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Court File No. T-634-13

FEDERAL COURT

BETWEEN:

GREENPEACE CANADA
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
LAKE ONTARIO WATERKEEPER and
NORTHWATCH

Applicants

and

ATTORNEY GENERAL OF CANADA
MINISTER OF FISHERIES AND OCEANS
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 MOTION

TAKE NOTICE THAT the applicants, Greenpeace Canada, Canadian Environmental Law Association, Lake Ontario Waterkeeper and Northwatch, will make a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR:

1. An order granting the applicants leave to amend the Notice of Application dated April 12, 2013 by:
 - (a) removing the Minister of Fisheries and Oceans (“Minister”) as a respondent to this judicial review application;

- (b) adding the “course of action” decision taken by the Minister’s agents and servants within Fisheries and Oceans Canada (“FOC”) under section 20 of the *Canadian Environmental Assessment Act* (“CEAA”) as a statutory decision to be reviewed within the scope of this judicial review application; and
- (c) making other related and consequential amendments to the Notice of Application, in the form attached as Exhibit “G” in the affidavit of Rizwan Khan sworn June 25, 2013.
2. An order directing the Minister and/or FOC to forthwith provide the applicants and this Honourable Court with a certified copy of FOC’s decision record respecting the proposed refurbishment and continued operation of the Darlington Nuclear Generating Station.
 3. An order granting the applicants leave to serve a supplementary affidavit within 30 days of receiving FOC’s decision record pursuant to paragraph 2.
 4. An order extending the time for service of the respondents’ affidavits to 45 days after service of the applicants’ supplementary affidavit.
 5. An order directing that the cross-examinations on the parties’ affidavits, the filing of the parties’ records, and the filing of the hearing requisition in this proceeding shall be completed in accordance with the *Federal Courts Rules*.
 6. An order that there shall be no costs associated with this motion, or, in the alternative, that the costs of this motion are in the cause.

THE GROUNDS FOR THE MOTION ARE:

1. The respondent Ontario Power Generation Inc. (“OPG”) proposes to refurbish and continue operating the Darlington Nuclear Generating Station.

2. The refurbishment project requires statutory approvals from the Canadian Nuclear Safety Commission (“CNSC”) under subsection 24(2) of the *Nuclear Safety and Control Act*, and from FOC under section 32 of the *Fisheries Act*.
3. As Responsible Authorities under the CEAA, the CNSC and FOC were both legally obliged to ensure that an environmental assessment of the refurbishment project was completed in accordance with applicable CEAA requirements before the statutory approvals could be issued to OPG under the above-noted statutes.
4. The CNSC’s “course of action” decision (and reasons for decision) under section 20 of the CEAA was issued on March 13, 2013, and was summarized and web-posted on the CEAA Registry on or about March 14, 2013.
5. On April 12, 2013, the applicants jointly commenced an application for judicial review of the CNSC’s “course of action” decision under the CEAA, and also requested certain injunctive relief against the Minister.
6. Prior to the issuance of the judicial review application, the applicants made inquiries of the Minister’s agents and servants in FOC regarding the existence, status and content of FOC’s own “course of action” decision under the CEAA in relation to the refurbishment project.
7. The applicants received no response to their inquiries from FOC before the expiry of the 30 day statutory deadline commencing the judicial review application in this matter.
8. After the judicial review application was commenced in relation to the CNSC decision under the CEAA (but also included relief requested against the Minister), FOC responded to the applicants’ inquiries by indicating that the decision

- statement on the CEAA Registry also constituted FOC's "course of action" decision on the refurbishment project
9. Counsel for the Minister subsequently refused to provide the applicants with a copy of FOC's decision record despite the applicants' Rule 317 request, and has advised the applicants that FOC has not made any other or further "course of action" decision aside from the one that was web-posted on the CEAA Registry.
 10. The CNSC and FOC "course of action" decisions should be considered together in this judicial review application because they represent a continuous course of administrative conduct in relation to the same refurbishment project, and because the two decisions are closely related, factually indistinguishable, and arise out of the same environmental assessment process under the CEAA.
 11. As the Minister responsible for FOC's "course of action" decision, it is improper to name the Minister as a respondent in this proceeding, and the Minister's interests are adequately represented by counsel for the Attorney General of Canada.
 12. The amendments to the Notice of Application proposed by the applicants:
 - (a) are being brought at an early stage of this proceeding;
 - (b) facilitate the Court's consideration of the merits of the application, and are therefore necessary for the purposes of adjudicating the real controversy between the parties;
 - (c) serve the interests of justice while causing no demonstrable prejudice or injustice to the respondents; and

- (d) will not unduly delay the hearing and determination of the judicial review application.
13. The respondents have consented to the relief requested in this notice of motion.
 14. Rules 3, 8, 54, 75, 302, 317 and 369 of the *Federal Courts Rules*.
 15. Such further or other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Rizwan Khan affirmed June 25, 2013.
2. The consents of the respondents.

June 25, 2013

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Court File No. T-634-13

FEDERAL COURT

BETWEEN:

GREENPEACE CANADA
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
LAKE ONTARIO WATERKEEPER and
NORTHWATCH

Applicants

and

ATTORNEY GENERAL OF CANADA
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Respondents

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

AFFIDAVIT OF RIZWAN KHAN

I, RIZWAN KHAN, Student-at-Law, of the City of Toronto, AFFIRM THAT:

1. I am employed as a student-at-law in the offices of the Canadian Environmental Law Association (“CELA”), and as such have knowledge of the matters deposed to in this affidavit.

(a) Background

2. The respondent Ontario Power Generation Inc. (“OPG”) has proposed to refurbish and continue operating the Darlington Nuclear Generating Station (“NGS”).

3. In order to proceed, the refurbishment project requires statutory approvals from the Canadian Nuclear Safety Commission (“CNSC”) under subsection 24(2) of the *Nuclear Safety and Control Act*, and from Fisheries and Oceans Canada (“FOC”) under section 32 of the *Fisheries Act*.

4. As Responsible Authorities under the *Canadian Environmental Assessment Act* (“CEAA”), the CNSC and FOC are both obliged to ensure that an environmental assessment (“EA”) of the refurbishment project is completed in accordance with applicable CEAA requirements before the above-noted statutory approvals can be issued to OPG.

5. For CEAA purposes, the CNSC served as the Federal EA Coordinator and took the lead role in conducting the Darlington NGS Refurbishment and Continued Operation EA.

6. In December 2012, the CNSC held a public hearing on the refurbishment project EA and related licencing matters, and CELA and the other three applicants in this proceeding participated in the CNSC’s public hearings. No separate public hearings were held by FOC under the CEAA.

