



Supplementary Information

Oral presentation

Written submission from the Wolf Lake First Nation

In the Matter of the

Canadian Nuclear Laboratories (CNL)

Application from the CNL to amend its Chalk River Laboratories site licence to authorize the construction of a near surface disposal facility

Commission Public Hearing Part 2

May 30 to June 3, 2022

Renseignements supplémentaires

Exposé oral

Mémoire de la Première Nation de Wolf Lake

À l'égard des

Laboratoires Nucléaires Canadiens (LNC)

Demande des LNC visant à modifier le permis du site des Laboratoires de Chalk River pour autoriser la construction d'une installation de gestion des déchets près de la surface

Audience publique de la Commission Partie 2

30 mai au 3 juin 2022



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May 4, 2022

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Mr. Denis Samure
Senior Tribunal Officer, Secretary
Canadian Nuclear Safety Commission
Ottawa, ON

Re: WLFN Submission for the CNSC Near Surface Disposal Facility Hearing

Dear Mr. Samure

This submission is provided by the Algonquin First Nation of Wolf Lake First Nation (WLFN) who wish to intervene in response to the Canadian Nuclear Safety Commission's (CNSC) Revised Notice of Public Hearing on Canadian Nuclear Laboratories' (CNL) application to amend its nuclear research and test establishment operating license for the Chalk River Laboratories' (CRL) site to authorize the construction of a "Near Surface Disposal Facility" (NSDF) for low-level radioactive waste.

This submission is intended for part 2 of the hearing and regarding CNCS's determinations on whether the NSDF project will likely cause significant adverse environmental effects pursuant to the *Canadian Environmental Assessment Act, 2012* (CEAA) (project registry number: 1547525) and whether the license amendment should be granted under the *Nuclear Safety and Control Act* (NSCA). WLFN intends to expand on this written submission in its oral submission at part 2 of the hearing.

Should you require any additional information from us in advance, please let us know.

Sincerely,

Chief Lisa Robinson

Wolf Lake First Nation Technical Submission

In the following pages, Wolf Lake First Nation (“WLFN”), in brief, sets out our issues and recommendations regarding the CNL NSDF project consultation. We look forward to further discussion with respect to this matter before the Commission in Pembroke scheduled for Thursday, June 02, 2022.

Introduction

Wolf Lake First Nation (“WLFN”) is one of eleven communities representing the Algonquin Nation in Canada. Nine of the communities are located in Québec and two are located in Ontario. These communities are subject to the Canadian Indian Act. Algonquin people continue to occupy both sides of the Ottawa River and have never relinquished title to our territory or our rights as Anishinaabeg people. WLFN Title and Rights Territory includes the Chalk River campus. WLFN is governed by an elected Chief and Council. Our community does not have a reserve and our population is 234 members mainly dispersed between Témiscamingue Québec, North Bay and Ottawa Ontario.

Together, our members remain connected to the territory and continue to occupy, manage, safeguard and intensively use OUR LANDS AND WATERWAYS as we carry out traditional and contemporary activities. All such initiatives are based on a model of self-determination and a history of Algonquin traditional knowledge, ecological sustainability, and land governance. As such, WLFN does not accept, or acknowledge any claims to any Aboriginal or Treaty Rights made by the Algonquins of Ontario (“AOO”) or recognize AOO as an entity entitled to consultation or accommodation on Algonquin territory.

The term Anishnaabeg, literally translates as “the real people.” The Algonquin Nation emerges from a rich historical legacy deep within the Ottawa River watershed. The Kitchi sibi as we know it, or Ottawa River as settlers have since renamed it, has been our home and highway since time immemorial. Anthropologist Frank Speck recorded that families living along the Ottawa in 1913 were still known as the Kichi sibi anishnaabeg or Kichississippirinis., “big river people”.¹ For centuries Anishinaabeg peoples have relied on their lands and waterways for our ability to exercise our inherent rights under our own system of customary law and governance, known as Ona’ken’age’win. This law is based on mobility on the landscape, the freedom to hunt, gather and control the sustainable use of our lands and waterways for future generations.

