GREENPEACE

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

CFRE

November 19, 2008

Sent Via Mail and Electronic Mail

Darlington New Nuclear Power Plant Project
Canadian Environmental Assessment Agency
160 Elgin Street, Ottawa, Ontario K1A 0H3
E-mail: Darlington.Review@ceaa-acee.gc.ca

Dear Sir or Madam:

Re: Draft Agreement to Establish a Joint Review Panel for the New Nuclear Power Plant Project by Ontario Power Generation (Darlington) within the Municipality of Durham, Ontario (CEAR Reference Number 07-05-29525)

Please find enclosed comments in regard to the draft Agreement to Establish a Joint Review Panel for the New Nuclear Power Plant Project by Ontario Power Generation (Darlington) within the Municipality of Durham, Ontario (CEAR reference number 07-05-25738). These comments are submitted on behalf of the Canadian Environmental Law Association, Greenpeace, and Citizens for Renewable Energy.

Yours truly,

Theresa McClenaghan
Executive Director and Counsel, Canadian Environmental Law Association

Shawn-Patrick Stensil
Energy Campaigner, Greenpeace Canada

"Ziggy Kleinau"
Citizens for Renewable Energy, Co-ordinator

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

November 19, 2008

Sent Via Mail and Electronic Mail

Darlington New Nuclear Power Plant Project
Canadian Environmental Assessment Agency
160 Elgin Street, Ottawa, Ontario K1A 0H3
E-mail: Darlington.Review@ceaa-acee.gc.ca

RE: Comments on the Draft Agreement to Establish a Joint Review Panel for the New Nuclear Power Plant Project by Ontario Power Generation (Darlington) within the Municipality of Durham, Ontario (CEAR Reference Number 07-05-29525)

I. INTRODUCTION

The draft Agreement to Establish a Joint Review Panel for the New Nuclear Power Plant Project by Ontario Power Generation (Darlington) within the Municipality of Durham, Ontario ("draft JRPA") suffers from three main categories of problems: (1) panel membership, (2) potentially inadequate procedural rights, and (3) inadequate terms of reference.

To begin, we wish to be clear that due to our concerns about independence and public perception of bias, we feel it is inappropriate for members of the Canadian Nuclear Safety Commission ("CNSC") to sit on the Joint Review Panel ("JRP"). Additionally, the draft JRPA provides the President of the CNSC with almost complete control over the appointment of members to the JRP. The Minister of the Environment should be given more control in this respect, so as to ensure that the members of the Panel are experienced and knowledgeable regarding the environmental impacts of nuclear developments, and that they are unbiased and independent in their approach the Review process. The Minister should, at a minimum, be granted the power to appoint the Chairperson and at least one other member of the JRP without first having to get the approval of the President of the CNSC.

Of fundamental importance to the effectiveness and legitimacy of the JRP Hearings is the need for individuals and groups to be accorded sufficient procedural rights, so as to ensure full, meaningful, and comprehensive public involvement in the Hearing process.

Because of the serious and direct impact the JRP's Report will have on the interests of those involved in the JRP Hearings, stringent procedural rights must be accorded. Means by which procedural rights can be adequately provided for include: (a) requiring the JRP to consult the public prior to finalizing its directions on procedure, rather than making such consultation optional, (b) authorizing cross-examination of witnesses by parties, participants, and/or intervenors, and (c) and abstaining from establishing time limits on presentations to the JRP.

Our third main area of concern – the inadequacy of the draft Terms of Reference for the Review ("draft TOR") – encompasses what we see as a number of substantial problems. First of all, as with the draft Environmental Impact Statement Guidelines ("draft EIS Guidelines"), the draft JRPA contains a project description which lacks a significant amount of information that is central to the full and precautionary assessment of the environmental and health effects of the New Nuclear Power Plant Project by Ontario Power Generation (Darlington) within the Municipality of Durham, Ontario ("the Project"). The draft TOR should be re-written and released for public consultation once it contains the information outlined below, which is presently lacking.

The flaws in the present project description render public consultation on scoping at this point meaningless. Furthermore, the public consultation on the scope of the Project for the purposes of the EA has to-date been inadequate, because insufficient time has been provided and no public meetings have been held specifically on scoping.

We also have serious concerns about the proposed scope of the Environmental Assessment ("EA"). Specifically, we believe it is necessary for Part IV of the draft TOR to explicitly require Ontario Power Generation ("OPG") to: describe the need for and purpose of the project in terms of the public interest; examine non-electricity producing alternatives to the project such as demand management; examine alternatives, even if they may conflict with provincial energy policy; and assess alternatives, even if they are outside of OPG's control. These concerns are more fully discussed in the submissions of Greenpeace in regard to the draft EIS Guidelines for the Project.

Underlying all of the above-noted problems are our concerns with regard to the failure of the draft EIS Guidelines and the draft JRPA to comply with the applicable principles of international environmental law. The Review process for the Project must be in accordance with Canada's international law duty to prevent transboundary environmental harm. The approach taken must also (1) be in accordance with the precautionary principle; (2) include a focus on the sustainability of the proposed development; (3) demonstrate respect for the principle of intergenerational equity; and (4) include consideration of the ecosystem approach. These international legal principles are outlined in further detail in the submissions below.

II. PANEL MEMBERSHIP CONCERNS

Pursuant to the *Canadian Environmental Assessment Act* ("CEAA"), mediation or assessment by Panel is the highest level of EA. The determination as to whether a Review by a Panel is necessary is based upon considerations of the level of public concern regarding the development, and whether or not a given project, taking into account appropriate mitigation measures, may cause significant adverse environmental effects.

For these projects, the CEAA sets out a process designed to ensure that Panel members are unbiased and knowledgeable about the potential adverse environmental effects of the project, and which is aimed at guaranteeing meaningful public consultation throughout the Review process. In the present instance, the JRP membership should not include members of the CNSC. At the very least, the Minister of the Environment should have more control over the composition of the JRP than is presently provided for.

A. MEMBERSHIP

The draft JRPA is unacceptable. As written, it grants so much power and control to the CNSC that it seems to amount to a delegation or fettering, or even an abdication of the Minister's legal obligations under the CEAA. In order for a panel to engage in a far-reaching environmental assessment process, the panel members must have a willingness and a freedom to consider impacts and scenarios that go far beyond the licensing criteria of a facility as laid down under CNSC regulations. It is therefore inappropriate for the JRPA to be so composed of members of the CNSC and for the composition of the Panel to be determined largely by the CNSC President.

Moreover, the independence of the Panel members from the proponent is an essential requirement for a credible and a creditable EA. Over the years, members of the CNSC have developed a close working relationship with OPG and other licensees, to the point that it may be difficult or impossible for such individuals to have the objectivity and freshness required for a full and complete EA of the Project. Even if this could be accomplished, there would be a public perception that the Panel members are not sufficiently independent from the nuclear industry in general, and from the proponent in particular.

This public perception of bias on the part of the CNSC has recently been reinforced by such events as: (1) the firing of the previous President of the CNSC for what many people believe, rightly or wrongly, was her application of reactor safety standards of the CNSC in too rigorous a fashion; (2) a recent internal report, commissioned by the CNSC, which criticizes the CNSC for being closer and cozier with licensees than with the CNSC's true clientele – namely, the representatives of the communities potentially affected by licensed facilities.; and (3) a recent presentation by the CNSC President to the Canadian Nuclear Society which incorporated the promotional concepts (such as "nuclear renaissance") and the energy demand analyses espoused by nuclear proponents in order to justify the rapid expansion of new nuclear facilities in the near future. People do not

expect this kind of presentation from a non-proponent, especially from the head of a regulatory agency whose sole purpose under the *Nuclear Safety and Control Act* ("NSCA") is to safeguard the health and safety of Canadians and the environment, and to see that Canada's international obligations in the nuclear field are being respected.

Upon reflection, we feel that it is inappropriate for any members of the JRP to be members of the CNSC, because of the very real possibility of a conflict of interest. During the Hearings of the Seaborn Environmental Assessment Panel (which operated under the Environmental Assessment and Review Process Guidelines Order, now superceded by the CEAA), the Atomic Energy Control Board – the precursor to the CNSC – was one of the bodies that was summoned before the panel to testify. Important questions were raised by panel members and by intervenors on the existence and/or adequacy of regulations and expertise available to the regulator to deal with environmental impact scenarios under investigation.

The EA process, as envisaged under the CEAA, is fundamentally different than that involved in licensing a facility. The former requires a wide-ranging holistic approach, envisaging many scenarios and contingencies that are not necessarily reflected in licensing criteria. If the JRP attempts to do both at once – i.e. licensing and assessing – the result could be quite unsatisfactory.

Recommendation #1: None of the members of the Joint Review Panel should be members of the CNSC.

