VIA EMAIL

February 16, 2015

Mr. Brian Torrie
Director General
Regulation Policy Directorate
Canadian Nuclear Safety Commission
280 Slater Street
Ottawa ON K1P 5S9

Dear Mr. Torrie:

RE: AREVA Resources Canada Inc. (AREVA) Comments on the Canadian Nuclear Safety Commission (CNSC) REGDOC 3.2.2, *Aboriginal Engagement*

We are writing in response to the CSNC's request for comments on REGDOC 3.2.2, Aboriginal Engagement (REGDOC). AREVA has been exploring and operating mining and milling facilities on the traditional lands of Aboriginal people in Canada for over 50 years. During this period AREVA continually strives to inform and engage Aboriginal people who have the potential to be impacted by our activities. AREVA has also actively included Aboriginal people and companies in its activities, starting with its now decommissioned Cluff Lake mine and mill and continuing this practice at its McClean Lake operations.

During the almost 20 years since construction activity commenced at the McClean Lake Uranium Mine and Mill AREVA has continuously worked to meaningfully share information and engage with Aboriginal people about our operations and activities. Presently at McClean Lake approximately 49% of our employees are residents of Saskatchewan's northern region and 48% of our McClean Lake employees are Aboriginal. In addition, AREVA strives to maximize the use of Aboriginal owned businesses and has developed long standing relationships with these companies.

Lastly, leading good business practice, alongside with Cameco Corporation, AREVA is entering into Collaboration Agreements with targeted Aboriginal communities who have traditionally been identified for McClean Lake and other uranium operations in the region. One of the intents of these confidential agreements is to be advised of the best practices for engaging these communities.

It is in this context that AREVA provides its comments on the REGDOC.

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It is AREVA assertion that the REGDOC as drafted is fundamentally flawed as it creates confusion for the licencees, general public and for the Aboriginal communities by not clearly delineating between the principles of the Crown's Duty to Consult and general stakeholder engagement. The REGDOC does not adequately distinguish matters on the duty to consult spectrum or provide any guidance in this regard. Rather, as it is written the REGDOC appears to create a hybrid area where there may be Aboriginal groups who do not necessarily have an identified impact by a proposed project are elevated above the requirements to inform the general public. By blending these two concepts the REGDOC introduces uncertainty and additional legal risk.

It is a well-established principle in law that the consultation requirement is on a spectrum and determined in the context of each circumstance. In *Haida Nation v. British Columbia (Minister of Finance), 2004 SCC 73, [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70 (Haida),* the Supreme Court of Canada states "Where an Aboriginal claim is relatively weak and the potential adverse effects are minor, the Crown's duties may be limited to giving notice, disclosing information and discussing the issues raised in response to the notice".

In a court case directly on this point which involved the renewal of the CNSC McClean Lake operating licence, *Athabasca Regional Government v. Canada (AG), 2010 FC 948, affirmed 2012 FCA 73 (ARG).* In ARG, the court recognized that the CNSC licensing action was used as leverage against the federal and provincial governments and stated at paragraph 211 that:

> *"For the duty to consult to arise there must be some evidence presented to establish an adverse impact on Aboriginal rights. Further, evidence to support the finding of an interference with a specific or tangible interest must be linked to the project or decision under consideration and must constitute more than mere submissions or generalities."*

Furthermore, the court in ARG went on to hold that:

> *"These mining and milling operations have been in existence for over ten years; renewal of an operating licence was being sought; and no evidence was provided that the granting of the licensing application by the Commission would result in a negative impact on specific Aboriginal or Treaty rights of the Applicants. In these circumstances, I think that AREVA is correct to say that the duty to consult was not even triggered. At the very most given the low threshold for triggering the duty to consult, any duty triggered was minimal in scope and at the lower end of the spectrum and it was discharged the process that took place in this instance" (para 218 -219)*

Accordingly, it is AREVA's submission that should the CNSC proceed with the REGDOC it should be revised to clearly identify when the REGDOC is required to be followed (i.e. Duty to Consult trigger, what information is required by the CNSC from the Aboriginal group and licencees related to impacts;

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the factors the CNSC Staff and the CNSC Commission will use in making a determination on this issue; the level of engagement that is required commiserate with the potential to impact an Aboriginal right; and clearly identify where there is no trigger that engagement activities should be deferred then to RG/DG 99.3 *Public Information and Disclosure* (RG/DG 99.3).

By broadening the scope of Aboriginal engagement that is not related to the potential to impact the CNSC is heightening expectations of Aboriginal groups and is creating additional burden and cost on the licencees and the CNSC staff that is not justifiable and have the potential to take away from the Aboriginal communities that have already been identified as having a relationship to the project in questions. This concern is evidenced by the list of Considerations for Aboriginal Engagement in Appendix A which states that if the "answer is yes to one or more of the questions, than Aboriginal engagement is likely appropriate". Given the list, it is difficult to envision a project or proposed activity that would not trigger the proposed REGDOC.

Should the CNSC proceed with establishing clearer protocols in this area, the protocol should be linked directly to the jurisprudence in the area of duty to consult, should clearly identify how the CNSC will determine the legal aspects of the Crown's duty to consult and build on existing documentation such as the RG/DG 99.3, for where there is no trigger and the Crown's Duty to Consult and the *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Federal Guidance) and the CNSC's *Codification of Current Practice: Canadian Nuclear Safety Commission Commitment to Aboriginal Consultation*, where there is possibly a trigger.

Lastly, AREVA takes issue with the reference to the CNSC's REGDOC 2.9.1, *Environmental Protection: Environmental Assessments* in this REGDOC 3.3.2. The CNSC commits to an inclusive and transparent process for establishing regulation and guidance for its licencees or the public but this is difficult to reconcile with reference to draft documents being included in subsequent new proposed regulatory documents. In light of this, AREVA requests that should the CNSC, as a matter of process, establish a more enhanced and transparent process to allow interested parties, including licencees, on REGDOC 2.9.1 and REGDOC 3.3.2 to provide a more expansive and transparent process to be used to inform the CNSC Commission on the need for this document within the context the CNSC's mandate of protecting national security, the health and safety of persons while balancing the potential utilization of monetary and non-monetary resources of licencees, interested parties and Aboriginal groups.

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We would be please do discuss this matter further, or to respond to any question. Please contact the undersigned at tammy.vanlambalgen@areva.ca or (306) 343 4569.

Yours truly,

Tammy Van Lambalgen
Vice President, Regulatory, CSR & Legal

cc: J. LeClair, UMMD - CNSC