COMMENTS BY
THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE MINISTER OF ENVIRONMENT
REGARDING PROGRAM APPROVAL APPLICATIONS
FOR DARLINGTON, PICKERING AND BRUCE
NUCLEAR GENERATING STATIONS

EBR Registry Number: 1A8E0672
Ministry of Environment Reference Number: CR980021
Proponent Ontario Hydro Nuclear (Pickering Generating Station)
EBR Registry Number: 1A8E0673
Ministry of Environment Reference Number: CR98003
Proponent Ontario Hydro Nuclear (Darlington Generating Station)
EBR Registry Number: 1A8E0674
Ministry of Environment Reference Number: PASWOO5
Proponent Ontario Hydro Nuclear (Bruce Generating Station)

Ministry: Environment
Date Proposals Loaded: 1998/05/20
Type of Postings: Instruments
Comment Period: 30 days
Written submissions to be made between May 20, 1998 and June 19, 1998
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PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 to use and improve laws to protect the environment and conserve natural resources. 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 issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

The purpose of these submissions are to comment on the above noted proposals for Instruments, posted on the Environmental Bill of Rights 1993 (EBR) electronic registry. CELA's comments focus on the appropriateness of the use of program approvals in these circumstances.

PART II - COMMENTS ON THE PROGRAM APPROVAL APPLICATIONS

The subject applications by Ontario Hydro Nuclear are essentially for three program approvals pursuant to section 10 of the *Environmental Protection Act*; one for each of the Ontario Hydro Nuclear Generating Stations, at Darlington, Bruce A and Bruce B, and Pickering.

Program approvals allow the holder to operate and emit contaminants to the environment, beyond the limits established by regulations under the *Environmental Protection Acct*, on the basis that a program is being pursued to bring the operator into eventual compliance.

In this case, the applicable regulation is Regulation 215/95 (amended by Regulation 525/95), the Electric Power Generation Sector Regulation. It was promulgated on April 13, 1995, and requires the Generating Stations to be in compliance with Part IV of the Regulation by April 13, 1998. We understand that it deals with certain parameters under the MISA program, and not for example, with the radioactive emissions limits. (However, at least one type of waste stream at the plants covered by this regulation may contain radioactive waste, i.e. the radioactive liquid waste management system. See page 11 of Ontario Hydro' application.)

The parameters covered by Regulation 215/95 include, in limits as specified for each type of stream for each plant, Total Suspended Solids, Aluminum, Iron, Biochemical Oxygen Demand, Ammonia plus Ammonium, Total Phosphorous, Zinc, and Oil and Grease. Part IV of the Regulation also requires in section 17 that Lethality Limits be met, i.e. that each effluent stream pass acute lethality tests to ensure that the effluent does not result in mortality for more than 50 per cent of the test organisms (rainbow trout and Daphnia magna) in 100 per cent effluent. Ontario Hydro describes the purpose of the regulation as specifying that "All Electric Power Generation Sector sites must meet process and building effluent discharge limits, and must not discharge effluent acutely lethal to rainbow trout or daphnia magna." (At page 17 of their application.) Ontario Hydro refers to this aspect of the Regulation as "toxicity" in their application.

CELA has had the benefit of reviewing the application package as submitted to the Ministry of Environment on April 23, 1998, which was provided to us by Ontario Hydro, in addition to the

information posted on the Environmental Bill of Rights registry. From the supporting information in that package, we note that Ontario Hydro has been taking steps toward compliance with Regulation 215/95 in the form of capital projects and improved management practices. As a result, we note that emissions of some contaminants have been reduced and the effluent quality has been improved in some respects.

However, there are several respects in which Ontario Hydro Nuclear advised the Ministry of Environment in its application for program approval, that it would be unable to comply with the MISA regulation by the effective date of April 13, 1998.

These areas (which are described in the Application as specifically applicable to each type of stream at each Plant) include, in general, the following types of non-compliance:

-toxicity due to chlorination (for zebra mussel control) (application page 4)
-toxicity due to air and water emissions of hydrazine (used in corrosion prevention) (page 4)
-"system leakage" (page 5)
-boiler chemicals (hydrazine, morphaline, and ammonia)
-demineralized water (page 6)
-undetermined causes of toxicity (page 6).
-"chemicals" (page 9)

CELA's comments are with respect to the appropriateness of the use of program approvals in this situation.

Issuance of a program approval will give Ontario Hydro Nuclear complete immunity from prosecution for the matters described in the approval and for the time period of the approval (*Environmental Protection Act* section 186). The Director's only power to enforce the regulation in the areas in which Ontario Hydro Nuclear is not in compliance will be by issuance of a stop order or control order under section 12 of the *Environmental Protection Act*; or by revoking or amending the program approval under section 11.

However issuance of program approvals will restrict the Ministry's enforcement options considerably. For example, the Director is not at liberty to revoke or amend a program approval, once issued, at will. His authority then is only to do so on consent of Ontario Hydro Nuclear, or where the program approval was issued "in error" or where it "no longer adequately provides for the protection and conservation of the natural environment". (Sections 11(2) and 11(3)).

Case law on this point states that the Director's power to issue a stop order while a program approval is in effect Amust be issued judicially and not arbitrarily". The court even drew an analogy between a stop order following a program approval and an injunction - that [the Director] be able to show (or be satisfied) that the failure to issue the stop order "will cause irreparable harm that cannot be compensated for by monetary damages, and that on the balance of convenience the stop order ought to issue..."

