



# AFN ENVIRONMENTAL STEWARDSHIP

## RESPECTING AND PROTECTING MOTHER EARTH

### **Moving Forward Together: Designing the Process for Selecting a Site – August 2008** **Nuclear Waste Management Organization (NWMO)**

#### **RESPONSE TO QUESTIONS:**

- I. Does the framework of objectives, ethical principles and requirements provide a sound foundation for designing the process for selecting a site?

#### **COMMENTS:**

Although the framework provides for a sound foundation, it is important to avoid the perception of predetermined outcomes. First Nations must be part of the process for site selection at the earliest stages. A culturally appropriate process for site selection is needed whereby First Nations are equal partners in decision making versus participating in a predetermined process. However, it should be noted that invitations to participate at meetings are not considered to be a partnership.

There is also a need to address and acknowledge the concerns by First Nation communities as well as other affected communities. These concerns and remarks need to be documented and reflected in documents as published by the Nuclear Waste Management Organization. Incorporating the views by participants will illustrate an inclusive and transparent process with respect to decision making.

There should also be some clarity in the objectives as they may have different connotations for First Nations people. For instance, the concept of “community well-being” may reflect collective liberties and privileges. Concepts of well being may encompass social, economic, spiritual and cultural factors, as well as individual health and security.

The same clarity in definitions will also apply to the concepts of environmental integrity, and economic viability and fairness. One striking difference is between First Nations peoples as right holders, compared to mere stakeholders.

- II. How can we ensure that the process for selecting a site is fair?

#### **COMMENTS:**

It is important to note Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights<sup>1</sup>. The Supreme Court of Canada (SCC) has ruled that the Crown is legally obliged to consult with First Nations about actions which might infringe Aboriginal rights<sup>2</sup>. The purpose of consultation is to facilitate the accommodation of Aboriginal rights. Consultation must genuinely attempt to address First Nation concerns about the impact of an action on their rights. Therefore the Crown has a fiduciary responsibility and duty to protect the interest of First Nations, including the impact of nuclear waste disposal within First Nations lands and territories and on Aboriginal and Treaty Rights.

Although the Crown cannot delegate its fiduciary obligation to consult to a third party, the Crown can delegate certain aspects of the administration of consultations to a third party. As the federal government has approved the Adaptive Phase Management Process and the mandated activities undertaken by the Nuclear Waste Management Organization, the NWMO should follow the requirements of consultation applicable to the Crown. Furthermore, the NWMO can and should follow a higher threshold in consultation, rather than doing the bare minimal outlined in court decisions. It would be in the best interest of the NWMO to consider and accommodate Aboriginal and Treaty Rights. Involving First Nations in decision-making is critical to the development and implementation process versus a costly litigation process that could occur as a result of resistance.

The NWMO should also note, the *United Nations Declaration on the Rights of Indigenous Peoples* ("Declaration") as it encourages harmonious and cooperative relations between States and Indigenous Peoples. Adopting principles of the *Declaration* can provide a framework for ensuring that the fundamentals of the NWMO's values and beliefs are realized.

For instance, under the following articles of the *Declaration*, there is a direct linkage to the commitments by the NWMO in terms of working in cooperation with interested stakeholders in a manner that is honest, respectful, open and transparent, and inclusive by way of engagement. Adopting the principles of the *Declaration* will ensure that First Nations rights are taken into consideration and respected.

<sup>1</sup> *Constitution Act, 1982*, being Schedule to B to the *Canada Act, 1982* (U.K.), 1982, c.11., section 35(1).

<sup>2</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Sparrow).



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.”<sup>3</sup>

Article 29(2): “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the land or territories of indigenous peoples without their free, prior and informed consent.”<sup>4</sup>

Engaging and consulting First Nations is essential to identifying the potential costs, harms, risks and other losses including financial, physical, biological, social, cultural and ethical costs. Therefore, consultation and accommodation with respect to Aboriginal and Treaty Rights can ensure a fair and honorable process for site selection.

To foster an understanding of “fairness” at the outset, the NWMO needs to outline what is possible and what isn’t. For example, there should be some documents on what geological conditions the NWMO requires, the type of rock and other infrastructural needs. The NWMO should also establish a step by step evaluation guide for potential willing host communities; this should outline the economic considerations especially if there are more than one willing host communities which are similar in every respect.

Finally, the NWMO should fully explain which decisions they can make and which decisions will be influenced by an environmental assessment process and by the federal government.

III. From what models and experiences should we draw in designing the process?

#### COMMENTS:

Defining a willing host community is needed and must include surrounding areas such as neighboring First Nation communities. A host community will have to consider the traditional territories of First Nations and the impacts associated with hosting a deep geological repository, i.e., potential infringement on Aboriginal and Treaty Rights.

<sup>3</sup> *United Nations Declaration on the Rights of Indigenous People*, Article 27.

<sup>4</sup> *United Nations Declaration on the Rights of Indigenous People*, Article 29(2).

The host community will need to specify how the concerns and rights of other affected First Nation communities will be taken into consideration and addressed. Adjacent First Nations need to be involved in shared decision-making with the host community in order to balance the interests of both parties.

First Nation communities along transportation routes also need to become heavily involved in the design process. For instance, jurisdictional issues need to be addressed particularly in terms of emergency preparedness to address any possible accidents. Open communication is needed to keep First Nation communities well informed about transportation routes through their communities and traditional territories.

Community acceptance needs to be measured upon the acceptance of not only the host community but surrounding neighboring First Nation communities and other communities along transportation routes. Having well informed communities and open communication amongst them will achieve an open, transparent and fair site selection process.

