AN ANALYSIS

of

BILL C-14: THE NUCLEAR CONTROL AND ADMINISTRATION ACT

prepared by

ENERGY PROBE and the CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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I

GENERAL CONCERNS

The use and potential abuse of nuclear energy and the materials and technology required to produce it is one of the most contentious issues facing Canada today. A fair and effective system of obtaining adequate data, identifying, analyzing and prescribing for environmental, social and health problems, of assessing impacts, and of resolving conflicts in an orderly and objective manner must be found, or the result will be social chaos.

Under severe public criticism, the two major mechanisms for controlling atomic energy, the Atomic Energy Control Act and the Environmental Assessment and Review Process, have insufficient credibility as methods of identifying and solving problems. The former has lost its credibility and the latter has yet to achieve it. The federal government has recognized that the Atomic Energy Control Act has been overtaken by the technology it was to control. The minister of Energy, Mines and Resources, the Honourable Alistair Gillespie, has recognized that, "Rapid growth and the increasing complexity of the nuclear industry, both nationally and internationally, have overtaken the existing legislation which was created in the immediate post-war period when interests and priorities were very different. (Information EMR, news release: 'Nuclear Control Act Tabled,' 7/59.)

This regime has been criticized by the public for its secrecy, unfettered government discretion, lack of public hearings, and for the domination of the Atomic Energy Control Board by members of the nuclear industry.

The federal Environmental Assessment and Review Process (EARP), which has been used to assess the potential impacts of nuclear installations, also has failed to obtain public confidence. When this process was used to assess the proposed Point Lepreau nuclear generating station in New Brunswick, environmentalists and neighbours of the proposed project criticized its lack of public funding, lack of public notice, and timing. EARP was evolving, and has gained some measure of public credibility as a result of its hearings on the proposed Eldorado refinery and waste disposal area at Port Granby. However, this process fell considerably short of meeting the need for an effective preventive and participatory regime.

The proposed Nuclear Control Act could be a major step forward towards such a regime. However, in the opinion of Energy Probe and CELA, it still falls considerably short of providing an effective regime to assess impacts and resolve conflicts objectively and fairly. In one respect, it may represent a major step backwards: that is, if the Act replaces the current policy of providing an environmental impact assessment of major nuclear facilities with public hearings by the Nuclear Control Board which exclude environmental impact assessment.

Mr. Gillespie has stated that, "The new Bill gives the federal government the necessary legislative and regulatory authority to deal effectively with all the present and forecast issues associated with the nuclear industry in Canada, while providing adequate means for public participation in the decision-making process with respect to nuclear energy." (Information EMR, op. cit.)

Energy Probe and CELA disagree.

II

IMPACT ASSESSMENT

The proposed Bill provides no guarantee that the proposed Nuclear Control Board will consider the key social questions raised by nuclear power: namely, long term supply and demand for electric power, health, environmental, security and safety concerns, the effect of availability of nuclear power on energy conservation and development of alternative energy sources, the economics of nuclear power, social impacts, nuclear weapons proliferation, and other social, ethical and political issues. Nor is there any guarantee in the Bill that the impact of individual projects will be adequately assessed.

In this respect the Bill may leave the public in a worse position than under the previous regime. There, at least, there was some possibility of environmental impact assessment of individual projects through EARP. EARP is a known quantity. The experience at Port Granby suggests that its procedures are evolving towards a process which would be seen as fair and adequate by the public. As proposed, the Bill leaves the role of environmental impact assessment and of EARP in doubt. It is unclear whether the Bill anticipates the new Nuclear Control Board will hold hearings prior to the licensing of any particular nuclear facility and whether these hearings will include any form of environmental impact assessment.

A fair and effective regime for regulating nuclear energy must explicitly provide for two levels of impact assessment. First, there must be hearings to assess such questions as general energy policy, economic and social choices, the need for the individual facility, and the need for nuclear power generally. Without an assessment of 'threshold' issues of need and policies to provide a framework for discussion, the assessment of individual projects is of limited value. Secondly, of course, hearings must be held which include assessment of health, safety, environmental, social and economic impacts of individual projects.

A Generic Assessment

Although the Nuclear Control Act would provide for hearings in the case of some individual licensing applications, there is no provision for discussion of the threshold questions of need and policy. Unless questions can be raised about the need for

expansion of the nuclear industry and its overall effects on the socio-economic and natural environment and on human health, individual hearings will take place in a vacuum. For example, 'generic assessment' (to use the American term) has not been done on nuclear energy demands, alternative methods of producing energy and on public acceptance of dependence on nuclear energy. There have been demands for a federal commission to look into these questions but no such commission has been established. In Ontario, some of these questions have been looked at by the Royal Commission on Electrical Power Planning (the Porter Commission). However, the federal government has no obligation to consider the findings of this provincial commission. Without such an overall assessment, projects come before policies, foreclosing future options and making individual hearings on narrow questions of dubious fairness or value.

B Individual Assessments

There must be an assessment for each individual nuclear facility requiring a licence, which may have some significant impact on environment, health, or the socio-economic and cultural life of people. The regime should not create uncertainty in this regard, leaving the public in confusion over which projects require a hearing and which do not. Under Bill C-14, there is considerable ambiguity on this point.

