

Assembly of First Nations

Nuclear Fuel Waste Dialogue



Recommendations to the Nuclear Waste Management Organization

September 30, 2005

Introduction

The Assembly of First Nations (AFN) has participated in a dialogue with First Nations across Canada on the issue of nuclear fuel waste management. This dialogue has been supported with financial assistance from the Nuclear Waste Management Organization (NWMO) and Natural Resources Canada (NRCan).

Included in these recommendations are comments regarding nuclear fuel waste management that we heard from First Nation communities as we traveled the country. They range from a discussion about Aboriginal and treaty rights to energy policy to traditional knowledge. That said First Nations have yet to reach conclusions on possible nuclear fuel waste disposal options. The First Nations advised the AFN that they were not prepared to comment on the Draft Study Report *Choosing a Way Forward: The Future Management of Canada's Used Nuclear Fuel* until they had sufficient time to study the issues and are not yet in a position to make a recommendation one way or the other regarding the options. First Nations do have very strong opinions on the general issue of nuclear fuel waste management. These opinions and recommendations are summarized below.

Background

The AFN is a non-profit organization dedicated to promoting the interests of First Nation peoples in Canada. Through the Chiefs-in-Assembly, the AFN represents more than 633 First Nations across the country and is designed to present the views of the various First Nations through their leaders. Policy and program areas include: health, justice, education, taxation, environment, housing, social development, economic opportunities, land claims, languages and literacy and Aboriginal and Treaty Rights.

First Nations are deeply concerned about the state of our environment. Our Elders advise us that we should think of the impact of our actions seven generations hence. Nowhere is this truer than with respect to the creation and disposal of nuclear waste. The production of energy from nuclear sources is fraught with peril. Disposal of the waste can have unforeseen and potentially dangerous impacts far into the future even if managed with the utmost care and caution.

Many First Nation communities are either in close proximity of a nuclear power plant or research centre or hold traditional territory in areas which may be considered for the long term storage of nuclear fuel waste. Many First Nation individuals, communities and organizations participated in the Seaborn Environmental Assessment Panel including the AFN. The Seaborn Panel was conducted from 1989 to 1998 and reviewed the deep geological concept for the disposal of nuclear waste. During the hearings, First Nations expressed concern that: they had not had the opportunity to study the proposals; the proposals did not incorporate traditional ecological knowledge; the proposals strongly conflicted with their deeply held beliefs; and they doubted they would derive any significant benefit from agreeing to accept a nuclear fuel waste facility in their territory. These concerns have not abated with time.

In November, 2001 the AFN made a presentation to the Parliamentary Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources on Bill C-27, the *Nuclear Fuel Waste Act*. During this presentation six recommendations were made, with the purpose of protecting the rights and interests of First Nations. A presentation was also made by the AFN to the Senate Standing Committee on Energy, the Environment and Natural Resources in May 2002. Only one recommendation made in November 2001 was implemented; the submissions in May 2002 were essentially the same.

Since the *Nuclear Fuel Waste Act (2002)* came into force, the AFN Environmental Stewardship Unit began to play a role in First Nations engagement on the issue of nuclear fuel waste management. NRCAN has provided funding for the AFN to facilitate a nuclear fuel waste management dialogue with First Nations communities. The AFN is also received funds from the NWMO to enhance its dialogue program.

Depending on the management approach selected, there is potential for hundreds of communities to be affected. Several First Nations are close to a nuclear power plant (in Ontario, Quebec and New Brunswick), some hold traditional territory in areas that could be considered for long-term storage of nuclear fuel waste, while others are located along potential transportation routes.

The purpose of a First Nations-led dialogue process on nuclear fuel waste management was to:

1. Raise awareness within First Nations communities about nuclear fuel waste management and potential impacts on their territories;
2. Build First Nations' capacity to engage in discussions and decision making on the issue of nuclear waste management;
3. Promote dialogue within First Nations and between First Nations and NRCAN regarding long-term management of nuclear fuel waste; and
4. Facilitate First Nations engagement on the issue of nuclear fuel waste management within the broader Canadian society.