Migizi Kiishkaabikaan (in Anishnaabemowin), also called “Oiseau Rock” or “Eagle/Bird Rock” is a rock face that rises 150 meters above the Kitchi sibi across from Chalk River Laboratories on the north side of the river. It is recognized as a sacred site by our peoples. European historical records dating as far back as 1626 document the Anishinaabe story of this site as “the man who turned to stone” and the guarantee of safe travels by placing tobacco directly in the cracks of the rock’s surface or attaching tobacco offerings to an arrow fired at its summit. Anishinaabeg Peoples’ left a legacy of ancient pictographs

¹ Ottawa River Heritage Designation Committee, A Background Study for Nomination of the Ottawa River Under the Canadian Heritage Rivers System, Une étude de base pour la mise en candidature de la rivière des Outaouais au Réseau des rivières du patrimoine canadien, 2005, p.21:<http://ottawariver.org/pdf/0-ORHDC.pdf>

painted in red ochre several hundred and possibly several thousand years ago on the rock that have been since defaced by modern graffiti. In 1686, en route to Hudson Bay, Pierre de Troyes wrote in his diary:

" One sees on the north side, following the road, a high mountain whose rock is straight and very steep, the middle in black paroist. It may come from the fact that the savages make their sacrifices, throwing arrows over them, at the end of which they attach a little piece of tobacco. Our Frenchmen are in the habit of baptizing in this place those who have not yet passed. This rock is called the bird by the savages, and some of our people, unwilling to lose the old custom, throw water at us; we were camped at the bottom of the portage. " These baptisms were performed at Pointe au Baptême, a prominent sand spit on the south side of the river between Bird Rock and the current site of the Chalk River Laboratories.²

At "WLFN" we continue to be active 'keepers of the land and waterways', with 'seven generations' worth of responsibilities for livelihood security, cultural identity, territoriality, and biodiversity—a sentiment expressed by many other First Nations in Canada. Today, both traditional and contemporary ecological interests e.g., traditional hunting, fishing, gathering, trapping, cultural occupancy and access that support these activities as well as, contemporary interests in resource management, ecotourism and territorial stewardship form the basis for Crown- Indigenous consultation engagements on our territory.

Continued Challenges of Consultation and Contamination at Chalk River

It is important for our community to note that before the Government of Canada completed construction of the Chalk River Laboratories (CRL) in 1944, no assessment was undertaken to determine how the nuclear complex might affect upstream or downstream areas of the Kitchi sibi. No thought was given to how the nuclear complex might affect the members of the Algonquin Nation, our dependence on the then plentiful watershed resources of the Kitchi sibi, or our multi-generational socio-cultural connection to the places and customs associated with the Kitchi sibi.

No thought was given to whether the promises of the Royal Proclamation could be upheld if the complex was built. No thought was given to Algonquin jurisdiction around the Kitchi sibi at all. We understand, CRL was first opened in 1944, during the Second World War as Canada's primary facility for nuclear research. Key factors for choosing Chalk River as the location for this facility included the site's proximity to Ottawa and Montreal, being located close to an important rail center (Chalk River), adjacency to the Kitchissippi and the site's proximity to the Petawawa Military Reserve (AECL Research, 1992). While CRL was originally planned to be used for warfare purposes during the Second World War, the war ended shortly after the site was selected, and the reactor built on-site was used as a test reactor to assist in the design and start-up of a much larger reactor (AECL Research, 1992).

The National Research Universal (NRU) reactor originally came online on November 3,

² <https://mcelroy.ca/bushlog/20050921.html>

1957, marking a significant achievement in Canada. As directed by the Government of Canada, the NRU was permanently shut down on March 31, 2018, which coincided with the expiration of the CRL license. It is important to note that over time the facility has created significant environmental and human health risks to Algonquin and non-Algonquin people alike who live in the vicinity of CRL. There have been at least four significant reported nuclear incidents at CRL, namely:

- The 1952 NRX Incident-“A power excursion and partial loss of coolant in the NRX reactor resulted in significant damage to the NRX reactor core. The control rods could not be lowered into the core because of mechanical problems and human errors. Three rods did not reach their destination and were taken out again by accident. The fuel rods were overheated, resulting in a meltdown. The reactor and the reactor building were seriously damaged by hydrogen explosions. The seal of the reactor vessel was blown up four feet. In the cellar of the building, some 4,500 tons of radioactive water was found. To avoid having the water reach the Ottawa River, a pipeline was built to a sandy area about 1,600 m away. The contaminated water, containing about 10,000 curies of long-lived fission products, was pumped to this area and allowed to seep away. No radioactivity was detected in the creek which drained this area to a small lake. During this accident, some 10,000 curies or 370 TBq of radioactive material was released.” (Jedicke, 1989).
- The 1958 NRU Incident- “In 1958, there was a fuel rupture and fire in the National Research Universal reactor (NRU) reactor building. Some fuel rods were overheated. During a facility shutdown, a robotic crane pulled one of the rods with metallic uranium out of the reactor vessel. When the arm of the crane moved away from the vessel, the uranium caught fire and the rod broke. The largest part of the rod fell down into the containment vessel, still burning. The whole building was contaminated. The valves of the ventilation system were opened, and a large area outside the building was contaminated. The fire was extinguished by scientists and maintenance personnel in protective clothing running along the hole in the containment vessel with buckets of wet sand, throwing the sand down at the moment they passed the smoking entrance. The clean-up involved a large number of personnel, including AECL staff, soldiers from CFB Petawawa, and workers from the Civil Defense Unit based in Arnprior, Ontario, and a commercial cleaning company in Ottawa, Ontario.” (Whitlock, n.d.).
- 2008 Radioactive Leakage at the NRU Reactor – “On December 5, 2008, heavy water containing tritium leaked from the NRU. The leaked water was contained within the facility, and the CNSC was notified. In its report to the CNSC, AECL noted that 47 litres of heavy water were released from the reactor, about 10% of which evaporated, and the rest was contained. AECL further noted that the spill was not serious and did not present a threat to public health. The public was informed of the shutdown at the reactor, but not the details of the leakage, since it was not deemed to pose a risk to the public or the environment. The leak stopped before the source could be identified, and the reactor was restarted on December 11, 2008, with the approval of the CNSC, after a strategy for dealing with the leak (should it reappear) was put in place (Spears, 2009).
- Heavy Water Leaks from the NRU Reactor – « In late 2008, the NRU reactor

experienced a leak from a 2.4 inch crack in a weld in its reflector system. The leaking light water was allowed to flow into the Kitchi sibi after collection and processing at an on-site water treatment facility in accordance with CNSC, Health Canada, and Ministry of the Environment regulations. The CNSC determined that the leakage is not a concern from a health, safety or environmental perspective (Spears, 2009). The NRU experienced another heavy-water leak in 2009 that led to a 15-month, \$70-million shutdown and a global shortage of medical isotopes. That followed emergency safety shutdowns in 2007 and 2008.” (Macleod, 2016).

Wolf Lake First Nation has never been consulted on the development or maintenance of the CRL site and although we understand the site is contaminated the site has been restricted to our access since 1944.

We do not agree with the NSDF disposal mound proposal on our Title territory alongside the Ottawa River. We view this alarming situation as clearly inconsistent with the federal objective of advancing reconciliation. Moreover, the commission bypassing our and other Algonquin communities’ participation in the CEAA 2012 environmental assessment ignores our rights under section 35 of the *Constitution Act, 1982* and the Crown’s duty to consult and accommodate WLFN’s concerns.

As a result, the NSDF consultation process has not:

1. Properly take into account the cultural, environmental, and social concerns and interests of our community, including gender-based analysis and incorporating our watershed sustainability and long-term nuclear waste effect-related concerns into the evaluation of this major development.
2. Take into account traditional knowledge and our capacity to carry out independent studies as part of environmental, social, and cultural impact-assessment processes, with due regard to our ownership of and the need for the protection and safeguarding of our traditional knowledge;
3. Collaborated on appropriate land use, social, and cultural impact study methodologies and technologies providing suitable timeframes to implement studies within a mutually agreed upon consultation framework agreement;
4. Identified and implemented appropriate measures to prevent or mitigate any negative impacts of proposed studies, developments, or monitoring;
5. Taken into consideration the importance of balancing interrelationships among cultural, environmental, and social elements;
6. Recognized and supported Algonquin jurisdiction and a community-led assessment.

In January 2013, Timiskaming (TFN), Wolf Lake (WLFN) and Kebaowek First Nation (KFN) presented Canada, Quebec and Ontario with a Statement of Asserted Aboriginal Rights & Title (SAR), in part to address the gaps in federal policy related to consultation and interim measures prior to treaty negotiations. As explained in that document The purpose of this Statement is to set-out the evidence to support WLFN, TFN and KFN in our efforts to engage the honour of the Crown and its duty to consult them and accommodate their interests in matters affecting their traditional territories. It is intended to engage Canada's obligations under domestic law (Constitution Act, 1982, s. 35 and the Haida case) and international law, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which requires free prior and informed consent before any development activities within the traditional territories of Indigenous Peoples.

“This Statement is provided as an interim step prior to the completion of formal Statements of Claim from TFN, WLFN and KFN, and is provided at this time to give the Crown formal notice of their asserted Aboriginal rights and title. [...] Although this Statement is only a summary of the evidence, it is intended to provide enough evidence to trigger the Crown's duty and to establish that the scope of that duty is at the high end because of the strength of the claim”.³

The package that went with the SAR included extensive documentary evidence to substantiate the assertions made. It also included a map showing the geographic extent of the area over which the three communities assert Aboriginal title and rights (Timiskaming, Wolf Lake and Kebaowek: Asserted Aboriginal Title & Rights area (January 2013)).