C Board Procedure and Public Hearings

The proposed Nuclear Control Act provides no guarantee of environmental, cultural or health protection. Apart from a general statement of responsibility in section 21,which will be discussed below, the Act contains no criteria upon which the Nuclear Control Board is to make a decision. The Board is left to decide what impacts it will consider significant, and may choose to sacrifice or trade off aspects of health, culture or the environment, even if the impacts are found to be significant. This largely unfettered discretion in the Board may lead to uncertainty as to what its proper role is, and to its co-option or 'capture' by the regulated industry. The role of the Board should primarily be to carry out enunciated government policy rather than to create it. Legislative guidelines subject to scrutiny by Parliament would be more compatible with the principles of legislative sovereignty and ministerial responsibility.

Although the Act provides for some public hearings, the subject matter of those hearings is largely unstated. It is

submitted that the hearings of the Nuclear Control Board should in fact be environmental impact assessment hearings unless this function is undertaken by EARP or some other process. We suggest that the subject of a Nuclear Control Board hearing be an environmental impact assessment such as the assessment described in the Ontario Environmental Assessment Act:

5(3) An environmental assessment submitted to the Minister pursuant to subsection 1 shall consist of,

(a) a description of the purpose of the undertaking,
(b) a description of and a statement of the rationale for
(i) the undertaking,
(ii) the alternative methods of carrying out the undertaking, and
(iii) the alternatives to the undertaking,
(c) a description of,
(i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
(ii) the effects that might be caused or that might reasonably be expected to be caused to the environment, and
(iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment, by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and
(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking.

The Science Council of Canada, in Northward Looking: A Strategy and a Science Policy for Northern Development (report #26, August 1977), recommended a number of further issues which should be addressed in any impact assessment. Probe and CELA recommend that the Nuclear Control Act be amended to incorporate these concerns. They are as follows:

1 Assessments must have broad terms of reference. It is not enough, for instance, merely to consider whether there will be environmental effects. Each affected party must be able to determine in what ways the project may affect its interest and how, if modified, the project might have less harmful or more beneficial impact.

2 Government is responsible for ensuring that affected parties have adequate opportunity to make their needs known, that no projects are undertaken which do not meet basic economic and environmental standards and that, from a long-term point of view, the most desirable rate of non-renewable resource depletion is determined. This requires a capacity for independent data

gathering and the independent assessment and evaluation of data belonging to others.

3 There must, as a general principle, be open access to information. While there are occasionally good reasons for keeping some of the data or plans confidential, too often this is done routinely.

4 There must be independent bodies to identify areas in need of technology assessment, as well as independent bodies to conduct the assessment.

5 Where unrefereed scientific work supports a project proposal there must be opportunities for a credible validating procedure. The adversary approach is useful in this context, as was demonstrated at the hearings of the National Energy Board and Mackenzie Valley Pipeline. The competing applications of Foothills and Canadian Arctic Gas incidentally produced a much more thorough examination of the pipeline proposal than if there had been only one application.

Moreover, the issues should be addressed before the project has become a fait accompli. The Science Council noted that when assessing projects, economic considerations often impel major actors to take action before an adequate data base can be developed. Timing the assessment process so that the pacing of the constituent elements of development is orderly, is critically important. The Council further noted, "assessments must be timed so that they take place before the decision to proceed is taken," and that assessment must be conducted in the context of other related projects. "A single proposal, for instance, may have a relatively minor effect. However, if it is just one of many, a cumulative effect may be much greater."

Adequate impact assessment would also take into account long-term, secondary and indirect effects (that, spill-over effects of a specific project) as well as the immediate effects of development. Side effects of development should be scrutinized at the outset and anticipated to the greatest extent possible rather than discovered after it is too late.

D Funding

A final serious omission from this Bill is the lack of provision for public funding. Funding is required to enable intervenors

adequately to examine and respond to technical submissions made by the applicants and to enable intervenors to hire counsel, so that they may be adequately represented at lengthy technical hearings. For public participation in the decision-making process to be effective, funding must be made available at an early stage; an initial critical analysis of the proponent's documents and studies is required and feedback must be sought from the communities concerned.

The EARP panel which held hearings on the proposed Eldorado uranium refinery and waste management facility at Port Granby recognized this need. In its report, the panel stated:

Despite the good intentions and much hard work by individuals and interest groups during the two phases of the hearings, the effectiveness of their participation was inhibited by a lack of financial means to do the job. This was particularly true of those persons and groups at the local and regional level -- those most likely to be affected by the project.

*The Panel, therefore, recommends that a proposal be drafted by the Federal Environmental Assessment Review Office to provide funding and other assistance for the public participating in Panel reviews.**

A 1978 consultant's report to the Ontario Environmental Assessment Board made similar recommendations.**

Without such funding, the public might be better off in some cases without a public hearing. CELA and Probe strongly recommend the addition to this Bill of provision for funding.

E Separation of Conflicting Functions

Although the Department of Energy, Mines and Resources news release states that it is the government's intention to place responsibility for health, safety, security and environmental matters and responsibility for commercial and promotional matters under separate ministers, there is no guarantee in the Bill that this will be the case. CELA and Energy Probe support this separation of responsibilities. We recommend that the responsible minister be named in each Part of the Bill itself, and that a section be added to the Act stating that the minister responsible for administering Part I shall not be the same minister as the minister responsible for administering Part II.

Having outlined some of our general concerns about Bill C-14, we will now embark upon a clause by clause analysis.