Working within the timelines created by the *Nuclear Fuel Waste Act*, which requires industry to recommend a preferred management approach by November 15, 2005, the AFN developed a dialogue program which began actively engaging First Nations in the summer of 2004. To date, the Regional Dialogue Coordinators have conducted 4 regional forums and approximately 75 dialogues with First Nations. Direction and support for their work came from the Dialogue Manager, Environmental Stewardship Director, Regional Chiefs' Committee on Environmental Stewardship and the Nuclear Dialogue Working Group.

The following activities were planned and carried out as part of the dialogue program.

1. Regional Dialogue Coordinator

Four Regional Dialogue Coordinators (Quebec and Atlantic, Southern Ontario, Northern Ontario, and Prairies and Northern) have traveled extensively within their respective areas, meeting with First Nation communities and organizations to carry out the dialogue and will continue to do so until the end of November 2005. In addition, there have been information booths at large First Nations gatherings, for example, the AFN Annual General Assemblies and Confederacy of Nations meetings.

2. Regional Fora
Regional fora were larger meetings where interested First Nations community representatives or individuals came together to discuss the management of nuclear fuel waste and how it might affect their territory.
3. Nuclear Waste Working Group
The First Nations Nuclear Waste Working Group is a small group of First Nation regional representatives participating in their individual capacity who met following the release of milestone documents by the NWMO. The Working Group reviewed the documents, highlighted deficiencies and summarized key findings in a report. These reports were distributed to First Nations and sent to the NWMO.
4. First Nations Video "*Our land, Our choice*"
A video from a First Nations perspective has been created which explains what is happening with Canada's nuclear fuel waste management and the possible implications for First Nations. This video includes interviews with National Chief Phil Fontaine, scientist and world renowned environmentalist David Suzuki, various experts, and concerned First Nation individuals. Copies are available from the AFN and have been distributed by the Regional Nuclear Dialogue Coordinators at various meetings. It is available in English, Ojibwe and Plains Cree and is in the process of being translated into French.
5. First Nations Art Contest
The AFN had a nation wide art contest to promote youth awareness and involvement. The AFN received over 70 entries from First Nations' youth across Canada. The winner's artwork can be viewed on the AFN website.

Issues and Recommendations

The AFN has pulled together the numerous comments we received from First Nations during the course of the nuclear fuel waste management dialogue. These have been summarized for consideration by the NWMO below. Some general comments are provided first and more specific issues raised following these.

The NWMO dialogue process has not provided adequate time for First Nations to review and comment on the initial options proposed for study and certainly not sufficient time to examine and reflect upon the Draft Study Report made public on May 24, 2005 and closed for comment on August 31, 2005. It must be noted that there are 633 First Nation communities and approximately 269 of these are in the four provinces of focus. Although the AFN made its best efforts to reach out to all communities, it must be noted that most First Nations lack capacity and resources to participate and to be fully engaged on this critical issue.

While First Nations had many concerns, no First Nation individual, group, or organization has indicated support for any of the proposed options for nuclear fuel waste management. First Nations have advised us that they are seeking full and effective consultation on this matter and that they do not consider the dialogue process to be adequate for this purpose. First Nations have also advised us that they need adequate capacity to comment on this matter and are seeking further capacity building in order to allow them to participate effectively in decision making.

Further, First Nations are requesting information on plans for monitoring nuclear plants, addressing health impacts from nuclear industry activities, and emergency response to potential nuclear accidents, including plans for capacity to First Nation communities to respond. First Nations are seeking a review of the entire nuclear industry chain, from mining uranium to nuclear energy development and to disposal of low, intermediate and high level waste. We are not convinced that these short comings will be resolved in NWMO's final report due November 15, 2005.