Canada Metal Co. v. MacFarlane (1973) 1 O.R. (2d) 577; 41 D.L.R. (3d) 161 (H.C.)

In that case, the Court set aside a stop order where the "medical and other evidence cited is insufficient, too vague and too unfounded to indicate "an immediate danger"".

The issuance of program approvals to Ontario Hydro Nuclear in these applications would therefore not only grant Ontario Hydro Nuclear complete immunity from prosecution for their failure to comply with MISA, but would also seriously restrict the Director's ability to issue stop or control orders in the face of a program approval, even where he reasonably believes same would be in the best interests of protection of the environment. There is a substantial difference between the Director's normal power to issue a control or stop order under sections 7 and 8 of the *Environmental Protection Act* and this much more restricted power under section 12, as interpreted by the Courts.

Section 7 control orders are normally available to the Director at any time (except where a program approval has been issued) where the report of a provincial officer finds that a contaminant discharged into the natural environment "is a contaminant the use of which is prohibited by the regulations or is being discharged in contravention of section 14 of the regulations." (Section 14 is the general prohibition on discharge of a contaminant into the natural environment, that causes or is likely to cause an adverse effect.)

However, under section 12 of the *Environmental Protection Act*, the threshold for issuance of a control order where a program approval has been issued is raised to a requirement that the Director be of the opinion "based on reasonable and probable grounds, that it is necessary or advisable for the protection or conservation of the natural environment, the prevention or control of an immediate danger to human life, the health of any persons or to property..." As noted above, there is case law interpreting this threshold as analogous to the issuance of an injunction; a very high threshold. This unduly restricts the Director's powers to act in accordance with the purposes of the *Environmental Protection Act.*

It is inappropriate in the instant case to grant Ontario Hydro Nuclear immunity from prosecution. They have had three years notice of and time to prepare for the implementation date of the Regulation, which was prepared with their input. Even if the Ministry chooses not to

prosecute, they should not hamper their future ability to decide to prosecute if they believe that inadequate progress is being made, or for other reasons. It should also not hamper its normal powers with respect to the issuance of stop orders and control orders.

CELA is also concerned because the description of the program approval contained in the application would cover causes of toxicity that have not yet been determined as well as (unspecified) Achemicals" (page 9). If the root causes of toxicity are discovered in those instances, the Director should retain unrestricted powers to enforce the *Environmental Protection Act* by any of the means provided by the legislation, including prosecution, issuance of control orders and issuance of stop orders.

CONCLUSION

Program Approvals have not been used in Ontario since the early 1970s when air standards were implemented. Much litigation ensued, and in one case the Court stated the purpose of program approvals under section 10 of the *Environmental Protection Act*, namely to allow for the transition to Athe strict new regime of air emissions controls" following Afifty years of mistakes, errors and abuses." The Court said that section 10 recognized that time was required to correct this history. This is hardly the situation today with the MISA regulations. Even prior to the promulgation of Regulation 215/95, Ontario Hydro was actively involved in its development. Upon enactment of the Regulation, the effective date of Part IV was delayed by three years to provide time for compliance. Without taking away the fact that Ontario Hydro Nuclear has been taking steps to comply, CELA does not see a sufficient rationale for the issuance of program approvals in these circumstances. The Director should retain all of his normal enforcement powers under the *Environmental Protection Act*, even while steps are being taken by Ontario Hydro to attain compliance.

In its Comments on the Revisions to Compliance Guideline F-2, submitted to the Ministry of Environment and Energy, by R. Nadarajah and R. Lindgren, May, 1995, CELA stated that:

> "...there is no valid reason for the MOEE to continue to resort to program approvals since the MOEE can achieve the same voluntary abatement objectives through control orders, while retaining the option to resort to enforcement in the event of non-compliance....Under Compliance Policy 05-02, a programme approval was only permitted for situations where preventative measures were needed and not for abating pollution that was actually occurring. ..." (at page 3, 4)

CELA reiterates the concerns stated in this brief, and recommends that the program approvals applications which are the subject of the above noted EBR postings NOT be granted. Rather CELA recommends that the MISA compliance issues be dealt with by the Director in a manner that does not restrict or hamper his enforcement options under the *Environmental Protection Act*. It is not necessary to issue program approvals in order for Ontario Hydro to proceed with its plans for full compliance. Furthermore, if the Director desires remedies aside from prosecution, control orders or stop orders, there are also the tools available under section 17 of the *Environmental Protection Act*, Remedial orders, and section 18 of the *Act*, Prevention orders. These latter measures are much more appropriate to the type of case here in question, where pollution is actually occurring. If the Director sees fit to take some action in the face of Ontario Hydro's submission that they are not in compliance with the MISA Regulation, a remedial order would be the appropriate instrument, since it is designed for this situation. The only result of the issuance of program approvals will be to grant Ontario Hydro Nuclear immunity from prosecution and to restrict the Director's ability to enforce Regulation 215/95 as he sees fit, in circumstances where there is no apparent justification.

Submitted this 19th day of June, 1998

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

per Theresa McClenaghan
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cc Eva Ligeti, Environmental Commissioner of Ontario