Unfortunately, the CNSC has been unprepared to address the SAR in any meaningful way. It has refused to engage the communities substantively with respect to consultation on the NSDF.

The CNSC's Failure to Engage with WLFN

We would expect the CNSC to develop outreach methods tailored to Indigenous communities from whom you have not yet heard. Instead, the CNSC and CNL reached out to the Algonquin Nation Secretariat (ANS) from 2016 to 2022 continually receiving no response.⁴ The ANS was mandated to direct communication directly to the member communities (which are the rights and title holders) regarding land issues such as consultations, which ANS did.

Consequently, any issue that the CNSC or CNL takes with WLFN's "lack of participation" is moot. WLFN was never given an opportunity to engage. The CNSC and CNL just assumed that ANS represented our interests without ever having communicated with us directly and then assumed that ANS' unresponsiveness represented our unwillingness to engage. The IER makes no further reference to WLFN specifically and only refers to ANS with respect to its attempted consultation. The CNSC and CNL's Commission Membership Documents

³ Statement of Asserted Aboriginal Rights & Title: Timiskaming, Wolf Lake & Eagle Village, Jan 2013: p. 2

⁴ <https://www.cnl.ca/wp-content/uploads/2022/04/NSDF-Indigenous-Engagement-Report-Rev-6.pdf>

(CMDs) each only refer to WLFN as encompassed within the ANS tribal council.⁵⁶

As we were never engaged directly, WLFN has never had a chance to review any of the documents relied upon at this hearing and on which the CNSC will ultimately make its determination on whether to approve CNL's application and amend its CRL Site license to authorize the construction of the NSDF. WLFN has not had an opportunity to review these documents with our community and provide our comments on the structure of the environmental assessment, the risks outlined, or the mitigation measures proposed prior to official submission to the CNSC. To this day, we do not have a comprehensive sense of our community's position on any of these issues which is essential to determine WLFN's concerns, express them and have them responded to.

We were also never asked the question: "How would you prefer to be engaged?" Had we been contacted directly; we would have expected the CNSC to work with us to create work plans and execute agreements in line with our preferred means of engagement and to provide funding in support of our engagement in the planning and environmental assessment processes.

Throughout this engagement, we would expect the CNSC to consult with our community on values of importance, potential effects and impacts related to changes in health, social, economic, and environmental conditions due to the Project. We would expect the CNSC to seek direction from our community concerning:

- cultural practices to be followed;
- expectations for time allotted for review, dialogue, and collaboration;
- how Wolf Lake First wishes to be kept informed;
- Elder and youth working committees to be formed;
- specific studies that Wolf Lake First Nation may lead or participate in;
- how Algonquin communities choose to work together in relation to the IA process; and
- how Indigenous knowledge will be used and protected.

Instead, we received no direct engagement at all. The CNSC and CNL assumed that ANS represented our interests, communicated with the Secretariat and took its "unresponsiveness" as an indication that WLFN was not interested in engaging. Both the CNSC staff and CNL set out these nonsensical attempts at "engagement" in their CMDs and in the CNL's EIS. It should be noted that the CNSC staff's CMD acknowledges that ANS, and consequently WLFN as the rights and title holders, may have an interest in and/or could potentially be impacted by the NSDF project.⁷

⁵ Canadian Nuclear Safety Commission, Commission Member Document for "A License Amendment, Required Approvals for Construction of the Near Surface Disposal Facility (NSDF) at the Chalk River Laboratories (CRL) site", January 24, 2022 .

⁶ Canadian Nuclear Laboratories, Commission Member Document for Licensing Decision, "Chalk River Laboratories Site License Amendment to Authorize the Construction of the near Surface Disposal Facility", January 24, 2022 at p 47.

⁷ Canadian Nuclear Safety Commission, Commission Member Document for "A License Amendment, Required Approvals for Construction of the Near Surface Disposal Facility (NSDF) at the Chalk River Laboratories (CRL) site", January 24, 2022 at p 99.

In its EIS, the CNL claims to have provided ANS with 6 letters, 8 phone/email correspondences and 16 general emails regarding the NSDF project. CNL's CMD further claims that ANS has not provided a response to any of CNL's attempts to engage with them. It should also be noted that ANS was following the mandate to direct communication directly to the members communities, which it did.