Issue # 1: Aboriginal & Treaty Rights

The Supreme Court of Canada has confirmed that the prior occupation of First Nations as sovereign organized societies on the land entitles them to pre-existing rights. These rights are recognized in section 35 of the *Constitution Act, 1982*. These rights include the right to hunt and fish in our traditional territories, to practice our religion, and to pursue our traditional ways of life. Aboriginal and treaty rights are of paramount importance for First Nations, as it is only through the vigorous protection of these rights that First Nations can expect to survive as distinct cultures into the future. First Nations expressed time and again their concern about the lack of respect for their Aboriginal and treaty rights that was evident in the development of nuclear energy in Canada and the consequences of nuclear waste. The transportation and disposal of nuclear fuel waste on the land has the potential to cause devastating damage, impacting our capacity to pursue our traditions including our Aboriginal and treaty rights to hunt, trap, and fish, to practice our religions, and sustain our traditional knowledge and languages.

The issue of respect for First Nation peoples must be addressed in an atmosphere of greater trust. In the current climate, as a result of long standing conflicts, First Nations feel great distrust toward the federal government. The AFN raised this issue as a concern during its submission to the Parliamentary Standing Committee during its review of the legislation. First Nations are not convinced that the NWMO is the most suitable organization to be conducting public dialogue or making recommendations to the Canadian Government because they are comprised of nuclear energy producers. Protestations to the contrary are not convincing in this climate of mistrust.

First Nations also expressed concern that their lands would be targeted for a nuclear waste management facility. According to NWMO, there are references to the need to site the facilities away from large population concentrations and that "remote" sites might be preferred. Many First Nation communities are located in these so-called "remote" areas. They are concerned that as their lands are considered "remote" that they would be targeted for hosting the facility and required to pay a heavy cost, socially, economically, culturally, and spiritually. First Nations have benefited little from the development of the nuclear industry in Canada and see little advantage from locating a nuclear fuel waste disposal site in their territory. Some First Nations expressed concern that their need for economic opportunities could be manipulated to facilitate an otherwise unwelcome decision.

In addition, First Nations are concerned that a decision made by their neighbouring communities to volunteer to host a waste management facility could have a detrimental impact on their Aboriginal and treaty rights. First Nations have their own autonomous governments, and therefore any development activity, nuclear related or not, must be done in full partnership and

consultation with First Nations. Conversely, a decision by a First Nation to host a facility would have to consider the impacts on their non-Aboriginal neighbours. Government to government dialogue is required to ensure that First Nations' rights and interests are fully respected and protected through out this process.

Recommendation:

Recognition of Aboriginal and treaty rights must be respected throughout the nuclear waste disposal dialogue process. This includes NWMO's recommendation to government and any subsequent implementation of activities approved by the Canadian Government.

The federal government must work to rebuild trust in First Nation communities.

Government to government relations are required to ensure that First Nations are fully involved in the decision making process so that their rights and interests are fully respected and protected.

Issue #2: Fiduciary Responsibility

The Crown has a special responsibility to First Nations borne from a fiduciary relationship. The Supreme Court of Canada has outlined the parameters of this fiduciary relationship and affirmed that the Crown has a legal responsibility to consult First Nations when their lands and waters are being affected. The federal government has a fiduciary obligation to protect the interests of First Nations, including from the impact of nuclear waste disposal on our Aboriginal and treaty rights. Thus far, the federal government has been silent on how they plan to meet its fiduciary obligation. The current process to discuss the disposal of Canada's nuclear waste does not address how the Crown will fulfill its legal responsibility to First Nations in this regard. The NWMO is not an agent of the Crown and therefore cannot fulfill the Crown's fiduciary obligations to First Nations.

Recommendation:

To uphold the honour of the Crown, the federal government must fulfill its fiduciary responsibility to First Nations concerning the effects that the disposal of nuclear waste may have on the enjoyment of our Aboriginal and treaty rights.

Issue # 3: Consultation

Part of the federal government's fiduciary obligation is the Crown's specific obligation to consult with First Nations when there is a potential for impairment of our Aboriginal and treaty rights. The federal government has not shown to date on how and when it proposes to consult with First Nations about the three options being studied by the NWMO. First Nations are concerned that the NWMO will table its report and the federal government will proceed with a decision on which option to pursue without conducting a consultation with the First Nations.

