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VIA EMAIL

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

Dear Mr. Torrie:

Cameco Corporation's (Cameco) Comments on REGDOC-3.2.2: *Aboriginal Engagement*

Cameco values having supportive communities. As evidence of this, the support of communities is one of our four measures of success, and as such it plays a key role in all of our decision making activities. As part of our effort to sustain and enhance the support of our communities, we conduct ongoing community engagement activities at all of our operations. This combined with an ongoing focus on community engagement and our long history of activities in this regard, has allowed Cameco to be recognized as a leader in Aboriginal engagement. Cameco is one of the only mining companies to receive four gold certifications from the Canadian Council for Aboriginal Business Progressive Aboriginal Relations program. In addition, Cameco was also recognized in 2013 by the Prospectors and Developers Association of Canada (PDAC) as the winner of the Environmental and Social Responsibility award. These accolades, as well as being the largest industrial employer of Aboriginal people in Canada, demonstrate that Cameco is committed to working with and ensuring prosperity in Aboriginal communities.

In addition, Cameco has built a successful engagement approach over our history. This has led to positive, long-standing relationships with communities located near our operations. Cameco's public participation programs aim to build and maintain the trust and support of local communities and other stakeholders by actively disseminating information about Cameco's projects and activities.

We strive to elicit and address relevant community and stakeholder concerns on a regular and ongoing basis. Our approach involves focusing engagement efforts on communities that have been identified by Cameco as having an interest in our operations based on a number of considerations, including Crown consultation considerations. These communities have been and will continue to be the primary focus of public participation activities in relation to our operations.

Cameco has and will continue to engage communities through our sites' Public Information Programs (PIPs) (i.e. discussing new projects and any applicable changes at existing operations). Our PIPs are intended to ensure we are communicating on issues relating to health, safety and the environment in order to meet established regulations and to broaden the understanding of communities of the many measures that exist to keep people safe and healthy and the environment protected. Efforts are tracked and submitted to the Canadian Nuclear Safety Commission (CNSC) as part of each site's annual report as evidence of implementation of the site's PIP.

In light of this background and experience in this area, Cameco has significant concerns with both the purpose and scope of REGDOC-3.2.2 *Public and Aboriginal Engagement: Aboriginal Engagement* (the REGDOC). Fundamentally, Cameco's concern stems from the view that it is unnecessary while adding uncertainty and regulatory burden.

To begin with, in the *Athabasca Regional Government v Canada (Attorney General)*, 2010 FC 948, aff'd 2012 FCA 73 (*ARG*) decision, the Court held that the process that had been followed by the CNSC and the licensee had been sufficient to meet any duty to consult that had been triggered. The Court stated at para. 229 as follows:

[I]f a duty to consult did arise, the Crown's duty to consult was fulfilled by the public information and consultation activities carried out by AREVA in respect of the licensing application, by the regulatory process, and by the full participation of the Applicants in that process.

ARG is thus an affirmation that the CNSC's current processes, in combination with licensees' engagement activities, are sufficient to meet the duty to consult. What is therefore needed (if anything), is further delineation of how the CNSC fulfills the Crown's duty to consult, and how certain specific aspects of this process are delegated to industry. This guidance should reflect the CNSC's current practice of consulting licensees while determining which groups to consult and the scope of consultation, as licensees are well placed to provide the CNSC with information relevant to this determination. We believe that this type of information could form the basis of a revision to the *Codification of Current Practice: Canadian Nuclear Safety Commission Commitment to Aboriginal Consultation* (Codification), under the "Assistance of Licensee to CNSC Aboriginal Consultation Activities" heading, which would eliminate the need for an additional regulatory document. Further, because fulfilling the duty to consult is discharged during the licensing process, a guidance document of this nature should then not form part of the licensing basis for a facility.

Significantly, the REGDOC, as currently drafted, also does not incorporate several aspects of the federal government's *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 2011 (Updated Guidelines). Importantly, the REGDOC does not reflect the roles and responsibilities identified for federal departments and agencies, Aboriginal groups, and third parties. For example, Section 3.2.2 of the REGDOC does not provide any timelines for the CNSC's review of a licensee's Aboriginal engagement plan, or for the CNSC's analysis of whether Aboriginal consultation activities are required by the Crown.

Further, as presently drafted, the REGDOC will create additional administrative burden on licensees, with little corresponding benefit. Cameco already informs the CNSC of our ongoing and project specific engagement activities through our annual reports and throughout any environmental assessment or licensing process. In Cameco's view, additional reporting requirements are both redundant and unnecessary.

In addition, the REGDOC blends three related, but distinct concepts: industry-led and CNSC-required public engagement activities (addressed in RD/GD-99.3, *Public Information and Disclosure*), industry-driven corporate responsibility activities, and the CNSC's constitutional obligation to ensure the Crown's duty to consult Aboriginal peoples is fulfilled when proposed projects may adversely affect Aboriginal and treaty rights. While all three of these types of activities are closely related, they are not all driven by the same considerations, and thus, they should each be treated distinctly. The blending of these three concepts in the REGDOC has resulted in a flawed and confusing document.

In addition to these overarching concerns, Cameco also has many specific concerns with the content of the REGDOC. We will touch on the more significant ones in the following discussion.