In some cases, specific amendments will be proposed. In other cases, we will note our concerns about the procedural or institutional safeguards proposed without attempting to

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*Report of the Environmental Assessment Panel on the Eldorado Uranium Refinery Port Granby, Ontario, Ministry of Supply and Services Canada, May 1978, pp 42-43.

**A Public Participation Program for the Ontario Environmental Assessment Board, K.F. Maurer, February, 1978, p 6.

recommend specific amendments. We wish to acknowledge the "Suggested Amendments to the Nuclear Control and Administration Act," prepared by the West Coast Environmental Law Association, from which many of our suggested amendments have been adapted.

Where no comments are made on a section, for example sections 11 to 18, 24 to 27 and 37 to 55, this generally indicates that CELA and Probe agree with the provisions. We have made few comments on Part II of the Bill as these provisions less directly affect the health, safety and environmental matters with which we are concerned than the provisions of Part I. Part III consists primarily of enforcement mechanisms and housekeeping matters with which we generally agree.

III

SUGGESTED AMENDMENTS TO THE NUCLEAR CONTROL AND ADMINISTRATION ACT

Section 2
Interpretation

CELA and Probe support the inclusive definition of a 'nuclear facility.' All aspects of the nuclear industry must be placed under this Act for its proper administration and regulation.

The Act purports to impose upon the Board the object and responsibility to consider 'environmental' concerns. It should be made clear that 'environmental', as under the federal Environmental Assessment and Review Process and the Ontario Environmental Assessment Act, includes economic, cultural and social concerns as well as ecological ones.

Proposed additions

'environment' means,

(i) air, land or water,

(ii) plant and animal life, including man,

(iii) the social, economic and cultural conditions that influence the life of man or a community,

(iv) any building, structure, machine or other device or thing made by man,

(v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or

(vi) any part or combination of the foregoing and the interrelationships between any two or more of them.

The reasons for this addition will be discussed under section 9.

Section 3
Declaration

This section declares certain nuclear works and undertakings to be 'works for the general advantage of Canada.' The effect of this declaration is to give the federal government sole jurisdiction over all such works and undertakings. It also suspends the operation of any applicable provincial legislation to the extent that its enforcement would interfere with essential aspects of the facilities. Thus, this declaration may prevent provincial and municipal authorities from applying their

anti-pollution, environmental impact assessment, land use planning, occupational health and waste disposal legislation to nuclear facilities. This would be acceptable if equivalent federal legislation and controls were available to protect the public; however, this is not the case. The exclusive jurisdiction of the federal government, together with its failure to enact or enforce suitable environmental protection legislation, has frequently resulted in the creation of federal pollution havens. Nuclear energy appears to be no exception. The proposed Nuclear Control Act does not impose any obligation to observe provincial or municipal standards, but only to take them into account.

We are also concerned whether the works and undertakings specified in section 3 include each of the facilities defined as 'nuclear facility' in section 2. For example, it is questionable whether section 3 includes reprocessing plants and whether it includes the 'lands, buildings, structures and equipment' associated with the works and undertakings covered in section 3, as does the definition of 'nuclear facility' in section 2.

It is recommended that section 3 be amended to make clear that it includes all those works and undertakings included in the definition of 'nuclear facility.'

Proposed Amendments

Section 3(c) should be amended to include the word 'reprocessing' following the word 'processing.'

A new subsection, 3(d), should be added:

... for any application or use of a prescribed substance or prescribed technology, or that constitutes a nuclear facility.

Section 4

This section states that the Act is binding on the Crown, both federally and provincially. We commend the government on this provision, which repairs a serious flaw in the Atomic Energy Control Act. That Act purported to regulate an industry dominated by government agencies and other emanations of the Crown, yet the doctrine of Crown immunity made it questionable whether these bodies were subject to the law.

However, CELA and Probe are concerned about the breadth of the 'national defence' exemption. This section can be used by the government to exempt any matter relating, no matter how peripherally or tangentially, to national defence, even where there is no necessity for exempting the matter. CELA and Probe are concerned that this section may needlessly exclude

important applications of nuclear technology from the Act and the safeguards it incorprates.

As such, the section is open to abuse. We respectfully submit that the Act should be binding on the Crown and its agencies in any matter relating to national defence except to the extent it is necessary to exempt them for the national defence.

It is recommended that exemptions should be made by order of the Government in Council, and that such an Order in Council should be tabled in Parliament and published in the Canada Gazette unless the government deems it necessary not to make the Order public.

Section 5

Interpretation

CELA and Probe recommend that Part I of the Act be administered by the Minister of the Environment or the Minister of National Health and Welfare. We believe that it would be inappropriate to place matters as contentious and as potentially hazardous to the environment and to human health as radioactive material under any other ministry.

Proposed amendment

'Minister' should be defined as the Minister of the Environment or the Minister of National Health and Welfare.

Section 6

Board Established

CELA and Probe support the policy expressed in this section of appointing part time as well as full time members. However, on the basis of experience in adequately regulating environmental and health matters through boards and tribunals in other areas of subject matter, it would appear that it would be unwise to restrict the Board to a maximum of nine members.

The staffing of the Nuclear Control Board will be of prime importance to the successful regulation of the nuclear industry. In recent years, the Atomic Energy Control Board, composed of one full time and four part time members, restricted its deliberations to broad policy issues and to decisions on the site location and licensing of major nuclear facilities. The remainder of up to 2000 licences issued annually* were handled by AECB staff.

