



CMD 25-H6.11B

Date: 2025-06-04

Supplementary Information

Kebaowek First Nation

In the matter of

Nordion (Canada) Inc.

Application to Renew Licence for the
Nordion Facility

Commission Public Hearing

June 4, 2025

Renseignements supplémentaires

Première nation de Kebaowek

À l'égard de

Nordion (Canada) Inc.

Demande pour le renouvellement de son
permis pour l'installation de Nordion

Audience publique de la Commission

Le 4 juin 2025

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Oral Presentation

Written submission from the Kebaowek First Nation

In the Matter of the

BWXT Medical Ltd.

Application for a Class IB nuclear substance
processing facility operating licence

Commission Public Hearing

June 9-10, 2021

Exposé oral

Mémoire de la Première nation de Kebaowek

À l'égard de

BWXT Medical Ltd.

Demande pour un permis d'exploitation d'une
installation de traitement de substances
nucléaires de catégorie IB

Audience publique de la Commission

9 et 10 juin 2021



KEBAOWEK FIRST NATION

110 OGIMA STREET

KEBAOWEK (QUEBEC)

J0Z 3R1

TEL: (819) 627-3455

FAX: (819) 627-9428

May 10, 2021

Senior Tribunal Officer, Secretariat
Canadian Nuclear Safety Commission
280 Slater Street, P.O. Box 1046, Station B
Ottawa, Ontario K1P 5S9

via cnsc.interventions.ccsn@canada.ca

Dear Commissioners,

**Re: Hearing for a New Licence for BWXT Medical Ltd. – Submissions of
Kebaowek First Nation (“KFN”)**

We are submitting this letter and supporting document in response to a consultation with Kebaowek First Nation (“KFN”) with respect to a new, ten-year license, requested by BWXT Medical Ltd (herein “BWXT Medical”) for a medical isotope facility in Ottawa, Ontario. This submission provides a number of recommendations and conditions which Kebaowek proposes must be met prior to proceeding with the granting of a license.

Kebaowek First Nation is one of eleven distinct First Nations that make up the Algonquin Anishinabeg Nation. Nine are located in Quebec and two in Ontario. KFN’s traditional territory lies on either side of the Ottawa River Basin where our 1000 members live, work and exercise Aboriginal rights, including Aboriginal title, in both Ontario and Quebec. As an Algonquin First Nation Government who represents rights holders to the area of the BWXT Medical Project and to areas that may be affected by the proposal, our duty is to protect our lands, waters and environment for our present and future generations.

We understand the existence of nuclear facilities in and around Algonquin Anishinabeg lands and waterways have adverse impacts on the unceded, inherent rights of Algonquin Anishinabeg peoples in perpetuity. Given the long-lived nature of the radionuclides

created by these facilities' continued operation and their legacy wastes, we are totally opposed to nuclear developments on or near our ancestral land and waterways.

As the Canadian Nuclear Safety Commission (CNSC) is aware, Kebaowek has expressed serious concerns about the CNSC's independence as a regulator. Thus, our comments on this license do not signify that we have attorned to the jurisdiction of the CNSC, but rather provide the recommendations and conditions of licensing we set out as being required in order to protect Kebaowek's rights.

Moving forward we insist that ethical frameworks for consultation for nuclear projects on our lands be worked out in a nation-to-nation fashion. This license request must be construed in a manner consistent with Canadian Constitutional obligations to consult our First Nation community. Therefore, the Ministry of National Resources Canada (NRCAN) shall consult First Nation communities separately if the circumstances so warrant.

We await your response to this license, and advise that our First Nation will continue to do whatever we can to protect our natural resources, culture and way of life from illicit nuclear generating activities that our community never consented to.

Sincerely,

A handwritten signature in black ink, appearing to read "Lance Haymond". The signature is fluid and cursive, with the first name "Lance" and last name "Haymond" clearly distinguishable.

Chief Lance Haymond

Kebaowek First Nation

Kebaowek First Nation Review

of BWXT Medical, Ltd. (BWXT Medical) Application for a Class IB nuclear
substance processing facility operating license.

FINAL WRITTEN SUBMISSION

presented to

Canadian Nuclear Safety Commission

May 10, 2021

NOTE

This document is the final written submission of the Algonquin Nation of Kebaowek submitted by the Chief and Council on May 10, 2021.

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1. INTRODUCTION

The following submission is presented on behalf of Kebaowek First Nation (KFN) to the Canadian Nuclear Safety Commission (CNSC) provided for under the *Nuclear Safety and Control Act (NSCA)*.

The term Anishnaabe, 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. For centuries Anishinaabeg peoples have relied on 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.

Kebaowek First Nation is one of ten distinct First Nations that make up the Algonquin Nation. Nine are located in Quebec and one, in Ontario. KFN’s traditional territory lies on either side of the Ottawa River Basin and 1,000 members live, work and exercise Aboriginal rights, including Aboriginal title, in both Ontario and Quebec. KFN’s reserve is located in Quebec on Lake Kipawa, 15 km from the interprovincial border. KFN, like many Aboriginal peoples in Canada, is a trans-border community.

BWXT Medical Lt. (formerly BWXT ITG Canada, Inc.) is requesting a license that would authorize it to operate an existing medical isotope facility located within a nuclear substance processing facility in Ottawa, Ontario.

The location of the BWXT Medical’s proposed facility is on the unceded title and rights territory of Kebaowek and the Algonquin Anishinaabeg Nation in what is now the provinces of Ontario and Quebec. KFN are part of the Algonquin Anishinabeg Nation Tribal Council.

As a preliminary matter, KFN would like to draw to your attention some procedural concerns about the conduct of this consultation. Unfortunately, this process has been marred by in-availability of information, and insufficient funding and timing for KFN to prepare comments. In summary, the consultation process is ineffectual for Indigenous participation, unduly limiting us through funding, necessary information and arbitrary timing constraints that in effect leave little sentiment for other Algonquin Nation communities to prepare or participate.

KFN does not endorse, accept, nor acknowledge any claims to any Aboriginal or Treaty Rights made by the Algonquins of Ontario (“AOO”) or any members of AOO. KFN does not recognize the AOO as an entity entitled to consultation or accommodation. Furthermore, we question

CNSC licensing approvals when AOO engagement and resourcing is made available as they are simply a corporation and not Section 35 rights holders.

In order to safeguard against this situation we request KFN's presentation be recorded as a consultation under protest.

2. DUTY TO CONSULT

Regardless of the specific nuclear project under review, the government of Canada has a constitutional obligation to consult Kebaowek and all First Nations within the Algonquin Nation. Section 8(2) of the *NSCA* recognizes that the CNSC acts as an agent of the Crown. Therefore, it is the CNSC acting as the Crown that must meet obligations to consult and is entrusted with the responsibility of fulfilling the Honour of the Crown.

Furthermore, in carrying out the review, we are unclear how the Commission is to recognize the objectives of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹ specifically how the CNSC shall reflect the principles of the Declaration in its recommendations, especially with respect to the manner in which the license review can be used to address potential impacts to potential or established Aboriginal and treaty rights.

In practice, UNDRIP would promote, amongst other things, transitions toward sustainable development. The concept of free, prior, and informed consent (FPIC) promoted by the UNDRIP in advance of project development is of paramount importance to KFN and other First Nation communities across Canada.

The UNDRIP also includes a number of articles recognizing the need for a dominant state to respect and promote the rights of its Aboriginal peoples as affirmed in treaties and agreements, including how Aboriginals participate in decision-making processes that affect their traditional lands and livelihoods.²

For example, article 18 provides as follows:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedure, as well as to maintain and develop their own indigenous decision-making institutions.

¹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at:

<https://www.refworld.org/docid/471355a82.html>

² *Ibid*

Moreover, article 32 (2) of the UNDRIP states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources.

We also recommend the Commission strengthen the Indigenous consultation components of its regulatory documents as per Canada's International commitments related to the Convention on Biological Diversity (CBD) in recognizing the benefits of incorporating Indigenous knowledge for natural resource management and conservation.

In 2008, Elinor Ostrom introduced how governments should “evolve institutional diversity”. What this refers to is the adaptation of the existing mono-cultural institutions and/or the fostering of new institutional arrangements that recognize Aboriginal rights and empower communities to enter into co-operative schemes – schemes that respect and recognize First Nation rights, values and priorities even when different to those of dominant society. As she stated, “we have got to understand the institutional diversity that is out there, because if we are actually going to protect biodiversity we have to have institutions that match the complexity of the systems that are evolved and those systems have to be complex.” Her motto was, “Build enough diversity of the world and allow multi-tier systems at multiple scales so that you don't have an uniform top down panacea that is predicated to cure everything and instead of curing it, kills it.”³

It is this kind of multi-tier system that could provide KFN with the political space to work in partnership with other stakeholders, industry and government agencies. However, it remains to be seen whether CNSC can be reformed to recognize the cultural and other legal specificities of Algonquin Anishinaabeg rights and land use, and allow the kind of institutional diversity that Ostrom calls for to truly build sustainable societies.

KFN and the Algonquin Anishinaabeg Tribal Council are currently petitioning the Minister of Natural Resources Canada (NRCAN) to try to resolve the ongoing consultation crisis between CNSC and the Algonquin Anishinaabeg Nation. Historically, Kebaowek First Nation and the Algonquin Anishinaabeg Nation was never consulted on the nuclear developments and relicensing of Chalk River Nuclear operations.

³ Ostrom, Elinor. 2008. *Sustainable Development and the Tragedy of the Commons*. Stockholm Whiteboard Seminar, Stockholm Resilience Centre TV, online: <http://www.youtube.com/watch?v=ByXM47Ri1Kc>

Furthermore, what is altogether absent from licensing documents before the CNSC, is any consideration of the requested licence in tandem with other existing and ongoing nuclear project reviews. These include:

- Micro Modular Reactor Project at Chalk River (IAA Ref. #80182)
- Near Surface Disposal Facility Project (IAA Ref. #80122)
- Nuclear Power Demonstration Decommission Project (IAA Ref. #80121)
- CNL Access Road Upgrade (IAA Ref. #81243)
- CNL Material Pit Expansion Project (IAA Ref. #81209)
- CNL Intermediate Waste Storage Area (IAA Ref. #81177)
- CNL Bulk Storage Laydown Area (IAA Ref. #81178)

Maintaining an individualized or a licence-specific approach to engagement is contrary to Canada's stated intent to advance reconciliation and nation-to-nation relationships. In our view, this fragmented approach diminishes the ability of Kebaowek to comprehensively and effectively address the environmental, socio-economic and health effects of these nuclear projects, which, if considered in their entirety, could have profound impacts and create potential infringements of Kebaowek's section 35 constitutional rights.

Viewed together, we can begin to understand the magnitude of direct, indirect and cumulative effects posed by nuclear facilities' operations, the radioactive and non-radioactive wastes they produce, and accompanying effects from the transport of nuclear substances and the storage of waste. Together, these activities have led to the permanent deterioration of Algonquin Territory and given the long-lived nature of radionuclides, they are impacts, which cannot be taken away.

Unlike other regulatory proceedings, there is no stated commitment in the *NSCA* or its regulations that requires Indigenous knowledge to be taken into account. However, the obligation duty is independent of any other statutory or procedural requirements and/or obligations under any other legislation.

Taking into account the rights, interests and customary laws of Native communities is an integral part of reconciling nuclear activities with other possible uses of the territory. As a new licence, Kebaowek is disappointed by the lack of attention to conditions which may facilitate the inclusion of Kebaowek and upholding of Indigenous rights. As drafted, there is no role for Kebaowek contemplated for instance, in the CNSC's Independent Environmental Monitoring Program (IEMP) for the site nor BWXT Medical's Environmental Monitoring Program.

Security of First Nations' lands must be ensured through in-depth consultation and direct participation. Indeed, it is a principle of article, per Article 29.2 of the UNDRIP that 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.”

In response, we request the following licence specific changes be made and new conditions added:

1. Kebaowek values collaborative processes that are clear, transparent and predictable, and where information is shared in a timely and accessible manner. This requires BWXT Medical to have an ongoing duty to disclose notices, changes to the licence, or the submission of revised licensing documents to CNSC. As Constitutional rights holders on Unceded Algonquin lands Kebaowek can not be restricted from “BWXT business proprietary information.” Kebaowek should be promptly communicated with and all documents made fully available in French and English.
2. The ‘proponent’ BWXT Medical should enter into a formal licensing process agreement to be negotiated with Kebaowek.

Recommendations

- 1. It is incumbent on the CNSC that before making this decision, there be collaboration to the furthest extent possible with Kebaowek and the Algonquin Anishinaabeg Nation to ensure decisions are made respectful of their law and practices and the free, prior and informed consent (FPIC) principle. Without the duty to consult being fulfilled, there isn’t the requisite constitutional basis to proceed with this license.**
- 2. If the CNSC is to discharge its duty to consult, the CNSC must demonstrate that Indigenous communities, including Kebaowek, were engaged in making a licensing decision, and it must be clear what was heard and how it factored into the license decision. Indeed, BWXT’s Indigenous engagement plan was among the documents to which Kebaowek was denied access. To date, there has not been meaningful consultation with KFN necessary to allow the license to be granted.**
- 3. UNDRIP must be a minimum framework for the relationship between Aboriginal peoples and the Canadian State and nuclear development decisions across Canada. CNSC engagement should better reflect Canada’s commitments through international instruments like UNDRIP.**
- 4. Reforming licensing assessment and the role of the Algonquin Anishinaabeg Nation in such assessment requires CNSC understanding that mutuality, respect and consultation are integral to Algonquin social and political organization on a number of levels: family- to-family, band-to-band, and nation-to nation. From and Algonquin Anishinaabeg perspective, the current CNSC process should be harmonized with that expectation providing adequate basis for developing ‘real’ Anishinaabeg nation-to nation relationships and supporting ‘real’ Algonquin Anishinaabeg institutions.**

5. This requires reviewing other pieces of federal legislation such as but not limited to the Federal Comprehensive Claims Policy that support and/or create false entities and processes that further undermine ‘real’ Algonquin Anishinaabeg participation in environmental decision making.

6. KFN does not endorse, accept, or acknowledge any claims to any Aboriginal or Treaty Rights made by the Algonquins of Ontario (‘AOO’). KFN does not recognize the AOO as an entity entitled to consultation or accommodation. To this end, CNSC and other federal authorities evaluating licensing projects pursuant to *Canadian Constitution* should restrict participation of the Algonquins of Ontario (‘AOO’) also known more appropriately as an ALGONQUIN OPPORTUNITY (NO.2) CORPORATION.⁴

3. NUCLEAR HISTORY ON ALGONQUIN ANISHINAABEG LANDS AT CHALK RIVER AND BEYOND

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 or license approval was undertaken with the Algonquin Anishinaabeg Nation 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 Anishinaabeg 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 and 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. The 1945 Zero Energy Experimental Pile (ZEEP) reactor the basis for the 1947 National Research Experimental reactor, or NRX, and the 1957 National Research Universal (NRU) reactor came online marking a significant achievement with Canada having the world's most powerful research nuclear reactor. The NRU converted from highly enriched uranium (HEU) to low enriched uranium (LEU) in 1991. The NRU was permanently shut down in March 31, 2018, and the NRX in 1993. Although the reactors were tucked away in a remote area on the shore of the Kitchi-Sibi, they ran around the clock producing isotopes and over time the CRL facility created significant environmental and human health risks to Algonquin Anishinaabeg 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:

⁴ Ontario Superior Court of Justice Court File no. CV_18-00603975-000 “*Chief Kirby Whiteduck on his own behalf of the ALGONQUINS, and the ALGONQUIN OPPORTUNITY (NO.2) CORPORATION.*”

- 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. Scientists and maintenance personnel in protective clothing were 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 and extinguished the fire. 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).

In the late 1980s, Atomic Energy of Canada Limited (AECL) began to acknowledge that continued isotope production would require the construction of a new reactor to replace capacity lost by the planned closing of the NRX in 1993, and the planned closing of the NRU early in the new millennium. Design work on a replacement, originally under the name "Maple-X10", began in the late 1980s. As part of a restructuring taking place around the same time, the medical isotopes side of AECL was reorganized as Nordion in 1988. Work on the X10 project essentially ended at this point. Nordion company was purchased by MDS in 1991, and an agreement was reached between AECL and MDS Nordion that a new facility dedicated to the production of medical isotopes would be needed.^[3] A formal agreement was signed to begin the project in August 1996. Following a year-long environmental assessment, construction began in December 1997.^[4]

The Multipurpose Applied Physics Lattice Experiment (MAPLE) 1 and 2, and a dedicated target processing facility were completed in 2000 to replace the NRU reactor. These facilities were later renamed MDS Medical Isotope Reactors (MMIR), as a dedicated isotope-production facility built by AECL and MDS Nordion they were scheduled to produce Mo-99 starting in 2000. The Mo-99 production capacity of these new facilities was to exceed the then global demand for Mo-99 (see OECD-NEA, 2010). However, the reactors were never used to produce Mo-99 because of technical and regulatory problems that were too expensive to address (IAEA 2009). In 2008, AECL terminated the MAPLE project and in 2011 CNSC renewed the operating license for Chalk River and the NRU to 2016. BWX Technologies Inc., in Lynchburg, Virginia, previously supplied highly enriched uranium (HEU) targets for the MAPLE reactors at CNL. These reactors were constructed to produce Mo-99 for Nordion but were never put into commercial use. (see NRC, 2009, pp.115-120)

Although we are not aware of the Nordion Facility history in Ottawa we are very concerned about for profit spin-offs to produce Mo-99 and Technetium-99m (Tc-99m). Tc-99m is a decay isotope of Molybdenum-99 (Mo-99). At this stage, there is no indication by BWXT as to what other medical isotopes or radiopharmaceuticals it plans to manufacture.

4. DENIED ACCESS – PROCEDURAL & DOCUMENTARY INEQUITIES

A repeated issue Kebaowek faces in reviewing project proposals, is the inadequate information which is provided and often, differential levels of information wherein one party has greater access than the other. In this instance, there is clearly inequitable levels of access to licensing documents inhibiting our review of procedures and activities which have direct bearing on the lands and waters of our traditional territory.

Kebaowek sought copies of all documents referenced in CNSC Staff CMD. However, references 5, 9, 13, 17, 18, 19 and 40 were all deemed internal and not provided. They are:

- 5. BWXT Medical, CPM-6-06, Nordion Environmental, Health and Safety Policy, 2018.
- 9. BWXT Medical, SE-EHS-009, EHS Regulatory Reporting and Notifications, 2018.
- 13. BWXT Medical, IS/SR 1070 Z000, Final Safety Analysis Report for the Nuclear Medicine Production Facility, 2018.
- 17. BWXT Medical, SE-ENV-015, Nordion Environmental Protection Program, 2018.
- 18. BWXT Medical, SE-ENV-001, Environmental Management System Manual, 2018.
- 19. BWXT Medical, SE-RP-008, Radiation Protection Manual, 2020.
- 40. BWXT Medical, SE-LIC-020, Public Information and Disclosure Program and Indigenous Engagement for BWXT ITG, 2020.

In response to our disclosure request, BWXT Medical provided short summaries. These summaries however, did not expand upon the information already provided in the licensing documents and thus, cannot be considered equal in depth or detail to the originating documents.

Kebaowek has actively engaged on a range of significant infrastructure and energy projects and at a minimum, a company's environmental plan and Indigenous engagement protocol are documents which are public for the very reason they are necessary in building positive relationships, advancing community trust and economic reconciliation with First Nations.

As Canada's nuclear regulator, when the CNSC is reviewing factual, technical or scientific evidence tendered by proponents like BWXT Medical, there must be sufficient rigour and minimum procedural safeguards in place so that CNSC's purpose of disseminating information to the public per section 9(b) of the *NSCA* and ensuring a licensing decision is arrived at in a fair and credible manner, can be fulfilled. In this circumstance, it is Kebaowek's view that neither have been fulfilled.

We therefore make the following recommendations to the CNSC:

Recommendations

7. The CNSC provide a response in writing explaining how the federal Crown sought to address concerns which have been raised by Kebaowek. In the event we feel we have outstanding concerns, we retain the right to make submissions to the CNSC which shall be made publicly available and posted to the licensee and hearing project page managed by the CNSC.

8. At a minimum, any document referenced by the CNSC in its licensing hearings – which are purportedly open to the public – should also be public. Instead, the CNSC is enabling a hearing process where documents directly pertinent to our rights and our ability to meaningful review, are withheld. We encourage the CNSC to work with licensees to develop documents which by default, are available for the public.

5. ASSESSING RESOURCE FAIRNESS

Adequate resources to carry out meaningful consultation between parties must be assessed and negotiated, not unilaterally determined by CNSC staff. Our experience to date is the CNSC does not follow the general cost or time considerations to fulfill the Crown's legal obligations to fulfill the duty to consult.

The availability of adequate participant funding is essential to KFN's ability to participate in CNSC licensing reviews. Although we recognize that some funding through the Participant Funding Programme (PFP) is very important, the current levels are inadequate for KFN to fill in the information gaps it finds in the BWXT Medical Application.

Furthermore, it is imperative that BWXT's \$10.54 million dollar project and licensing application be put on pause until a proponent consultation agreement is in place for Kebaowek First Nation and there be financing to enable further review of this licensing proposal. The CNSC's participant funding budget limited to \$17,100.00 is in no way sufficient to resource the review of existing licensing documents and additional information that has not been forthcoming by the proponent.

If KFN and other Algonquin Anishinaabeg First Nations are going to establish a legitimate consultation and review processes over its territory that engages the Algonquin as assessors of projects, not simply passive participants, there needs to be an adequate transfer to resources from both the regulator and the proponent.

Recommendations

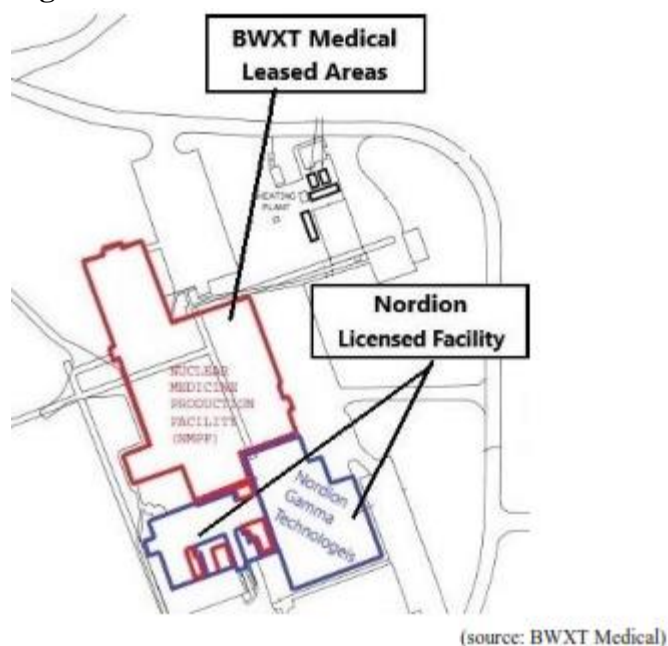
9. Participant funding needs to be increased to allow meaningful Aboriginal participation in CNSC licensing reviews.

