



# Public and Aboriginal Engagement

## **Aboriginal Engagement**

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

Tel.: 613-995-5894 or 1-800-668-5284 (in Canada only)

Facsimile: 613-995-5086

Email: [cnscccsn@canada.ca](mailto:cnscccsn@canada.ca)

Website: [nuclearsafety.gc.ca](http://nuclearsafety.gc.ca)

Facebook: [facebook.com/CanadianNuclearSafetyCommission](https://facebook.com/CanadianNuclearSafetyCommission)

YouTube: [youtube.com/cnscccsn](https://youtube.com/cnscccsn)

Twitter: [@CNSC\\_CCSN](https://twitter.com/CNSC_CCSN)

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## Preface

This regulatory document is part of the CNSC's Public and Aboriginal Engagement series of regulatory documents, which also covers public information and disclosure. The full list of regulatory document series is included at the end of this document and can also be found on the [CNSC's website](#).

Regulatory document REGDOC-3.2.2, *Aboriginal Engagement*, sets out the requirements and guidance for licensees on Aboriginal engagement. REGDOC-3.2.2 also provides procedural direction for licensees in support of the whole-of-government approach to Aboriginal consultation implemented by the CNSC in cooperation with federal departments and agencies.

Aboriginal groups and communities in this document include Indian, Inuit and Métis peoples of Canada. For the purposes of this document, "licensee" refers to new licence applicants and existing licensees, and "regulated facility" refers to proposed or existing regulated facilities. "CNSC" refers to CNSC staff and "the Commission" refers to the administrative tribunal. The term "engagement" refers to the licensee's activities with Aboriginal groups and the term "consultation" refers to the activities undertaken by the CNSC to fulfill its duty to consult.

This document is not a comprehensive guide on Aboriginal engagement, and it does not interpret treaties or replicate information provided in the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) or other environmental statutes or guidelines.

The CNSC's approach to Aboriginal consultation is found in Appendix C : *Codification of Current Practice: Canadian Nuclear Safety Commission (CNSC) Commitment to Aboriginal Consultation*. This approach is informed by the guiding principles for Canada outlined in *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. [1]

This document supersedes *Supplementary Information for Licensees: Aboriginal Consultation* (published in 2011). The requirements in this document are in addition to those found in RD/GD-99.3, *Public Information and Disclosure*, [2] and are meant to ensure that potential or established Aboriginal and/or treaty rights and related interests are considered, as described in *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. [1]

As Canada's approach to the duty to consult and Aboriginal engagement continues to evolve, along with the respective case law, the CNSC will review and update REGDOC-3.2.2 to reflect new and updated requirements and best practices, as needed.

Guidance contained in this document exists to inform the licensee, to elaborate further on requirements or to provide direction to licensees on how to meet requirements. It also provides more information about how CNSC staff evaluate specific problems or data during the review of licence applications. Licensees are expected to review and consider guidance; should they choose not to follow it, they should explain how their chosen alternate approach meets regulatory requirements.

**Important note:** Where referenced in a licence either directly or indirectly (such as through licensee-referenced documents), this document is part of the licensing basis for a regulated facility or activity.

The licensing basis sets the boundary conditions for acceptable performance at a regulated facility or activity, and establishes the basis for the CNSC's compliance program for that regulated facility or activity.

Where this document is part of the licensing basis, the word “shall” is used to express a requirement to be satisfied by the licensee or licence applicant. “Should” is used to express guidance or that which is advised. “May” is used to express an option or that which is advised or permissible within the limits of this regulatory document. “Can” is used to express possibility or capability.

Nothing contained in this document is to be construed as relieving any licensee from any other pertinent requirements. It is the licensee’s responsibility to identify and comply with all applicable regulations and licence conditions.

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# Aboriginal Engagement

## 1. Introduction

The Crown's unique relationship with Aboriginal peoples gives rise to the duty to consult, and where appropriate accommodate Aboriginal peoples when the Crown contemplates conduct that might adversely impact potential or established Aboriginal and/or treaty rights.

As an agent of the Crown, the CNSC has responsibility for fulfilling its legal duty to consult, and where appropriate accommodate Aboriginal peoples when its decisions may have an adverse impact on potential or established Aboriginal and/or treaty rights. While the CNSC cannot delegate its obligation, it can delegate procedural aspects of the consultation process to licensees. In many cases, licensees are best positioned to collect information and propose any appropriate additional measures. The information collected and measures proposed by licensees to avoid, mitigate or offset adverse impacts may be used by the CNSC in meeting its consultation obligations.

Additionally, ensuring consistency between the CNSC and licensees' approach to Aboriginal consultation and engagement can help minimize legal and timeline risks to proposed facilities. These details are also critical to informing the Commission in its decision-making.

### 1.1 Purpose

This document identifies requirements for CNSC licensees, with respect to Aboriginal engagement. It also provides guidance and information on conducting Aboriginal engagement activities.