(b) Commencement of Application for Judicial Review

7. After completion of the public hearings, the CNSC’s “course of action” decision (and reasons for decision) under section 20 of the CEAA was issued on March 13, 2013, and was summarized and web-posted on the CEAA Registry as a “decision statement” on or about March 14, 2013.

8. The CEAA Registry posting also included a brief reference to FOC, but otherwise provided no further reasons, details or information about FOC’s “course of action”

decision under the CEAA. A copy of the Registry posting of the Responsible Authorities' decision statement for the refurbishment project is attached to this affidavit as Exhibit "A".

9. On April 12, 2013, CELA and the other three applicants jointly commenced an application for judicial review on the grounds that the EA for the refurbishment project did not comply with the applicable requirements of the CEAA. A copy of the Notice of Application, as issued on April 12, 2013, is attached to this affidavit as Exhibit "B".

10. The Notice of Application names as respondents the Attorney General of Canada, the Minister of Fisheries and Oceans ("Minister"), and OPG. The Notice of Application claims, *inter alia*, certain injunctive relief against the Minister, and includes a Rule 317 request that both the CNSC and Minister provide a copy of their respective decision records under the CEAA to the applicants and to this Honourable Court.

(c) Communications with Fisheries and Oceans Canada

11. Prior to the issuance of the judicial review application, I made verbal inquiries on behalf of the applicants to the Minister's agents and servants in FOC to clarify the existence, status and content of FOC's own "course of action" decision under the CEAA in relation to the refurbishment project.

12. In particular, I contacted FOC staff located at Prescott, Ontario to ask whether the FOC had issued an official "course of action" decision under the CEAA concerning the EA of the Darlington NGS refurbishment project.

13. However, I received no response to my inquiries to FOC before the issuance of the Notice of Application on April 12, 2013.

14. On April 15, 2013, after the judicial review application had been commenced, I spoke by telephone with Mr. Thomas Hoggarth, Team Leader, Client Liaison, Partnership, Standards and Guidelines at FOC, and I requested confirmation on whether or not FOC had issued a “course of action” decision as an RA in the Darlington NGS refurbishment project EA. He informed me that FOC had rendered a decision as an RA, that it was the same decision as the CNSC, and that he would forward the decision to me via email.

15. On April 15, 2013, I received an email from Mr. Thomas Hoggarth that simply provided a link to the Registry posting attached to this affidavit as Exhibit “A”. No other explanation, documentation or reasons for decision was provided to me by FOC. A copy of the FOC email to me dated April 15, 2013 is attached to this affidavit as Exhibit “C”.

16. On April 23, 2013, the CELA office received a letter from counsel for the Minister and Attorney General of Canada (“AGC”) indicating that the applicants’ Rule 317 request to the Minister was “improper”, that the Minister’s decision record would not be provided, and that the judicial review application should be amended accordingly. A copy of the letter to CELA dated April 23, 2013 is attached to this affidavit as Exhibit “D”.

17. On April 30, 2013, counsel for the applicants wrote to counsel for the Minister and AGC to seek further clarification regarding FOC’s decision under the CEAA, as reflected in the decision statement posted on the CEAA Registry. A copy of CELA’s letter to counsel for the Minister and AGC is attached to this affidavit as Exhibit “E”.

18. On May 8, 2013, the CELA office received a letter from counsel for the Minister and AGC indicating that while the decision statement on the CEAA Registry was “jointly

posted” by the FOC and CNSC, FOC had made its own separate “course of action” decision regarding the refurbishment project, based on information submitted to the CNSC. A copy of the letter to CELA dated May 8, 2013 is attached to this affidavit as Exhibit “F”.

19. A copy of the CNSC’s record was received by CELA on or about May 24, 2013. No decision record has been received to date from the Minister or FOC.

20. In light of the foregoing information and recent developments, the applicants now seek leave to amend the Notice of Application issued on April 12, 2013 to better reflect, and more efficiently address, the legal issues in dispute in this proceeding. A copy of the draft revised Notice of Application, containing the amendments proposed by the applicants, is attached to this affidavit as Exhibit “G”.

21. At the present time, and on the basis of the CNSC record received to date, the applicants have prepared and served four affidavits upon the respondents in this proceeding, and the respondents’ affidavits are due to be served by mid-July 2013. No cross-examinations have been conducted to date, and the respondents have taken no other steps in this proceeding aside from filing their respective Notices of Appearance.

22. If the applicants’ motion is granted and the Minister and/or FOC is directed to provide the FOC record pursuant to Rule 317, the applicants intend to expeditiously review the disclosed record to determine whether – or to what extent – it may be necessary to attach materials from the FOC record as exhibits in a supplementary affidavit in this proceeding.

23. At the present time, the CNSC has not amended OPG’s operating licence under the *Nuclear Safety and Control Act* to permit the proposed refurbishment and continued

operation of the Darlington NGS, and FOC has not issued an authorization under section 32 of the *Fisheries Act* in relation to the project.

24. The respondents have consented to the relief requested in the moving parties' notice of motion, and copies of the executed consents are attached at Tab 3 of the motion record.

25. I make this affidavit in support of the applicants' motion to amend the Notice of Application in this proceeding, and for no other or improper purpose.

AFFIRMED BEFORE ME at the)
City of Toronto, in the Province of)
Ontario, this 25th day of June, 2013)
)
_____)
Commissioner for Taking Affidavits

Rizwan Khan



[Home](#) > [Registry](#) > [Refurbishment and Continued Operation of the Darli...](#) > [Additional Information](#) > Decision Statement

DECISION

The Canadian Nuclear Safety Commission and Fisheries and Oceans Canada have taken the following course of action on March 14, 2013 relating to the environmental assessment of the Refurbishment and Continued Operation of the Darlington Nuclear Generating Station. The authorities may exercise any power or perform any duty or function with respect to the project because, after taking into consideration the screening report and taking into account the implementation of appropriate mitigation measures, the authorities are of the opinion that the project is not likely to cause significant adverse environmental effects.

Implementation of mitigation measures is required for the project to address:

- ▶ Air quality
- ▶ Noise levels
- ▶ Water quality
- ▶ Soil quality
- ▶ Fish and/or their habitat
- ▶ Mammals and/or their habitat
- ▶ Human health and safety
- ▶ Socio-economic impacts

A follow-up program to verify the accuracy of the environmental assessment and/or determine the effectiveness of any measures taken to mitigate the adverse environmental effects is required for this project. The follow-up program is estimated to be completed by 2026.

Date Modified: 2013-04-02

Court File No.

T-634-13

FEDERAL COURT

BETWEEN:

GREENPEACE CANADA,
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Applicants

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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.