10. Aboriginal institutions require sufficient financial resources to build capacity to undertake nuclear project reviews properly. They require increased funding as they take on increased responsibility.

6. CHOICE OF LICENCE & LENGTH

As described by CNSC Staff (see Figure 1 below), the proposed BWXT Medical licence would authorize BWXT Medical to operate the Nuclear Medicine Production Facility (NMPF), and the operation of this facility would be removed from Nordion's Licence Conditions Handbook. Nordion would continue to operate the Cobalt Operations Facility (COF) only. CNSC Staff state "no licence amendment would be required."⁵

Figure 1: BWXT Medical and Nordion licenced and leased areas



In support of the new, 10-year licence, there are repeated assurances by CNSC Staff that 'Nordion's past performance at the facility, appropriately reflects CNSC staff's regulatory expectations for the operation of the facility,' and likewise, the past performance of the facility 'has been in a manner compliant with CNSC requirements.'⁶

⁵ CNSC Staff CMD, p 7

⁶ CNSC Staff CMD, p 6

However, these statements and the recommendation by CNSC Staff to grant the licence fails to consider significant operational changes at the site regarding the production of molybdenum-99 (Mo-99), that BWXT Medical is a first-time licensee, and the success of Nordion and BWXT Medical partnership remains to be seen. It is for these reasons, each detailed below, that Kebaowek strongly opposes a ten-year licence:

1. A significant change is proposed at the site which would allow BWXT Medical to produce molybdenum-99 (Mo-99) using neutron activation of natural molybdenum-98 targets in a reactor. The foregoing documentary and consultation omissions must be remedied before proceeding with any licence. A ten-year licence would be a further violation of the Indigenous and participatory rights which should be prioritized by the CNSC as Canada's nuclear regulator.
2. BWXT Medical is a first-time licensee before the CNSC and does not have performance or compliance record which can be used as precedent in this instance. In making a licensing decision pursuant to section 24(4) of the *Nuclear Safety and Control Act*, the CNSC must be satisfied that the licensee is qualified to make adequate protection for the protection of the environment and human health. The past performance of this facility cannot be used to demonstrate that a licensee is qualified to undertake the proposed licenced activity.
3. Nordion and BWXT Medical will share the oversight and compliance of a number of Safety and Control Areas. For reasons of different staff, leadership, company direction and internal management, the success of these shared responsibilities cannot be assumed. Further, of the shared responsibilities described by CNSC Staff (excerpted below), none are reflected in the proposed Licence of LCH with the same level of detail or clarity. It is critical they be expressly set out in the LCH. These areas of shared oversight include:
 - *Staffing and operations:* BWXT Medical and Nordion will have joint committees to ensure that relevant experience in the facility is shared across both organizations⁷
 - *Safety and fire protection:* CNSC staff note that BWXT Medical has agreements in place with Nordion to ensure that measures for security, fire protection and emergency response are in place at the NMPF⁸
 - *Fire protection:* As separate licensees, BWXT Medical and Nordion must conduct separate fire response drills in order to meet their regulatory requirements under CSA N393-13. This will require additional effort and coordination with OFS to facilitate. CNSC staff confirm that BWXT Medical has proactively worked with OFS on the

⁷ CNSC Staff CMD, p 13

⁸ *Ibid*, p 16

development of a formal service agreement between BWXT Medical and OFS to ensure full and continued support to BWXT Medical⁹

- *Radiation protection*: BWXT Medical has set annual performance targets for radiation protection. Both Nordion and BWXT Medical's Executive and Environmental Health and Safety management teams will routinely review progress against these targets. BWXT Medical will work with the landlord Nordion for future facility improvements¹⁰
- *Environmental Monitoring*: BWXT Medical will be responsible for a portion of the environmental releases measured and reported¹¹

For these reasons, it would be contrary to the *NSCA* for the CNSC to issue a licence to BWXT Medical as all necessary licence documents have not been updated and the licence and LCH drafted to clearly delineate roles and responsibility. Currently, there is not sufficient information before the Commission to demonstrate the licensee is qualified to undertake the proposed activities, including the production of Mo-99.

7. ENVIRONMENTAL REPORTING & HEALTH

Environmental Monitoring

The licensing documents including that by CNSC Staff make conclusive statements about the environmental protection measures in place for the facility (i.e. with reference to CSA standards and the proponent's environmental and radiation protection programs which are not publicly viewable). However, there is a lack of data and other contextual information accompanying these statements which explains on what basis these conclusions are reached. This problem is further exacerbated given the documents referred to by CNSC Staff were denied when requested by Kebaowek.

Our review also shows that CNSC Staff erred by using the past performance of the facility to derive BWXT Medical's ability to undertaking environmental protective actions.¹² We remind the CNSC that in making a decision on this licence request, it must be established that the licensee:

24(4)(b) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national

⁹ *Ibid*, p 40

¹⁰ *Ibid*, p 30

¹¹ *Ibid*, p 36

¹² CNSC Staff CMD, p 38

security and measures required to implement international obligations to which Canada has agreed.

In other words, absent data, findings and an intelligible rationale setting out how the licensee – and not the facility – meets this threshold set out in the *NSCA*, its regulations and the CNSC’s REGDOC 2.9.1, statements which conclude that “BWXT Medical will make adequate provision for the protection of the public and environment” are not supportable.¹³

We also request the following specific information from the CNSC. Kebaowek submits this is crucial information which must be disclosed in order to determine the sufficiency of BWXT Medical’s environmental monitoring. The following is also information required to be provided in the licence application as set out in the *Class I Nuclear Facilities Regulations*, SOR/2000-204.

Recommendations

11. For emissions and discharges to soil, groundwater and air, please provide:

- Methods and frequency of monitoring and a comparison of these approaches to other Class 1B nuclear facilities**
- Roles and responsibilities**
- Post-operation monitoring requirements**
- Plans showing the location of the proposed monitoring locations**
- Plans showing the release points to air, land and water from the facility**
- Anticipated rates of discharge**
- Physical, chemical, and radiological characteristics of all discharges and emissions**

12. As previously commented, there has been no outreach with Kebaowek to discuss our role in environmental monitoring or oversight. We therefore request the following licence specific changes be made and new conditions added:

- a. Participation by Kebaowek and other interested First Nations should be provided through an environmental committee, where participating First Nations will have full and equal participatory rights to technical, monitoring and oversight matters. The terms of reference for such a committee, with capacity funding, shall be established within 12-months of any licence being granted.**
- b. BWXT Medical shall prepare and provide quarterly reports to Kebaowek with costs related to Kebaowek’s understanding and responding to such reporting being covered by BWXT Medical.**

¹³ CNSC Staff CMD, p 39

c. Require as a condition of licensing that BWXT Medical develop a community health study conducted by an independent expert, as agreed to by Kebaowek, with the costs of the health studies paid for by BWXT.

d. Require as a condition of licensing that BWXT Medical shall incorporate into its emergency and public disclosure plans, that notice will be given to First Nations of adverse events, unintended releases to the environment, changes to licensing documents or programing with respect to environment, radiation and emergency protections.

Environmental Risk Assessment

Kebaowek is shocked that the CNSC did not require a revised Environmental Risk Assessment (ERA) by BWXT Medical given the new operations to produce Mo-99 and new roles and responsibilities for the oversight of the facility.

Currently, BWXT Medical's application included an ERA report that was completed for the Nordion facility in May 2017. BWXT Medical obtained permission from Nordion to use the report and CNSC staff accepted that Nordion's ERA was applicable to BWXT Medical.¹⁴

However, according to the CNSC's REGDOC 2.9.1 *Environmental Protection* "the ERA is subject to regular updates (at least every five years, and whenever a significant change occurs in either the facility or activity that could alter the nature (type or magnitude) of the interaction with the environment" (emphasis added). Despite the proposed significant change in the operations at the facility, the ERA, which supports the licence renewal application, does not take into account these changes.

On the basis that REGDOC 2.9.1 requires there be an updated ERA when significant changes occur, a revised ERA is merited in this instance. Further, as the ERA will be updated in 2022 (per the requirement they be updated *at least* every 5 years), a revised ERA should have been required for this licensing hearing.

KFN is also concerned that when the revised ERA is submitted to the CNSC, it will not be part of a public hearing, nor attract any comment opportunity. Therefore, Kebaowek is limited in providing comments on an ERA which is not tailored to the request before the CNSC and further, we will not have an opportunity to review or comment when a revised ERA is submitted. This not only diminishes our ability to fully participate in this hearing, but removes our ability to provide comment in a public forum before a panel of CNSC Commissioners.

¹⁴ CNSC Staff CMD, p 38

Recommendations

13. The CNSC should not proceed with licensing until the licence application has been updated with an ERA from BWXT Medical which reflects changes in operation and production, and clearly delineates the roles and responsibility within the facility.

Independent Environmental Monitoring Program

CNSC Staff's CMD states that in addition to the ERA, to complement ongoing compliance activities the CNSC has implemented its Independent Environmental Monitoring Program (IEMP).¹⁵ In referencing the validity of the IEMP, CNSC Staff's CMD notes "results for Nordion's [IEMP] indicate that the public and the environment in the vicinity of the Nordion facility are protected."¹⁶ While Kebaowek supports the existence of an IEMP, we do not support the CNSC's findings on this matter for the reasons detailed below. Further, we are dismayed by the CNSC's lack of engagement to consider impacts on Algonquin Territory, despite public statements by the CNSC that as a regulator it is "committed to reconciliation" and "collaboration among Indigenous groups."¹⁷

First, Kebaowek reiterates the environmental and human health protection measures being considered by the CNSC should be specific to the licensee and not the facility. The application before the CNSC is not a site wide licence but rather a licensee-specific licence. Kebaowek once again asks the CNSC to detail the IEMP which is specific to BWXT Medical as the licensee. Further, the IEMP data that is referenced for the site is from 2018. With only two data points (from 2016 and 2018), we submit the CNSC does not have the requisite basis to definitively state "the public, Indigenous communities and the environment in the vicinity of Nordion are protected and that there are no expected health or environmental impacts."¹⁸

Second, we understand that the purpose of the CNSC's IEMP is to verify the protection of the public and the environment around licensed nuclear facilities. This furthers the goals of the CNSC that are set out in section 9(b) of the NSCA, which includes "to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production, possession." However, the statutory mandate of the CNSC as contemplated by the NSCA has not been met as the CNSC Staff's CMD only has one paragraph

¹⁵ CNSC Staff CMD, p 35

¹⁶ *Ibid*

¹⁷ CNSC, "Remarks by President Rumina Velshi at the G4SR-2 Virtual Summit" (18 Nov 2020), online: <https://nuclearsafety.gc.ca/eng/resources/presentations/president-velshi-remarks-g4sr.cfm>

¹⁸ CNSC, Transcript of Public Hearing (5 March 2020) online: <http://www.nuclearsafety.gc.ca/eng/resources/maps-of-nuclear-facilities/iemp/nordion.cfm>, p 119

about the IEMP. Instead of providing specifics, it simply states that there is an IEMP program. Upon further external review by Kebaowek, we discovered the most recent IEMP data dates to 2018.¹⁹ Kebaowek believes the treatment of the IEMP for this new licensee is critically deficient and this level of cursory review in licensing documents should not be accepted by the CNSC.

Third and most critically, Kebaowek has previously heard the CNSC state that the “incorporation of indigenous knowledge and values and collaborating with communities on the Independent Environmental Monitoring Program is central to the program” (emphasis added).²⁰ As the CNSC’s Team Lead for Indigenous Relationships, Adam Levine, has previously explained, collaborating with First Nations has resulted in the development of IEMP sampling plans wherein a range of a different sampling campaigns are considered and plans developed which reflect Indigenous values and interests.²¹

In this instance, Kebaowek has not been contacted by the CNSC in advance of this hearing to have a direct conversation about the IEMP and our potential role. While the CNSC has stated in other licensing hearings that “we are certainly happy to talk about how we can support that [Indigenous engagement in IEMP] through our Participant Funding Program” and “there are lots of different options on the table and we are going to tailor it to each community,”²² such commitments should not be post-hearing commitments. It is integral there be *early* engagement with First Nations when a licensing application is contemplated. Making commitments to engage post-hearing are not meaningful and should not be undertaken *post hoc*.

Recommendations

14. Kebaowek therefore requests the following licence specific information be provided and engagement undertaken before proceeding with licensing:

a. The CNSC should explain why a site rather than licensee-specific IEMP is relied upon. A licensee-specific IEMP should be required and the parameters the CNSC intends to monitor and the frequency of updates (given existing data dates to 2018) clearly set out in licensing documents and online. The CNSC should commit to updating the current IEMP program and website which currently excludes any mention of BWXT Medical.

b. Indigenous involvement within the development of the IEMP should not be a *post hoc* licensing requirement. As a regulator which promotes itself as being “committed to

¹⁹ CNSC, “Independent Environmental Monitoring Program: Nordion (Canada) Inc” online: <https://nuclearsafety.gc.ca/eng/resources/maps-of-nuclear-facilities/iemp/nordion.cfm>

²⁰ *Ibid*

²¹ *Ibid*

²² *Ibid*

reconciliation” and “collaboration among Indigenous groups,”²³ the CNSC should have provided opportunities for Kebaowek to provide input on the IEMP and provide meaningful results to our community. Further, we do not accept CNSC’s approach to engagement wherein commitment for involvement comes after rather than precedes the licensing hearing.

8. RADIOACTIVE & NON-RADIOACTIVE WASTES

The production of Mo-99 by aqueous chemical processing of irradiated HEU or LEU targets produces the following four waste streams:

- Uranium solids (alkaline target dissolution only). These solids, which contain LEU or HEU, are placed into long-term storage for reuse or disposal.
- Processing off-gases, primarily the noble gases xenon (Xe-131m, Xe-133, Xe-133m, and Xe-135) and krypton (Kr-85). These gases are stored for several months to allow time for radioactive decay. Following storage, the gases are vented to the atmosphere.
- Process liquids from target dissolution. These liquids contain fission products and neutron activation products produced during target irradiation. These wastes are typically solidified and packaged for disposal.
- Other solid wastes produced during target processing: for example, radioactively contaminated processing equipment. These wastes are also packaged for disposal.²⁴

Each Mo-99 supplier has a different approach for managing these wastes, depending on the regulations and storage/disposal facilities available in host countries. Production of Mo-99 by aqueous processing of LEU targets will produce these same types of waste streams, but some waste volumes will be larger. Current global Mo-99 suppliers are developing additional capacity to manage these wastes as part of their conversion efforts.

BWXT Medical’s submission to the CNSC references that ‘waste chemicals will be picked up by a licensed waste disposal company for treatment and disposal,’²⁵ and non-hazardous waste will be sent to landfill,²⁶ while radioactive wastes will be collected and transported to a licenced radioactive waste management facility.²⁷

²³ CNSC, “Remarks by President Rumina Velshi at the G4SR-2 Virtual Summit” (18 Nov 2020), online: <https://nuclearsafety.gc.ca/eng/resources/presentations/president-velshi-remarks-g4sr.cfm>

²⁴ National Academies of Sciences, Engineering, and Medicine. *Molybdenum-99 for medical imaging*. National Academies Press, 2016.

²⁵ BWXT CMD, p 48

²⁶ *Ibid*

²⁷ BWXT CMD, p 39

However, there is an incomplete picture of the movement of BWXT Medical's waste (radioactive and non-radioactive) offsite. While Kebaowek is generally able to view offsite transfers and accompanying emissions for non-radioactive transfers on the National Pollutant Release Inventory for other companies and facilities in Algonquin territory,²⁸ an equivalent is not available for radioactive materials.

In order to document these transfers, Kebaowek asks the CNSC require the following information prior to opining on the sufficiency of waste management. Further, Kebaowek retains the right to provide further submissions on this topic as this information was requested by proponent but not disclosed:

- Substance name
- Units/weight/volume
- Method of disposal and location
- Percentage change in quantity from previous years

The CNSC is obliged to, pursuant to international law conventions Canada has ratified, including international law norms and principles pertaining to human and Indigenous rights that it ensure a licensing procedure that meets these international norms. We note that Canada is a signatory to the UNDRIP. Article 29.2 of UNDRIP specifically addresses the issue of waste we raise before the CNSC, as it requires 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."

In this instance, consent has not been sought and nor has the information been provided such that we can make an *informed* decision on the new and existing waste streams accompanying the Nordion/BWXT Medical facility. Thus, this licensing proceeding is non-compliant with international law conventions, principles and norms.

Before proceeding with licensing, the CNSC should set out in writing how it considered and complied with UNDRIP, specifically Article 29.2 in making the recommendation that this licence be granted for a period of 10 years and, expressly require that the FPIC principle be upheld. Kebaowek submits the CNSC is proceeding with its licensing proceed contrary to its obligations with regards to our rights under UNDRIP, including Articles, 1, 7, 29 and 32.

²⁸ See the NPRI's site profile for Nordion, online: https://pollution-waste.canada.ca/national-release-inventory/archives/index.cfm?do=substance_details&lang=En&opt_npri_id=0000002247&opt_cas_number=NA%20-%2008&opt_report_year=2017

Recommendation

15. The CNSC should set out in writing how it considered and complied with UNDRIP, specifically Article 29.2 in making the recommendation that this licence be granted for a period of 10 years and, expressly require that the FPIC principle be upheld.

9. LONGTERM PLANNING & DECOMMISSIONING

In light of the historical omission to consider decommissioning from the outset of operations, Kebaowek strongly urges decommissioning planning to be a mandatory component of all licensing. Unfortunately, this aspect remains critically vague for the facility and as CNSC staff note, they “expect Nordion to submit a revised preliminary decommissioning plan, decommissioning cost estimate and financial guarantee for Commission approval once BWXT Medical has its financial guarantee in place.”²⁹

Like all nuclear facilities, decommissioning is the inevitable end of life. However, as the International Atomic Energy Association (IAEA) cautions, it has only been more recently that attention has been focused on the generation of radioactive waste and the radiological hazards associated with decommissioning.³⁰

Currently, only three high level and summary paragraphs are provided regarding BWT Medical’s decommission plans.³¹ Such cursory review and lack of detail and analysis should not be accepted by the CNSC.

Recommendation

16. The inclusion of detailed decommissioning planning would directly further the objects of the CNSC pursuant to section 9 of the NSCA, specifically its role in preventing unreasonable risk to the environment and human health and achieving conformity with international obligations.

²⁹ CNSC Staff CMD, p 7

³⁰ IAEA, Decommissioning of Particle Accelerators (No. NW-T-2.9), p 2

³¹ CNSC Staff CMD, p 43

10. CONCLUSION & ORDER REQUESTED

Understanding KFN's Expectations

For over 7000 years the forest and waterways have provided Algonquin Anishinaabeg people their livelihood -food, energy and materials, landscapes, spiritual grounds, economic trade and peace of mind. The distinctive feature of Anishinaabeg society over this period was that resources were managed as sacred. The past 300 years Algonquins have witnessed the results of an exploitive management regime. Much of their traditional territory and livelihoods have been significantly degraded and many ecosystems have permanent or severe damage with numerous species are at risk and approaching threatened status. All the while Algonquin people have suffered disproportionate poverty.

KFN is interested in new models/institutions of decision making federally and provincially that respect meaningful interaction between proponents, authorities and affected Aboriginal communities in the environmental reviews and project licensing process.

KFN have specific legal rights that need to be reflected in licensing processes that does not treat our community as “just another stakeholder” but rather a constitutional partner to be consulted on a “nation-to-nation” basis.

The analysis of Article 32(2) of UNDRIP by former UN Rapporteur on Indigenous Rights, James Anaya, provides a better model for “good faith” process of consultation and collaboration that is envisioned internationally when States make decisions “affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources.” Comparing the language of UNDRIP to the language of ILO Convention No. 169, Mr. Anaya explains (emphasis added):

The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.³²

Order Requested

For the foregoing reasons and rationale provided in this intervention, we request the CNSC issue an order:

³² Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, HRC, 12th Sess., UN Doc. A/HRC/12/34 (2009) at para. 46.

- (1) Granting Kebaowek First Nation the status of intervenor;
- (2) Granting Kebaowek the opportunity to make an oral presentation at the June 2021 hearing
- (3) Denying BWXT Medical's request for 10-year licence.

SUMMARY OF RECOMMENDATIONS

1. It is incumbent on the CNSC that before making this decision, there be collaboration to the furthest extent possible with Kebaowek and the Algonquin Anishinaabeg Nation to ensure decisions are made respectful of their law and practices and the free, prior and informed consent (FPIC) principle. Without the duty to consult being fulfilled, there isn't the requisite constitutional basis to proceed with this license.
2. If the CNSC is to discharge its duty to consult, the CNSC must demonstrate that Indigenous communities, including Kebaowek, were engaged in making a licensing decision, and it must be clear what was heard and how it factored into the license decision. Indeed, BWXT's Indigenous engagement plan was among the documents to which Kebaowek was denied access. To date, there has not been meaningful consultation with KFN necessary to allow the license to be granted.
3. UNDRIP must be a minimum framework for the relationship between Aboriginal peoples and the Canadian State and nuclear development decisions across Canada. CNSC engagement should better reflect Canada's commitments through international instruments like UNDRIP.
4. Reforming licensing assessment and the role of the Algonquin Anishinaabeg Nation in such assessment requires CNSC understanding that mutuality, respect and consultation are integral to Algonquin social and political organization on a number of levels: family- to-family, band- to-band, and nation-to nation. From an Algonquin Anishinaabeg perspective, the current CNSC process should be harmonized with that expectation providing adequate basis for developing 'real' Anishinaabeg nation-to nation relationships and supporting 'real' Algonquin Anishinaabeg institutions.
5. This requires reviewing other pieces of federal legislation such as but not limited to the Federal Comprehensive Claims Policy that support and/or create false entities and processes that further undermine 'real' Algonquin Anishinaabeg participation in environmental decision making.
6. KFN does not endorse, accept, or acknowledge any claims to any Aboriginal or Treaty Rights made by the Algonquins of Ontario ('AOO'). KFN does not recognize the AOO as an entity entitled to consultation or accommodation. To this end, CNSC and other federal authorities evaluating licensing projects pursuant to Canadian Constitution should restrict participation of the Algonquins of Ontario ('AOO') also known more appropriately as an ALGONQUIN OPPORTUNITY (NO.2) CORPORATION.³³

³³ Ontario Superior Court of Justice Court File no. CV_18-00603975-000 "*Chief Kirby Whiteduck on his own behalf of the ALGONQUINS, and the ALGONQUIN OPPORTUNITY (NO.2) CORPORATION.*"

7. The CNSC provide a response in writing explaining how the federal Crown sought to address concerns which have been raised by Kebaowek. In the event we feel we have outstanding concerns, we retain the right to make submissions to the CNSC which shall be made publicly available and posted to the licensee and hearing project page managed by the CNSC.