Although this document is for licensees only, information on the CNSC's approach to Aboriginal consultation is found in Appendix C : *Codification of Current Practice: Canadian Nuclear Safety Commission (CNSC) Commitment to Aboriginal Consultation*.

### 1.2 Scope

This document sets out requirements and guidance for CNSC licensees on:

- Aboriginal engagement
- reporting to the CNSC about Aboriginal engagement activities and issues

This document applies to regulated facilities described in the *Class I Nuclear Facilities Regulations* and the *Uranium Mines and Mills Regulations* when a licensee's application has the potential to raise the Crown's duty to consult.

The following are examples to which the requirements contained in this document do not apply:

- licence renewals with no proposed changes to existing operations as authorized by the Commission
- administrative licence amendments
- Class II nuclear facilities in existing hospitals
- users of portable nuclear gauges and radiography equipment

As appropriate, the CNSC may also request information from licensees on regulated facilities not described in the *Class I Nuclear Facilities Regulations* and the *Uranium Mines and Mills Regulations* to determine if the requirements of this document apply.

If licensees conduct Aboriginal engagement activities outside of the scope of this document or in support of due diligence, they are encouraged to share any relevant information with the CNSC, when available.

### 1.3 Relevant legislation

The following provisions of the *Nuclear Safety and Control Act* (NSCA), regulations made under the NSCA, and the *Constitution Act, 1982* are relevant to this document:

- paragraph 9(b) of the NSCA, which provides that “The objects of the Commission are (b) 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 and use referred to in paragraph (a).”
- subsection 3(1.1) of the *General Nuclear Safety and Control Regulations* (GNSCR), which provides that “The Commission or a designated officer authorized under paragraph 37(2)(c) of the Act, may require any other information that is necessary to enable the Commission or the designated officer to determine whether the applicant (a) is qualified to carry on the activity to be licensed; or (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.”
- paragraph 3(c)(i) of the *Uranium Mines and Mills Regulations* (UMMR), which provides that “An application for a licence in respect of a uranium mine or mill, other than a licence to abandon, shall contain the following information in addition to the information required by section 3 of the *General Nuclear Safety and Control Regulations*: (c) in relation to the environment and waste management, (i) the program to inform persons living in the vicinity of the mine or mill of the general nature and characteristics of the anticipated effects of the activity to be licensed on the environment and the health and safety of persons;”
- paragraph 8(a) of the UMMR, which provides that “An application for a licence to abandon a uranium mine or mill shall contain the following information in addition to the information required by sections 3 and 4 of the *General Nuclear Safety and Control Regulations*: (a) the program to inform persons living in the vicinity of the site of the mine or mill of the general nature and characteristics of the anticipated effects of the abandonment on the environment and the health and safety of persons;”
- paragraph 3(j) of the *Class I Nuclear Facilities Regulations*, which provides that “An application for a licence in respect of a Class I nuclear facility, other than a licence to abandon, shall contain the following information in addition to the information required by section 3 of the *General Nuclear Safety and Control Regulations*:

(j) the proposed program to inform persons living in the vicinity of the site of the general nature and characteristics of the anticipated effects on the environment and the health and safety of persons that may result from the activity to be licensed;”

- section 35 of the *Constitution Act, 1982*, which provides that
  - “(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
  - (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
  - (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
  - (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

## 2. Background

The CNSC recognizes and understands the importance of consulting with Canada’s Aboriginal peoples. The CNSC’s approach to Aboriginal consultation includes commitments to uphold the honour of the Crown through information sharing, relationship building and promoting reconciliation, as well as to meeting its common law duty to consult. The CNSC meets these responsibilities through Aboriginal consultation activities, and its approach is articulated in Appendix C.

### The duty to consult

Since 2004, the Supreme Court of Canada (SCC) has held that the Crown (federal, provincial and territorial governments) has a duty to consult, and where appropriate accommodate, when it contemplates conduct that might adversely impact potential or established Aboriginal and/or treaty rights. [3, 4, 5] Existing Aboriginal and/or treaty rights have been recognized and affirmed under section 35 of the *Constitution Act, 1982*. The SCC identified that the duty stems from the honour of the Crown and the Crown’s unique relationship with Aboriginal peoples.

The common law duty to consult, and where appropriate accommodate is raised when the following three factors are present:

- contemplated Crown conduct
- potential adverse impact
- potential or established Aboriginal or treaty rights

The SCC has emphasized that the duty to consult, and where appropriate accommodate, is raised at a low threshold; knowledge of a credible but unproven claim suffices to raise this duty.

The SCC subsequently clarified responsibilities related to the duty to consult, and where appropriate accommodate – noting that entities such as boards and tribunals (such as the CNSC) also play a role in fulfilling the duty in its *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council decision in 2010*. [6]

The duty to consult cannot be delegated to third parties; however, the SCC has also stated that the Crown may delegate procedural aspects of the consultation process to third parties, such as licensees.