Had CNL or the CNSC made real attempts to engage with a back and forth with the ANS, they would have been aware of this as opposed to continuously sending boilerplate correspondence when the ANS was not in a position to receive or consider it at this time. Again, none of these "attempts" were made with WLFN directly, and we are not in a position to comment on the CNSC and CNL's claimed attempts of engagement with ANS or ANS' alleged lack of response.

Despite this, we eventually became aware of our need to get involved in this process through discussions with Kebaowek First Nation. Algonquin First Nation communities have communicated with each other on issues of importance on our territory since time immemorial, family to family, band to band. Once we became aware that Kebaowek was becoming involved, despite the CNSC's failure to engage them as well, we took action to support Kebaowek and our own position. This gave us little to no time to register to intervene and make a submission to this hearing.

Accordingly, WLFN supports Kebaowek and Barriere Lake's recent requests for ruling to the CNSC in accordance with rule 20 of the *Canadian Nuclear Safety Rule* in favour of an adjournment of this public hearing.⁸

Ultimately, the procedure to date is ineffectual and ignores the necessity of our participation entirely, unduly limiting us through arbitrary timing constraints that leave us no time to determine and present as to how the NSDF project will impact our rights and title lands. We are a jurisdiction. We want to cooperate, but we need time and resources to act accordingly. The CNSC cannot bypass our right to do so by forcing us into its ready-made hearing process in order to check off boxes and be satisfied that it "engaged" us and fulfilled its DTCA.

The CNSC's Duty to Consult and Accommodate WLFN has Not Been Fulfilled

The Crown's, and in this case the CNSC's, DTCA owed to WLFN applies and is triggered by the CNSC's decisions under the CEAA and NSCA. Considering WLFN's rights that flow from its title and the serious potential impact the NSDF project may have on them, the duty owed here falls on the high end of the spectrum and the CNSC has not undertaken the deep consultation required in this case.

The Duty Applies

As per its enacting legislation, the CNSC "is for all its purposes an agent of Her Majesty and may exercise its powers only as an agent of Her Majesty."⁹ As an agent of the Crown, the CNSC "acts in place of the crown" and is "indistinguishable from [the Crown], and as such,

⁸ SOR/2000-211.

⁹ *Nuclear Safety and Control Act*, s 8(2).

can owe a duty to consult.”¹⁰ There is no dispute about whether or not the CNSC is responsible for the DTCA in this case. The CNSC has expressly acknowledged that it owes a DTCA to First Nations affected by the NSDF project, including WLFN.¹¹

The Duty is Triggered

The DTCA is triggered when “the Crown has knowledge, real or constructive” of Aboriginal and/or Treaty rights, and “contemplates conduct” which might “adversely affect” those rights.¹² The CNSC, has again, explicitly recognized that the duty is triggered here. The CNSC’s Commission Member Document for the NSDF project states, “Both the EA and licensing decisions trigger the Crown’s duty to consult and, where appropriate, to accommodate Indigenous peoples whose potential or established Indigenous and/or treaty rights, under section 35 of the *Constitution Act, 1982*, have the potential to be impacted by the proposed NSF project.”¹³ Importantly, WLFN is included, via ANS, in the CNSC staff’s list of Indigenous Groups who may have an interest in and/or could potentially be impacted by the NSDF project.¹⁴

The Duty Falls on the High End of the Spectrum

The scope of the DTCA lies on a spectrum.¹⁵ Determining where the duty falls in any given case depends on the strength of the rights claim, the scope of the Aboriginal right, and the potential infringements on the rights.¹⁶ If the duty falls on the low end, the content of the duty may be to provide notice and information and discuss any issues raised in response.¹⁷ Conversely, if the duty falls on the high end of the spectrum, deep consultation is required.¹⁸

When deep consultation is required, the Supreme Court of Canada discussed the following indicia for this level of consultation having being met:

- “the opportunity to make submissions for consideration;
- “formal participation in the decision-making process;
- “provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and
- dispute resolution procedures like mediation or administrative regimes with impartial decision makers.”¹⁹

Here, the CNSC’s duty falls on the high end of the spectrum and requires deep

¹⁰ *Peter Ballantyne Cree Nation v Canada*, [2016 SKCA 124](#) at para 61.

¹¹ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 126.

¹² *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 35.

¹³ Canadian Nuclear Safety Commission, Commission Member Document for “A License Amendment, Required Approvals for Construction of the Near Surface Disposal Facility (NSDF) at the Chalk River Laboratories (CRL) site”, January 24, 2022 at p 13.