8. At a minimum, any document referenced by the CNSC in its licensing hearings – which are purportedly open to the public – should also be public. Instead, the CNSC is enabling a hearing process where documents directly pertinent to our rights and our ability to meaningful review, are withheld. We encourage the CNSC to work with licensees to develop documents which by default, are available for the public.

9. Participant funding needs to be increased to allow meaningful Aboriginal participation in CNSC licensing reviews.

10. Aboriginal institutions require sufficient financial resources to build capacity to undertake nuclear project reviews properly. They require increased funding as they take on increased responsibility.

11. For emissions and discharges to soil, groundwater and air, please provide:

- Methods and frequency of monitoring and a comparison of these approaches to other Class 1B nuclear facilities
- Roles and responsibilities
- Post-operation monitoring requirements
- Plans showing the location of the proposed monitoring locations
- Plans showing the release points to air, land and water from the facility
- Anticipate rates of discharge
- Physical, chemical, and radiological characteristics of all discharges and emissions

12. As previously commented, there has been no outreach with Kebaowek to discuss our role in environmental monitoring or oversight. We therefore request the following licence specific changes be made and new conditions added:

- a) Participation by Kebaowek and other interested First Nations should be provided through an environmental committee, where participating First Nations will have full and equal participatory rights to technical, monitoring and oversight matters. The terms of reference for such a committee, with capacity funding, shall be established within 12-months of any licence being granted.

- b) BWXT Medical shall prepare and provide quarterly reports to Kebaowek with costs related to Kebaowek's understanding and responding to such reporting being covered by BWXT Medical.
- c) Require as a condition of licensing that BWXT Medical develop a community health study conducted by an independent expert, as agreed to by Kebaowek, with the costs of the health studies paid for by BWXT.
- d) Require as a condition of licensing that BWXT Medical shall incorporate into its emergency and public disclosure plans, that notice will be given to First Nations of adverse events, unintended releases to the environment, changes to licensing documents or programing with respect to environment, radiation and emergency protections.

13. The CNSC should not proceed with licensing until the licence application has been updated with an ERA from BWXT Medical which reflects changes in operation and production, and clearly delineates the roles and responsibility within the facility.

14. Kebaowek therefore requests the following licence specific information be provided and engagement undertaken before proceeding with licensing:

- a) The CNSC should explain why a site rather than licensee-specific IEMP is relied upon. A licensee-specific IEMP should be required and the parameters the CNSC intends to monitor and the frequency of updates (given existing data dates to 2018) clearly set out in licensing documents and online. The CNSC should commit to updating the current IEMP program and website which currently excludes any mention of BWXT Medical.
- b) Indigenous involvement within the development of the IEMP should not be a post hoc licensing requirement. As a regulator which promotes itself as being "committed to reconciliation" and "collaboration among Indigenous groups,"³⁴ the CNSC should have provided opportunities for Kebaowek to provide input on the IEMP and provide meaningful results to our community. Further, we do not accept CNSC's approach to engagement wherein commitment for involvement comes after rather than precedes the licensing hearing.

15. The CNSC should set out in writing how it considered and complied with UNDRIP, specifically Article 29.2 in making the recommendation that this licence be granted for a period of 10 years and, expressly require that the FPIC principle be upheld.

16. The inclusion of detailed decommissioning planning would directly further the objects of the CNSC pursuant to section 9 of the NSCA, specifically its role in preventing unreasonable risk to the environment and human health and achieving conformity with international obligations.

³⁴ CNSC, "Remarks by President Rumina Velshi at the G4SR-2 Virtual Summit" (18 Nov 2020), online: <https://nuclearsafety.gc.ca/eng/resources/presentations/president-velshi-remarks-g4sr.cfm>



Supplementary Information

Presentation from the Kebaowek First Nation

In the Matter of the

BWXT Medical Ltd.

Application for a Class IB nuclear substance
processing facility operating licence

Commission Public Hearing

June 9-10, 2021

Renseignements supplémentaires

Présentation de la Première nation de Kebaowek

À l'égard de

BWXT Medical Ltd.

Demande pour un permis d'exploitation d'une
installation de traitement de substances
nucléaires de catégorie IB

Audience publique de la Commission

9 et 10 juin 2021

Application for a Class 1B Licence
BWXT Medical Ltd.
CNSC Licence Renewal (Ref. 2021-H-05)

Kebaowek First Nation

June 9, 2021

An Introduction to Kebaowek First Nation

Kebaowek First Nation is one of eleven distinct First Nations that make up the Algonquin Nation. Nine are located in Quebec and two, in Ontario.

KFN's traditional territory lies on either side of the Ottawa River Basin and 1,000 members live, work and exercise Aboriginal rights, including Aboriginal title, in both Ontario and Quebec. As an Algonquin First Nation Government who represents the Algonquin rights & title holders to the area of the BWXT Medical Ltd. Project and to areas that may be affected by the Project, our duty is to protect our lands, waters and environment for our present and future generations.

The BWXT Licensing Project is located within, and has the potential to significantly affect, the shared traditional territories of the Algonquin Anishinaabeg Nation.

I. Duty to Consult

Summary of Comments

Duty to Consult

Kebaowek First Nation and the Algonquin Anishinaabeg Tribal Council are currently petitioning the Minister of Natural Resources Canada (NRCAN) to try to resolve the ongoing consultation crisis between CNSC and the Algonquin Nation on various nuclear project proposals on Algonquin lands. Kebaowek First Nation does not endorse, accept, nor acknowledge any claims to any Aboriginal or Treaty Rights made by the Algonquins of Ontario or any members of AOO. Kebaowek First Nation does not recognize the AOO as an entity entitled to consultation or accommodation.

1. Before making the BWXT Medical Ltd. license decision CNSC must demonstrate how it has contributed to meeting the obligations for the Duty to Consult as per Section 35 of the constitution, and the extent to which it has met requirements of the UN Declaration on the Rights of Indigenous Peoples, including Article 32 regarding obtaining the Free Prior Informed Consent of Indigenous Peoples *"prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."*

Without the duty to consult being fulfilled, there isn't the requisite constitutional basis to proceed with this license.

Summary of Comments

Duty to Consult

2. If the CNSC is to discharge its duty to consult, the CNSC must demonstrate that Indigenous communities, including Kebaowek, were engaged in making a licensing decision, and it must be clear what was heard and how it factored into the license decision. Indeed, BWXT's Indigenous engagement plan was among the documents to which Kebaowek was denied access. **To date, there has not been meaningful consultation with KFN necessary to allow the license to be granted.**
 3. UNDRIP must be a minimum framework for the relationship between Aboriginal peoples and the Canadian State and nuclear development decisions across Canada.
 4. Reforming licensing assessment and the role of the Algonquin Anishinaabeg Nation in such assessment requires CNSC understanding that mutuality, respect and consultation are integral to Algonquin social and political organization on a number of levels.
-

Integrating Indigenous Knowledge

- Indigenous knowledge, is rooted in the traditional life of Algonquin Peoples and has an important contribution to make to decision making. Indigenous knowledge refers to the broad base of knowledge held by individuals and collectively by communities that may be based on spiritual teachings, personal observation and experience or passed on from one generation to another through oral and/or written traditions.
- Indigenous knowledge provides necessary perspective, knowledge and values for the IA process. Traditional knowledge may, for example, contribute to the description of the existing physical, biological and human environments, natural cycles, resource distribution and abundance, long and short-term trends, and the use of lands and land and water resources. It may also contribute to project siting and design, identification of issues, the evaluation of potential effects and their significance, the effectiveness of proposed mitigation, cumulative impacts and the consideration of independent Indigenous follow-up and monitoring programs

II. Nuclear History on Algonquin Anishinaabeg Lands

Summary of Comments

Nuclear History of Algonquin Anishinaabeg Lands

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 or license approval was undertaken with the Algonquin Anishinaabeg Nation 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 Anishinaabeg 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

Kebaowek First Nation and the Algonquin Anishinaabeg Nation was never consulted on the nuclear developments and relicensing of Chalk River Nuclear operations

III. Access Denied

Summary of Comments

Access Denied

Kebaowek sought copies of all documents referenced in CNSC Staff CMD. However, references 5, 9, 13, 17, 18, 19 and 40 were all deemed internal and not provided. This includes the Environmental Protection Program, Environmental Management System and Indigenous Engagement Program.

Kebaowek First Nation asks the CNSC to provide a response in writing explaining how the federal Crown sought to address concerns which have been raised by Kebaowek. We have outstanding concerns and a minimum, request the CNSC to make any document referenced by CNSC and Staff publicly available.

IV. Licence Specific Deficiencies

Summary of Comments

Licence Deficiencies

Environmental Reporting and Health There has been no outreach with Kebaowek to discuss our role in environmental monitoring or oversight. We request the following licence specific changes be made and new conditions added:

- a. Participation by Kebaowek and other interested First Nations should be provided through an Independent environmental committee, where participating First Nations will have full and equal participatory rights to technical, monitoring and oversight matters. The terms of reference for such a committee, with capacity funding, shall be established within 12-months of any licence being granted.
- b. BWXT Medical shall prepare and provide quarterly reports to Kebaowek with costs related to Kebaowek's understanding and responding to such reporting being covered by BWXT Medical

Summary of Comments

Licence Deficiencies

Independent Environmental Monitoring Program Indigenous involvement within the development of the IEMP should not be *a post hoc* licensing requirement. The CNSC should have provided opportunities for Kebaowek to provide input on the IEMP and provide meaningful results to our community. Further, we do not accept CNSC's approach to engagement wherein commitment for involvement comes after rather than precedes the licensing hearing.

Radioactive Wastes The CNSC should set out in writing how it considered and complied with UNDRIP, in making the recommendation that this licence be granted for a period of 10 years and, expressly require that the FPIC principle be upheld:

UNDRIP Article 29.2 “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.”

V. Order Requested

Order Requested

Deny BWXT Medical's request for 10-year licence.

For over 7000 years the forest and waterways have provided Algonquin Anishinaabeg people their livelihood -food, energy and materials, landscapes, spiritual grounds, economic trade and peace of mind. The past 300 years Algonquins have witnessed the results of an exploitive management regime. Much of their traditional territory and livelihoods have been significantly degraded and many ecosystems have permanent or severe damage - all the while Algonquin people have suffered disproportionate cultural destruction displacement and poverty.

KFN is working with other Algonquin community partners to develop new models and legal institutions of decision making federally and provincially that respect meaningful interaction between proponents, authorities and affected Algonquin communities in the environmental reviews and project licensing process.

Contact us:

McKaylii Jawbone
Kebaowek Lands and Resources Office
Kebaowek QC
1-819-627-3309
mjawbone@kebaowek.ca



**Final submission from the
Kebaowek First Nation and the
Kitigan Zibi Anishinabeg
First Nation**

**Mémoire définitif de la
Première nation de Kebaowek et de la
Première Nation des Anishinabeg
de Kitigan Zibi**

In the Matter of the

À l'égard des

Canadian Nuclear Laboratories (CNL)

Laboratoires Nucléaires Canadiens (LNC)

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

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

**Commission Public Hearing
Part 2**

**Audience publique de la Commission
Partie 2**

May and June 2022

Mai et juin 2022

**In the Matter of
Canadian Nuclear Laboratories**

Application to amend the Nuclear Research and Test Establishment Operating Licence for the Chalk River Laboratories site to authorize the construction of a Near Surface Disposal Facility

**Final Submissions of the Kebaowek First Nation and
Kitigan Zibi Anishinabeg First Nation**

Pursuant to the *Revised Notice of Public Hearing and
Procedural Guidance for Final Submissions (Rev. 2)*,
dated May 17, 2023

June 6, 2023

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0. INTRODUCTION

The Kebaowek First Nation (“**KFN**”) and Kitigan Zibi Anishinabeg First Nation (“**KZA**”) provide these joint final submissions as part of the Canadian Nuclear Safety Commission’s (“**CNSC**”)¹ hearings on Canadian Nuclear Laboratories’ (“**CNL**”) environmental assessment and licence amendment application for the proposed Near Surface Disposal Facility (“**NSDF**”).

Throughout this matter, we have consistently expressed concerns with this CNSC review process, including: its timelines; CNL and CNSC staff objections to our work, rejecting our comments as “outside of the scope” (including our supplemental submissions and our own environmental monitoring of the NSDF’s potential footprint at the Chalk River site); and the virtual format of the final hearing. Out of respect, in good faith, and to avoid prejudicing our submissions, we have worked diligently to adhere to these limitations throughout. At the same time, we raise these procedural concerns again and ask that our submissions be read in light of these challenging requirements.

We have also raised numerous concerns about the NSDF proposal itself, including that the Commission and CNSC Staff (“**Staff**”) have failed to meaningfully consult with us on this project, and that they lack sufficient information from CNL on environmental effects to move forward with the environmental assessment (“**EA**”). Without sufficient information on the relevant rights and significance of potential impacts to those rights, we cannot comment on the efficacy of any mitigation measures.

We have made written and oral submissions on these issues, which remain live and relevant for the Commission.² We will not repeat those submissions here unless necessary.

In July 2022, in response to our arguments at Part 2 of the hearing, the Commission issued a Procedural Direction. Specifically, the Commission allowed the record to stay open until May 1, 2023³ “to allow for the Commission to receive further evidence and/or for more engagement and consultation to take place in respect of [KFN] and [KZA]”. We provide these final closing remarks, building on our May 1 supplemental submission.

KFN and KZA are independent First Nations that had different interactions with Staff and the CNL in the past several months. Having said that, we are both part of the broader Algonquin Nation, and we continue to share similar interests and serious concerns about the NSDF and its impacts on our rights and interests. Namely:

- the duty to consult has not been fulfilled;
- there is insufficient information to assess the NSDF’s environmental effects or, in the alternative, the NSDF is likely to cause significant adverse environmental effects and the question of whether the adverse environmental effects are justified in the circumstance

¹ When referring to the decision-making tribunal, we use “**Commission**”. When referring to CNSC staff, we use “**Staff**”.

² For KFN: CMD22-H7-111, “Preliminary Written Submissions,” (April 11, 2022); CMD22-H7-111A, “Written Submission – Part 2” (April 28, 2022); CMD22-H7-111C, “Supplementary Information,” (May 1, 2023). For KZA: CMD 22-H7.113, “Written Submissions”; CMD22-H7.113B (May 8, 2023), “Supplementary Information”.

³ The Procedural Direction initially stated that additional evidence would be submitted by January 31, 2023. At the request of KFN and KZA, the Commission extended the Procedural Direction deadline to May 1, 2023.

must be referred to the Lieutenant Governor in Council as required under the [Canadian Environmental Assessment Act, 2012](#) (“CEAA 2012”)⁴;

- there is insufficient information to determine that CNL will “make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed”, as required under the *Nuclear Safety and Control Act* (“NSCA”);
- approving this project would violate the [United Nations Declaration on Rights of Indigenous People](#) (“UNDRIP”), which is a universal human rights instrument with application in Canadian law.⁵

1. BACKGROUND

At present, there are eleven federally recognized Algonquin communities. Nine of these communities are in Quebec and two in Ontario. Proceeding roughly from northwest to southeast, these are the Abitibiwinini, Timiskaming, Kebaowek, Wolf Lake, Long Point (Winneway), Lac Simon, Kitcisakik (Grand Lac), Mitcikinabik Inik (Algonquins of Barriere Lake) and Kitigan Zibi (River Desert). In Ontario, the communities are the Algonquins of Pikwàkanagàn (at Golden Lake) and Wagoshig (Lake Abitibi).

Our members can trace their ancestry, use, and occupation of the territory in and around the Kichi Sibi back to time immemorial. We have names, in our own language, for all the lakes, rivers, mountains, and features of our respective territories. These names are proof of our long relationship with the land.

Beginning in 1760 the Algonquins entered various treaties with Great Britain: at Swegatchy and Kahnawake in 1760, and at Niagara in 1764. These were not land surrender treaties. Rather, these agreements assured the British of our alliance, and in turn the British promised, among other things, to respect and protect our Aboriginal title and rights. In addition, the Royal Proclamation of 1763 applies to our traditional territory. It guaranteed that our lands would be protected from encroachment, and that they would only be shared with settlers if we provided our free and informed consent through treaty.

Unfortunately, despite these commitments, the British Crown, and later the Canadian government, took our lands by force, without our consent, and without any compensation. Our people suffered greatly as a result, even as those around them became rich from the furs, timber, minerals, and other resources. It is within this context that we must consider the proposed NSDF.

2. FAILURE TO FULFILL THE DUTY TO CONSULT

There is no dispute that the NSDF “has the potential to adversely impact potential or established Aboriginal treaty rights. As such, the Commission must be satisfied that this constitutional duty to meaningfully consult is satisfied prior to making...licensing decisions” regarding the NSDF.⁶

⁴ CEAA 2012, s 5, 7(b), 52(2)

⁵ [United Nations Declaration on the Rights of Indigenous Peoples Act](#), SC 2021, c 14, s. 4(a).

⁶ Procedural Direction, [DIR 22-H7](#) (July 5, 2022), at para. 3.

To determine whether the duty to consult has been fulfilled, we believe the Commission must consider which rights of all communities in the Algonquin Nation will be negatively impacted; the seriousness of the negative impact to those rights; and the threshold of consultation and accommodation required.

We outline these issues they relate to us below.

a. Rights that will be impacted

I. KFN'S RIGHTS

In 2013, KFN – along with two other Algonquin First Nations, the Wolf Lake First Nation, and Timiskaming First Nation – asserted rights and title over a broad area.⁷ This territory is just upstream of the Chalk River Laboratories site and is where our legal claim to Aboriginal rights and title is the strongest. Having said that, KFN members, as members of the broader Algonquin Nation, can practice their rights throughout the entire Algonquin traditional territory (which includes the entire Chalk River Laboratories site).⁸

KFN identified three categories of rights potentially impacted by the NSDF:⁹

- **Rights to harvest**

- KFN's community survey reflected significant proportions of respondents engaging in hunting (32%), fishing (42%), and harvesting/gathering/foraging (31%) around the Chalk River Laboratories site.¹⁰ A wide range of resources are hunted, fished, or harvested, including moose, bear, trout, catfish, sturgeon, berries, mushrooms, cedar, sage, and sweetgrass. As one member succinctly put it, "all of our foods are in this area".
- Consuming and sharing wild foods remain an important part of KFN's culture. About more than a third of respondents reported that wild foods make up either 25%-50% or more than 50% of their diet.¹¹ In a different community survey, about three quarters of respondents reported they that someone "often" or "sometimes" shared traditional foods with their household in the past year.¹²

- **Rights to govern and protect the territory**

- This includes a right to apply KFN's customs and laws, and to make decisions about issues that will impact them. For instance, KFN (as well as KZA), as part of a conservation alliance of Algonquin communities, worked with the Nature Conservancy of Canada to support a land back transfer of Fitzpatrick Island (located approximately 40km south of the Chalk River Laboratories site). The

⁷ KFN Procedural Direction Submissions, dated May 1, 2023 ([CMD 22-H7.111C](#)), Appendix A, at pp. 15-16 ("KFN Procedural Direction Submissions").

⁸ KFN Procedural Direction Submissions, Appendix A, at p. 17.

⁹ In addition to this submission, see also KFN's Rights Impact Assessment, at Section A.1, at pp. 34-35 of Staff's Procedural Direction Submissions, dated May 1, 2023 ([CMD 22-H7.D](#)).

¹⁰ KFN Procedural Direction Submissions, Appendix B, at p. 36.

¹¹ KFN Procedural Direction Submissions, Appendix B, at p. 37. Between KFN's Procedural Submissions and these submissions, the survey data was reviewed and in fact, about 8% (not 1%) of respondents reported that more than 50% of their diet is made up of wild foods.

¹² KFN Procedural Direction Submissions, Appendix A, at p. 31.

alliance is working to establish an Indigenous Protected and Conserved Area, to ensure governance in accordance with Algonquin laws, protocols, and knowledge.

- Almost all respondents in the community survey agreed that KFN and its members “are guardians of the land, water, animals, plants and resources in Algonquin territory.” Many members wrote in answers that reflected a deep understanding of their sacred responsibility and right to speak on behalf of the water, animals, plants, and environment generally.¹³
 - As one member eloquently wrote: “As stewards of the land, water, and animals, we need to be the voice in order to ensure that these things are protected. The government and big businesses can’t be left to assume that they will take care of the above mentioned...It is up to us to monitor what is happening in our territory.”
- **Rights to maintain a cultural and spiritual relationship with the territory**
 - KFN depends on the territory to protect, revitalize, and pass on its way of life to future generations. As such, it should be able to use, travel through, and enjoy the territory in peace, without fear or trepidation.
 - Many KFN members expressed a cultural and spiritual relationship with animals on the territory, identifying them as spirits, ancestors, and/or teachers that must be protected. Animals like wolf and bear are important symbols in Algonquin culture, with some KFN members belonging to wolf or bear clans.¹⁴
 - Approximately 12% of respondents reported engaging in spiritual or ceremonial activities around the Chalk River Laboratories site, including visiting Oiseau Rock, offering tobacco, drumming, and picking medicine.¹⁵

II. KZA’S RIGHTS

In 1989, KZA presented a comprehensive land claim to the federal Crown. KZA’s claimed territory is just downstream of the Chalk River Laboratories site. At its closest, the NSDF would be less than 38 kilometers from KZA’s claimed territory.¹⁶ At the same time, KZA members still enjoy and use the entire traditional territory of the Algonquin Nation, which includes the Chalk River Laboratories site.¹⁷

KZA identified four categories of rights potentially impacted by the NSDF:¹⁸

- **Rights to harvest**
 - This includes rights to hunt, fish, or gather food and plants, through KZA’s preferred means and in KZA’s preferred locations. Members hunt animals like moose; fish species like walleye, trout, bass, and lake sturgeon; and gather medicinal products, materials and wild foods like berries, nuts, and wild garlic.

¹³ KFN Procedural Direction Submissions, Appendix A, at pp. 37-38.

¹⁴ KFN Procedural Direction Submissions, Appendix B, at pp. 37-39.

¹⁵ KFN Procedural Direction Submissions, Appendix B, at p. 36.

¹⁶ KZA Procedural Direction Submissions, dated May 8, 2023 ([CMD 22-H7.113B](#)), at pp. 3-4 (“**KZA Procedural Direction Submissions**”).

¹⁷ KZA Procedural Direction Submissions, at p. 16.

¹⁸ KZA Procedural Direction Submissions, at pp. 15-17.