Early Aboriginal engagement will help licensees determine if the activity described in their licence application could adversely impact potential or established rights and related interests. This information will also inform the CNSC’s approach to conducting its own Aboriginal consultation activities.

In June 2014, in *Tsilhqot’in Nation v. British Columbia*, [7] the SCC granted Aboriginal title for the first time to a specific land area in Canada, and it clarified the application of provincial laws and regulatory regimes to Aboriginal title lands. For the purpose of this document, Aboriginal title, proven or unproven, is included in the consideration of potential or established Aboriginal and/or treaty rights.

Aboriginal consultation activities can vary depending on the activity described in the licence application. Table 1 depicts the consultation activity spectrum that the CNSC uses to consider the relevant factors to determine appropriate consultation activities.

**Table 1: Consultation activity spectrum\***

<b>Potential for adverse impacts to Aboriginal and/or treaty rights</b> <----->	
<b>Weak claim</b> <b>No serious adverse impacts</b>	<b>Strong claim</b> <b>Potential for serious adverse impacts</b>
<ul style="list-style-type: none"> <li>• provision of adequate notice</li> <li>• disclosure of relevant information</li> <li>• discussion of issues raised in response to notice</li> </ul>	<ul style="list-style-type: none"> <li>• exchange of information</li> <li>• correspondence</li> <li>• meetings</li> <li>• site visit</li> <li>• research</li> <li>• studies</li> <li>• opportunity to make submissions to the decision maker</li> <li>• determination of accommodation, where appropriate: seek to adjust project, develop mitigating measures, consider changing proposed activity, attach terms and conditions to permit or authorization, consider rejecting a project, etc.</li> </ul>

\* Informed by Canada’s Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, March 2011. [1]

### 3. Applicability

Licensees shall conduct a review to consider whether the activity described in their licence application requesting authorization from the Commission:

- could result in impacts to the environment
- could adversely impact an Aboriginal group’s potential or established Aboriginal and/or treaty rights, such as the ability to hunt, trap, fish, gather or conduct cultural ceremonies

If the review identifies impacts, licensees shall submit their review to the CNSC as part of their licence application or as a project description if an environmental assessment (EA) decision under CEAA 2012 is being sought prior to a licensing decision.

### **Guidance**

Licensees are strongly encouraged to submit their review to the CNSC as early as possible, preferably when they begin early discussions with CNSC staff and prior to submitting an application. This will allow the CNSC to provide feedback and guidance if required. Early discussions with the CNSC may also help licensees and the CNSC align future Aboriginal engagement and consultation activities, potentially leading to a more efficient and effective regulatory review.

The CNSC encourages licensees to continue ongoing engagement and outreach with interested Aboriginal groups for activities that do not raise the duty to consult, and where appropriate accommodate, which is consistent with the requirements of RD/GD 99.3, *Public Information and Disclosure*. [2]

## **4. Licensee Requirements and Guidance for Aboriginal Engagement**

When licensees determine that the activity described in their licence application requesting authorization from the Commission could adversely impact potential or established Aboriginal and/or treaty rights, they shall:

1. identify and engage with potentially impacted Aboriginal groups
2. submit an Aboriginal engagement report
3. submit material change updates to the Aboriginal engagement report
4. include a summary of Aboriginal engagement activities in their Commission Member Document (CMD)

### **4.1 Identification and engagement**

Licensees shall conduct research to identify Aboriginal groups whose potential or established Aboriginal and/or treaty rights may be adversely affected by the activity described in their licence application, and determine the appropriate level or scope of engagement activities to be conducted with each identified group.

### **Guidance**

Key factors to consider when determining which Aboriginal groups to engage include:

- historic or modern treaties in the region of the regulated facility
- potential impacts to the health and safety of the public, the environment and any potential or established Aboriginal and/or treaty rights and related interests
- proximity of the regulated facility to Aboriginal communities
- existing relationships between Aboriginal groups and licensees or the CNSC
- traditional territories
- traditional and current use of lands
- settled or ongoing land claims
- settled or ongoing litigation related to a potentially impacted group
- membership in a broader Aboriginal collective or tribal council or Aboriginal umbrella group

Early engagement provides the opportunity to start or further develop relationships with Aboriginal communities and can help build trust and respect. For example, it may provide Aboriginal groups the necessary time to gather and share information on local and Aboriginal traditional knowledge (ATK). ATK may help to identify potential impacts from the activity described in the licence application on traditional land use, treaty rights, Aboriginal rights, and culturally important sites, including archeological sites. Gathering of ATK must be approached respectfully, in collaboration with the Aboriginal group, and with the understanding that the ATK may be sensitive or proprietary. ATK must be understood in the context of the Aboriginal group's world view.

Once contact is established with Aboriginal groups, licensees should ask each group how they would like to be engaged, as preferences may vary by community.