We are concerned that the probable increase in the responsibilities of the Nuclear Control Board under this Act will cause the workload of the Board members to be unmanageable. The Board will conduct public hearings, disseminate information, administer the Radioactive Decontamination Fund, and possibly

* The Atomic Energy Control Board, G. Bruce Doern, Law Reform Commission of Canada, October 1976.

have a larger role in licensing. We would recommend therefore that the minimum number of full time positions on the Board be increased substantially to allow the Board to function effectively, with a commensurate increase in the number of part time members. It is also recommended that the statutory restriction on the maximum number of Board members be deleted to facilitate the appointment of additional part time and full time Board members as conditions warrant.

We support the appointment of part time members, since some of the best qualified people might be available on a part time basis, who would be unwilling to commit themselves to a full time position.

Section 8

The members of the Board, who will be required to regulate government agencies, should not be subject to the discretion of the Executive Branch in setting their salaries. To safeguard the independence of the Board, the Act should provide that the salary of members of the Board will be equivalent to that of a particular civil service category or judicial position, for example the salary of a Deputy Minister or Judge of the Trial Division of the Federal Court.

Sections 9 and 10

Section 10 prescribes minimum qualifications for membership on the Board, which Probe and CELA support. However, section 10 refers to members, and not to 'substitute members.' It is possible that the government of the day or the courts could interpret sections 9 and 10 to create two distinct classes of membership. If 'substitute members' in section 9 and 'members' in section 10 were to be interpreted as different classes of membership, it is arguable that 'substitute members' would not need the qualifications stipulated for 'members' by section 10.

Accordingly, we have recommended the amendment to section 2 stated above.

Section 10

CELA and Probe commend the government on excluding individuals with certain vested financial interests from membership on the Nuclear Control Board. The domination of the AECB by such persons was a matter of serious concern to environmentalists. However, section 10 does not prevent persons with vested interests in the nuclear industry other than the listed interests from membership on the Board. For example, employment by this industry

and previous financial interest in the industry would not exclude a person from membership.

Proposed Amendment

CELA and Probe therefore propose the following amendment:

10(4) No more than one-third of the members at any time shall have been employed within five years prior to their appointment by

(a) a corporation engaged in producing, selling, buying, exporting or importing prescribed substances, prescribed equipment or nuclear facilities, or
(b) within any branch, department, agency or commission of government engaged in the promotion, production, selling, buying, exporting or importing of prescribed substances, prescribed equipment or nuclear facilities.

In addition to the exclusion of those with vested interests, it is important to ensure that members have appropriate, up to date experience and qualifications in relevant fields. CELA and Probe therefore recommend the following amendment to section 10:

10(5) Five or more members shall be persons with extensive and up to date qualifications and experience in

(a) health sciences
(b) physics
(c) environmental science
(d) organized labour
(e) nuclear engineering
(f) nuclear chemistry
(g) earth sciences
(h) mining engineering, or
(i) law

Section 19

Section 19(1) reduces the independence of the Board by making it subject to directives from the Governor in Council. This may emasculate the Board completely. Amendments to the procedures of the Board or directives should be made through the usual channels of regulations and amendments to the Act. If amendments are made by regulations, these regulations should be published and made available for public comment. Our submissions regarding section 56 and proposed amendments thereto apply equally to section 19.

Sections 20, 21 and 22

Sections 20 and 21 set out in general terms the objects, responsibilities and powers of the Board. These sections contain nice sentiments; however, these sentiments are not reflected in section 22 and the following sections dealing with the critical functions of the Board of issuing, renewing, amending, suspending or revoking a licence.

Sections 20 and 21 are misleading. Their wording leaves the superficial impression of imposing a duty on the Board to protect

health and safety, to protect the environment, to maintain national security, and to ensure that nuclear energy and prescribed substances will be used only for peaceful purposes. However, the courts have frequently held that 'objects' and 'responsibilities' expressed in such general language impose no enforceable duty upon an agency.

For example, the Department of Justice Act, RSO 1970, ch 116, states inter alia:

> 5 *The Minister, (the Attorney General)*
> *(b) shall see that the administration of public affairs is in accordance with the law ...*

The Police Act also appears to impose an obligation on various police forces to impose the law. It contains several sections setting out the law enforcement responsibilities of municipal councils and various police forces. For example, section 46 of the Police Act, RSO 1970, ch 351, states:

> *46(1) It is the duty of the members of the Ontario Provincial Police Force, subject to this Act and the orders of the Commissioner,*
> *(a) to perform all duties that are assigned to constables in relation to the preservation of the peace, the prevention of crime and of offences against the laws enforced in Ontario and the criminal laws of Canada and the apprehension of criminals and offenders and others who may lawfully be taken into custody ...*

Notwithstanding such noble-sounding phrases, the courts have frequently held that officials such as the Attorney General and the police have almost unfettered discretion whether to enforce any particular law or take legal action in any particular situation.

It is notable that when the Nuclear Control Act turns to specific functions of the Board, such as licensing, any such legally enforceable responsibilities or duties are conspicuously absent. The Board has no duty to implement health, safety, security and environmental standards established by other government bodies, only to take them into account. The criteria to be applied by the Board and the procedures to be used by the Board in making licensing decisions are not stated.