- **Right to a safe and healthy environment**
 - KZA's way of life depends on the sustainability and health of the environment. KZA recognizes the importance maintain balance between the "Seven Nations": humans, animals, birds, fish, plants, trees, and insects. Health and diversity amongst the Seven Nations result in a healthy ecosystem.
 - As stewards, KZA has a right and responsibility to protect the environment from harm across generations.
- **Rights to access and occupy traditional territory**
 - As traditionally nomadic peoples, mobility on the territory is a key aspect of Anishinaabe and KZA's culture. Mobility means eliminating physical, environmental, legal, and psychological barriers (e.g., fear) to accessing the territory.
 - A right to access and occupy traditional territory is both a right in itself, and a necessary condition for exercising other rights (e.g., harvesting).
- **Rights to dignity of culture**
 - KZA's relationship with the territory is another crucial foundation for its culture and way of life. KZA's culture comes from the land, and from being on the land. This relationship, based on respect and gratitude, is expressed through cultural spiritual sites, as Oiseau Rock, a major spiritual site just next to the NSDF project site. The integrity of and the access to this site is a major concern to KZA.
 - As part of KZA's relationship with the territory, women are keepers of the waters and men are keepers of the fire. Men's fire keeping teachings include the Earth's internal fire. Traditional knowledges teaches that the heat from burying nuclear waste would change the Earth's internal fire. That the nuclear energy leeches into the water and then flows into livings forms, disturbing all life.¹⁹

b. Serious potential impact on rights

The NSDF has serious potential impacts to our rights.²⁰

I. PERMANENT, IRREVERSIBLE LOSS OF HABITAT AND BIODIVERSITY

KFN's preliminary environmental field work identified over 600 high value components within the NSDF footprint, including eastern wolf, three active bear dens, and habitat for winter moose and deer.²¹ Given the presence of these valued components, the NSDF footprint holds significant cultural and sacred value for us. More details on this Indigenous led NSDF environmental assessment can be found online.²² KZA has also expressed that there are high value components important to their harvesting and traditional activities in and around the Chalk River Laboratories site.²³ In particular, moose is a key part of our diet and livelihood.²⁴

¹⁹ KZA Procedural Direction Submissions, at p. 17.

²⁰ In addition to this submission, see also KFN's Rights Impact Assessment, at Section A.1, at pp. 36, 41-43 of Staff's Procedural Direction Submissions, dated May 1, 2023 ([CMD 22-H7.D](#)).

²¹ KFN Procedural Direction Submissions, p. 9.

²² <https://storymaps.com/stories/59c9e394da1a4d4eb2a117566664a3f0>

²³ KZA Procedural Direction Submissions, p. 16, 31.

²⁴ KZA Procedural Direction Submissions, p. 2.

The NSDF requires cutting down 37 hectares of forest, excavation, and blasting approximately 170,000 m³ of rock. The permanent conversion of this area into a nuclear waste dump – without our consent or even input in the early stages of planning – violates our governance and stewardship rights.

More plainly, the clearcutting and rock blasting means a permanent loss of biodiversity including chigwatik, mukwa, mahingan and the many other relations. Staff and CNL argue that there is no public access to the NSDF currently, so there is no impact if the forest is cut down. We reject using the current lack of access to the NSDF footprint as a baseline when it effectively legitimizes ongoing land dispossession, our access to the land, and allows previous infringements to justify continued infringements.

Even if the current lack of physical access is accepted as a baseline, the permanent loss of this mountain and all its biodiversity is a serious impact to our inherent rights and responsibilities. It means there is no possibility of returning access or control over the territory to Algonquin peoples. Practically speaking, the conversion of the forest into a waste dump extinguishes our inherent rights in that area. The biodiversity at risk is not outlined in the Environmental Impact Statement (“**EIS**”), since CNL did not undertake mammal population counts in the footprint for the proposed NSDF.

II. CONTAMINATION OF THE ENVIRONMENT

As an above ground project, the NSDF allows contaminants to leak more readily into the environment than alternative designs, such as a subterranean geologic waste management facility (“**GWMF**”). CNL has acknowledged that GWMFs have a “natural geologic barrier” that the NSDF lacks and can be considered “more robust against surface activities and therefore is more favourable”.²⁵

We are also generally concerned about effluent during the construction and operation of the NSDF.

- For instance, tritium concentration is estimated to be 140,000 Bq/L in wastewater prior to treatment, and there is a 360,000 Bq/L effluent discharge limit for tritium.²⁶ Both these concentrations far surpass Health Canada’s Canadian Drinking Water Guideline of 7,000 Bq/L²⁷ and the Ontario Drinking Water Advisory Council’s recommendation of 20 Bq/L.²⁸
- Once released in the environment, tritium is incorporated in organisms as organically bound tritium. The EIS contains some data about organically bound tritium but does not discuss the associated risks and uncertainties (e.g., longer retention in the body or possible accumulation in the environment).

²⁵ CNL Final Environmental Impact Statement (“**EIS**”), 2-19.

²⁶ EIS, 3-58, Table 3.2.4-2.

²⁷ https://www.canada.ca/content/dam/hc-sc/migration/hc-sc/ewh-semt/alt_formats/pdf/pubs/water-eau/sum_guide-res_recom/summary-tables-sept-2022-eng.pdf, at p. 33.

²⁸ http://ccnr.org/ODWAC_tritium_2009.pdf, at p. 5.

- It is also unclear in the EIS what effects non-radiological waste will have on the environment.

Contamination of the environment and bioaccumulation of toxins has a serious impact on our harvesting rights. It limits the resources available to us for gathering and consumption and poses a health risk for members consuming wild foods. The presence of tritium or other contaminants in the environment is not limited to the NSDF footprint, as water, animals, and plants move and spread throughout the territory.

Our communities are also concerned about the increased risk of climate change events sending above threshold contaminants flooding from Perch Lake into Perch Creek lowlands and into the Kichi Sibi. This risk will be exacerbated by the removal of 37 hectares of old growth forest on the mountain and the replacement of the full suite of ecosystem forest services with a waste mound covered with geomembrane and shallow vegetation. After witnessing the 2023 flood conditions of Perch Lake, Perch Creek and the Kichi Sibi, our communities request further climate change related flood and drought event modelling for review. Given the increasing severity of climate change events including flooding, drought, ice storms, tornadoes and forest fires our communities are uncertain how the water treatment plant could effectively remain in operation during a disaster.

Finally, the risk of contamination and presence of nuclear waste also negatively impacts our ability to maintain a spiritual connection with the land and water. As one KFN member described, they would know they are “walking on soil that’s poison. How can we feel sacred knowing that our walk there is not in balance or harmony.”²⁹ And, as KZA highlighted in previous submissions, the burying of nuclear waste is contrary to certain traditional knowledge regarding protection of the Earth’s internal fire.³⁰

III. INCREASED AVOIDANCE

The NSDF also has a high impact on our right to use and travel through the area peacefully, freely, and without fear. There is a history of exclusion from and opaqueness around Chalk River Laboratories. The nuclear industry is also one that invokes fear and skepticism in many people.

In this context, KFN and KZA members repeatedly expressed concern about the risk of contamination or accident, with a particular emphasis on protecting future generations. Approximately 60% of respondents in a KFN community survey said they would not hunt, fish, trap, or forage (or consume game, fish, or plants that were taken) within a 10km radius of the Chalk River Laboratories. Most answers cited concerns around contamination.³¹ Similarly, for KZA, perceived and actual risks of contamination mean members are reluctant to practice traditional activities around Chalk River Laboratories.³²

The NSDF, as an above ground landfill for nuclear waste, will cause heightened concerns about nuclear malfunction or contamination. This is especially given the NSDF’s proximity to the Kichi Sibi, and the lack of meaningful consultation with KFN and KZA earlier in the process. As required

²⁹ KFN Procedural Direction Submissions, Appendix B, at p. 39.

³⁰ KZA Procedural Direction Submissions, at p. 17.

³¹ KFN Procedural Direction Submissions, Appendix B, at p. 39.

³² KZA Procedural Direction Submissions, at p.36.

by section 19(1)(a) of CEAA 2012, the Commission's review of environmental effects from malfunctions or accidents must be reviewed in line with the definition of environmental effects, which includes impacts to Indigenous land use and access for traditional purposes. These consequences have not been adequately considered by CNL whose EIS assesses environmental effects in a piecemeal and not synergistic fashion.

IV. CUMULATIVE EFFECTS

One purpose of CEAA 2012 is to encourage "the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments."³³ Indeed, there is a mandatory factor that "any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out" be accounted for in the EA, as well as a review of the significance of those effects.³⁴

At the heart of cumulative effects assessment is understanding the effects of other past, proposed, and reasonably foreseeable future activities.³⁵ As the Canadian Council of Ministers of the Environment explain:

Cumulative effects denote the combined impacts of past, present, and reasonably foreseeable future human activities on the region's environmental objectives. It requires a broader, forward-looking approach to planning and management that balances environmental factors with economic and social (may include cultural and spiritual) considerations.³⁶

Regarding past and present events at the site, we have previously detailed how colonialism, land dispossession, legal oppression, industrial encroachment, and nuclear accidents (among other things) have severely curtailed our ability to exercise our rights in and around the Chalk River Laboratories site.³⁷ Notably:

- More than three quarters of KFN members reported not being able to practice traditional activities as much as they would like to. Many identified being denied access to their traditional territory by various actors or factors, including private landowners and environmental contamination.³⁸
- In KZA's case, the community has also been exposed to abnormal levels of (naturally occurring) uranium and radium in their drinking water for several decades. Members could not drink their tap water and were constantly worrying for their health and safety using tainted water in their everyday life (showering, gardening, etc.). Some community members continue to receive weekly deliveries of bottled water, given the unsafe levels of

³³ CEAA 2012, s 4(1)(i)

³⁴ CEAA 2012, s 19(1)(a), (b)

³⁵ Impact Assessment Agency of Canada, "[Cumulative Effects Assessment Practitioners' Guide](#)," (1999).

³⁶ Canadian Council of Ministers of the Environment, [Canada-wide Definitions and Principles for Cumulative Effects](#), PN 1541 (2014).

³⁷ KFN Procedural Direction Submissions, Appendix A, at pp. 18-27 and KZA Procedural Direction Submissions, pp. 10-15.

³⁸ KFN Procedural Direction Submissions, Appendix A, at pp. 28-29.

uranium found in their well water still to this day.³⁹ This first-hand experience with water contamination means a heightened awareness of and aversion to further environmental contamination and radioactive risk.

- The federal government's control over nuclear development and environmental assessments has historically excluded us. In the few instances where we have been consulted, we are constrained by externally imposed deadlines and a legislative structure that fails to recognize our inherent rights and authority, and does not protect or recognize our traditional knowledge, methods, and laws.

Regarding ongoing and future developments in and around the Chalk River Laboratories site, many impactful nuclear projects have been proposed at the Chalk River Site, including:

1. The Advanced New Materials Research Centre facility to develop small scale nuclear reactors for use in places like remote mines, and to research and undertake the reprocessing of radioactive fuel.
2. The decommissioning of the Nuclear Power Demonstration Project at Rolphton which contemplates entombing radioactive materials from the site in concrete and leaving them beside the Kichi Sibi in perpetuity or alternatively putting the reactor waste in the NSDF.
3. The Global First Power/OPG Micro Modular Nuclear Reactor Demonstration Project.
4. Plans to develop, manufacture and process fuel for multiple nuclear reactor vendors, including with (1) ARC Canada, with whom CNL signed an MOU in July 2022⁴⁰ and (2) Clean Core with whom CNL signed an MOU in April 2023.⁴¹
5. Leaving the NRX Ottawa River Contaminants in situ in the Ottawa River.

All the above projects ought to be reflected in CNL's cumulative effects assessment ("CEA"). Currently, projects 4 and 5, above, are not discussed, nor the various proposals for project 3 which remains undecided. In considering these potential future activities, it would have been helpful had CNL provided future looking development scenarios that identify a range of possible outcomes and interactions, based on best available information. This is a recommended approach as set out by the IAAC's Technical Advisory Committee on cumulative effects subcommittee.⁴²

CNL's cumulative effects assessment is neither credible nor in keeping with best practice as CNL has narrowly defined the spatial boundary for the CEA, limiting the review of cumulative effects from reasonably foreseeable projects (like the Global First Power SMR project) to effects which "spatially overlap" with the NSDF project site. As CNL finds that none of the effects from the reasonably foreseeable activities are "expected to spatially overlap" with the NSDF project site,

³⁹ KZA Procedural Direction Submissions, pp. 13-15.

⁴⁰ Canadian Nuclear Laboratories, "[CNL Partners with ARC Canada to Advance Fuel Development](#)," (27 July 2022)

⁴¹ The Recorder & Times, "[Clean Core and Canadian Nuclear Laboratories sign strategic partnership on advanced nuclear fuel development](#)," (14 April 2023)

they can conclude that there will be no potential cumulative impacts to valued components, including hydrogeology, surface water, aquatic and terrestrial biodiversity.⁴³

A narrow spatial boundary for the CEA (which is defined by the project's physical footprint) is not appropriate in the circumstances. Natural boundaries (including the river, watershed, and ecosystem considerations) are broader and more inclusive of synergistic effects, and as such would have been more appropriate. As a result of this narrow scope, the CEA data was unduly restricted and CNL's conclusions of no anticipated cumulative effects is neither well characterized nor supportable.

CNL and Staff's lack of meaningful attention to cumulative effects means it is impossible to understand the seriousness of the impacts of the NSDF project on our rights, which is necessary to then address the consequences.

Considering cumulative effects when assessing the scope of the duty to consult "is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the NSDF.⁴⁴ Indeed, the above-mentioned cumulative effects can cause death by a thousand cuts. Our ability to exercise rights in and around the Chalk River Laboratories site is already vulnerable due these cumulative effects. Any additional impacts on our rights in light of past, present, and future activities is very serious and cumulative effects must first be properly ascertained before it can be determined if KFN and KZA's rights can be upheld.

b. The duty to consult is on the high end of the spectrum

There is a strong prima facie case for our rights. The right and potential impacts are of high significance to us. The risk of non-compensable damage is high, particularly given the permanent conversion of a forest – specifically, a forest with valuable habitats, which is next to meaningful cultural areas – into a nuclear waste dump. In these circumstances, deep consultation is required.⁴⁵

c. The duty to consult has not been met

There are several reasons why the duty to consult has not been met in this case.

I. "CONSULTATION" OCCURRED TOO LATE IN THE PROCESS

Consultation should occur early, before a project has moved too far along. As proponents finalize details of a project, secure financing, conduct studies, and obtain approvals, the project gains momentum and it becomes more difficult to change course. Consultation will be meaningless if the project has progressed so far that there is effectively only one outcome. As one court aptly noted:

"The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions[.] Once important preliminary decisions have

⁴³ EIS, 5-156, 5-226, 5-267, 5-324, 5-602.

⁴⁴ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, [2011 BCCA 247](#), at para. 119, leave to appeal dismissed.

⁴⁵ *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#), at para. 44; see also KFN's written submissions dated April 28, 2022, at p. 14.

been made and relied upon by the proponent and others, there is clear momentum to allow a project.”⁴⁶

Unfortunately, such delayed consultation is exactly what has happened here.

The Commission attempted consultation too late, right before the last decision-making points. As outlined in previous submissions, prior to 2022, Staff had not effectively consulted with us. With KFN, Staff did not seriously pursue consultation as we had requested until very recently (e.g., under a general consultation framework agreement, to ensure a meaningful nation-to-nation relationship). With KZA, capacity issues made it difficult to fully participate in consultation processes.⁴⁷ As a result, at the hearings in June 2022, even Staff’s own materials acknowledged it has not obtained “reliable information” about our exercise of rights.

Under the pressure of the Procedural Direction, in the last 10 months, Staff was eager to seek feedback from us on the NSDF. Yet, at this point in the process, key preliminary decisions have already been made, relied upon, and deemed complete or final by the proponent and others, including:

- site selection and design;
- the scope of CNL’s Environmental Impact Statement;
- baseline environmental assessment work;
- technical approval of CNL’s Environmental Impact Statement; and
- Staff’s conclusions that the proposed NSDF would not have significant adverse environmental effects.

The failure to consult during these early decisions means we were unable to suggest alternatives that would have had less impact on our rights. Once we became involved, Staff and CNL had already assumed crucial aspects of the NSDF were going forward. This was particularly problematic for site selection and design, given our continuing concerns about the NSDF’s above-ground placement and proximity to the Kichi Sibi.

Staff insists that they have no authority to affect the location and type of project proposed, despite ‘alternatives’ to the project, including other locations, being a required assessment under CEAA 2012.⁴⁸ It is true that consultation in the early phases of project planning is not required under CEAA 2012. However, the duty to consult is upstream of statutory obligations and “cannot be boxed in by legislation”⁴⁹. In other words, strict compliance with a statutory process does not necessarily mean the duty to consult has been fulfilled.⁵⁰ Rather, the Crown must exercise its powers in a manner that fulfills the honour of the Crown.

Failing to engage in early consultation is inconsistent with common law obligations. Canada appears to acknowledge this, as it has codified early consultation in the new *Impact Assessment*

⁴⁶ *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al*, [2004 BCSC 1320](#), at para. 74.

⁴⁷ KZA Procedural Direction Submissions, at p. 18.

⁴⁸ KZA Procedural Direction Submissions, at p. 24; CEAA 2012, 19(1)(g); Impact Assessment Agency of Canada, [Addressing “Purpose of” and “Alternative Means” under the Canadian Environmental Assessment Act, 2012](#) (March 2015)

⁴⁹ *Ka’a’Gee Tu First Nation v. Canada (Attorney General)*, [2007 FC 763](#), at para. 121.

⁵⁰ *Aboriginal Law in Canada*, Jack Woodward (Carswell, Toronto: 2022) (looseleaf), § 5:37, para. 5.1400.

Act (“**IAA**”),⁵¹ which replaced CEAA 2012. Specifically, under the heading of “Planning Phase”, sections 10-15 of the *IAA* require:

- the proponent to provide an initial description of the project, including a summary of any engagement taken with Indigenous groups and any plan for future engagement⁵²;
- the responsible agency to consult with the public and “any Indigenous group that may be affected by the carrying out of the designated project”;
- the responsible agency to provide the proponent a summary of issues raised through consultation with the public and Indigenous groups; and
- the proponent to provide a notice describing how it intends to deal with the raised issues.

Once the responsible agency is satisfied the proponent’s responding notice contains all the information required under the *IAA*, it will post the proponent’s notice online. Only after that point will the agency decide whether an impact assessment is required.

Even though this process is not mandated under CEAA 2012, it reflects an understanding that early consultation with Indigenous groups is required. Early engagement is a recognized best practice, and we encourage the Commission to exercise their discretion and abide by the highest and most modern impact assessment standards and practices. Yet, in this process, we were not given opportunity to participate in these preliminary decisions or processes. To now seek KFN’s and KZA’s input at this late stage of the process leaves very little room, if any, for meaningful consultation.

II. LACK OF OPEN-MINDEDNESS

Indeed, CNSC staff explicitly admitted they were not prepared to reconsider past decisions or underlying baseline information on the NSDF.⁵³ Instead, Staff was fixated on obtaining information about where we practiced our rights. Staff wanted this information so it could conclude that existing mitigation measures would be sufficient to address any impacts to our rights.

KFN explained multiple times that it needed to review past decisions and underlying baseline information, to meaningfully assess any impacts on our rights and responsibilities. For example, without ground truthing CNL’s conclusions on the NSDF’s effects on the terrestrial environment and mammal populations in the surrounding area, KFN would not be able assess the NSDF’s impact on their harvesting rights and inherent responsibilities to the mammals and aquatic species they typically harvest. In their RIA and previous submission, KZA also stated that the assessment scope was too narrow and needed to be redefined with KZA.

We experienced Staff being uninterested in KFN independently collecting or grounding truth relevant Species at Risk (“**SAR**”) baseline information for their EIS and questioning the proposed mitigation measures.⁵⁴ This reflected Staff had closed its mind to the possibility that the NSDF could potentially impact KFN’s or SAR rights in a way that was not (or could not be) mitigated or accommodated.

⁵¹ *Impact Assessment Act*, SC 2019, c 28, s 1.

⁵² *Information and Management of Time Limits Regulations*, [SOR/2019-283](#), s. 3.

⁵³ KFN Procedural Direction Submissions, at p.4.

⁵⁴ KFN Procedural Direction Submissions, at pp.4-5.

Both CNL and CNSC staff treated the NSDF approval as a foregone conclusion.⁵⁵

CNSC staff's hollow approach to consultation falls short of their constitutional obligations. The Crown must always engage in consultation in good faith, with an open mind. Consultation is not an opportunity for an Indigenous group to simply air their grievances before the Crown just "proceeds to do what [it] intended to do all along".⁵⁶ Specifically, the Crown cannot discharge its duty to consult if it begins with the assumption that a project "should proceed and that some sort of mitigation plan would suffice...[T]o commence consultation on that basis does not recognize the full range of possible outcomes, and amounts to nothing more than an opportunity for the First Nations 'to blow off steam'".⁵⁷

The Crown's job goes beyond simply listening and recording the concerns of Indigenous groups.⁵⁸ Rather, the Crown must be willing to change its mind and potentially say "no" to a proposed project, based on what it hears from the Indigenous group.⁵⁹ Yet, Staff entered consultations with a closed mind, on the assumption that this project would be approved and that existing mitigation measures would be sufficient.

III. THE RECORD IS INSUFFICIENT TO ASSESS IMPACTS TO RIGHTS, ENVIRONMENTAL EFFECTS AND PROPOSED MITIGATION MEASURES

Staff's closed mind meant they failed to acknowledge the gaps in the existing record. Staff's conclusion that the NSDF does not cause any significant adverse environmental effects depends in large part on proposed future and yet to be developed mitigation and monitoring measures. For instance:

- in response to concerns about changes in surface water quality, Staff wrote that CNL has committed to a Surface Water Management Plan;⁶⁰
- in response to concerns about species at risk, Staff wrote that CNL intends to work closely with Canadian Wildlife Services with regards to permit requirements;⁶¹ and
- in response to concerns about the loss of forest and habitat, Staff wrote that CNL has committed to offsetting the loss through a site wide Sustainable Forest Management Plan ("SFMP").⁶²

It is unclear whether, and to what extent, Staff have independently verified the efficacy of these mitigation measures.

⁵⁵ For instance, CNL stated they simply would exercise the precautionary principle for all SAR onsite. Yet, the precautionary principle has four components: "taking preventative action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making."; David Kreibel et al, *The Precautionary Principle in Environmental Science*, 109 *Env'tl. Health Persp.* 071 (2001). KFN demonstrated in its field ground truthing that in no way has CNL fulfilled its burden of proof for SAR, and indeed, blatantly avoided undertaking the necessary actions to meet its obligations as required by the precautionary principle.

⁵⁶ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para. 54.

⁵⁷ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, at para. 149.