B. APPOINTMENT

1. Erosion of the Minister's Powers

Independence and impartiality are fundamentally important qualities that an administrative decision-maker must possess, especially in circumstances such as the present JRP Hearings, where the outcome of the proceedings will have a profound impact on the rights of the public.

Part 4.2.1 of the Guidance document entitled *Procedures for an Assessment by a Review Panel* states as follows with regard to the selection of review panel members under s.33 of the CEAA:

> 4.2.1 The Agency shall identify candidates for appointment to review panels in consideration of the criteria stated in s. 33(1)(a) of the Act. Persons appointed will normally be chosen from outside the public service, shall be unbiased, free from any conflict of interest relative to the project and shall have knowledge or experience relevant to the anticipated environmental effects of the project. [s. 33(1)(a)(i)]

There is no reason to believe that these characteristics are any less important in the context of JRPs than they are for review panels provided for under s.33 of the CEAA.

Indeed, part 1.2 of the *Procedures for an Assessment by a Review Panel* document states that the Agency is to consider the procedures outlined in that document along with the requirements of s.41 of the CEAA in the context of JRPs.

The requirement governing the appointment of JRP members under s.41 of the CEAA is as follows:

> (*a*) the Minister shall appoint or approve the appointment of the chairperson or appoint a co-chairperson, and shall appoint at least one other member of the panel…

Pursuant to the draft JRPA, the JRP will also constitute a Panel of the CNSC. That is, for all intents and purposes, the JRP and the Responsible Authority ("RA") for the Project will be one and the same. Two of the Panel's members are to be appointed by the CNSC with the "approval" of the Minister of the Environment. The third member is to be "proposed" by the Minister of the Environment to the President of the CNSC. Only if the appointee meets the President's satisfaction will he then approve this candidate, recommending to the Minister of Natural Resources he or she be recommend to the Governor General for appointment as a temporary member of the Commission.

The Minister of the Environment's s.41(1)(a) powers have thus been eroded. The Minister can only approve the CNSC's appointment of two panel members and propose one member of the Panel to the President of the CNSC. Ultimately, the President of the CNSC retains control over the identity of all three JRP members.

Through the process set out in Part 3 of the draft JRPA, the appointment powers intended by Parliament to be retained by the Minister of the Environment in order to ensure the unbiased, independent character of the members of the JRP have been eroded so extensively as to render them meaningless. The Minister's power to ensure members have experience regarding the environmental effects of the Project is important, and has also been compromised by giving complete control to the CNSC.

Giving the RA the power not only to control the composition of the JRP, but to stack the JRP with its own members – or temporary members, at best – is contrary to the intent behind s.40 of the CEAA. The JRP is supposed to be a joint body established by the Minister of the Environment and a "jurisdiction". The present JRP is merely a panel of the CNSC, and is thus indistinguishable from the Project's RA.

Recommendation #2: The Minister of the Environment should be given more control over the composition of the Joint Review Panel. At a minimum, the Minister should be granted the power to appoint the Chairperson and at least one other member of the JRP without first having to get the approval of the President of the CNSC.

2. Potential Bias and Conflict of Interest

Though the "unbiased and free of any conflict of interest" language from ss.41(b) of the CEAA is contained in Part 3.5 of the draft JRPA, more must be done to ensure that this substantive requirement is met. First and foremost, the members of the JRP should not be members of the CNSC. Furthermore, the Minister of the Environment must retain the control over appointment which Parliament envisioned in enacting s.41 of the CEAA, and must appoint individuals who will not approach the Review with a pro-nuclear bias. Given the concerns expressed above with regard to the JRP constituting a panel of the CNSC, this requirement has been compromised.

As mentioned above, the *Procedures for an Assessment by a Review Panel* Guideline issued in 1997 is to be considered by the CEA Agency, along with the requirements set out in s.41 of the CEAA, in its discussions with non-federal jurisdictions in the case of joint reviews. The vision expressed in Part 4.2.4 of this Guideline is of a panel, the members of which are selected by the Minister of the Environment, following consultation with the RA. The CEAA process for appointing panel members was never intended to permit the RA to maintain complete control over panel composition and to stack it with its own members.

We are also concerned that the Secretariat envisioned in Part 5 of the draft JRPA as a provider of professional, scientific, and technical information necessary for the purposes of the Review will also be largely composed of CNSC members, and will be run out of the CNSC offices. Having a Panel composed of members of the CNSC make recommendations to the CNSC based upon information provided by the CNSC's own staff creates a process in which the CNSC is endowed with an undue level of control over the EA.

In addition to according the Minister of the Environment a higher degree of control over the composition of the panel to ensure it is unbiased and knowledgeable regarding the potential environmental and health effects of the Project, at the very least clause 10 of Part II of the draft TOR should be amended such that independent expert technical and scientific evidence is a mandatory component of the materials considered by the Panel.

Recommendation #3: The Minister of the Environment should ensure that the members of the Panel are independent and unbiased, and that they do not approach the Review process with a pro-nuclear bias.

Recommendation #4: Clause 10 of Part II of the draft Terms of Reference for the Review should be amended, such that the Panel is required to consider independent technical and scientific expert evidence.

III. POTENTIAL LACK OF PROCEDURAL FAIRNESS

Because of the significant impact the Report produced by the JRP will have on the interests of the public and the environment at large, those participating in the JRP Hearing process must be accorded a high level of procedural rights. To meet its procedural fairness obligations, the JRP should adopt Directions on Procedure which are

akin to the rules of procedure of environmental administrative bodies such as the Ontario Environmental Review Tribunal which, *inter alia*, hears applications under Ontario's *Environmental Assessment Act*.

The draft TOR and the Directions on Procedure that are to be issued by the JRP should, at a minimum, contain the procedural rights outlined below. As mentioned above, it is important that public consultation by the JRP on the draft Directions on Procedures be mandatory.

Recommendation #5: The Panel should be required to consult the public prior to finalizing its Directions on Procedures.

A. PRINCIPLES OF ADMINISTRATIVE LAW

1. General

Administrative law addresses the process by which government decisions are reached, as well as the merits of those decisions. Basic principles of administrative law are designed to ensure that administrative bodies that make decisions that affect the interests of individuals and the public at large afford those persons minimum procedural protections.

Where the "threshold" is met for entitlement to a duty of fairness owed by an administrative body, certain procedural rights will be owed.[1] Accordingly, for example, a "refusal to permit cross-examination of witnesses may amount to procedural unfairness, especially if a witness has testified orally and a party requests leave to confront and cross-examine him."[2] The seriousness of the potential environmental and human health impacts of the Project warrants the imposition of stringent procedural requirements to ensure that the duty of fairness is exercised in the present instance.

As is set out in further detail below, if the JRP's Directions on Procedure set out restrictions on status, time restrictions in making submissions, and/or restrictions on the manner of direct public participation in the Hearing, they will serve to perpetuate problems in both the CNSC *Rules of Procedure* ("CNSC Rules") as written, and as applied, that are inconsistent with sound principles of administrative law.

2. The Panel's Report is Substantially Determinative

To begin, it is important to note that although, pursuant to s.37 of the CEAA, the JRP Report is submitted to the RA who then decides what course of action to take based upon the Report's contents, the Report will unquestionably result in a decision being made by the RA which has significant implications on the environment and health of members of the public. Thus, the Report and recommendations of the JRP will not be merely

---

[1] Evans et al., *Administrative Law: Cases, Text, and Materials (4th ed)* at p37.
[2] Lord Woolf, J. Jowell and A.P. Le Sueur, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 338-339.

preliminary in nature, and are thus the type of recommendatory decisions which will trigger the duty to act fairly.

In cases such as *Re Abel and Director, Pentanguishene Mental Health Centre*[3], the Courts have made it clear that where an administrative body makes a recommendation, a duty of fairness may be owed even if the body receiving that recommendation is not technically bound to act up it. Where, as is the case in the present instance, the recommendation will unquestionably influence the determination of the rights at issue and may in fact be decisive in this regard, the body making the recommendation will owe a duty of fairness.

In the present instance, the JRP Report will be largely determinative of the RA's decision as to what course of action to take in respect of the Project. The potential harm to the environment and the public is incalculable. Given these two considerations, although the duty of fairness is distinguishable from the rules of natural justice, the duty in the present instance involves the application of a number of those rules. Members of the public must be accorded the procedural protections discussed below during the JRP Hearing process.

