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March 23, 2015

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Brian Torrie
Director General
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Canadian Nuclear Safety Commission
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Dear Mr. Torrie:

Re: SON's Comments on *Draft REGDOC-3.2.2, Aboriginal Engagement*

Honourary Counsel:

Art Pape
(1942 – 2012)

Richard B. Salter
(Retired)

This letter is sent on behalf of the Saugeen Ojibway Nation (the "SON") and provides comments on the *Draft REGDOC-3.2.2, Aboriginal Engagement* (the "REGDOC"). The SON continues to reject the CNSC's determination of the CNSC's consultation obligations to the SON, or the procedures it believes will discharge those obligations in the context of the REGDOC. We submit the following comments only to ensure that a continued consultation process between the SON and the CNSC will occur expeditiously with respect to the continued development of the REGDOC. As such, the following should not be viewed as an exhaustive list of the SON's concerns with respect to the REGDOC.

Role of the Crown vs. Role of the Proponent

The draft REGDOC fails to clearly distinguish between the role of the Crown and the proponent concerning the duty to consult and accommodate and requires the proponent to conduct the bulk of the engagement with an Aboriginal group(s). The CNSC, as the Crown, unilaterally determines what, if any, "consultation activities" are required with an Aboriginal group based solely on an Aboriginal engagement plan and report filed by the proponent as part of a project description and/or license application. This is problematic for two reasons.

First, such unilateral decisions are very much part of the "old way" of relating to Aboriginal people and is inconsistent with the law, the honour of the Crown and the Crown's fiduciary obligations. More importantly, it fails to focus on the primary outcome of any consultation process - the protection of Aboriginal and Treaty rights and the facilitation of reconciliation. Instead, the REGDOC continues to reflect a unilateral, "check box" approach to the Crown's duty to consult and accommodate where critical early determinations of potential impacts are made by CNSC without the requirement of

early consultation or engagement on the scope of the consultation itself. This inevitably will lead to significant disagreement between the CNSC and the SON on the requirements of consultation for a given review and leave the SON with the impression that consultation has been reduced to a hollow series of meetings, telephone calls and emails. It is unclear how unilateral determinations by the CNSC on the scope of consultations efforts could effectively address the SON's concerns, protect the SON's rights and interests, or ultimately, promote reconciliation with the SON. The CNSC must seek out, understand and incorporate the SON's perspective on the requirements of consultation and accommodation in the review of an activity, application or project *prior* to establishing or implementing its review process. This is true also for those circumstances where CNSC determines either no, or cursory, consultation engagement is required due to the low potential for adverse impacts. These determinations simply cannot be made by CNSC in the absence of consultation with SON to understand the significance of the proposed licencee activities or their potential impact on SON Rights and interests.

Second, the CNSC cannot wash its hands of the duty to consult and accommodate. Consultation and accommodation cannot proceed in the absence of the Crown. It must be absolutely clear to all parties what procedural aspects of the duty the CNSC is planning to delegate to a proponent. The SON expects the CNSC to be fully and directly engaged with the SON on activities or projects, planned or existing, that may impact on the SON's rights, interests and way of life. As such, the SON expects that the parties (CNSC, SON and the proponent) would set out by way of agreement the specific role of the Crown and the procedural aspects of the Crown's duty that are being delegated to the proponent before the commencement of a SON specific process[1]. Such an approach provides the necessary clarity for the parties and provides for a much more efficient process, and will help avoid any unnecessary delays in the process. More importantly, it ensures that the ensuing process fully addresses the SON's concerns and that the fundamental objectives of the duty are being met, that is, the protection of the SON's Aboriginal and Treaty Rights and the facilitation of reconciliation.

Early Engagement and Role of Proponent Engagement Activities

The SON has consistently stressed upon the CNSC and proponents the importance of early engagement. Early engagement is essential to any successful consultation and accommodation process. The REGDOC requires licensees who "propose regulated facilities or activities" that could adversely impact potential or established Aboriginal and/or Treaty rights to engage with the potentially impacted Aboriginal group(s). The SON welcomes the CNSC's recognition of the importance of a proponent engaging the SON directly on any matters that may impact on their rights, interests and way of life at the

[1] SON has expressed its concern to the CNSC that consultation efforts within the SON Traditional Territory must be specific to SON. This is also consistent with the long engagement history between CNSC and SON on previous nuclear project reviews, including Bruce Power's application to build new nuclear reactors, as well as the current and ongoing review of OPG's DGR Project. Many aspects of the REGDOC seem to be inconsistent with the past practice between the SON and the CNSC on these matters. The SON must have confidence in any consultative process for matters or projects within Anishnaabekiing and has and will continue to insist that any consultative process be specific to them. In short, SON must help shape and develop the consultative process. The language in the REGDOC must reflect this fundamental principle.

