit included a request for an Offsite Restoration Fund to be used by our Nations to protect and enhance our territories.
- xiii. Given the concerns raised, as well as the uncertainty regarding the beneficial action areas due to the excess soils that are anticipated, we request, as an accommodation, that the Commission require OPG to establish an Offsite Restoration Fund for our Nations to use to offset some of the impacts to our territory and rights by the project.

5. Cumulative Effects Assessment

- i. Traditionally, Environmental Assessments narrow their focus to the impacts of a specific project on the immediate physical environment. Traditional EAs do not commonly reflect the scope of Indigenous Knowledge Systems which tend to focus on the interconnectedness of the proposed activity on all living things, the sustainable management of lands, the conservancy of biodiversity, and the reduction in carbon emissions.
- ii. Of note, the Joint Review Panel Guidance document for the 2009 Environmental Impact Statement for the Darlington New Nuclear Project included the assessment of “*any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out*”.
- iii. However, through discussion with OPG, we learned that, despite the clear indication within the guidance document that effects of projects or activities that have been carried out should be considered, it was not clear if the assessment included an understanding of the legacy impacts of the already operating Darlington Nuclear Generating Station.
- iv. Nuclear activities and operations in our territory began and continue without our consent, and decisions were made, as part of these activities, which have irreparably altered the landscapes and waters, and have had direct impacts on our ability to fish, hunt, harvest and practice our cultural and spirituality in our territory. These facilities have operated in Scugog

First Nation's backyard for decades with little consideration of how this would impact the culture, health, and traditions of our community.

- v. Therefore, we are requesting, as an accommodation, that the Commission require CNSC and OPG to work collaboratively with our Nations to develop and undertake a Cumulative Effects Assessment, as part of an EA Follow-up Program, to understand how nuclear activities have cumulatively impacted our territories, and our ability to exercise our Inherent, Aboriginal and Treaty rights. Such an assessment process may provide additional mitigation measures and accommodations that we could potentially agree to advance collaboratively with OPG.

6. International Best Practices Review

- i. Lastly, I wish to re-submit the request made by Scugog Island in December 2022 regarding OPG's application to renew its Darlington Waste Management Facility operating license.
- ii. Again, I request that OPG and CNSC staff meet with leadership at Scugog Island, and any other interested leadership from Curve Lake or Hiawatha, to review and present a paper providing an assessment of current international best practices for the management and storage of used nuclear fuel at reactor sites in relation to current practices at the Darlington site. It is our submission that the Honor of the Crown depends upon this level of due diligence.
- iii. We respectfully request that OPG provide us with capacity funding to hire international experts to peer review the comparison and contrast assessment paper.
- iv. Peer review will allow us to sufficiently assess the risks and potential impacts of nuclear waste on our communities and have a more fulsome understanding of OPG standards.

Miigwech, thank you, Merci. This concludes my submission.

#	MSIFN Question or Concern	CNSC staff response
1	<p>MSIFN disagrees that there will be no significant residual adverse environmental effects from the deployment of up to four BWRX-300 reactors. The mitigation measures suggested thus far do not outweigh the negative environmental impacts of the project, and OPG is not willing to commit to protecting SAR habitat on the site long-term. Further, this conclusion is not reasonable given the lack of decommissioning plan</p> <p>We do not have the information needed to conclude that the DNNP will not lead to residual adverse impacts on the environment. As stated, OPG's plans are currently not finished for things such as SAR beneficial actions, fish impacts and offsetting, and decommissioning plans for the site.</p> <p>MSIFN and the CNSC must understand the proposed mitigation measures fully before the license to construct hearing.</p>	<p>CNSC staff understand that MSIFN is seeking additional information regarding the conclusions of the environmental assessment for the DNNP. CNSC remain open to working with MSIFN to understand their concerns, respond to their questions and work to address the concerns to the extent possible. CNSC also expect that OPG work with the Williams Treaties First Nations to address the concerns.</p> <p>An environmental assessment (EA) has been conducted for the proposed DNNP. The purpose of the EA was to assess potential impacts of the project and identify measures to help mitigate these impacts. Each potential impact and the related mitigation measures were evaluated by CNSC staff, along with other Responsible Authorities (RAs) for this project, including Fisheries and Ocean's Canada (DFO) and Transport Canada (TC), in consultation with Indigenous Nations and members of the public. These are documented in the Environmental Impact Statement (EIS) and Joint Review Panel (JRP) Report.</p> <p>Based on the evaluation of the site documented in the EIS and its supporting documentation, as well as the documentation and interventions heard during the JRP Public Hearings, the JRP concluded that the DNNP would not result in significant residual adverse effects, provided that the mitigation measures and JRP Recommendations were implemented. These recommendations were accepted by the Government of Canada, and OPG has been conducting ongoing assessments, evaluations and monitoring throughout the site preparation licensing period that followed.</p> <p>In 2021, once a reactor technology was selected, OPG was required to review the EIS against the reactor parameters, and any other updated site characteristics. OPG submitted the <i>EIS Review Report</i> as part of the LTC application in 2022. This <i>Review Report</i> did not alter the mitigation measures presented in the EA; it evaluated whether the previously accepted measures remained effective to mitigate any potential effects of the chosen reactor.</p> <p>The <i>EIS Review Report</i> found that the mitigation measures remained sufficient to mitigate potential environmental impacts from the deployment of up to 4 BWRX-300s, with one exception related to species at risk (SAR). Since the EA studies were conducted, 8 bat species have been identified at the DNNP site, 3 of which are now species at risk, subject to regulation under Ontario's <i>Endangered Species Act</i>. One potential effect from project construction and operation was found to be potentially harmful to bats: site illumination. An additional mitigation measure was proposed to minimise the harmful effects of vibrant site lighting on bat habitats.</p> <p>In order to pursue licensed activities, OPG was required to present sufficient evidence it has considered and implemented measures to mitigate potential harms to species at risk (SAR) species, as required either by the federal <i>Species at Risk Act</i> or Ontario's legislation. OPG submitted this documentation to both the Ontario Ministry of Environment, Conservation, and Parks (MECP) and CNSC, and MECP issued a permit under the Ontario ESA to conduct vegetation removal. CNSC subsequently authorised gradual commencement of site preparation works in 2022 and 2023.</p> <ul style="list-style-type: none"> • OPG has several commitments to provide federal and provincial departments—that is, DFO, Environment and Climate Change Canada (ECCC), and MECP, as required—with studies and documentation that it has implemented required measures to mitigate impacts on SAR species, prior to commencing any work that would affect those species or their habitats. To date, OPG has not conducted work in the Lake nor at the Bluffs that would cause harmful effects to the species that reside in those environments, and these commitments remain outstanding. DNNP Commitments D-P-12.3, D-P-12.4, D-P-14, and D-P-16 consequently remain open: D-P-12.3 <i>Methodology Report for EMEAF for: Surface Water Environment</i> (commitment with CNSC, as well as ECCC) • D-P-12.4 <i>Methodology Report for EMEAF for: Aquatic Environment</i> (Commitment with CNSC, as well as DFO) • D-P-14 <i>Fish Habitat Compensation Plan</i> (commitment with DFO) • D-P-16 <i>Lake Infill Design</i> (commitment with CNSC, DFO, Transport Canada, and Ontario Ministry of Natural Resources) <p>These commitments will be closed after satisfactory review by CNSC and other governmental departments, and only after the submissions meet the criteria in the <i>DNNP Commitments List</i> (Rev. 09, available upon request).</p> <p>CNSC staff remain open to working collaboratively with MSIFN to discuss ongoing concerns with respect to SAR, decommissioning and mitigation measures.</p> <p>CNSC staff are also aware that OPG has been engaging MSIFN and other interested Williams Treaties First Nations on the various Federal and Provincial permits required for the DNNP. CNSC staff encourage OPG to continue to engage on the permits of interest to MSIFN.</p>

<p>2</p>	<p>MSIFN raised concern regarding impacts to water from usage as coolant and moderator in SMRs.</p>	<p>CNSC staff note that that it will not be lake water that is used to cool the fuel or provide neutron moderation for the BWRX-300. Demineralised water, either produced on-site in a dedicated Water Treatment Plant, or shipped in from an off-site treatment plant will be used as coolant/moderator. Untreated water has too many impurities that render it conductive, corrosive, or susceptible to other deleterious effects on the reactor and its systems (such as increased rates of radiation-induced dissociation of water molecules into free hydrogen and oxygen gases, for example). The overriding objective of the reactor coolant pressure boundary is to contain the coolant (and maintain the pressure boundary), but in so doing, to maintain the required inventory through constant heating/condensation cycles as the water passes through the reactor and the turbines. Inventory is added from dedicated storage tanks to cover losses due to evaporation. This water is not discharged to any receiving body during normal operations—it is intended to be continually recirculated.</p>
<p>3</p>	<p>MSIFN raised concern regarding environmental effects of intake and discharge structures offshore, and mitigations remain outstanding and have not been addressed.</p> <p>MSIFN requested more information about the construction of the intake and discharge structures offshore, including their size and location in Lake Ontario as well as anticipated environmental effects/mitigations.</p>	<p>CNSC staff note that OPG has yet to submit the final design of the intake and diffuser to the CNSC for review. CNSC staff currently expect OPG to submit this information in early summer 2024.</p> <p>However, to aid in siting of the intake and diffuser of DNNP, OPG conducted aquatic characterization studies in 2018 and 2019. Results of the characterization studies indicated high variability throughout the study area, it was determined there was no particular advantage to siting the intake and diffuser deeper than 15m or between gravel or sand substrate. The aquatic characterization indicated ideal siting for the intake and diffuser was >10m and <15m to avoid placement within the preferred spawning locations of round whitefish (<10m) and deeper benthic species (deepwater sculpin) to minimize impact on their preferred habitat.</p> <p>CNSC staff note that the detailed design of the Condenser Cooling Water (CCW) system, part of the cooling methodology known as <i>once-through lake water cooling</i>, is still under development by OPG, and is subject to further evolution and refinement. CNSC staff understand OPG is working with Williams Treaties First Nations in the design of the CCW system, in an effort to understand the Nations’ concerns and implement effective mitigation measures. We expect the completed CCW design package in Q2 of 2024 (currently estimated sometime in the summer).</p> <p>In a once-through cooling system, the CCW system is a supporting system to the Main Condenser of any nuclear reactor (including SMRs, if chosen). The function of the Main Condenser is to condense waste steam from the low-pressure steam turbines (at this point, this is now called condensate) and recirculate that condensate back to the Steam Generators (in a CANDU or traditional PWR), or directly to the Reactor Pressure Vessel (in the case of a BWR). The CCW is a separate system consisting of piping and associated pumps and valves that penetrate the condenser, through which cooling water flows, but does not contact the condensed steam/condensate. Steam exhausted from the turbine is in contact with the outer portion of these CCW pipes, and it is this temperature/pressure difference that allows condensation to occur. Water flows through these CCW pipes at a higher pressure than the vacuum of the Main Condenser and consequently condenses the steam, but at no point is this cooling water in contact with the steam/condensate.</p> <p>The water supplying the CCW is minimally-treated with biocide prior to circulating through the piping, removing any remaining heat/energy from the steam and condensing it, before ultimately recirculating back to the receiving body.</p> <p>In the case of the DNNP, water from Lake Ontario will be pumped from the intake structure to a receiving “forebay,” and from there, pumped through the CCW piping in the “service side” of the BWRX-300 Main Condenser, and returned to the lake through the outlet. OPG states in their EIS Review Report that the maximum flow rate to supply adequate cooling to the Main Condenser of up to 4 BWRX-300 units is approximately 68 cubic metres per second—far less than the bounding scenario of up to 250 m³/s (for deployment of four traditional reactors considered in the EA).</p> <p>To mitigate the effects of increased thermal energy deposited into the lake, the outlet structure includes many “diffusers” intended to spread the heated water across a larger area. A turbulent mixing zone allows for further diffusion of the deposited heat.</p> <p>OPG is required to design the outfall to ensure that it will not discharge heated water with an average temperature, beyond this mixing zone, greater than 2 degrees Centigrade above ambient. This is to ensure protection of Round Whitefish larvae during their winter breeding periods. This requirement is documented in DNNP Commitment D-C-1.2.</p>
<p>4</p>	<p>MSIFN raised concerns regarding impacts to aquatic SAR, proposed fish protection measures, and fish habitat compensation plans remain outstanding and have not been addressed.</p>	<p>CNSC staff note that OPG will have to acquire a Fisheries Act Authorization from Fisheries and Ocean's Canada (DFO) before conducting any activities with the potential to harm fish and fish habitat (in water works, construction and operation of the condenser cooling water system etc.). OPG will be required to record number of fish, species, and age class of fish impinged and entrained and then propose and implement compensation measures for the fish lost. OPG will have to implement offsetting or compensation measures, commensurate with observed fish losses, and will be outlined in their authorization and approved by DFO. DFO</p>

	<p>MSIFN asked whether OPG will be creating any beneficial actions or offsetting as they are likely to impact two SAR species? Will DFO Authorizations be required?</p> <p>MSIFN requested additional information on how there is no further concern for the fish species if entrainment of Deepwater Sculpin has been identified recently on site? What does OPG mean by “fish protection measures will be taken if needed at the intake structures”? MSIFN requests that fish protection measures be taken at the intake structures regardless of prevalence of SAR or other factors.</p>	<p>and OPG will be required to consult with MSIFN and other Indigenous Nations and communities on the Fisheries Act Authorization. CNSC staff commit to informing DFO and OPG of MSIFN’s interested to be consulted on this topic.</p> <p>Although entrainment of Sculpin has been identified at the existing DNGS, subsequent monitoring studies performed by OPG, and reviewed and accepted by CNSC staff, have not detected significant interactions with the DNGS intake structures (e.g., Deepwater Sculpin were not entrained at DNGS in 2004 or 2006 but were entrained in 2015/2016. Deepwater Sculpin population in Lake Ontario had been found to be recovering and densities and biomass may be similar to other Great Lakes (Weidel et al. 2017). Furthermore, the Deepwater Sculpin population in Lake Ontario may be nearing its carrying capacity (Weidel et al., 2019). This conclusion is expected to remain applicable to the intake and discharge structures for the DNNP (only one Deepwater Sculpin larva was collected in spring 2011 within the DNNP Site Study Area, and one Deepwater Sculpin larva was collected from larval tows in 2018 within the DNNP Site Study Area).</p> <p>OPG would be required to implement fish protection or adapt mitigation measures to continue to ensure that DNNP activities do not introduce significant environmental effects to aquatic biota. For species that are listed as Endangered or Threatened under Schedule 1 of the federal Species at Risk Act, OPG is required to obtain permits from DFO prior to commencing any work and would be required to comply with direction from those regulatory authorities.</p> <p>Weidel et al. 2017 – Brian C. Weidel, Maureen G. Walsh, Michael J. Connerton, Brian F. Lantry, Jana R. Lantry, Jeremy P. Holden, Michael J. Yuille, James A. Hoyle, Deepwater sculpin status and recovery in Lake Ontario, Journal of Great Lakes Research, Volume 43, Issue 5, 2017, Pages 854-862, ISSN 0380-1330, https://doi.org/10.1016/j.jglr.2016.12.011.</p> <p>Weidel et al., 2019 - Weidel, Brian & Connerton, Michael & Holden. (2019). Bottom trawl assessment of Lake Ontario prey fishes</p>
<p>5</p>	<p>MSIFN’s view is that that the concern regarding long-term protection of SAR habitat remains outstanding and is further emphasized as OPG seeks ESA permits for SMR units 2-4. Currently, OPG does not have planned locations for beneficial action areas to compensate for SAR impacts as a result of these units, so we are unable to confirm whether appropriate compensation measures exist.</p>	<p>CNSC staff note that OPG has been issued a permit in March 2024 for work affecting SAR species for units 2-4. Permitting to date must:</p> <ul style="list-style-type: none"> ○ create 1.99 hectares of meadow habitat providing foraging habitat for Bank Swallow and SAR Bats ○ create 2.42 hectares of treed habitat providing roosting and foraging habitat for SAR Bats ○ enhance 0.58 hectares of existing thicket habitat providing roosting and foraging habitat for SAR Bats ○ install 20 bat boxes within the treed habitat creation area, providing roosting habitat for Little Brown Myotis ○ develop and install four interpretive or educational signs at publicly accessible trails within the habitat creation and enhancement areas, that will provide information on Bank Swallow and SAR Bats ○ monitor the effectiveness of the meadow habitat for a period of five years ○ monitor the effectiveness of the treed habitat creation and enhancement areas and bat boxes for a period of ten years <p>CNSC staff’s review determined that the impact to SARA species would be less than or equal to that than was accepted in the EA due to the mitigation measures proposed by OPG, see appendix table below “Proposed Terrestrial Mitigation Measures for DNNP”.</p> <p>Health of SAR species is assessed throughout the lifecycle of the facility through the cyclical nature of environmental risk assessments, which assess the potential health impacts to species around the facility by modelling impacts of contaminants of potential concerns alongside any physical effects (such as noise).</p> <p>CNSC staff work with partners in ECCC/MECP to review these plans, but species at risk permitting is ultimately the jurisdiction of the Province, given the project is occurring on provincial lands.</p> <p>CNSC staff encourage OPG to continue to discuss MSIFN’s request for off-site restoration and work to address MSIFN’s concerns regarding long-term protection of SAR.</p>

<p>6</p>	<p>MSIFN raised concern regarding Habitat fragmentation and the East-West wildlife corridor.</p> <p>It is unreasonable to conclude that because the east-west wildlife corridor has survived past fragmentation that wildlife will still be present during/after DNNP project construction. Cumulative effects of multiple activities on site over a long period of time could permanently impact the corridor disrupting connectivity and the surrounding ecosystem.</p>	<p>CNSC staff note the interruption of wildlife travel along the east-west corridor across the Darlington Nuclear site was considered an adverse effect of the DNNP, and the EA identified incorporating, to the extent practicable, design measures to maintain access for wildlife travel on the east-west wildlife corridor during construction activities, and to enhance the function of the corridor for the long term as a mitigation measure. OPG has conducted annual biodiversity monitoring on the Darlington Nuclear site, including monitoring of wildlife traffic along the east-west corridor, and has noted the presence of wildlife despite roads and other major disturbances on the site. The mitigation measures identified in the EA would continue to address adverse effects on landscape connectivity and would apply to the deployment of the BWRX-300 reactors.</p> <p>CNSC staff note that OPG’s proposed mitigation includes incorporating to the extent practicable in the DNNP design, measures to maintain access for wildlife travel on the east-west wildlife corridor during construction activities; and to enhance the corridor function for the long-term.</p>
<p>7</p>	<p>MSIFN indicated that they have outstanding concerns regarding:</p> <ul style="list-style-type: none"> - Decommissioning and end-of-life plans for DNNP site, including other OPG uses - increased volume of solid waste generated, with no long-term plan for safe management and storage - the Preliminary Decommissioning Plan <p>MSIFN understand that issues relating to radioactive materials will be assessed as part of a future license to operate application, and not during the license to construct. However, MSIFN remains concerned regarding the lack of long-term planning for waste management and storage from the project. We know that the volumetric inventory of solid radioactive wastes, and the predicted airborne emissions, are slightly higher than the values reported in the EA. OPG and the CNSC must use this information to plan for the used nuclear fuel and emissions prior to granting a license to operate. MSIFN is interested in collaborating on the PDP and staying informed about plans and strategies for decommissioning the DNNP at each licensing stage.</p> <p>It is disappointing that OPG has not created a decommissioning plan or even a preliminary strategy for the BWRXT reactors/DNNP site.</p>	<p>To date, OPG has provided three decommissioning plans for the site of the DNNP. The first was submitted in support of the Licence to Prepare Site, which was renewed in October 2021.</p> <p>In support of its submission for a Licence to Construct, OPG provided CNSC staff with two Preliminary Decommissioning Plans (PDP). The first PDP was submitted to satisfy the requirements for REGDOC-1.1.2, <i>Licence Application Guide: Licence to Construct a Reactor Facility, Version 2</i>.</p> <p>REGDOC-1.1.2 states in section 4.5.16:</p> <p style="padding-left: 40px;"><i>At construction, the applicant shall consider 2 areas of decommissioning:</i></p> <ul style="list-style-type: none"> • <i>construction from a decommissioning perspective</i> • <i>activities encompassed by the licence to construct: a preliminary decommissioning plan and financial guarantee that covers the scope of work and related costs to return the site from the conditions expected at the end of a licence to construct to an agreed-upon end state (including, if the project is halted, restoration of the site to the original condition)</i> <p style="padding-left: 40px;"><i>The preliminary decommissioning plan shall be in accordance with REGDOC-2.11.2, Decommissioning.</i></p> <p>Additionally, section 4.5.3 states:</p> <p style="padding-left: 40px;"><i>The application shall describe considerations and design provisions that will facilitate future reactor facility decommissioning and dismantling activities.</i></p> <p style="padding-left: 40px;"><i>The application should also describe considerations and provisions for storage of radioactive waste after the end of commercial operation.</i></p> <p>To summarize, this plan must demonstrate the processes and activities necessary to return the as-constructed plant to a determined end-state that is satisfactory to the CNSC, ensuring the safety of the public, workers, and the environment. Additionally, OPG must provide a credible estimation of the costs associated with the work activities necessary to achieve the determined end-state and an accompanying financial instrument to ensure access to the funds necessary for decommissioning.</p> <p>In addition to the PDP for the as-constructed site, OPG provided a PDP for the end-of-life phase. The end-of-life phase PDP details the process from bringing the site from the end of operations (should the project proceed) to the agreed upon end-state. This PDP included all activities and considerations regarding the management of radioactive materials and wastes. This PDP is not a requirement for a licence to construct, and as such, the assessment of this PDP will not play a</p>