April 12, 2013

Issued by: MAGGIE LAU
REGISTRY OFFICER
AGENT DU GREFFE

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APPLICATION

This is an application for judicial review of the decision dated March 13, 2013 by the Canadian Nuclear Safety Commission (“CNSC”) under section 20 of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (“CEAA”) in relation to the screening-level environmental assessment (“EA”) conducted by the CNSC of the refurbishment and continued operation of the Darlington Nuclear Generating Station (“NGS”) as proposed by Ontario Power Generation Inc. (“OPG”).

The applicants make application for:

1. An order declaring that:
 - (a) the CNSC’s decision regarding the Darlington NGS Refurbishment and Continued Operation EA is invalid and unlawful due to non-compliance with the applicable requirements of the CEAA;
 - (b) the CNSC has no jurisdiction to amend or re-issue any licences under the *Nuclear Safety and Control Act*, S.C. 1997, c.9 (“NSCA”) to permit the proposed refurbishment and continued operation of the Darlington NGS until such time as the CEAA has been fully complied with by the CNSC;
 - (c) in the alternative, the decision of the CNSC in relation to the Refurbishment and Continued Operation EA was unreasonable.
2. An order quashing or setting aside the CNSC’s decision under the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA.
3. An order remitting the Darlington NGS Refurbishment and Continued Operation EA back to the CNSC for further consideration and determination in accordance with the CEAA and any directions as this Honourable Court considers appropriate.

4. An interlocutory and permanent order prohibiting the CNSC and the Minister of Fisheries and Oceans, or any of their agents, servants or designates, from licensing, permitting or otherwise authorizing any activities related to the proposed refurbishment and continued operation of the Darlington NGS until such time as the CEAA has been fully complied with by these Responsible Authorities.
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. OPG proposes to undertake activities to refurbish four nuclear reactors, and activities related to the continued operation of the refurbished reactors, at the Darlington NGS, which is located on the Lake Ontario shoreline in the Municipality of Clarington, Ontario.
2. The intended purpose of OPG's refurbishment and continued operation project is to allow the Darlington NGS reactors to continue to generate electricity until approximately 2055. OPG proposes that the reactors will then be shut down and decommissioned in 2085; however, the radioactive wastes resulting from the overall project will continue to exist, and have to be safely managed, for thousands of years.
3. OPG's proposed refurbishment and continued operation activities at the Darlington NGS have the potential to cause environmental effects. In particular, OPG's project includes the following physical works, undertakings and facilities:

- (a) site preparation and construction of various buildings and structures;
 - (b) shutting down, defueling and dewatering the four CANDU nuclear reactors;
 - (c) inspection, servicing and replacement of the major reactor components, including nuclear fuel channel assemblies and feeder pipes;
 - (d) interim on-site storage of low- and intermediate-level radioactive refurbishment waste, or off-site transportation of such waste to a licensed facility;
 - (e) refilling each reactor system with heavy water;
 - (f) refueling and restarting the refurbished reactors;
 - (g) continued operation of the refurbished reactors and ancillary support systems;
 - (h) management of ongoing operational waste and low- and intermediate-level radioactive waste;
 - (i) construction of additional on-site storage capacity for high-level radioactive waste (i.e. used nuclear fuel);
 - (j) ongoing repair and maintenance, including possible replacement of steam generators; and
 - (k) operational activities required to achieve a safe state of closure prior to decommissioning.
4. In order to proceed with the proposed refurbishment and continued operation of the Darlington NGS, OPG requires various statutory approvals under federal law, including an amendment to OPG's current Power Reactor Operating Licence ("operating licence") issued by the CNSC under subsection 24(2) of the NSCA. OPG's proposal also requires an authorization under section 32 of the *Fisheries Act*, R.S.C. 1985, c.F-14 from the Minister of Fisheries and Oceans for the destruction of fish by means other than fishing. Accordingly, both the CNSC and the

Minister of Fisheries and Oceans are “Responsible Authorities” as defined by the CEAA, and both are legally required to ensure that an EA of the OPG proposal is conducted in compliance with the CEAA.

5. Operating licences under subsection 24(2) of the NSCA and authorizations under section 32 of the *Fisheries Act* are prescribed by the *Law List Regulations* (SOR/94-636) under the CEAA. Thus, the CNSC and the Minister of Fisheries and Oceans are prohibited by subsection 5(1)(d) of the CEAA from permitting the proposed refurbishment and continued operation of the Darlington NGS until an EA has been completed in accordance with the CEAA and unless a “course of action” decision is lawfully taken by the Responsible Authorities under section 20 of the CEAA.
6. For CEAA purposes, the CNSC served as the Federal EA Coordinator and took the lead role in conducting the Darlington NGS Refurbishment and Continued Operation EA.
7. Because no provincial EA has been (or will be) conducted in relation to OPG’s proposal, the federal EA at issue in this application is the only EA that will be required for the multi-billion dollar refurbishment and continued operation project over the next 70 years (i.e. to 2085).
8. After OPG filed its project description in April 2011, the CNSC commenced a screening-level EA of OPG’s proposal in June 2011, pursuant to section 18 of the CEAA.
9. In July 2011, the CNSC issued a public notice inviting comments on the draft EA Scoping Information Document for the Darlington NGS Refurbishment and Continued Operation EA. The applicants submitted detailed written comments that raised various legal, technical, and EA

planning concerns about the conduct and content of the proposed screening process for OPG's project.

10. In October 2011, a panel of the CNSC was established to review and issue an EA Scoping Information Document regarding the scope of the project and the scope of the factors to be assessed in the Darlington NGS Refurbishment and Continued Operation EA. During these non-public proceedings, the CNSC panel received written submissions from OPG and CNSC staff, but no transcript was prepared and no members of the public (including the applicants) were permitted to make submissions directly to this CNSC panel.
11. In issuing the EA scoping documentation, the CNSC panel declined to refer the matter to a review panel or mediator under the CEEA, and the CNSC panel delegated the preparation of technical support studies to the proponent, OPG, pursuant to section 17 of the CEEA. In addition, the CNSC panel determined that the scope of the project to be assessed in the EA would include all components of the project as proposed by OPG, including waste management activities related to the project.
12. The CNSC panel further affirmed that the scope of the EA would include not only the considerations in subsections 16(1)(a) to (d) of the CEEA, but would also address the project's purpose and preliminary design and implementation plan for a follow-up program for the project. However, the CNSC panel declined to exercise its discretion to assess the "need" for the project, or the "alternatives to" the project pursuant to subsection 16(1)(e) of the CEEA.
13. In December 2011, OPG submitted an Environmental Impact Study ("EIS") and technical supporting documents, which the CNSC made available for public review and comment. The applicants filed detailed

written comments that reiterated their earlier concerns about the OPG proposal, its adverse environmental effects, the inadequacy of the EIS, and the unsatisfactory nature of the screening process to date.