The Act should connect the Board's responsibility for health, safety and environmental factors directly to the issuance and withdrawal of licences for nuclear facilities, and should specifically require the Board to withhold a licence where issuance could be harmful, to revoke a licence where harm is threatened, and to attach conditions to licences where such conditions will mitigate potential harm.

Nor should the conditions under which the Board may amend, suspend or revoke a licence or site approval be left to the

regulations except for minor and procedural aspects. In the interest of natural justice, the substantive grounds for amendment, suspension or revocation should be stated in the Act itself. Accordingly, the following amendments are recommended.

Proposed Amendments

22(1) *The Board may, on application made to it accompanied by such fee as is prescribed in relation thereto by the regulations, issue a licence authorizing the carrying out of such of the activities prohibited by sections 30 and 31 as are specified in the licence in a period of time specified therein that does not exceed any maximum prescribed by the regulations, except when the evidence before the Board indicates that the activities to be specified within the site approval or the licence are likely to endanger the health or safety of persons, result in the use of nuclear energy or facilities or prescribed substances, technology or equipment for other than peaceful purposes, result in failure to comply with measures of international control undertaken by Canada, or result in a breach of environmental standards established by or on the recommendation of other departments or agencies of the government of Canada or any province.*

(2) *The Board may impose terms and conditions in respect of a site approval or a licence issued or proposed to be issued or renewed by it, including terms and conditions relating to any evidence of financial responsibility that it may require from the applicant for a site approval or a licence and shall impose terms and conditions that are necessary to mitigate or eliminate any danger to the health or safety of persons, or any significant degradation of the quality of the environment.*

(3) *No licence to construct a nuclear facility other than a sub-critical nuclear reactor assembly or a particle accelerator may be issued by the Board unless*

(a) the approval of the site on which the nuclear facility is to be constructed has previously been obtained in writing from the Board;
(b) the Board has received evidence satisfactory to it that the applicant for such a licence has complied with the conditions, if any, of such approval, and
(c) the Board has received, reviewed, and considered an environmental impact assessment consisting of,

(i) a description of the purpose of the undertaking;
(ii) a description of and a statement of the rationale for,

(a) the work or undertaking,
(b) the alternative methods of carrying out the work or undertaking,
(c) the alternatives to the undertaking,
(d) the need for the work or undertaking;

(iii) a description of,

(a) the persons and environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
(b) the effects that might be caused or that might reasonably be expected to be caused to persons or the environment, and
(c) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon persons or the environment,

by the work or undertaking, the alternative methods of carrying out the work or undertaking and the alternatives to the work or undertaking;

(iv) an evaluation of the advantages and disadvantages to persons and the environment of the work or undertaking, the alternative methods of carrying out the work or undertaking, the alternatives to the work or undertaking, and the need for the work or undertaking.

(4) The Board may renew a licence or a site approval after considering any objections received in writing.

(5) The Board may amend, suspend, refuse to renew or revoke a site approval or licence where it considers, upon probable grounds, that the work or undertaking may create a nuisance, is not in the public interest, does not comply with the provisions of this Act or the regulations, or may result in a hazard to the health or safety of any person or degradation of the quality of the environment, and shall amend, suspend, refuse to renew or revoke a site approval or licence where necessary to protect the health or safety of any person or the environment.

Section 23

Although sections 20 and 21 purport to impose upon the Board the responsibility of dealing with such matters as health, safety, security and environmental issues, and of assuring the compliance of nuclear works and undertakings with health, safety, security and environmental standards and with measures of international control undertaken by Canada, section 23 imposes no obligation on an applicant to provide any information about these matters. For the Act to provide any certainty or clarity both to applicants and to potential opponents of applications, the Act should specify the information to be provided in an application for a licence or a site approval. CELA and Probe recommend that the Act provide that all applications contain a detailed description of the effects which the proposed activities involving nuclear substances or facilities are likely to have on human health and safety or on the environment.

The Act should also require the Board to undertake a critical review of the information contained in the application prior to holding a hearing, if a hearing is to be held, and prior to issuing a licence or site approval, if no hearing is to be held. The Board should also make the application and the review available for public inspection.

Proposed Amendment

23(1) An application for a site approval or for the issuance or renewal of licence referred to in section 22 shall contain an environmental impact assessment, and shall be in such form, contain such other information, and be accompanied by such documents as may be prescribed by the regulations and shall be accompanied by any other supplementary information that the Board considers necessary.

(2) The Board,

(a) shall cause a review of the assessment to be prepared; and
(b) shall give notice of,

(i) the receipt of the application,
(ii) the completion of the preparation of the review,

(iii) the place or places where the application, assessment and review may be inspected, and
(iv) such other matters as the Board considers necessary or advisable,

to the applicant, the clerk of each municipality in which the work or undertaking will be carried out, all owners and occupants of lands adjoining the proposed site of the work or undertaking subject of the application, any person who has requested notice in writing, and such other persons as the Board considers necessary or advisable.

(3) The Board shall make the application, assessment and review available for public inspection not less than sixty days prior to holding public hearings, or, where no public hearing is held, sixty days prior to issuance of the licence, at the Board's head office, at the office of the clerk of each municipality in which the work or undertaking will be carried out, or at a place as close as possible to the site of the work or undertaking, if in an area without municipal organization, and at any other place the Board considers suitable.