	<p>It is irresponsible to begin a project of this size without a decommissioning strategy, this is a requirement for most major projects on Crown land.</p>	<p>role in CNSC staff's assessment of the waste management SCA for licence to construct. However, should OPG request a Licence to Operate following the potential construction of the DNNP, a PDP describing the decommissioning of this phase will be a requirement.</p> <p>To clarify a previous statement from CNSC Staff on August 29, 2023 that "the volumetric inventory of solid radioactive wastes, ...during normal operations are slightly higher than the values in the EA." The Plant Parameter Envelope (N-REP-01200-10000 Rev. 5) analysis for the BWRX-300 identified that the solid volumetric activity (Bq/m³) would exceed the values assessed in the Environmental Assessment. This exceedance was found for some radionuclides, whereas others were below the values established for the EA. That is to say that whilst some radionuclides are higher in activity, the overall activity of all the radionuclides is still within the bounds of the EA.</p> <p>OPG has provided more comprehensive modeling of radionuclide production in the later revision of the Plant Parameter Envelope (N-REP-01200-10000 Rev. 6) using specific data from other Boiling Water Reactors. The revised analysis is now within PPE values for both waste activity (Bq/y) and volume (m³/y).</p> <p>CNSC staff acknowledge that MSIFN remains concerned regarding the lack of long-term planning for waste management and storage from the project. CNSC staff reiterate the CNSC's commitment to consultation with MSIFN and continuing to provide information regarding waste management, as it becomes available, at each stage of the project should it proceed.</p> <p>CNSC staff are open and interested in collaborating with MSIFN on reviewing OPG's future revisions to the PDP. CNSC staff also encourage MSIFN to offer to work collaboratively with OPG in the development of future revisions of the PDP.</p>
<p>8</p>	<p>MSIFN indicated that the evaluation of alternative on-site locations for the used fuel dry storage facility is considered in the framework of the bounding site development, so long as OPG does not exceed its used fuel storage and processing specifications. MSIFN acknowledges that higher solid waste volumetric activity will be generated during the BWRX-300 operation. Therefore, OPG may exceed the specifications in the framework of the bounding site. Considering this, this issue should be further evaluated and mitigated through meaningful collaboration between WTFN and OPG.</p>	<p>For this application, CNSC has not received an application for waste management facility related to the DNNP. A DNNP Solid Radioactive Waste Management Strategy has been submitted to CNSC staff for review. The Strategy document describes some of the lifecycle considerations for waste management, including interim storage. These considerations include:</p> <ul style="list-style-type: none"> • spent fuel casks will be transferred to an interim storage facility within the Darlington site. • The interim storage facility should be as close as possible to the DNNP. • The location and design of the interim storage facility depends on several considerations such as ground water table level, seismic efficiency, foundation and soil profile, security, as well as other environmental conditions. The location and design of the facility will ensure that it does not have a substantial affect on the environment, as well as ensuring that the facility is suited to withstand all conditions on site. • The facility must also be designed to ensure sub-criticality of the used fuel is maintained and that radiation shielding is provided to ensure dose limits to both the workers and the public are maintained ALARA (As Low As Reasonably Achievable). <p>Currently, waste generated at OPG nuclear generating sites is managed at waste management facilities that are licenced under separate CNSC licences. Any changes to the licensing basis of one of those licences, for example increased capacity, would require a licence amendment that would be subject to a CNSC licensing process. CNSC staff will ensure that MSIFN is kept informed of any proposed amendments and has opportunities to meaningfully participate in the regulatory process.</p> <p>CNSC staff also encourage OPG to conduct early engagement and collaboration with MSIFN, and other interested WTFN's on this topic.</p>
<p>9</p>	<p>MSIFN indicated that the CNSC's response to a request for a Gap analysis and the requirements for an Environmental Assessment follow up program that follow the principles of the IAA framework has not resolved their concern.</p>	<p>CNSC staff note that OPG is required to implement an EA Follow-Up program, as per the <i>Canadian Impact Assessment Act</i> (CEAA) of 1992, under which the EA conclusions for the DNNP were accepted. Although this project is not subject to the <i>Impact assessment Act</i> (2019), CNSC staff are aware that OPG has committed to collaboratively, with MSIFN and other interested WTFNs, reviewing the environmental work done in 2009 and determine what needs to be updated to today's standards. OPG is committing to conduct an environmental monitoring augmentation program to apply an Indigenous knowledge lens and involve interested Williams Treaties First Nations in the on-site environmental monitoring. CNSC staff understand that OPG and the WTFNs, including MSIFN, are currently in the scoping phase of this project.</p>

	<p>CNSC staff note that OPG developed the initial EA Follow-Up program following the Government of Canada's EA conclusions in 2012. OPG has since revised this EA Follow-Up plan twice, and CNSC staff anticipate a subsequent revision should the Commission issue a construction licence.</p> <p>The requirement to implement the EA Follow-Up program required under CEAA 1992 is carried through to the proposed Licence to Construct, and documented in the proposed <i>Licence Conditions Handbook (LCH) for a Licence to Construct</i>. This LCH is currently undergoing development and will be available for MSIFN to review and comment after 18 June 2024. CNSC staff note that MSIFN will be able to comment on the LCH as part of their intervention to ensure their views are heard by the Commission. CNSC staff are open to further discussing the LCH and any questions or concerns directly with MSIFN. Additionally, there will be opportunities to update the LCH throughout the licensing phases, including based on feedback from Indigenous Nations and communities.</p> <p>CNSC staff will include an explicit requirement in the LCH that requires OPG to follow through with their commitments with the Nations when updating the EA Follow-Up program. As suggested in the November 20th meeting between CNSC staff and MSIFN, CNSC staff encourage MSIFN to inform OPG of their expectations for what gets included in the EA follow-up program, and flag any concerns with CNSC.</p>
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Proposed Terrestrial Mitigation Measures for DNNP

<p>Terrestrial Environment – Vegetation Communities</p>	<ul style="list-style-type: none"> • Re-planting of approximately 40 to 50 ha of Cultural Meadow and approximately 15 to 20 ha of Cultural Thicket with native shrub plantings, and Woodland dominated by Sugar Maple. • Creation of new fish-free wetland ponds with riparian plantings. • Create wetlands on lake filled area. • Development of stormwater management techniques to provide for adequate flow and water quality (e.g., TSS) to Coot’s Pond. • Salvage and relocate or re-plant rare plant species in suitable existing or created habitat. • Include native forb seeds in seed mixture for Cultural Meadow re-planting. <p>Some of these mitigation measures may not be necessary for the BWRX-300 deployment. The area required for BWRX-300 deployment is smaller in size and deployment may not require removal of on-site ponds. As a result, there is an opportunity to retain some of the on-site features, once slated for removal. This opportunity would be explored further during the finalization of the DNNP plant layout and the construction plan.</p>
<p>Terrestrial Environment - Insects</p>	<ul style="list-style-type: none"> • Retention of onsite ponds • Dust suppression plan (see atmospheric row)
<p>Terrestrial Environment - Birds</p>	<p>Breeding Birds</p> <ul style="list-style-type: none"> • Dust and Noise Suppression (see atmospheric row) • Potential habitat compensation (see vegetation communities) <p>Bird Strikes</p> <ul style="list-style-type: none"> • Implementation of Good Industry Management Practice in the design and development of lighting systems and structures, including strategies to reduce the incidence of bird strikes to the extent practicable while considering the needs of navigation safety and site security; and • Implementation of Good Industry Management Practice in the initial design of security fencing systems to reduce the incidence of bird entanglement and entrapment to the extent practicable. <p>Bank Swallow</p> <ul style="list-style-type: none"> • Acquisition of lands that contain existing large Bank Swallow colonies for study and protection; • Development of artificial Bank Swallow habitat in potentially suitable locations on the DN site and the monitoring of existing colonies; • Development of artificial habitat for aerial forage species (e.g., Chimney Swift and Purple Martin) in potentially suitable locations on the DNNP site; • Development of partnerships to undertake research into the general decline of aerial foragers in Ontario; and • Integrate interpretive opportunities related to the effects of the DNNP on shoreline bluff habitat and Bank Swallows such as erecting interpretative signage and constructing observation decks.
<p>Terrestrial Environment – Amphibians and Reptiles</p>	<p>The EIS determined that mitigation measures associated with the effects on Vegetation Communities were also beneficial for the Amphibians and Reptiles. No other mitigation measures were identified in the EIS.</p> <p>The BWRX-300 deployment will not result in the removal of the three amphibian breeding areas (onsite ponds). For the bounding scenario reactors, three amphibian breeding areas were removed and any potential for disturbance or impacts to these ponds was not addressed by the EIS.</p>
<p>Terrestrial Environment – Breeding Mammals</p>	<p>The EIS identified that mitigation measures associated with the effects on Vegetation Communities were also beneficial for the Breeding Mammals. Consequently, no other additional mitigation measures were identified in the EIS for Breeding Mammals.</p> <p>With the BWRX-300 deployment, there is an opportunity to retain habitat that was assessed as being removed in the EIS. Because it was anticipated that all habitat within the construction areas would be removed, the potential for disturbance or effects to these mammals and their habitats from dust and noise during the site preparation, construction and/or operation phases of the BWRX-300 deployment was not addressed by the EIS</p>
<p>Terrestrial Environment - Bats</p>	<ul style="list-style-type: none"> • Avoiding lighting on key habitat and features; • Implementing dark buffer zones, illuminance limits and zonation around key habitat and features; • Incorporating lighting source specifications that are less impactful to bats. Examples include: <ul style="list-style-type: none"> ○ no ultra-violet or florescent sources; ○ reduced blue light components; ○ peak wavelengths higher than 550nm;

	<ul style="list-style-type: none">○ low-level downward directional lighting;○ Consideration for mounting height and horizontal orientations○ Use of baffles, hood or louvres to reduce light spill;● Use of landscape screening; and● Strategic dimming and part-night lighting.● Implementation of Good Industry Management Practice in the design and development of lighting systems and structures, including strategies to reduce the impact of lighting on bat species to the extent practicable while considering the needs of navigation safety and site security.● Habitat compensation measures under the provincial ESA permit
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**Mississaugas of Scugog Island First Nation Rights Impact
Assessment Report
for the Darlington New Nuclear Project Licence to Construct
Application**

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1. INTRODUCTION

1.1. Purpose and scope of the Rights Impact Assessment

The Canadian Nuclear Safety Commission (CNSC) is mandated under legislation to regulate the use of nuclear energy and materials to protect health, safety, security, and the environment. The CNSC is also committed to advancing Nation-to-Nation reconciliation, in alignment with the principles respecting the Government of Canada's relationship with Indigenous peoples and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). As an agent of the Government of Canada and as Canada's nuclear regulator, the CNSC recognizes its responsibility to uphold the honour of the Crown and meet its duty to consult with and, where appropriate, accommodate Indigenous peoples who exercise Aboriginal and/or treaty rights in proximity to CNSC-regulated activities or facilities.

Ontario Power Generation (OPG) submitted an application for a Licence to Construct (LTC) for the Darlington New Nuclear Project (DNNP) to build one BWRX-300 reactor at the Darlington Nuclear site. The site consists of the existing Darlington Nuclear Generating Station, a tritium removal facility and a waste management facility. The portion of the existing site proposed for the DNNP is the eastern third of the overall site. OPG and the Government of Ontario intend to construct up to four (4) BWRX-300 reactors, but to date has only applied for a LTC to build a single unit. [Placeholder – additional information to be added once the Commission makes a decision on the applicability of the environmental assessment to chosen technology, after the January 2024 hearing]

To ensure that the Commission decision takes into account potential effects of the DNNP on potential or established Indigenous and/or treaty rights pursuant to section 35 of the Constitution Act, 1982 [ref], CNSC staff completed community-specific, collaborative Rights Impact Assessments (RIAs) for potentially impacted Indigenous Nations and communities.

The Mississaugas of Scugog Island First Nation (MSIFN) is one of the seven Williams Treaties First Nations. MSIFN has signed Terms of Reference for long-term engagement with the CNSC. MSIFN is located approximately 37 kms north from the proposed project. The proposed DNNP is located on and adjacent to Michi Saagig Nishnaabeg lands and waters. The lands and waters are covered by the Johnson-Butler Purchase, also referred to as the "Gunshot Treaty" (1787-88) and the Williams Treaties (1923). MSIFN has identified concerns and areas of interest with respect to the proposed DNNP.

CNSC staff and MSIFN committed to collaborating on and carrying out a thorough, evidence-based, and methodologically sound RIA for the DNNP. The purpose of this RIA is to assess the potential impacts of the DNNP licence to construct on MSIFN's Indigenous and/or Treaty rights and interests. MSIFN has raised concerns regarding the RIA process, which are outlined in Section 1.3.3 below.

1.2. Principles of the Rights Impact Assessment

The goal of the assessment was to come to a mutual understanding of the severity of any identified potential impacts on the rights, claims, and interests of MSIFN as a result of the DNNP, taking into account potential project-specific interactions with any existing and historical impacts on MSIFN's rights and interests. The RIA also identifies any potential mitigation and/or accommodation measures that could help to avoid, reduce, or compensate for any identified impacts and communicates the process,

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outcomes and recommendations in a collaborative way to the Commission as part of its decision-making process. The assessment was completed collaboratively between CNSC staff and MSIFN, with contributions from OPG where appropriate. Through discussions between MSIFN and CNSC staff, it was determined that CNSC staff would draft the RIA and share with MSIFN for input and feedback.

MSIFN highlights concerns regarding the RIA time constraints limiting the understanding of MSIFN's rights in relation to the Project and their concern that the Williams Treaties First Nation's were not involved in designing the CNSC's RIA framework. Additional details about MSIFN's views on the methodology, scope and limitations of the RIA is included in Section 1.3.3 below.

Where MSIFN and CNSC staff were not able to agree on specific aspects of the RIA or the RIA process, differing views have been identified in the text boxes and clearly articulated in each section of the RIA.

1.3. Methodology

1.3.1. Process Steps

Below are the overarching process steps that MSIFN and CNSC staff (with input from OPG, where appropriate) followed in order to complete the RIA for the DNNP.

Step 1: Identification of potentially impacted rights, claims, and interests

Step 2: Identification of current baseline conditions* including cumulative effects, current territorial capacity and historical context

Step 3: Identification of potential project interactions/pathways with identified rights, claims, and interests (i.e., potential changes to current baseline conditions related to the project)

Step 4: Determination of severity of potential project interactions with identified rights, claims and interests

Step 5: Identification of potential mitigation and/or accommodation measures to address identified potential project interactions with identified rights, claims, and interests

Step 6: Identification of any residual impacts after consideration of proposed mitigation and/or accommodation measures

Step 7: Consideration of any additional mitigation and/or accommodation measures, should residual impacts be identified, and conclusions on seriousness of any remaining impacts or concerns

Step 8: Documenting and submitting process steps and outcomes to decision-makers (the Commission); collaborative drafting of rights impact analysis to be included in CNSC staff's Commission Member Document; MSIFN written and oral interventions at the Commission hearing

1.3.2. Rights Impact Severity Criteria

Step 4 of the RIA process involves evaluating the severity of potential impacts on MSIFN's Indigenous and/or Treaty rights. These potential impacts were characterized using the following criteria: expected magnitude, geographic extent, reversibility, and duration. Each criterion has three potential severity ratings, ranging from low to high. Note that the risk of potential impacts is a

product of both their potential severity and the likelihood that they will occur. Therefore, the likelihood of each impact was also evaluated in order to indicate the overall risk of potential project impacts. See Annex A Table 1 for definitions of these effects characterization criteria and descriptions of their ratings.

A decision matrix (Annex A, Table 2) was also developed to integrate the individual criteria into an overall severity rating for each potential impact. The expected magnitude of the potential impact is the main driver of this evaluation, which is then modified through consideration of reversibility, followed by duration, frequency, and timing, and finally the geographic extent. Generally, high ratings compound to produce a higher overall severity, but low individual ratings can also reduce the overall severity relative to the original magnitude rating. Likelihood does not factor into this decision matrix and is presented separately, as it is a separate factor from impact severity in evaluating risk.

1.3.3. MSIFN's views on the methodology, scope and limitations of the RIA

MSIFN has expressed their view that a Rights Impact Assessment (RIA) process should have occurred in conjunction with OPG's original Environmental Impact Statement which was provided for the Darlington Nuclear site in 2009. MSIFN also emphasizes that MSIFN and other interested Williams Treaties First Nations have not been part of designing the current RIA process and have not been provided with adequate time to coordinate the work and gather the information required to participate in the RIA process for the DNNP. MSIFN is of the view that CNSC's request for MSIFN to participate in the DNNP RIA process should have come earlier to provide adequate time to collaboratively design a project-specific RIA.

MSIFN is of the view that the first step in any consultation should be seeking a consensus with potentially-affected First Nations on the project description. MSIFN notes that UNDRIP should be given substantial consideration in interpreting section 35(1) of the constitution, especially in light of the recent adoption of the UNDRIP Act, 2021 which underscores the recognition of Indigenous peoples as sovereign entities.

MSIFN is concerned that the current regulatory framework does not ensure OPG's compliance with the requirements and standards set forth in UNDRIP or the UNDRIP Act. MSIFN requests that the CNSC mandate OPG obtain MSIFN's consent for the Darlington New Nuclear Project (DNNP) before advancing project activities.

MSIFN has concerns regarding cumulative effects and accurately capturing impacts to the environment and Treaty rights over time relating to the DNNP. MSIFN notes that a description of the past state of each of the identified Valued Components (VC) should be included in the baseline description of each VC, inclusive of Indigenous Knowledge of that past state, demonstrating how the state of the VC has evolved over time: not just the state of each VC at the time of the project. Current best practices for environmental assessments in Canada now encompass health, social, and economic impacts alongside environmental factors, together with enhanced focus on Aboriginal rights and Indigenous knowledge. The IAA 2019 also considers how climate change could impact the project's feasibility and environmental impact over its lifespan, as well as the project's potential contributions to or mitigations of climate change. Considering this, MSIFN strongly recommends

Commented [KM1]: Note to MSIFN: This was drafted based on views expressed during meetings, the DNNP intervention, and follow up communications. Please review and make any additions or updates to ensure CNSC staff have captured MSIFN's perspectives and tht they are accurately reflected

that OPG and CNSC consider the selected BWRX-300 technology through current federal IAA requirements.

Additionally, MSIFN has concerns regarding the volume of CNSC-regulated sites and activities within their territory including but not exclusive to the proposed DNNP. MSIFN feels that any examination of cumulative effects should be wholistic and also consider the impacts created by related and nearby CNSC-regulated activities.

CNSC response to Mississaugas of Scugog Island First Nation's views on the methodology, scope, and limitations of the RIA:

CNSC staff appreciate MSIFN sharing these perspectives and concerns regarding the proposed methodology and approach to conducting the RIA for the DNNP LtC and related information gaps that currently exist. CNSC staff take the concerns and comments raised by Mississaugas of Scugog Island First Nation seriously and have had multiple discussions and correspondence with MSIFN regarding the CNSC's methodology and approach to conducting RIAs. CNSC staff's approach and methodology for RIAs is based off of best practices and guidance used across the Federal Government to assess a Government decision or action that could impact Indigenous and/or Treaty rights. This includes the Impact Assessment Agency of Canada's guidance and procedures for RIAs for major projects and assessments. The RIA process is meant to be flexible and tailored to each specific project or decision as well as the Indigenous Nation or community that is being consulted.

Timing of the RIA:

CNSC staff acknowledge MSIFN's view that the RIA should have been conducted during the Environmental Assessment (EA) for the DNNP, which was completed in 2011. Potential impacts on rights were considered during the EA by the CNSC, the Canadian Environmental Assessment Agency of Canada and the Joint Review Panel. At the time of the EA and JRP hearings, no concerns about potential impacts on rights were raised by MSIFN or other Williams Treaties First Nations. CNSC staff acknowledge that consultation and engagement expectations and requirements have changed since the EA, including the signing of the Williams Treaties Settlement Agreement in 2018. In addition, as part of the consultation process for the applicability of the EA to OPG's chosen technology and the Licence to Construct application for the DNNP, MSIFN and other Williams Treaties First Nations have now more recently raised specific concerns regarding the potential for the construction and operation of the DNNP to lead to new impacts on their rights and interests. As a result, CNSC staff are collaborating on RIAs with potentially impacted Williams Treaties First Nations, including MSIFN, at this stage of the process to ensure that the CNSC is able to better understand and assess these concerns based on the information available at this time. This approach is part of the CNSC's commitment to consider current best practices as part of the DNNP regulatory and consultation processes.

Request for requirement of consent:

Under the CNSC's current regulatory framework, including the Nuclear Safety and Control Act, the CNSC does not have a legislative or regulatory tool to require licensees or proponents to commit to a specific approach for consent on their projects and activities with potentially impacted Indigenous Nations and communities. CNSC staff note that it is ultimately up to the proponent to

work with potentially impacted Indigenous Nations and communities to develop a specific approach to achieving consent, as appropriate, which CNSC can then support and encourage. Additionally, CNSC is supporting whole-of-government work underway to implement the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA), and the UNDA Action Plan released in 2023. The action plan action plan measure 32, which speaks to developing guidance for implementing Free, Prior and Informed Consent for natural resource and energy projects and related decisions, which is being led by Natural Resources Canada. In addition, CNSC staff are actively working on updating guidance and requirements for proponents and licensees with regards to Indigenous engagement through proposed updates and amendments to REGDOC 3.2.2: Indigenous engagement, which include changes to bring the guidance and requirements in line with the principles of UNDRIP.

Established baseline and cumulative effects:

CNSC staff's approach to establishing baseline conditions for RIAs is based on the current environmental conditions, present-day exercise of rights by the Indigenous Nation or community, and existing activities that have affected or could affect the conditions that support or limit the Indigenous Nation or community's meaningful exercise of rights. The baseline for an RIA considers the conditions necessary to allow a community to continue to exercise its rights and how historical and current cumulative effects may already impact those conditions, or how future foreseeable projects may have an impact (i.e. Territorial capacity). This can also include taking into account the context and perspectives of Indigenous Nations and communities with regards to the current state of their territory and cumulative impacts from all previous impacts and development in the territory that could interact with the currently proposed project, as well their perspectives on how they would prefer to practice their rights and interests. This context as provided by the Indigenous Nation and community, helps to inform the CNSC with regards to the current conditions of the territory including the current capacity of their territory to withstand additional new impacts as the result of the proposed project and how project specific impacts could interact with existing conditions and cumulative impacts in the territory. This is taken into consideration in the RIA as part of the magnitude of project specific impacts, and directly informs the assessment of the potential severity of project specific impacts as well as potential options for addressing, mitigating or accommodating those project specific impacts so as they do not contribute to any existing impacts on the Nation's territory and rights.

CNSC staff support for additional studies to gather information:

CNSC staff remain committed to collaborating with MSIFN, interested Williams Treaties First Nations, and OPG on an Indigenous Knowledge and Land Use study specific to the DNNP to help gather more specific information and data regarding Williams Treaties First Nations rights and interests that could be potentially impacted by the DNNP and other projects in the Treaty territory.