earliest possible stages, and while the greatest opportunities exist for mitigation of impacts. However, the SON has deep concerns for the determination of the scope of this early engagement. The REGDOC clearly states that the level of engagement by the proponent is "commensurate" with the significance of the potential impact on asserted and established Aboriginal and Treaty rights and related interests, including Aboriginal title. This is highly problematic for many of the same reasons outlined above in the context of the CNSC's unilateral determination of the scope of the Crown's consultations with an Aboriginal group(s). Specifically, it reaffirms an historic pattern of exclusion and marginalization of the SON from fundamental decisions that may adversely impact on their rights, interests and way of life and their relationship to their territory for many generations to come. It presupposes that the SON's Aboriginal and Treaty rights and its relationship to their territory are frozen in time and fails to acknowledge that SON's rights, interests and way of life can and will evolve over time and take on a modern expression consistent with their relationship with and sustained vision for their territory[2]. Moreover, it creates a recipe for conflict and adversarial approaches that will not achieve the reconciliation that is so desperately needed in the context of the nuclear industry's historic and ongoing operations within SON territory - Anishnaabekiing. This is simply unacceptable.

A proponent cannot possibly determine the scope of its engagement with an Aboriginal group(s) without first having some context and deep understanding of the asserted and established Aboriginal and Treaty rights. This deeper understanding can only come from the Aboriginal group(s) itself. This is the crucial first step in the early engagement of the Aboriginal group(s). The proponent's primary focus should be on a respectful and meaningful process that will foster the necessary rapport, trust and confidence to move the process forward and to ensure that it will achieve its primary objectives. This will likely require the completion of the necessary protocol or framework agreements that will set out the terms of the engagement with the Aboriginal group as well as to, among other things, facilitate the sharing of vital information, address capacity issues, provide for the identification of key issues and means for addressing those issues, provide a mechanism(s) for the development and implementation of key mitigation measures/strategies, and anything that may be of importance to the parties either in terms of the process itself and or the overall relationship. This work will also be informed by which procedural aspects of the Crown's duty have been delegated to the proponent.

Accommodation

It has been the SON's experience that the Crown has increasingly relied on proponent activities to discharge its constitutional duties, including the conclusion of appropriate accommodation measures. The REGDOC suggests that any proposed mitigation or accommodation measures be submitted as part

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[2] The SON has consistently stated that any consultative process must not adopt or adhere to a narrow view of Aboriginal and Treaty rights. The dialogue is much broader then whether or not one can hunt, trap or fish. The process must focus on the protection of the SON's fundamental relationship to Anishnaabekiing. The relationship is ever evolving and is not frozen in time. A full expression of the SON's Aboriginal rights, Treaty rights, interests and way of life are inextricably linked to this relationship. The REGDOC simply does not provide enough flexibility to fully analyze the risk and potential impacts of project, activity or development on the SON's rights, interests and way of life. There is reference to the use and incorporation of Aboriginal Traditional Knowledge but the REGDOC fails to acknowledge that the use and incorporation of such knowledge must be done on the SON's terms, consistent with their relationship to Anishnaabekiing.

of the overall engagement plan and report and that such information will inform the CNSC's own consultations with an Aboriginal group(s). However, there is no reference or guidance to the CNSC's role concerning the treatment of the mitigation/accommodation measures established through the proponent's engagement with an Aboriginal group(s). There should, at a minimum, be clear language in the REGDOC that the CNSC will use the mitigation or accommodation measures to further support and or enhance its consultation and accommodation process with a specific Aboriginal group(s). The CNSC will render the proponent's engagement meaningless if, as the Crown, it is unable or unwilling to support and implement the mitigation or accommodation measures arrived at between the proponent and a specific Aboriginal group(s). This would be inconsistent with the honour of the Crown and the Crown's fiduciary obligations to the specific Aboriginal group(s).

The REGDOC also fails to offer any guidance in terms of the CNSC's role in the event that the proponent and an Aboriginal group are unable to reach an agreement on potential impacts and the appropriate mitigation or accommodation measures for addressing those impacts. The failure of the proponent and an Aboriginal group(s) to reach an agreement on the appropriate accommodation measures does not mean that accommodation is not required. The responsibility to ensure that the appropriate accommodation measures are in place ultimately rests with the Crown. While it is recognized that the Commission can make decisions and impose licence conditions that facilitate or implement accommodation measures, the REGDOC should clearly set out what the CNSC perceives to be its role, as the Crown, in the development and implementation of appropriate accommodation measures. This should be consistent with the primary objective of the duty to consult and accommodate – to ensure the protection of Aboriginal and Treaty rights and the facilitation of reconciliation.

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

We look forward to the opportunity to discuss our concerns in greater detail in an in-person meeting so that we can ensure that the development of the REGDOC, and its implementation in Anishnaabekiing, is consistent with the previous consultation relationship between the SON and the CNSC and is responsive to the needs of SON.

Yours truly,

Randall Kahgee