⁵⁸ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, at para. 558.

⁵⁹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 46.

⁶⁰ Staff Submissions dated January 24, 2022 (CMD 22-H7), section F. Environmental Assessment Report, at p. 60.

⁶¹ Staff Submissions dated January 24, 2022 (CMD 22-H7), section F. Environmental Assessment Report, at p. 67.

⁶² Staff Submissions dated January 24, 2022 (CMD 22-H7), section F. Environmental Assessment Report, at p. 67.

Most notably, Staff have not yet reviewed the SFMP and proposed offsetting measures. In their conversations with KFN, Staff was opaque about the process by which they will review and approve the SFMP. They did not believe it was their role to facilitate public consultation on the SFMP and deferred to CNL's process for gathering input.⁶³ Yet, if the SFMP is crucial mitigation measure, Staff have a duty to consult with Indigenous communities like us when deciding whether to approve or reject the SFMP.

More generally, we are concerned with gaps or inaccuracies in the EIS and EA, as outlined below.

Lack of internal expert capacity at CNSC

- We were particularly disturbed by the lack of expert review capacity internally at CNSC. Rather than relying on their Memorandums of Understanding with the Department of Fisheries and Oceans (“DFO”) and Environmental and Climate Change Canada (“ECCC”) for subject expertise, they relied on internal persons without such subject expertise. For example, CNSC did not follow DFO protocols for species at risk mussels’ presence absence studies in the project area of influence for Hickory nut mussels. This is despite the Perch Creek outlet to the Ottawa River is their ideal habitat.
- Similarly, for Eastern wolf, Staff failed to use the expertise of the Canadian Wildlife Service. They did not require CNL to define presence or absence of the species in the NSDF footprint. This is despite Eastern wolf being highly assigned to the region and is a threatened species in Ontario and of Special Concern federally.

Questionable conclusions on environmental issues

- In correspondence with KFN, CNL represented that the NSDF footprint “currently does not have any Milkweed as it is mainly forested”. However, KFN’s fieldwork identified milkweed within the NSDF footprint. Milkweed is the only host plant for monarch butterfly caterpillars, which is a species of special concern under the [*Species at Risk Act*](#).
- CNL claimed that records of Blanding’s turtles nesting in active sand and gravel pits along roadsides suggests they “can tolerate some level of anthropogenic sensory disturbances”. Yet, a turtle found in an active sandpit does not speak to whether that turtle was highly disturbed or distressed, and what the impacts of that stress on the species is. The turtles may have been so conditioned by their habits that they went to the sandpit to forage despite heightened stress and disturbance, potentially affective their reproductive capabilities. This is because a stressed animal will put less energy into choosing the best micro-habitat or might limit its foraging.⁶⁴
- CNL opted for engineered solutions versus nature-based Indigenous solutions. For example, CNL’s proposed turtle fencing and turtle crossings making it easier for predators to kill species at risk turtles. CNL’s proposed relocation of endangered bats to bat boxes CNL’s lack of methodology and baseline on NSDF mammal populations and prey-predator use of the NSDF became more evident are CNL more suspect of having completely

⁶³ KFN Procedural Direction Submissions, at p. 13.

⁶⁴ KZA’s Procedural Direction Submissions, p. 32.

avoided this work since 2016. And, when KFN attempted to become involved fieldwork, we felt CNL was, at times, obstructing or, at the very least, unnecessarily delaying our work.⁶⁵

Failure to take an ecosystem approach

- The CNSC's *Generic Guidelines for the Preparation of an EIS under CEAA, 2012* requires all EISs to "provide a rationale for selecting specific VCs and for excluding any VCs".⁶⁶ However, the EIS lacks such rationale. Notably:
 - Lower trophic level species are hardly represented in the EIS— despite forming the base of the aquatic food web and thus serving crucial ecosystem functions. More specifically, algae, phytoplankton, and diatoms are excluded from the EIS with no rationale for this choice, despite their potential sensitivity to radioactivity.
 - The presence or absence of benthic species at risk around Chalk River (including Rapids Clubtail, Riverine Clubtail, and Skillet Clubtail – all known to live around the Ottawa area) is never established in the EIS. Benthic organisms are hardly represented as VCs, even though they frequently consume sediments when feeding, thus comprising a unique category of species susceptible to lakebed and riverbed contamination.
 - Terrestrial and aquatic flora are excluded as VCs, despite their significance as food sources for other species of fauna and for Indigenous picking practices.
- CNL's discussions of potential impacts to species does not consider how species interact with each other. The EIS considers each VC in a vacuum, rather than in relation (and constant interaction) with other species.
 - For example, there is no consideration for increased competition between species, including increased competition for food resource or habitat, because of the removal of 37 hectares of forest. There is also no consideration given to the potential for noise-sensitive species to leave the area or alter their foraging habits (e.g., bats) and how that would affect the food-web. The 37 hectares proposed for removal also contains critical habitat for bears as well as a major wildlife corridor that if removed, will alter the activity of many species.

General lack of information and transparency

- Generally, the EIS and several supporting documents are long but contain little information. They are repetitive and key findings relating to the significance of identified potential environmental effects tend to reference other reports, plans, and documents rather than provide clear descriptions, analysis, and supported findings. The extensive references

⁶⁵ KFN Procedural Direction Submissions, at pp. 6-8.

⁶⁶ Canadian Nuclear Safety Commission, "Generic Guidelines for the Preparation of an Environmental Impact Statement – Pursuant to the *Canadian Environmental Assessment Act, 2012*", at s. 5.2.1, online: <https://nuclearsafety.gc.ca/eng/resources/environmental-protection/ceaa-2012-generic-eis-guidelines.cfm>.

(without sufficient explanation and analysis of these sources in the EIS itself) makes an already unwieldy document more difficult to understand and navigate.

- For example, CNL discussions of drilling mud refer to a DFO Ontario Operational Statement, a Frac-out Response Plan, and Spill Contingency Plan, none of which are summarized with much detail in the EIS.⁶⁷ As will be expanded upon below, the EIS does not provide information relating to specific reviews of drilling mud's potential effects on specific species or habitat, nor does the EIS discuss assessments of *Fisheries Act* authorizations relating to drilling mud.
- Further, some description of the Environmental Assessment Follow Up Monitoring Plan is provided in Table 11.0-1. However, this description again refers to other documents for crucial details, such as Waste Water Treatment Plant ("WWTP") effluent verification monitoring, where CNL just asserts the monitoring will be conducted in keeping with CSA Standard N288.5-11.⁶⁸ Further analysis relating to how exactly CNL will apply the CSA standard, and the assumptions and calculations relied on to support CNL's ultimate proposals relating to the frequency and types of monitoring for each contaminant have not been included in the EIS.

Given these above gaps and inaccuracies, the conclusions in the EIS and EA are unreliable. In turn, we cannot trust Staff's assessment that there are no residual impacts to our rights. For these reasons, the Commission should find that the duty to consult has not been satisfied.

IV. AUTHORIZATIONS UNDER THE *FISHERIES ACT*

One particularly large area of lacking information in the EIS is regarding *Fisheries Act* reviews.

CNL's EIS notes the physical changes to fish habitat and temporary riparian area disturbances predicted to result from the installation of the diffuser and transfer line into Perch Lake as well as wetland disturbances resulting from the construction of the WWTP.⁶⁹ This discussion is paired with a set of proposed mitigation activities (including references to DFO guidelines). However, the EIS does not include any detailed discussion of DFO permits for drilling, blasting/use of explosives, excavating and grading activities. Rather, it assures that DFO guidelines for mitigation of these activities will be followed.⁷⁰

Section 35 of the *Fisheries Act* prohibits anyone from carrying on any work, undertaking, or activity that results in the harmful alteration, disruption, or destruction of fish habitat, unless it has been approved via permit or Ministerial authorization. It remains unclear from the EIS and CNSC staff's CMD how much work has been undertaken to determine whether DFO authorization for these activities will be pursued.

Additionally, CNL's EIS does not contain a detailed assessment of potential impacts to fish or fish habitat from each of the expected contaminants that will be present in WWTP effluent. Such an evaluation is not performed in the EIS for drilling mud either. Rather, CNL again relies on

⁶⁷ EIS, Table 5.4.2-7 at p.5-275.

⁶⁸ EIS, Table 11.0-1 at p. 11-6.

⁶⁹ CNL 2020 EIS at p. 5-336 and Table 5.6.5-1 on p. 5-472.

⁷⁰ CNL 2020 EIS, Table 5.4.2-7 on p. 5-276 and p. 5-291

assurances to adhere to Canadian Council of Ministers for the Environment release limits, Ontario Provincial Water Quality Objectives, and DFO guidelines to support its argument that the NSDF will avoid significant future environmental harm.⁷¹

Section 36(3) of the *Fisheries Act* prohibits the release of “deleterious substances” into waters frequented by fish. Deleterious substances are defined broadly as anything that would degrade or alter water quality to such an extent that it could harm fish or fish habitat (s. 34(a), and there are established toxicity thresholds for various species for reference). The potential for harm of a given substance can be measured by quantity or concentration, and the legislative language is clear that the substance being released must be sampled/measured at the point of discharge and not once it has been released and diluted into receiving waters (s. 34(1)(b)). Deleterious substances can include releases of treated wastes and thus potentially apply to contaminants in effluent from the WWTP (s. 34(1)(e)). CNL also notes drilling mud is considered a deleterious substance that can adversely affect aquatic species and habitat.⁷² It remains unclear from the EIS and CNSC staff’s CMD how much work has been undertaken to determine whether specific ECCC authorization for these activities under the Act will be pursued.

In 2012, the CNSC and (then) Environment Canada entered into a memorandum of understanding (MOU) for their shared cooperation, coordination, and consultation in meeting the relevant requirements of the *Canadian Environmental Protection Act* (CEPA), s. 36(3) of the *Fisheries Act*, *Migratory Birds Convention*, *Species at Risk Act* (SARA), and the CEAA 2012.⁷³ The MOU also ensures the CNSC and ECCC will consult with one another over reviews of licence applications and environmental assessments (ss. 3(b) and (c)). In 2013, a more prescriptive MOU was signed between the DFO and CNSC.⁷⁴ This MOU applies to Class 1 nuclear facilities which would include the NSDF (as it is classified as a “Class 1B” nuclear facility under s. 19(a) of the *General Nuclear Safety and Control Regulations*).⁷⁵

This second MOU sets out the required work of both the DFO and CNSC and distinguishes their respective roles when meeting the requirements of the NSCA, SARA, and the *Fisheries Act*. Importantly, the MOU is clear that both government agencies/departments are responsible for ensuring “Aboriginal consultation” requirements are met in all given cases (s.2(a)(iii) and s. 4(a)(v)). Further, the preamble of the MOU requires the Government of Canada (via the DFO and CNSC) to undertake:

“a process of early, effective and meaningful engagement and consultation concerning contemplated Crown conduct that may adversely affect established or potential and treaty rights in relation to regulatory decisions under the *Fisheries Act* (e.g., issuance of

⁷¹ See for example: CNL 2020 EIS at p. 3-64, 5-279, and 5-291.

⁷² CNL 2020 EIS at p. 5-486.

⁷³ Memorandum of Understanding (MOU) Between The Canadian Nuclear Safety Commission And Environment Canada, June 2012, online: https://nuclearsafety.gc.ca/eng/pdfs/MoU-Agreements/June-2012-MOU-between-CNSC-and-Environment-Canada_e.pdf.

⁷⁴ Memorandum of Understanding (MOU) Between Fisheries and Oceans Canada and Canadian Nuclear Safety Commission For Cooperation and Administration of the *Fisheries Act* Related to Regulating Nuclear Materials and Energy Developments, December 16, 2013, online: <https://nuclearsafety.gc.ca/eng/pdfs/MoU-Agreements/2014-02-27-mou-cnsc-fisheries-oceans-eng.pdf>.

⁷⁵ As confirmed in CNSC staff’s CMD for this matter: <https://www.nuclearsafety.gc.ca/eng/the-commission/hearings/cmd/pdf/CMD22/CMD22-H7.pdf>.

Authorizations), *SARA* (e.g., issuances of permits) and/or the *Nuclear Safety and Control Act* (e.g., issuance of licenses for nuclear facilities)” (s. 1(f)).

Both parties are required to prepare work plans and protocols to guide their review and assessment of applications, and ultimately ensure intents of the NSCA, *Fisheries Act*, and *SARA* are adhered to. They must also “coordinate Aboriginal consultation activities” (s. 3(a)). To date, neither KFN nor KZA have been informed of any *Fisheries Act*-specific consultation by either CNSC, DFO, or ECCC staff.

All reviews under the *Fisheries Act* should have been completed and clearly communicated as part of the evidentiary record in this hearing process as they speak directly to predicted environmental impacts of the NSDF and their mitigation. This review should have been undertaken in a collaborative way with KFN and KZA who should also have been given the opportunity to contribute their own Indigenous (traditional and ecological) knowledge to the review.

3. FAILURE TO FULFILL THE CONDITIONS UNDER THE CEAA 2012

Under section 5 of *CEAA 2012*, the Commission must consider the NSDF’s “environmental effects”, which include:

- (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,
 - (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.

Section 19 of *CEAA 2012* likewise sets out the factors that must be taken account in an EA. For the same reasons that the Commission has failed to fulfill their duty to consult with us, there is insufficient information to determine CNL has fulfilled the requirements under sections 5 and 19 of *CEAA 2012*. Without sufficient information on environmental effects, together with mitigation measures which flow from the understandings of these effects, the Commission is not able to reliably assess the NSDF’s effects within the parameters required in *CEAA 2012*.

We remain of the view that the Commission has insufficient evidence to assess the environmental effects of the NSDF, as required under *CEAA 2012*. In the alternative, the unreliability of CNL and Staff’s conclusions means that the NSDF is likely to cause significant adverse environmental effects. This would align with the precautionary principle, wherein the Commission’s own guidance recognizes the proponent bears the burden of showing the project will not cause irreversible damages to people or the environment.⁷⁶

Notably, CNL’s approach has been contrary to section 19(1)(g) of *CEAA 2012*, as they have not conducted an adequate ‘alternative means’ assessment that reviews, among other factors, other locations for the proposed project what would not require the permanent destruction of this forest

⁷⁶ Canadian Nuclear Safety Commission, “Implementation of the Precautionary and Sustainable Development Principles in Nuclear Law – A Canadian Perspective” (2009).

ecosystem and wildlife habitat, next to the Kichi Sibi, a significant waterway for KZA and KFN and a clean water source.⁷⁷

Furthermore, among the purposes of CEAA 2012 is to “take actions that promote sustainable development.”⁷⁸ Mounting evidence of biodiversity’s persistent degradation around the world, as well as its critical role for humanity, makes biodiversity a key element of sustainability. On this basis, we submit the Kunming-Montreal Global Biodiversity Framework (“**Biodiversity Framework**”), as agreed to at the 15th meeting of the Conference of the Parties to the *United Nations Convention on Biological Diversity*, ought to inform the Commission’s EA decision.⁷⁹ This is especially so given the Frameworks’ emphasis on ‘mainstreaming,’ which posits biodiversity, and the services it provides, be appropriately and adequately integrated in decision-making, where a decision stands to have an impact on biodiversity.⁸⁰

Central to the Biodiversity Framework is a recognition of the dependency of Indigenous peoples and local communities on biological diversity and their unique role in conserving life on Earth.⁸¹ While KFN has asked both CNL and CNSC to comment on their respective efforts to uphold commitments in the Biodiversity Framework, including the full, equitable and inclusive participation of Indigenous peoples in decision-making as set out at Target 22, no response has been received to date.

4. FAILURE TO FULFILL THE CONDITIONS UNDER THE NSCA

Under section 24(4) of the *NSCA*, to approve CNL’s licence amendment application, the Commission must be satisfied that CNL:

- (a) is qualified to carry on the activity that the licence will authorize the licensee to carry on; and
- (b) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed. [Emphasis added.]

For the same reasons that the Commission failed to fulfill their duty to consult with us, there is insufficient information to determine that CNL can meet the criteria of s. 24(4). The lack of adequate baseline information in the EIS means the Commission cannot reliably assess whether CNL’s will develop the NSDF in accordance with the requirements of s. 24(4).

There is also insufficient information to demonstrate whether CNL has considered the targets set out in the Biodiversity Framework. Reviewing the application in line with the Biodiversity Framework would be in keeping with the objects of the Commission, which requires they uphold international obligations to which Canada has agreed.⁸²

⁷⁷ <https://storymaps.com/stories/59c9e394da1a4d4eb2a117566664a3f0>

⁷⁸ CEAA 2012, s 4(1)(h)

⁷⁹ United Nations Environment Program, *Convention on Biological Diversity – Kunming-Montreal Global Biodiversity Framework*, CBD/COP/15/L.25 (2022) [**Global Biodiversity Framework**]

⁸⁰ Global Biodiversity Framework, Targets 14 -23

⁸¹ United Nations Environment Programme (1992). *Convention on biological diversity*, June 1992. <https://wedocs.unep.org/20.500.11822/8340>.

⁸² NSCA, s 9(a)(iii); REGDOC-2.9.1, *Environmental Principles, Assessments and Protection Measures*, s 2.1

Notably, as will be outlined in more detail below, if the Commission approves CNL's licence application without the consent of Indigenous nations affected, it will violate UNDRIP and contrary to "international obligations to which Canada has agreed", per s. 24(4)(b) of the NSCA.

5. APPROVING THE PROJECT VIOLATES UNDRIP

Finally, approving the NSDF on this record would violate UNDRIP. The *United Nations Declaration on the Rights of Indigenous Peoples Act* confirms that UNDRIP is a universal human rights instrument with application in Canadian law.⁸³

We have previously outlined the various UNDRIP articles that are relevant to the NSDF.⁸⁴ Many of the rights we outlined in Section 2a are consistent and reflected in UNDRIP. Notably, Indigenous peoples have the right to maintain, protect, and have access in privacy to their religious and cultural sites (Article 12), as well as a right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied lands, and to uphold their responsibilities to future generations in this regard (Article 25). By deforesting and blasting a significant area with multiple valued components, the NSDF would violate these articles.

Both Staff and CNL insist that the application of UNDRIP in this process is unknown. They say the federal government is still consulting with Indigenous groups on an action plan to implement UNDRIP. It is debatable how some of UNDRIP's articles might translate into practice and discrete obligations.

Having said that, Article 29.2 of UNDRIP is unequivocal. It reads:

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.

The language is clear, without qualification. This provision leads to only one interpretation: free, prior, and informed consent is not merely a process of consultation with Indigenous groups. Rather, Indigenous groups have a substantive right to say "no". Specifically, the storage or disposal of hazardous waste – like that proposed in the NSDF – cannot occur until Indigenous peoples provide their free, prior, and informed consent.

If Canada is serious about implementing UNDRIP, then Article 29.2 requires Staff to abide by a "willing host" model for proposed nuclear development on Indigenous territories. In this case, there does not appear to be a willing host for the NSDF. The NSDF is within the Algonquins of Pikwàkanagàn First Nation's ("Pikwàkanagàn") unceded traditional territory. As of their May 19, 2022, submission, Pikwàkanagàn had not made an official "FPIC" decision regarding the NSDF. They stated they did "not see enough Project revisions, commitments, and conditions in place to offset" their concerns.⁸⁵

⁸³ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s. 4(a).

⁸⁴ KFN's written submissions dated April 28, 2022 ([CMD 22-H7.111A](#)), at pp. 2-4.

⁸⁵ Algonquins of Pikwàkanagàn First Nation written submissions, dated April 11, 2022 ([CMD 22-H7.109](#)), at p. 74.

As two neighbouring communities to Pikwàkanagàn, with territory very near to the proposed NSDF footprint, we are not willing hosts at this time (for all the reasons outlined above). The lack of a willing host for the NSDF should be sufficient basis to deny this project from moving forward. If the Commission decides that Article 29.2 and a “willing host” model is not applicable, then it must – at a minimum – ensure that the safest and least harmful proposal is under consideration. Overriding the express wishes of Indigenous communities means the Commission is effectively the sole gatekeeper of the project. As such, Indigenous groups depend on the Commission’s utmost vigilance and scrutiny of a proposed project.

In this case, CNL had safer alternative means available to it. It could have pursued a subterranean GWMF, or a different location, farther away from the Kichi Sibi. Yet, CNL chose not to do so, citing high costs (among other things). To add insult to injury, there are gaps in the environmental baseline work to suggest Staff and CNL’s conclusions are not reliable.

In these circumstances, allowing the NSDF to move forward would violate both the letter and spirit of UNDRIP. The Commission should decline to do so.

6. NEED FOR AN ENVIRONMENTAL JUSTICE LENS

The Commission should review the NSDF with an environmental justice lens.

Environmental justice requires that a project’s impacts be borne equitably amongst all people. However, due to colonialism, racism, and economic inequality, many Indigenous communities are disproportionately located near contaminated and degraded industrial sites.

No Algonquin communities were ever consulted about the construction of the Chalk River Laboratories. Now, communities are expected to permanently accept in their territories the wastes this facility has generated as well as other wastes brought in from elsewhere (namely Whiteshell Laboratories, the Nuclear Power Demonstration reactor, and Port Hope). These Algonquin communities have been excluded from many of the benefits of these projects, and disproportionately shoulder the burdens of contamination and other risks associated with the safe operation of on-site facilities and their impacts.

Other jurisdictions have laws that require government agencies to consider environmental justice factors when carrying out their mandates.⁸⁶ A proposed bill in Canada has similar aims to counter environmental injustice.

Specifically, Bill C-226 (*“An Act respecting the development of a national strategy to assess, prevent and address environmental racism and to advance environmental justice”*),⁸⁷ has passed in the House of Commons and is receiving its second reading in the Senate. The Bill recognizes

⁸⁶ See: US Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”, online: <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>; and US Executive Order on Revitalizing Our Nation’s Commitment to Environmental Justice for All, April 21, 2023, online: <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/21/executive-order-on-revitalizing-our-nations-commitment-to-environmental-justice-for-all/>

⁸⁷ Canada, Bill C-266, *An Act respecting the development of a national strategy to assess, prevent and address environmental racism and to advance environmental justice*, 1st Sess, 44th Parl, 2023 (first reading in Senate March 30, 2023), online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-226>.

that “a disproportionate number of people who live in environmentally hazardous areas are members of an Indigenous, racialized or other marginalized community” and that “establishing environmentally hazardous sites, including landfills and polluting industries, in areas inhabited primarily by members of those communities could be considered a form of racial discrimination”.

