

**FEDERAL COURT**

BETWEEN:

GREENPEACE CANADA,  
LAKE ONTARIO WATERKEEPER, NORTHWATCH, and  
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Applicants

and

ATTORNEY GENERAL OF CANADA,  
MINISTER OF THE ENVIRONMENT,  
MINISTER OF FISHERIES AND OCEANS,  
MINISTER OF TRANSPORT,  
CANADIAN NUCLEAR SAFETY COMMISSION, and  
ONTARIO POWER GENERATION INC.

Respondents

APPLICATION UNDER sections 18, 18.1 and 18.2 of the *Federal Courts Act*,  
R.S.C. 1985, c.F-7 as amended

**NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Toronto, Ontario.


IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the

Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

September 23, 2011

Issued by:   
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## APPLICATION

This is an application for judicial review in relation to an Environmental Assessment Report published August 25, 2011 by the Joint Review Panel ("Panel") established by the Minister of the Environment ("Minister") and the Canadian Nuclear Safety Commission ("CNSC") to conduct an environmental assessment and licencing application review for the Darlington New Nuclear Power Plant Project ("the Project"). This application also seeks to prohibit the Minister, the CNSC, the Governor in Council, and other federal authorities from issuing any authorizations or taking any other actions to enable the Project to proceed, in whole or in part, until an environmental assessment has been completed in accordance with the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 ("CEAA").

The applicants make application for:

1. An order declaring that:
  - (a) the environmental assessment conducted by the Panel in relation to the Project failed to comply with the CEAA and the *Agreement to Establish a Joint Review Panel for the New Nuclear Power Plant Project by Ontario Power Generation (Darlington) within the Municipality of Clarington, Ontario* (including the Panel's Terms of Reference) dated January 2009 ("the Agreement"), and is therefore invalid and unlawful;
  - (b) the Panel's Report and recommendations concerning the Project, entitled *Joint Review Panel Environmental Assessment Report: Darlington New Nuclear Power Plant Project*, dated August 25, 2011, failed to comply with the CEAA and the Agreement, and are therefore invalid and unlawful;
  - (c) the Governor in Council has no jurisdiction under section 37(1.1) of the CEAA to approve the response of any Responsible Authority to the Panel's Report until the CEAA and the Agreement have been complied with by the Panel; and
  - (d) the CNSC, the Department of Fisheries and Oceans ("DFO") and Transport Canada have no jurisdiction to issue any authorizations or take

any other actions which would enable the Project to proceed, in whole or in part, until the CEAA and the Agreement have been complied with by the Panel.

2. An order remitting the environmental assessment and the Report back to the Panel for further consideration and determination in accordance with the CEAA, the Agreement and such directions as this Honourable Court considers appropriate.
3. An interlocutory and permanent order prohibiting the CNSC, the Minister of Fisheries and Oceans, and the Minister of Transport, or any of their agents, servants, and officials, from issuing any licences, permits, certificates or statutory authorizations which would permit the Project to be carried out, in whole or in part, until the CEAA and the Agreement have been complied with by the Panel.
4. An order quashing or setting aside:
  - (a) any approval that the Governor in Council may issue under section 37(1.1) of the CEAA to enable the Project to proceed, in whole or in part, before this application has been heard and determined by this Honourable Court; and
  - (b) any authorizations or approvals issued by the CNSC, DFO or Transport Canada to enable the Project to proceed, in whole or in part, before this application has been heard and determined by this Honourable Court.
5. An order requiring the respondents to pay the applicants their costs of this application if requested, or, in the alternative, an order that all parties shall bear their own costs.
6. Such further or other relief, including interim relief, as this Honourable Court may deem just.

The grounds for the application are:

1. The Project, as proposed by Ontario Power Generation Inc. ("OPG"), involves the site preparation, construction, operation, decommissioning and abandonment of up to four new nuclear reactors at OPG's existing Darlington Nuclear Generating Station located on the Lake Ontario shoreline in the Municipality of Clarington, Ontario.
2. The Project is subject to the environmental assessment requirements prescribed by the CEAA, and the Minister has statutory responsibilities for the environmental assessment of the Project pursuant to the CEAA and the Agreement.
3. The Project requires statutory authorizations from various federal authorities, including the CNSC, DFO, and Transport Canada. Since these authorizations have been prescribed by the *Law List Regulations* under the CEAA, these federal authorities are prohibited by section 13 of the CEAA from issuing authorizations until an environmental assessment has been completed in accordance with the CEAA, and until a "course of action" decision has been made under section 37 of the CEAA as approved by the Governor in Council.
4. In January 2009, the Minister and the CNSC signed the Agreement to establish a Joint Review Panel for the Project pursuant to section 40 of the CEAA, and fixed the Terms of Reference for the Panel pursuant to section 41 of the CEAA. The dual mandate of the Panel was to carry out the environmental assessment required under the CEAA, and to review the Application for a Licence to Prepare a Site filed by OPG under the *Nuclear Safety and Control Act* ("NSCA").
5. In September 2009, OPG filed its Environmental Impact Statement, supporting documents, and a revised Application to Prepare a Site under the NSCA.

6. In October 2009, the Minister and the Governor in Council appointed three persons to the Panel, and the Panel undertook various review activities, including a 17 day public hearing in March and April 2011 in relation to the Project.