(4) The Board shall provide a copy of the application, assessment or review at a cost no greater than the direct cost of copying to any person who so requests in writing.

Section 28

While section 50(1) makes a person who knowingly had a prescribed substance causing contamination liable for all costs and expenses reasonably incurred by the Board as a result of contamination, there appears to be no similar authority for the Board to recover costs and expenses incurred in assuming responsibility for prescribed substances or nuclear facilities under section 28. Where the Board assumes responsibility for abandoned or dangerous substances or facilities, the Act should provide authority to charge the costs incurred to those responsible for the substance or facility whenever possible.

Proposed Amendment

28(2) Where the Board has assumed responsibility for any prescribed substance or nuclear facility pursuant to subsection (1), the person formerly in possession thereof or the operator thereof is liable, without affecting the liability of an operator under the Nuclear Liability Act and without proof of fault or negligence, for all costs and expenses reasonably incurred by the Board or by any person on order of the Board.

Section 29

Information

CELA and Probe are concerned that this requirement may be unreasonably broad and unfair to some persons. We support the requirement that, subject to the common law right to claim privilege for certain documents, government agencies and parties to any hearing should have a duty to provide relevant information which may assist the Board. Like a court and like other existing tribunals the Nuclear Control Board and the parties appearing before it should have some right to discovery of documents and to information obtained through the spending of public funds. The present impediments to access to government information and information held by corporations have been

well-documented, and section 29 should help to alleviate some of the problems caused by lack of freedom of information legislation throughout Canada. At the same time, care should be taken not to allow unwarranted and damaging invasions of privilege. The Board should have the right to rule on the validity of a claim for privilege in the same manner and according to the same rules as in civil proceedings before the courts. However, recognition must be given to the fact that the overriding consideration in a Nuclear Control Board hearing should be the public interest rather than the narrower interests of the parties to the dispute. The Board therefore should have powers to view otherwise privileged documents to protect the public interest without revealing the contents of the document to the parties. In matters of such great national importance as nuclear licences it may become necessary to scrutinize privilege claims carefully and even to restrict the grounds for granting privilege. However, no such restrictions are recommended at this time, subject to further experience with the Board.

Furthermore, it is submitted that the public should have greater right to government information prima facie than to information compiled by private interests. To this extent, we would recommend that the onus in regard to public documents should be shifted by legislation from the need for the public to prove documents should be available, to an onus on government to prove they should not, as in the United States. However, it would be unfair to require persons other than government bodies and parties to provide information to the Board free of charge, unless this information was compiled using public funds. Thus, section 20 should provide for compensation to any person other than a public authority or party who is required to provide such information to the Board. Independent investigators, for example, should not be compelled to provide free research services to the Board.

Section 30

The Act should not allow the government to exempt operators from the requirement of obtaining a licence without requiring public hearings, Parliamentary debates, or both.

Proposed Amendment

See proposed amendment for section 56.

Section 32

Hearings

CELA and Probe have a number of concerns about section 32. The Board is given unfettered administrative discretion to decide

the subject matter, procedures, timing, purpose of, and issues to be dealt with in a public hearing in connection with the issue of licences. Furthermore, all hearings for licences other than licences to construct those works or undertakings listed in subsections in (a) to (f) of subsection (2) of section 32 are completely discretionary. Surely the purpose of such a regulatory process as is set out in this Act is to ensure the decisions about licensing are made on rational grounds, rather than extraneous ones, and to ensure that all relevant viewpoints are heard prior to licensing. Unless the Act incorporates some process other than unfettered agency discretion for deciding which matters will be subjected to public hearing and which matters will be exempted from public hearing, the purpose of the Act is to a large extent defeated. The decision whether to hold a public hearing in many cases then may remain a political football and may be decided on the basis of confrontation rather than rational analysis.

In particular,we note that there is no requirement that a public hearing be held before issuance of a licence, nor is there any requirement that the public hearing be held in connection with the issuance of a site approval. CELA and Probe are aware of numerous examples of cases where a proponent has proceeded to build and then to apply for licensing after construction is well under way or substantially complete. In such cases, government agencies responsible for licensing have frequently been unwilling to withhold a licence or permit for a fait accompli. Furthermore, a public hearing in connection with the issue of a licence to construct a facility for which a site approval has previously been granted without any public involvement would be mere tokenism, and would clearly be seen as unfair by the public.

Proposed Amendment

32(2) The Board shall hold a public hearing in connection with an application for a site approval or for the issue of a licence to construct or operate

(a) a uranium or thorium mine, mill or processing plant;
(b) a nuclear reactor of power greater than one megawatt (thermal);
(c) a spent reactor fuel reprocessing plant;
(d) a radioactive waste management facility;
(e) a uranium enrichment plant;
(f) a heavy water plant; or
(g) a nuclear-powered vehicle or a vehicle equipped with a nuclear reactor

not less than sixty days prior to site approval or issuance of the licence.

(3) The Board shall consider any written request to hold a public hearing in connection with any other matter within its jurisdiction.

The Board should also hold a public hearing to consider whether to renew, revoke, or suspend a site approval or licence pursuant to section 22(4) when requested by members of the public, and, particularly, when it is alleged that any of the activities permitted under the site approval or licence are likely to endanger the health and safety of persons or degrade the quality of the environment. See the proposed amendment, section 22(4).