The Bill would require the Canadian government to meaningfully involve marginalized communities in finding solutions to issues of environmental racism. The spirit and intent of these sort of laws is harmonious with the purposes of existing jurisprudence in Canada, such as that arising from the duty to consult, and the *Charter of Rights and Freedoms* (e.g., section 7 regarding the right to life, liberty, and security of the person, and s. 15 regarding the right to equality under the law).⁸⁸

7. CONCLUSION AND ORDER REQUESTED

KFN and KZA submit that in the circumstance:

- the Commission has not fulfilled the duty to consult;
- CNL’s EIS and licensing application lack essential information necessary to fulfill the requirements of CEAA 2012 and the NSCA; and
- approving CNL’s licence amendment in these circumstances, without a willing host for the NSDF, would violate Article 29.2 of UNDRIP.

For these reasons, the Commission should find there is insufficient information to assess the NSDF’s environmental effects or, in the alternative, the NSDF is likely to cause significant adverse environmental effects and the question of whether the adverse environmental effects are justified in the circumstance must be referred to the Lieutenant Governor in Council as required under CEAA 2012.



**Presentation from the
Kebaowek First Nation and
the Kitigan Zibi Anishinabeg**

**Présentation par la
Première Nation Kebaowek
et Kitigan Zibi Anishinabeg**

In the Matter of the

À l'égard des

**Canadian Nuclear Laboratories,
Chalk River Laboratories**

**Laboratoires Nucléaires Canadiens,
Laboratoires de Chalk River**

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

Demande 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

**Commission Public Hearing
Part 2**

**Audience publique de la Commission
Partie 2**

May 30 to June 3, 2022

30 mai au 3 juin 2022



ASSESSMENT of the CANADIAN NUCLEAR
LABORATORIES NEAR SURFACE DISPOSAL FACILITY
and LEGACY CONTAMINATION of ALGONQUIN AKI SIBI.



Intervention by Kitigan Zibi Anishinabeg and Kebaowek First Nation
to the Canadian Nuclear Safety Commission

August 10, 2023

Kwey Kakina

Opening
Prayer



STRONGER TOGETHER

Chiefs Statements

CHIEF DYLAN WHITEDUCK
KITIGAN ZIBI ANISHINABEG



CHIEF LANCE HAYMOND
KEBAOWEK FIRST NATION



OUR LAND OUR RESEARCH

Indigenous Led Assessment



Keenan chief and Perry Mongrain proposed NSDF site

ALGONQUIN

Chalk River Site Historical Impacts

- Alienation from unceded lands
- Disruption of water and land based livelihoods
- Loss of sense of place and spiritual connection to Pointe au Baptême and Kînew Kiishkaabikâan (Bird Rock)
- Loss of sacred places and rituals
- Erosion of customary governance and inherent management systems
- Degradation of lands and waters, sacred sites
- Erosion of cultural identity
- Disruption of land based activities
- Decline in access to Indigenous food
- Increases in income inequality
- Nuclear contamination impacts
- Reduction in food availability
- Negative impacts on the mental health and spiritual well being
- Loss of accumulated Indigenous knowledge and eco-friendly practices
- PROPOSED NSDF LAND DEGRADATION INCREASES HISTORICAL IMPACTS

The Procedural Order

EFFORTS OF COLLABORATION

- KFN and KZA, are independent Algonquin First Nations that had different interactions with Staff and the CNL in the past several months. We are both part of the broader Algonquin Nation, and we continue to share similar interests and serious concerns about the NSDF and its impacts on our rights and interests. Namely:
- the duty to consult has not been fulfilled;
- there is insufficient information to assess the NSDF's environmental effects or, in the alternative, the NSDF is likely to cause significant adverse environmental effects. JUSTIFICATION must be referred to the Lieutenant Governor in Council as required under the Canadian Environmental Assessment Act, 2012 ("CEAA 2012")
- insufficient information to determine that CNL will **"make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed"**, as required under the Nuclear Safety and Control Act ("NSCA");
- Obligations under UNDRIP and UNDA 2021 have not been fulfilled

PROPOSED NSDF

IMPACTS ON COMMUNITY RIGHTS

Kebaowek First Nation

- Rights to harvest
- Rights to govern and protect the territory
- Rights to maintain a cultural and spiritual relationship with the territory

Kitigan Zibi Anishinabeg

- Rights to harvest
- Right to a safe and healthy environment
- Rights to access and occupy traditional territory
- Rights to dignity of culture

POTENTIAL IMPACTS



Mother Bear in the proposed NSDF footprint

A SACRED LANDSCAPE

- PERMANENT, IRREVERSIBLE LOSS OF HABITAT AND BIODIVERSITY
- CONTAMINATION OF THE ENVIRONMENT
- INCREASED AVOIDANCE
- CUMULATIVE EFFECTS



PROPOSED NSDF SITE

GROUND TRUTHING



- Introduction to Algonquin Inherent High Value Relations in the Proposed NSDF
- Failure of CNL and CNSC to Assess Forest and Wildlife Habitats including Species at Risk
- Failure of CNL to Provide Estimates of Animal Mortality
- Failure of CNL and CNSC to recognize implications of Clearcutting NSDF Site in Sustainable Forest Management Planning
- CNL and CNSC Capacity Issues (lack of DFO and ECCC oversight)
- KFN DIRECT TO DIGITAL FINDINGS HUB
<https://arcg.is/90GzD0>

International Commitments

TARGET 22 CALL FOR COMPLIANCE

**Promoting sustainable development
requires consideration of biodiversity**

- **Among the purposes of CEAA 2012 is to “take actions that promote sustainable development.”** Mounting evidence of biodiversity’s persistent degradation around the world, as well as its critical role for humanity, makes biodiversity a key element of sustainability.
- **Recommendation:** The Kunming-Montreal Global Biodiversity Framework (“Biodiversity Framework”), as agreed to at the 15th meeting of the Conference of the Parties to the *United Nations Convention on Biological Diversity*, ought to inform the Commission’s environmental assessment decision, including the principle of ‘mainstreaming,’ which posits biodiversity, and the services it provides be appropriately and adequately integrated in decision-making, where a decision stands to have an impact on biodiversity.
- **Recommendation:** Target 22 of the Biodiversity Framework, which requires the full, equitable and inclusive participation of Indigenous peoples in decision-making ought to be upheld by the Commission in making an EA decision, recognizing the dependency of Indigenous peoples and local communities on biological diversity and their unique role in conserving life on Earth.

ALGONQUIN LAND BACK

**INDIGENOUS
PROTECTED
CONSERVATION
AREA**

**OTTAWA RIVER LAND BACK AND
WATER GOVERNANCE**



FITZPATRICK ISLAND DOWNSTREAM OF CHALK RIVER

ALGONQUIN

Redress

**2015 TRC Calls to Action
UNDRIP 2007 Articles
UNDA 2021 Action Plan**



LEGAL

**The duty to
consult: a
refresher**

- **Content of the duty falls on a spectrum**
- **Consultation must occur early in the process**
- **The Crown must keep an open mind and engage in good faith**

LEGAL

**The duty to
consult has not
been fulfilled**

- Consultation occurred too late
- Consultation assumed project approval
- Insufficient record to make a decision

LEGAL

**Failure to fulfill
comply with
legislation**

- s. 5(c) of the *Canadian Environmental Assessment Act* – environmental effects that must be considered in this assessment

(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,
- (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.

LEGAL

Failure to fulfill
comply with
legislation

- s. 24(4) of *Nuclear Safety and Control Act* – no licence amended unless, in the Commission's opinion, the applicant:

- (a) is qualified to carry on the activity that the licence will authorize the licensee to carry on; and
- (b) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

LEGAL

An approval
would violate
UNDRIP

- UNDA 2021 Federal legislation affirms UNDRIP “as a universal international human rights instrument with application in Canadian law”
- UNDRIP recognizes and protects various Indigenous people’s rights

UNDRIP ARTICLES

FPIC and willing hosts

ARTICLE 19

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and

ARTICLE 29.2

“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.”

Closing Prayer





Canadian Nuclear
Safety Commission

Commission canadienne
de sûreté nucléaire

CMD 22-M35.4

Date: 2022-10-31

File / dossier : 6.02.04

Edocs pdf : 6905910

Oral presentation

Exposé oral

Written submission from the Kebaowek First Nation

Mémoire de la Première nation de Kebaowek

Regulatory Oversight Report for Uranium and Nuclear Substance Processing Facilities in Canada: 2021

Rapport de surveillance réglementaire des installations de traitement de l'uranium et des substances nucléaires au Canada :2021

Commission Meeting

Réunion de la Commission

December 15/16, 2022

15/16 décembre 2022



**KEBAOWEK FIRST NATION
110 OGIMA STREET
KEBAOWEK (QUEBEC)
J0Z 3R1**

TEL: (819) 627-3455

FAX: (819) 627-9428

October 31, 2022

Senior Tribunal Officer, Secretariat
Canadian Nuclear Safety Commission
280 Slater Street, P.O. Box 1046, Station B
Ottawa, Ontario
K1P 5S9

BY EMAIL: cns.interventions.ccsn@canada.ca

Re: Regulatory Oversight Report (“ROR”) for Uranium and Nuclear Substance Processing Facilities in Canada: 2021 – Submissions of Kebaowek First Nation (“KFN”)

Dear Commissioners

The following submission is presented on behalf of Kebaowek First Nation (“KFN”) to the Canadian Nuclear Safety Commission (“CNSC”) provided for under the *Nuclear Safety and Control Act* (NSCA 1007).

As an Algonquin First Nation Government who represents Algonquin rights & titleholders in the Kitchi-Sibi watershed and to areas that may be affected by the uranium and nuclear processing facilities in Canada outlined in the CNSC 2021 ROR it is our duty to protect our lands, waters and environment for future generations.

While we appreciate the 2021 ROR document having included land acknowledgements and Indigenous consultation and engagement as a standalone section for the first time, we are not encouraged by the CNSC’s commitment to Indigenous consultation in general.

As an ROR related example, on October 8, 2021 the Commission made a decision on the BWXT Medical license application where in your decision CNSC staff expressed their opinion, “that the duty to consult is not engaged by this decision because the proposed license, as it does not pose a change to the footprint of the existing Nordion nuclear substance processing facility or significantly change the operations of the existing facility, would not cause any adverse impacts to any established or potential Indigenous and/or treaty rights.”

This 10 year licensing decision is of deep concern to Kebaowek as we expect to be consulted regarding all operations inside and outside of the Nordion facility including the development of new nuclear technologies and the packaging and shipping of nuclear waste and the potential impacts of these new and existing operations on our current and future socio-cultural and environmental well-being.

It is further concerning that the 2021 ROR indicates that the CNSC performed no inspections at the BWXT Medical Facility as they were operating under Nordion's operating license from January 1, 2021 to October 31, 2021.

KFN understand's the existence of uranium and nuclear substance processing facilities in and around Algonquin Anishinaabeg land and waterways can have adverse impacts on our unceded land and inherent rights of the Algonquin Anishinaabeg peoples in perpetuity. Given the long-lived nature of the uranium and nuclear substances used and created by these facilities' operation and their legacy wastes we are totally opposed to increasing industry self-regulation on or near our ancestral land and waterways.

Moving forward we insist that ethical frameworks for consultation and oversight of nuclear waste management for nuclear facilities on our lands be worked out in a nation-to-nation fashion. This request must be construed in a manner consistent with the Canadian Constitutional obligations to consult our First Nation community and evolving provisions of the United Nations Declaration on the Rights of Indigenous Peoples Canada Act 2021. Therefore, the Ministry of National Resources Canada (NRCA) shall also consider our contribution to nuclear operations and waste management oversight under the UNDA 2021 as statutory circumstances are developing.

Kebaowek remains committed to develop a mutually agreeable consultation process with regard to CNSC – led regulatory processes of interest to Kebaowek.

This submission provides a number of forward looking recommendations and conditions regarding the uranium and nuclear processing facilities operations affecting Algonquin Anishinaabeg lands and waters as outlined in 2021 ROR. We await our further discussion of these subjects and our recommendations in the upcoming December 2022 ROR Commission hearing.

Sincerely



Justin Roy
Councillor Kebaowek First Nation

cc: Chief Lance Haymond lhaymond@kebaowek.ca
Andrew Bisson andrew.bisson@canada.ca
Councillor Verna Polson vpolson@kebaowek.ca
Kerrie Blaise CELA kerrie@cela.ca

**Kebaowek First Nation Review
of the Regulatory Oversight Report (“ROR”) for Uranium and Nuclear
Substance Processing Facilities in Canada: 2021**

FINAL WRITTEN SUBMISSION

presented to
Canadian Nuclear Safety Commission

October 31, 2022

NOTE

This document is the final written submission of the Algonquin Nation of Kebaowek submitted by the Chief and Council on October 31 , 2022.

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INTRODUCTION

The following submission is presented on behalf of Kebaowek First Nation (KFN) to the Canadian Nuclear Safety Commission (CNSC) provided for under the *Nuclear Safety and Control Act (NSCA 1997)*. We will refer to this CNSC staff uranium and nuclear substance processing report as ROR.

KFN is one of ten distinct First Nations that make up the Algonquin Nation. Nine are located in Quebec and one, in Ontario. KFN's traditional territory lies on either side of the Ottawa River Basin and 1,000 members live, work and exercise Aboriginal rights, including Aboriginal title, in both Ontario and Quebec. KFN's reserve is located in Quebec on Lake Kipawa, 15 km from the interprovincial border. KFN, like many Aboriginal peoples in Canada, is a trans-border community.

Mobility on our lands and waterways has always been central to our culture and our relations. The following KFN ROR comments on uranium and nuclear substance processing facilities on our lands and waterways arises from our growing concern that Canadian nuclear facilities and operational activities continue to introduce nuclear waste into the environment and decrease the capacity of our future generations to benefit from the environment. Environmental sustainability is central Ona'ken'age'win our system of customary law and governance.

Today it appears Canadian governments accept any new nuclear technologies along with a willingness to invest as a demonstration of need.¹ For its part, the proponent will consider existing and projected demand and supply and use that value to ascertain project/operation profitability. However over many centuries our Algonquin Communities can attest that such market-driven decision-making may not always lead to satisfactory results in terms of the resulting human and ecological harm and implications.

The probability of accidents and malfunctions should not be hidden by assumptions or optimistic expectations of the proponent and governments. Nor should there be a lack of facility inspections and increase in industry self-regulation. KFN is highly concerned with the extent to which biological diversity and ecological functions may be affected. KFN is also concerned with how climate change events increasingly interfere with the predictability of facility operations and safety as outlined in the 2021 ROR. We also understand from the 2022 AECL/CNL Annual General meeting that there is a worldwide question of uranium and nuclear material resources supply to meet the needs of present and future facility operations.

¹ <https://www.reuters.com/business/energy/canada-backs-nuclear-power-project-with-c970-mln-financing-2022-10-25/> See also:

https://www.iisd.org/system/files/publications/mmsd_sevenquestions.pdf

The above concerns lead to questions of the equitable distribution of benefits and costs in the near-term (i.e. life of project) for our Algonquin Nation as well as the inter-generational equity in the distribution of costs and benefits in the long-term.

Kebaowek First Nation supports the “Precautionary Principle” and insists CNSC to adopt a cautionary approach, or to err on the side of caution, especially where there is a large degree of uncertainty or high risk.² Related, KFN seeks the CNSC review of the Medicine and Nuclear Power document produced by Dr. Gordon Edwards of the Canadian Coalition for Nuclear responsibility September 2022. Available at: http://www.ccnr.org/med_facts_flyer.pdf

Kebaowek has some fundamental questions addressing uranium and nuclear substance needs assessment as part of both licensing and regulatory oversight reports for the uranium and nuclear substance processing facilities before the commission, including:

(1) How, in practice, should a needs assessment on new technologies and operations that improves on the current regulatory oversight approach be undertaken? (2) Whose needs should drive the assessment? and (3) Who should be the judge?

In addition, Kebaowek would like to discuss the following areas of specific concern within the Regulatory Oversight Report (“ROR”) for Uranium and Nuclear Substance Processing Facilities in Canada: 2021 CNSC at December 2022 hearing:

1. INDIGENOUS CONSULTATION

Regardless of the specific nuclear project or ROR under review, the government of Canada has a constitutional obligation to consult Kebaowek and all First Nations within the Algonquin Nation. Section 8(2) of the *Nuclear Safety and Control Act (NSCA 1997)* recognizes that the CNSC acts as an agent of the Crown. Therefore, it is the CNSC acting as the Crown that must meet obligations to consult and is entrusted with the responsibility of fulfilling the Honour of the Crown.

While we appreciate the ROR document includes land acknowledgements and Indigenous consultation and engagement as a stand alone section for the first time, we are not encouraged by a recent CNSC decision related to BWXT medical’s licence request and the fulfillment of deep and meaningful Indigenous Consultation.

On October 08, 2021 the Commission made a decision on the BWXT Medical licence application where in your decision CNSC staff expressed their opinion, “that the duty to consult is not engaged by this decision because the proposed license, as it does not pose a change to the

² See: Framework for the Application of Precaution in Science- based Decision Making About Risk (Government of Canada, 2003) <https://publications.gc.ca/collections/Collection/CP22-70-2003E.pdf>

footprint of the existing Nordion nuclear substance processing facility or significantly change the operations of the existing facility, would not cause any adverse impacts to any established or potential Indigenous and/or treaty rights.”

This 10 year licencing decision is of deep concern to KFN as we expect to be further consulted regarding all operations inside and outside the Nordion facility including the development of new nuclear technologies and the packaging and shipping of nuclear waste and the potential impacts of these operations on our current and future socio-cultural and environmental well-being. The CNSC carte blanche opinion statement that “the duty to consult is not engaged by this decision” actively discouraged any further meaningful engagement between BWXT and KFN that is necessary in building positive relationships, advancing community trust and environmental reconciliation with First Nations. “The Supreme Court of Canada has said that deep consultation will typically include the following elements:

- Meaningful and accessible information about the project: *Information about a project should come in a form that is useful and digestible to the Indigenous community affected. For instance, where community members speak their Indigenous language, translation of the project materials into that language may be required.*
- Formal participation in the decision making process: *This will usually include the opportunity to submit evidence and make submissions about the impacts of the project.*
- Funding to enable the participation of the Indigenous community in the decision-making process: *Without adequate funding, it can be difficult for a community to participate meaningfully in the decision-making process.*
- Written reasons to show how Aboriginal concerns were considered and the impact they had on the decision. *This should include a specific assessment of the impact of the project on the asserted right, not just a consideration of the environmental impacts of a project generally.*

See, generally, *Hamlet of Clyde River v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 47-52.

This is not a rigid checklist, however. A reviewing court will look at each case on its facts to determine whether the standard of “deep consultation” is met. The overarching requirement is to engage in a meaningful process of consultation that attempts to substantially address Indigenous concerns about the project. Simply providing a forum for an Indigenous community to air their concerns, or to exchange information about the project is not deep consultation. Nor is it acceptable if consultation begins from the premise that no accommodation can be made to address Indigenous concerns (*Haida Nation*, paras 42, 44; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 55). In other words, reasonable accommodations to address Indigenous concerns should be made as part of the consultation process.

Where can deep consultation happen?

The Crown can rely on a tribunal or other decision-making body, like the CNSC, to fulfill the duty to consult, even in cases where deep consultation is required. However, this will only be appropriate where the statute that creates that tribunal gives it the powers it needs to provide meaningful consultation and accommodation to Indigenous communities. This has to include 1) the procedural powers to give Indigenous communities a meaningful voice in the decision-making process; and 2) the remedial powers to order appropriate accommodations of Indigenous concerns (*Hamlet of Clyde River*, at paras 30-34).³

KFN seeks clarification on CNSC's approach to meaningful consultation and the BWXT licensing and operations decision.

In addition, in carrying out the 2021 Regulatory Oversight Review, we are unclear how the Commission is to recognize the objectives of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), specifically how the CNSC shall reflect the principles of the Declaration in its recommendations, especially with respect to the manner in which the license review can be used to address potential impacts to potential or established Aboriginal and treaty rights.

UNDRIP is an international human rights instrument negotiated over twenty years which recognizes "[minimum standards for the survival, dignity and well-being of Indigenous Peoples](#)".

These standards are based on obligations under customary international law and international treaties to which Canada is a party. UNDRIP enjoys a strong consensus at the international level as well as great respect and commitment among Indigenous Peoples in Canada, whose [involvement was instrumental in its drafting and adoption](#).

The [Truth and Reconciliation Commission of Canada](#), the [National Inquiry into Missing and Murdered Indigenous Women and Girls](#), and the [Viens Commission](#) have recognized the importance of UNDRIP and recommended its implementation.

[British Columbia](#) and [Canada](#) have followed this recommendation. In June 2021, Canada introduced the United Nations Declaration on the Rights of Indigenous Peoples Act.

In practice, UNDRIP would promote, amongst other things, transitions toward sustainable development. The concept of free, prior, and informed consent (FPIC) promoted by the UNDRIP in advance of project development is of paramount importance to KFN and other First Nation communities across Canada.

The UN Declaration includes a number of articles, towards recognizing the need for a dominant state to respect and promote the rights of its Aboriginal peoples as affirmed in treaties and agreements, including how Aboriginals participate in decision-making processes that affect their traditional lands and livelihoods (UNDRIP, 2007).

³ <https://www.oktlaw.com/consultation-at-the-high-end-of-the-spectrum-a-primer/>

For example, article 18 provides as follows:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedure, as well as to maintain and develop their own indigenous decision-making institutions.

Security of First Nations' lands must be ensured through in-depth consultation and direct participation. Indeed, it is a principle of article, per Article 29.2 of the United Nations Declaration on the Rights of Indigenous Peoples that 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."

Moreover, article 32 (2) of the UN Declaration states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources.

We invite the CNSC to reconsider the articles of UNDRIP, in your effort to build constructive relationships and engagement between the commission industry and Indigenous Peoples.

UNDRIP sets out the duty to consult with Indigenous communities to obtain their free, prior and informed consent (**FPIC**) to projects that impact their rights. The content of the consultations is tailored to the circumstances and leads to varying outcomes, such as a mutual determination that a project is not feasible.

Many industrial sectors support UNDRIP and the principle of FPIC, and are not afraid of a "veto":

- The [International Council on Mining and Metals](#) whose members include Rio Tinto Alcan, GoldCorp, and the [Mining Association of Canada of which Agnico-Eagle](#) is member;
- The [new Canadian FSC standard](#) and its [FPIC guidance](#), under which companies like Cascades, White Birch's mills and most Resolute Forest Products' facilities have been certified;
- The [Equator Principles](#), adopted by [Canadian banks](#) and [Export Development Canada](#).

The [United Nations Global Compact](#), the [World Bank](#) and the [International Finance Corporation](#) have standards that recognize the relevance of FPIC. Many international investors monitor corporate performance in this regard.

We also recommend to the Commission to strengthen Indigenous consultation components of your regulatory documents as per Canada's International commitments related to the Convention on Biological Diversity (CBD) in recognizing the benefits of incorporating Indigenous knowledge for natural resource management and conservation.