14. While the various stages of the screening process were underway, the Parliament of Canada repealed CEAA and replaced it with new federal EA legislation (S.C. 2012, c.19) that came into force in July 2012. However, the federal Minister of the Environment issued a statutory order under the new legislation that the Darlington NGS Refurbishment and Continued Operation EA would continue as a screening-level EA under the applicable provisions of the former CEAA.
15. In July 2012, the CNSC invited public comments on the draft EA Screening Report that had been prepared by CNSC staff on the basis of OPG's EIS and technical supporting documents. The applicants submitted detailed written submissions on this draft EA Screening Report and raised various procedural and substantive concerns, particularly in relation to data, information, and details that were missing, in whole or in part, from the draft report.
16. Subsequent to the public comment period, CNSC staff finalized the EA Screening Report, which was submitted to the CNSC for consideration under the CEAA.
17. In December 2012, the CNSC concurrently held public hearings on the Darlington NGS Refurbishment and Continued Operation EA and on two related OPG applications (i.e. licence renewals for the Darlington NGS and on-site waste management facilities). At the four-day public hearing, the CNSC received written and oral submissions from OPG, CNSC staff, and approximately 690 individuals, residents' groups, non-governmental organizations, industry associations, municipalities, First Nations

representatives, and governmental departments and ministries at the federal and provincial level.

19. At the CNCS public hearings, testimony was not presented under oath and cross-examination on oral or written evidence (including opinion evidence and expert qualifications) was not permitted.
20. The applicants participated as interveners during the CNCS's public hearings. Like other interveners, the applicants' presentations were restricted by the CNCS to 10 minutes in total on all three matters being considered at the public hearings (i.e. the Darlington NGS Refurbishment and Continued Operation EA and the two related OPG licensing applications).
21. On March 13, 2013, the CNCS made its decision under section 20 of the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA. Among other things, the CNCS's decision concluded that:
 - (a) the screening-level EA is "complete" and meets "all of the applicable requirements" under the CEAA;
 - (b) after taking into account the appropriate mitigation measures identified in the EA, OPG's proposed refurbishment and continued operation of the Darlington NGS "is not likely to cause significant adverse environmental effects";
 - (c) the CNCS would not request the federal Environment Minister to refer OPG's project to a review panel or mediator under the CEAA; and
 - (d) pursuant to subsection 20(1)(a) of the CEAA, the CNCS will consider an amendment of OPG's operating licence under the NSCA which, if approved, would allow OPG's project to proceed. The CNCS anticipates that such amendments will be considered in 2014.

22. As a matter of statutory interpretation, the CNSC's decision incorrectly or unreasonably construed the legal requirements imposed by the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA.
23. The statutory condition precedent for the issuance of an amendment to OPG's operating licence, and for the issuance of a section 32 authorization under the *Fisheries Act*, is the completion of an EA in full compliance with all applicable requirements of the CEAA. This condition precedent has not been satisfied to date because contrary to the CEAA, the Darlington NGS Refurbishment and Continued Operation EA:
- (a) failed to assess, or incorrectly or unreasonably assessed, the mandatory considerations listed in subsections 16(1)(a) to (d) of the CEAA, particularly in relation to the direct and cumulative environmental effects of OPG's project;
 - (b) failed to conduct, or incorrectly or unreasonably conducted, an EA in respect of every construction, operation, modification, decommissioning, abandonment or other undertakings in relation to OPG's project, contrary to subsection 15(3) of the CEAA;
 - (c) failed to assess, or incorrectly or unreasonably assessed, the "environmental effects of accidents or malfunctions that may occur in connection with the project", contrary to subsection 16(1)(a) of the CEAA, even though CNSC staff confirmed at the public hearings that such an analysis was feasible;
 - (d) incorrectly or unreasonably constrained its assessment of the foregoing factors by unlawfully adopting the so-called "bounding approach" (i.e. excluding low-probability, high-consequence nuclear accidents or malfunctions) when reviewing OPG's proposal, its environmental effects, and the efficacy of proposed mitigation measures, such as emergency planning and public evacuation;

- (e) failed to assess, or incorrectly or unreasonably assessed, the project's effects upon Lake Ontario fish species, or the significance of such effects, by, *inter alia*, purporting to consider potential impacts on the basis of lake-wide populations and excluding consideration of technically and economically feasible mitigation measures (i.e. closed-cycle cooling) to prevent, reduce or control such effects, contrary to subsections 16(1)(a), (b) and (d) of the CEAA; 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.
24. In failing to rectify these fundamental deficiencies in the Darlington NGS Refurbishment and Continued Operation EA, the CNSC's interpretation of the screening provisions in the CEAA is neither reasonable nor correct, and its reasons for decision are not justified, transparent or intelligible in law or on the facts.
25. The above-noted EA deficiencies (particularly the missing information about the human health and environmental effects of a severe accident or malfunction) deprived the CNSC of any statutory ability under the CEAA to make credible, rational, and evidence-based determinations on: whether the OPG proposal is likely to cause significant adverse environmental effects; whether the OPG proposal should be referred to a review panel or mediator under CEAA; or whether to CNSC should proceed to consider amending OPG's operating licence to allow the refurbishment and continued operation of the Darlington NGS.
26. The CNSC decision purports to address the significant evidentiary gaps in the EA (and the applicants' concerns about such omissions) by noting that

some of the missing information (i.e. thermal effects on aquatic biota, public health effects of a severe reactor accident, etc.) will be subsequently gathered and considered by OPG and CNSC staff in future regulatory proceedings.

27. As a matter of law, the above-noted matters are important considerations that were required under subsection 16(1) of the CEAA, and should have been fully set out, at an appropriate level of detail for public and agency review, within the record for the Darlington NGS Refurbishment and Continued Operation EA. In the absence of such critical information, the screening EA cannot be considered "complete" or "compliant" with CEAA requirements, as erroneously claimed in the CNSC decision.
28. The applicants are non-profit public interest organizations with a lengthy history of involvement and demonstrated interest in nuclear issues and environmental protection.
29. The applicants have public interest standing to bring this application because: it raises serious issues; the applicants have a genuine interest in this matter; and this is a reasonable manner in which the issues may be brought to this Honourable Court.
30. Sections 18, 18.1 and 18.2 of the *Federal Courts Act*; the *Federal Court Rules*; the NSCA; the *General Nuclear Safety and Control Regulations*, SOR/2000-202; the *Class I Nuclear Facilities Regulations*, SOR/2000-204; the CNSC Regulatory Document RD-346; the CEAA; the *Law List Regulations*, SOR/94-636; and section 32 of the *Fisheries Act*.
31. Such further or other grounds as counsel may advise and this Honourable Court may consider appropriate.