Licensees should provide Aboriginal groups with:

- preliminary information on the nature and scope of the activity described in the licence application and its potential impact on the environment and possible mitigation measures if identified
- opportunities to participate in the development, implementation and review of mitigation measures

There may also be a need to address different linguistic, cultural, geographic, capacity or informational needs and to allow for a flexible approach to engagement. The CNSC encourages the development of an engagement plan that is reasonable to both parties. When developing an Aboriginal engagement plan, licensees should consider:

- scope of the consultation required with each group identified, based on the preliminary analysis and the severity of the potential adverse effects on potential or established Aboriginal and/or treaty rights and related interests
- incorporation of a variety of engagement forums and techniques (e.g., letters, phone calls, face-to-face meetings, presentations, working groups)
- schedules and workloads of the Aboriginal groups involved
- potential engagement protocols (either drafted by the Aboriginal groups or concluded between Aboriginal groups and the Crown)
- assignment of a consistent representative
- translation of information into the native languages of the Aboriginal groups engaged, where appropriate
- communication with identified Aboriginal groups throughout the licensing period of the regulated facility

Appendices A and B provide guidance, tools and resources to assist licensees in collecting the relevant information to identify Aboriginal groups to be engaged and to prepare their approach to Aboriginal engagement. CNSC staff are also available to answer questions and provide guidance.

In some instances during engagement, an Aboriginal group may request an additional study that falls outside of the initial scope of the activity described in the licence application. This may include traditional land use studies or archaeological assessments. Licensees are encouraged to contact the CNSC for advice related to such requests for additional studies if they are not sure how to approach the request.

## **4.2 Aboriginal engagement report**

The Aboriginal engagement report shall include:

1. a list of Aboriginal groups identified for engagement
2. a summary of any Aboriginal engagement activities conducted to date
3. a description of planned Aboriginal engagement activities
4. the proposed schedule for interim reporting to the CNSC

The Aboriginal engagement report shall be submitted:

1. as part of a licence application, or
2. as part of a project description if an EA decision under CEAA 2012 is being sought prior to a licensing decision

It is essential that licensees submit all necessary and relevant information gathered pursuant to the engagement report, as this helps the CNSC to ensure an adequate Aboriginal consultation process, to determine the appropriate level of Aboriginal consultation activities, and to carry out an effective and efficient EA and/or licensing review.

### **Guidance**

Licensees are strongly encouraged to submit a draft Aboriginal engagement report to the CNSC prior to submitting a licence application. This will allow the CNSC to answer questions and provide guidance, if it is required, for a licensee's Aboriginal engagement report.

#### **4.2.1 List of identified Aboriginal groups**

Licensees should provide the methodology and rationale used to develop the list of identified Aboriginal groups.

#### **4.2.2 Summary of Aboriginal engagement activities**

Licensees should document all Aboriginal engagement activities to track issues and concerns raised as well as any steps taken to minimize impacts or to address issues. Examples of information to include:

- meeting details (e.g. date, attendees, and topics discussed)
- information specific to the activity described in the licence application that has been provided to Aboriginal groups
- any issues that have been raised related to adverse effects on the potential or established Aboriginal and/or treaty rights and related interests of the Aboriginal groups
- any mitigation measures proposed by either Aboriginal groups or the proponent that address potential adverse impacts on Aboriginal and/or treaty rights and related interests

Licensees should have a records management process in place to record Aboriginal engagement activities. Records management tools may include an engagement log that lists activities by date, time and individual/group, and an issues tracking table that identifies issues raised by groups and whether and how these have been addressed or if they remain outstanding.

Licensees are encouraged to provide relevant and necessary information on Aboriginal engagement activities to the CNSC, including elements of agreements with Aboriginal groups, as

they relate to mitigation measures and other forms of accommodation to address adverse impacts to potential or established Aboriginal and/or treaty rights and related interests.

Note that, pursuant to the [Access to Information Act](#) and the [Privacy Act](#), the CNSC is required to release certain information when requested by interested parties. Information provided to the CNSC that is to remain confidential must be provided to the Commission Secretary, under separate cover from a project description or licence application, with a request that the information be protected pursuant to section 12(1) of the [Canadian Nuclear Safety Commission Rules of Procedure](#).

#### **4.2.3 Description of planned Aboriginal engagement activities**

The Aboriginal engagement report shall include a high-level outline of proposed engagement activities. The CNSC will take licensees' planned Aboriginal engagement activities into consideration when developing its own Aboriginal consultation plans. Licensees are encouraged to contact the CNSC for advice on their Aboriginal engagement plan.

The CNSC may participate in licensees' Aboriginal engagement activities, upon request and where appropriate. Joint licensee/CNSC activities offer Aboriginal groups the opportunity to learn more about the regulated facility and the roles and responsibilities of licensees and the CNSC, and to raise questions and concerns with both parties.

#### **4.2.4 Proposed interim status reporting schedule**

The licensees' proposed schedule is to provide the CNSC with an interim status report (or reports) to update the CNSC on progress against the Aboriginal engagement plan.