First and foremost, the REGDOC does not fully incorporate the legal elements of the duty to consult, as established in several Supreme Court of Canada (SCC) decisions. The SCC has held that the Crown's duty to consult is triggered when the Crown has knowledge of the potential existence of a treaty or Aboriginal right or Aboriginal title and contemplates conduct that might adversely affect it (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69). Despite this clear direction from the SCC, s. 3.2.1 of the REGDOC states that licensees should conduct Aboriginal engagement activities (and report on such activities in an Aboriginal engagement plan and report) if:

- The proposal falls outside of the licensing basis, such as changes to the size of the footprint of a facility;
- The proposal can result in changes to the environment; or
- The proposal may adversely impact an Aboriginal group's ability to practice its potential or established Aboriginal and/or treaty rights and related interests, including Aboriginal title.

Cameco has a number of concerns with this broad list of items. Specifically, the first two items are not reflective of the triggering test established by the SCC in *Haida*, which limits the duty to consult to Crown conduct that might adversely affect a treaty or Aboriginal right, or Aboriginal title. A similar point can be made in relation to Appendix A, as the majority of the questions in Appendix A are not tied to any potential impact on the exercise of an Aboriginal or treaty right. In addition, the third item, which unnecessarily includes the phrase "related interests," is broader than the triggering test established by the SCC. While it is certainly possible that many new facilities and major expansions of existing facilities, particularly those related to resource development, have the potential to adversely impact an Aboriginal or treaty right and consequently trigger the duty to consult, the broad list in s. 3.2.1 as drafted has the potential to

attach engagement obligations to many projects occurring at existing facilities, most of which would be unlikely to have any new impact on the exercise of an Aboriginal or treaty right. Thus, the first two items in section 3.2.1 are an example of the flawed blending in the REGDOC of duty to consult considerations with possible public engagement considerations.

Moreover, it is not clear to Cameco how the list of items in s. 3.2.1 that trigger a licensee to carry out Aboriginal engagement activities fits with s. 3.6.1 (non-applicability of Aboriginal engagement planning and reporting requirements), which states that licensees are not required to submit an Aboriginal engagement plan and report if the activity will not have potential adverse impacts on potential or established Aboriginal and/or treaty rights. Perhaps reflecting our earlier concern on confusing these related but distinct concepts, section 3.6.1 (non-applicability of Aboriginal engagement planning and reporting requirements) does not address the first two items listed in s. 3.2.1 (the proposal falls outside of the licensing basis, and the proposal may result in changes to the environment), which are not connected to any potential impact on the exercise of an Aboriginal or treaty right.

The SCC has also clearly stated that the content of the duty to consult varies according to the circumstances, and is generally proportionate to the preliminary assessment of the strength of the claimed Aboriginal or treaty right, and to the seriousness of the potentially adverse effect upon the claimed right (*Haida*). The SCC conceptualized the content of the duty to consult as lying on a spectrum with providing notice, disclosing information, and discussing issues raised in response to the notice being at the low end of the spectrum, and deep consultation, which may lead to a duty to accommodate at the high end of the spectrum. A duty to accommodate may arise where a strong case exists for the claimed right, and where the proposed Crown conduct may adversely affect the claimed right in a significant way.

While the REGDOC discusses these concepts generally, it also states that the duty to accommodate, “where appropriate”, arises when Crown conduct might adversely impact Aboriginal and/or treaty rights and “related interests”. As discussed above, the phrase “related interests” should not be referred to. Further, the REGDOC should be revised to reflect the SCC’s statements on when a duty to accommodate may arise, which is when the proposed Crown conduct may adversely affect the claimed right in a significant way. In addition, Table 1: *Consultation Activity Spectrum*, refers only to the potential for adverse impacts to Aboriginal and/or treaty rights, and does not refer to any preliminary assessment of the strength of the claimed right by the Crown.

Cameco also fundamentally takes issue with the REGDOC’s “encouragement” of licensees to provide to the CNSC with all potentially useful information on Aboriginal engagement, including agreements with Aboriginal groups. Based on the commercial decisions of the parties involved, the terms of these agreements may be confidential, and thus Cameco will not share such agreements. In addition, Cameco’s agreements with Aboriginal groups are not relevant to the CNSC’s assessment of whether it has met the duty to consult; this is an example of the blending in the REGDOC between a licensee’s corporate responsibility activities and the Crown’s duty to consult activities. While this statement in the REGDOC is described as a guidance statement, Cameco is concerned that these types of statements have been interpreted as being requirements.

This concern is heightened given the statement in the preface to the REGDOC asserting that licensees are expected to review and consider guidance, and if they decide not to follow it, should explain how their chosen alternate approach meets regulatory requirements.

In summary, the REGDOC is not only unnecessary, confusing and potentially burdensome but also inconsistent with existing federal guidance and the jurisprudence. For these reasons, Cameco suggests that the CNSC withdraw this REGDOC and look to make some minor revisions to the Codification.

We would be pleased to respond to any further questions. Please contact the undersigned at (306) 956-6685 or liam_mooney@cameco.com.

Sincerely,



R. Liam Mooney
Vice-President
Safety, Health, Environment, Quality & Regulatory Relations
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c: J. LeClair, UMMD – CNSC
Regulatory Records - Cameco