CNSC staff are also open to supporting the scoping and implementation of a cumulative effects study, in collaboration with Mississaugas of Scugog Island First Nation, other interested Williams Treaties First Nations and OPG.

The results of these studies can then help to inform an adaptive management approach and EA monitoring and follow-up program, which will ensure the DNNP project and related activities would be protective of their rights and interests throughout the whole life-cycle of the project.

CNSC staff are also committed to updating this RIA in collaboration with Mississaugas of Scugog Island First Nation for future phases of the DNNP regulatory process, should it proceed, as new information is available and as appropriate.

2. CONTEXT AND POTENTIALLY IMPACTED MSIFN'S RIGHTS AND INTERESTS

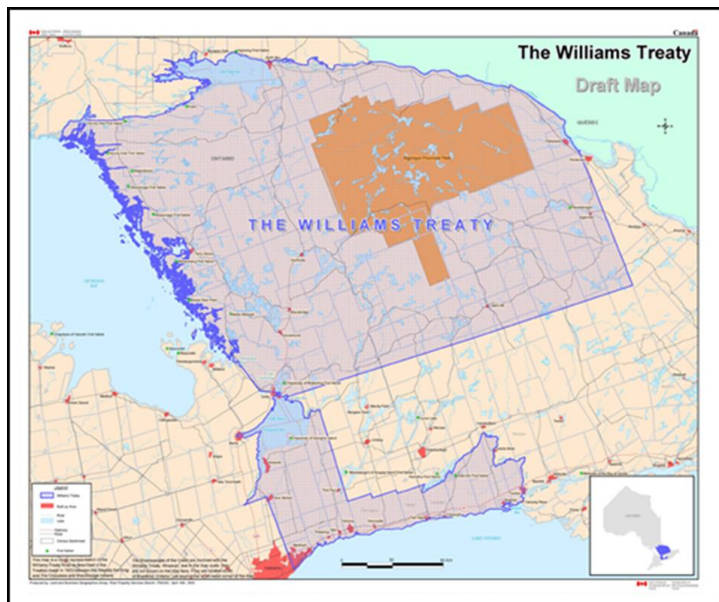
- *MSIFN's characterization of their rights and interests that may be affected by the project*
- *Current baseline conditions including narrative of historical context and current territorial capacity. MSIFN's perspectives on the importance, value, uniqueness of an area, resources or species and thresholds*

MSIFN are a part of the greater Ojibwa Nation, originally from the northern shores of Lake Huron, having settled on Scugog Island around the year 1700. MSIFN is located on the shores of Lake Scugog in Durham, Ontario. MSIFN has a long history in this part of Ontario and is part of the Williams Treaties First Nations. The Williams Treaties First Nations territory extends from the shore of Lake Ontario in the south, Georgian Bay in the west, the Ottawa Valley in the east, and as far north as the French River.

The *Williams Treaties* of 1923 were created from several earlier treaties involving seven First Nations: Alderville First Nation, Chippewas of Beausoleil, Chippewas of Georgina Island, Chippewas of Rama, Curve Lake First Nation, Hiawatha First Nation and Mississaugas of Scugog Island First Nation. As the last historic land cession treaties in Canada, these agreements transferred over 20,000 km² of land in southcentral Ontario to the Crown in exchange for one-time cash payments.

MSIFN and other signatory First Nations claimed that The Williams Treaties created a number of ongoing injustices — insufficient compensation, inadequate reserve lands, and the inability to freely exercise harvesting rights Throughout their territory. From the Nation's perspective The Crown's inaccurate interpretation of the Treaties made it difficult for the First Nations to exercise their rights, as the Crown's view was that the Treaties extinguishing all harvesting rights outside of the reserve lands.

In 2018, a Settlement Agreement was reached between the Crown (Federal and Provincial) and the Chippewa and Mississauga peoples who signed the Williams Treaties, providing recognition of pre-existing Treaty harvesting rights in certain areas, financial compensation, potential for additional reserve lands, and apologies from Canada and Ontario for their narrow interpretation which denied Chippewa and Mississauga peoples of the rights solidified in the 1923 treaties.



In the past, MSIFN and other Williams Treaties First Nations were not consulted by the Crown or facility operators during the initial decision-making processes for the establishment and operation of the Darlington Nuclear Generating Station (DNGS) or the Darlington Waste Management Facility (DWMF) on treaty lands. The Environmental Impact Study (EIS) for the DNNP site was conducted in 2009 prior to the 2018 Settlement Agreement. MSIFN notes that the establishment of the DNGS, DWMF, and now the potential establishment of the proposed DNNP has the potential to directly impact the MSIFN community and limits the exercise of pre-existing treaty rights of Williams Treaties First Nations, which were reaffirmed in 2018 under the Williams Treaties First Nations Settlement Agreement. MSIFN regards the impacts of all activities within the Darlington Nuclear site as cumulative and interconnected. MSIFN has also raised concerns about the cumulative effects of the DNNP, Darlington Site, Pickering Nuclear Generating Station and other projects in the area. MSIFN is concerned that there has not been a holistic view taken when considering cumulative effects, which could lead to significant impacts on their rights.

MSIFN community members and other Williams Treaties First Nations are currently unable to use land and resources at the Darlington site because it is inaccessible to the public. The land and resources

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within the DNGS have been inaccessible for over 50 years. MSIFN community members currently exercise their section 35 rights on the waters and other aquatic resources surrounding the Darlington site and intend to continue to use those resources in perpetuity. Similarly, MSIFN community members anticipate returning to the lands within the Darlington site after decommissioning in order to exercise their section 35 and treaty rights as well: it is therefore any negative impacts to the environment and biota in the areas are of great concern to MSIFN, as is the fact that OPG has not provided a decommissioning strategy for them to review.

MSIFN members have expressed direct concerns and uncertainty surrounding the safety, management, and security of the nuclear reactors and waste stored on site, particularly how the design of sites takes into consideration international best-practices regarding security and safety in light of potential external threats (both intentional and unintentional), as well as impacts to the environment. MSIFN never provided consent to the creation of the DNGS or DWMF. MSIFN members live with the associated risks to treaty rights and community safety of the Darlington Nuclear site and proposed DNNP within their treaty lands and waters.

3. **IMPACT PATHWAYS**

MSIFN maintains their perspective that the DNNP, if approved, will result in effects that will either directly or indirectly impact MSIFN member's Inherent, Aboriginal and Treaty Rights. MSIFN's view is that the DNNP will contribute to cumulative effects on their Aboriginal and Treaty Rights.

These impacts include:

- Impacts from nuclear waste, including from a lack of decommissioning strategy and long-term solution to waste management Impacts to MSIFN members ability to harvest/fish/interact with lands and waters on and surrounding the Darlington Nuclear Site
- impacts from radiation on human and non-human biota Impacts to MSIFN members ability to harvest/fish/interact with lands and waters on and surrounding the Darlington Nuclear Site
- Impacts to Species at Risk habitats

MSIFN is concerned that OPG has not created a decommissioning plan for the DNNP. There is still no long-term plan for the safe management and storage of nuclear waste in Ontario, and MSIFN must live with the risk of temporarily storing this excess waste in their Treaty Territory, at the DWMF, without ever providing their consent. With regards to MSIFN's concerns related to waste management, CNSC staff's understanding is that OPG has not yet made a decision about where waste generated by the DNNP will be stored, should it proceed, and that is not within the scope of the decision to be made by the Commission regarding at the Licence to Construct application. CNSC staff note that no nuclear waste will be generated from construction or during construction of the DNNP, as there is no licensed activity in the construction licence that permits nuclear materials to be on-site. OPG will be required to characterise the nuclear wastes, identify the waste streams, handling requirements and hazards, transportation and storage locations in the Licence to Operate application phase, should the DNNP proceed. As a lifecycle regulator, CNSC's regulatory requirements increase in scope as the applicant

Commented [LD2]: Note to MSIFN - CNSC staff have drafted this section based on information available and provided to date regarding potential impacts to rights specific to the DNNP licence to construct application. Please include any other potential impacts on rights from the DNNP that MSIFN is concerned about, if that information is available at this time.

progresses through each licensing phase. CNSC will continue to evaluate and assess OPG's programs against regulatory requirements should the applicant progress through each licensing phase, including OPG's nuclear waste management program.

MSIFN have raised concerns about solid radioactive wastes, airborne radioiodine emissions, and their overall effects on the general environment, as well as human and nonhuman biota as a result of the proposed operation of BWRX-300 reactor technology for DNNP. As part of the EIS review process, OPG completed a revised dose assessment to consider releases from a single unit and multi-unit deployment consisting of up to four BWRX-300 reactors. For normal operations, radiological doses to all receptor groups all are significantly below the regulatory dose limit of 1 mSv per calendar year to a member of the public. CNSC staff conclude that deployment of up to four BWRX-300 reactors would result in a radiological dose to the most exposed human receptor estimated to be 1.20 μ Sv/year. The public dose limit is 1mSv/yr (1000 μ Sv/yr) making the estimated dose 0.0012% of the public dose limit. OPG also calculated dose to non-human biota resulting from the BWRX-300 Grasses were identified as critical receptor within the terrestrial environment. For a multi-unit deployment of four BWRX-300 reactors, the highest dose to the grass was estimated to be 61.6 nGy/day (6.16E-05 mGy/day). IAEA guidance for terrestrial vegetation sets a chronic dose limit of 400 μ Gy/hr (9600 μ Gy/d). Converting nGy to μ Gy, the dose rate of 0.0616 μ Gy/d would be 0.0000064% of the recommended dose limit for grasses.

MSIFN has also raised concerns regarding the lack of guarantee for long-term protection of the Species at risk habitat, including for bank swallows on site. OPG has completed modelling studies assessing the potential for disturbances or impacts on the Bank Swallow population related to dust, noise, hydrogeology, blasting vibrations, and shoreline stabilisation work. Results from these models indicated that the adverse effects on Bank Swallows, following the implementation of mitigation measures identified in the EA, are anticipated to be minor. Project activities that have an adverse effect on the Bank Swallow population or habitat (e.g., shoreline stabilisation) would require approvals and implementation of appropriate compensatory measures from both ECCC and the Ontario Ministry of the Environment, Climate, and Parks (MOECP). The Little Brown Myotis, the Northern Myotis, and the Tri-coloured Bat, as well as their habitat, are listed as endangered species under the Ontario Endangered Species Act. OPG assessed Potential impacts or disturbances on the bat population from interaction pathways related to dust and noise, changes in hydrogeology, and on-site illumination and effects were concluded as likely to be minor. On-site illumination was assessed to provide the greatest impact to bat species. Project activities that have an adverse effect on the endangered Bat population or their habitat would require approvals and implementation of appropriate compensatory measures from the MOECP.

Additionally, OPG will have to acquire a Fisheries Act Authorization from the Department of Oceans and Fisheries Canada before conducting any activities with the potential to harm fish and fish habitat (in water works, construction and operation of the condenser cooling water system etc.). OPG will be required to record number of fish, species, and age class of fish impinged and entrained and then propose and implement compensation measures for the fish lost. OPG will have to implement offsetting or compensation measures, commensurate with observed fish losses, and will be outlined in their authorization and approved by DFO

OPG's EIS Review report indicates that no significant adverse environmental effects are expected, provided the identified mitigation measures and follow-up program are implemented. Additionally, CNSC staff expect no significant residual adverse environmental effects from the deployment of up to four BWRX-300 reactors, provided the mitigation measures identified in the EA are implemented, as required by OPG's EA follow-up program.

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MSIFN's disagrees that there will be no significant residual adverse environmental effects from the deployment of up to four BWRX-300 reactors. The mitigation measures suggested thus far do not outweigh the negative environmental impacts of the project, and OPG is not willing to commit to protecting SAR habitat on the site long-term. Further, this conclusion is not reasonable given the lack of decommissioning plan.

MSIFN has made requests for the following mitigation measures:

1. The Commission require CNSC and OPG to fund a Regional Indigenous Knowledge Study
2. The Commission require CNSC and OPG to work collaboratively with MSIFN, CLFN and HFN to develop and undertake a Cumulative Effects Assessment
3. The Commission require CNSC to work collaboratively with MSIFN, CLFN and HFN undertake a Rights Impact Assessment that, at a minimum, is informed by a gap analysis, Regional Indigenous Knowledge Study and Cumulative Effects Assessment
4. The Commission require OPG to work with MSIFN, CLFN and HFN to implement and participate in any environmental monitoring plan or program for the DNNP
5. Ensure OPG engages and consults with MSIFN, CLFN and HFN on other Federal and Provincial permits related to the DNNP of interest to the Nations
6. Ensure OPG provides MSIFN, CLFN and HFN with information that has been requested to inform the assessment of impacts on Michi Saagig Rights.
7. The CNSC require OPG to obtain consent from MSIFN and other Williams Treaties First Nations (WTFN) for the Project prior to issuing a license to construct.
8. The CNSC require OPG to complete a gap analysis between the JRP EA and the current Federal Impact Assessment Act, 2019 (IAA) requirements.
9. The CNSC and OPG provide MSIFN with greater clarity and a plan for nuclear waste, including waste that could be produced by the DNNP.
10. The CNSC mandate a follow-up program (in line with the current IAA framework) to be completed by OPG in collaboration with interested WTFNs.
11. The CNSC and OPG Commit to Meeting with Leadership to Review International Best Practices for the management and storage of used nuclear fuel at reactor sites with current practices at the Darlington site.
12. OPG establish a restoration fund that would facilitate projects on lands within and outside of OPG Darlington's site control, in collaboration with First Nations, and other governments.

4. MITIGATION, ACCOMMODATIONS, MONITORING AND FOLLOW-UP MEASURES AND CHARACTERIZATION OF IMPACTS

As indicated in Section 3, potential DNNP impact pathways were identified for MSIFN's rights, including impacts on Species at Risk, MSIFN members ability to harvest/fish/interact with lands and waters on and surrounding the Darlington Nuclear Site and impacts from nuclear waste. Section 4 identifies key mitigation, accommodation, monitoring and follow-up measures to avoid, minimize, and/or effectively manage these impacts, and assesses the severity of the impact while taking into consideration the baseline and context for the practice of the rights (when available).

Commented [DL3]: Note to MSIFN - items #7 to 12 are ones MSIFN previously identified as unresolved.

The section below outlines the mitigation measures that CNSC staff are aware of OPG committing to. If MSIFN's view is that these concerns remain outstanding, CNSC staff recommend having a meeting between CNSC staff, OPG and MSIFN to discuss these concerns and the path forward to addressing them.

Commented [DL4]: Note to MSIFN: Mitigation measures included here are based on existing information and currently committed to by OPG and CNSC.

Additional information about mitigation measures will be included dependant on the Commissions decision and potential direction, CNSC staff's ongoing review of the Licence to Construct application and discussions with MSIFN about impacts to rights, severity of impacts and potential additional mitigation / accommodation.

CNSC subject matter experts are also available to attend meetings with MSIFN to discuss the primary mitigation measures being proposed to reduce biophysical / environmental impacts, if that is of interest.

4.1. Mitigation, Accommodations, Monitoring and Follow-up Measures

- *Identification of potential mitigation and/or accommodation measures to address identified potential project interactions with identified rights and interests*

In relation to the above impacts, OPG has committed to a number of mitigation, monitoring and follow-up measures. OPG's EIS from 2009 and OPG's EIS Review Report provide information regarding the mitigation measures that have been identified for each environmental component. Monitoring and follow up plans are included in OPG's Environmental Monitoring and Environmental EA Follow up Program. OPG concludes that the DNNP, considering the mitigation measures identified, will not result in significant adverse environmental effects, including effects from accidents, malfunctions and malevolent acts, effects of the environment on the Project, and cumulative effects. CNSC staff confirmed that they expect no significant residual adverse environmental effects from the deployment of up to four BWRX-300 reactors, provided the mitigation measures identified in the EA are implemented, as required by OPG's EA follow-up program.

In relation to impact on Bank Swallows, OPG has mitigation based on an adaptive management approach, which may include the construction of artificial habitat for Bank Swallows on the DN site or off-site, provision of nesting habitat for related insectivore bird species, integration of interpretive opportunities, acquisition and protection of existing colony areas that are not on the DN property, and funding research into the decline of aerial foragers. OPG commits to developing a Bank Swallow mitigation plan for implementation during Site Preparation and Construction and verify the implementation of the plan throughout construction and operation. OPG will also conduct species at risk surveys on the DNNP site prior to site preparation and operation, if the project proceeds. Project activities that have an adverse effect on the Bank Swallow population or habitat (e.g., shoreline stabilisation) would require approvals and implementation of appropriate compensatory measures from both ECCC and the Ontario Ministry of the Environment, Climate, and Parks (MOECP).

In relation to impacts on bats, OPG has proposed mitigation measures to address potential impacts from lighting including avoiding lighting on key habitat features, implementing dark buffer zones and limits on illumination surrounding habitats, implementing lighting specifications that minimise impact on bats. Project activities that have an adverse effect on the endangered Bat population or their habitat would require approvals and implementation of appropriate compensatory measures from the Ontario MOECP.

In OPG's Environmental Monitoring and EA Follow up program, OPG recognizes that while the assessment of environmental effects from DNNP has been satisfied from the Western perspective, it may not fully address the impact of the DNNP on Indigenous and/ or Treaty rights as they are understood today. OPG indicates that they endeavor to continue to work with Indigenous Nations and communities having a historical relationship with the site to appropriately identify the impacts of the Project on them and to achieve feasible mitigation measures and/or accommodation.

OPG commits to working with Indigenous Nations and communities to incorporate Indigenous and Traditional knowledge, where available, in order to further understand the potential impacts of the project and strengthen assessment and decision-making. OPG has committed to developing a plan to undertake an Indigenous Knowledge Study with interested Williams Treaties First Nations including

MSIFN, which could include or lead to a cumulative effects study, a rights impact assessment (which is being conducted by the CNSC in collaboration with MSIFN) and opportunities to identify and address the options for enhanced collaboration and engagement with regards to environmental protection, monitoring and follow-up activities.

OPG has been having ongoing discussions regarding MSIFN's concerns about species at risk, including on OPG's Endangered Species Permit. Through those discussions, OPG has committed to:

- Developing a monitoring plan for bats including noise and dust effects, and for invertebrates including the effect of dust on aerial insectivore prey.
- Bat boxes design to mitigate potential overheating. Opportunity to harvest butternuts (for planting) prior to the trees being removed. Also, a 40:1 replanting of butternuts removed. A 3:1 replacement of trees removed under the ESA permit.
- Involve Williams Treaties First Nations in developing monitoring plans and plans for site restoration and planting, as requested by MSIFN
- Share with Williams Treaties First Nations the monitoring reports for review.

OPG has also committed to further discussions on the following:

- The potential for a Harvesting Agreement (non-consumption) with MSIFN.
- The potential for a 'restoration fund' requested by MSIFN.

OPG has committed to provide funding for the Williams Treaties First Nations to hire a coordinator to support capacity building and community engagement specific for the DNNP.

OPG has and will continue to conduct ceremony on site, with MSIFN and other interested Williams Treaties First Nations on the DNNP site. OPG will also continue to engage MSIFN and other interested Williams Treaties First Nations in archaeological activities or findings required or uncovered by the construction process.

In response to MSIFN's request that First Nations be provided the opportunity to harvest butternuts from the Darlington site prior to site-prep, OPG agreed to maintain two Butternut trees and provide an opportunity for harvesting in the fall of 2023. OPG has indicated continued support for the harvesting of seeds/nuts for off-site planting and will work with First Nations to arrange for this on request. It was noted that OPG does not support harvesting plants on site for consumption and weapons are not allowed on site for security reasons. For areas of the site not publicly accessible, prior notification to a site sponsor/OPG security would be required.

CNSC mitigation and monitoring measures

In addition to OPG's proposed mitigation measures, follow up and monitoring activities and commitments to MSIFN, described above, CNSC staff are committed to additional mitigation and monitoring measures to work towards addressing MSIFN's concerns with regards to potential impacts on their rights and interests as the result of the proposed construction of the DNNP.

CNSC staff are committed to long-term engagement and collaboration with MSIFN, through the existing terms of reference for long-term engagement between MSIFN and the CNSC.

CNSC staff commit to collaborating with MSIFN on the CNSC's environmental monitoring program around the DNNP and Darlington site, including the CNSC's Independent Environmental Monitoring

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Program. This includes providing opportunities for MSIFN to review and provide input into the sampling plans, participate in sampling, and conduct ceremony and walk the land prior to conducting sampling. CNSC staff will work with MSIFN to ensure that their land use, values, and knowledge systems are reflected and considered in the CNSC's environmental sampling, as appropriate and where possible.

CNSC staff have been offering to support an Indigenous Knowledge study with MSIFN and other Williams Treaties First Nations for many years. CNSC staff remain committed to supporting an Indigenous Knowledge and land use study and taking an adaptive management approach to the oversight of the DNNP and OPG's commitments and follow up and monitoring programs, should it proceed, to ensure MSIFN's rights and interests are protected. The CNSC is also committed to supporting a potential cumulative effects study as it relates to the DNNP and other relevant nuclear facilities and projects in their territory, in collaboration with MSIFN, other interested Williams Treaties First Nations and OPG, as appropriate. CNSC staff are also committed to continuing to update this RIA as a new information is gathered and provided by both MSIFN and OPG and providing updates to the Commission at appropriate opportunities in future phases of the regulatory review and licensing process for the DNNP, should the project proceed.

CNSC staff are committed to collaboratively monitoring OPG's implementation of their proposed mitigation measures and commitments with MSIFN. CNSC staff are committed to working with MSIFN to verify the commitments and measures specific to them and report the results and relevant updates to the Commission as appropriate. CNSC staff will be conducting EA follow-up and licensing compliance activities throughout the life cycle of the DNNP, should it be approved.

CNSC staff are committed to ongoing dialogue and collaboration with MSIFN to better understand their issues and concerns and identifying appropriate measures and commitments to help address and manage the concerns and potential impacts as a result of the DNNP.

In addition, CNSC staff are committed to supporting the ongoing development of capacity, knowledge, recognition and inclusion of MSIFN in the CNSC's regulatory processes and ongoing oversight of the DNNP and other nuclear facilities and projects in their territory.