The NWMO should consider a number of access and benefit agreements, both nationally and internationally. These agreements set out a number of processes in how to interact with Indigenous communities.

#### IV. Who should be involved in the process for selecting a site, and what should be their role?

##### COMMENTS:

First Nation governments and communities need to be involved in the process for selecting a site. First Nations have a unique cultural, traditional and social connection to the land and have a special interest in preserving and protecting the balance of the environment while providing a sustainable future for generations to come.

As mentioned previously, Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights<sup>5</sup>. Therefore, there is a need to respect Aboriginal and Treaty Rights, and the jurisdictions of First Nations governments through shared decision-making. With that being said, the following points are offered for your consideration.

<sup>5</sup> *Constitution Act, 1982*, being Schedule to B to the *Canada Act, 1982* (U.K.), 1982, c.11., section 35(1).

Separate dialogues and meaningful engagement is needed with First Nation governments, communities (youth, elders and women), tribal councils, political and territorial organizations, teachers, traditional knowledge holders and various First Nations people with professional background and different disciplines. Dialogue sessions need to be open and transparent and must take place with sufficient timelines. First Nations need to be given the fullest information to enable them to make sound and informed decisions. Full participation in all aspects of any decision making process is essential and consent to any activity affecting traditional territories is required for First Nations to ensure control over their own future.

There is a need to discuss and determine the potential impacts (both real and perceived) of site selection and transportation of nuclear waste on First Nations traditional territories. In order to allow informed decision making there is a need for an inclusive review of all aspects of nuclear power production from the beginning to the end product. It is important to learn from past experiences and examine the impacts of the nuclear industry (including low and intermediate waste as it concerns the entire fuel cycle) has had on traditional territories and lifestyles, i.e., damages to the environment that effect harvesting, fishing and hunting rights. First Nations can share their experiences and contribute to focus groups and/or other dialogues. Understanding and acknowledging past experiences can help prevent negative impacts and alleviate future concerns.

Once a potential site and host community is selected, meaningful consultation with First Nations needs to take place. Developing protocols with First Nations, federal and provincial government, the host community, NWMO, and other stakeholders on engagement and consultation will assist in open communication and relationship building. Having a strategy in place outlining First Nations full participation in decision making will demonstrate respect for traditional territories and jurisdiction of First Nations.

While it is understood that other stakeholders will be part of the process, these groups should not hold veto power. First Nations peoples are not mere stakeholders, but are rights holders. Thus, local First Nations governments in the region of a potential site should have the authority to intervene in the process and their consent must be present for the project to proceed.

V. What information and tools do you think would facilitate your participation?



**COMMENTS:**

Separate dialogue sessions and panel discussion are needed so that discussions are culturally appropriate and First Nations have the opportunity to be kept apprised of the Adaptive Phased Management process. This will give First Nations the opportunity to network, collaborate and share information amongst each other. Developing a supportive network can help with the undertaking of research and studies so that positions and strategies can be developed.

First Nations will need resources to build capacity to properly participate and attend future dialogue sessions. Resources for independent research, expertise and legal advice may also be needed. This would enhance legitimacy, build trust and expand perspectives.

The NWMO relies heavily on web based activities but it is important to note that there is lack of access by some First Nations. Nation wide advertisements on major accessible television stations can be utilized to alert people to this important national issue and how they can become involved in the process.

Culturally appropriate communication products are needed to raise awareness which could be updated and distributed to First Nation communities.

- Fact sheets
- Discussion journals
- Deck presentations for dialogue sessions
- Brochures to raise awareness for upcoming dialogue sessions with photos of focus groups and facility sites
- Video on nuclear waste
- CD-Rom with background information on Adaptive Phase Management
- FAQs with a First Nations focus

Perhaps a video of a consultation session would be helpful in that it provides a visual presentation of questions asked and responses.

**VI. What else needs to be considered?****COMMENTS:**

Respect for Aboriginal Traditional Knowledge is crucial for site selection and long term monitoring and surveillance. Aboriginal knowledge of the land can provide access to baseline information, an important aspect to site selection. Aboriginal Traditional

Knowledge can be expanded to include the experiences of First Nations with radioactive contamination to themselves, the environment, their lifestyles and land use changes.

The use of Aboriginal Traditional Knowledge can ensure that First Nations are fully engaged with respect to site selection and implementation. It is important that the use of Aboriginal Traditional Knowledge is interpreted according to the spirit of those teaching and First Nations have the opportunity to review and verify the usage and interpretation of that knowledge.

First Nations are concerned with protecting Aboriginal Traditional Knowledge from outside appropriation. Therefore establishing a protocol for the use of Aboriginal Traditional Knowledge is imperative so that the knowledge provided is protected and that a copyright is secured prior to publishing any information.

In addition, knowledge of the ramifications of hosting such a facility, like number of people to be employed in both construction and in maintaining the facility, where they would live, what support facilities would be required and traffic to and from the facility is of interest on how this may affect the existing community or neighboring communities.

The NWMO does have a fair amount of work to undertake. It is assumed that a willing host community will be found but is there a back up plan should no community come forward? The amount of time this project will take to the construction completion phase is considerable. All the while, additional waste will accumulate. Will the facility be large enough to store the present waste and the waste of another 30 years? Will another site be required and will this require a separate process?

A process should be outlined with willing host communities to ensure committed buy-in. Host communities should be provided with the option to back out of a project but this needs to be balanced within an agreed upon timeframe. For instance, there needs to be a point in time where host communities cannot back out otherwise considerable time and resources will be lost.

On a final note, AFN is of the view that the NWMO should have a separate parallel consultation and engagement process with First Nations people for the reasons outlined above.