One final point which must be highlighted regarding the dispositive nature of the JRP Report and recommendations is that the connection between the Report and the RA's decision in the present instance is even stronger than it generally would be in the context of a JRP given that, for all intents and purposes, the JRP and the RA are one and the same. The CNSC is the RA and the composition of the JRP will be determined almost entirely by the CNSC. As a panel for the purposes of s.22 of the NSCA, the JRP's acts are deemed to be those of the CNSC (NSCA ss.22(2)). The CNSC is effectively developing the JRP Report and then providing it to the CNSC who then determines what course of action to take with regard to the Project. This further underscores the connection between the JRP Report and the decision with regard to the appropriate course of action to take respecting the Project. The Report will thus have a direct and potentially devastating impact on the interests of those engaged in the JRP Hearing process.

3. The Panel's Decision Necessitates the Provision of Substantial Procedural Rights

The SCC held in *Board of Education of the Indian Head School Division No. 19 of Saskatchewan v. Knight*[4] that consideration of three factors determines the existence of a general right to procedural fairness: (1) the nature of the decision to be made, (2) the relationship between the body and the individual, and (3) the effect of the decision on the individual's rights. All three of these factors point in the present instance to a duty of fairness being owed by the JRP.

First, the decision to be made in the present instance is administrative and specific, and is therefore not of a merely legislative and general nature. The Report will be largely

---

[3] (1979), 97 D.L.R. (3d) 304 (Ont. Div. Ct.), aff'd. (1981), 119 D.L.R. (3d) 101 (Ont. C.A.)
[4] [1990] 1 S.C.R. 653.

determinative of the course of action taken in regard to the Project. Therefore, it does not constitute a merely preliminary or interlocutory decision. With regard to the third consideration, the decision is significant and will have an important impact on the individuals involved in the JRP Hearing process and the environment at large.

The "threshold" is met in the present instance, such that the JRP owes a duty of fairness. The next step in the analysis is then to determine specifically which kinds of procedural rights should be accorded and which procedures are appropriate.

In the present instance, it is fundamentally important that the JRP Hearings allow for full, meaningful, and comprehensive public involvement. The Hearings must provide for the exchange of scientific and technical information, and allow opportunity for detailed questioning and cross-examination of witnesses. The JRP must ensure that all persons and groups interested in the outcome of the review are given an opportunity to meaningfully participate.

4. Existing Procedural Inadequacies

It is important that the Directions on Procedure which are developed go beyond the requirements of the NSCA and the CNSC Rules. According to the proposed procedure:

> (1) hearings shall be public unless the joint review panel is satisfied after representations made by a witness based on criteria identified in the procedure that
>
> > (a) harm may be caused to the witness, the environment, or to national or nuclear security,
> > (b) the information is confidential based on criteria identified in the procedure, or
> > (c) disclosure may endanger life, liberty, or security of a person;
>
> (2) timelines for presentations to the JRP will be established;
>
> (3) questions will be directed through the JRP Chair who may allow a participant to put questions directly to a presenter; and
>
> (4) the JRP Chair is given significant discretion to limit or exclude questions and discussions.

Rule 1(1) of the CNSC Rules defines a "party" as an applicant for a licence, a person already holding a licence, or a person who may be named in, or subject to, a CNSC order. Rule 1(1) defines an "intervenor" as a person permitted to intervene in a public hearing under Rule 19 of the CNSC Rules. This Rule also defines a "participant" as either a party or an intervenor.

Rule 3 authorizes the CNSC to "vary or supplement" the CNSC Rules "in order to ensure that a proceeding" is "dealt with as informally and expeditiously as the circumstances and the considerations of fairness permit."

With regard to timing, Rule 17 requires the CNSC to give "at least" 60-day notice to the public before the start of a public hearing. Rule 18 requires CNSC staff to file documentary information and written submissions that it will present at the hearing "at least" 30 days before the start of the hearing.

Rule 19 sets out the requirements for intervention at a hearing. These include (1) the tests for who may intervene,[5] and (2) the manner of intervention.[6] Rule 19 also notes the CNSC's practice for two-day public hearings in which intervenors may only make written submissions and oral presentations at the second hearing day.

Rule 21(1) authorizes the CNSC to permit each participant to present information and submissions on the subject-matter orally or in writing. This Rule also allows the CNSC to permit participants to question one another and any witnesses, and to respond to any submissions, in any manner and sequence that will enable the CNSC to determine the matter before it in a fair, informal, and expeditious manner.

In our respectful submission, and as noted more fully below, it is important that the JRP's Directions on Procedure go beyond the CNSC Rules and the modifications to those rules included in the draft TOR, so as to ensure that full public opportunities to properly scrutinize adequacy of the Project as proposed are provided. On their face, and as applied, the CNSC Rules leave much to be desired as mechanisms for ensuring that there are full and fair public hearings with respect to matters that come before the CNSC.

a. Need for a Broad Definition of 'Party'

Concerns about the CNSC Rules as drafted have previously been brought to the attention of the CNSC.[7] The 2007 Institute on Governance's report to the CNSC emphasized that "for the CNSC to be effective in its work, it must be considered legitimate by those it serves and those who have an interest in its work. For this reason, protecting the legitimacy of the CNSC…is key to its success." Part of the process of protecting the CNSC's legitimacy is to ensure that an appropriate voice is accorded "to those whose interests are affected by its decisions."[8]

As written, the CNSC Rules authorize inadequate procedural due process for CNSC public hearings. The narrow definition of "party" under Rule 1(1), which is restricted to

---

[5] Rule 19(a) [person must have an interest in the matter being heard], or 19(b) [person must have expertise in the matter or information that may be useful to the CNSC in coming to a decision].

[6] Rule 19 (persons may participate as intervenors in the manner and to the extent that the CNSC considers will enable it to determine the matter before it in a fair, informal, and expeditious manner).

[7] Correspondence from EcoJustice Canada and Lake Ontario Waterkeeper to the CNSC Respecting Revision of the CNSC Rules of Procedure, dated August 31, 2007.

[8] Institute of Governance, *Regulatory Independence: Law, Practice and Perception* (IOG, 2007) at 5 and 16.

licence holders or applicants, generates uncertainty as to whether members of the public who may wish to intervene in a proceeding will be constrained in their entitlement to make a full case before the CNSC because they are not a "party." This contrasts with the rules of procedure for other administrative bodies such as the Environmental Review Tribunal, which broadly define a party, the tests for obtaining party status, and the rights attendant on that status.[9]

Indeed, the CNSC Rules only permit intervenors to question witnesses and parties with leave of the CNSC as set out in Rule 21(1). By contrast, the Ontario Energy Board sets out clear entitlements for intervenors (who are granted the same status as "parties" under Rule 3.01 of that Board's rules) to cross-examine witnesses in such proceedings.[10]

Recommendation #6: When they are developed, the Directions on Procedure should provide a broader definition of a 'Party' to the Joint Review Panel proceedings than that which is set out in the CNSC Rules, such that members of the public are not unduly constrained in their entitlement to make a full case before the Panel.

b. Need to Prevent Undue Variance of the Rules

It is not just the CNSC Rules as written that are a cause for concern. It is also the manner in which the Rules have been applied that raises problems. In our experience, the CNSC Rules, under the authority of Rule 3 which gives the Commission broad discretion to vary requirements, have been varied significantly to: (1) shorten minimum periods in the rules between a notice of hearing and a hearing itself to the detriment of members of the public seeking to intervene in an application; (2) shorten minimum periods in the rules between the date of hearing and the date for CNSC staff to file documentary information and written submissions to the detriment of members of the public seeking to intervene in an application; and (3) restrict who may speak at a public hearing and permit only the licensee and CNSC staff to make submissions at such hearings.[11]

Concerns about the CNSC Rules as applied and variances thereto have previously been brought to the attention of the CNSC.[12]

---

[9] Environmental Review Tribunal, *Rules of Practice and Practice Directions* (November 15, 2007), *Rules* 53 (parties include persons specified by statute, otherwise entitled by law, or those who request such status), 54 (tests for naming a person as a party include if interests directly and substantially affected by the hearing or its result, having a genuine interest in the subject matter, or likely to make a relevant contribution to the Tribunal's understanding of the issues in the proceeding), 55 (party to a proceeding may bring motions, be a witness, be questioned by the Tribunal and the parties, call witnesses at the hearing, cross-examine witnesses, make submissions to the Tribunal, including final argument, receive copies of all documents exchanged or filed by the parties, attend site visits, claim costs or be liable to pay costs when permitted by law).

[10] Ontario Energy Board, *Rules of Practice and Procedure*, Rule 23.02.

[11] Correspondence from the Canadian Environmental Law Association to the CNSC Respecting the Application by SRB Technologies (Canada) Inc. for an Amendment to its Nuclear Substance Processing Facility Possession Licence No. NSPFPL – 13.00/2008, dated March 29, 2007.

