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February 4, 2021

Mayor and Council
21 Gordon Street E.
Teeswater, ON N0G 2S0

Sent via email to: clerk@southbruce.ca

Dear Mayor and Council,

Re: Proposed Deep Geological Repository

Donnelly Law (“we” or the “Firm”) represents Protect Our Waterways – No Nuclear Waste (“Protect Our Waterways” or the “Client”). The Nuclear Waste Management Organization (“NWMO”) has secured just over 1,500 acres north of Teeswater, Ontario for a deep geological repository (“DGR”) to store 5 million, high level nuclear fuel bundles. According to the NWMO, the DGR facility will require 250 acres for “facilities on the surface,”¹ about the area of 125 CFL football fields.

Our Client secured legal and planning opinions that state The Municipality of South Bruce (“South Bruce”) is legally obliged to obtain *Planning Act* applications from NWMO for at least some of these surface “facilities.” It is our opinion NWMO should undertake a planning exercise pursuant to adopting the DGR in your Official Plan.

In addition, NWMO pledges to locate a DGR only in a “willing host” community, to be “supported by a compelling demonstration of willingness.” South Bruce Council embraced this principle but hasn’t committed to a process to establish the threshold of support.

We write to pose two critical questions: **Question #1: Will Council commit to the *Planning Act* approval process? Question #2: Will South Bruce confirm a**

¹ <https://www.nwmo.ca/en/More-information/News-and-Activities/2020/10/13/18/57/The-NWMO-continues-progress-with-landowners-in-South-Bruce>

“compelling” demonstration of willingness to host a DGR as a binding referendum, requiring a two-thirds majority?

Willing Host Determination

On January 20, 2021, Protect Our Waterways convened a well-attended virtual public meeting to discuss the process established by the Municipality of South Bruce (“South Bruce”) to determine the acceptability of the proposed DGR. In addition, a recent poll of residents confirmed 64% oppose the DGR, with only 16% approving. More than 1500 residents of South Bruce and more than 11,700 residents of Ontario have signed a petition to oppose hosting a DGR in South Bruce.

According to South Bruce’s Community Liaison Committee website, “Our intention is not to promote Canada’s plan for the long-term management of used nuclear fuel.”² Protect Our Waterways is concerned that in fact, the CLC webpage has been used to promote DGR. Now that the site is undergoing a refresh, will Council meet with our Client to discuss the work of the CLC and communications before the site re-emerges?

Community members have repeatedly made the point that Council is not being transparent regarding how it will establish whether the community is a willing host, particularly in light of the fact it is obvious a majority of residents do not want the DGR.

Peer Review and Participant Funding

The NWMO site selection process is designed to address a broad range of technical, social, economic and cultural factors. During step 4, detailed site evaluations are to be completed for the candidate sites.

Peer reviews are an important aspect of any major planning study or significant undertaking such as the NWMO’s Site Selection Process. Peer reviews provide an opportunity to evaluate the work of one or more people with similar competencies as the producers of the work (peers) and are used to maintain quality standards, improve performance, and provide credibility. Peer reviews function as a form of self-regulation by qualified members of a profession within the relevant field.

² <https://clcinfo.ca/southbruce/>

The Municipality of South Bruce does not have the Staff or financial resources to undertake peer reviews of the NWMO reports. Nor does the Municipality have the financial resources to retain experts to conduct peer reviews.

The funding of peer reviews is normally provided by the proponent of a major planning study or significant undertaking. In many jurisdictions funding of peer reviews is a requirement of a *Planning Act* application e.g. Windsor, London, Burlington, Oakville, etc.

Residents have lost confidence in the Municipality of South Bruce to remain detached from the DGR promotion campaign and to remain neutral. It is essential that independent peer review be conducted by experts chosen by Protect Our Waterways, free from close associations with the nuclear industry.

The Government of Canada claims to offer 3 different funding programs for participants in the impact assessment process. There are three traditional grounds that support federal regulation of some aspects of nuclear energy. First, that federal legislation has declared nuclear energy to be a “work” for the general advantage of Canada under s. 92(10)(c) of the *Constitution Act, 1867*; second, the power over nuclear energy falls under the general power for “peace, order and good government” set out in the preamble to s.91 of the *Constitution Act, 1867*; and third, that it falls under matters of national defense. Although not the subject of this opinion, it seems obvious that some aspects of a DGR approval are a federal jurisdiction, begging the question why a municipality is being cast in a quasi-approval role?