4.2. Severity Characterization of Impacts (including Summary table)

- *Description of impacts and severity characterization*
- *Consideration of additional mitigation or accommodation measures, should residual impacts be identified, and conclusions on seriousness of any remaining impacts or concerns*
- *Table summarizing rights, impacts, and severity of impacts, including agreed-upon criteria (e.g. magnitude, geographic extent, frequency, duration, reversibility, etc.).*

5. CONCLUSIONS AND RECOMMENDATIONS

- *Conclusions and recommendations would be submitted/addressed to the Commission for their consideration as part of the Commission hearing process*

6. REFERENCES

Document Type	Document / Reference Title
Written Comments	Submission from the Mississaugas of Scugog Island First Nation: DNNP applicability of environmental assessment
Written Letter	MSIFN's January 2024 letter to CNSC/ OPG about the RIA process
Meeting	MSIFN-CNSC Leadership Meeting Between CNSC and Mississaugas of Scugog Island First Nation – November 20, 2023
Meeting	March 2023 meeting on the DNNP
Meeting	October monthly meeting between CNSC staff and MSIFN
Meeting	December monthly meeting between CNSC staff and MSIFN
Meeting	January monthly meeting between CNSC staff and MSIFN
DNNP Hearing #1 Intervention	CMD_24-H2_26_- _Submission_from_the_Mississaugas_of_Scugog_Island_First_Nation
OPG document	Darlington New Nuclear Project Environmental Impact Statement Review Report for Small Modular Reactor BWRX-300
OPG Document	Environmental Impact Statement New Nuclear – Darlington Environmental Assessment
OPG document	Environmental Monitoring and Environmental Assessment Follow-up (EMEAF) Plan for Darlington New Nuclear Project
CNSC document	CMD 24-H2 – Submission from CNSC Staff - Applicability of the DNNP EA to the BWRX-300 Reactor Technology

ANNEX A – EFFECTS CHARACTERIZATION CRITERIA

Table 1. Draft criteria for assessing the severity of impacts to the Mississaugas of Scugog Island First Nation's Aboriginal and/or Treaty rights.

Criterion	Definition	Rating		
Magnitude	Degree and importance of the change the impact will likely cause relative to an established baseline. Takes into account context and territorial capacity to withstand additional stressors.	Low Little impact on quality or quantity of resources, locations, conditions and other factors required for the exercise of rights, relative to an established baseline. Impact is considered by the rights holders to be of relatively low importance and of a minor degree.	Moderate Changes in the quality, quantity, and accessibility of resources, locations, conditions, and other factors that affect the ability or willingness to exercise the right in the preferred manner and locations are considered by the rights holders to be of moderate importance and degree relative to an established baseline.	High Changes in the quality, quantity, and accessibility of resources, locations, conditions, and other factors such that the right can or will no longer be exercised in the preferred manner and locations and the impacts are considered by the rights holders to be of high/critical importance and degree relative to an established baseline.
Geographic Extent	Area over which impact is expected to occur. This may differ from the physical footprint of the change.	Site-specific Project footprint, avoids preferred areas, little impact on interconnectedness.	Local Extends beyond project footprint, may affect preferred/valued areas, disrupts interconnectedness.	Regional Significant portion of territory affected, especially preferred/valued areas, disrupts interconnectedness.
Reversibility	Ability to return to established baseline. Considers both the reversibility of the impact pathway and the reversibility of the impact to the exercise of rights.	Reversible Easily reversible	Partially reversible Reversible but requires significant effort and cost or will take a long time via natural processes.	Irreversible Permanent or persistent.
Duration	How long an impact may last.	Short-term Short-term, only a year or two.	Medium-term Lasts for more than a year or two but less than one generation.	Long-term Persists beyond one generation.
Likelihood	An estimate of the probability that a potential impact on the exercise of rights will occur as a result of the Project. Considers the degree of evidence available and level of certainty to characterize the likelihood of occurrence.	Low A potential impact on the exercise of rights has a low probability and is unlikely, but could occur.	Moderate A potential impact on the exercise of rights is probable and likely, but may not occur.	High An impact is highly likely to occur. Strong evidence is available and there is a high level of certainty in characterizing the likelihood of a potential impact to occur.

Table 2. Decision matrix to determine overall severity of potential impacts based on ratings of identified criteria.

Magnitude	Reversibility	Duration	Geographic Extent	Severity
Low	Any Level of Reversibility	Any Duration	Any Extent	Low
Magnitude	Reversibility	Duration	Geographic Extent	Severity
Moderate	Fully reversible	Short- or medium-term	Site-specific or local	Low
		Long-term	Regional	Moderate
			Site-specific	Low
		Local or regional	Moderate	
	Partially Reversible	Short-term	Site-specific	Low
		Medium or long-term	Local or regional	Moderate
			Site-specific or local	Moderate
			Regional	High
Permanent	N/A	Site-specific	Moderate	
		Local or regional	High	
Magnitude	Reversibility	Duration	Geographic Extent	Severity
High	Fully reversible	Short- or medium-term	Any	Moderate
		Long-term	Site-specific	Moderate
			Local or regional	High
		Partially reversible	Short- or medium-term	Site-specific
	Local or regional			High
	Long-term		Any	High
			Long-term	Any

Summary of Potential Impacts to Indigenous Rights for the Mississaugas of Scugog Island First Nation with respect to the DNNP

Established/Potential/Asserted Right <i>(Nature, Scope, Exercise)</i>	Mississaugas of Scugog Island First Nation Perspective on the Importance, Value, Uniqueness of an Area, Resources or Species	Context	Potential Project Impact <i>(Type and Description)</i>	Magnitude	Geographic Extent	Duration	Reversibility	Frequency & Timing	Mitigation and follow up measures	Residual impacts	Overall Severity
Hunting, Trapping, Gathering (on land)											
e.g. Established Treaty right to hunt, trap, and gather on treaty lands (not taken up for other purposes).											
Fishing and Harvesting (on water)											
Other Traditional and Cultural Uses and Practices											

**MSIFN & CNSC Meeting to discuss the Rights Impact Assessment for the Darlington New
Nuclear Project: Virtual Meeting
May 13th 2024**

MSIFN: Don Richardson, Sam Shrubsole, Rob Lukacs, Gary Kissack, William Taggart, Kayla Ponce de Leon
CNSC: Laura DeCoste, Adam Levine, Anna Mazur, Joanne Gordon, Keely McCavitt

Agenda:

1. Welcome and Introductions
2. Overview of CNSC's legal basis and approach to conducting Rights Impact Assessments (RIAs)
3. Discussion on the timing and sequencing of the Indigenous Knowledge Study, RIA and DNNP LtC (LtC) hearing
4. Discussion on the path forward for the DNNP LtC RIA and opportunities for collaboration
5. Topics of interest to MSIFN

Overview of CNSC's legal basis and approach to conducting RIAs:

- MSIFN requested that CNSC staff provide an overview of the CNSC's legal basis for conducting RIAs.
- CNSC staff indicated that the CNSC is an agent of the Crown. CNSC staff conduct consultation with potentially impacted Indigenous Nations and communities to ensure that the Crown's legal obligations are met for any decision or action by the CNSC that could impact Indigenous or treaty rights. The Commission takes into consideration the consultation conducted by CNSC staff, the engagement by proponents, and interventions and perspective provided by Indigenous Nations and Communities when making its decisions as part of public Commission hearings. The Commission then bases their decisions on all sources of information and hears from all parties during the public hearing process.
- The Commission determines whether the Duty to consult has been upheld based on all information provided on the record.
- The CNSC has developed policy and procedures that support the Crown's obligations for consultation and accommodation that follows best practices. An example of this is the RIA process. The RIAs allow for a focus on impacts to rights for each Nation, and how potential impacts could be mitigated.
- The RIA is an analytical tool which is developed in collaboration with the impacted Nations. The RIA outlines potential impacts to rights as well as potential mitigations (commitments or accommodations) that could address concerns. The RIA allows CNSC staff and Nations to bring this information to the Commission collaboratively.
- MSIFN raised concerns that it is not straightforward to determine what the impacts on their rights are when they do not have confirmation from OPG as to what the scope of the DNNP is.
- MSIFN noted that they were just recently informed about OPG's intention to apply for a LtC a low-intermediate waste facility at the Darlington site. MSIFN indicated that the DNNP represents many unknowns for the Williams Treaties First Nations (WTFNs) as it is unclear what is being considered for the LtC application, and the intended addition of the nuclear waste facility on site by OPG is interpreted as a major changes to the DNNP project description.
- CNSC staff noted that OPG has indicated their interest in applying for a waste facility to CNSC, but to this date have not submitted an application. CNSC staff's understanding is that this request would either come in the form of a new application, or an amendment to their current application for DNNP.

CNSC staff indicated that they are working to get regulatory certainty from OPG to determine what exactly the Commission is assessing within the scope of the LtC. CNSC staff noted that they are working to build more time into the process for the consultation and collaboration on the RIA and outstanding issues and concerns.

- MSIFN leadership is concerned that if CNSC staff make a determination on the impacts to rights for WTFNs ahead of the Hearing in October, that the impacts from that determination will last for generations. This RIA will be the first undertaken in the context of the Williams Treaties and the Gunshot Treaty
MSIFN asked whether the CNSC has experience conducting RIAs. CNSC staff confirmed that the CNSC has done several RIAs for different projects with different Nations. CNSC staff noted that they will share examples with MSIFN.
- CNSC staff also clarified that the RIA process is meant to be a framework and process to support potentially impacted Nations in collaborating with CNSC staff to clearly articulate to the Commission their specific concerns and perspectives about their rights and interests and how they may be impacted by the proposed project. It is also a way for the Nation to be able to clearly express any existing data and information gaps with regards to their rights and interests and ways to address, mitigate or accommodate those concerns now and into the future.

Discussion on the timing and sequencing of the Indigenous Knowledge Study, RIA and DNNP LtC hearing :

- CNSC staff acknowledged MSIFN's concerns that the RIA for the DNNP LtC will not be informed by the Indigenous Knowledge (IK) study that that Nations are currently scoping out.
- CNSC staff noted that that their understanding is that the IK study will likely take multiple years to finish. CNSC staff indicated that staff will be required to make an assessment on whether the DNNP LtC application is expected to cause impacts to Indigenous and/ or Treaty rights in advance of the LtC hearing for consideration by the Commission.
- CNSC staff reiterated that the RIA is a way to pull together all existing information and draft a report collaboratively to ensure MSIFN's views are reflected in a report. CNSC staff noted that there will be space in the RIA to include MSIFN's concerns and views on the limitations of the assessment.
- CNSC staff noted that the CNSC's proposed approach to mitigating or reducing MSIFN's concerns about the timing of the RIA is to commit to the RIA being an evergreen process which will allow for the potential impacts to rights and mitigations to be continuously updated and built upon as the project continues to develop and as additional information is available, should the project proceed. CNSC staff noted that the outcomes of the IK study and cumulative effects study will help to inform an adaptive management approach to OPG's EA follow-up monitoring program, which will ensure the DNNP and related activities would be protective of MSIFN's rights and interests.
- CNSC staff indicated that there are two paths forward. 1) that the IK study is done in parallel with the DNNP progressing through the regulatory process and the RIA is conducted in advance of the DNNP LtC hearing, prior to the IK study being completed. In this case, an adaptive management approach would be taken as discussed. 2) the DNNP regulatory process is paused until the IK study is completed, then the RIA for the LtC is completed and hearing is held.
- MSIFN confirmed that leadership's current preference is to conduct the IK study in parallel with the DNNP proceeding through the regulatory process. MSIFN reiterated that that they still have

concerns with how the DNNP is proceeding and with conducting the RIA prior to the IK study being completed.

- The Fogler Legal team noted that there are three factors that they have seen in successful adaptive management projects: A set of guiding principles all parties follow, trust between parties, and a dispute resolution mechanism that all parties are comfortable with. Any guiding principles used in an adaptive management approach on the DNNP and the RIA should be informed by MSIFN governance and include IK.
- CNSC staff indicated that the mitigations agreed to between OPG and Nations will be incorporated into the Licensing Conditions Handbook, and the agreements then become licensing conditions. CNSC staff are committed to conducting follow up compliance verification on OPG's commitments to MSIFN, in collaboration with MSIFN throughout the life-cycle of the project.

Discussion on the path forward for the DNNP LtC RIA and opportunities for collaboration

- CNSC staff acknowledged MSIFN's concerns about the RIA process, that MSIFN submitted through their comments on CNSC Staff's Consultation Report for the DNNP. Specifically, CNSC staff highlighted MSIFN's comment that the RIA is being forced on the Nation without meaningful consultation and the approach is not collaborative as MSIFN only has the chance to comment.
- CNSC staff noted that during early discussions with MSIFN on the RIA process, CNSC staff discussed different options for the assessment and report, including the option for MSIFN to draft sections of the report. At that time, MSIFN did not express interest in drafting sections of the report. Based on this CNSC staff drafted an initial version of the first chapters of the RIA.
- CNSC staff noted that the initial copy of the RIA that was shared for MSIFN is meant to support discussion and is based on concerns and impacts that MSIFN has raised to date. CNSC staff indicated that the CNSC is still open to MSIFN re-writing or drafting sections of the RIA.
- CNSC staff indicated that in addition to writing the report, CNSC staff are flexible with the approach to conducting the assessment on the severity of impacts (i.e which party drafts the first version, whether MSIFN would like to meet to discuss the impacts and severity prior to chapter being drafted etc.).
- MSIFN indicated that their preference is to collaborate with the other Mississauga Nations on the Indigenous Knowledge (IK) study and RIAs. MSIFN and WTFN are just in the very first stages of scoping out the IK study. CNSC staff noted that other Nations have indicated a preference to conduct the RIAs separately.
- MSIFN indicated that they are unsure how to proceed with the RIA before the IK study is conducted. MSIFN confirmed that they will discuss the path forward internally.

Other topics of interest:

- CNSC staff indicated that the issues tracking tables are being updated (with feedback from OPG). The updated copy will be shared with MSIFN shortly. CNSC staff noted that there will be more iterations of the table, with an updated version being submitted closer to the LtC Hearing.
- MSIFN raised concerns about the potential for a piecemeal approach to consultation, with MSIFN being asked to consult on small portions of the DNNP project instead of consulting on the whole. MSIFN is concerned that the proposed waste facility is being applied for separately, which will make a holistic understanding of potential impacts more difficult to gauge for MSIFN.
- MSIFN flagged that there has not been any substantive discussion with the shoreline protection and how MSIFN can be involved to date- this is an example of an area that MSIFN requires clarity on.

- MSIFN noted that OPG has made several verbal commitments regarding monitoring activities around the site and commitments/ mitigation, but OPG has not made firm commitments in writing.
- MSIFN raised concerns about progress on a project agreement for the DNNP with OPG. MSIFN noted that such an agreement would need to be crafted in a way that could move forward post LtC. MSIFN has drafted and sent an agreement to OPG for their review, but they have not heard back at this point.

- CNSC staff noted that the contents of any such agreement would need to be determined between MSIFN and OPG, and then the CNSC can support by including the commitments in the Licence Condition Handbook, as appropriate.
- MSIFN has flagged that there seems to be a communication disconnect between the OPG Indigenous consultation team and the OPG DNNP technical project and licensing teams.
- MSIFN also raised concerns about the current timelines for the DNNP hearing. CNSC staff indicated that they are currently working on an approach to address the timeline concerns for the upcoming Commission hearings and will be communicating the approach publicly once finalized.
- CNSC is working to have a triparty meeting between MSIFN, OPG and CNSC have a good dialogue, and address issues and concerns once CMD is released. CNSC proposes planning for this in late June-early July, 2024.

Action Item Summary

Responsible Party	Action Item
CNSC staff	Send updated issues tracking table and DNNP consultation report for MSIFN review / validation.
CNSC staff	Share examples of RIAs completed for the Near Surface Disposal Facility environmental assessment (Completed)
CNSC staff	Follow up with OPG staff to seek clarity on MSIFN’s concerns as well as the scope of their application
CNSC Staff	Organize meeting between MSIFN, OPG and CNSC staff to discuss issues and concerns with DNNP, mitigation measures and proposed path forward
MSIFN	Discuss internally path forward for RIA and confirm preferred approach with CNSC staff

CNSC staff's Indigenous Consultation Report for the
Darlington New Nuclear Project License to Construct
Application

Executive Summary

Commented [LD1]: New section

The Canadian Nuclear Safety Commission (CNSC) Staff would like to acknowledge that the Darlington New Nuclear Project (DNNP) is situated within the lands and waters of the Michi Saagiig Anishinaabeg, the Gunshot Treaty (1877-88) and the Williams Treaties (1923). In 2018, the Williams Treaties First Nations Settlement Agreement with Canada and the Province of Ontario was signed, which recognized the pre-existing Treaty rights of the Williams Treaties First Nations. This includes Curve Lake First Nation, Hiawatha First Nation, Alderville First Nation, the Mississaugas of Scugog Island First Nation, Chippewas of Beausoleil First Nation, Chippewas of Georgina Island First Nation and the Chippewas of Rama First Nation,

CNSC staff's Indigenous Consultation Report for the DNNP Licence to Construct Application ("Consultation Report") provides a summary, key information, conclusions and recommendations to date, as well as next steps regarding the Indigenous consultation and engagement activities conducted by CNSC staff in relation to the regulatory process for the DNNP, as well as CNSC staff's assessment of Ontario Power Generation's (OPG) engagement activities to date and OPG's intention to comply with REGDOC 3.2.2: Indigenous Engagement.

CNSC staff have aimed to conduct a thorough, transparent, flexible and collaborative consultation and regulatory process for OPG's DNNP Licence to Construct application. CNSC staff worked to collaboratively draft key sections of this report with Indigenous Nations and communities, including issues tracking tables, summary of consultation and engagement activities, and the conclusions section. The Nation specific consultation activities sections (Section 5.1 to 5.8) specify which particular sections of the report was shared with each Nation and which sections the Nation provided input and review based on their particular rights, interests and level of engagement with the CNSC in relation to the regulatory review process.

An update on consultation efforts with all identified Indigenous Nations and communities (as outlined in Section 3 of this report), as well as updated issues tracking tables and finalized Rights Impact Assessments, will be submitted to the Commission as part of CNSC staff's supplemental submission., which will include CNSC staff's final conclusions and recommendations with regards to consultation and impacts to Indigenous and/or Treaty rights will be provided as part of the supplemental submission, prior to the DNNP Licence to Construct application Commission Part-2 hearing.

1 Introduction

CNSC staff's Indigenous Consultation Report for the Darlington New Nuclear Project Licence to Construct Application report ("Consultation Report") provides a summary, key information, as well as next steps regarding the Indigenous consultation and engagement activities conducted by CNSC staff in relation to the regulatory process for Ontario Power Generation's (OPG) Darlington New Nuclear Project (DNNP) Licence to Construct application, as well as CNSC staff's assessment of Ontario Power Generation's (OPG) engagement activities to date and OPG's intention to meet REGDOC 3.2.2: Indigenous Engagement.

Additionally, CNSC staff are ~~working~~ aiming to work collaboratively with Curve Lake First Nation, Hiawatha First Nation and the Mississaugas of Scugog Island First Nation on drafting Rights Impact Assessments (RIA) and updating and finalizing issues and concerns tracking tables with each identified Indigenous Nation and community who has raised concerns specific to the DNNP Licence to Construct application. In order to provide additional time for collaboration on these documents, this information will be submitted by CNSC staff to the Commission in a supplemental report, to be considered as part of the record by the Commission for the Licence to Construct application Part-2 hearing. This will include an update on CNSC staff's consultation activities, RIAs, updated issues and concerns tracking tables, conclusions and recommendations with regards to the Duty to Consult and Accommodate, OPG's engagement activities, and potential impacts to rights and interests and key measures and commitments to address any potential impacts as the result of the Licence to Construct application.

The CNSC's approach to consultation and engagement with Indigenous Nations and communities is guided by the Duty to Consult and Accommodate, as required by subsection 35(1) of the *Constitution Act, 1982*, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) and the CNSC's commitment to Reconciliation, as discussed below.

1.1 Duty to Consult and Accommodate

The common-law duty to consult, and where appropriate, accommodate Indigenous Nations and communities applies when the Crown contemplates actions that may adversely affect potential or established Indigenous and/or treaty rights. The CNSC, as an agent of the Crown, ensures that all licence decisions under the Nuclear Safety and Control Act (NSCA) and decisions under other applicable legislation, uphold the honour of the Crown and consider Indigenous peoples' potential or established Indigenous and/or treaty rights, pursuant to section 35 of the Constitution Act, 1982.

When the CNSC receives a licence application, CNSC staff conduct an initial assessment, considering these three factors, to determine whether there is a common law duty to consult. If the duty to consult is triggered, the CNSC then assesses the depth of the duty to consult and, where appropriate, accommodate.

The CNSC's approach to assessing the preliminary depth of the duty to consult is in line with the process and policies outlined in the Aboriginal Consultation and

2

Commented [LD2]: Section 1 is all new

Commented [C3]: As noted in our previous comments, MSIFN has not agreed to work collaboratively with the CNSC on the Rights Impact Assessment. The level of consultation required to complete a Rights Impact Assessment cannot be completed in time for the January 2025 hearing. Please change this language to make clear that this is not a collaborative process.

Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011 (rcaanc-cirnac.gc.ca). In order to assess the potential depth of consultation owed by the CNSC, the CNSC uses resources such as Crown-Indigenous Relations and Northern Affairs Canada's Aboriginal and Treaty Rights Information System (rcaanc-cirnac.gc.ca), information regarding Indigenous and Treaty rights shared by Indigenous Nations and communities through interventions or submissions, as well as information gathered by proponents or licensees as outlined in REGDOC-3.2.2: Indigenous Engagement, version 1.1 (cnscccsn.gc.ca). As the CNSC is not a rights-determining body, the CNSC does not do a formal strength of claim analysis. The CNSC does not have the authority to confirm, establish or deny the existence of Indigenous and/or treaty rights as claimed or asserted by Indigenous Nations and communities. The CNSC assesses the potential severity of the potential impacts of the proposed project to determine what depth of consultation may be required to adequately discharge the duty to consult and, where appropriate, accommodate.

CNSC staff continuously updates the assessment of the depth of the duty to consult and, where appropriate, accommodate, as additional information is made available. This can include information provided by the Indigenous Nations and communities with regards to the nature and extent of their rights that may be impacted by the project, as well as based on CNSC staff's technical assessment of the project's potential impacts on the environment and people. CNSC staff ensure that the approach to consultation is commensurate with the assessed depth of consultation and is flexible based on the specific needs of each Indigenous Nation and community.