The AFN has held all along that the process in which it has engaged is a dialogue and not a consultation. The Supreme Court of Canada in decisions such as *Guerin*, *Sparrow* and *Delgamuukw* have made it clear that the federal government, as part of its fiduciary duty to First Nations, is obliged to consult with First Nations when their interests are affected. There continues to be considerable disagreement and misunderstanding between First Nations and the federal government regarding the form and content of consultations. To avoid any possible future misunderstandings the AFN made it clear to the federal government, the NWMO and to First Nations that our work under this program does not represent consultation, despite the reference in subsection 12(7) of Act that the NWMO “shall consult the general public, and in particular aboriginal peoples, on each of the proposed approaches”. First Nations expressed concern time and again throughout the process that this dialogue would be taken to constitute consultation. It is the opinion of the AFN that the federal government holds the obligation to consult and that this obligation cannot be delegated to non government organizations such as the NWMO.

The process outlined by the *Nuclear Fuel Waste Act* states in Section 12(6)(d) that a plan for consultations must be provided by the NWMO with its final recommendation to government. As noted above, the AFN does not consider the dialogue conducted by NWMO to date to constitute consultation, and therefore has not fulfilled the federal government’s obligation to consult on the three initial options. This will be a crucial phase for First Nations and must be dealt with properly to uphold the honour of the Crown. If the Governor in Council proceeds with the recommendations proposed by NWMO in its report, without first consulting with the First Nations on this matter, it is our opinion that the honour of the Crown will be brought into disrepute. The *First Nations – Federal Crown Political Accord* signed by the Government of Canada and the AFN in May 2005, acknowledges that,

...cooperation will be a cornerstone for partnership between Canada and First Nations. This requires honorable processes of negotiations and respect for requirements for consultation, accommodation, justification and First Nations’ consent as may be appropriate to the circumstances. Upholding the honour of the Crown is always at stake in the Crown’s dealings with First Nations peoples.

Government to government discussions on the proposed options are required prior to a decision to move forward on a recommendation from NWMO. The federal government needs to conduct full and effective consultations with First Nations, provide adequate funds for capacity building, ensure reasonable timeframes for discussion, and adequate involvement in decision making. Furthermore, in honouring the *Political Accord* and addressing the First Nations’ interests, it is essential that NRCan in collaboration with NWMO provide the necessary support to conduct further research and provide support to First Nations’ driven research into the long term management of nuclear waste including potential impacts on vulnerable aquifers.

Although the AFN has been able to meet with a significant number of First Nation communities, further efforts are required to bring this issue to the attention of all First Nations and gather their views. In particular, efforts must be made to include Elders, youth, and women. The Elders are concerned about the future based on their traditional knowledge, the youth are concerned with living with the legacy of nuclear waste disposal, and women are concerned about protecting the

water for all people and the environment as this is their traditional role. In order that all First Nations views and concerns are heard and addressed, all First Nations community members must be involved. There has been an indication that the First Nations dialogue needs to be conducted at a regional and local level and AFN will continue to support regional initiatives in this regard.

Further, the AFN rejects any proposal that takes a pan-aboriginal approach to issues of concern. First Nations, Inuit and Métis peoples are distinct and their unique circumstances must be reflected in process. There are cultural, political, legal and historical differences between these three groups of peoples that need to be respected.

In response to Resolution #39/2005 adopted during its Annual General Assembly in Yellowknife, July 2005 the AFN has written to the Minister of Natural Resources Canada, seeking an extension of time to review the proposed options and make suggestions for improved consideration of First Nation peoples' interests.

Recommendation:

The federal government must conduct its own consultations with First Nations on the three proposed options prior to taking any further action on this matter. This must include adequate capacity and time for discussion and involve Elders, youth and women.

Further dialogue and discussion is required at the regional and local level to facilitate full informed consent on the choice of site for nuclear waste disposal facilities.

The distinct circumstances of First Nations must be reflected in any final decisions.