[12] *Ibid.*

Given the widespread and significant public interest in the Project, it is imperative that there be a level of certainty and predictability for those involved in the JRP Hearing. Not only must the procedural rights accorded be appropriate for this type of decision-making process, as discussed below, but those rights must be definite and prescribed with certainty, such that the public can be confident that its participatory rights will be respected.

Recommendation #7: The Panel's Directions on Procedures should provide a high degree of certainty that the public's procedural rights will be respected.

c. Procedural Rights which Must be Included

In our respectful submission, given the magnitude of, and the environmental, health, safety, and security implications with respect to, the Project, it is incumbent on the JRP to afford maximum, not minimum, public scrutiny to the project in the forthcoming public Hearings.

Given the stringent requirements of the JRP's duty of fairness in conducting the Hearings in the present instance, we recommend that the JRP's Directions on Procedure, when issued, provide for a number of procedural rights including, but not limited to, those set out below.

First, as discussed above, the definition of who is a "party" must be broad. Secondly, cross-examination of witnesses by parties (or intervenors if our first recommendation is not adopted) must be authorized. Another recommendation is that time and other restrictions on oral presentations made, including by intervenors, at the JRP Hearing be eliminated. A right to counsel should also be embedded in the Directions on Procedures, and evidence should be given under oath or affirmation.

As occurs before administrative bodies such as the National Energy Board, the public should have an opportunity, prior to the JRP Hearings, to submit information requests to the proponent and the JRP, based on the EIS that is filed. These requests should be answered in a detailed, responsive, and complete manner a reasonable period in advance of the commencement of the Hearings. As is also provided for by bodies such as the National Energy Board, the Directions on Procedures should explicitly provide an opportunity for members of the public who are unable, or do not wish, to participate in the proceedings before the JRP, to submit a letter of comment explaining their position on the Project.

The public should first be given an opportunity to comment on the draft JRPA and then once this process is complete, it should be consulted regarding the draft EIS Guidelines. This recommendation is consistent with, *inter alia*, part 4.8.6 of the *Procedures for an Assessment by a Review Panel* Guidance document, which states:

> 4.8.6 The Agency shall submit a copy of the draft guidelines to the review panel upon its appointment. Shortly after its appointment, the review panel will receive

> written comments from interested parties on the draft guidelines. The review panel may convene scoping meetings to receive comments on the guidelines. [emphasis added]

Another procedural right which should be included in the Directions on Procedures is the right to site visits or inspections to better understand the information contained in the EIS prepared by the proponent. The JRP should make the site visit in the presence of any Parties or intervenors, or their representatives, interested in attending.

Because many members of the public who wish to participate in the JRP Hearing process will likely have employment obligations during the day, the JRP must hold one or more evening sessions during the Hearing, so as to reasonably accommodate such individuals.

The Directions on Procedures should contain authorization for meetings between any experts retained by parties, participants, or intervenors in the JRP Hearing, and those experts retained by the proponent in the preparation of the EIS. This is an important step if the public is to have the opportunity to meaningfully contribute to the discussion surrounding the EIS and its adequacy.

Finally, it must be noted explicitly in the Directions on Procedures and/or the TOR that the fact that information is exempted under the *Access to Information Act* does not necessarily mean that its disclosure will be denied in proceedings – such as the JRP Hearing – to which the rules of procedural fairness apply (see s.2(2)). The *Access to Information Act* does not replace existing entitlements to access, and does not take away from the common law of procedural fairness.

In addition to the need for all of the above-mentioned procedural rights to be enshrined in the TOR and Directions on Procedures, it is also fundamentally necessary that the Hearings held also include informal sessions designed to allow and encourage residents of various communities to present their views about the environmental effects of the Project. For example, such a requirement was contained in the Operational Procedures for the review panel for the Red Hill Creek Expressway Project. This is particularly important, given the wide range of potentially significant adverse effects from the proposed Project on a wide range of communities. It is also important, given that many members of the public do not have the means by which to adequately engage in formal hearings.

Recommendation #8: Cross-examination of witnesses by parties (or intervenors if our Recommendation #6 is not adopted) must be authorized by the Directions on Procedures.

Recommendation #9: There should not be time restrictions on oral presentations made at the Hearings.

Recommendation #10: A right to counsel must be embedded in the draft Terms of Reference for the Review and/or the Panel's Directions on Procedure.

Recommendation #11: Evidence at the Joint Review Panel Hearings should be given under oath or affirmation.

Recommendation #12: The public should have an opportunity, prior to the Joint Review Panel Hearings, to submit information requests to the proponent and the Panel, based on the Environmental Impact Statement that is filed.

Recommendation #13: Members of the public who are unable, or do not wish, to participate in the proceedings before the Joint Review Panel, should be permitted to submit a letter of comment explaining their position on the Project.

Recommendation #14: The public should first be given an opportunity to comment on the draft Joint Review Panel Agreement, and once this process is complete it should be consulted regarding the draft Environmental Impact Statement Guidelines.

Recommendation #15: The Directions on Procedure should include a right to site visits or inspections.

Recommendation #16: The JRP should hold one or more evening sessions during the Hearing.

Recommendation #17: The Directions on Procedure should provide for meetings of experts.

Recommendation #18: The draft Terms of Reference for the Review and/or the Directions on Procedure should contain acknowledgement that the fact that information is exempted under the Access to Information Act does not necessarily mean that its disclosure will be denied in proceedings before the Panel.

Recommendation #19: Provision must also be made for informal sessions to be held, which are designed to allow and encourage residents of various communities to present their views about the environmental effects of the Project.

B. THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT

1. Information Lacking

Pursuant to s.41(1)(e) of the CEAA, the public is to have an opportunity to participate in an assessment conducted by a JRP. The draft JRPA contains a number of provisions regarding the Public Registry and public availability of information generally (6.1, 6.2, 6.3). However, further detail is needed with regard to the manner in which Hearings will be conducted, so as to demonstrate adequately that the public will have an opportunity to meaningfully participate in the assessment. Though part 4.1 of the Draft Agreement states that the review will be conducted in accordance with, inter alia, the requirements

set out in the CEAA, there is not sufficient information provided as to the substantial and procedural requirements that will be observed by the Panel in carrying out the review. The procedural guarantees outlined above must be enshrined in the TOR for the Review and the Directions on Procedures which will be issued.

Part 7 of the draft JRPA addresses the contents of the report, but this part does not explicitly address how comments received from the public will be summarized and taken into account by the Panel. This must be explicitly set out in the Directions on Procedures when they are issued.

In previous Panel Reviews, such as that involved the Red Hill Creek Expressway Project, all information received by the Panel, from the Proponent and from other interested parties, was required to be made public through the Public Registry, and the Panel would not accept any confidential or restricted information. The broad language of clause 4 of Part III of the draft TOR for the Review is unacceptable. Simply put, the JRP Hearings must be public. The public has a right to access information regarding the Project and the issues raised by it, including the production and management of nuclear waste.

Recommendation #20: Further information should be included in the Joint Review Panel Agreement with regard to the manner in which hearings will be conducted.

Recommendation #21: The Joint Review Panel Agreement, or at a minimum, the Directions on Procedure, should set out how public comments will be summarized and taken into account by the Panel in its Report.

Recommendation #22: Clause 4 of Part III of the draft Terms of Reference for the Review should be removed, so as to guarantee that all information received by the Panel will be publicly accessible.

2. Exercise of Statutory Powers

Though part 4.2 of the Agreement states that the JRP will have all the powers and duties set out under s.35 of the CEAA, no further information is provided as to how the JRP will exercise these powers. It is important that further information in this regard be provided in the Directions on Procedure when they are issued by the Panel.

Recommendation #23: Further information should be provided as to how the Joint Review Panel will exercise the powers set out under s.35 of the Canadian Environmental Assessment Act.

3. Public Access to Report

In addition to the above-noted informational deficiencies in terms of public participation in the environmental assessment itself, the draft JRPA is also silent on the issue of how the report will be made available to the public by the Minister, and how the public will be

advised of the report's availability. Part 7.2 of the Draft Agreement merely states that the Minister of the Environment will "publish the report". This language is *prima facie* consistent with that of s.41(g) of the CEAA, but it is ultimately inadequate to protect the public's procedural rights. It is important that further detail be provided in the Directions on Procedures regarding how the JRP Report will be made available to the public and how the public will be advised of its availability.

Recommendation #24: Further information should be provided as to how the Panel's Report will be made available to the public.

IV. INADEQUATE DRAFT TERMS OF REFERENCE

A. DEFICIENT PROJECT DESCRIPTION

A very basic tenet of the CEAA is that a "project" in relation to a physical work is "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work" (s.2). Thus, a project description submitted by a proponent must, at a minimum, contain adequate information pertaining to these aspects of the proposed development.