The CNSC sets out requirements and guidance for licensees and applicants whose proposed projects may raise the Crown's duty to consult in *REGDOC 3.2.2: Indigenous engagement*. While the CNSC cannot delegate its duty to consult obligation, procedural aspects of the consultation process can be carried out by proponents in support of meeting the CNSC's consultation obligations, where appropriate. For this matter, the Commission will be considering the engagement undertaken by OPG and proposed mitigations or accommodation, when determining whether the Duty to Consult has been met.

1.2 United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) is an international human rights instrument that recognizes the human rights of Indigenous peoples around the world. On June 21, 2021, the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA) received Royal Assent and came into force in Canada. This legislation provides a framework for the Government of Canada to work with Indigenous peoples to implement the UN Declaration at the Federal level.

The CNSC is committed to supporting the Government of Canada's whole-of-government approach to implementing UNDA, and the 2023-2028 UNDA Action Plan, where it intersects with the CNSC's mandate. The principle of Free, Prior and Informed

Consent (FPIC) is an integral aspect of the UN Declaration that is reflected in the 2023-2028 UNDA Action Plan¹.

Measure #32 of the UNDA action plan, which is being lead by Natural Resources Canada (NRCan), is “the development of guidance for engaging with Indigenous Peoples on natural resources projects in order to obtain free, prior and informed consent, consistent with Articles 18, 19, 20, 27, 28, 29, and 32 of the United Nations Declaration on the Rights of Indigenous Peoples.” NRCan has initiated discussions with Indigenous partners, industry and across federal departments and agencies to develop a shared understanding of expectations when it comes to free, prior and informed consent around federally regulated natural resource and energy projects. The CNSC is supporting NRCan in these efforts and is closely monitoring progress with regards to the development of a consistent policy and approach to implementing FPIC in Canada.

The CNSC’s approach to consultation and engagement with Indigenous peoples are mindful of the principles articulated in the UN Declaration.

The CNSC strives to achieve consensus through collaborative consultation approaches that allow for open dialogue and opportunities to understand, document, and meaningfully address the concerns of Indigenous Nations and communities, including measures to minimize or avoid potential impacts to their rights and interests, to the extent possible. Concerns raised by Indigenous Nations and communities, including related to consent for a project, are considered as part of the public hearing and the Commission’s decision-making process. The CNSC provides funding through the Participant Funding Program and the Indigenous and Stakeholder Capacity Fund to help ensure that Indigenous peoples can meaningfully participate in Commission proceedings and ongoing regulatory work.

While the CNSC’s current approach to Indigenous consultation and engagement, including public Commission proceedings, are mindful of the principles articulated in the UN Declaration, the CNSC is committed to continuing to evolve it’s approaches to align with best practices and guidance that emerge through whole-of-government implementation of UNDA 2021, and the 2023-2028 UNDA Action Plan, including those that relate to FPIC. This includes making updates and amendments to the CNSC’s REGDOC 3.2.2: Indigenous engagement to provide nuclear proponents and licensees with further guidance and clarity with regards to how -their approach to engagement and partnership with Indigenous Nations can align with UNDA. CNSC staff encourages all nuclear proponents and licensees to pro-actively work with Indigenous Nations and communities who are potentially impacted by their projects to establish a mutually agreeable process to seek and secure the impacted Nation’s FPIC, as appropriate, and communicate the process and outcomes on the record to CNSC staff and the Commission. This information will be used to help inform the Commission’s decision-

¹ The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan: [unda-action-plan-digital-eng.pdf \(justice.gc.ca\)](#)

Commented [C4]: Please see MSIFN’s comments submitted to the CNSC regarding the Pickering Life Extension. Specifically, Section 3.2.1 Implementation of UNDRIP and Action Measure #34 under the Nuclear Safety and Control Act.

The CNSC has yet to embrace and incorporate UNDRIP and FPIC in its policies and regulations, despite the SCC interpreting the *UNDRIP Act* as recognizing UNDRIP as a pre-existing set of rights that must continue to animate Canadian law. The CNSC must now officially recognize and respond accordingly to the SCC’s interpretation of UNDA as recognizing UNDRIP as a pre-existing set of rights. MSIFN understands that the CNSC is involved in broader efforts by the Government of Canada to continue advancing implementation of the UN Declaration, including through the efforts to implement UNDA and the 2023 – 2028 Federal UNDA Action Plan. MSIFN is concerned that current and near future CNSC decisions including this decision on the license to construct application for the DNNP should be, but may not be, informed by the SCC’s position on UNDRIP as “domestic positive law”.

making and assessment of consultation. Ultimately it is up to each potentially impacted Indigenous Nation and community to directly express and inform the Commission with regards to their process and position on their FPIC with regards to a potential project or activity that could impact their rights and interests, which will help inform the Commission’s decision-making on nuclear projects and activities.

The CNSC is using the following sources of guidance in this interim period to guide its decision making:

- Principle Number 6: [Principles respecting the Government of Canada's relationship with Indigenous peoples \(justice.gc.ca\)](https://www.justice.gc.ca/eng/1525/1525prncpl.html)
 - *the Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.*

- [Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act \(justice.gc.ca\)](https://www.justice.gc.ca/eng/1525/1525prncpl.html) – see section on FPIC”
 - *More specifically, FPIC describes processes that are free from manipulation or coercion, informed by adequate and timely information, and occur sufficiently prior to a decision so that Indigenous rights and interests can be incorporated or addressed effectively as part of the decision making process - all as part of meaningfully aiming to secure the consent of affected Indigenous peoples*

1.3 CNSC’s Commitment to Reconciliation

The CNSC’s approach to reconciliation focuses on establishing ongoing collaborative relationships through consistent and meaningful engagement and consultation, and it aims to build capacity and seek to improve opportunities for Indigenous participation in decision making and regulatory oversight activities throughout the full lifecycle of nuclear facilities and projects located in their territories.

The CNSC is committed to listening actively, establishing regular dialogue, and understanding the perspectives and values put forth by Indigenous Nations and communities. Feedback from Indigenous Nations and communities, along with priorities identified by them, guide how the CNSC identifies key areas of focus for implementing action and change.

The following initiatives are some of our key reconciliation areas:

- I. Formalizing Terms of Reference for long-term engagement with Indigenous Nations and communities
- II. Incorporating Indigenous Knowledge into the CNSC’s regulatory processes and assessments

- III. Reducing financial and capacity barriers to participate in the full life-cycle of the CNSC's regulatory activities
- IV. Updating regulatory documents to better reflect Indigenous Nations and communities perspectives and the principles of UNDA
- V. Increasing Indigenous cultural competency and awareness for CNSC staff

Additional information about the key initiatives with regards to the CNSC's reconciliation initiatives can be found on the CNSC website here: [Reconciliation \(cnsccan.gc.ca\)](https://www.cnsccan.gc.ca/reconciliation)

1.4 CNSC Staff's approach to consultation for the DNNP Licence to Construct Application

It is important to note that CNSC staff have been consulting and engaging with potentially impacted or interested Indigenous Nations and communities (as identified in Section 3 of this report) with regards to the DNNP on an on-going basis since 2007 and throughout the environmental assessment (EA) process. Consultation efforts during the EA process included letters, emails, telephone calls, and meetings at key points, including an invitation to review and provide comments on OPG's EA and licence to prepare site application in 2009, as well as opportunities to apply for funding through CEAA's Participant Funding Program. CNSC and CEAA staff provided many opportunities for the Indigenous Nations and communities to submit comments on the project and discuss potential concerns, including any potential impact on rights. CNSC staff encouraged Indigenous Nations and communities to submit information to the Joint Review Panel (JRP) and to participate in the public hearings. During the EA process, no project specific concerns or impacts to rights were identified by the Indigenous Nations and communities. The JRP EA report indicated that CNSC and CEAA staff concluded that the DNNP was not likely to result in significant adverse effects on the current use of land and resources for traditional purposes by Indigenous peoples. Additional information about consultation activities related to the EA process can be found in the JRP EA report ²

CNSC staff acknowledge that consultation requirements and expectations have evolved since the EA was conducted and that several Indigenous Nations and communities have indicated that the consultation during the EA was not adequate. CNSC staff note that when the EA was conducted, conclusions were drawn on the assessment and a licence to prepare site was issued on the basis that the duty to consult had been adequately discharged. Additional information regarding the Indigenous Nations and communities concerns with the consultation during the EA and CNSC staff's responses are included in the issues tracking tables in Appendix B.

CNSC staff have ensured that the consultation and engagement process for the DNNP has taken into consideration the recent changes, including the signing of the Williams Treaties Settlement Agreement in 2018 and evolution of best practices. Since the

² Report, Joint Review Panel – Environmental Assessment Report – Darlington New Nuclear Power Plant Project, dated 25 August 2011.

conclusion of the EA in 2012, CNSC staff have continued to consult and engage on the DNNP, including on the renewal of the DNNP Licence to Prepare Site in 2021, the review process prior to and during the hearing regarding the applicability of the DNNP EA to OPG's chosen technology; and the Licence to Construct application. CNSC staff also acknowledge that should the DNNP proceed throughout the licensing stages, there will be a continued obligation on the CNSC to hear and understand perspectives and concerns of Indigenous Nations and communities and continue to consult and engage over the lifecycle of the DNNP.

Specifically, for the DNNP Licence to Construct Application, based on CNSC staff's assessment as described in Section 1.1 above, including information provided by Indigenous Nations and communities and OPG CNSC staff determined that the licence to construct application for the DNNP raised the legal Duty to Consult and accommodate, where appropriate, potentially affected Indigenous Nations and communities.

CNSC staff sought information from potentially impacted Indigenous Nations and communities about the nature of their Indigenous and/or Treaty rights protected under section 35 of the Constitution Act, 1982 (Indigenous rights), how they may be impacted by OPG's DNNP licence to construct application (the Project) and potential measures and commitments to meaningfully address potential impacts and concerns identified by the Nations. As part of this process, CNSC staff considered information provided by Indigenous Nations and communities as well as by OPG about the potential impacts of the Project, in an effort to understand the nature, scope and extent of any adverse impacts on rights and interests and potential measures to address those impacts and concerns.

Following current best practices and approaches for consultation and in an effort to ensure potentially impacted Indigenous Nations and communities were able to present their views in a collaborative and meaningful way with respect to potential impacts of the Project on their rights and interests, CNSC staff sought to collaboratively draft Project specific Rights Impact Assessments (RIAs) with potentially impacted and interested Williams Treaties First Nations

For the DNNP regulatory process, CNSC staff have conducted consultation with consideration of the Government of Canada and CNSC's commitments to Reconciliation and the principles of UNDA with the goal of aiming to reach a consensus with respect to the project by the conducting the following activities:

- I. Providing early notification in May 2022 about the expected regulatory process for the applicability of the EA to OPG's selected technology and the Licence to Construct application for the DNNP and offering opportunities for early consultation with the identified Indigenous Nation and community to discuss the DNNP.
- II. Offering to discuss how each Indigenous Nation and community would like to be consulted and create an approach to consultation that would be meaningful and mutually agreeable.

Commented [C5]: Same comment as above. MSIFN has not agreed to collaborate on the Rights Impact Assessment for the DNNP.

Commented [C6R5]: For additional context, it should be noted here that CNSC staff have initiated a Crown-led Rights Impact Assessment. However, this process lacks collaboration with WTFNs, sufficient time for First Nation governance processes to be integrated into the RIA framework, and is not informed by a requested gap analysis, Indigenous Knowledge Study, or Cumulative Effects Assessment.

Commented [C7]: MSIFN understands that the CNSC has a goal of aiming to reach consensus on the DNNP project. MSIFN has repeatedly requested that the CNSC require OPG to obtain consent from MSIFN and other WTFN for new nuclear facilities and the storage of new nuclear waste, including waste that could be produced by the DNNP. UNDRIP and FPIC are now part of "domestic positive law" in Canada. The CNSC must now recognize this and consistently require the consent of First Nation rights-holders – see <https://www.oktlaw.com/undrip-is-now-part-of-canadas-domestic-positive-law-what-does-this-mean/>

- III. Having a comment period between December 2022 and March 2023 on OPG's Environmental Impact Statement (EIS) review and Plant Parameter Envelope (PPE) documents and specifically requesting feedback from the identified Indigenous Nations and communities to consider their knowledge and perspectives in CNSC staff's technical review and work to address concerns raised to the greatest extent possible.
- IV. Aiming to conduct collaborative RIAs with potentially impacted Williams Treaties First Nations, in response to concerns raised by Curve Lake First Nation, Hiawatha First Nation and the Mississaugas of Scugog Island First Nation about the potential for the DNNP to impact their rights and interests.
- V. Respond to and work with potentially impacted Nations and OPG to address issues and concerns raised, with the goal of coming to a consensus on each issue.
- VI. Collaborate on issues tracking tables, included in Appendix B of this Report, and the CNSC's Consultation Report with each identified Indigenous Nation or community who has raised concerns related to the DNNP to ensure the views of each Indigenous Nation and community are reflected, including where there are disagreements, and proposed measures and commitments to address the issues and concerns raised to date. CNSC staff also sought input from OPG on the issues tracking tables to ensure their response and commitments were accurately captured and communicated to the Indigenous Nations and communities.
- VII. Support and encourage participation in the decision-making process, through interventions for the DNNP Commission hearings and sharing the Indigenous Nations and communities knowledge, perspectives and concerns directly to the Commission.
- VIII. Providing funding and capacity support throughout the consultation and engagement process through the CNSC's participant funding program (PFP) and Indigenous and Stakeholder Capacity Fund (ISCF) funding programs,
- IX. Providing information and consulting on the CNSC staff's technical review and assessment of OPG's licence to construct application and related programs, documents and reports.

CNSC staff have also committed to providing opportunities for Indigenous Nations and communities to continue to participate in the regulatory and decision-making processes throughout the lifecycle of the DNNP, should the project proceed. This includes committing to collaborating with potentially impacted Indigenous Nations and communities and OPG on supporting an Indigenous Knowledge study specific to the DNNP to help gather more specific information and data regarding the Indigenous Nations and communities rights and interests that could be potentially impacted by the DNNP and other projects in the treaty territory. CNSC staff note that the CNSC has been offering to provide funding and support for an Indigenous Knowledge study with interested Williams Treaties First Nations for many years and remain committed to doing so. The results of these studies could then help to inform an adaptive management

approach to the regulation of the DNNP and EA follow-up monitoring program, which will ensure the DNNP project and related activities would be protective of their rights and interests, should the project proceed.

Details regarding CNSC staff's consultation activities with regards to the DNNP Licence to Construct application is found in Section 5 of this report.

CNSC staff acknowledge that at the time of publishing this Indigenous Consultation Report, some Indigenous Nations and communities have outstanding concerns (see Appendix B Issues Tracking Tables for additional details). CNSC staff are committed to working with each Indigenous Nation and OPG to continue discussions regarding any outstanding issues and developing a path forward for addressing them to the greatest extent possible. CNSC staff will provide a supplemental submission to the Commission on the status of CNSC staff's consultation efforts, OPG's engagement, the outcomes from the CNSC's efforts to aim to reach a consensus on the project and concerns and addressing potential impacts to Indigenous and/ or Treaty rights and interest to be filed on the record prior to the Licence to Construct Part-2 hearing.

1.4.1 Indigenous Nations and Communities views CNSC's approach to consultation

As part of the consultation process, CNSC staff sought feedback and perspectives from Indigenous Nations and communities on the CNSC's consultation process for the DNNP Licence to Construct application, the following Indigenous Nations and communities shared their views on the approach to consultation and concerns regarding the implementation of free, prior and informed Consent. CNSC staff are committed to continuously improving the approach to consultation, based on this feedback received.

The Mississaugas of Scugog Island First Nation

The Mississaugas of Scugog Island First Nation have raised concerns regarding the fact that the Williams Treaties First Nations were never consulted when the Darlington Nuclear Generating site and waste management facility was established. The Mississaugas of Scugog Island First Nation have requested that the CNSC mandate OPG to obtain the Mississaugas of Scugog Island First Nation's consent for the DNNP. The Mississaugas of Scugog Island First Nation ~~have stated that~~ ^{is of the view} that their concern and request for consent has not been addressed by either OPG or the CNSC.

MSIFN wishes to document that MSIFN was not engaged or meaningfully consulted by the CNSC in developing the approach, scope, methodology and scheduling of the RIA. MSIFN notes that the CNSC staff have taken MSIFN's request raised at the January 2024 hearing for a Rights Impact Assessment, and Cumulative effects assessment and initiated a Crown-led Rights Impact Assessment. However, this process lacks collaboration with WTFNs, sufficient time for First Nation governance processes to be integrated into the RIA framework, and is not informed by a requested gap analysis, Indigenous Knowledge Study, or Cumulative Effects Assessment. MSIFN notes that MSIFN has had to engage legal counsel to work closely with staff to engage with CNSC staff on the various RIA

Commented [DL8]: Note to MSIFN - all comments / concerns about the RIA that MSIFN submitted from their review of the Consultation Report have been included here.

Please feel free to adjust the language or re-write to ensure it captures your concern. We have also included MSIFN's request for consent in this section.

Please provide any additional comments / concerns or feedback on the CNSC's approach to consultation in this section, if you are interested. We can also include MSIFN views on this in the supplemental submission in advance of the hearing, if that is preferred?

Commented [C9R8]: The inclusion of MSIFN's perspectives is appreciated. However, this information should be mentioned in the above section as well, when the CNSC is indicating that MSIFN will be collaborating on the RIA. It is important for readers to have the proper context, during the introduction, that the process has not been collaborative.

issues. MSIFN’s position is that any RIA determinations will impact MSIFN and all WTFN interpretation of treaty rights for generations to come.

MSIFN’s view is that the RIA is being initiated and drafted by the CNSC, with MSIFN only having the opportunity to comment. This approach is not collaborative, and again, does not provide MSIFN with sufficient time to accurately assess the impacts of the proposed projects on MSIFN’s rights. MSIFN does not agree with the chosen approach. MSIFN will continue to reject the RIA approach being forced upon the Nation by the CNSC without meaningful consultation.

CNSC staff response to MSIFN’s concerns regarding the RIA consultation process:

CNSC staff note that additional information regarding the Mississaugas of Scugog Island First Nation concerns about the RIA framework is included in their letter dated January 11, 2024 in Appendix A. CNSC staff’s responses to the many of the concerns raised regarding the approach and path forward on the RIA is included in the CNSC response letter dated January 24, 2024 included in Appendix A.

CNSC staff are committed to continuing to work with MSIFN on a path forward for collaboration on the RIA.

2 Asserted or established Indigenous and/ or Treaty rights in the Project Area

The DNNP is proposed to be constructed within the Darlington Nuclear Generating site on the north shore of Lake Ontario, approximately 15 KMs from Oshawa Ontario. The proposed DNNP is located on Michi Saagiig Anishinaabeg lands, waters and the Williams Treaties First Nations territory.

The Williams Treaties First Nations (WTFNs) consist of Hiawatha First Nation, Alderville First Nation, Curve Lake First Nation, Beausoleil First Nation, Mississaugas of Scugog Island First Nation, Chippewas of Georgina Island First Nation and Chippewas of Rama First Nation. In 2018, a settlement agreement was reached between the 7 First Nations that adhered to the Williams Treaties and Governments of Canada and Ontario. The settlement agreement formally recognizes the pre-existing Treaty harvesting rights of the Williams Treaties Signatories members to hunt, trap, fish and gather for food, social and ceremonial purposes within the portions of their traditional territories covered by Treaties No. 5, 16, 18, 20, and 27-271/4 that lie outside of Clauses 1 and 2 of the Williams Treaties. The Settlement Agreement also included a statement of apology from the Government of Canada for the negative impacts of the 1923 Williams Treaties on the Williams Treaties First Nation³. The lands where the DNNP is proposed are covered by

³ Statement of Apology for the Impacts of the 1923 Williams Treaties: [Statement of Apology for the Impacts of the 1923 Williams Treaties \(rcaanc-cirnac.gc.ca\)](https://www.rcaanc-cirnac.gc.ca)

the Johnson-Butler Purchase, also referred to as the “Gunshot Treaty” (1787-88), the Williams Treaties (1923), and the lands that were subject to the settlement agreement. Figure 1 below shows a map of the Williams Treaties territory.

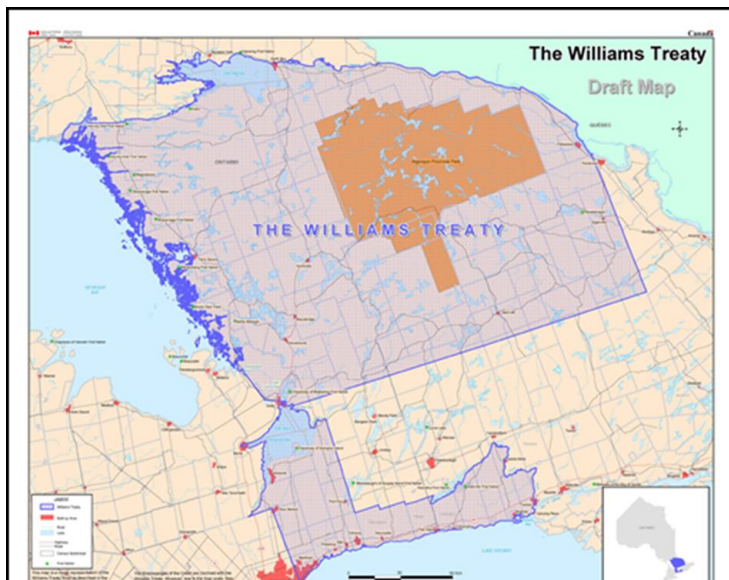


Figure 1 Map of the Williams Treaties

Commented [LD10]: Note to MSIFN - the map referred to in the version of the consultation report originally reviewed by MSIFN is now included below, in the body of the report rather than an appendix.

Please let us know if MSIFN has any additional or alternative maps that they would like to include in the report.

Commented [DR11R10]: This map is missing areas covered by the Williams Treaties - MSIFN is making efforts to engage with treaty researchers and other WTFNs to establish new mapping. This mapping will not be available for at least another year.