The proposed reporting schedule should be aligned with the regulatory review process, and take into account the potential impacts to established Aboriginal and/or treaty rights and related interests.

The interim status report should be in the form of a hard copy and/or electronic letter, signed by the licensee's appropriate authority for Aboriginal engagement, and sent to the appropriate CNSC point of contact.

The CNSC encourages licensees to share reports with identified Aboriginal groups. The CNSC will share reports submitted by the licensee with Aboriginal groups upon request.

### **4.3 Material change updates to the Aboriginal engagement report**

Licensees shall submit material change updates to the Aboriginal engagement report.

#### **Guidance**

During the licensees' engagement process, changes from the original Aboriginal engagement report may occur and need to be reported. This may include the addition or removal of groups, identification of impacts on rights, or any other issues that could affect the licensee's planned Aboriginal engagement activities and/or the CNSC's planned Aboriginal consultation activities. What constitutes a material change and the timing and method for reporting (e.g., email, letter) should be formalized as part of the change management process as set out in the licensee's management system.

#### **4.4 Aboriginal engagement information for the Commission Member Document**

Licensees shall include a summary of Aboriginal engagement activities in their CMD.

##### **Guidance**

The Aboriginal engagement section of a licensee's CMD should include:

- a list of identified Aboriginal groups
- a summary of Aboriginal engagement activities conducted
- a summary of potential adverse impacts on potential or established Aboriginal and/or treaty rights and related interests, noting concerns that were raised
- a summary of mitigation measures or plans and proposed timing for mitigation and accommodation measures to address adverse impacts
- a summary of actions taken, or proposed actions to be taken, to address previously unidentified issues or impacts raised by the CNSC and/or others
- a summary of planned Aboriginal engagement activities

Much of the information required in the Aboriginal engagement section of a licensee CMD is also required in the Aboriginal engagement report (see section 4.2 for related guidance).

### **5. Canadian Nuclear Safety Commission activities**

After the CNSC receives the Aboriginal engagement report, it will provide feedback and may request further information or seek clarification. The CNSC will also conduct its own preliminary duty to consult determination to decide if Aboriginal consultation activities are required by the Crown, and the scope of those activities (if appropriate).

The CNSC's determination includes creating its own preliminary list of Aboriginal groups that may have interest in the activity described in the licence application. The CNSC will share its preliminary list of identified Aboriginal groups with the licensee. If the CNSC identifies additional Aboriginal groups not already identified by the licensee, a coordinated approach to ongoing engagement and consultation activities will be discussed with the licensee. CNSC staff also develop Aboriginal consultation processes for each licence application that offer opportunities for both CNSC staff and the identified Aboriginal groups to discuss issues and to encourage Aboriginal groups' participation in Commission hearings.

If the CNSC determines that Aboriginal consultation activities are required, it will notify the identified Aboriginal groups and provide information regarding:

- the activity described in the licence application
- the regulatory review process to be followed
- the proposed scope of Aboriginal consultation activities
- CNSC contact information

As more information is gathered during the consultation process, the CNSC will review its preliminary list of Aboriginal groups and Aboriginal consultation plan, and adjust them accordingly. This may include changing the scope of activities as appropriate or adding newly identified Aboriginal groups with interest in the activity described in the licence application. The CNSC will inform licensees if, during the EA or licensing process, it becomes aware of previously unidentified issues or impacts to potential or established Aboriginal and/or treaty

rights and related interests, that could also be addressed through licensee Aboriginal engagement activities.

For more information on the CNSC's approach to Aboriginal consultation, please refer to Appendix C and the Government of Canada's, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. [1]

## **6. Engagement Activities After an Environmental Assessment or Licensing Decision**

### **Guidance**

The Commission may, at its discretion, require licensees to ensure that any adverse impacts from the activity described in the licence application are avoided, mitigated or addressed through offset measures. Licensees may be required to continue to engage Aboriginal groups.

Licensees may also be required to update the CNSC about their ongoing Aboriginal engagement activities; for example, the status of the implementation and effectiveness of mitigation and accommodation measures. Licensees should also update the CNSC on new issues raised by Aboriginal groups with respect to an adverse impact on potential or established Aboriginal and/or treaty rights and related interests, which could affect future operations of the regulated facility or a future licence application. The CNSC will advise the licensee on when and how this information is to be provided, but will use existing processes (such as those set out in RD/GD-99.3, *Public Information and Disclosure* [2]), regulatory oversight reports, and other reporting mechanisms as applicable.

The licensee's continued communication with the identified Aboriginal groups can help build long-term relationships and trust. CNSC encourages licensees to keep the identified Aboriginal groups involved by sharing information on the regulated facility's operation and updates on follow-up and/or monitoring programs.