The project description contained in the draft TOR is fundamentally inadequate for the reasons outlined below. As such, for the Minister of the Environment to approve the TOR as drafted would be patently unreasonable. The draft project description is lacking in five main respects:

(1) The precise generation capacity of the Project must be provided.

(2) It is impossible to do an EA of a proposed nuclear power plant project when the proponent has not even decided on a reactor design. The Minister of the Environment cannot reasonably approve draft TORs containing a project description which does not identify the specific technology that will be used to undertake the Project.

(3) The proponent has not even committed to the number of new nuclear power reactors which it purports to build. A project description which does not identify the number of facilities involved cannot possibly form the basis of an EA.

(4) Unless and until the proponent is certain as to how it will manage and dispose of the radioactive waste produced from the present Project, any assessment of the environmental and social viability of the present Project is premature. OPG should be required to explicitly and fully describe the long term potential adverse environmental effects of creating this nuclear waste.

(5) Further detail is required regarding ancillary works which will be undertaken as part of the Project.

The Operational Policy Statement entitled "Preparing Project Descriptions under the *Canadian Environmental Assessment Act*" (Updated November 2007) states as follows with regard to the requisite level of detail involved in the preparation of project descriptions under the CEAA:

Project Description Information Requirements

Level of detail

The level of detail in a project description should be appropriate for the scale and complexity of the project and to the sensitivity of its location. For example, greater detail will be required for large, complex projects, such as those on the *Comprehensive Study List Regulations*.

A project description based on this operational policy statement does not, however, preclude a federal authority from requesting clarification or additional information from a proponent to determine if an environmental assessment will be required.

Table 1 serves as a general guide for proponents and federal authorities about the type of information to include in a thorough project description. Proponents are encouraged to contact potential responsible authorities (federal authorities with decision-making responsibilities under the Act) to identify any additional information requirements.

…

Table 1: Sample Outline of a Detailed Project Description

I. GENERAL INFORMATION
General ▪ The name and nature of the project. ▪ The proposed location of the project. ▪ A copy of the distribution list of the parties who received the project description. ▪ Information on consultations already held on the project with federal authorities, provincial or municipal governments, Aboriginal peoples, the public, etc. ▪ Information on other environmental assessment regimes to which the project has been or could be subjected (i.e., provincial, territorial, land claim environmental assessment processes, etc.) **Contacts** ▪ The name of the proponent. ▪ The name of any co-proponent, such as a federal government department or agency. ▪ The name and coordinates (address, telephone, fax, e-mail) of two contact(s)

from whom federal authorities can obtain more information.

Federal Involvement

- Information identifying any federal government department or agency that is, or may be, providing financial support to the project.
- Ownership of the land to be used or required by the project, and in particular, whether any federal land is involved.

Authorizations Required

- information relating to federal permits, licences and authorizations that the proponent believes must be obtained for the project to proceed
- information on applicable provincial and municipal permits

II. PROJECT INFORMATION

Project Components/Structures

- the main components of the project, including any permanent and temporary structures, associated infrastructure, associated construction and type of equipment used
- production capacity and the size (e.g., length of road, acreage used) of the main components of the project

Project Activities

- the construction, operation and decommissioning phases, and the timing and scheduling of each phase
- schedule (e.g., time of year, frequency and duration)
- site plans or sketches with project location, features, project activities described on a map
- engineering design details (e.g., temporary diversion works, dam)
- identification of requirements for off-site land use

Resource/Material Requirements

- the production process(es) to be used in the project
- the project's raw materials, energy and water requirements and sources, and associated infrastructure (e.g., access roads, pipelines)
- excavation requirements and quantity of fill to be added or removed
- identification of any toxic or hazardous materials to be used or by-products to be generated by the project

Waste Disposal

- the nature of any solid, liquid or gaseous wastes likely to be generated by the project, and of plans to manage these wastes
- disposal procedures for any toxic or hazardous materials to be used or any by-products to be generated by the project

III. PROJECT SITE INFORMATION

Project Location

- the location of the project, including a legal land description or geographical coordinates (latitude/longitude or the Universal Transverse Mercator system)
- a map indicating the location of the project including the project site, the site layout of the main components of the project, and the environmental features that could be affected by the project

Environmental Features

- a summary of the physical and biological components in the area likely to be affected by the project (e.g., terrain, water, air, vegetation, fish and wildlife including migratory birds and species listed under the *Species at Risk Act*)
- information on whether the project may affect fish or fish habitat, and navigable waters (see section 4) or any unique or special resources not already identified

Land Use

- current and past land use(s) (e.g., agricultural, recreational, industrial) at the project site and in the adjacent area
- potential contamination of the site from past land use
- proximity of the project to Indian reserves and lands used currently or traditionally by Aboriginal peoples
- proximity to important or designated environmental or cultural sites, (e.g., national parks, heritage sites and other protected areas)
- proximity to residential and other urban areas

IV. REQUIREMENTS RELATED TO FISH, FISH HABITAT AND NAVIGABLE WATERS

The following information should also be provided for components of the project to be undertaken or activities that will occur in a water body or within 30 metres of a water body.

Environmental Features

- description of freshwater or marine environmental features in the area (e.g., water bodies including the name of the watercourse, coastal areas, etc.)
- proximity to water bodies (both freshwater and marine)

- physical characteristics of the waterway (e.g., length, width, depth, seasonal flow and fluctuations)
- information on freshwater and marine fish and fish habitat (e.g., fish presence and species)
- qualitative and quantitative description of the fish habitat
- information on natural site features and characteristics (e.g., wetlands)
- photos or video(s) of the site

Use of Waterway

- existing use of the waterway (e.g., kind, size and frequency of vessels, description of existing obstructions in the waterway)
- information on commercial, recreational or Aboriginal/subsistence fisheries

For more information related to fish and fish habitat for the purposes of developing project description, please contact the Department of Fisheries and Oceans (www.dfo-mpo.gc.ca). For more information about navigable waters, please contact Transport Canada (www.tc.gc.ca).

[emphasis added]

Given the large, complex, and demonstrably contentious nature of the Project, the level of detail which must be contained in the project description is high. A significant amount of detail must be provided regarding factors such as the technology/type of equipment to be used, the number of nuclear power reactors involved, the precise capacity of those reactors, the nature of the radioactive waste that will be produced by the project, and the methods which will be employed to manage and dispose of that waste.

It is an affront to the purposes of the CEAA – which is meant to ensure that projects are considered in careful and precautionary manner, and that they are undertaken in a manner that does not cause significant adverse environmental effects – to accept from a proponent a project description which is as woefully deficient as the present project description is. Furthermore, it is an affront to common sense to suggest that the environmental effects of the Project can be fully and accurately assessed in a precautionary manner when the proponent has not identified the type of reactor technology to be used, the number of reactors involved, the actual generation capacity of those reactors, or the actual manner in which radioactive waste produced will be managed. These factors must be identified in the project description, as they will inevitably play a central roll in the assessment of the environmental and social impact of the Project.

For these reasons, the Minister of the Environment should not approve the draft TOR at this time. Rather, the Minister must request clarification and additional information with regard to the above-noted issues. Once the project description is complete, meaningful public participation can begin with regard to the draft EIS Guidelines and the draft JRPA.

Recommendation #25: The Minister of the Environment should not approve the draft

Terms of Reference for the Review unless and until further and adequate information is provided by the proponent with regard to:

(1) the Project's generation capacity;
(2) specific reactor technology to be utilized;
(3) the number of new nuclear power reactors which will be built;
(4) how radioactive waste produced by the Project will be managed over the long-term; and
(5) ancillary works which will be undertaken as part of the Project.

B. INADEQUATE PUBLIC CONSULTATION ON SCOPING

One of the main purposes of the CEAA is to ensure timely and meaningful public participation in decision-making during the EA process. The importance of this objective was underscored by the 2003 amendments to the Act, which clarified that where a project is described on the Comprehensive Study List ("CSL") – as the present Project is – the public must be consulted prior to decisions being made with regard to, *inter alia*, (1) the scope of the Project, (2) the factors to be considered in the EA, and (3) the scope of those proposed factors. For the reasons outlined below, the public must be given further and more meaningful opportunity to comment on the proposed scope of the present Project.

Section 21(1) of the CEAA states as follows:

> **21.** (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

The purpose of public consultation on scoping is to "ensure that the issues to be studied in the review represent fairly the concerns of the interested parties. Scoping is also intended to ensure that all issues considered in the review warrant study and presentation in the EIS." (*Procedures for an Assessment by a Review Panel*, part 4.8.1)

Because project descriptions form the basis of decisions on scoping, the omissions in the project description contained in the draft TOR – as discussed above – are such as to render any public consultation on scoping meaningless and premature. We wish to be clear that prior to any meaningful consultation on the draft JRPA and draft EIS Guidelines, the Minister must request further information from the proponent, as outlined above, in order to comply with the provisions of the CEAA.