3 Identification of Indigenous Nations and communities

Commented [LD12]: New section

CNSC staff conducted research to identify which Indigenous Nations and communities potential or established Indigenous and/or treaty rights may be adversely affected by the licensing decision. The Indigenous Nations and communities have been identified based on analysis conducted using Crown Indigenous Relations and Northern Affairs Canada (CIRNAC) Aboriginal and Treaty Rights Information System (ATRIS) and other mapping and database tools, as well as through a review of existing CNSC and publicly available resources including CNSC records and previous interventions and submissions by Indigenous Nations and communities who may have expressed interest in OPG’s DNNP in the past.

CNSC staff identified the following Indigenous Nations and communities who have Indigenous and/or Treaty rights in the area where the DNNP is proposed:

- Alderville First Nation
- Curve Lake First Nation
- Hiawatha First Nation
- Mississaugas of Scugog Island First Nation

- Beausoleil First Nation
- Chippewas of Georgina Island First Nation
- Chippewas of Rama First Nation

In addition, CNSC staff have identified the following Indigenous Nations and communities that have expressed an interest in the DNNP:

- Saugeen Ojibway Nation
- Mohawks of the Bay of Quinte
- Métis Nation of Ontario
- Six Nations of the Grand River

This determination is a preliminary assessment that can be adjusted based on information received from Indigenous Nations and communities throughout the lifecycle of the project, should it proceed.

4 Participant Funding Program

Commented [LD13]: New section

In order to facilitate the participation of Indigenous Nations and communities in the DNNP licensing and regulatory review process, CNSC staff made funding available to all potentially interested Indigenous Nations and communities through its Participant Funding Program (PFP) on multiple occasions. In total, the CNSC has allocated approximately \$271,059.21, as shown in Table 1, to support the participation of Indigenous Nations and communities in the DNNP licensing and regulatory review process for the Project. Additional funding was provided to members of the public and stakeholders, as described in the DNNP Licence to Construct Commission Member Document.

Three stages of funding have been made available:

Stage 1 – Participant funding to support the review of OPG’s environmental impact statement review document and plant parameter envelope for the DNNP and participate in meetings and a workshop with CNSC staff. This participant funding opportunity was open for applications from October 24 to December 2, 2022.

Stage 2 - Participant funding to support review of CNSC Staff’s and OPG’s submission and participate in the Commission hearing on the applicability of the DNNP environmental assessment and plant parameter envelope to OPG’s selected reactor technology. This participant funding opportunity was open for applications from April 3 to May 26, 2023.

Stage 3 - Participant funding to support review of CNSC Staff’s and OPG’s submission and participate in the Commission hearing for OPG’s application for a licence to construct for the DNNP. This participant funding opportunity was open for applications from October 10 to December 8, 2023.

Table 1 Participant funding approved for the DNNP regulatory process.

Indigenous Nation or community	Stage 1 approved funding	Stage 2 approved funding	Stage 3 approved funding	Total approved funding
Curve Lake First Nation	Did not apply	\$8,030*	\$15,779.72	\$23,809.72
Hiawatha First Nation	\$8,250	\$20,790	\$26,015.88	\$55,055.88
Mississaugas of Scugog Island First Nation	\$19,281.90	\$18,233.93	\$26,099.58	\$63,615.41
Saugeen Ojibway Nation	\$21,231.20	\$21,231.20	\$22,975.80	\$65,438.20
Métis Nation of Ontario	\$12,800	\$13,200	\$19,140	\$45,140
Six Nations of the Grand River	\$7,500	Did not apply	Did not apply	\$7,500
Chippewas of Georgina Island First Nation	Did not apply	\$2,750*	\$7,750	\$10,500
Total				\$271,059.21

*The CNSC awarded funding to Curve Lake First Nation and Chippewas of Georgina Island First Nation to meet with CNSC staff to discuss the applicability of the DNNP environmental assessment and plant parameter envelope to Ontario Power Generation's selected BWRX-300 Small Modular Reactor technology.

5 CNSC staff's Consultation Activities

In order to fulfill the CNSC's consultation obligations for this specific licensing decision under the NSCA, CNSC staff sent early notification of the expected DNNP Licence to Construct application in May 2022 and since then have CNSC staff continued to provide multiple opportunities throughout the regulatory process for dialogue and collaboration with Indigenous Nations and communities about their concerns and areas of focus/interests related to the DNNP Licence to Construct application through multiple phone calls, correspondence, open houses, workshops, regular meetings and meetings with leadership and community representatives, as well as through the provision of funding and capacity support. Additional information about the specific consultation and engagement activities with each identified Indigenous Nation and community is provided in the section below specific to each identified Indigenous Nation and community.

CNSC staff provided regular updates to interested each identified Indigenous Nations and communities as part of its consultation efforts, to keep them informed of key

13

Commented [DR14]: The tables here should specifically identify when CNSC staff first provided each FN with information about the proposed Rights Impact Assessment

Commented [DL15]: MSIFN feedback

developments and to solicit their feedback and perspectives on the Project, the potential impacts to Indigenous and / or Treaty rights as well as the regulatory review and consultation processes. CNSC staff offered opportunities for a collaborative approach to reviewing and commenting on relevant sections of the Consultation Report, including the issues tracking tables in Appendix B, as well as CNSC staff are also aiming to collaboratively drafting-draft project specific Rights Impact Assessment (RIA) reports, however MSIFN has expressed concerns with the process being followed, as included in Section 1.4.1. and issues and concerns tables. Additional information regarding the RIA process, including concerns raised by Curve Lake First Nation, Hiawatha First Nation and the Mississaugas of Scugog Island First Nation is included in Section 7 of this report.

Commented [LD16]: Note to MSIFN - CNSC staff have updated the language here to note CNSC staff are **aiming** to collaboratively draft RIAs, and noted that additional context, including concerns raised are included in Section 7.

The views MSIFN has expressed in their comments on the report, related to the RIA, are also included in the MSIFN feedback section.

Commented [C17R16]: Additional language added to clarify.

CNSC staff have also been consulting with the identified Indigenous Nations and communities on an ongoing basis concerning nuclear projects and activities at the Darlington site and have Terms of Reference in place for long-term engagement with several of the identified Indigenous Nations and communities — including with Hiawatha First Nation, Curve Lake First Nation, the Mississaugas of Scugog Island First Nation, Saugeen Ojibway Nation and the Métis Nation of Ontario. The Terms of References provide a forum for collaboration and a structure for regular meetings and dialogue to address areas of interest or concern regarding CNSC-regulated facilities and activities, including the DNNP.

During these recurring meetings and discussions, CNSC staff provided updates specific to the DNNP and licence to construct application, reminders of upcoming engagement activities, deadlines and had discussions regarding interests, concerns and potential impacts on Indigenous and/or Treaty rights in relation to the proposed Project. CNSC staff have offered to and have held multiple DNNP specific meetings to discuss issues of concern, and to collaborate proactively on an approach to consultation and engagement for the DNNP regulatory process, including the Licence to Construct application. CNSC staff have also provided multiple opportunities to apply for participant funding to support participation at every phase and step of the DNNP regulatory review process. All identified Indigenous Nations and communities have been encouraged to participate in the regulatory review process, as well as the Commission’s public hearing process, to advise the Commission of any concerns they may have with respect to the construction of the DNNP.

CNSC staff invited all identified Indigenous Nations and communities to attend public workshops and webinars and, in addition, have provided multiple opportunities to meet directly with CNSC staff throughout the review process to discuss DNNP, the applicability of the EA to OPG’s chosen technology and the licence to construct application and address any issues, items of concern, questions, or comments.

Table 2 contains a summary of the key general correspondence and opportunities to participate in the consultation and regulatory process for the Project. Appendix A includes copies of the key correspondence with each identified Indigenous Nations and communities. Additional information about the specific consultation and engagement

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activities with each Indigenous Nation and community is provide in the section below specific to each Indigenous Nation and community.

Table 2 Summary of the general correspondence and opportunities to participate in the consultation and regulatory process.

Date	Indigenous Nation or community	Correspondence / Activity
May 2022	Alderville First Nation Curve Lake First Nation Hiawatha First Nation Mississaugas of Scugog Island First Nation Beausoleil First Nation Chippewas of Georgina Island First Nation Chippewas of Rama First Nation Mohawks of the Bay of Quinte Métis Nation of Ontario	On May 13, 2022, CNSC staff sent email correspondence providing advance notice of OPG’s expected Licence to Construct application and provided information about early and ongoing engagement opportunities.
June and July 2022	Alderville First Nation Curve Lake First Nation Hiawatha First Nation Mississaugas of Scugog Island First Nation Beausoleil First Nation Chippewas of Georgina Island First Nation	CNSC staff conducted follow up phone calls and emails multiple times throughout June and July 2022 to confirm receipt of the May 2022 correspondence and confirm whether there was interest in meeting to discuss the DNNP licence to construct application.

Date	Indigenous Nation or community	Correspondence / Activity
	<p>Chippewas of Rama First Nation</p> <p>Mohawks of the Bay of Quinte</p> <p>Métis Nation of Ontario</p>	
October 2022	All identified Indigenous Nations and communities	On October 20, 2022, CNSC staff provided notification of a DNNP webinar on November 15, 2022
October 2022	All identified Indigenous Nations and communities	On October 25, 2022 CNSC staff sent notification email regarding the availability of the first stage of PFP for the DNNP and offered to meet to discuss further.
November 2022	All identified Indigenous Nations and communities	<p>On November 23 and November 24, 2022, CNSC staff sent letters indicating that OPG had submitted an application for a Licence to Construct for the DNNP. These letters provided information about the Environmental Assessment process, the requirement for OPG to demonstrate how the selected technology (BWRX-300) fits within the bounds of the approved EA, as well as participant funding offered to review OPG's documents (EIS Review and PPE).</p> <p>Follow up phone calls were also conducted to ensure receipt of letter and re-iterate offer to meet to discuss any concerns or comments.</p>
December 2022	All identified Indigenous Nations and communities	On December 21, 2022, CNSC staff sent an email notification that OPG's PPE and EIS Review documents were available for review and comment on the "Let's Talk Nuclear Safety"

Date	Indigenous Nation or community	Correspondence / Activity
		website, and included an offer for each Nation to meet with CNSC staff.
February 2023	All identified Indigenous Nations and communities	On multiple dates in February 2023, CNSC conducted follow up phone calls and sent emails as a reminder that the CNSC was seeking feedback on OPG's two documents and offered to meet to discuss how the Indigenous Nation or community would like to be consulted moving forward throughout the DNNP regulatory review process.
February 2023	All identified Indigenous Nations and communities	On February 16, 2023, CNSC staff sent email invitations to attend the April 4, 2023 CNSC staff led DNNP public workshop. CNSC staff also offered to meet directly with each Indigenous Nation or community to discuss the DNNP and any questions or comments.
March 2023	All identified Indigenous Nations and communities	On March 9, 2023, CNSC staff sent reminder emails regarding the DNNP workshop and offered to meet directly to discuss the DNNP and the role of the CNSC for the regulatory review process for the confirmation of the applicability of the EA to OPG's chosen technology and licence to construct application.
March and April 2023	Hiawatha First Nation Mississaugas Of Scugog Island First Nation Saugeen Ojibway Nation	CNSC staff received written comments from the Mississaugas of Scugog Island First Nation, Hiawatha First Nation, and Saugeen Ojibway Nation on OPG's PPE and EIS Review documents. Comments received included questions and concerns related to the applicability of the EA as well as the licence to construct and the DNNP in general from the three First Nations listed.

Date	Indigenous Nation or community	Correspondence / Activity
		CNSC staff offered to meet with the Mississaugas of Scugog Island First Nation, Hiawatha First Nation, and Saugeen Ojibway Nation to discuss their concerns and comments further, and address the concerns to the extent possible.
April 2023	Mississaugas Of Scugog Island First Nation Curve Lake First Nation Hiawatha First Nation Six Nations of the Grand River	On April 4, 2023 CNSC staff sent emails after the CNSC DNNP public workshop thanking the Indigenous Nations and communities who participated in the workshop for their participation and perspectives. CNSC staff also extended an offer for subsequent meetings to continue discussing the comments and concerns raised during the workshop and in their written submissions. No meetings were held to specifically discuss the comments raised during the workshop or written submissions.
April 2023	All identified Indigenous Nations and communities	On April 3, 2023 CNSC staff sent email notifications that participant funding was available to support the review of CNSC staff's and OPG's CMD documentation, and support participation at the January 2024 Commission hearing regarding the applicability of the EA to OPG's chosen technology.
May 2023	All identified Indigenous Nations and communities	On May 17, 2023 CNSC staff sent email reminder of second stage of PFP available and the upcoming deadline for funding applications. On May 31, 2023, CNSC staff sent email notification of June 22, 2023 CNSC staff public webinar on the DNNP.

Date	Indigenous Nation or community	Correspondence / Activity
June 2023	Curve Lake First Nation Hiawatha First Nation	On June 16, 2023, CNSC staff hosted a public webinar to provide information on OPG's licence to construct application, an update on the CNSC's technical review, including the review of OPG's EIS and PPE and how to participate in the January 2024 public Commission hearing.
August 2023	All identified Indigenous Nations and communities	<p>On August 10, 2023, CNSC staff sent an invitation to CNSC's September 2023 Darlington Open public House held in Oshawa, Ontario. CNSC staff were available to discuss the regulatory process and oversight for Darlington Nuclear Generating Station, Darlington Waste Management Facility and the DNNP. The open house also provided an opportunity to answer any questions and discuss any comments or concerns related to the DNNP with CNSC staff.</p> <p>In the invitation, CNSC staff offered to meet directly with each Indigenous Nation and community to discuss the DNNP, if that was of interest.</p>
October 2023	All identified Indigenous Nations and communities	On October 4, 2023 CNSC staff sent an invitation to the October 31 st , 2023 CNSC staff public webinar on the DNNP.
October 2023	All identified Indigenous Nations and communities	On October 18, 2023, CNSC staff sent email notifications that participant funding (Stage 3) was available to support the review OPGs licence to construct application, to assist in the review of related documentation, and to support participation in a potential public hearing for the Commission to consider the application.

Date	Indigenous Nation or community	Correspondence / Activity
October 2023	Chippewas of Georgina Island First Nation Beausoleil First Nation Rama First Nation Mohawks of The Bay of Quinte Alderville First Nation	On multiple dates in October 2023, CNSC staff followed up with the Indigenous Nations and communities who had not recently responded to opportunities for consultation and engagement on the DNNP. Phone call and email to offer to meet to discuss the regulatory review process for DNNP, <u>including the applicability of the EA and an update on the CNSC's review of the Licence to Construct application</u> and any comments or questions. <u>No response was received.</u>
November 2023	All identified Indigenous Nations and communities	On multiple dates in November 2023 CNSC staff conducted follow up phone calls and sent emails as a reminder of the availability of the stage 3 of PFP funding. CNSC staff also offered to meet to discuss the DNNP, the steps in the regulatory review process, how to get involved and the CNSC's role.
January 2024	Curve Lake First Nation Hiawatha First Nation The Mississaugas of Scugog Island First Nation Saugeen Ojibway Nation	On January 23-25 2024, Indigenous Nations and communities participated in the Commission's January 2024 hearing regarding the applicability of the EA to OPG's chosen technology.
March 2024	All identified Indigenous Nations and communities	On multiple dates in March 2024, CNSC staff conducted follow-up phone calls and emails or raised at regularly scheduled meetings, an offer to meet to discuss OPG's Licence to Construct application, technical review and any comments and questions regarding the DNNP.

Commented [C18]: Is this an appropriate place to include that CNSC staff met with MSIFN leadership to discuss the DNNP on November 20th, 2023?

Date	Indigenous Nation or community	Correspondence / Activity
April 2024	All identified Indigenous Nations and communities	<p>On April 22, 2024, CNSC staff provided notification that the Commission had made a decision on the applicability of the environmental assessment to OPG's chosen technology for the DNNP.</p> <p>CNSC staff offered to set up a meeting to discuss the decision and next steps in the DNNP regulatory and consultation process.</p>

5.1 Consultation activities with the Mississaugas of Scugog Island First Nation

5.1.1 Background on Mississaugas of Scugog Island First Nation and Relationship with the CNSC

The Mississaugas of Scugog Island First Nation was included on all the key correspondence and opportunities for consultation and participation in the regulatory processes listed in Table 2 above. The Mississaugas of Scugog Island First Nation is a Mississauga Nation and is located approximately 50 km north of Oshawa, Ontario. The Mississaugas of Scugog Island First Nation has Indigenous and Treaty rights under section 35 of the *Constitution Act* and is a signatory to the Gunshot Treaty (1877-88), Williams Treaties (1923) and the Williams Treaties Settlement Agreement (2018). The Mississaugas of Scugog Island First Nation is actively engaged on all nuclear projects in their territory, including the [DNNP](#).

CNSC staff and the Mississaugas of Scugog Island First Nation signed a Terms of Reference for long-term engagement in March 2022. Since receiving OPG's Licence to Construct application in November 2022, regularly scheduled meetings under the TOR have often been used to discuss [and consult on](#) the DNNP. Additionally, CNSC staff offered to have DNNP specific meetings and/or consultation activities in addition to the regularly scheduled monthly meetings. CNSC staff have been having ongoing discussions with the Mississaugas of Scugog Island First Nation to better understand their project specific concerns and potential impacts to their Indigenous and/or Treaty rights. [Additional information about this is included in Section 7 of this report and in the Mississaugas of Scugog Island First Nation specific issues tracking table in Appendix B. Key correspondence related to the consultation activities below is included in Appendix A.](#)

Table 3 Summary of the key consultation activities the Mississaugas of Scugog Island First Nation

Commented [C19]: Please include here for reference that MSIFN is within the 50 km IPZ for both Pickering and Darlington NGS, and will be for the future DNNP.

Date	Consultation Activity
June 2022	On June 10, 2022, CNSC staff and the Mississaugas of Scugog Island First Nation had a meeting to provide an update on the DNNP. Questions and concerns raised included requests for information on opportunities to participate in OPG's review of the Environmental Impact Statement and OPG's waste management strategy.
January 2023	On January 10, 2023, the Mississaugas of Scugog Island First Nation was awarded PFP to support the review of OPG's environmental impact statement and plant parameter envelope for OPG's DNNP as well as participate in meetings and workshops with the CNSC.
March 2023	<p>On March 6, 2023, CNSC staff met with the Mississaugas of Scugog Island First Nation to discuss the history of the DNNP EA, a DNNP licensing review update, and an overview of OPG's EIS and PPE review findings.</p> <p>On March 20, 2023, the Mississaugas of Scugog Island First Nation submitted written comments on OPG's EIS review and PPE documents to the CNSC.</p>
April 2023	<p>On April 4, 2023, the Mississaugas of Scugog Island First Nation attended the the DNNP public workshop to discuss issues and concerns related to the DNNP.</p> <p>On April 4, 2023, CNSC staff followed up with the Mississaugas of Scugog Island First Nation following the workshop and offered to meet directly with the Mississaugas of Scugog Island First Nation to continue discussing concerns regarding the DNNP and next steps in the regulatory process. <u>Although a meeting was originally scheduled, the Mississaugas of Scugog Island First Nation requested the meeting be cancelled and a response to their concerns be provided in writing instead.</u></p>
July 2023	On July 11, 2023 Mississaugas of Scugog Island First Nation was awarded PFP to support reviewing the documentation on the applicability of the DNNP environmental assessment and plant parameter envelope to OPG's selected BWRX-300 small modular reactor technology, and in participating in the hearing process by providing topic-specific interventions to the Commission.
August 2023	On August 29, 2023, CNSC staff provided a written response with the CNSC's position with regards to the Mississaugas of

	<p>Scugog Islands comments related to the applicability of the EA and offered to meet to continue to work to address concerns, answer questions and discuss next steps in the DNNP regulatory review process.</p> <p>On August 24, 2023, Mississaugas of Scugog Island First Nation sent an email to CNSC staff asking questions regarding the waste management plans for DNNP.</p>
September 2023	<p>On September 21, 2023, CNSC staff provided written responses to the Mississaugas of Scugog Island First Nation comments and concerns regarding the waste management plans for the DNNP.</p>
October 2023	<p>On October 17, 2023, CNSC staff and the Mississaugas of Scugog Island First Nation had a meeting to discuss the Mississaugas of Scugog Island First Nation concerns with regards to DNNP waste management and provide answers and responses.</p> <p>On the October 10, 2023, monthly meeting, the Mississaugas of Scugog Island First Nation, raised concerns about the EA follow up program for the DNNP, asking if it remains valid. On November 3, 2023, CNSC staff provided a written response and offered to meet to discuss further and work to address the concerns.</p>
October 2023 to January 2024	<p>During regularly scheduled monthly meetings, CNSC staff and the Mississaugas of Scugog Island First Nation discussed the CNSC's Rights Impact Assessment (RIA) Framework with the goal of collaboratively drafting a Mississaugas of Scugog Island First Nation specific RIA for the DNNP Licence to Construct . Concerns regarding the RIA framework, including the timing and scope of the RIA and how cumulative effects would be considered in the assessment, were raised and discussed.</p>
November 2023	<p>On November 20, 2023, the Mississaugas of Scugog Island First Nation submitted an intervention for the DNNP hearing on the applicability of the EA.</p> <p>On November 21, 2023, CNSC staff and MSIFN had an in-person meeting with leadership, in their community. CNSC staff provided an overview of all nuclear facilities and activities in the Mississaugas of Scugog Island First Nation's Treaty territory, including the DNNP. CNSC staff and MSIFN staff and leadership discussed the DNNP, upcoming milestones and</p>