¹⁴ Canadian Nuclear Safety Commission, Commission Member Document for “A License Amendment, Required Approvals for Construction of the Near Surface Disposal Facility (NSDF) at the Chalk River Laboratories (CRL) site”, January 24, 2022 at p 99.

¹⁵ *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#).

¹⁶ *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at paras 43-44.

¹⁷ *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 43.

¹⁸ *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 43.

¹⁹ *Coldwater First nation v Canada (Attorney General)*, [2020 FCA 34](#) at para 41.

consultation. WLFN has evidenced our strong prima facie case for our Aboriginal rights and Title at Chalk River. Further, these rights are wide in scope covering all our use, enjoyment, occupancy and decision-making rights that flow from our title. No treaties were signed by us in relation to our land and these rights remain unextinguished. WLFN has not brought an Aboriginal rights or Title claim through the Canadian courts, but we would easily be able to prove our inherent section 35 rights under the relevant test. This test requires the court to “examine the pre-sovereignty aboriginal practice and translate that practice into a modern legal right” by considering the characterization of the right, its location, whether it was exercised prior to European contact, whether it is “integral to our distinctive culture” and the continuity of the exercise of the right.²⁰ Our rights including our rights to harvest, gather and use the land stem from the fact that we have been on the land since time immemorial. Our exercise of these rights were and continue to be integral to our distinctive culture.

Unfortunately, the potential infringements on our rights by the NSDF project is impossible for us to comment on without having the opportunity to undertake the necessary due diligence required by these submissions. However, looking to the CNSC’s EAR, the adverse impact to the environment generally can be used to understand the potential adverse impacts to WLFN’s rights.

Of particular concern is the proposed site’s proximity to and interaction with the Ottawa River. The site is directly adjacent to the River and “contains several small drainage basins that drain directly or indirectly” into it.²¹ Additionally, the Perch Creek and Perch Lake watersheds are located just southwest of the project site. These watersheds have been adversely impacted in the past by plumes coming from the CRL’s waste management areas and Liquid Dispersal Areas. The rapids at Cotnam Island are also located 40 kilometres downstream of the site and control the water level in the River.

Impacts to our waterways are just one area of concern. A skim of the CNSC’S EAR provides a wide range of potential impacts of the NSDF Project on the surrounding environment, including:

- “Change to air quality due to an increase in emissions, including dust and greenhouse gasses (GHGs), associated with construction and operations activities”;²²
- “Changes to surface water quality” as a result of the degradation of the barriers of the NSDF post-closure, “resulting in increased infiltration of surface water to the emplaced waste”;²³
- “Changes to downstream discharge patterns”;²⁴

²⁰ *R v Marshall*; *R v Bernard*, [2005] [2 SCR 220](#) at para 51 see also: *R v Sparrow*, [1990] [1 SCR 1075](#); *R v Van der Peet*, [1996] [2 SCR 507](#); *R v NTC Smokehouse Ltd.*, [1996] [2 SCR 672](#); *R v Gladstone*, [1996] [2 SCR 723](#); *R v Nikal*, [1996] [1 SCR 1013](#); *R v Pamajewon*, [1996] [2 SCR 821](#); *R v Adams*, [1996] [3 SCR 101](#); *R v Côté*, [1996] [2 SCR 139](#); *Mitchell v. MNR*, [2001] [1 SCR 991](#); *R v Powley*, [2003] [2 SCR 2007](#); and *R v Sappier*; *R v Gray*, [2006 SCC 54](#).

²¹ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 47.

²² Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 49.

²³ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 53.

²⁴ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility

- “Loss of terrestrial habitat and vegetation communities due to vegetation clearing and grubbing” due to the 33 hectares of forested ecosystem cleared for the construction of the project;²⁵
- “Changes to habitat quality and function from NSDF Project activities during construction and operations phases”;²⁶
- “Changes to groundwater flow”;²⁷
- “Changes to groundwater quality”;²⁸
- “Fish habitat loss and alteration”;²⁹
- “Changes to fish health” including those to the four species of fish with conservation concern;³⁰
- “Habitat loss and alteration for migratory birds” including those in the local study area that have been identified as species at risk;³¹
- “Sensory disturbance of migratory birds throughout the construction, operation and closure phases” again including the identified species at risk;³²
- Human “exposure to air and water non-radiological contaminants by inhalation and ingestion”;³³
- Human “external and internal exposures to radiological contaminants”;³⁴
- Greenhouse gas emissions from decomposition of the waste on the site;³⁵
- Impacts on species at risk including bats, Blanding’s turtle, eastern milksnake and monarch butterfly;³⁶
- Impacts from potential accidents and malfunctions; and³⁷
- Cumulative environmental effects.³⁸

Project,” January 2022 at p 53.