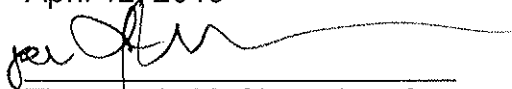
This application will be supported by the following material:

1. The affidavit of Shawn-Patrick Stensil on behalf of Greenpeace Canada, to be served.
2. The affidavit of Kathleen Cooper on behalf of Canadian Environmental Law Association, to be served.
3. The affidavit of Mark Mattson on behalf of Lake Ontario Waterkeeper, to be served.
4. The affidavit of Brennain Lloyd on behalf of Northwatch, to be served.
5. The decision records before the CNSC and the Minister of Oceans and Fisheries.
6. Such further or other materials as counsel may advise.

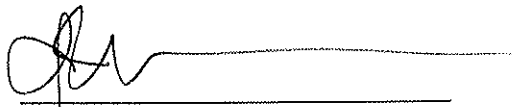
Rule 317 Request: The applicants request the CNSC and the Minister of Fisheries and Oceans to send certified copies of the following materials that are not in the possession of the applicants, but are in the possession of the CNSC and the Minister of Fisheries and Oceans, to the applicants and to the Registry:

1. The record of materials before the CNSC in respect of the Darlington NGS Refurbishment and Continued Operation EA.
2. The record of materials before the Minister of Fisheries and Oceans in respect of the Darlington NGS Refurbishment and Continued Operation EA.

April 12, 2013



Theresa A. McClenaghan &
Richard D. Lindgren
130 Spadina Avenue, Suite 301
Toronto, ON M5V 2L4
Tel: 416-960-2284
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Solicitors for the Applicants



Justin Duncan
550 Bayview Avenue, Suite 401
Toronto, ON M4W 3X8
Tel: 416-368-7533
Fax: 416-363-2746
Solicitor for the Applicants



Rizwan Khan <articling@cela.ca>

(no subject)

Hoggarth, Thomas <Thomas.Hoggarth@dfo-mpo.gc.ca>
To: articling@cela.ca

15 April 2013 10:04

As discussed please see link below.

<http://www.ceaa.gc.ca/050/document-eng.cfm?document=87565>

C. Thomas Hoggarth

Fisheries and Oceans Canada
Team Leader, Client Liaison, Partnership, Standards and Guidelines
401 King Street West, Prescott, Ontario, K0E 1T0

Thomas.Hoggarth@dfo-mpo.gc.ca

Phone 613 925-2865 ext. 109

Cell 613 340-7365



FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
Name / Nom: Please See Below		Name / Nom: Michael H. Morris General Counsel	
Address / Adresse: Theresa A. McClenaghan & Richard D. Lindgren @ 416-960-9392; Justin Duncan @ 416-363-2746; John B. Laskin @ 416-865-7380; Michael James @ 613-996-7383.		Address / Adresse: Ontario Regional Office The Exchange Tower 130 King St. West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur:	Tel. No. / No du Tél:	Fax # / No du télécopieur:	Tel. No. / No du Tél:
		(416) 973-0809	(416) 973-9704
Comments / Commentaires:			
Re: GREENPEACE CANADA, et. al. v. Attorney General of Canada, et. al. Court File No.: T-634-13			
Enclosed please find letter of today's date			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
Pages (including cover sheet)	Date:	Time:	
3	April 23, 2013		

NOTICE:

This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this communication in error, please notify us immediately by telephone. Thank you.

Cette communication est exclusivement destinée à qui elle est adressée. Elle peut contenir de l'information privilégiée, confidentielle et ne pouvant être divulguée selon la loi applicable à l'espèce. Si vous avez reçu cette communication par erreur, veuillez nous en aviser immédiatement par téléphone. Merci.

In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:
Name / Nom: Yuri Li at /au: 416-952-3805



Department of Justice
Canada

Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Ministère de la Justice
Canada

Bureau régional de l'Ontario
la tour Exchange
130 rue King ouest
Pièce 3400, CP 36
Toronto (Ontario)
M5X 1K6

Tel: (416) 973-9704
Fax: (416) 973-0809
Email: Michael.Morris@justice.gc.ca

Our File: 2-598595
Notre dossier:

Your File:
Votre dossier:

34

April 23, 2013

VIA FACSIMILE

Theresa A. McClenaghan & Richard D. Lindgren
130 Spadina Avenue, Suite 301
Toronto, ON
M5V 2L4

Justin Duncan
550 Bayview Avenue, Suite 401
Toronto, ON
M4W 3X8

Dear Sir/Madam:

Re: Greenpeace et al. v. AG Canada et al.
Court File No.: T-634-13

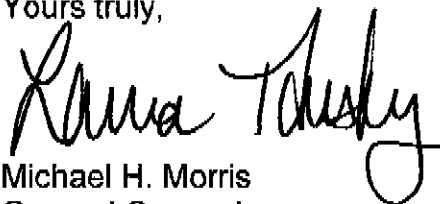
I am writing with respect to the Rule 317 request contained in the Notice of Application dated April 12, 2013 in the above-noted matter. The Attorney General of Canada ("AGC") and the Minister of Fisheries and Oceans (the "Minister") take the position that the portion of the Rule 317 request directed at the Minister is improper, since the application does not challenge any decision made by the Minister.

A Rule 317 request can only be made when a decision or order of a tribunal is under review. The Notice of Application states that the decision under review in this application is "the decision dated March 13, 2013 by the Canadian Nuclear Safety Commission ("CNSC") under section 20 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37... in relation to the screening-level environmental assessment... conducted by the CNSC of the refurbishment and continued operation of the Darlington Nuclear Generating Station..." This is a decision made by the CNSC, not a decision made by the Minister.

Accordingly, we kindly request that you amend the Notice of Application to remove that part of the Rule 317 request directed at the Minister. Failing which, please accept this letter as the formal objection by the Minister under Rule 318(2) to the production of the materials requested, for the reasons set out in this letter.

- 2 -

Yours truly,



Per: Michael H. Morris
General Counsel
Business and Regulatory Division

cc. John Laskin, Counsel for the Respondent Ontario Power Generation Inc.
Michael James, Counsel for the CNSC

April 30, 2013

BY EMAIL

Michael H. Morris
General Counsel
Business and Regulatory Division
Department of Justice Canada
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6

Dear Mr. Morris:

RE: GREENPEACE et al. v. AGC et al. – Federal Court File No. T-634-13

We acknowledge receipt of your letter dated April 23, 2013 with respect to the above-noted matter.