We would also recommend that section 32 and any other sections providing for public hearings or licensing matters follow directly after the sections of the Act dealing with the Board's licensing powers (sections 22 and 23).

Section 33

Rules of Procedure

This section leaves far too much discretion to the Board and the Cabinet to decide important questions of procedure without any scrutiny of these rules by the public or by Parliament prior to their imposition. The Act should address itself to such critical matters as the nature and purpose of hearings, the timing of hearings, the need for liberal rules of standing, and the question of costs.

Proposed Amendment

33(1)(a) Hearings of the Board held under this Part shall be held in the municipality, or if the territory is not municipally organized, in the locality in which the proposed work or undertaking is to be sited.

(b) Any person shall have standing to appear at the hearing, be represented by an agent or by counsel, give evidence, call and examine witnesses, present arguments and submissions, and conduct cross-examination of witnesses reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

(c) The Board shall

(i) ensure that all testimony at a hearing is recorded and transcribed;
(ii) provide a copy of the transcript, at a charge not to exceed the direct cost of copying, to each person who so requests; and
(iii) make such transcripts available as soon as possible after each daily session of the hearing.

(d) No member of the Board shall participate in the decision of the Board pursuant to a hearing unless he was present throughout the hearing and heard the evidence and the argument of the parties and, except with the consent of the parties, no decision of the Board shall be given unless all members so present participate in the decision.

(e) The Board shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by any participant in the hearing.

(f) The Board shall send by first class mail addressed to the participants to any proceedings, at their addresses last known to the Board, a copy of any final decision and order in the proceedings, together with the reasons therefor, where reasons have been given, and each participant shall be deemed to have received a copy of the decision or order on the fifth day after the day of mailing unless the person did not, acting in good faith, through absence, accident, illness, or other cause beyond his or her control, receive the copy of the decision or order until a later date.

(g) The Board may award costs of participating in a hearing to a participant other than the applicant who has substantially prevailed, or who has raised a substantial issue of public policy, to be paid by the applicant.

(2) In any hearing, the Board shall make its decision on the basis of all relevant and material evidence presented.

(3) Except as otherwise provided by statute, the burden of proof is on the applicant. The Board may receive any oral or documentary evidence, but the Board as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence.

(4) The Board may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(5) The Board shall compile a record which shall include,

(a) any application, complaint, reference or other document, if any, by which the proceedings were commenced;
(b) the notice of any hearing;
(c) the final order, if any, and any intermediate orders made by the Board;
(d) all documentary evidence filed with the Board, subject to any limitation specially imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceedings;
(e) the transcript of the oral evidence given at the hearings;
(f) the decision of the tribunal and the reasons therefor, where reasons have been given.

Section 35

Publication of Notice

It is submitted that the Act should be more specific about the timing of notices and their contents. The issues to be dealt with by the Board are complex, and fairness requires sufficient advance notice to the public to permit them to evaluate an application adequately and prepare their submissions, which may be very technical. Ideally, notice that an application has been received should be given as soon as possible after receipt. Notice of a hearing should be given as soon as possible after the decision is made to hold one and a date for the hearing has been set.

Proposed Amendment

35(2)(c) A notice of a hearing shall include,

(i) a statement of the time, place and purpose of the hearing;
(ii) a reference to the statutory authority under which the hearing will be held;
(iii) a statement that if the person notified does not attend at the hearing, the Board may proceed in his or her absence, and he or she will not be entitled to any further notice in the proceedings;
(iv) a statement of the place and manner of obtaining a copy of the procedures to be used by the Board; and
(v) such other information as may be prescribed by the regulations.

(3) A notice under subsection (1)(a) or (1)(c) shall be published not later than thirty days after receipt of the application and not fewer than sixty days prior to issuance of the site approval or licence, or, where a hearing is to be held, not fewer than sixty days before a hearing.

A notice required under subsection (1)(b) shall be published not later than thirty days after the issue, refusal to issue, amendment, renewal, suspension or revocation, and, where a public hearing is to be held, not later than thirty days after the decision to hold a public hearing and not fewer than sixty days prior to the hearing.

Section 36

Disclosure of Information

The public statements of the Ministry of Energy, Mines and Resources and the provisions of this Act are extremely misleading in attempting to give the impression that the public will have the right to access to information. As the Board and Cabinet have the power to make regulations without scrutiny by Parliament or the public to exempt all information from disclosure, the Board has virtually no duty to make available for inspection any documents other than the notices referred to in section 35. Not even the application and its contents need be made public. The only reference to any responsibility of the Board to disclose information is in section 20, which states that one of its objects is to act as a source of information. However, this general object is unlikely to impose any duty. This statute, like many others in the environmental field, imposes vast powers on government authorities over the public without imposing any concomitant duties on the government to act fairly. The absolute right of Cabinet and the Board to withhold information contrast starkly with the duty imposed upon any member of the public under section 29 to provide the Board with any information it requests.

Proposed Amendment

The Act should state clearly what types of information are available and what types are not. It should state that all information is available except the classes of information listed in the Act itself as exempt. The list of exemptions should be

added to this section.

In the alternative, if the Board is to have the right to withhold documents within any class exempted from disclosure by the regulations, any member of the public (not just 'interested' members as provided by section 56(2)) should have the right to make submissions, as they now do under the Clean Air Act, the Environmental Contaminants Act and many American statutes, before the regulation is adopted.