²⁵ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 63.

²⁶ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 63-64.

²⁷ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 70.

²⁸ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 70.

²⁹ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 75.

³⁰ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 75, 76.

³¹ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 81-82.

³² Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 81-82.

³³ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 90.

³⁴ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 90.

³⁵ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 96-97.

³⁶ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 100-107.

³⁷ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 107-112.

³⁸ Canadian Nuclear Safety Commission, “Environmental Assessment Report: Near Surface Disposal Facility Project,” January 2022 at p 120.

These potential environmental impacts must be considered in light of the immense lifespan of a nuclear project like the NSDF. NSDF's impacts will begin with its construction and will continue for hundreds of years after the facility is closed. Specifically, the operations of the NSDF will last at least 50 years with the decommissioning phase expected to last 30 years and the post-closure phase extending for at least 300 years.³⁹ The impacts of the NSDF project are not only wide in scope, they have the potential to last for hundreds and hundreds of years.

The Duty Has Not Been Met

While the CNSC staff have recommended that the Commission determine that the NSDF project is not likely to cause significant adverse environmental effects referred to in the CEAA and conclude pursuant to the NSCA that CNL's application with respect to the NSDF should be approved, the Commission cannot make this determination and fulfil its DTCA absent WLFN's input and lack engagement with this process whatsoever. The Commission simply does not have any of the information it needs to make these determinations. Both WLFN's lack of opportunity to provide this input and CNSC's resulting inability to consider and address this information mean that the DTCA has not been met.

Engaging in a "meaningful two-way dialogue" is required by deep consultation.⁴⁰ This dialogue is essential for any accommodation provided by the crown to have a nexus with the First Nation concern.⁴¹ "Consultation in its least technical definition is talking together for mutual understanding" and it requires a "mutual understanding on the core issues" including the potential impact on rights, which has not occurred here.⁴²⁴³ one of the "consultation" steps taken by the CNSC, and directed towards the wrong body, have facilitated this. It must be emphasized that CNSC's inquiries under the DTCA is not into environmental impact or the safety of a proposed project, "it inquires into the impact on the *right*."⁴⁴ The CNSC is not in a position to consider the impact of the NSDF project on WLFN's rights without having even initiated this two-way dialogue. It is not sufficient for the CNSC to rely on its EAR for generic impacts on the environment and then claim that considering and responding to those impacts addresses any potential impacts to WLFN's rights.

We are not in a position to analyze the sufficiency of the CNSC's consultation efforts towards us as simply none were made. The CNSC made an erroneous assumption about who could properly represent ABL in these assessment processes and then acted on that assumption without ever asking us. It is unclear what gave the CNSC the impression that ANS was in a position to represent our interests, but the fact that it did not even take the care to discuss the issue with us speaks directly to CNSC's complete failure to engage WLFN whatsoever in its assessment and decision-making process regarding the proposed NSDF project. As a result of CNSC's complete lack of engagement with us, we have had no real opportunity to even consider if and how we would want to be involved. First, WLFN has not had the opportunity to review any of the documents that the CNSC staff based its

³⁹ Transcript of February 22, 2022 Part 1 of CNSC Public Hearing at p 23-24.

⁴⁰ *Squamish First Nation v Canada (Fisheries and Oceans)*, [2019 FCA 216](#) at para 63.

⁴¹ *Squamish First Nation v Canada (Fisheries and Oceans)*, [2019 FCA 216](#) at paras 71-79.

⁴² T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49 at p 61.

⁴³ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 49.

⁴⁴ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 45.

recommendations on or to undertake our own studies to provide input on these determinations considering the adverse impact the project may have on our rights. Together, CNL's EIS and CMD and CNSC's CMD total 2,422 pages. In part, these documents are meant to address impacts to our rights. Not only can CNSC not address First Nations' concerns through document dumping, but none of these documents can be said to have properly addressed impacts to WLFN's rights without having considered our actual input on this topic.⁴⁵ All of the assessments and conclusions made by the CNSC staff have been made without WLFN's input and have been made unilaterally. Despite this, the

CNSC staff still ask the Commission to make their determinations based off of this inadequate information. CNSC staff are unable to properly identify WLFN's rights let alone come to any conclusions on potential impacts to them.

While CNSC staff are satisfied with their analysis, WLFN has not had any opportunity to study or consider the project's potential impacts on its harvesting or any other rights. WLFN has not completed a land use, occupancy study, traditional knowledge study or cumulative effects study on the affected area and this assessment was done absent any information of WLFN's land use.