	<p>the comments and concerns that MSIFN had raised to date. This included discussions around MSIFN’s concerns about the RIA process, consent and OPG’s Environmental Monitoring and Follow up Program. In addition, MSIFN leadership and the CNSC discussed the specific commitments that MSIFN are discussing with OPG in order to address their concerns in relation to potential impacts of the DNNP on their rights and interests.</p>
January 2024	<p>On January 11, 2024, CNSC staff provided a written response to the Mississaugas of Scugog Island First Nation’s RIA concerns raised at monthly meetings and outlined a proposed path forward.</p> <p>On January 11, 2024, the Mississaugas of Scugog Island First Nation sent a letter to the CNSC reiterating their concerns with the RIA process and highlighting additional concerns. On January 24, 2024 CNSC staff responded to this letter and offered to meet to discuss the content further and to collaborate on options and solutions moving forward.</p> <p>On January 23, 2024, Chief Kelly LaRocca of the Mississaugas of Scugog Island First Nation participated orally in the DNNP Commission hearing on the applicability of the EA.</p>
January 2024 to May 2024	<p>During regularly scheduled monthly meetings, CNSC staff and Mississaugas of Scugog Island First Nation continued to discuss how the licence to construct application for the DNNP may impact their rights and interests, noting their concerns regarding the RIA framework. More information about Mississaugas of Scugog Island First Nation’s views on this will be included in the supplemental consultation information to be submitted prior to the Licence to Construct Commission Part-2 hearing.</p>
February and March 2024	<p>On February 2, 2024 CNSC staff shared the update on Consultation and Engagement for the DNNP report that the Commission had requested during the January 23-25th, 2024 Commission hearings. CNSC staff noted that they would be looking to work collaboratively with the Mississaugas of Scugog Island First Nation in the coming months to update and refine the information for the DNNP Licence to Construct application, should the project proceed.</p> <p>On February 16, 2024 the Mississaugas of Scugog Island First Nation submitted a letter to the CNSC, outlining concerns with the report that the CNSC submitted to the Commission, as per the Commission’s request for an update on consultation and</p>

	<p>engagement conducted since the submission of Staff's CMD. The Mississaugas of Scugog Island First Nation outlined their concerns that the report did not include the list of requests for mitigation and accommodation included in their oral and written interventions and that they did not have the opportunity to review the report before it being submitted to the Commission. CNSC staff responded by email and clarified the scope of the Commission's request and addressing their concerns.</p> <p>On March 4, 2024, the Mississaugas of Scugog Island First Nation submitted a second letter regarding the requested update on consultation and engagement report submitted by CNSC staff to the Commission. During the March 12, 2024 monthly meeting, CNSC staff and the Mississaugas of Scugog Island First Nation continued to discuss the Commission's request for both OPG and CNSC staff to submit additional DNNP Indigenous engagement report request from OPG and CNSC staff. CNSC staff reiterated the commitment to working together to address issues and concerns and ensure the Mississaugas of Scugog Island First Nation's views are reflected in the CNSC's consultation report and CMD to be submitted to the Commission for the Licence to Construct application.</p> <p>On February 29, 2024, CNSC staff sought feedback from the Mississaugas of Scugog Island First Nation on a summary table of the issues and concerns that the Mississaugas of Scugog Island First Nation raised regarding the Project to date during the consultation process for the DNNP, including -CNSC staff's and OPG's responses to the concerns.</p> <p>On February 19 2024, the Mississaugas of Scugog Island First Nation was awarded PFP to support reviewing the application from OPG for a licence to construct for the DNNP. This funding was also to assist in the review of related documentation and to support participation in a potential hearing for the Commission to consider the application.</p>
March 2024	<p>On March 22, CNSC staff offered to set up a DNNP specific meeting, to discuss the Mississaugas of Scugog Island First Nation's issues and concerns and next steps in the process. The Mississaugas of Scugog Island First Nation's confirmed that they would be interested in this meeting once the Commission's decision on the applicability of the EA to OPG's chosen technology is released is by the Commission.</p> <p>On March 27 2024, CNSC staff shared draft sections (Sections 2, 5, 5.1, 6, 7 and 8) of the DNNP consultation report for the</p>

	<p>Mississaugas of Scugog Island First Nation’s review. CNSC staff provided information about the approach to reporting to the Commission, including tentative timelines for the submission of supplemental <u>consultation</u> information (RIAs, updated issues tracking tables).</p> <p><u>On March 28, 2024, the Mississaugas of Scugog Island First Nation provided comments and feedback on the draft issues tracking table. CNSC staff offered to meet to discuss any of the Mississaugas of Scugog Island First Nation outstanding concerns and of the Mississaugas of Scugog Island First Nation confirmed their preference was to receive a written response first, followed by meetings as necessary.</u></p>
<p><u>April 2024</u></p>	<p><u>On April 9, 2024, CNSC staff shared a draft of the DNNP LtC RIA (chapters 1 -4.1) with the Mississaugas of Scugog Island First Nation for their review and feedback. CNSC staff offered to meet to discuss the RIA and any outstanding issues or concerns.</u></p> <p><u>At the April 9, 2024 MSIFN-CNSC monthly meeting, CNSC staff provided an overview of the status of the three documents (issues tracking table, consultation report and RIA) that the Mississaugas of Scugog Island First Nation were reviewing and providing feedback on as well as proposed next steps for consultation on the DNNP. CNSC staff noted that once the Mississaugas of Scugog Island First Nation reviewed the initial version of the RIA and updated issues tracking table it would be beneficial to have a tri-party meeting between OPG, CNSC staff and the Mississaugas of Scugog Island First Nation to discuss any outstanding concerns, potential impacts on rights and proposed mitigation to address the concerns. CNSC staff are in the process of setting up this meeting and additional information about the outcomes will be included in the CNSC’s supplemental consultation submission. CNSC staff also reiterated that they were open to meeting with the Mississaugas of Scugog Island First Nation at any time to discuss any concerns about the proposed next steps for consultation on the DNNP.</u></p> <p><u>The Mississaugas of Scugog Island First Nation confirmed that their legal team would review the RIA at each stage. The Mississaugas of Scugog Island First Nation also provided an update on the Indigenous Knowledge Study that CNSC staff and OPG committed to supporting, indicating that it would likely be a multi-year study done jointly between the Mississauga Nations (the Mississaugas of Scugog Island First</u></p>

	<p><u>Nation, Curve Lake First Nation, Hiawatha First Nation and Alderville First Nation).</u></p> <p><u>On April 18, 2024, the Mississaugas of Scugog Island First Nation submitted comments on Sections 2, 5, 5., 6, 7 and 8 of the Consultation Report to the CNSC. CNSC staff requested a meeting with the Mississaugas of Scugog Island First Nation to discuss their comments on the RIA process. This meeting occurred on May 13, 2024.</u></p> <p><u>On April 23, 2024, CNSC staff responded to the technical issues and concerns related to the DNNP that to the Mississaugas of Scugog Island First Nation indicated were outstanding. CNSC staff reiterated a commitment to working to address the concerns to the extent possible and offered to set up focused consultation meetings if there were specific topics MSIFN would like to discuss further.</u></p>
<p><u>May 2024</u></p>	<p><u>On May 13, 2024, CNSC staff and the Mississaugas of Scugog Island First Nation met to discuss their comments on the RIA process. CNSC staff provide background information and context about the RIA process, indicating that CNSC staff will be required to make a recoemndation to the Commission regarding the potential impacts on Indigenous and/or Treaty rights from the DNNP Licence to Construct decision to support the Commissions decision making. CNSC staff acknowledged that the timelines meant that the IK study currently being scoped out would not be completed to support the RIA that will be submitted prior to the Licence to Construct hearing. However, CNSC staff reiterated that CNSC staff are planning on a phased approach to the RIA, in that it will be an evergreen document that will be collaboratively updated at each phase of the DNNP regulatory process, should it proceed. CNSC staff also noted that the outcomes of the IK study and cumulative effects study help to inform an adaptive management approach and EA follow-up monitoring program, which will ensure the DNNP project and related activities would be protective of rights and interests. CNSC staff and the Mississaugas of Scugog Island First Nation also discussed concerns related to what will be considered in scope for the Licence to Construct application and therefore the assessment of impacts to rights. The Mississaugas of Scugog Island First Nation confirmed that their leaderships current preferred approach is to conduct the IK study in parallel to the DNNP regulatory process.</u></p> <p><u>CNSC staff also discussed opportunities to collaborate on the RIA, acknowledging Mississaugas of Scugog Island First Nation concerns with the process.</u></p>

	<p><u>The Mississaugas of Scugog Island First Nation confirmed that they would discuss the information provided by the CNSC regarding the RIA process, sequencing and opportunities for collaboration internally and would then confirm how they would like to proceed. Additional information about the outcomes of this and the approach taken for the RIA will be included in supplemental information submitted to the Commission in advance of the Part-2 hearing.</u></p> <p><u>CNSC staff incorporated the comments from Mississaugas of Scugog Island First Nation and on May 21, 2024 shared an updated version of the CNSC’s Consultation Report (executive summary and Sections 1, 2, 3, 4, 5, 5.1, 6, 7 and 8) and issues tracking table on XX date with the Mississaugas of Scugog Island First Nation to demonstrate how their feedback was addressed.</u></p>
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Commented [LD20]: To be updated

5.1.2 Key Issues and Concerns raised by the Mississaugas of Scugog Island First Nation

Information regarding key issues and concerns raised by the Mississaugas of Scugog Island First Nation specific to the DNNP is summarized below. Additional information about issues and concerns raised to date, CNSC Staff’s responses, CNSC Staff’s views on OPG’s responses and current status of the issues are included in the issues tracking table found in Appendix B.

1. Concerns about the plans for waste management at the DNNP and the storage of nuclear waste in their treaty territory. including MSIFN’s request for the requirement to obtain consent from MSIFN to build additional on-site nuclear waste facilities and store nuclear waste in the treaty territory.
2. Concerns about the potential for the DNNP to impact the environment, including Species at Risk, impacts on fish and fish habitat and the terrestrial environment. MSIFN is concerned about the existing measures (put in place by OPG) that aim to protect existing natural spaces on the DNNP lands. MSIFN is concerned about the existing measures (put in place by OPG) that aim to protect existing natural spaces on the DNNP lands. Due to inadequate information, MSIFN is unable to confirm the full extent of impacts, and unable to confirm if compensation measures are adequate.
3. Concern that the DNNP, if approved, will result in effects that will either directly or indirectly impact MSIFN member’s Inherent, Aboriginal and Treaty Rights, including contribution to cumulative effects on their Aboriginal and Treaty Rights.
4. Concerns regarding OPG’s engagement on permits required for the DNNP, including that on past permits MSIFN has not always been given all the information needed to assess impacts on rights.

Commented [DL21]: MSIFN feedback

Commented [LD22]: Note to MSIFN - added additional specifics here based on MSIFN’s feedback. The further details around the offsetting plans, long term protection of SAR and the shoreline protection are captured in the issues tracking table

5. Concerns regarding the proposed Environmental Assessment follow up program and the differences between CEAA 1992 and IAA 2019 requirements.
6. Concerns that the Williams Treaties First Nations were never consulted when the Darlington Nuclear Generating site and waste management facility was established and requests for OPG to be required to obtain their consent for the DNNP.

Commented [LD23]: MSIFN feedback

The Mississaugas of Scugog Island First Nation have requested the following mitigation and accommodation measures:

1. The Commission require CNSC and OPG to fund an Regional Indigenous Knowledge Study that is designed and undertaken by interested Williams Treaties First Nations
2. The Commission require CNSC and OPG to work collaboratively with MSIFN, CLFN and HFN to co-develop and undertake a Cumulative Effects Assessment to understand how nuclear activities have cumulatively impacted our territories, and our ability to exercise our Inherent, Aboriginal and Treaty rights.
3. The Commission require CNSC to work collaboratively with our Nations to develop and undertake a Rights Impact Assessment, that, at a minimum is informed by the Gap Analysis, Regional Indigenous Knowledge Study, and Cumulative Effects Assessment. ~~require CNSC to work collaboratively with MSIFN, CLFN and HFN undertake a Rights Impact Assessment that, at a minimum, is informed by a gap analysis, Regional Indigenous Knowledge Study and Cumulative Effects Assessment~~
4. The Commission require OPG to work collaboratively with our Nations to co-develop, implement and participate in any Environmental Monitoring Plan or Program for the Darlington New Nuclear Project. OPG to work with MSIFN, CLFN and HFN to implement and participate in any environmental monitoring plan or program for the DNNP
5. Ensure OPG engages and consults with MSIFN, CLFN and HFN on other Federal and Provincial permits related to the DNNP of interest to the Nations
6. Ensure OPG provides MSIFN, CLFN and HFN with information that has been requested to inform the assessment of impacts on Michi Saagig Rights.

Commented [DL24]: Note to MSIFN - feedback indicated to reflect exactly what was requested. However other feedback requested to remove "regional" from in front of Indigenous Knowledge study. Please confirm whether it should be included here.

Commented [U25R24]: Confirmed.

MSIFN has also made the following requests and are of the view that they remain unresolved. CNSC staff are committed to working with MSIFN and OPG to resolve and address these requests and concerns.

1. The CNSC require OPG to obtain consent from MSIFN and other Williams Treaties First Nations (WTFN) for the Project prior to issuing a license to construct.
2. The CNSC require OPG to work collaboratively with WTFN to develop and undertake a gap analysis to understand how the impacts of the DNNP, including the BWRX-300 SMR technology would be understood through current standards and the WTFN settlement agreement, utilizing the Impact Assessment Act, 2019 as a foundational standard for inclusion of Indigenous Knowledge into the analysis and to ensure Indigenous participation in decision making. ~~OPG to~~

complete a gap analysis between the JRP EA and the current Federal Impact Assessment Act, 2019 (IAA) requirements.

3. The CNSC and OPG provide MSIFN with greater clarity and a plan for nuclear waste, including waste that could be produced by the DNNP, as well as obtain consent from MSIFN and other WTFN for the storage of new nuclear waste, including waste that could be produced by the DNNP.
4. The CNSC mandate a follow-up program (in line with the current IAA framework) to be completed by OPG in collaboration with interested WTFNs. MSIFN request that CNSC and OPG work collaboratively with WTFN to develop and undertake a Cumulative Effects Assessment, as part of an EA Follow-up Program consistent with the approach of the Impact Assessment Act, 2019, to understand how nuclear activities have cumulatively impacted our territories, and MSIFN's ability to exercise our Inherent, Aboriginal and Treaty rights
5. The CNSC and OPG Commit to Meeting with Leadership to Review International Best Practices for the management and storage of used nuclear fuel at reactor sites with current practices at the Darlington site.
6. The CNSC require OPG to establish a restoration fund that would facilitate projects on lands within and outside of OPG Darlington's site control, in collaboration with First Nations, and other governments.

5.1.3 CNSC staff's response

CNSC staff acknowledge the issues and concerns that the Mississaugas of Scugog Island First Nation has raised to date related to the DNNP. CNSC staff have worked to understand, assess and address the concerns to the greatest extent possible by having focused discussions and consultation, providing detailed responses, reflecting the Mississaugas of Scugog Island First Nation's views in CNSC's documentation (including this report, issues tracking table the RIA), communicating the Mississaugas of Scugog Island First Nation's concerns to OPG and discussing the DNNP at regularly meetings with the Mississaugas of Scugog Island First Nation to better understand their concerns and identify commitments, mitigation and a path forward to addressing the concerns related to the DNNP Licence to Construct application. Information regarding specific responses to each of the Mississaugas of Scugog Island First Nation's concerns are included in the issues tracking table found in Appendix B.

In summary, CNSC staff are committed to:

1. Continuing to discuss the requests for mitigation and accommodation that MSIFN has raised, including with OPG as appropriate.
2. Collaborating with the Mississaugas of Scugog Island First Nation and interested Williams Treaties First Nations and OPG on supporting an Indigenous Knowledge Study and Land Use study specific to the DNNP to help gather more specific Indigenous Knowledge information and data regarding Williams Treaties First Nations rights and interests that could be potentially impacted by the DNNP and other projects in the treaty territory. The results of these studies can then help to inform an adaptive management approach and OPG's EA follow-up monitoring

program, such that the proposed DNNP project and related activities would be protective of their rights and interests.

3. CNSC staff are supportive of OPG and potentially impacted Williams Treaties First Nations working collaboratively on the scoping and implementation of a cumulative effects study. CNSC staff are open to [providing funding and supporting this study to help inform OPG's EA follow-up monitoring program and future RIAs as appropriate.](#)
4. Ongoing engagement [and consultation](#) with the Mississaugas of Scugog Island First Nation for this Project including discussions through the TOR for long-term engagement between the CNSC and the Mississaugas of Scugog Island First Nation, as well as ongoing involvement of the Mississaugas of Scugog Island First Nation in the CNSC's Independent Environmental Monitoring Program (IEMP) and collaboration on ongoing oversight of commitments and protection of the environment and their rights and interests for the broader Darlington Site.

CNSC staff are aware that OPG has been engaging with the Mississaugas of Scugog Island First Nation to better understand their concerns and work on collaborative ways to address or mitigate the concerns. In response to the request for mitigation and accommodation raised at the January 23-25, 2024 Commission hearing, CNSC staff are aware that OPG has committed to continuing to discuss with MSIFN:

1. The potential for a restoration fund;
2. Updating their environmental monitoring program to consider and reflect new best practices and standards, [such as incorporating Indigenous Knowledge](#) and;
3. providing additional clarity on waste management and scoping MSIFN's request for a review of international best practices for management and storage of nuclear waste.

CNSC staff are aware that OPG is working with interested Williams Treaties First Nations, including the Mississaugas of Scugog Island First Nation to support an Indigenous Knowledge- [Study and Land-use study](#). CNSC staff understand that OPG is currently working with interested Williams Treaties First Nations to scope the study and plan to begin implementation by the end of 2024.

CNSC staff encourages OPG to continue discussions and collaboration with the Mississaugas of Scugog Island First Nation to address their concerns regarding waste management ~~concerns~~, cumulative and legacy effects, including collaboration on the scoping of a potential cumulative effects study as it relates to the DNNP and other OPG nuclear operations in Williams Treaties First Nations' territory. [CNSC staff anticipate receiving an update from OPG on their engagement efforts, in an Indigenous Engagement Report to be filed on the record.](#)

5.1.4 Conclusions

CNSC staff are committed to continuing to work collaboratively with the Mississaugas of Scugog Island First Nation and OPG to address the concerns and requests they have raised to date. This includes ~~completing aiming to collaboration~~ [collaborate](#) on the [CNSC-led](#) Rights Impact Assessment and to address their issues and concerns raised to

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date. As well as ensuring that OPG follows through and implements commitments made to date to address their specific requests and concerns. Updated information about the potential impacts of the DNNP Licence to Construct application on the Mississaugas of Scugog Island First Nation’s Indigenous and/ or Treaty rights and mitigation and/ or accommodation measures to address any identified impacts will be included in the supplemental information, to be submitted to the Commission prior to the Licence to Construct hearing.

6 Engagement led by OPG

REGDOC-3.2.2 – Indigenous Engagement sets out requirements and guidance for licensees whose projects may raise the Crown’s duty to consult. While the Crown cannot delegate the duty to consult and is ultimately responsible for ensuring the discharge of the duty to consult, and where appropriate, accommodate, is fulfilled, the Commission may consider the engagement undertaken by OPG when determining whether consultation has been adequate. The information collected by OPG, including measures proposed by OPG to avoid, mitigate, or offset potential adverse impacts from the proposed DNNP are used to support the CNSC in meeting its consultation obligations.

CNSC staff have determined that REGDOC-3.2.2 applies to the DNNP licence to construct application. To date, OPG has been following the requirements and guidance of REGDOC 3.2.2, including the submission of an Indigenous Engagement Report to CNSC staff for review and assessment. In 2020, OPG submitted an Indigenous Engagement Report that covered the period of November 2018 to March 2020. OPG has since submitted multiple updates to their DNNP Indigenous Engagement Report, covering from April 2020 to November 2023. CNSC staff have reviewed this each version of the report and will continue to monitor and assess OPG’s engagement related to the DNNP. - and will continue to monitor and assess OPG’s engagement activities throughout the regulatory review process.

CNSC staff note that OPG has been engaging the identified Indigenous Nations and communities by holding meetings, hosting open houses, conducting workshops, site visits and ceremonies, sharing newsletters, and discussing issues and concerns and potential options to mitigate and address the concerns raised to date. OPG has offered capacity funding agreements to assist Indigenous Nations and communities in their engagement with OPG, where appropriate. CNSC staff recognise that OPG has long-standing relationships and engagement protocols with many of the identified Indigenous Nations and communities.

OPG has demonstrated a flexible and adaptive approach to engagement and has worked to build relationships and meet the needs and expectations of interested Indigenous Nations and communities. As a part of their engagement process for the DNNP, OPG has implemented a number of best practices, including early engagement on the technology selection process and on the EIS Review prior to its submission to the CNSC.

Commented [LD27]: Note to MSIFN - if you would like to provide any feedback on OPG’s engagement to date related to the DNNP, we will include that here.

There will also be an opportunity to provide feedback on OPG’s engagement to be included in the supplemental submission prior to the hearing, if that is preferred.

Commented [DL28]: Note to MSIFN - Feedback from MSIFN was that they should be able to identify if their needs have been met.

CNSC staff have adjusted the language in this section - CNSC staff’s final conclusions and assessment related to OPG’s engagement will be included in the supplemental submission, as opposed to this version. This assessment will be based on information provided by OPG and any feedback from MSIFN or other WTFNs

OPG provides regular updates to CNSC staff regarding its engagement activities and has sought to include the CNSC in its engagement activities, where appropriate and agreed by each Indigenous Nation or Community. CNSC staff acknowledge that Indigenous Nations and communities have raised concerns through OPG's engagement process about the DNNP, including the potential for impacts on hunting, fishing, and harvesting in the areas surrounding the site, as well as the need to involve Indigenous Nations and communities in environmental monitoring programs and reflect their knowledge and perspectives. CNSC staff are also aware that MSIFN leadership has repeatedly called for OPG to secure consent before advancing the project, including the storage and transportation of nuclear fuel and waste.

Commented [DL29]: MSIFN feedback

OPG is in discussions with representatives of the Williams Treaties First Nations to develop a pathway forward that includes a scoping exercise in early 2024 to begin to develop a plan framework to undertake an Indigenous Knowledge Study, which could include or lead to a cumulative effects study, a rights impact assessment and opportunities to identify and address the options for greater involvement and engagement in OPG's environmental monitoring and follow-up programs, which would be informed by current approaches and best practices. MSIFN has noted that the WTFNs have only recently begun scoping the Indigenous Knowledge Study and the inclusion of a cumulative effects study, rights impact assessment, and other opportunities are yet to be determined.