Regardless of the source of funds, it is our respectful submission that the Municipality of South Bruce must:

- i. update its fees by-law to require cost recovery for peer reviews as part of any future *Planning Act* application(s); and/or
- ii. require NWMO to provide the municipality and residents with funding for peer reviews; and
- iii. For the studies to be undertaken by the municipality, experts bidding on the studies should not be permitted to apply for future work on the project.

The Municipality should refuse to be a “willing host” community if NWMO declines to fund the peer review work, whether conducted by the municipality or concerned residents.

Planning Act - Legal Opinion

The law of Canada has evolved considerably regarding municipal regulation of traditionally federal facilities like airports, ports and nuclear power plants.

The question of overlapping jurisdiction has been addressed in several court decisions involving the predecessor to the Hamilton Port Authority and the City of Hamilton (5) (*Hamilton Harbour Commissioners v City of Hamilton*). The trial level decision was issued in 1976 and the Court of Appeal handed down its decision in 1978. The Court of Appeal endorsed the following portions of the trial level decision:

In my opinion, land-use control within a harbour has both provincial and federal aspects. I conclude that the City pursuant to s. 35 of the Planning Act may validly pass a zoning by-law affecting land use within the harbour so long as it does not explicitly attempt to prohibit or regulate the use of land for purposes related to navigation and shipping [emphasis added].

Based on the above, it is clear that municipal zoning is applicable to the DGR proposal provided any zoning regulations do not affect or impair the core of the federal power to license and regulate the use for a nuclear waste repository or create an operational conflict with federal laws.

Similarly, other municipal regulations and requirements beyond municipal zoning may also be applicable. Site alteration permits, grading and drainage permits, driveway entrance permits and site plan approval are examples of some of the municipal requirements that could be applicable.

The South Bruce Zoning By-law 2011-63 does not authorize a nuclear waste repository in the Municipality. A nuclear waste repository is not a service or utility referenced in subsection 3.1.1 (i) or (ii) nor is the NWMO considered an agency or department of the Federal Government.

Municipality of South Bruce Zoning By-law 2011- 63 also includes the following additional provision for public uses, buildings and/or structures:

3.2 PUBLIC USES, BUILDINGS AND/OR STRUCTURES

Despite Section 3.1.1, the erection of any building or structure designed for use as an office, storage or other uses, and the use of land for outside storage, by the Corporation; any telephone, cable or communications utility company; any agency or department of the Federal, Provincial or

County Government; any company holding a Provincial license to transport or distribute natural gas; an electric service provider; a railway company and any local or County Board or Commission must conform to the provisions of this By-law.

The Public uses provision from South Bruce Zoning By-law 2011-63 does not authorize a nuclear waste repository in the Municipality. Rather, this section requires any use, building or structure to conform to the provisions of the zoning by-law.

Both the Bruce Nuclear Power Development and Darlington Nuclear Power Plant are governed in part by the *Planning Act*. What this means in layman's terms is that NWMO should apply under the *Planning Act* for amendments to the South Bruce Zoning By-law. The primary benefit of this regulation would be the opportunity for the public to participate in a transparent process.

Conclusion

It is our respectful submission that South Bruce must require certain DGR facilities to comply with the provisions of the South Bruce Zoning-By-laws and *Planning Act*.

In addition, the site selection process does not currently enjoy public confidence. For this reason, Protect Our Waterways is seeking an immediate commitment to Participant Funding for the purpose of completing peer review of select technical studies.

Finally, Protect Our Waterways requests an immediate answer from Council: will it commit to a binding referendum, with a "compelling" willingness to host a DGR to be set at two-thirds (66%) majority vote?

Please do not hesitate to contact me at 416-572-0464, or by email to david@donnellylaw.ca, cc'ing alexandra@donnellylaw.ca and morgan@donnellylaw.ca should you have any questions or concerns.

Yours Truly,



David R. Donnelly

cc. Client