KFN does not endorse, accept, or acknowledge any claims to any Aboriginal or Treaty Rights made by the Algonquins of Ontario ('AOO'). KFN does not recognize the AOO as an entity entitled to consultation or accommodation. To this end, CNSC and other federal authorities evaluating licensing projects pursuant to *Canadian Constitution* should restrict participation of the Algonquins of Ontario ('AOO') also known more appropriately as an ALGONQUIN OPPORTUNITY (NO.2) CORPORATION.

2. NUCLEAR WASTE TRANSFER TO CNL

KFN understands from the ROR that in 2021, "Cameco carried out Vision in Motion (VIM) work that included:

Preparation and transfer of stored wastes to the CNSC licensed Canadian Nuclear Laboratories (CNL) [Port Hope Project Long Term Waste Management Facility](#) (LTWMF). Packaged waste to the LTWMF was suspended temporarily in 2021 until a new waste cell was made available." (SECTION 2.3 P.8)

KFN requests regulatory oversight including CNSC should set out in writing how waste transfer to CNL was considered and complied with Indigenous consultation and UNDRIP, specifically Article 29.2. Kebaowek submits the CNSC is proceeding with its licensing for licensees to proceed contrary to obligations with regards to our rights under UNDRIP, including Articles, 1, 7, 29 and 32.

KFN requests documentation on waste transfers from all nuclear facilities to CNL Chalk River ON as this is located on KFN, WLFN and TFN Statement of Asserted Rights and Title Territory, Kebaowek asks the CNSC to provide the following information:

- Facility of Origin
- Substance name
- Units/weight/volume
- Method of disposal and location
- Percentage change in quantity from previous years

3. INSPECTION AND REPORTABLE EVENTS

We understand from the ROR there were no inspections conducted by CNSC staff at Nordion in 2021. (SECTION 3.2 p.13). KFN also takes note of the extensive list of Section 7.1 reportable

events from the different ROR facilities and would like to raise our specific questions and concerns regarding these events at the December 2022 hearing.

As stated in the BWXT licensing hearing KFN values collaborative processes that are clear, transparent and predictable, and where information is shared in a timely and accessible manner. This requires nuclear substance processing facilities to have an ongoing duty to consult with KFN and disclose notices, changes to the licence, or the submission of revised licensing documents and activities to CNSC.

KFN acknowledges from BWXT medical's website that on June 27, 2021 BWXT executed a commercial agreement with Bayer AG (Bayer) to supply high purity Actinium 225(Ac-255). KFN requests more information on Ac-255 is it produced at the Nordion site?
<https://www.bwxt.com/bwxt-medical/news>

KFN requested BWXT should enter into a formal licensing process agreement to be negotiated with Kebaowek First Nation. However, statements and the recommendation by CNSC Staff to grant the BWXT licence failed to consider KFN's consultation concerns with significant operational changes at the site regarding the production of molybdenum-99 (Mo-99), that BWXT Medical is a first-time licensee, and the success of Nordion and BWXT Medical partnership remains to be seen. It is for these reasons, each detailed below, that Kebaowek strongly opposes a ten-year licence:

1. A significant change is proposed at the site which would allow BWXT Medical to produce producing molybdenum-99 (Mo-99) using neutron activation of natural molybdenum-98 targets in a reactor.
2. BWXT Medical is a first-time licensee before the CNSC and does not have performance or compliance record which can be used as precedent in this instance. In making a licensing decision pursuant to section 24(4) of the *Nuclear Safety and Control Act*, the CNSC must be satisfied that the licensee is qualified to make adequate protection for the protection of the environment and human health. The past performance of this facility cannot be used to demonstrate that a licensee is qualified to undertake the proposed licenced activity.
3. Nordion and BWXT Medical will share the oversight and compliance of a number of Safety and Control Areas. For reasons of different staff, leadership, company direction and internal management, the success of these shared responsibilities cannot be assumed. Further, no CNSC inspections were carried out in 2021. Our understanding is these inspections include:
 - *Staffing and operations*

- *Safety and fire protection*
- *Fire protection*
- *Radiation protection*
- *Environmental Monitoring*

KFN requests clarification on the regulatory oversight of BWXT Medical at the Nordion site as there is not sufficient information before the Commission to demonstrate the licensee is qualified to undertake the proposed activities, including the production of Mo-99 and any other new nuclear substances.

A repeated issue Kebaowek faces in reviewing project proposals, is the inadequate information which is provided and often, differential levels of information wherein one party has greater access than the other. In this instance, there is a clearly inequitable levels of access to licensing documents inhibiting our review of procedures and activities which have direct bearing on the lands and waters of our traditional territory. KFN is essentially required to operated in a poorly resourced informational vacuum.

Kebaowek sought copies of all documents referenced in CNSC Staff CMD for the BWXT license. However, references 5, 9, 13, 17, 18, 19 and 40 were all deemed internal and not provided. They are:

5. BWXT Medical, CPM-6-06, Nordion Environmental, Health and Safety Policy, 2018.
9. BWXT Medical, SE-EHS-009, EHS Regulatory Reporting and Notifications, 2018.
13. BWXT Medical, IS/SR 1070 Z000, Final Safety Analysis Report for the Nuclear Medicine Production Facility, 2018.
17. BWXT Medical, SE-ENV-015, Nordion Environmental Protection Program, 2018.
18. BWXT Medical, SE-ENV-001, Environmental Management System Manual, 2018.
19. BWXT Medical, SE-RP-008, Radiation Protection Manual, 2020.
40. BWXT Medical, SE-LIC-020, Public Information and Disclosure Program and Indigenous Engagement for BWXT ITG, 2020.

KFN also requests to the CNSC the following license specific changes be made and new conditions added:

1. Kebaowek values collaborative processes that are clear, transparent and predictable, and where information is shared in a timely and accessible manner. This requires BWXT Medical to have an ongoing duty to disclose notices, changes to the licence, or the submission of revised licensing documents to CNSC. As Constitutional rights holders on

Unceded Algonquin lands Kebaowek can not be restricted from “BWXT business proprietary information”. Kebaowek should be promptly communicated with and all documents made fully available in English.

Kebaowek has actively engaged on a range of significant infrastructure and energy projects and at a minimum, a company’s environmental plan and Indigenous engagement protocol are documents which are public for the very reason they are necessary in building positive relationships, advancing community trust and economic reconciliation with First Nations.

4. RADIOACTIVE & NON-RADIOACTIVE WASTES

It is KFN’s understanding the production of Mo-99 by aqueous chemical processing of irradiated HEU or LEU targets produces the following four waste streams:

- Uranium solids (alkaline target dissolution only). These solids, which contain LEU or HEU, are placed into long-term storage for reuse or disposal.
- Processing off-gases, primarily the noble gases xenon (Xe-131m, Xe-133, Xe-133m, and Xe-135) and krypton (Kr-85). These gases are stored for several months to allow time for radioactive decay. Following storage, the gases are vented to the atmosphere.
- Process liquids from target dissolution. These liquids contain fission products and neutron activation products produced during target irradiation. These wastes are typically solidified and packaged for disposal.
- Other solid wastes produced during target processing: for example, radioactively contaminated processing equipment. These wastes are also packaged for disposal.⁴

Each Mo-99 supplier has a different approach for managing these wastes, depending on the regulations and storage/disposal facilities available in host countries. Production of Mo-99 by aqueous processing of LEU targets will produce these same types of waste streams, but some waste volumes will be larger. Current global Mo-99 suppliers are developing additional capacity to manage these wastes as part of their conversion efforts.

BWXT Medical’s licensing submission to the CNSC references that ‘waste chemicals will be picked up by a licensed waste disposal company for treatment and disposal,’⁵ and non-hazardous waste will be sent to landfill,⁶ while radioactive wastes will be collected and transported to a licenced radioactive waste management facility.⁷

⁴ National Academies of Sciences, Engineering, and Medicine. *Molybdenum-99 for medical imaging*. National Academies Press, 2016.

⁵ BWXT CMD, p 48

⁶ *Ibid*

⁷ BWXT CMD, p 39

For KFN this was an incomplete picture of the movement of BWXT Medical's waste (radioactive and non-radioactive) offsite. While Kebaowek is generally able to view offsite transfers and accompanying emissions for non-radioactive transfers on the National Pollutant Release Inventory for other companies and facilities in Algonquin territory,⁸ an equivalent is not available for radioactive materials.

As mentioned earlier in order to document these transfers, Kebaowek asks the CNSC require the following information so we can understand the current regulatory sufficiency of waste management on our territory. Further, Kebaowek requested this information from BWXT Medical in advance of the licensing hearing and it was not disclosed:

- Substance name
- Units/weight/volume
- Method of disposal and location
- Percentage change in quantity from previous years

The CNSC is obliged to, pursuant to international law conventions Canada has ratified, including international law norms and principles pertaining to human and Indigenous rights that it ensure a licensing procedure that meets these international norms. We note that Canada is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 29.2 of UNDRIP specifically addresses the issue of waste we raise before the CNSC, as it requires 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."

In this instance, consent has not been sought and nor has the information been provided such that we can make an *informed* decision on the new and existing waste streams accompanying the Nordion/BWXT Medical facility. Thus, the licensing proceeding is non-compliant with international law conventions, principles and norms.

5. COMMUNITY KNOWLEDGE

Community knowledge is also a necessary regulatory oversight component that is not integrated into the ROR report.

TEK is based on holistic and integrated understandings of ecosystems as

⁸ See the NPRI's site profile for Nordion, online: https://pollution-waste.canada.ca/national-release-inventory/archives/index.cfm?do=substance_details&lang=En&opt_npri_id=0000002247&opt_cas_number=NA%20-%2008&opt_report_year=2017

complex interdependencies. It is sensitive to imbalances in local environments, and is used to monitor indicators of ecosystem health. Again, this deeply rooted orientation to the environment is compatible with changes in specific uses of the land, so long as the changes do not significantly threaten sustainability and renewability. KFN raises concerns that CNSC regulatory oversight is not in concert with these traditional understandings as well as with contemporary environmental science.

6. CONSULTATION RESOURCES

If KFN and other Algonquin Anishinaabeg First Nations are going to establish a legitimate consultation and review processes over its territory that engages the Algonquin as assessors of projects, not simply passive participants, there needs to be an adequate transfer to resources from both the regulator and the proponent.

Participant funding needs to be increased to allow meaningful Aboriginal participation in CNSC licensing reviews.

KFN requires sufficient financial resources to build capacity to undertake nuclear project reviews properly. KFN requires increased funding as KFN takes on increased responsibility.

CONCLUSION

Moving forward KFN insists that ethical frameworks for consultation and nuclear waste management for nuclear facilities on our lands be worked out in a nation-to-nation fashion. This request must be construed in a manner consistent with Canadian Constitutional obligations to consult our First Nation community and evolving provisions of the United Nations Declaration on the Rights of Indigenous Peoples Canada Act 2021. Therefore, the Ministry of National Resources Canada (NRCAN) shall also consult First Nation communities separately if the circumstances so warrant.

KFN remains committed to develop a mutually agreeable consultation process with regard to CNSC –led regulatory processes of interest to KFN. KFN remains committed to consultation framework agreements with uranium and nuclear substance process facilities on Unceded KFN rights and title lands.

This submission provides a number of forward looking recommendations and conditions regarding the uranium and nuclear processing facilities operations affecting Algonquin Anishinaabeg lands and waters as outlined in 2021 ROR. We await our further discussion of these subjects and our recommendations in the upcoming December 2022 ROR Commission hearing.



Canadian Nuclear
Safety Commission

Commission canadienne
de sûreté nucléaire

CMD 23-M35.3

Date: 2023-10-30

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Edocs pdf : 7158522

Oral presentation

Exposé oral

**Written submission from the
Kebaowek First Nation**

**Mémoire de la
Première Nation de Kebaowek**

**Regulatory Oversight Report for
Uranium and Nuclear Substance
Processing Facilities in Canada: 2022**

**Rapport de surveillance réglementaire
des installations de traitement de
l'uranium et des substances nucléaires
au Canada : 2022**

Commission Meeting

Réunion de la Commission

December 13-14, 2023

13-14 décembre 2023

**Kebaowek First Nation Review
of the Regulatory Oversight Report (“ROR”) for
Uranium and Nuclear Substance Processing Facilities in Canada: 2022**

WRITTEN SUBMISSION

presented to
Canadian Nuclear Safety Commission

October 30, 2023

NOTE

This document is the final written submission of the Algonquin Nation of Kebaowek submitted by the Chief and Council on October 30, 2023.

1. INTRODUCTION

The following submission is presented by Kebaowek First Nation (KFN) to the Canadian Nuclear Safety Commission (CNSC) in response to CNSC Staff's Regulatory Oversight Report (ROR) for Uranium and Nuclear Substance Processing Facilities in Canada: 2022.¹

This submission provides a number of forward-looking recommendations and conditions regarding the uranium and nuclear processing facilities operations affecting Algonquin Anishinaabeg lands and waters as outlined in 2022 ROR. We await further discussion of these subjects and our recommendations in the upcoming December 2023 ROR Commission meeting.

A. Who We Are

Kebaowek First Nation ("KFN") is an Algonquin Anishinaabe First Nation with lands along the Kitchi Sibi (the Ottawa River watershed) on both sides of the Québec-Ontario boundary. Our reserve is located in Quebec on Lake Kipawa, 15 km from the interprovincial border. The Algonquin Nation is made up of eleven distinct communities recognized as Indian Act bands. Nine are based in Quebec and two are in Ontario. Since time immemorial, the Anishinaabe people have occupied a territory whose heartland is Kitchi Sibi. Our lands and waters are part of the Anishinaabe Aki, a vast territory surrounding the Great Lakes in North America. We were known as the Omamiwinniwig (travellers of the river).

For centuries we have relied on our lands and waterways for our ability to exercise our inherent rights under our own system of law and governance known to us as Ona'ken'age'win, and to fulfil our sacred obligations to these lands and waterways and the animals and rocks and resources in and on them. Our law enables and is based on our mobility on the landscape, the freedom to hunt, gather and control the sustainable use of our lands and waterways for future generations. The forest and waterways have provided the Algonquin Anishinaabeg our livelihood - food, energy and materials, landscapes, spiritual grounds, economic trade and peace of mind.

The Algonquin Nation has never ceded, nor abandoned its lands and waterways. Our rights and title have not been extinguished. Hence, we continue to exercise our rights as 'keepers of the waterways' while continuing to promote seven generations' worth of responsibilities regarding livelihood, security, sacred sites, cultural identity, territorial integrity and biodiversity protection. We advocate to advance the rights and recognition of Algonquin Anishinaabeg laws and ceremonial customs in relation to the Kitchi Sibi watershed, with a special focus on affirming Anishinaabeg women's role as water keepers. We have accumulated local, historic and current

¹ CMD 23-M35 – Submission from CNSC staff on the Regulatory Oversight Report for Uranium and Nuclear Substance Processing Facilities in Canada: 2022 [ROR]

traditional knowledge and values, customary laws and wisdom that relate to the sustainable care of the lands and waterways we occupy.

B. Focus of Our Submission

Mobility on our lands and waterways has always been central to our culture and our relations. The following KFN ROR comments on uranium and nuclear substance processing facilities on our lands and waterways arises from our growing concern that Canadian nuclear facilities and operational activities continue to introduce nuclear waste into the environment and decrease the capacity of our future generations to benefit from the environment. Environmental sustainability is central Ona'ken'age'win our system of customary law and governance.

We make these submissions recognizing Kebaowek First Nation was never consulted on the nuclear developments that impacts our lands and waters and that they continue to operate without our free and prior consent. We also recognize that the existence of nuclear activities on our lands not only brings routine releases of radionuclides into the environment, but the possibility of accidents and malfunctions. These the inequitable effects of nuclear activities that we will continue to bear in perpetuity, given the inherent danger and toxicity of nuclear materials.

We submit that these concerns remain unaddressed and neither the ROR nor actions by the Commission have grappled with the disproportionate impact we as Indigenous peoples bear because of nuclear developments.

2. COMMENTS ON THE ROR

A. Indigenous engagement characterized as 'meaningful'

KFN does not support CNSC Staff's characterization in the ROR that its engagement with Indigenous Nations was "meaningful." As the ROR reads: "In 2022, CNSC staff undertook ongoing and meaningful engagement activities with Indigenous nations."²

First, **KFN recommends** CNSC Staff ought not to rank their own performance on whether their consultation was meaningful, and instead rephrase such statements to read that 'efforts to engage meaningfully were undertaken' and then, an assessment of whether this was found to be effective and true, provided by the communities with whom consultation occurred.

Second, **KFN finds** the assessment by CNSC Staff that engagement was "meaningful" fails to recognize and grapple with the submissions Kebaowek First Nation made in last year's ROR

² ROR, p 3

where we highlighted a number of licensee specific matters where minimal procedural thresholds for consultation – such as have accessible information and ensuring our concerns were substantially addressed – had not been met.³

B. Failure to include *UN Declaration on the Rights of Indigenous Peoples*

KFN brings forward a comment made in last year's ROR, namely that the ROR fails to consider, assess and apply the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) to the licensed activities under review.

Section 8(2) of the *NSCA* recognizes that the CNSC acts as an agent of the Crown. Therefore, it is the CNSC acting as the Crown that must meet obligations to consult and is entrusted with the responsibility of fulfilling the Honour of the Crown. Implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴ strengthens our ability to participate in decisions which directly affect our rights and territory, and thus can aid in fulfilling the Crown's duty to consult and accommodate.

While the ROR recognizes that 'requests for CNSC to fully implement UNDRIP principles' were a theme from last year's ROR,⁵ beyond a commitment to 'make changes to the report based on recommendations and feedback from intervenors,'⁶ yet another year has passed when we fail to see the CNSC seriously consider the changes that are needed to nuclear regulation and oversight necessary to recognize and respect UNDRIP.

KFN recommends that the Commission review the sufficiency of the ROR in line with the principles UNDRIP and the more recently released provisions in the federal government's UN Declaration Act Action Plan (both of which are highly relevant to federal regulators and industry).

KFN also recommends that all forthcoming RORs include mandatory chapters on how licensee activity and CNSC oversight conform to the principles of UNDRIP, including whether:

- Participation with Indigenous peoples was enhanced during the timeframe being reviewed
- Local and Indigenous knowledge was considered and included in the review of licensed activities

³ Kebaowek First Nation Review of the Regulatory Oversight Report ("ROR") for Uranium and Nuclear Substance Processing Facilities in Canada: 2021, (31 October 2022) p 6 [**KFN ROR - Comments 2021**]

⁴ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <https://www.refworld.org/docid/471355a82.html>

⁵ ROR, p 121

⁶ ROR, p 1

- Measures to prevent and address impacts to Indigenous rights were addressed, responsive to community concerns
- Consultation was undertaken which could lead to the setting of measures enabling the exercise of regulatory authority by First Nations⁷

C. Mandatory Review of Climate Vulnerability

A number of comments are made throughout the ROR which speaks to the critical and urgent need for the CNSC to directly assess the vulnerability of nuclear operations and activities to climate change. For instance, in regards to the Port Hope Conversion Facility, the ROR states:

Cameco reported uranium sanitary sewer results from the combined facility discharge that were above the daily action level...Groundwater infiltration, exacerbated by heavy precipitation events was the primary contributing factor to these exceedances.⁸

KFN recommends considering whether climate change impacts a licensee's ability to protect human health and the environment, as required by section 24(4) of the *NSCA*, is directly relevant to the CNSC's oversight and ought to be reported in the ROR.

Catastrophic weather events are becoming more frequent and **KFN recommends** climate vulnerability of nuclear operations and facilities be mandatory chapters in all RORs, including review of frequency and scale of regional lightning strikes and related fire and blowdown events.

D. Disclosure of Information regarding Waste Transfer to CNL

In keeping with UNDRIP, including Articles, 1, 7, 29 and 32, **KFN seeks confirmation** and documentation of waste transfers from any of the uranium and nuclear substance facilities included in the ROR to CNL's Chalk River site.

We also ask the CNSC review and inform of us potential waste transfers, whether from operations or eventual decommissioning, that could result at Chalk River from the licensed uranium and nuclear substance processing facilities, as Chalk River is located on lands included within KFN's Statement of Asserted Rights and Title Territory.⁹

For each waste transfer, **Kebaowek asks** the CNSC to provide the following information:

- Facility of Origin

⁷ United Nations Declaration on the Rights of Indigenous Peoples Act [Action Plan](#), 30 and 34 [UNDA Action Plan]

⁸ ROR, p 26

⁹ Timiskaming, Wolf Lake and Eagle Village Members of the Algonquin Nation Statement of Assertion of Aboriginal Rights & Title, (11 Jan 2023), [online](#)

- Substance name
- Units/weight/volume
- Method of disposal and location
- Percentage change in quantity from previous years

E. BWXT Consultation Remains Lacking

Regardless of the specific nuclear project or ROR under review, the government of Canada has a constitutional obligation to consult Kebaowek and all First Nations within the Algonquin Nation. Section 8(2) of the *Nuclear Safety and Control Act (NSCA 1997)* recognizes that the CNSC acts as an agent of the Crown. Therefore, it is the CNSC acting as the Crown that must meet obligations to consult and is entrusted with the responsibility of fulfilling the Honour of the Crown.

On October 08, 2021 the Commission made a decision on the BWXT Medical licence application where in your decision CNSC staff expressed their opinion, “that the duty to consult is not engaged by this decision because the proposed license, as it does not pose a change to the footprint of the existing Nordion nuclear substance processing facility or significantly change the operations of the existing facility, would not cause any adverse impacts to any established or potential Indigenous and/or treaty rights.”

This 10 year licencing decision is of deep concern to KFN as we expect to be further consulted regarding all operations inside and outside the Nordion facility including the development of new nuclear technologies and the packaging and shipping of nuclear waste and the potential impacts of these operations on our current and future socio-cultural and environmental well-being. The CNSC carte blanche opinion statement that “the duty to consult is not engaged by this decision” actively discouraged any further meaningful engagement between BWXT and KFN that is necessary in building positive relationships, advancing community trust and environmental reconciliation with First Nations.

“The Supreme Court of Canada has said that deep consultation will typically include the following elements:

- Meaningful and accessible information about the project: *Information about a project should come in a form that is useful and digestible to the Indigenous community affected. For instance, where community members speak their Indigenous language, translation of the project materials into that language may be required.*
- Formal participation in the decision making process: *This will usually include the opportunity to submit evidence and make submissions about the impacts of the project.*

- Funding to enable the participation of the Indigenous community in the decision-making process: *Without adequate funding, it can be difficult for a community to participate meaningfully in the decision-making process.*
- Written reasons to show how Aboriginal concerns were considered and the impact they had on the decision. *This should include a specific assessment of the impact of the project on the asserted right, not just a consideration of the environmental impacts of a project generally.*

See, generally, *Hamlet of Clyde River v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 47-52.