The procedures followed to-date have stripped the public of their right to meaningful consultation on the proposed scope of the Project. This is so for three main reasons:

(1) the time period allotted for public comment on scoping is insufficient;

(2) the opportunity for public comment on scoping has been buried amongst the multiplicity of issues raised by the draft EIS Guidelines and the draft JRPA which are being consulted on simultaneously; and
(3) there have been no public scoping meetings.

1. Inadequate Time Provided

The proposed scope of the Project is contained in the draft EIS Guidelines. The public has just over two months to provide comments on the proposed scope of the Project and on all other issues raised in the draft EIS Guidelines, and on those raised by the draft JRPA. Given the contentious and complex nature of the Project, the substantial number of citizens and NGOs that have expressed an interest in it, and the fact that concerned members of the public must take time apart from their daily work and family schedules to review and comment on the draft documents, the time for consultation on the various documents must be extended.

Furthermore, as stated above, the public should have been consulted on the draft JRPA prior to and separate from being consulted on the draft EIS Guidelines. This view is reflected in the Guideline entitled *Procedures for an Assessment by a Review Panel*, which provides that:

> 4.8.6 The Agency shall submit a copy of the draft guidelines to the review panel upon its appointment. Shortly after its appointment, the review panel will receive written comments from interested parties on the draft guidelines. The review panel may convene scoping meetings to receive comments on the guidelines. [emphasis added]

Recommendation #26: The period for public comment on the draft Joint Review Panel Agreement should be extended.

2. Lack of Scoping Meetings

To date, there have been no scoping meetings held or scheduled with regard to the proposed scope of the Project. Given the fundamental importance of public consultation – as evidenced in the CEAA as a whole and s.21 in particular – the public must be given the opportunity to discuss with the JRP the issue of scoping, separate and apart from the broader issues raised. Thus, once the JRPA has been finalized, and before any decision is made by the Minister of the Environment with regard to the scope of the Project for the purposes of the EA, public scoping meetings must be held.

With regard to public participation in EAs conducted by review panels, the website of the CEA Agency states as follows:

> **How can I get involved in a review panel?**

> In assessments by review panels, members of the public may participate in scoping meetings to identify issues that need to be addressed. There are also opportunities later in the process to appear before the review panel in public hearings to present evidence, concerns and recommendations. Find out more about funding to assist the public in participating in an assessment by a review panel. Consult the Canadian Environmental Assessment Registry or read more at Review Panels. [emphasis added]

The need to consult on scoping early in the CEAA process is also confirmed by the Guidance document entitled *Procedures for an Assessment by a Review Panel*, which states as follows with regard scoping as part of review panel EAs under the CEAA:

> 4.8.2 Scoping should commence as early as practicable in an environmental assessment. Scoping consists of the following stages:
>
> a) agency prepares draft project-specific guidelines, circulates them to identified interested parties and announces their availability for public comment;
>
> b) review panel receives written comments and may conduct scoping meetings; and
>
> c) review panel prepares final project-specific guidelines. [emphasis added]

In the context of projects such as the Red Hill Creek Expressway and the Whites Point Ferry and Marine Terminal Project, the Panels appointed have held scoping meetings during the public comment period on the draft EIS Guidelines, after the panel agreement has been finalized. The lack of public scoping meetings in regard to the present Project relates back to the problems with timing identified above. Before the draft EIS Guidelines were released for public comment, the public should have been consulted on the draft JRPA, and then the JRPA should have been finalized and the Panel members appointed. Once the Panel members are appointed, they can hold scoping meetings during the public comment period on the draft EIS Guidelines. [13]

To be clear, it is our position that public comment on the proposed scope of the Project has been rendered meaningless and devoid of any legitimacy, due to the absence of fundamentally important information in the project description contained in the draft TOR and the draft EIS Guidelines. Furthermore, public comment on scoping is a fundamentally important step in the EA process for projects on the CSL under the CEAA. In the present instance, the proposed scope of the project is but one of a plethora of issues upon which the public is expected to provide comment in a short period of time. Consultation on the scope of the project has been rendered meaningless by the RA's approach of burying the issue amongst an overabundance of other matters, thereby

[13] Examples of other EAs where this order has been followed include the following: Encana Shallow Gas Infill Development Project in the Suffield National Wildlife Area, the Enbridge Gateway Pipeline and Marine Infrastructure Project, Glacier Power Ltd.'s Dunvegan Hydroelectric Project, the Joslyn North Mine Project,and the Kemess North Gold-Copper Mine.

overwhelming members of the public who do not have the ability to devote a sufficient amount of time to considering the multiplicity of significant issues raised by the draft JRPA and draft EIS Guidelines within the short period of time given for public comment on these documents.

It is of note that pursuant to s.15(3) of the CEAA, the scope of the project must include "every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent" or that the Minister considers likely to be carried out in relation to the physical work. Given this statutory requirement, if is fundamentally important that in the present instance the Minister does not make a narrow scoping decision. The Province has at this time denied any jurisdiction over the EA process, so it is up to the federal government to ensure that every undertaking in relation to the Project is subject to a careful, considered, and comprehensive EA under the CEAA.

Recommendation #27: Once the Panel is appointed, it should hold public scoping meetings during the comment period for the draft Environmental Impact Statement Guidelines.

C. INADEQUATE LIST OF FACTORS TO BE CONSIDERED

As mentioned above, and as described more fully in the submissions of Greenpeace in regard to the draft EIS Guidelines for the Project, Part IV of the draft TOR should be amended to explicitly require that OPG: describe the need for and purpose of the project in terms of the public interest; examine non-electricity producing alternatives to the project such as demand management; examine alternatives, even if they may conflict with provincial energy policy; and assess alternatives even if they are outside of OPG's control.

Recommendation #28: Part IV of the draft Terms of Reference should explicitly require that OPG: describe the need for and purpose of the project in terms of the public interest; examine non-electricity producing alternatives to the project such as demand management; examine alternatives, even if they may conflict with provincial energy policy; and assess alternatives even if they are outside of OPG's control.

V. INTERNATIONAL OBLIGATIONS

The Review of the Project must be conducted in accordance with Canada's international legal duties. Specifically, the RA's decision as to how to proceed in respect to the authorization of the Project must be based on an assessment of the possible transboundary harm caused by it. This decision must also be made in accordance with the precautionary principle, and the international requirements of sustainable development, intergenerational equity, and the ecosystem approach.

A. DUTY TO PREVENT TRANSBOUNDARY ENVIRONMENTAL HARM

Canada is a Party to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention"). The List of Activities to which the Espoo Convention applies includes the following:

> 3. Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste.

As a Party to the Espoo Convention, Canada is legally bound by Articles 2(1) and 2(6) of that Treaty, which state as follows:

> 1. The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.
>
> 6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

While recognizing that the United States has not yet ratified the Espoo Convention, the fact remains that, separate and apart from the provisions of this treaty, Canada has an unquestionable international law duty to prevent transboundary environmental harm. That is, Canada cannot allow OPG, or any other proponent, to use its territory so as to cause any transboundary environmental interference, or a significant risk thereof which causes substantial harm—i.e. harm which is not minor or insignificant.[14]

Given the proximity of the Darlington site to Lake Ontario, the Project has the potential to cause serious adverse tranboundary effects. Indeed, the Preamble to the Convention on Nuclear Safety recognizes that, regardless of proximity to national boarders and international bodies of water, "accidents at nuclear installations have the potential for transboundary impacts."

---

[14] See, e.g. International Law Commission's *Prevention of Transboundary Harm from Hazardous Activities* (2001); Report of the World Commission on Environment and Development Our Common Future, Annexe 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the World Commission on Environment and Development Experts Group on Environmental Law, Article 10; *Trail Smelter Arbitration* (1931-1941), 3 R.I.A.A. 1905; *Declaration of the United Nations Conference on the Environment*, Principle 21; *Rio Declaration on Environment and Development*, Principle 2; General Assembly resolution 2995 (XXVII) of 15 December 1972, UNEP, *Environmental Law: Guidelines and Principles on Shared Natural Resources* (Nairobi, 1978), Principle 3.

The need to prevent transboundary environmental harm is enshrined in the Purposes section of the CEAA. In this regard, section 4(1)(c) of the Act states as follows:

> **4.** (1) The purposes of this Act are…
> (c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out

The ILC's draft Articles on the *Prevention of Transboundary Harm From Hazardous Activities* ("ILC Articles"), which apply to "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences" (Article 1) are particularly pertinent to the Project. Importantly, "risk of causing significant transboundary harm" is defined as follows at Article 2 of the ILC Articles as:

> …risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm.