Before deciding whether – or to what extent – amendments to the judicial review application may be appropriate, we are writing to seek clarification from you in relation to the decision apparently made in this matter by, or on behalf of, the Minister of Fisheries and Oceans under the *Canadian Environmental Assessment Act* (“CEAA”).

As you note in your letter, the decision of the CNSC dated March 13, 2013 is specifically mentioned in the judicial review application. This CNSC decision was provided to the applicants, and was web-posted on the CNSC website. It is also reflected in the notice of decision posted on the Canadian Environmental Assessment Registry (as modified on April 4, 2013).

However, we note that the CEAR notice indicates that the decision under the CEAA in this matter has been made concurrently by the CNSC and Fisheries and Oceans Canada. Based on our review of the available record, no other decision (or reasons for decision) from Fisheries and Oceans Canada appears to have been web-posted or otherwise provided to the applicants.

To clarify this situation prior to the issuance of the judicial review application, we contacted staff with Fisheries and Oceans Canada to confirm what decision (if any) has been made by that Responsible Authority under the CEAA in relation to the screening EA. No answer was received to this inquiry until after the judicial review application was issued on April 12, 2013. In particular, we were advised on April 15, 2013 by Fisheries and Oceans Canada staff that the brief note posted on the CEA Registry constitutes the department’s decision under the CEAA.

Accordingly, we are writing at this time to request confirmation from you that:

1. The note posted on the CEA Registry constitutes a joint “course of action” decision of both the CNSC and Fisheries and Oceans Canada for the purposes of section 20 of the CEEA; and
2. Fisheries and Oceans Canada has not made any other or further decisions under section 20 of the CEEA, and has not prepared or provided any independent or separate reasons for decision under section 20 of the CEEA.

We look forward to your reply to the foregoing questions.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. John Laskin, for OPG
Michael James, for CNSC
Justin Duncan, Ecojustice
Theresa McClenaghan, CELA



May 8, 2013

VIA FAX

Richard D. Lindgren
130 Spadina Avenue, Suite 301
Toronto, ON
M5V 2L4

Dear Sir:

Re: Greenpeace et al. v. AG Canada et al.
Court File No.: T-634-13

With respect to your letter of April 30, 2013, we have discussed your questions with our client, and can confirm the following in response to your requests:

1. The decisions on the Canadian Environmental Assessment Registry are separate decisions of DFO and the CNSC. Both Responsible Authorities have fulfilled the requirement under paragraph 55. 1(2)(r) of the *CEAA* by jointly posting their decisions on the Registry.
2. The decision on the Registry constitutes DFO's only course of action decision under section 20 of the *CEAA* in respect of this matter. It was based on information also provided to the CNSC in respect of its course of action decision.

I trust all is satisfactory.

Yours truly,

Michael H. Morris
General Counsel
Business and Regulatory Division

cc: John Laskin, for OPG
Michael James, for CNSC
Justin Duncan, Ecojustice
Theresa McClenaghan, CELA

WITHOUT PREJUDICE - DRAFT

Court File No. T-634-13

FEDERAL COURT

BETWEEN:

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

Applicants

and

ATTORNEY GENERAL OF CANADA,
~~MINISTER OF FISHERIES AND OCEANS~~
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

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.

April 12, 2013 Issued by: _____
(Amended: June X, 2013)

Address of local office:

180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

TO:

ATTORNEY GENERAL OF CANADA
284 Wellington Street
East Memorial Building, 4th Floor
Ottawa, ON K1A 0H8
Tel: 613-992-4621

~~MINISTER OF FISHERIES AND OCEANS
1570 — 200 Kent Street
Ottawa, ON K1A 0H8
Tel: 613-996-3085~~

ONTARIO POWER GENERATION INC.
700 University Avenue
Toronto, ON M5G 1X6
Tel: 416-592-2555

APPLICATION

This is an application for judicial review of the decision dated March 14~~3~~, 2013 by the Canadian Nuclear Safety Commission (“CNSC”) and Fisheries and Oceans Canada (“FOC”) under section 20 of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (“CEAA”) in relation to the screening-level environmental assessment (“EA”) conducted by the CNSC of the refurbishment and continued operation of the Darlington Nuclear Generating Station (“NGS”) as proposed by Ontario Power Generation Inc. (“OPG”).

The applicants make application for:

1. An order declaring that:
 - (a) the CNSC and FOC’s decision regarding the Darlington NGS Refurbishment and Continued Operation EA is invalid and unlawful due to non-compliance with the applicable requirements of the CEAA;
 - (b) the CNSC has no jurisdiction to amend or re-issue any licences under the *Nuclear Safety and Control Act*, S.C. 1997, c.9 (“NSCA”) to permit the proposed refurbishment and continued operation of the Darlington NGS until such time as the CEAA has been fully complied with by the CNSC;
 - (c) FOC has no jurisdiction to issue any authorizations under the Fisheries Act, R.S.C. 1985, c.F-14 to permit the proposed refurbishment and continued operation of the Darlington NGS until such time as the CEAA has been fully complied with by FOC;
 - (d) FOC fettered its discretion or otherwise failed to carry out its duties as a Responsible Authority by improperly relying on the CNSC to fulfill its duties under the CEAA to conduct an EA of the refurbishment and continued operation of the Darlington NGS; and

- (e) in the alternative, the decision of the CNSC and FOC in relation to the Refurbishment and Continued Operation EA was unreasonable.
2. An order quashing or setting aside the CNSC and FOC's decision under the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA.
 3. An order remitting the Darlington NGS Refurbishment and Continued Operation EA back to the CNSC and FOC for further consideration and determination in accordance with the CEAA and any directions as this Honourable Court considers appropriate.
 4. An interlocutory and permanent order prohibiting the CNSC and the Minister of Fisheries and Oceans, or any of their agents, servants or designates, from licensing, permitting or otherwise authorizing any activities related to the proposed refurbishment and continued operation of the Darlington NGS until such time as the CEAA has been fully complied with by these Responsible Authorities.
 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. OPG proposes to undertake activities to refurbish four nuclear reactors, and activities related to the continued operation of the refurbished reactors, at the Darlington NGS, which is located on the Lake Ontario shoreline in the Municipality of Clarington, Ontario.

2. The intended purpose of OPG's refurbishment and continued operation project is to allow the Darlington NGS reactors to continue to generate electricity until approximately 2055. OPG proposes that the reactors will then be shut down and decommissioned in 2085; however, the radioactive wastes resulting from the overall project will continue to exist, and have to be safely managed, for thousands of years.