Issue #4: Traditional Knowledge

The recognition of Traditional Knowledge (TK) by the NWMO is a positive step. However, First Nations have expressed concerns about the NWMO's understanding of TK and whether it is being shown proper respect. TK is comparable to modern western science and is worthy of full and appropriate consideration. The AFN has concerns that TK is not being properly incorporated and is in danger of being trivialized in this process.

For example, the NWMO has expressed an interest in the First Nations' philosophy that requires decision makers to consider the impacts of their decisions seven generations hence. The use of the seven generations teaching in this manner overlooks the fact that disposing nuclear fuel waste will continue beyond seven generations. The decisions we make today will impact the future.

From a First Nations' perspective the environment must be considered holistically, as opposed to segregating parts of it into dispensable units that are somehow unconnected to the rest of the environment. In this regard, First Nations were reluctant to confine their considerations to the issue of nuclear waste disposal, but wish to discuss all issues related to nuclear development, from mining, to energy policy, to nuclear armaments.

Although the NWMO claims to have listened to the lessons that TK holds, the AFN is concerned that the NWMO has been selective in its use of TK. To cite with favour the seven generations teachings while at the same time promoting nuclear energy is inconsistent at best and at worst denigrates and belittles the value of TK and First Nations' cultures, beliefs, and spiritual understandings.

Recommendation:

The NWMO should not attempt to use TK unless it has given Aboriginal representatives the opportunity to review the usage and interpretation of that knowledge, to ensure that it is being used in the spirit of those teachings.

Issue # 5: Capacity

Capacity to meaningfully engage in the dialogue and decision making process was highlighted again and again. First Nations expressed their concern that they did not know enough about nuclear waste management to make a fully informed decision on the issue. First Nations are seeking independent First Nations research and data collection on the effects of nuclear development. This includes research on the entire nuclear energy chain, not just waste management. Part of this is a question of trust, as the First Nations were very clear that they did not trust the information supplied by the NWMO and felt that it contained a strong pro-industry bias.

Independent data collection and scientific expertise were identified as a necessary complement to TK and stories of prior First Nation involvement with the nuclear fuel chain across Canada. First Nations also expressed interest in learning more about the experiences of Indigenous peoples outside of Canada with respect to the nuclear industry.

Recommendation:

NWMO should conduct further research and provide support to First Nations' driven research into the long term management of nuclear waste, particularly with respect to issues of concern to First Nations.

First Nations must have the independent resources to evaluate the necessary information to make informed decisions on the issues surrounding the long-term management of nuclear fuel waste.

Issue # 6: Energy

The need for more renewable energy and intensive energy conservation programs was a concern raised by many First Nations in this dialogue process. First Nations expressed strong support for the development of alternative energy sources and the adoption of energy conservative measures. First Nations are deeply concerned about the issue of climate change. While they appreciate that nuclear energy does not contribute to greenhouse gas emissions they recognize that other dangers associated with nuclear energy may outweigh this particular benefit.

Recommendation:

The Government of Canada should promote, and provinces should be encouraged to support, the development of alternative energy sources.

This includes providing capacity and resources to assist First Nations to develop renewable sources of energy to serve their communities.

Issue # 7: Low & Intermediate Waste

Throughout this dialogue process First Nations felt strongly that it was necessary to examine all aspects of the nuclear energy chain. This is reflective of First Nations' holistic perspective. Many communities, including those in Saskatchewan, Ontario, Quebec and New Brunswick are impacted by elements of the nuclear energy chain, whether as a result of uranium mining, research laboratories or nuclear plants in their territories. Some of these communities have experienced first hand the results of improper nuclear material management. First Nations have heard the stories of the "village of widows" where two generations of First Nations men were employed to haul radioactive material in burlap sacks on their backs or clean up old uranium mine sites with little more protection than gloves and a surgical mask. First Nations are not content to limit their consideration of this issue only to the disposal of high level nuclear waste.

