Canadian Nuclear Safety Commission | Commission canadienne de sûreté nucléaire

CMD 18-H103.3

File/dossier : 6.01.07
Date : 2018-05-24
Edocs pdf : 5544476

Written submission from Sagkeeng First Nation

Mémoire de Sagkeeng First Nation

In the Matter of

À l'égard de

Whiteshell Laboratories

Laboratoires de Whiteshell

Request by CNL to renew the Whiteshell Laboratories Decommissioning Licence for a one-year period to December 31, 2019, with the same terms and conditions as the current licence.

Demande des LNC concernant le renouvellement du permis de déclassement des Laboratoires de Whiteshell pour une période d'un an, jusqu'au 31 décembre 2019, avec les mêmes modalités et conditions que le permis actuel

Public Hearing - Hearing in writing based on written submissions

Audience Publique - Audience fondée sur des mémoires

June 2018

juin 2018

Canada

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May 24, 2018

Senior Tribunal Officer, Secretariat
Canadian Nuclear Safety Commission
280 Slater Street, PO Box 1046, Station B
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Commissioners,

Re: Hearing in Writing: Renewal of the Nuclear Research and Test Establishment Decommissioning License for Whiteshell Laboratories (WL) – Submissions of Sagkeeng First Nation

Please accept this letter as the submission of Sagkeeng First Nation with respect to the one-year license renewal, requested by Canadian Nuclear Laboratories Limited (CNL) for the WL. Within these submissions, Sagkeeng has provided a number of conditions which it proposes be added to CNL's license if it's request for a one-year renewal is granted.

We appreciate that the Hearing Notice was revised from the original, which precluded submissions from Sagkeeng First Nation (and others), entertaining only the submissions of CNSC staff and the proponent. The existence of WL, its operation, and ongoing decommissioning, have all caused adverse impacts on the constitutionally guaranteed Aboriginal and Treaty rights of Sagkeeng, as well as on Sagkeeng's unextinguished Aboriginal title (all of which is hereinafter referred to as "Sagkeeng Rights"). The Duty to Consult and Accommodate (the "Duty") has never been discharged with respect to WL, and as such, has been breached.

APPLICATION OF THE DUTY TO CONSULT AND ACCOMMODATE / SAGKEENG RIGHTS

Aboriginal peoples hold Aboriginal rights because "[l]ong before Europeans explored and settled North America, [they] were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures."[1] With the Crown's assertion of sovereignty, "the interests of aboriginal peoples arising from their historical occupation and use of the land… and customary laws… were absorbed into the common law as rights" subject to certain exceptions.[2] As the original occupiers of North America, Aboriginal

[1] *Mitchell v MNR*, 2001 SCC 33 at para 9.
[2] *Ibid* at para 10.

peoples entered into treaties with the Crown allowing for peaceful settlement by Europeans in return for certain rights.3

Canada is emerging from a long and dark period of "cultural genocide," in which "the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada." The recognition and affirmation of Aboriginal and treaty rights in s. 35 of the Constitution Act, 1982 was "the culmination of a long and difficult struggle in both the political forum and the courts." It represents only the beginning of a new era of "reconciliation," both of "pre-existing Aboriginal sovereignty with assumed Crown sovereignty," and of "aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." This is the "fundamental objective" of Aboriginal law, including the Duty.

Reconciliation is a process and not a "final legal remedy." It applies to asserted rights and continues after rights are proven. It must not be treated as a "distant legal goal," but like the honour of the Crown, be articulated in the present through concrete practices that address the interests at stake.

As set out in section 8(2) of the *Nuclear Safety and Control Act*, CNSC "is for all its purposes an agent of Her Majesty and may exercise its powers only as an agent of Her Majesty." Among CNSC's objectives is "… to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to (i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,…". In regulating WL, and determining whether to renew CNL's license for one year, CNSC acts as an agent of the Crown and is responsible for discharging the Duty in respect of that renewal. Given that the Duty has never been discharged with respect to WL, and Sagkeeng has continued to suffer the consequences of the operations and decommissioning decisions related to WL, it is necessary that the Duty be discharged in respect of all decisions related to WL now, including this renewal.