3. OPG's proposed refurbishment and continued operation activities at the Darlington NGS have the potential to cause environmental effects. In particular, OPG's project includes the following physical works, undertakings and facilities:
 - (a) site preparation and construction of various buildings and structures;
 - (b) shutting down, defueling and dewatering the four CANDU nuclear reactors;
 - (c) inspection, servicing and replacement of the major reactor components, including nuclear fuel channel assemblies and feeder pipes;
 - (d) interim on-site storage of low- and intermediate-level radioactive refurbishment waste, or off-site transportation of such waste to a licensed facility;
 - (e) refilling each reactor system with heavy water;
 - (f) refueling and restarting the refurbished reactors;
 - (g) continued operation of the refurbished reactors and ancillary support systems;
 - (h) management of ongoing operational waste and low- and intermediate-level radioactive waste;
 - (i) construction of additional on-site storage capacity for high-level radioactive waste (i.e. used nuclear fuel);
 - (j) ongoing repair and maintenance, including possible replacement of

- steam generators; and
- (k) operational activities required to achieve a safe state of closure prior to decommissioning.
4. In order to proceed with the proposed refurbishment and continued operation of the Darlington NGS, OPG requires various statutory approvals under federal law, including an amendment to OPG's current Power Reactor Operating Licence ("operating licence") issued by the CNSC under subsection 24(2) of the NSCA. OPG's proposal also requires an authorization under section 32 of the *Fisheries Act*, R.S.C. 1985, c.F-14 from the Minister of Fisheries and Oceans for the destruction of fish by means other than fishing. Accordingly, both the CNSC and FOC ~~the Minister of Fisheries and Oceans~~ are "Responsible Authorities" as defined by the CEAA, and both are legally required to ensure that an EA of the OPG proposal is conducted in compliance with the CEAA.
5. Operating licences under subsection 24(2) of the NSCA and authorizations under section 32 of the *Fisheries Act* are prescribed by the *Law List Regulations* (SOR/94-636) under the CEAA. Thus, the CNSC and FOC ~~the Minister of Fisheries and Oceans~~ are prohibited by subsection 5(1)(d) of the CEAA from permitting the proposed refurbishment and continued operation of the Darlington NGS until an EA has been completed in accordance with the CEAA and unless a "course of action" decision is lawfully taken by the Responsible Authorities under section 20 of the CEAA.
6. For CEAA purposes, the CNSC served as the Federal EA Coordinator and took the lead role in conducting the Darlington NGS Refurbishment and Continued Operation EA.
7. FOC relied on the CNSC to conduct the EA without fulfilling its full range

of duties as a Responsible Authority under the CEAA.

8. Because no provincial EA has been (or will be) conducted in relation to OPG's proposal, the federal EA at issue in this application is the only EA that will be required for the multi-billion dollar refurbishment and continued operation project over the next 70 years (i.e. to 2085).
9. After OPG filed its project description in April 2011, the CNSC commenced a screening-level EA of OPG's proposal in June 2011, pursuant to section 18 of the CEAA.
10. In July 2011, the CNSC issued a public notice inviting comments on the draft EA Scoping Information Document for the Darlington NGS Refurbishment and Continued Operation EA. The applicants submitted detailed written comments that raised various legal, technical, and EA planning concerns about the conduct and content of the proposed screening process for OPG's project.
11. In October 2011, a panel of the CNSC was established to review and issue an EA Scoping Information Document regarding the scope of the project and the scope of the factors to be assessed in the Darlington NGS Refurbishment and Continued Operation EA. During these non-public proceedings, the CNSC panel received written submissions from OPG and CNSC staff, but no transcript was prepared and no members of the public (including the applicants) were permitted to make submissions directly to this CNSC panel.
12. In issuing the EA scoping documentation, the CNSC panel declined to refer the matter to a review panel or mediator under the CEAA, and the CNSC panel delegated the preparation of technical support studies to the proponent, OPG, pursuant to section 17 of the CEAA. In addition, the

- CNSC panel determined that the scope of the project to be assessed in the EA would include all components of the project as proposed by OPG, including waste management activities related to the project.
13. The CNSC panel further affirmed that the scope of the EA would include not only the considerations in subsections 16(1)(a) to (d) of the CEAA, but would also address the project's purpose and preliminary design and implementation plan for a follow-up program for the project. However, the CNSC panel declined to exercise its discretion to assess the "need" for the project, or the "alternatives to" the project pursuant to subsection 16(1)(e) of the CEAA.
 14. In December 2011, OPG submitted an Environmental Impact Study ("EIS") and technical supporting documents, which the CNSC made available for public review and comment. The applicants filed detailed written comments that reiterated their earlier concerns about the OPG proposal, its adverse environmental effects, the inadequacy of the EIS, and the unsatisfactory nature of the screening process to date.
 15. While the various stages of the screening process were underway, the Parliament of Canada repealed CEAA and replaced it with new federal EA legislation (S.C. 2012, c.19) that came into force in July 2012. However, the federal Minister of the Environment issued a statutory order under the new legislation that the Darlington NGS Refurbishment and Continued Operation EA would continue as a screening-level EA under the applicable provisions of the former CEAA.
 16. In July 2012, the CNSC invited public comments on the draft EA Screening Report that had been prepared by CNSC staff on the basis of OPG's EIS and technical supporting documents. The applicants submitted detailed written submissions on this draft EA Screening Report

- and raised various procedural and substantive concerns, particularly in relation to data, information, and details that were missing, in whole or in part, from the draft report.
17. Subsequent to the public comment period, CNSC staff finalized the EA Screening Report, which was submitted to the CNSC for consideration under the CEEA.
 18. In December 2012, the CNSC concurrently held public hearings on the Darlington NGS Refurbishment and Continued Operation EA and on two related OPG applications (i.e. licence renewals for the Darlington NGS and on-site waste management facilities). At the four-day public hearing, the CNSC received written and oral submissions from OPG, CNSC staff, and approximately 690 individuals, residents' groups, non-governmental organizations, industry associations, municipalities, First Nations representatives, and governmental departments and ministries at the federal and provincial level.
 20. At the CNSC public hearings, testimony was not presented under oath and cross-examination on oral or written evidence (including opinion evidence and expert qualifications) was not permitted.
 21. The applicants participated as interveners during the CNSC's public hearings. Like other interveners, the applicants' presentations were restricted by the CNSC to 10 minutes in total on all three matters being considered at the public hearings (i.e. the Darlington NGS Refurbishment and Continued Operation EA and the two related OPG licensing applications).
 22. On March 13, 2013, the CNSC made its decision under section 20 of the CEEA in relation to the Darlington NGS Refurbishment and Continued Operation EA. Notice of the CNSC's decision (and FOC's concurrent

decision) was web-posted on the Canadian Environmental Assessment Registry on March 14, 2013. Among other things, the CNSC's decision concluded that:

- (a) the screening-level EA is "complete" and meets "all of the applicable requirements" under the CEAA;
- (b) after taking into account the appropriate mitigation measures identified in the EA, OPG's proposed refurbishment and continued operation of the Darlington NGS "is not likely to cause significant adverse environmental effects";
- (c) the CNSC would not request the federal Environment Minister to refer OPG's project to a review panel or mediator under the CEAA; and
- (d) pursuant to subsection 20(1)(a) of the CEAA, the CNSC will consider an amendment of OPG's operating licence under the NSCA which, if approved, would allow OPG's project to proceed. The CNSC anticipates that such amendments will be considered in 2014.