The statute should provide for an index of materials in the Board's possession that are available, as well as a statutory right to inspect and copy public records, a description of the procedures the public may use to obtain information, statutory penalties for public officials who refuse to give out information under the Act, and the right to appeal to the courts a refusal to provide documents. The courts should have the power to inspect the documents in question, to order the government to wait until they have decided whether the information in question should be made available before acting on the basis of the information, and to award costs to an applicant for information. Costs should not be awarded against a person or public interest group raising a matter of public importance. In particular, where the disclosure of information promotes the public interest, the preservation of health or safety, or the protection of the environment, the Board should have a duty to make it available unless the Board or the person wishing to withhold the information shows some overriding consideration that would preclude disclosing it.

In section 36(5), the Board may withhold information from the public if it is satisfied that the information is not required in the public interest or would unduly impair the competitive position of the person making the request. The way the section is written, it appears that the Board has the power to withhold information whether or not disclosure would be detrimental to the licensee, if it is not convinced that the public needs that information. At the discretion of the Board, the matter of public need could be very narrowly interpreted. In the interests of public knowledge, it is recommended that section 35(6) be amended to provide that all information submitted to the Board be available for public inspection except where the Board is satisfied that disclosure of the information is not required in the public interest and would unduly impair the competitive position of the person making the request.

Section 56

Regulations and Publication of Proposed Regulations

The Act, as currently worded, provides a wide regulation-making power and says the public may make representations, but does not

provide for Parliamentary approval of regulations, for hearings, for withdrawal of a regulation if proved inadequate or harmful, or of appeal to courts of the passage of a regulation.

The Act's regulation-making power should be restricted to minor and procedural matters. All substantive provisions should be contained in the Act, or the Act should require that all regulations receive Parliamentary approval and that public hearings be held to consider important regulations such as exemptions from licence requirements pursuant to section 30 or the withholding of classes of documents pursuant to section 36 when such hearings are requested by the public. The Act should provide a procedure for review of regulations by the public and their withdrawal should new information or changing circumstances show that a regulation is detrimental; for example, when scientific evidence shows an approved level of radiation exposure is too high.

It is submitted that section 56 seriously erodes the public aspect of decision making in connection with nuclear matters.

Moreover, the opportunity to make representation to the Board about proposed regulations is limited to 'interested' persons. The courts have traditionally interpreted the term 'interest' as narrowly restricted to pecuniary and proprietary interest. With respect to public nuisance suits and judicial review applications, numerous scholars as well as the Canadian Civil Liberties Association have severely criticized this restriction on standing. Standing to make representations about the adequacy of proposed regulations should be available to any person. If it is necessary to modify this, standing should be granted at least to 'concerned, knowledgeable and interested' persons. The process of reviewing regulations provided for in the Environmental Contaminants Act, which permits public hearings before an Environmental Contaminants Board of Review (section 6) at which any interested or knowledgeable person may present evidence and make representation is far superior to the right provided under section 56, which may be limited to a right to send a letter.

Finally, section 56(3) is unclear. If this means that the Board has no duty to republish amended regulations and leave a further sixty days for representation after the first sixty day period, CELA and Probe have no objection, as the process must end somewhere. However, although a further sixty days should not be required before regulations come into effect, the regulations, if amended, should at least be republished in their amended form at the end of the sixty day period, or a notice

should be published indicating that the unamended regulations have come into force. We would recommend that this subsection be reworded to make its meaning less obscure.

Proposed Amendment

In section 56(1) the third line should be amended to add after the words 'Governor in Council' the words 'and Parliament.'

56(4) The Board shall hold a public hearing to consider a regulation proposed to be made pursuant to section 56(1)(j) or 56(1)(l) on the request of any person, and shall withdraw the proposed regulation if the evidence indicates that its operation is likely to endanger the health or safety of persons or degrade the quality of the environment or that the regulation is otherwise not in the public interest.

Section 57

Review and Appeal

The Act should not restrict standing to appeal to Cabinet or the courts, require leave to appeal, or exclude questions of natural justice other than jurisdictional questions from review. Appeal or review should be as of right by any participant in the Board's hearings.

Part II

Sections 66 and 67

Section 66 appears to authorize the minister responsible for Part II of the Act to issue a licence for many of the same operations which are prohibited without a licence by section 30, in Part I. Under section 22, the Board is to be responsible for the issuance of licences to these operations.

Does this mean that the same operator will be required to obtain licences from two separate licensing agencies before exploring, mining, milling, importing, exporting, etc.?

If not, then what does this overlap mean? Does it mean that the Cabinet, which may make regulations under section 67 without any requirement for public submissions, will exempt the operator from the requirements of Part I where regulations are subject to public comment and public hearings are possible and, in some cases, mandatory, before licensing?

It is possible that public involvement in decision making can be curtailed by an order in council placing licensing decisions under the sole jurisdiction of the minister responsible for Part II, who has no responsibility for disseminating information, giving public notice of applications, holding public hearings, or considering health, safety, security or environmental concerns.

Proposed Amendments

The comments on Part I regarding public access to information, public hearings, public participation, procedural safeguards and public rights and government obligations, apply equally to licensing decisions and the making of regulations under Part II.

We recommend that amendments be made to Part II to incorporate the amendments we have recommended to Part I where applicable.