Given this definition, the proposed location of the Project, and the potentially disastrous consequences of an accident involving the proposed nuclear facilities at issue, the Project is precisely of the type envisioned by the ILC Articles. In addition to preventing significant transboundary harm and minimizing the risk thereof, Canada should base any decision in respect to the authorization of the Project "on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment." (Article 7) Therefore, as stated above, Part IV of the draft Terms of Reference for the Review should be amended so as to include this as a mandatory factor to be considered during the Review.

If the assessment of the possible transboundary harm caused by the Project results in the conclusion that there is a risk of causing significant transboundary harm, Canada should act in accordance with the other provisions of the ILC Articles. For instance, Canada should provide the United States "with timely notification of the risk and the assessment and…transmit to it the available technical and all other relevant information on which the assessment is based." (Article 8) If there is a risk of causing significant transboundary harm, Canada should not make "any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response" from the United States (Article 8).

Furthermore, pursuant to Article 13 of the ILC Articles, Canada should provide the public – including American citizens – who are likely to be affected by the Project with relevant information relating to the nature of the Project, the risk involved, and the harm which might result and ascertain their views. To our knowledge, the American public potentially impacted by the Project have not been provided such information. Before any decision is made with regard to the draft JRPA or the draft EIS Guidelines, this international legal requirement must first be met.

Recommendation #29: The American public potentially impacted by the Project should be provided with relevant information relating to the Project, the risks involved, and the harm which may result, and should be consulted with regard to these factors.

B. INTERNATIONAL ENVIRONMENTAL LAW

1. The Precautionary Principle

The operation of new nuclear reactors at the Darlington site, and the radioactive waste that these reactors will produce, have the potential to cause irreversible harm to the environment and human health for thousands of years into the future. Because of the grave risks associated with the Project, decision-making with respect to it must be precautionary in nature.

The precautionary principle is defined as follows at paragraph 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

The precautionary principle is a central concept in environmental law and policy. The principle has been articulated in several international treaties, and most environmental laws in Canada require that it be used when decisions are being made on issues that could adversely affect the environment. Furthermore, Canadian courts, including the Supreme Court of Canada, have adopted and applied the precautionary principle.[15]

We believe there are eight basic and interrelated elements that form the foundation of the principle and explain how it must be implemented:[16]

(1) **The need for pro-action:** For many years environmental decision-making was mainly reactive, in that it waited for damage to be done and then reacted to it. The precautionary principle emphasizes the need for environmental decision-making to make decisions based on early warnings of possible hazards.

(2) **Considering alternatives:** When deciding how to react to a potential environmental hazard, the decision-maker must consider the effectiveness (including cost-effectiveness) of various alternatives to the mitigation approaches and to the project itself – including taking no action.

---

[15] See, e.g. 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Ville), 2001 SCC 40.

[16] This is paraphrased from CELA, Implementing Precaution: An NGO Response to the Government of Canada's Discussion Document "A Canadian Approach to the Precautionary Approach/Principle", April 2002, at pp.3-4.

(3) **Provision for ecological margins of error:** Part of the precautionary principle requires that we recognize that we do not know all that we should about ecosystems and thus a wider margin of error should be built into the process in order to try to avoid unexpected and/or cumulative harm.

(4) **Intrinsic value of non-human entities:** Precautionary decision-making requires recognition of the intrinsic value of entities other than humans

(5) **A shift in the burden of proof:** The person or group of people proposing the development that will potentially damage the environment should be required to prove that environmental damage is acceptable.

(6) **A concern for future generations:** The precautionary principle requires considering what the environmental impacts of the decision being made will be on future generations. Because nuclear waste will be problematic for thousands of years, this is a very important consideration in the present instance.

(7) **Payment for ecological debts through strict/absolute liability regimes:** This means that the approach also requires that someone will be forced to pay for environmental damage done because of the decision. This is also very important in the context of nuclear power because Canada's laws limit the amount of money that the nuclear industry has to pay in the event of an accident to a mere $75 million when the actual costs would be several billion dollars.[17]

(8) **Openness and transparency**: Decision-makers must be open and transparent in determining policy direction and in making decisions, thus allowing more meaningful discussion of public values and perspectives and clearer acknowledgement of the trade-offs inherent in such decisions.

The approach taken to date during the Project's EA process has been inconsistent with the precautionary principle. This is so for a variety of reasons, including: the underinclusive nature of the proposed scope of the Project, as discussed above; the lack of openness and sufficient information thus far in the EA process to ensure that the EA is a democratic process involving an examination of the full range of alternatives to the Project, including no action[18]; and the compromised effectiveness of the shift in the burden of proof in the present context due to the proponent being permitted to undertake the EIS without knowing, *inter alia*, which reactor technology it intends to use and how many reactors it intends to build.

2. Other Principles of International Law

In addition to the precautionary principle of international law, the government actors involved in the EA process for the Project are bound by a number of other applicable

[17] *Ibid*.
[18] *Ibid* at p6.

international requirements, including those concerning intergenerational equity, sustainable development, and the ecosystem approach.

"Sustainable development" was defined by the 1987 World Commission on Environment and Development (Brundtland Commission) as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."

The importance of sustainable development is underscored by the fact that the opening lines of the Preamble to the CEAA state as follows:

> WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;
>
> WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development

Furthermore, encouraging sustainable development is one of the fundamental purposes of the CEAA as a whole (s.4(1)(b)).

As noted above, intergenerational equity is of particular importance in the context of proposed developments involving the generation of nuclear energy and nuclear waste, given the extremely long timeframes within which the adverse environmental and health impacts of such developments may be felt.

The key aspects of intergenerational equity are that our development activities must be undertaken in a manner that ensures that the developmental, environmental, and social needs of future generations can be equitably met.[19] That is, current generations of Canadians hold the natural environment in trust for future generations, and may only use and enjoy its resources on the condition that they deliver the environment to the next generations in as good, or better, condition than that in which it was received.

Finally, the ecosystem approach is aimed at achieving the three objectives of the Convention on Biological Diversity, as set out in Article 1:

> …the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

Using the ecosystem approach to the management of land, water, and living resources, appropriate scientific methodologies must be applied which incorporate the functions,

---

[19] See, e.g. Rio Declaration on Environment and Development, Principle 4; United Nations Framework Convention on Climate Change, Article 3.1; Declaration of the United Nations Conference on the Human Environment, Principle 1; World Charter for Nature (1982), Preamble

processes, and interactions among all organisms in a given ecosystem and their environment.

Taking into account the principles of sustainable development and intergenerational equity, and the ecosystem approach in the present instance, what is required of the government actors involved is to:

> (1) Ensure that the Project constitutes a sustainable use of land and resources and that the interests of the United States in avoiding significant adverse environmental and health effects are seriously taken into consideration. However, without knowing precisely how radioactive waste will be managed in the long-term, and without knowing the number of reactors to be built, the technology to be used, and the capacity of the Project, it is impossible to make any determinations as to its sustainability.
>
> (2) Ensure that the Project supports the goal of passing the environment to the next generations in as good, or better, condition than that in which we received it. Unfortunately, due to the above-noted uncertainty regarding the nature of the Project, we cannot in fact know what legacy we will be passing on to future generations in regard to the Project and its potential adverse effects. Rather than leaving it to future generations to deal with unknown and poorly assessed adverse effects, we must ensure that all necessary information is on the table, and that the Project's environmental viability is assessed based upon consideration of all necessary factors discussed above.
>
> (3) Once all of the necessary information regarding the proposed Project is available, the RA must scientifically asses what its potential impacts will be not only on the environment at large, but on the functions, processes, and interactions among all organisms and between these organisms and their environment. Without a specific reactor design, and without certainty as to the generation capacity of the Project, it is impossible to accurately assess its impact on the ecosystem. As discussed above, the present project description is inadequate in light of ss.2 and 15(3) of the CEAA, and the Operational Policy Statement entitled "Preparing Project Descriptions under the *Canadian Environmental Assessment Act*".

Recommendation #30: All activities undertaken by government actors in regard to the Project and its environmental assessment must be in accordance with the precautionary principle and the international requirements of sustainable development, intergenerational equity, and the ecosystem approach.

VI. SUMMARY OF RECOMMENDATIONS

In conclusion, we respectfully request that the following recommendations be thoroughly considered and implemented:

Recommendation #1: None of the members of the Joint Review Panel should be members of the CNSC.

Recommendation #2: The Minister of the Environment should be given more control over the composition of the Joint Review Panel. At a minimum, the Minister should be granted the power to appoint a Chairperson and one other member of the Panel, without first having to get the approval of the president of the CNSC.

Recommendation #3: The Minister of the Environment should ensure that the members of the Panel are independent and unbiased, and that they do not approach the Review process with a pro-nuclear bias.