PROPOSED ADDITIONAL LICENSE CONDITIONS

As CNSC is aware, Sagkeeng has expressed serious and substantial concerns with respect to CNL's proposal to decommission WL in situ. Insofar as this renewal application is related to CNL taking those concerns seriously, Sagkeeng supports a renewal. However, Sagkeeng's support for the renewal is subject to CNSC imposing certain additional conditions on the renewed license, so as to ensure that Sagkeeng's Rights are protected and the Duty is finally discharged.

Sagkeeng proposes that the following conditions be added to the renewed license.

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[3] *Simon v The Queen*, [1985] 2 SCR 387 at para 49.

1. That CNL provide comprehsive reporting to Sagkeeng on a quarterly basis, on both adherence to license conditions and the status of decommissioning plans, with Sagkeeng's reasonable costs related to understanding and responding to such reporting (including, but not limited to, community, technical expert and legal counsel) to be paid by CNL.

2. That within six months of a license renewal being issued, CNL develop, jointly with Sagkeeng a community monitoring program to monitor any ongoing impacts on the environment (for land and water) in the area of impact, which includes but is not limited to, the Winnipeg River and near downstream areas. Such monitoring program shall include training for Sagkeeng members in relevant contaminant monitoring techniques. CNL shall then oversee initiation of the developed program, and reporting filed prior to the end of the one-year renewal period.

3. That CNL fund a community health and well-being survey, to be conducted by an expert of Sagkeeng's choice, subject to CNL's approval, which approval will not be unreasonably withheld, to determine the impacts of WL on the health and well-being of Sagkeeng's resident population and conduct a preliminary analysis of the possibility of a 'cancer cluster' at Sagkeeng.

As noted in comments previously submitted by Sagkeeng to CNSC, the ISD alternative proposed by CNL, for which this renewal is requested, "represents the highest risk to the environment at the WL site during the post closure phase because the majority of radioactive materials will be present on site, unlike the other alternatives where the radioactive materials are either completely or partially removed." In accordance with the "As Low as Reasonably Achievable" standard, CNSC ought to require as a condition of the license:

4. That any alternative closure strategies for the site proposed or applied for in the renewal year be required to meet or exceed the environmental performance of the approved off-site disposal strategy.

Consistent with international best practice and precedent, any alternative to the existing license considered or proposed during the 1-year renewal period ought to abide by the Willing Host principle. As such, the renewal license ought to include a condition:

5. That radioactive wastes from the WL site shall be disposed only at sites where locally affected communities, including municipalities and First Nations, have self-identified as willing hosts through a rigorous and transparent siting process.

CNSC's own guidance (CNSC 2006 Regulatory Guide G-320) states that "Long term management options should not rely on long term institutional controls as a safety feature unless they are absolutely necessary." Thus, a condition ought to be added to the license that:

6. All applications for the management of WL wastes be required to explicitly demonstrate that any long term institutional controls are indeed absolutely necessary.

As noted in our prior submissions, Sagkeeng identified multiple significant concerns with the proposed *in situ* alternative and the associated EIS. Indeed, we have been led to believe that the concerns raised by Sagkeeng were among the reasons for CNL to request this renewal. While we support the renewal of the current license, our concerns have yet to be resolved.

We note as well that Canada has adopted United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 29.2 of UNDRIP specifically addresses the issues before the CNSC, requiring that; "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."

As a consequence, we respectfully request that the CNSC make it a condition of the renewed license:

7. That any future changes to the license, or issuance of any further license with respect to WL, be subject to the free, prior and informed consent of Sagkeeng.

In addition to the above conditions which Sagkeeng proposes be added to CNL's renewal license, the parties (including the proponent) would benefit from CNSC imposing an internal obligation on itself. With few exceptions, the ISD alternative is considered unacceptable by international authorities. For example, the International Atomic Energy Association concluded: "Entombment, in which all or part of the facility is encased in a structurally long-lived material is not considered a decommissioning strategy, and is not an option in the case of planned permanent shutdown. It may be considered a solution only under exceptional circumstances (e.g., following an accident)". The US Nuclear Regulatory Commission has also reached similar conclusions. As such, Sagkeeng requests that CNSC, within the next year, undertake to clarify if and under what circumstances it considers in situ disposal to be an appropriate management technique for radioactive wastes.

These submissions are submitted to the CNSC Secretariat on behalf of Sagkeeng First Nation, with the assistance of Sagkeeng's consultants at The Firelight Group.

Yours truly,

Corey Shefman