This is not a rigid checklist, however. A reviewing court will look at each case on its facts to determine whether the standard of “deep consultation” is met. The overarching requirement is to engage in a meaningful process of consultation that attempts to substantially address Indigenous concerns about the project. Simply providing a forum for an Indigenous community to air their concerns, or to exchange information about the project is not deep consultation. Nor is it acceptable if consultation begins from the premise that no accommodation can be made to address Indigenous concerns (*Haida Nation*, paras 42, 44; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 55). In other words, reasonable accommodations to address Indigenous concerns should be made as part of the consultation process.

F. Other Comments

KFN also makes the following specific requests to the Commission, including clarifications for CNSC Staff:

- Table 4-1 sets out the number of IAEA-led safeguard inspections and CNSC-led safeguard inspections and the facilities.¹⁰ **KFN requests** the procedure or policy guiding each inspection to be cited in the ROR and a copy provided for our review.

For BWXT Medical, Best Theratronics and Nordion, we **request** the after-inspection reports from the IAEA and a **clarification** from the CNSC as to how any follow up actions are being tracked and overseen.

- The ROR states Best Theratronics had 3 NNCs related to “frivolous posting of radioactive symbols.”¹¹ We ask CNSC Staff further describe this occurrence and what follow up actions were taken. We also ask that NNC be spelled out in full.

¹⁰ ROR, p 16

¹¹ ROR, p 21

- KFN has reviewed the release of radionuclide data provided on the Open Government Portal.¹² The data is neither accessible nor presented in a way that can be easily compared to data provided on the National Pollutant Release Inventory (NPRI).¹³ We **request** licensees report radionuclide data via the NPRI for ease of use, review, accessibility and comparison.

¹² ROR, p 64

¹³ National Pollutant Release Inventory, <https://www.canada.ca/en/services/environment/pollution-waste-management/national-pollutant-release-inventory.html>



Canadian Nuclear
Safety Commission

Commission canadienne
de sûreté nucléaire

CMD 25-M10.3

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**Written submission from the
Kebaowek First Nation**

**Mémoire de la Première
Nation Kebaowek**

**Regulatory Oversight Report
for Uranium and Nuclear
Substance Processing
Facilities, Research Reactors,
and Class 1B Accelerators in
Canada: 2023**

**Rapport de surveillance
réglementaire des installations
de traitement de l'uranium et
des substances nucléaires, les
accélérateurs de particules de
catégorie IB au Canada: 2023**

Commission Meeting

Réunion de la Commission

February 26, 2025

Le 26 février 2025

Canadian Nuclear Safety Commission
 280 Slater St.
 Ottawa, ON K1P 5S9

January 11, 2025

Sent via email to: interventions@cnsccsn.gc.ca

Re: Comments from Kebaowek First Nation on the Regulatory Oversight Report (“ROR”) for Uranium and Nuclear Substance Processing Facilities, Research Reactors and Class IB Accelerators in Canada: 2023

Kebaowek First Nation (KFN) welcomes the opportunity to provide its views and recommendations to the to the Canadian Nuclear Safety Commission (CNSC) in response to CNSC Staff’s “Regulatory Oversight Report for Uranium and Nuclear Substance Processing Facilities, Research Reactors and Class IB Accelerators in Canada: 2023.”¹ In providing these written comments, we also request the opportunity to address the Commission at the upcoming ROR meeting scheduled for February 26, 2025.

Kebaowek First Nation is an Algonquin Anishinabeg First Nation and one of the eleven communities that constitute the broader Algonquin Nation. For centuries, the Algonquin Nation occupied the length of the Kichi Sibì (Ottawa River) watershed, from its headwaters in north central Québec, all the way to its outlet in Montreal. Algonquin peoples have long exercised our customary laws and governance, known as Ona’ken’age’win, on our traditional territory. This law is based on Algonquin peoples’ mobility on the territory, to hunt, gather, and control the use of the lands and waterways for future generations. The Algonquin Nation has never ceded its traditional territory, and its rights and title have not been extinguished. As Algonquin peoples we regard ourselves as keepers of the land, with seven generations worth of responsibilities for livelihood security, cultural identity, territoriality, and biodiversity.

Our comments are based on our extensive experience with federal regulators and agencies, and involvement in regulatory matters including impact assessments, licensing hearings, project reviews and law reform initiatives. This submission is focused on ensuring that oversight, decision-making and regulatory processes are aligned with our ability to participate in decisions that impact our rights.

1. Improving Transparency and Accessibility of Information

KFN actively participates in federal law reform processes and has contributed written and oral submissions to the Impact Assessment Agency of Canada and the former Canadian Environmental Assessment Agency, the Canada Energy Regulator and former National Energy Board, and standing committees. It is on this

¹ CMD 25-M10 – Canadian Nuclear Safety Commission, “Regulatory Oversight Report for Uranium and Nuclear Substance Processing Facilities, Research Reactors and Class IB Accelerators in Canada: 2023” [ROR]

basis that we make the following recommendations to improve the general accessibility and transparency of information included in the ROR. Taking up the following recommendations would also further the purpose of the CNSC which per section 9 of the *Nuclear Safety and Control Act* (NSCA) is to:

[D]isseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons.

Kebaowek recommends:

- **For each licensee and facility included in the ROR, new information be added noting the licence type, licence start and end dates, date of the most recent Environmental Risk Assessment and any ongoing/related assessment processes (i.e environmental or impact assessments). We also request links to the licence and Licence Condition Handbook to be included directly within the text of the ROR.**
- **New information be added to the ROR setting out the frequency of reporting going forward. For instance, when is the next reporting period for the ROR on uranium and nuclear substance processing facilities, Class 1B accelerators and research reactors, respectively? Currently, the ROR is backward looking and makes no commitment as to reporting periods and frequency going forward.**
- **Inspection reports be disclosed and hyperlinked as part of ‘Appendix B – CNSC Inspections.’ It would also be more helpful if the chart in Appendix B provided a summary of the nature of the inspection, findings and status of follow-up measures required of the licensee.**

2. Reconciliation and Implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*

On June 23, 2021, Canada’s *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA), entered into force. This federal statute is a form of implementing legislation for the United Nations Declaration on the Rights of Indigenous People (UN Declaration).

The preamble of the UNDA states (emphasis added):

...[T]he *rights and principles affirmed in the Declaration* constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world, and *must be implemented in Canada*.

...[T]he Declaration is *affirmed as a source for the interpretation of Canadian law* ...

UNDA’s purposes are to “affirm the Declaration as a universal international human rights instrument *with application in Canadian law*” and to “provide a framework for the Government of Canada’s implementation of the Declaration”. The Government of Canada is now legally required under section 5 of the UNDA to “take all measures necessary to ensure that the laws of Canada are consistent with the

Declaration.” There are two other prescribed legal requirements at sections 6 and 7 in respect of developing and implementing an Action Plan and reporting on the legal requirements to implement UNDRIP in Canada.

Section 2 of the UNDA prescribes that “[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law.” In other words, pursuant to UNDA, as of June 2021, the UNDA applies in Canadian law.

UNDA also requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to take all measures necessary to ensure that federal laws are consistent with the UN Declaration. In order to uphold the UN Declaration and UNDA, new laws and regulations, or updates to existing laws and regulations, that impact the rights of First Nations need to be consistent with the UN Declaration.

The Declaration contains 46 articles. The articles are intended to have governments respect a number of significant principles including that Indigenous groups have rights to self-determination, which is broader than self-government, and rights to redress, which is broader than simply compensation.

In order to meet the standard set in the UN Declaration and UNDA, the ROR and the legislation and policies underlying the *NSCA*, should be reassessed to confirm consistency with the UN Declaration. There should be no limitations within the ROR or CNSC legislation. We suggest the following ROR preamble:

The Government of Canada has committed to achieving reconciliation with Indigenous peoples through a renewed nation-to-nation, government to government relationship between Canada and Indigenous peoples based on recognition of rights, respect, co-operation and partnership as the foundation for transformative change.

The UN Declaration includes provisions relating to the free, prior and informed consent of Indigenous peoples, serves as a foundation for the Government of Canada’s commitment to achieve reconciliation in Canada as set out in the *United Nations Declaration on the Rights of Indigenous Peoples Act*. One of the Government of Canada’s principles for its relationship with Indigenous peoples is to recognize that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources. This is current law and is not subject to forward regulatory UNDA direction by Parliament. The Supreme Court of Canada has ruled that the UN Declaration is binding, positive domestic law in Canada.

The UN Declaration sets the minimum international standards on the individual and collective rights of Indigenous peoples; it prescribes free, prior and informed consent. The relevant articles to this ROR and jurisdiction of the CNSC provide:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 25

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” Article 29 goes further to highlight the rights of Indigenous peoples to the “conservation and protection of the environment.”

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Articles 29.1 and 29.2

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.

States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. 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.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Any negotiation and content of CNSC licences must be informed by and be consistent with the above articles and the following acknowledgement:

Recognition of Algonquin Anishinabeg First Nations' relationship to their territory

In keeping with the UN Declaration's acknowledgement of the nationhood and self-determination of Indigenous peoples, the Parties will conduct their engagement based on a shared recognition that:

- a. Algonquin peoples are keepers of the land with cultural and territorial stewardship obligations to the next seven generations.
- b. The First Nations assert that the Algonquin Anishinabeg Nation holds Aboriginal title and rights over their territory that straddles the Kichi Sibi (Ottawa River) basin on both sides of the Quebec-Ontario boundary and they enjoy the benefits of those asserted rights and title.
- c. The Kichi Sibi is of immense spiritual and cultural significance for the Algonquin Anishinabeg Nation and flows within the First Nations' territory.

The ROR provided the CNSC with an opportunity to be responsive to the realities and challenges of First Nation communities, including Kebaowek, with respect to participating in decision-making when activities are occurring in our lands or precedents being set (for instance, licensing decisions) which impact our self-determination and the health of our lands and water.

We were dismayed by the lack of mention of the UN Declaration and UNDA in the ROR and any commitment to ensure that oversight of nuclear substance processing facilities was done in alignment with the UN Declaration. This not only falls short of the obligation on the CNSC to implement the UN Declaration but also the CNSC's role as the Crown, in keeping with section 8(2) of the *NSCA*.

On countless occasions, KFN has asked the CNSC to review and assess how the UN Declaration has been upheld and to demonstrate how its principles are reflected in CNSC procedures, including the ROR. We continue to see this recommendation ignored. As a way forward, we suggest the ROR process be amended to engage "ethical space," that is, the space that is created when two societies with disparate worldviews engage with one another. We must recalibrate our ethical relations with each other, from an Indigenous earth jurisprudence point of view. Earth jurisprudence is a way of knowing the world is "sacred" that calls us all to the challenge of rethinking colonial government systems and laws to make something better, to do the long haul work.

While the ROR contains a chapter on Indigenous consultation and engagement, the list of 'engagement practices' does not empower a nation-to-nation approach,² that would enable KFN to mutually define outcomes and purposes of the ROR, such as the type and frequency of information shared and reported on, and weigh in on issues of general applicability across licenses (see section 5 below, for instance, where we discuss the ongoing need for cumulative effects and climate considerations within the ROR).

Kebaowek recommends:

- **The Commission develop a Reconciliation Framework to guide the CNSC's efforts to align its work with the objectives and spirit of the UN Declaration, which includes a commitment to maximize Indigenous leadership in impact assessments and to go beyond the Duty to Consult in impact assessment processes.**
- **To support the incorporation of the UN Declaration, the Commission share views and ideas relating to Canada's implementation of the UN Declaration with all licensees covered in this ROR.**
- **The Commission direct CNSC Staff to proactively work with Kebaowek on a framework for implementing free, prior, and informed consent decision making in relation to nuclear substance facilities and regularly share and seek feedback on its understanding of the First Nations' views of how potential recommendations and decisions relating to the nuclear facilities would align with the implementation of the objective and spirit of the UN Declaration.**
- **The Commission direct CNSC Staff to commit to implementing UNDIP and UNDA as binding, positive domestic law in Canada serving key Indigenous FPIC purposes within the ROR.**
- **The Commission direct CNSC Staff to amend the ROR procedure so that it actions our involvement and oversight. A new ROR process ought to be developed in consultation with KFN that creates space for FPIC and Indigenous-led regulatory reviews.**

² ROR, p 44

- **The Commission recognize the UN Declaration pushes participation and engagement opportunities beyond old approaches rooted in “public participation” or the narrow application of the Duty to Consult.**
- **The Commission be intentional about the UN Declaration and its implementation.**

3. The Duty to Consult and Accommodate

As noted above, Section 8(2) of the *NSCA* recognizes that the CNSC acts as an agent of the Crown. Therefore, it is the CNSC acting as the Crown that is entrusted with the responsibility of fulfilling the Honour of the Crown and obligated to consult.

We remain concerned, however, that the CNSC has unilaterally determined ‘the duty to consult is not engaged’ and thus, attempted to remove the onus on both itself, acting as the Crown, and licensees to meaningfully engage. For example, in the most recent BWXT medial licencing decision made October 8 2021, the Commission expressed in its Record of Decision:

CNSC staff expressed the opinion that the duty to consult is not engaged by this decision because the proposed licence, as it does not pose a change to the footprint of the existing Nordion nuclear substance processing facility or significantly change the operations of the existing facility, would not cause any adverse impacts to any established or potential Indigenous and/or treaty rights. Therefore, BWXT Medical’s licence application does not raise the formal requirements of REGDOC-3.2.2, Indigenous Engagement, Version 1.1.³

The CNSC’s carte blanche opinion statement that “the duty to consult is not engaged by this decision” actively discourages meaningful engagement between BWXT and KFN that is necessary in building positive relationships, advancing community trust and environmental reconciliation with First Nations. We also submit that the above statement by the Commission is not supportable in law. The Commission must provide a forum for Indigenous participation and accommodation and ensure our concerns can be substantially addressed. By waiving the need to consult, the Commission is making it difficult for us to participate, have access to capacity supports including funding, and accessible information.

Kebaowek requires the CNSC to provide direction and oversight to BWXT / Nordion to resource and coordinate:

- i. working groups, if deemed necessary by the Parties, to address specific issues;
- ii. regularly scheduled meetings;
- iii. exchange information, including reports and presentations, about their respective interests and concerns, and including all expert advice provided to the technical committee;
- iv. seek to reach a shared understanding about the nature of potential effects of the Project and the First Nations’ position regarding their free, prior and informed consent;

³ CNSC, BWXT Medical Ltd - Record of Decision, 8 Oct 2021, para 139

- v. work with an agreed upon work plan and schedule in accordance with legislative timeline requirements; and
- vi. develop, through consultation and collaboration, measures to guide Canada's CNSC implementation of the UN Declaration, including principles of free, prior and informed consent, into decision-making at the facilities

Kebaowek recommends:

- The Commission not minimize or otherwise attempt to nullify its constitutional obligations to consult and accommodate. We ask that the Commission amend its 2021 BWXT decision, recognizing that the duty to consult is an *ongoing* responsibility borne by Crown and industry to fulfill, and not one that we must trigger or justify.
- The Commission direct CNSC Staff to develop with Kebaowek consultation and collaboration measures to guide Canada's implementation of the UN Declaration, including principles of free, prior and informed consent, into decision-making.
- The Parties recognize that consultation and collaboration will have an explicit dimension around (i) understanding the conditions needed for the First Nations to make their the free, prior and informed consent decision and (ii) understanding how the First Nations' position on FPIC will inform the ROR reports, licensing and decision-making.

4. Compliance with Recent Legal and Policy Changes

Appendix D of the ROR sets out the status of the licensee's regulatory document (RegDoc) implementation. While the chart sets out the version (by year) to which licensees comply, KFN submits the ROR ought to simply state whether licensees are complying with *current* RegDocs. This would allow intervenors, like KFN, to more succinctly understand which licensees are in compliance with current RegDocs and which are working to come into compliance.

Kebaowek recommends:

- The CNSC set out timelines within which compliance must be achieved. This would be in addition to the current approach, requiring licensees to 'conduct a gap analysis and provide an implementation plan' for coming into compliance with RegDocs. This would ensure all licensees are being held to the same standard and not relying on a RegDoc which is out of date.
- The CNSC assess and report on any impacts to licensees resulting from amendments to the *Nuclear Security Regulations*
- The ROR assess, for each licensee, to what extent their licensed activities will advance or inhibit Canada's ability to meet obligations under:
 - The recently passed *National Strategy Respecting Environmental Racism and Environmental Justice Act*. This Act recognizes that environmentally hazardous activities primarily occur in areas inhabited by Indigenous people and these activities could be considered a form of racial discrimination. The ROR ought to assess and report any:

- Increase in health inequities faced by Indigenous people due to exposure to harmful emissions
- Increase in Indigenous people's vulnerability to environmental risk due to the intersection of health inequities from environmental exposures with structural inequities including poor housing conditions and infrastructure, water insecurity, reduced access to healthcare services, unemployment, gender-based violence and other ongoing impacts of colonization; and
- Opportunity to capitalize on the lack of capacity held by Indigenous people to resist the establishment of environmentally hazardous activities
- The *UN Declaration and UNDA* and the corresponding 2023-2028 Action Plan, recognizing that complicity with UNDRIP requires:
 - Respecting Indigenous people's right to determine and develop priorities and strategies for the proposed development or use of their lands or territories and other resources (Article 32(1))
 - Obtaining the free, prior and informed consent of Indigenous peoples before approving any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Article 32(2))
- Kunming-Montreal Global Biodiversity Framework, specifically Target 3 (to conserve 30% of land, waters and seas) and Target 22 (to enable the active involvement of Indigenous peoples in decision-making)

5. Assessing Climate and Cumulative Effects

Key to the CNSC's ability to protect the environment and human health from the suite of uranium and nuclear substance processing facilities reviewed in this report is to assess cumulative effects. KFN submits any assessment of the cumulative effect of nuclear activities on our lands, water and health are being left behind because of the licensee-specific or facility-specific approach adopted by the CNSC, that this ROR reflects.

Broader watershed and ecosystem-level would be most helpful in understanding the interaction among licencees and their activities. Environmental sustainability is central Ona'ken'age'win our system of customary law and governance and therefore recommend the Commission to direct staff to undertake a cumulative effects review of the nuclear substances class of licencees.

On a related note, there is no direct mention of climate impacts in this ROR, despite its impacts being felt by licensees. For instance, higher groundwater volumes due to rainfall events at CFM led to overflow and releases into Lake Ontario.⁴

⁴ ROR, p 52

Kebaowek recommends:

- **New chapters be drafted capturing broader environmental considerations, including an analysis of cumulative effects on Indigenous territories.**
- **The Commission direct CNSC Staff to report on climate change impacts to a licensees' ability to protect human health and the environment, as required by section 24(4) of the NSCA, and the adequacy of measures in place to adapt to and mitigate climate impacts. This is directly relevant to the CNSC's oversight and ought to be reported in the ROR.**

6. Information Requests

In keeping with the UN Declaration, including Articles, 1, 7, 29 and 32, KFN seeks confirmation and documentation of waste transfers from any of the uranium and nuclear substance facilities included in the ROR to CNL's Chalk River site. We make this request on the basis that Chalk River is located on lands included within KFN's Statement of Asserted Rights and Title Territory.⁵

We also ask the CNSC review and inform of us potential waste transfers, whether from operations or eventual decommissioning, that could result at Chalk River from the licensed uranium and nuclear substance processing facilities.

Kebaowek recommends:

- **For each waste transfer to Chalk River, the CNSC to provide the following information:**
 - **Facility of Origin**
 - **Substance name**
 - **Units/weight/volume**
 - **Method of disposal and location**
 - **Percentage change in quantity from previous years**

7. Regional Information and Monitoring Network for the Ottawa River Watershed (RIMNet) Initiative

In response to the update provided in the ROR regarding RIMNet, we provide the following background context and update.

Background Context

A coordinated regional monitoring network for radionuclides in the Kichi Sibi watershed is of great importance to Kebaowek First Nation. Chief Lance Haymond raised this issue in March 2024 to the House of Commons' Standing Committee on Environment and Sustainable Development Threat of Nuclear Poisoning of Ottawa River Waters, highlighting the Threat of Nuclear Poisoning of Ottawa River

⁵ Timiskaming, Wolf Lake and Eagle Village Members of the Algonquin Nation Statement of Assertion of Aboriginal Rights & Title, (11 Jan 2023)

Waters. This was during the time of the unreported untreated sewage leak from Chalk River Nuclear Laboratories Site.

Dr. Frederick Wrona Professor and Sware Research Chair in Integrated Watershed Processes notes quantifying, understanding, predicting the changes in water quantity, quality, and aquatic biota in response to multiple stressors requires a coordinated, integrated, credible monitoring evaluation reporting system (MER system), to inform what actions are necessary to ensure the conservation, protection, security and sustainability of our water resources. Effective design and implementation of an integrated system requires the acquisition and timely reporting of relevant environmental information. Moreover, integrated watershed management requires the ability to define appropriate baseline conditions against which to assess change, as well as identifying tracking environmental impacts and the capacity to assess and predict numerous effects. In addition, a critical and ongoing gap has been associated with the recognition and the need to use multiple knowledge systems and ways of knowing and monitoring evaluation recording design and integrating indigenous knowledge holders in the RIMNET program.

Our Experience to Date and Current Status

Since Kebaowek engagement began with CNSC and ECCC on RIMNET, our engagement has been limited. We have also requested an engagement protocol and a coordinated approach engaging Algonquin communities in the watershed under the same engagement and protocol standard power sharing design and implementation of such a program.

Dr. Wrona (2024) offers the Athabasca River Basin as a case example, to highlight some of the challenges and possible solutions associated with implementing an integrated and effective monitoring program. The Athabasca River Basin and associated larger Mackenzie River basin have become one of the most monitored and studied freshwater systems in Canada. However, substantial knowledge gaps and uncertainties and how the basin and downstream ecosystems are changing in relation to increasing environmental stressors associated with regional development and population growth. Coupled with economic growth are increasing indigenous community concerns living in and downstream of these developments.

Similarly, Kebaowek identifies growing concerns regarding whether the current environmental regulatory frameworks for nuclear contaminants are adequate and protecting the environment upon which their way of life depends.

Currently, we are waiting to implement a coordinated protocol for engagement. If we examine previous government-led independent expert reviews of regional oil sands monitoring in the Athabasca basin, we find despite long term and long-standing commitments to implement integrated monitoring and related cumulative effects assessment, there was little tangible progress in advancing assessment and related regulatory policies. After decades and hundreds of millions of dollars spent on environmental monitoring and research in the Athabasca basin, significant challenges remain in providing open, transparent

accessible data, which are only used to a fraction of their potential to inform state and condition of environment reporting and relevant environmental management decision making and actions.

Kebaowek recommends:

- **We do not need another website collating fragmented data. We need a systematic change in how we design and implement an effective monitoring evaluation reporting system.**
- **A coordinated approach engagement protocol and Indigenous working committee representing Algonquin communities.**