## Appendix A: Considerations for Aboriginal Engagement

Licensees may use the following questions to guide them in determining if Aboriginal engagement is appropriate and – if so – with whom and to what extent. These questions should be considered in conjunction with the consultation activity spectrum (see table 1) when determining the level of engagement for the activity described in the licence application. Conducting research and collecting information to respond to these questions will guide licensees in identifying potentially impacted Aboriginal groups, developing engagement plans, and organizing Aboriginal engagement activities. Licensees should initiate dialogue with Aboriginal groups early in the project development process and to contact the CNSC if they require clarity or have questions.

### Identifying potential adverse impacts

- Does the activity described in the licence application have likely or potential impacts on land, water and resources? Are these changes significant? What is the spatial extent of the potential impacts? Are there potential impacts beyond the immediate footprint of the regulated facility?
- Are there any Aboriginal groups that claim traditional territory that encompasses the location of the regulated facility?
- Are there any First Nations reserve lands, treaty lands, or Aboriginal communities located near the regulated facility?
- Does the activity described in the licence application involve lands or resources that are currently the subject of land claim negotiations or are part of existing comprehensive land claim agreements or self-government agreements?
- Have any environmental or other assessments of the regulated facility been carried out? Have any environmental or other assessments been undertaken for similar activities in the vicinity of the regulated facility? If so, what adverse impacts on rights and/or related interests are revealed, if any, by these assessments?
- Are there any other activities occurring in the same area? Is the activity described in the licence application likely to have any cumulative effects in combination with other activities in the same or surrounding area?

### Assessing the significance of potential adverse impacts

- Certainty of adverse impacts – what is the likelihood that the impact will occur?
- Magnitude of the adverse impacts – what is the nature and degree of the impact?
- Duration and frequency of the adverse impacts – are the potential adverse impacts that have been identified likely to be of a temporary or permanent nature? How often will the impact occur?
- Reversibility – is the adverse impact reversible?
- Spatial extent of the adverse impacts – will these be localized in nature or broader? How does the geographic extent of the adverse impact relate to the geographic extent of the right, as practiced?

### Additional considerations

- Are you aware of the nature and scope of any asserted rights and/or related interests in the area?

- Has the Aboriginal group continually occupied the area near the regulated facility?
- Does the group still occupy the area? If the Aboriginal group does not still occupy the area, at what period of time did they occupy it?
- Are there historical and/or current traditional Aboriginal practices occurring in the area?
- What is the Aboriginal perspective on the importance, uniqueness, or value of a particular use, area, activity or species?
- What is the Aboriginal group's capacity to participate in engagement activities? (capacity can include time, financial resources, technical expertise, technology, etc.)
- Is the Aboriginal group asserting that the claimed Aboriginal rights were exercised prior to European contact (or for the Métis, prior to effective control)? Do they continue to exercise these rights today in a traditional or modernized form? What impacts to an Aboriginal group's rights have occurred in the past?
- Are you aware of any communication from Aboriginal groups who are raising concerns about the regulated facility, similar facilities, or similar adverse effects in the area?
- Are you aware of any past grievances or issues that an Aboriginal group may have with your industry or organization? How were these grievances addressed?
- Have any Aboriginal groups expressed concerns about the activity described in the licence application and suggested any remedial measures that may accommodate the adverse impacts on their rights and/or related interests?
- Could the status of land claims and self-government agreements have implications with respect to the activity described in the licence application? Does this Aboriginal group have a sovereign government?
- Are there any cultural activities or events that may prevent many community members from participating in engagement activities?
- Does the Aboriginal group have its own consultation protocol? Licensees may want to consider whether consultation agreements with Aboriginal groups could support consultation activities. These arrangements can help to define roles and responsibilities, identify points of contact, determine timelines and steps to be followed, and sometimes address capacity needs.
- Has the Aboriginal group been involved in recent litigation or have judgments been rendered that clarify rights of the Aboriginal group?
- Is the Aboriginal group involved in the negotiation for treaty land entitlements?
- Is the Aboriginal group currently involved in any other consultations with industry or government?

## Appendix B: Resources

The following resources are some of the available tools that support the implementation of the CNSC's Aboriginal consultation approach, and that can assist licensees in planning Aboriginal engagement:

### Aboriginal and Treaty Rights Information System

The Consultation and Accommodation Unit of Indigenous and Northern Affairs Canada (INAC) has developed the Aboriginal and Treaty Rights Information System (ATRIS) to disseminate relevant information about Aboriginal groups in Canada and the Section 35 rights those groups exercise or assert. ATRIS is a web-based tool that features an interactive map and corresponding narrative content to help users identify Aboriginal communities in proximity to a given project area or whose potential or established Aboriginal or treaty rights may intersect with a project. Officials, proponents and others seeking to inform their Aboriginal consultations are encouraged to carry out their preliminary research within ATRIS. The information in ATRIS references electronic data from INAC databases as well as other federal sources, and includes:

- contact details for Aboriginal groups and their leadership
- multipartite agreements, historic and modern treaties and their provisions
- comprehensive and specific claims
- litigation and other assertions