The CNSC staff also deemed mitigation measures to be sufficient to address the project's environmental impacts without WLFN's input. WLFN has had no say in how the mitigation measures were decided upon nor had any time to consider the adequacy of these measures. From a preliminary reading of the CNSC staff's EAR, the mitigation measures identified are not sufficient in any event. For example, to address changes to groundwater flow, the CNSC staff's EAR simply states "NSDF designed to limit disturbance to the natural environment"⁴⁶ From the cursory overview of these documents that could be managed in the time available, it becomes clear that the Commission cannot rely on them to make the determinations recommended by the CNSC staff. The Commission does not have the information it requires in order to reasonably conclude that the statutory requirements and the DTCA are made out.

Conditions under CEAA 2012 cannot be met

Just as the CNSC's DTCA to WLFN has not been met, neither are the requirements under the CEAA. An EA decision under the CEAA on whether the proposed NSDF project is likely to cause significant adverse environmental effects cannot be made due to the complete lack of consultation with WLFN.⁴⁷ The CNSC cannot satisfy itself that all the environmental effects required to be taken into account under section 5 have been met. Specifically, section 5(1)(c) of the Act sets out the environmental impacts with respect to "aboriginal peoples" that must be considered in relation to any act subject to it:

- (c)** with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on
- (i)** health and socio-economic conditions,

⁴⁵ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 49.

⁴⁶ Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 71.

⁴⁷ *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19.

- (ii) physical and cultural heritage,
- (iii) the current use of lands and resources for traditional purposes, or
- (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.⁴⁸

In all the ways that the CNSC did not fulfil its DTCA with WLFN, it also failed to fulfil its requirements under this section of the CEAA. This section of the CEAA requires the consideration of impacts to First Nations as part of the environmental impacts to be taken into account. Again, the Commission cannot satisfy itself that these factors under section 5 have been met because they do not have any information from WLFN in order to make this assessment.

WLFN Has Not Frustrated Consultation

There is a requirement regarding a First Nations' involvement in the DTCA, that "Indigenous groups 'must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached[...]" though "hard bargaining on the part of Indigenous groups is permissible."⁴⁹ The CNSC cannot take the position that procedural issues including what it may perceive as WLFN's failure to proactively address assumptions about whether or not ANS represents our interests "frustrate" consultation and that, consequently, the Crown cannot be found responsible for the Duty not being met. This flies in the face of the reconciliatory purpose of the duty and its constitutional nature.

The DTCA's constitutional nature stems from the Honour of the Crown. It would be entirely dishonourable to blame WLFN in any way for the Crown's failure to fulfil its obligation, Further, the CNSC cannot blame WLFN for failing to rectify the CNSC's unfounded assumptions about ANS' representation of WLFN. It is not WLFN's onus to direct the Crown about how to follow through with its Constitutional obligations. The CNSC knew of WLFN's interest in the NSDF project as it listed us as an affected First Nation in its EAR.⁵⁰

The issues in communication between WLFN and the CNSC are largely attributable to the ways in which the CNSC attempted to "engage" with us. The Ontario Superior Court considered the Crown's duty to engage meaningfully considering "the cultural context of the engaged Indigenous form of communication and consultation where the emphasis is on speaking and active listening with a view to developing a mutual understanding and, hopefully, a resolution."⁵¹ By pushing forward by dealing with ANS instead of WLFN directly, the CNSC failed to communicate or engage with us at all and yet still unilaterally determined these efforts to be sufficient.

Conclusion

⁴⁸ *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 5(1)(c).

⁴⁹ *Coldwater* at para 195 citing *Haida* at para 42.

⁵⁰ Canadian Nuclear Safety Commission, "Environmental Assessment Report: Near Surface Disposal Facility Project," January 2022 at p 126.

⁵¹ *Saugeen First Nation v Ontario (MNRF)*, [2017 ONSC 3456](#) at para 159.

The Commission is not in a position to make either of the determinations required in order to approve CNL's application. The CNSC has not fulfilled the DTCA owed to WLFN, in fact it has not engaged with us at all and consequently it cannot satisfy itself that the requirements under the CEAA or the NSCA have been met. The Commission has no option at this point but to either deny CNL's application or defer its decision to allow for the proper fulfillment of its DTCA through the creation of an engagement framework that properly recognizes WLFN as an equal jurisdiction in this matter. Proceeding otherwise would result in the Commission's violation of the Crown's constitutional obligations and potentially the greater and unknown impacts to both the environment and our inherent and projected rights.