Recommendation #4: Clause 10 of Part II of the draft Terms of Reference for the Review should be amended such that the Panel is required to consider independent technical and scientific expert evidence.

Recommendation #5: The Panel should be required to consult the public prior to finalizing its Directions on Procedures.

Recommendation #6: When they are developed, the Directions on Procedures should provide a broader definition of a 'Party' to the Joint Review Panel proceedings than that which is set out in the CNSC Rules, such that members of the public are not unduly constrained in their entitlement to make a full case before the Panel.

Recommendation #7: The Panel's Directions on Procedures should provide a high degree of certainty that the public's procedural rights will be respected.

Recommendation #8: Cross-examination of witnesses by parties (or intervenors if our Recommendation #6 is not adopted) must be authorized by the Directions on Procedures.

Recommendation #9: There should not be time restrictions on oral presentations made at the Hearings.

Recommendation #10: A right to counsel must be embedded in the draft Terms of Reference for the Review and/or the Panel's Directions on Procedure.

Recommendation #11: Evidence at the Joint Review Panel Hearings should be given under oath or affirmation.

Recommendation #12: The public should have an opportunity, prior to the Joint Review Panel Hearings, to submit information requests to the proponent and the Panel, based on the Environmental Impact Statement that is filed.

Recommendation #13: Members of the public who are unable, or do not wish, to participate in the proceedings before the Joint Review Panel, should be permitted to submit a letter of comment explaining their position on the Project.

Recommendation #14: The public should first be given an opportunity to comment on the draft Joint Review Panel Agreement, and once this process is complete it should be consulted regarding the draft Environmental Impact Statement Guidelines.

Recommendation #15: The Directions on Procedure should include a right to site visits or inspections.

Recommendation #16: The JRP should hold one or more evening sessions during the Hearing.

Recommendation #17: The Directions on Procedure should provide for meetings of experts.

Recommendation #18: The draft Terms of Reference for the Review and/or the Directions on Procedure should contain acknowledgement that the fact that information is exempted under the *Access to Information Act* does not necessarily mean that its disclosure will be denied in proceedings before the Panel.

Recommendation #19: Provision must also be made for informal sessions to be held, which are designed to allow and encourage residents of various communities to present their views about the environmental effects of the Project.

Recommendation #20: Further information should be included in the Joint Review Panel Agreement with regard to the manner in which hearings will be conducted.

Recommendation #21: The Joint Review Panel Agreement, or at a minimum, the Directions on Procedure, should set out how public comments will be summarized and taken into account by the Panel in its Report.

Recommendation #22: Clause 4 of Part III of the draft Terms of Reference for the Review should be removed, so as to guarantee that all information received by the Panel will be publicly accessible.

Recommendation #23: Further information should be provided as to how the Joint Review Panel will exercise the powers set out under s.35 of the *Canadian Environmental Assessment Act*.

Recommendation #24: Further information should be provided as to how the Panel's Report will be made available to the public.

Recommendation #25: The Minister of the Environment should not approve the draft Terms of Reference for the Review unless and until further and adequate information is provided by the proponent with regard to:

(1) the Project's generation capacity;
(2) the specific reactor technology to be utilized;
(3) the number of new nuclear power reactors which will be built;
(4) how radioactive waste produced by the Project will be managed over the long-term; and
(5) ancillary works which will be undertaken as part of the Project.

Recommendation #26: The period for public comment on the draft Joint Review Panel Agreement should be extended.

Recommendation #27: Once the Panel is appointed, it should hold public scoping meetings during the comment period for the draft Environmental Impact Statement Guidelines.

Recommendation #28: Part IV of the draft Terms of Reference should explicitly require that OPG: describe the need for and purpose of the project in terms of the public interest; examine non-electricity producing alternatives to the project such as demand management; examine alternatives, even if they may conflict with provincial energy policy; and assess alternatives, even if they are outside of OPG's control.

Recommendation #29: The American public potentially impacted by the Project should be provided with relevant information relating to the Project, the risks involved, and the harm which may result, and should be consulted with regard to these factors.

Recommendation #30: All activities undertaken by government actors in regard to the Project and its environmental assessment must be in accordance with the precautionary principle and the international requirements of sustainable development, intergenerational equity, and the ecosystem approach.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

November 19, 2008

Darlington New Nuclear Power Plant Project
Canadian Environmental Assessment Agency
160 Elgin Street, Ottawa, Ontario K1A 0H3
Tel.: 1-866-582-1884
Fax: 613-957-0941
E-mail: Darlington.Review@ceaa-acee.gc.ca

To Whom It May Concern,

Re: Comments on the Draft Environmental Impact Statement Guidelines for the Darlington New Nuclear Power Plant Project (CEAR No. 07-05-29525)

These are the submissions of the Canadian Environmental Law Association ("CELA") in relation to the Draft Environmental Assessment Guidelines for the Darlington New Nuclear Power Plant Project ("draft Guidelines").

Background

CELA is a non-profit, public interest group established in 1970 to use and improve laws to protect the environment, conserve natural resources, and safeguard public health. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental protection and resource management matters. CELA staff have a long history of involvement in nuclear power issues, and have authored a number of publications on the subject.

The following are our high-level comments on the guidelines.

Purpose, Need, and Alternatives to the Project

The current draft Guidelines do not require OPG to provide important key information regarding the purpose, need, and alternatives to the project.

Specifically, the draft guidelines only require OPG to outline the purpose and need for the project from OPG's own perspective. OPG should instead be required to explain the purpose and need of the project in terms of the public interest.

The draft Guidelines only require OPG to provide information on alternative "methods of producing electricity." The guidelines should instead require OPG to examine potential alternatives of meeting electricity demand, including demand management and conservation.

The draft Guidelines expressly state that "provincial energy policy" cannot be addressed and that alternatives "contrary to Ontario's formal plans or directives" need not be examined. This part of the guidelines is unacceptable and should be removed.

Radioactive Waste

OPG should be required to describe the long-term potential adverse environmental effects of creating this nuclear waste.

However, under the present proposal, OPG is only required to describe "at a conceptual level" how used nuclear fuel waste will be managed, because another organization is "expected" to manage that waste.

The time horizons of the assessment must be extended beyond the abandonment phase. The potential adverse effects of used nuclear waste should also be assessed in the post-abandonment phase and when considering malfunctions, accidents and malevolent acts.

If OPG fails to assess this, it will have failed to consider some of the most important environmental effects of the project.

Application of Ontario's Environmental Assessment Act

Provincial environmental assessments must be carried out where the project is undertaken "on behalf of" Ontario.

OPG was directed to undertake this project by the Ontario Ministry of Energy in June of 2006 and therefore it appears that Ontario should formally participate in this environmental assessment as a signatory to the Joint Review Panel Agreement or else conduct its own assessment.

The draft Guidelines themselves recognize that this project is on behalf of Ontario when they say on page 9 that: "The Province of Ontario is considering a range of reactor designs." Therefore, this issue should be more thoroughly reviewed and explained.

OPG should be required to undertake a provincial environmental assessment, and if it does not do so it should be required to explain in its EIS why it thinks Ontario's *Environmental Assessment Act* does not apply.

Cost overruns and financing

In the draft guidelines OPG is only required to look at regional economic impacts, such as impacts on the job market. OPG should instead be required to provide information on the costs of the project and its alternatives, including the likelihood and liability for cost overruns.

This information is necessary to adequately compare the project to its alternatives. It is also necessary to quantify the project's effects on taxpayers and ratepayers who could end up footing the bill, as they did with the current fleet of nuclear reactors. As it stands, OPG is not properly examining the costs and financing of the project and its alternatives.

Accidents, Malfunctions, & Malevolent Acts

The draft Guidelines exclude a range of possible nuclear accidents and malfunctions from the scope of the environmental assessment. This is unacceptable, given that OPG is legally protected from paying the costs for such events beyond a certain level.

OPG should be required to identify and assess all potential adverse environmental effects of all realistic malfunctions, accidents and terrorist events.

The Darlington site is also home to four reactors as well as a spent fuel storage facility. OPG should be required to assess the cumulative impacts of accidents and malfunctions affecting each nuclear power plant and spent-fuel-storage facility as part of the environmental review.

The draft Guidelines do not require OPG to explain who would pay for clean up and compensation in the event of an accident, malfunction, or malevolent act. The EIS Guidelines should require OPG to detail (1) the extent of all potential cleanup and compensation costs arising from each possible nuclear accident, malfunction, and malevolent act, (2) whether persons in Canada and the United States would be fully compensated, (3) who would pay for the cleanup and compensation, and (4) how this compares to the system of nuclear liability in the United States.

Thank you for considering our comments.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
Theresa McClenaghan
Executive Director and Counsel