Commented [DL30]: MSIFN feedback

CNSC staff note that OPG has a well-established Indigenous engagement program that meets all of the requirements and guidance specified in REGDOC 3.2.2, by engaging and responding to the identified Indigenous Nations and communities. OPG continues to work to support and maintain relationships with Indigenous Nations and communities and is working to address items of concern and requests related to the DNNP. CNSC staff also sought feedback from Indigenous Nations and communities with regards to their perspectives on OPG and CNSC staff's engagement with them to date in relation to the DNNP. Each community's perspectives and views are summarized in their respective community specific section above. To date, CNSC staff are satisfied with OPG's engagement plans and activities and CNSC staff encourages OPG to continue to discuss issues and concerns raised by Indigenous Nations and communities, including the proposed mitigation measures and commitments, to address any potential impacts to Indigenous and/or Treaty rights, as appropriate. CNSC staff's final conclusions and assessment on OPG's engagement related to the DNNP Licence to Construct application will be included in the supplemental submission prior to the DNNP LtC Part 2 hearing

7 Approach and update on assessment of Impacts to Indigenous and/ or Treaty rights

In support of the CNSC's consultation obligations and process for OPG's LtC application for the DNNP, CNSC staff and interested Williams Treaties First Nations are considering and assessing potential impacts to Indigenous and /or Treaty rights related to the Project, by completing Rights Impact Assessments (RIAs) in collaboration with Curve Lake First Nation, Hiawatha First Nation and the Mississaugas of Scugog Island First Nation with

Commented [LD31]: Note to MSIFN: Added this based on feedback regarding the language and that the potential impacts on rights will be considered and assessed by WTFNs, included MSIFN.

As discussed previously with MSIFN, CNSC staff are required to make a determination and recommendation to the Commission. The goal is to do this collaboratively and to come to a mutual understanding.

However, if CNSC staff and MSIFN have differing views and outcomes of the assessment, both will be included in the report and shared with the Commission

Commented [U32]: Same comment as above. Please remove language around collaboration on the RIA.

[support from OPG as appropriate](#). For the other Williams Treaties First Nations, CNSC staff did not obtain information through OPG's engagement or CNSC staff's consultation that identified any potential impacts to their Indigenous and/or Treaty rights as a result of the Project, to date.

The purpose of an RIA is to assess the potential pathways and severity of impacts of the proposed Project on the exercise of Indigenous and/or Treaty rights of an Indigenous Nation or community, based on existing information, data and analysis, including Indigenous Knowledge, perspectives and views when provided and shared [by the Indigenous Nation or community](#). The RIA also helps to summarize any potential mitigation and/or accommodation measures committed to by the proponent, the CNSC and other parties as appropriate, that could help to avoid, mitigate, reduce, or accommodate for any identified impacts and communicate the process, outcomes and recommendations in a collaborative way to the Commission in support of its decision-making process.

As described in Section 5 "Consultation led by CNSC staff" CNSC staff have had discussions [and consulted](#) with Curve Lake First Nation, Hiawatha First Nation and the Mississaugas of Scugog Island First Nation the regarding the proposed approach to assessing potential impacts on their Indigenous and/or Treaty rights in relation to the DNNP LtC application.

Concerns regarding the CNSC's RIA framework, process and timelines were raised in discussions with each [of the potentially impacted Nations](#), including the timing for finalizing the RIA, existing gaps in the information required to conduct a fulsome RIA, concerns with regards to how cumulative effects are considered and assessed and the baseline being considered for the assessment. Additional details about the concerns raised by each Nation and CNSC's responses are included in the issues tracking tables in Appendix B-and the Mississaugas of Scugog Island First Nation letter dated January 11, 2024 (CNSC responses letter dated January 24, 2024) in Appendix A.

Through discussions with Curve Lake First Nation, Hiawatha First Nation and the Mississaugas of Scugog Island First Nation, it was determined that CNSC staff would draft the RIAs specific to the DNNP LtC application and provide drafts to each First Nation for their review, input and to support ongoing [discussion-consultation](#) regarding potential impacts and measures and commitments to address them to the greatest extent possible. On April ~~XX9~~, [2024](#), CNSC staff shared an initial draft of the RIAs with Curve Lake First Nation, Hiawatha First Nation and the Mississaugas of Scugog Island First Nation for their review and input.

In order to provide additional time for CNSC staff and each ~~these~~ [First Nations](#) to ~~collaborate on the drafting and finalization of~~ [review](#) the RIAs, the reports and related conclusions and recommendations will be finalized and submitted to the Commission as part of CNSC staff's supplemental submission which will be submitted to the Commission and made public in advance of the DNNP LtC Commission hearing.

8 Conclusion and next steps

CNSC staff have aimed to conduct a thorough, transparent, flexible and collaborative consultation and regulatory process for OPG's DNNP Licence to Construct application. All identified Indigenous Nations and communities were provided with multiple opportunities to participate in the regulatory review and consultation process including funding support, comment periods, workshops, multiple meetings and project updates. ~~Indigenous Nations and communities who have raised issues and concerns related to the DNNP were offered opportunities to collaboratively development of the community specific consultation, and engagement sections of CNSC staff's Indigenous Consultation Report and issues tracking tables. Potentially impacted Indigenous Nations and communities were provided opportunities to, the completion collaborate on of project~~ specific RIAs, as well as discussions with OPG and Indigenous Nations and communities regarding potential options and commitments to address and mitigate concerns and potential impacts raised.

CNSC staff ~~have will continue to monitored and assessed~~ OPG's engagement activities throughout the regulatory review process as per REGDOC 3.2.2. and ~~Staff's conclusions and assessment on OPG's engagement related to the DNNP Licence to Construct application will be included in the supplemental submission prior to the DNNP LtC Part 2 hearing are satisfied with the level of engagement, communications and collaboration with Indigenous Nations to date.~~

An update on consultation efforts with all identified Indigenous Nations and communities, as well as updated issues tracking tables, will be submitted to the Commission as part of CNSC staff's supplemental submission as part of the public record for the DNNP the Licence to Construct hearing.

Additionally, ~~CNSC staff continue to work collaboratively with the Mississaugas of Scugog Island First Nation, Curve Lake First Nation and Hiawatha First Nation on Project specific Rights Impact Assessments. The final reports, will include CNSC staff and the Indigenous Nations views on potential impacts on rights Indigenous and/or Treaty rights and mitigation and/or accommodation measures to address any identified impacts will be included in the supplemental information, to be submitted to the Commission prior to the Licence to Construct hearing.~~

~~The finalized RIAs, issues and concerns tables and additional consultation activities, including collaborative efforts with each potentially impacted Indigenous Nation and OPG with regards to identifying, and agreeing to specific measures and commitments to address identified concerns and impacts to rights and interests to the greatest extent possible, will help to inform CNSC staff's conclusions and recommendations to the Commission with regards to the adequacy of consultation and engagement for the DNNP Licence to Construct application.~~

Commented [U33]: Same comment as above. "CNSC staff continue to draft project specific RIAs..." would be more accurate.

Commented [DL34]: Note to MSIFN - MSIFN's feedback indicated that this should be included in the above section as it provides information about the purpose of the RIA.

However, CNSC staff view is that this information is already included in the section above, in more detail, and this summarizes it for the conclusion. If there is a specific aspect that MSIFN does not feel is captured above, please let us know.

CNSC staff's final conclusions and recommendations with regards to consultation and impacts to Indigenous and/or Treaty rights will be provided as part of the supplemental submission, prior to the DNNP Licence to Construct application Commission hearing.

Mississaugas of Scugog Island First Nation & CNSC Staff Meeting

Tuesday September 3rd, 2024
Virtual (MS Teams)

CNSC Attendees	Mississaugas of Scugog Island First Nation First Nation (MSIFN) Attendees
<ul style="list-style-type: none">• Adam Levine – Team Lead, CNSC Consultation Team• Drew Henkel – Student, CNSC Consultation Team• Joanne Gordon- Legal Counsel, CNSC	<ul style="list-style-type: none">• Sam Shrubsole• Scott Stoll – Legal Counsel• Kate Piggott – Babony – Legal Counsel• Kayla Ponce de Leon• Don Richardson

Agenda

1. Welcome and introductions.
2. Discuss the following four options for assessing potential impacts on rights from the DNNP LTC application and reporting to the Commission by December 2024:
 - a. Continue with the current draft Rights Impact Assessment (shared with MSIFN in April 2024)
 - b. Consider different reporting and assessment style – for example, use of different terminology and a narrative based severity assessment rather than a decision matrix (such as the one in the Annex in the draft rights impact assessment (RIA) shared previously)
 - c. Other options proposed by MSIFN – CNSC staff are open to taking a different approach based on feedback from MSIFN
 - d. CNSC staff and MSIFN conduct separate assessments - CNSC staff conduct assessment of impacts on rights based on information available to us at this stage and MSIFN provides their assessment in their intervention (least preferred from CNSC staff's perspective)
3. Discuss issues and concerns from MSIFN about the proposed approach and options to address them
4. If possible, confirm preferred approach and next steps

Meeting Notes

Topic	Discussion
Rights Impact Assessment (RIA)	<p>CNSC Staff provided an overview of the context around the Commission's obligation as an Agent of the Crown and the decision-making authority for the DNNP LTC application to consult potentially impacted Indigenous Nations, including MSIFN to understand their rights in the project area how the project could impact the exercise of their rights and how potential impacts could be mitigated and potentially accommodated.</p> <p>CNSC staff provided an overview of the different options available to assess and understand how the project could potentially impact MSIFN's rights and report that to the Commission.</p>

	<p>CNSC staff asked MSIFN representatives for their feedback on the preferred method of consultation and engagement going forward, including a preferred approach to assessing, documenting and communicating the project’s potential impacts on the rights and interests and measures to address those concerns.</p> <p>CNSC staff indicated that they are seeking feedback from MSIFN on whether rights practices such as those pertaining to fishing, water quality, air quality, subsurface resource management are of concern to MSIFN as it relates to the DNNP and how we can articulate/summarize any relevant data gaps with regards to MSIFN’s rights and interests in the area, were discussed. These are areas of importance to discuss and summarize together and communicate to the Commission to help inform decision making. CNSC staff noted that staff’s submission deadline (supplemental Commission Member Document (CMD)) for the January Commission hearing is early December. When questioned about the importance/legislated backing of an RIA, CNSC staff mentioned that a RIA is not a legislative requirement, but a tool developed as a best practice to help support the Crown in meeting its federal Duty to Consult requirements.</p> <p>Action: CNSC schedule follow up meeting to further discuss MSIFN preferred approach towards completing Rights Impact Assessment</p> <p>Action: MSIFN provide response to CNSC regarding preferred option on assessment and documentation of potential impacts to their rights and interests in relation to the DNNP.</p>
<p>RIA Report options</p>	<p>MSIFN representatives asked what options 2.b through 2.d for a RIA would consist of. CNSC staff noted for option 2.a for the RIA listed in the agenda would take the form of the draft RIA shared with MSIFN previously and continuing to work together on completing the assessment based on information available at this time. CNSC staff are open to taking different approaches to completing this assessment including one that is qualitative (narrative based), one that is more quantitative with specific data and information available from the Nation, or a mix of the two. The key point is that CNSC staff would like to collaborate with MSIFN on documenting their concerns with respect to the DNNP and how it could impact them and their community and potential measures and options to mitigate and accommodate those potential impacts and concerns.</p> <p>CNSC staff noted they have shared and can share again examples of past RIAs completed by the CNSC with Indigenous Nations. For example, the RIA completed for the Algonquin Nations in Quebec regarding the Near Surface Disposal Facility (NSDF) was highlighted as an instance of a qualitative narrative approach being utilized due to the Nation’s choice to not participate in consultation and engagement for the project. CNSC staff noted the RIA completed with the Algonquins of Pikwakanagan First Nation for the NSDF project was an example of a more quantitative and detailed RIA. CNSC staff noted that a hybrid approach was taken with Kebaowek First Nation and Kitigan Zibi First Nation for the same project when engagement occurred later in the project timeline and the report encompassed both qualitative narrative aspects, and a detailed quantitative approach</p>

	<p>CNSC staff indicated that they are open and flexible on the approach and would like some specific feedback and guidance from MSIFN on how we can collaborate on a path forward.</p> <p>No further deliberation on points 2c and 2d took place.</p>
Rights Determination Concerns	<p>MSIFN representatives spoke to concerns around how this assessment could impact future determination of their rights. CNSC staff stated that the CNSC is not a rights determining body and that its mandate is to understand, communicate and mitigate Nation’s concerns around proposed projects and that the CNSC is wanting to work with MSIFN to ensure that the way that the CNSC characterizes and communicates to the Commission regarding MSIFN’s concerns, rights and interests is accurate and agreed to by MSIFN. This work is needed by December 2024 in order to help inform the Commission’s decision making for the DNNP LTC.</p>
Phased Licensing Process	<p>MSIFN representatives raised concerns about the phased licensing approach currently used for projects regulated by the CNSC. MSIFN concerns centered on waste and how it is not captured in the current licensing step documentation and how focusing on current issues could create future problems. MSIFN noted that waste had been included in prior 2009 Environmental Assessment scope but is missing from current project assessment scope for the LTC. MSIFN commented that a process gap exists in respect to the 2009 EA and current impact assessment and suggested a gap assessment be conducted to identify gaps and a process developed to take action to fill them. CNSC staff stated that the current licensing phase does not permit radioactive material usage and would only authorize the construction of the DNNP and not the operation of it. Radioactive waste management would be captured in future licensing phases such as a License to Operate. CNSC staff noted that further phases of licensing will require consultation with MSIFN and other potentially impacted Nations, so issues relating to waste management in relation to the DNNP will be considered and discussed in detail as part of future phases of the regulatory review process.</p>
CNSC’s duty to consult obligations	<p>MSIFN representatives asked why it is CNSC who fulfills Duty to Consult, and not other agencies like NRCAN and IAAC. CNSC staff answered that the Commission is the decision maker and regulatory authority for the DNNP LTC application under the Nuclear Safety and Control Act and as an agent of the Crown is therefore responsible for fulfilling the Duty to Consult and Accommodate for this phase of the project as per the common law duty to consult under the Constitution Act, 1982. The Commission is a representative of the Crown regarding regulating the nuclear sector and must fulfill its consultation obligations prior to issuing a decision, which includes understanding, assessing and addressing where possible a nuclear project’s potential impacts on Indigenous or treaty rights.</p>
Shared rights impacts	<p>MSIFN representatives noted that Williams Treaties rights are held in collective nature amongst signatory nations, and that no one nation can discuss or make decisions pertaining to shared rights, and that RIA input should be a collaborative effort amongst Mississauga Nations. CNSC staff noted that Curve Lake First Nation and Hiawatha First Nation have stated a preference to work directly with CNSC staff on matters related to assessing potential impacts to their rights and interests and completing RIAs. MSIFN noted that they have never stated a desire to delay</p>

	<p>this decision, but feel the process is proceeding on a rushed timeline which doesn't allow for thorough consultation. CNSC staff are flexible and accommodating to each rights-bearing Nations' preferred approach, but requests clarity in communication from each Nation regarding their preference. MSIFN mentioned that they have contracted a consulting firm to interview elders and other nations to develop a governance approach to managing impacts related to projects, and that they are still awaiting this report.</p>
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Action Item Summary

Responsible Party	Action Item
MSIFN	Provide response to CNSC regarding preferred option on assessment and documentation of potential impacts to their rights and interests in relation to the DNNP.
CNSC	CNSC schedule follow up meeting to further develop MSIFN preferred approach towards completing Rights Impact Assessment

Draft Speaking notes for slides in CNSC staff's presentation at the Part 1 DNNP LTC hearing on October 2

Slide 1: Outline

In order to provide additional time to collaborate and consult with the Indigenous Nations and communities, CNSC staff have not yet made recommendations or conclusions regarding the:

- Potential impacts on rights
- Duty to consult and where appropriate accommodate
- OPG's engagement efforts

CNSC staff will be submitting a supplemental report to the Commission in advance of the Part 2 Licence to Construct hearing with this information.

In this presentation CNSC staff will provide information about the CNSC's approach to consultation, Treaty rights in the DNNP area, and an overview of the Indigenous Consultation and engagement conducted for OPG's licence to construct application. We will also provide information about commitments CNSC staff have made to date to address issues and concerns and next steps for consultation in advance of the Part 2 hearing.

Slide 2: Asserted or Established Indigenous and/or Treaty Rights

The DNNP site is located on Michi Saagiig Anishinaabeg lands, waters, and the Williams Treaties First Nations territory. The Williams Treaties First Nations consist of the Mississauga Nations of Hiawatha First Nation, Alderville First Nation, Curve Lake First Nation and, Mississaugas of Scugog Island First Nation as well as the Chippewas Nations of Georgina Island First Nation, Beausoleil First Nation and Rama First Nation. The lands where the DNNP is proposed are covered by the Johnson-Butler Purchase, also referred to as the "Gunshot Treaty" (1787-88), the Williams Treaties (1923), and the lands that ~~are~~ were subject to the Williams Treaties First Nations settlement agreement of 2018.

~~In 2018, a~~ The Williams Treaties First Nations Settlement Agreement of 2018 was reached between the ~~seven~~ 7 Williams Treaties First Nations and the Governments of Canada and Ontario. Prior to the settlement agreement, the Crown's interpretation was that the Williams Treaties extinguished all harvesting rights outside of the reserves of each First Nation. The settlement agreement formally recognizes **certain rights, including** the pre-existing Treaty harvesting Rights of the Williams Treaties Signatories members to hunt, trap, fish and gather for food, social and ceremonial purposes within portions of their traditional territories and treaty areas. The Settlement Agreement also included a *Statement of Apology for the Impacts of the 1923*

Williams Treaties from the Government of Canada for the negative impacts of the 1923 Williams Treaties on the Williams Treaties First Nations.

Slide 3: Consultation and Engagement activities with identified Indigenous Nations and communities

CNSC staff have conducted consultation on OPG's licence to construct application with consideration of current best practices and requirements for consultation, the Government of Canada and CNSC's commitments to Reconciliation and the principles of UNDA with the goal of striving to achieve a consensus with respect to the application. CNSC staff have aimed to have a flexible approach to consultation, targeted to each Indigenous Nation and community's specific interests and needs.

In order to fulfill the CNSC's duty to consult obligations for the decision before the Commission, CNSC staff sent early notification of the expected Licence to Construct application in May 2022 and since then have continued to provide multiple opportunities for consultation, engagement, dialogue and collaboration with all identified Indigenous Nations and communities. CNSC staff note that since May 2022, consultations and discussions have occurred simultaneously regarding the previous and related decision on the applicability of the EA to the chosen technology, OPG's Licence to Construct application and topics relevant to other licensing phases of the DNNP. However, CNSC staff consultation on an approach to a Rights Impact Assessment only commenced in October, 2023. [CNSC staff must acknowledge this because the above and below language implies that RIA engagement began in May 2022 which is patently false]-

Specifically for OPG's Licence to Construct application, CNSC staff have consulted or offered opportunities for consultation on:

- Issues, interests or concerns raised by the identified Indigenous Nations and communities
- CNSC staffs technical review, assessments and recommendations
- Beginning in October, 2023, potential impacts on Indigenous and/or Treaty Rights and potential measures, commitments and/or conditions to meaningfully address potential impacts and concerns identified by the Nations.

CNSC staff consulted and engaged through multiple phone calls, correspondence, and meetings with leadership and community representatives, as well as through the provision of funding and capacity support. CNSC staff collaborated with Indigenous Nations and communities on the CNSC's consultation report and issues tracking tables with the goal of ensuring each Indigenous Nation and communities views and perspectives were accurately reflected and that their key issues, concerns, recommendations and questions were meaningfully responded to and addressed by the CNSC and OPG. CNSC staff have also encouraged and supported the identified Indigenous Nations and communities to participate in the Commission's public hearing process to advise the Commission of any concerns they may have and proposed resolutions to the concerns.

All of the identified Indigenous Nations and communities were included in the consultation and engagement opportunities listed on this slide. Over the next few slides, I will go over the specific activities conducted with the identified Indigenous Nations and communities.

Slide 4: The Mississaugas of Scugog Island First Nation

The Mississaugas of Scugog Island First Nation is one of the 7 Williams Treaties First Nations and has treaty rights in the area covered by the DNNP site. CNSC staff and MSIFN signed a ToR for long-term engagement in March 2022. Regularly scheduled meetings under the ToR have often been used to discuss and consult on the DNNP. CNSC staff and MSIFN have also had multiple DNNP specific consultation meetings, with MSIFN leadership and representatives where topics of interest and concern were discussed. CNSC staff also provided written responses to MSIFN to questions or concerns raised and offered to meet to discuss these topics further to work to address the concerns to the extent possible.

CNSC staff continue to ~~consult, engage and collaborate~~ with MSIFN on potential approaches to assessing and understanding how the DNNP LTC could potentially impact their Rights. MSIFN objects to CNSC staff's late October, 2023 intervention seeking a Rights Impact Assessment, and to its methodology and approach for the Crown to unilaterally assess impacts to their Rights. MSIFN has engaged legal counsel to advise it on these matters, including advising on potential joint governance and decision-making for Indigenous knowledge and methodologies and approaches for assessing impacts of projects on rights and interests. MSIFN notes that its intervention at the hearing will reference its objections and recommendations. MSIFN in collaboration with representatives of Alderville, Curve Lake and Hiawatha First Nations is working with a consulting firm to provide a discussion paper on Michi Saagiig Nation governance and decision-making with respect to Indigenous knowledge decision-making which may inform future decisions.

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[Note – MSIFN does not understand how CNSC staff can provide] and the outcomes of this assessment will be included in CNSC staff's supplemental submission in advance of the Part 2 hearing.

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CNSC staff note that MSIFN has confirmed that they are supportive of the approach of the DNNP regulatory process, with the exception of a unilateral CNSC Rights Impact Assessment, moving in parallel with the studies and commitments that have been made by OPG and CNSC staff to date including designing and implementing a ~~future~~ Indigenous Knowledge Study informed by a future joint First Nation governance and decision-making framework, the Cumulative Impacts Assessment, waste management best practices review and the environmental monitoring augmentation program. MSIFN has highlighted the importance of ensuring that the commitments are binding on OPG through a project specific agreement as well as formalized in CNSC's licence conditions for OPG.

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CNSC staff acknowledge that one of MSIFN's key concerns related to the DNNP is around waste management. MSIFN objects to the regulatory process advancing with waste management scoped out of the license to construct application. MSIFN has engaged legal counsel to advise it on these matters and notes that its intervention at the hearing will reference its objections and recommendations. CNSC staff note that the potential waste facility is out of scope for this hearing [Note: CNSC staff should explain and reference the rationale for this]. CNSC staff are committed to consulting with MSIFN on that and note that a separate licensing process will be required should OPG submit an application.

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