7. The applicants, which are non-profit public interest organizations with a lengthy history of involvement and demonstrated interest in nuclear issues and environmental protection, participated as interveners during the Panel's public hearings on the Project.

8. In June 2011, the Panel announced that it had obtained and made public sufficient information in order to prepare its Report, and the Panel closed the record for the environmental assessment.

9. On August 25, 2011, the Panel published its Report and recommendations regarding the Project, and identified significant gaps in the data, information, methodology and analysis needed to assess the likelihood, nature, severity and mitigation of environmental effects which may be caused by the Project.

10. The Report further noted, *inter alia*, that no specific reactor technology, site design layout, cooling tower option, used nuclear fuel storage option, radioactive waste management option, or other key components have been selected for the Project to date. Despite the absence of these and other critical details, the Report purported to conclude that the Project is not likely to cause significant adverse environmental effects, provided that OPG's commitments, proposed mitigation measures, and the Panel's 67 recommendations are implemented.

11. Since the Panel has now submitted its Report to the Minister, the CNSC, DFO and Transport Canada are required by the CEAA to consider and respond to the Report with the approval of the Governor in Council, and are further required to make a "course of action" decision under section 37 of the CEAA that conforms with the approval of the Governor in Council. However, these statutory powers can only be exercised if the environmental assessment has been

completed in accordance with the CEAA.

**Grounds for Review: The Environmental Assessment and Report**

12. In conducting the environmental assessment of the Project and in rendering its Report, the Panel erred in law and/or acted beyond or without jurisdiction when it:
- (a) failed to assess, or incorrectly or unreasonably assessed, the mandatory factors listed in subsections 16(1) and (2) of the CEAA and in the Agreement;
  - (b) failed to assess, or incorrectly or unreasonably assessed, the environmental effects of all components of the Project (as defined by section 2(1) of the CEAA) over its entire lifecycle, contrary to subsection 15(3) of the CEAA;
  - (c) incorrectly or unreasonably constrained its assessment of the foregoing factors by adopting OPG's "bounding approach" (also known as the "plant parameter envelope") when reviewing the Project and its environmental effects;
  - (d) failed to meet the information-gathering and reporting requirements established by section 34 of the CEAA;
  - (e) failed to take into account relevant considerations, or, in the alternative, took irrelevant considerations into account; and
  - (f) failed to meet the purposes and duties imposed by subsections 4(1) and 4(2) of the CEAA to protect the environment and human health, to apply the precautionary principle, and to take actions to promote sustainable development.
13. In conducting the environmental assessment of the Project and in rendering its Report, the Panel:
- (a) contravened its statutory and common law duties to act fairly and to ensure meaningful opportunities for public participation in accordance with the CEAA and the Agreement; and

- (b) failed to act upon the applicants' reasonable expectations, created by the Agreement, Terms of Reference, and the Panel's assurances, that the environmental effects of the Project and its alternatives would be rigorously assessed in accordance with CEAA requirements.

14. The Panel's conclusion that the Project is not likely to cause significant adverse environmental effects is premised upon the Panel's reliance upon other agencies or entities at the federal, provincial and municipal level to undertake further information-gathering, perform further analytical work, conduct further impact assessment, and develop and implement mitigation measures and follow-up programs in the future, many of which are required prior to making an informed assessment of the Project's likely environmental effects. Such reliance and/or unlawful delegation is based upon an incorrect interpretation of the Panel's duties and responsibilities under the CEAA and the Agreement, and is unreasonable on the basis of the incomplete record before the Panel and the Panel's own findings about the Project and the environmental assessment.

#### **Basis for Seeking Relief against the Ministers and Governor in Council**

15. The failure by the Panel to comply with its statutory duties under the CEAA and the Agreement deprives the Governor in Council, CNSC, DFO and Transport Canada of jurisdiction to issue approvals or authorizations in relation to the Project. Completion of the environmental assessment of the Project by the Panel in full compliance with the CEAA and the Agreement is the mandatory condition precedent for the lawful exercise of statutory powers of decision or approval under section 37 of the CEAA.

16. The applicants are concerned about the lawful application of the CEAA to the Project, and have public interest standing to bring this application because: it raises serious issues; the applicants have a genuine interest in this matter; and there is no other reasonable or effective manner in which the issues may be brought to this Honourable Court.



17. Sections 18, 18.1 and 18.2 of the *Federal Courts Act*; the *Federal Court Rules*; the NSCA; the CEEA; the *Law List Regulations* (SOR/94-636); the *Comprehensive Study Regulations* (SOR/94-638); and the Agreement.

18. Such further or other grounds as counsel may advise and this Honourable Court may consider appropriate.

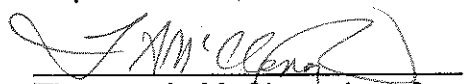
This application will be supported by the following material:

1. The affidavit of Shawn-Patrick Stensil on behalf of Greenpeace Canada, to be served.
2. The affidavit of Mark Mattson on behalf of Lake Ontario Waterkeeper, to be served.
3. The affidavit of Kathy Cooper, on behalf of Canadian Environmental Law Association, to be served.
4. The affidavit of Brennain Lloyd, on behalf of Northwatch, to be served.
5. The record before the Panel, including the Environmental Assessment Report.
6. Such further or other materials as counsel may advise.

**Rule 317 Request:** The applicants request the Panel to send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Panel to the applicants and to the Registry:

1. The record of materials before the Panel in respect of the Project.

September 23, 2011



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