Recommendation:

NWMO must examine all aspects of the nuclear energy chain, including low and intermediate waste, and provide a clear understanding of the impacts the whole nuclear process has on First Nations quality of life.

Issue #8: Importation of Waste

Throughout the dialogue process First Nations have expressed concern that Canada may decide to import nuclear waste from other countries. First Nations feel that this should be explicitly banned under federal legislation. There is concern that if Canada were to find a "solution" to the problem of managing nuclear fuel waste that this may open the door, for example, under the *North American Free Trade Act*, to accept other countries' nuclear waste. Given industry's apparent predilection for "remote areas" for deep geological disposal, this added concern that Canada could become host to an international repository for nuclear fuel waste given its 'sparsely' populated land mass. This sparse, remote area is inhabited by First Nations communities and is their traditional territory.

Recommendation:

Canada should pass legislation specifically banning the importation of nuclear waste.

Issue #9: Emergency Response

First Nations have expressed a great deal of concern over the transportation of nuclear fuel waste. Key issues included appropriate communication and internal First Nations' capacity to respond to emergency situations. Before any transportation of nuclear waste occurs through their communities and traditional territories, First Nations insist they be informed well in advance and have sufficient internal capacity to address any possible accidents. First Nations suggest that responsibility must lay with the producers and transporters of nuclear fuel waste to train, equip and maintain emergency response capacity within communities along transportation routes. First Nations cannot rely on external groups to do this because of slow response times and jurisdictional issues involved.

Recommendation:

NWMO and the federal government must present plans for monitoring the transportation of nuclear waste, including an emergency response system.

Resources, including training and proper equipment must be made available to First Nations to respond to potential nuclear accidents.

Issue #10: Timeline

First Nations have repeatedly stated that the timelines laid out in the *Nuclear Fuel Waste Act* are insufficient for First Nations to properly engage on the issue. Developing the necessary capacity, communications and development of strategy on a complex issue such as nuclear fuel waste management, can not be rushed if it is to be considered a legitimate process. The Seaborn Panel, for example, took nearly 10 years to complete its review of the AECL deep geological concept. Yet under the *Nuclear Fuel Waste Act* the NWMO has three years to review three disposal/storage concepts and provide detailed recommendations on how to proceed.

The NWMO provided a timeline of three months to comment on the Draft Study Report, including the new option of the adaptive phase management approach it promotes in the Draft Study Report. The time available to comment on the document was extremely short and there was insufficient time to receive feedback from the First Nations. The Working Group assisting the AFN's nuclear dialogue in its work on this issue recommended against commenting on the Draft Study Report, out of concern that the comments would be deemed to be evidence of the adequacy of the time available for comment. The First Nation comments on the Draft Study Report, that the NWMO is seeking, would have been minimal and in no way would constitute a full First Nation engagement and opinion on the fourth option.

As per Resolution 39/2005, the AFN has sought an extension of time from the Minister of NRCan before finalizing the report from the NWMO to allow for full consultation by the Federal Government on the issues under discussion.

Recommendation:

First Nations must have sufficient time to study the issue and develop the necessary positions, regardless of timelines imposed by the *Nuclear Fuel Waste Act*.

Conclusion

The Assembly of First Nations has been involved in conducting a dialogue for First Nations across Canada on the issue of nuclear fuel waste management. The comments have been compiled and recommendations have been extracted from hundreds of hours of dialogue with First Nation peoples on this topic.

First Nations have not yet made a final decision on the issue of nuclear fuel waste disposal. We still have many questions. We recognize the importance of this issue and will continue to seek a solution to this challenge that is fair to the current generation and to the many generations that will follow.

One of the most fundamental teachings of First Nations is the obligation to care for the earth. It is a firmly held belief by First Nations that they are entitled to be sustained and to prosper from the lands and resources given to them by the Creator, but that they also hold sacred responsibilities to care for the earth in a responsible manner. First Nations continually expressed concern about the impact of the nuclear industry on the land and all people. Our greatest concern is to ensure the long term sustainability of the land, as it is our deep and abiding connection to the land that holds our future.