### Consultation Information Service

ATRIS and its content are managed by the Consultation Information Service (CIS). Queries about ATRIS or the information within it can be sent to the CIS at [cau-uca@AANDC-aandc.gc.ca](mailto:cau-uca@AANDC-aandc.gc.ca)

### Other resources

Other sources of information include:

- INAC regional consultation coordinators, since they may be aware of ongoing or contemplated consultation processes and any other relevant regional information
- provincial government ministries and agencies (e.g., Aboriginal Affairs, Natural Resources)
- traditional-use studies; e.g., those prepared in the context of environmental assessments and land disposal
- colleagues who have worked with local Aboriginal groups or consulted with them
- websites or other sources that outline legal proceedings involving Aboriginal or treaty rights assertions and interpretation of potential and established rights
- press coverage and public statements in which Aboriginal groups have asserted rights, expressed concerns and proposed desired outcomes
- Natural Resources Canada's Canada Lands Google Earth layer (includes Aboriginal reserves across Canada) and Canada's Atlas of Canada – historic treaty maps
- websites of community organizations and umbrella organizations (regional organizations, provincial/territorial organizations, or tribal councils)
- maps on traditional land use
- Aboriginal traditional knowledge
- The Canadian Environmental Assessment Agency's website – [ceaa.gc.ca](http://ceaa.gc.ca)

## **Appendix C: Codification of Current Practice: Canadian Nuclear Safety Commission (CNSC) Commitment to Aboriginal Consultation**

### **CNSC's commitment and ongoing obligations**

The CNSC as an agent of the Government of Canada and as Canada's nuclear regulator recognizes and understands the importance of consulting and building relationships with Canada's Aboriginal peoples. The CNSC ensures that all its licensing decisions under the *Nuclear Safety and Control Act* and environmental assessment decisions under the *Canadian Environmental Assessment Act* uphold the honour of the Crown and consider Aboriginal peoples' potential or established Aboriginal or treaty rights pursuant to section 35 of the *Constitution Act, 1982* (together, the "Aboriginal Interests").

The CNSC recognizes that Aboriginal peoples have concerns with regard to the nuclear sector and that it is important to seek opportunities to work together in ensuring the safe and effective regulation of nuclear energy and materials. The CNSC will continue to communicate "objective scientific, technical and regulatory information" about CNSC activities and the effects of the nuclear industry in Canada as per the objectives of the *Nuclear Safety and Control Act*.

### **CNSC's approach to Aboriginal consultation**

#### *Good Governance*

The CNSC strives to meet its commitment to excellence, in part, through a good governance approach to effective and well-managed Aboriginal consultation processes when Aboriginal rights or interests could be impacted.

#### *Guiding Principles*

The CNSC is also mindful of its role as a statutory administrative tribunal exercising quasi-judicial powers, which confers on it the duty to treat fairly all participants in its proceedings. When developing and implementing consultation processes, the CNSC takes into account the "guiding principles" that have emerged from Canada's case law and best consultation practices as outlined in the document "*Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*." [1]

The CNSC builds on the "guiding principles" to establish project-specific Aboriginal consultation processes that:

- Offer opportunities for CNSC staff and Aboriginal peoples to meet and discuss issues and to allow for reasonable opportunities for participation in the hearing process before the Commission tribunal such that all relevant evidence in relation to Aboriginal Interests, including any potential impacts thereon from Aboriginal peoples, CNSC staff, the licensees, various federal, provincial, and territorial departments and agencies, and other interested parties are heard and taken into account by the Commission in relation to a project; and,
- Are made as accessible as reasonably possible to Aboriginal peoples through organized community meetings; through open-houses, technical workshops and/or site visits; through other direct consultation with Aboriginal peoples where appropriate; through the CNSC's public hearings, which are occasionally held in host communities, with opportunities for oral or written interventions by Aboriginal peoples; through the provision of videoconferencing facilities (in some situations) for

intervenor in hearings held in Ottawa; through webcast public hearings and meetings on the CNSC website; through making available on the CNSC website the hearing transcripts, information on the CNSC licensing processes, technical and safety facts and publications about the nuclear industry that the CNSC regulates; and, by ensuring that licensees assist the CNSC in consulting and engaging with Aboriginal peoples.

#### *Scope of Consultations*

The consultation activities for a given project may vary with the circumstances such that, for example, CNSC staff may work more closely with Aboriginal peoples prior to a Commission hearing where the potential for more serious potential adverse effects on Aboriginal Interests arising from a CNSC licensing decision appears to be a possibility. Aboriginal peoples are encouraged to bring their concerns before the Commission tribunal.

#### *Accommodation Measures*

The CNSC recognizes that the effect of good faith consultation may result in the need to establish accommodation measures to prevent or minimize impacts of activities involving nuclear substances on Aboriginal Interests. Accommodation will likely flow through licensing requirements on licensees subject to the CNSC's authority. Any such potential accommodation must be within the statutory mandate of the CNSC, keeping in mind that the CNSC's mandate is broad in that it allows for the protection of the environment, and the health, safety and security of Canadians and there are opportunities for potential impacts to rights to be mitigated through the licensing processes.

#### *Coordinated Approaches*

Insofar as its statutory functions allow, the CNSC supports a whole-of-government approach to Aboriginal consultation, with an aim to coordinating consultative efforts, where feasible, with other federal, provincial, and/ or territorial regulatory departments and agencies through a one-window approach, with respect to environmental assessment and licensing activities.

#### *Assistance of Licensee to CNSC Aboriginal Consultation Activities*

While licence applicants and existing licensees of nuclear projects do not bear the Crown's legal obligation to consult Aboriginal peoples under section 35 of the Constitution Act, 1982, as proponents of a project that will need to be regulated by CNSC, their role to engage Aboriginal peoples is important to the efficacy of the Commission's decision-making. Licensee's consultation activities are therefore important and can inform and assist the CNSC staff's consultation activities. The outcome of all such activities, including any proposed accommodation measures by the licensee, will also form part of the evidence presented by licensees for consideration by the Commission.

#### *Participation of Aboriginal peoples*

The CNSC encourages Aboriginal peoples to outline the nature and the scope of their Aboriginal Interests that they feel may be affected by a proposed project or activity regulated by CNSC and to bring forward outstanding issues and concerns throughout the regulatory process.

#### *Capacity*

The CNSC previously did not have the authority to provide participant funding, however, in the 2010 Budget the Government of Canada took steps to authorize the CNSC to establish a participant funding

program to ensure the timely and meaningful engagement of the public, stakeholders and Aboriginal peoples in CNSC hearing processes. The CNSC, as an independent regulator, has highly trained scientific and technical staff available to meet with Aboriginal peoples to discuss regulatory or technical issues and to answer questions.

## References

1. Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, March 2011.
2. CNSC, RD/GD-99.3, *Public Information and Disclosure*, March 2012.
3. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.
4. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.
5. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
6. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, 2010 SCC 43.
7. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, 2014 SCC 44.

## Additional Information

1. Mackenzie Valley Environmental Impact Review Board, *Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment*, July 2005.
2. Canadian Environmental Assessment Agency, “[Considering Aboriginal traditional knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act – Interim Principles](#)”.
3. [Canadian Nuclear Safety Commission Participant Funding Program](#).
4. Major Projects Management Office, “[Early Aboriginal Engagement: A Guide for Proponents of Major Resource Projects](#)”.
5. CNSC, GD-379, Guide for Applicants and Intervenors Writing CNSC Commission Member Documents, March 2012.
6. *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, [2012]. Federal Court of Appeal Decisions, 2012 FCA 73.

## CNSC Regulatory Document Series

Facilities and activities within the nuclear sector in Canada are regulated by the Canadian Nuclear Safety Commission (CNSC). In addition to the *Nuclear Safety and Control Act* and associated regulations, these facilities and activities may also be required to comply with other regulatory instruments such as regulatory documents or standards.

Effective April 2013, the CNSC's catalogue of existing and planned regulatory documents has been organized under three key categories and twenty-five series, as set out below. Regulatory documents produced by the CNSC fall under one of the following series:

### 1.0 Regulated facilities and activities

- |        |     |  |
|--------|-----|--|
| Series | 1.1 | Reactor facilities                       |
|        | 1.2 | Class IB facilities                      |
|        | 1.3 | Uranium mines and mills                  |
|        | 1.4 | Class II facilities                      |
|        | 1.5 | Certification of prescribed equipment    |
|        | 1.6 | Nuclear substances and radiation devices |

### 2.0 Safety and control areas

- |        |      |  |
|--------|------|--|
| Series | 2.1  | Management system                        |
|        | 2.2  | Human performance management             |
|        | 2.3  | Operating performance                    |
|        | 2.4  | Safety analysis                          |
|        | 2.5  | Physical design                          |
|        | 2.6  | Fitness for service                      |
|        | 2.7  | Radiation protection                     |
|        | 2.8  | Conventional health and safety           |
|        | 2.9  | Environmental protection                 |
|        | 2.10 | Emergency management and fire protection |
|        | 2.11 | Waste management                         |
|        | 2.12 | Security                                 |
|        | 2.13 | Safeguards and non-proliferation         |
|        | 2.14 | Packaging and transport                  |

### 3.0 Other regulatory areas

- |        |     |                                  |
|--------|-----|----------------------------------|
| Series | 3.1 | Reporting requirements           |
|        | 3.2 | Public and Aboriginal engagement |
|        | 3.3 | Financial guarantees             |
|        | 3.4 | Commission proceedings           |
|        | 3.5 | CNSC processes and practices     |

**Note:** The regulatory document series may be adjusted periodically by the CNSC. Each regulatory document series listed above may contain multiple regulatory documents. For the latest list of regulatory documents, visit the [CNSC's website](#).