- 23. As a matter of statutory interpretation, the CNSC's decision incorrectly or unreasonably construed the legal requirements imposed by the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA.
- 24. The statutory condition precedent for the issuance of an amendment to OPG's operating licence, and for the issuance of a section 32 authorization under the *Fisheries Act*, is the completion of an EA in full compliance with all applicable requirements of the CEAA. This condition precedent has not been satisfied to date because contrary to the CEAA, the Darlington NGS Refurbishment and Continued Operation EA:
 - (a) failed to assess, or incorrectly or unreasonably assessed, the mandatory considerations listed in subsections 16(1)(a) to (d) of the

CEAA, particularly in relation to the direct and cumulative environmental effects of OPG's project;

- (b) failed to conduct, or incorrectly or unreasonably conducted, an EA in respect of every construction, operation, modification, decommissioning, abandonment or other undertakings in relation to OPG's project, contrary to subsection 15(3) of the CEAA;
- (c) failed to assess, or incorrectly or unreasonably assessed, the "environmental effects of accidents or malfunctions that may occur in connection with the project", contrary to subsection 16(1)(a) of the CEAA, even though CNSC staff confirmed at the public hearings that such an analysis was feasible;
- (d) incorrectly or unreasonably constrained its assessment of the foregoing factors by unlawfully adopting the so-called "bounding approach" (i.e. excluding low-probability, high-consequence nuclear accidents or malfunctions) when reviewing OPG's proposal, its environmental effects, and the efficacy of proposed mitigation measures, such as emergency planning and public evacuation;
- (e) failed to assess, or incorrectly or unreasonably assessed, the project's effects upon Lake Ontario fish species, or the significance of such effects, by, *inter alia*, purporting to consider potential impacts on the basis of lake-wide populations and excluding consideration of technically and economically feasible mitigation measures (i.e. closed-cycle cooling) to prevent, reduce or control such effects, contrary to subsections 16(1)(a), (b) and (d) of the CEAA; 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.

25. In failing to rectify these fundamental deficiencies in the Darlington NGS

- Refurbishment and Continued Operation EA, the CNSC's interpretation of the screening provisions in the CEAA is neither reasonable nor correct, and its reasons for decision are not justified, transparent or intelligible in law or on the facts.
26. The above-noted EA deficiencies (particularly the missing information about the human health and environmental effects of a severe accident or malfunction) deprived the CNSC and FOC of any statutory ability under the CEAA to make credible, rational, and evidence-based determinations on: whether the OPG proposal is likely to cause significant adverse environmental effects; whether the OPG proposal should be referred to a review panel or mediator under CEAA; or whether ~~thee~~ CNSC should proceed to consider amending OPG's operating licence to allow the refurbishment and continued operation of the Darlington NGS.
 27. The CNSC decision purports to address the significant evidentiary gaps in the EA (and the applicants' concerns about such omissions) by noting that some of the missing information (i.e. thermal effects on aquatic biota, public health effects of a severe reactor accident, etc.) will be subsequently gathered and considered by OPG and CNSC staff in future regulatory proceedings.
 28. As a matter of law, the above-noted matters are important considerations that were required under subsection 16(1) of the CEAA, and should have been fully set out, at an appropriate level of detail for public and agency review, within the record for the Darlington NGS Refurbishment and Continued Operation EA. In the absence of such critical information, the screening EA cannot be considered "complete" or "compliant" with CEAA requirements, as erroneously claimed in the CNSC decision.
 29. The applicants are non-profit public interest organizations with a lengthy

history of involvement and demonstrated interest in nuclear issues and environmental protection.

30. The applicants have public interest standing to bring this application because: it raises serious issues; the applicants have a genuine interest in this matter; and this is a reasonable manner in which the issues may be brought to this Honourable Court.
31. Sections 18, 18.1 and 18.2 of the *Federal Courts Act*; the *Federal Court Rules*; the NSCA; the *General Nuclear Safety and Control Regulations*, SOR/2000-202; the *Class I Nuclear Facilities Regulations*, SOR/2000-204; the CNSC Regulatory Document RD-346; the CEEA; the *Law List Regulations*, SOR/94-636; the Coordination by Federal Authorities Regulations, SOR/97-181; and section 32 of the *Fisheries Act*.
32. 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 Kathleen Cooper on behalf of Canadian Environmental Law Association, to be served.
3. The affidavit of Mark Mattson on behalf of Lake Ontario Waterkeeper, to be served.
4. The affidavit of Brennain Lloyd on behalf of Northwatch, to be served.
5. The decision records before the CNSC and the Minister of Fisheries and Oceans.
6. Such further or other materials as counsel may advise.

Rule 317 Request: The applicants request the CNSC and the Minister of

Fisheries and Oceans to send certified copies of the following materials that are not in the possession of the applicants, but are in the possession of the CNSC and the Minister of Fisheries and Oceans, to the applicants and to the Registry:

1. The record of materials before the CNSC in respect of the Darlington NGS Refurbishment and Continued Operation EA.
2. The record of materials before the Minister of Fisheries and Oceans or his designates in FOC in respect of the Darlington NGS Refurbishment and Continued Operation EA.

April 12, 2013 (Amended: June X, 2013)

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Court File No. T-634-13

FEDERAL COURT

BETWEEN:

GREENPEACE CANADA
 CANADIAN ENVIRONMENTAL LAW ASSOCIATION
 LAKE ONTARIO WATERKEEPER and
 NORTHWATCH

Applicants

and

ATTORNEY GENERAL OF CANADA
 MINISTER OF FISHERIES AND OCEANS
 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

CONSENT

The parties, by their solicitors, hereby consent to the issuance of an Order in the form attached hereto as Schedule "A".

June __, 2013

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 130 Spadina Avenue, Suite 301
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June __, 2013

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Attorney General of Canada and
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June __, 2013

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Ontario Power Generation Inc.

SCHEDULE “A”

Court File No. T-634-13

FEDERAL COURT

BETWEEN:

GREENPEACE CANADA
 CANADIAN ENVIRONMENTAL LAW ASSOCIATION
 LAKE ONTARIO WATERKEEPER and
 NORTHWATCH

Applicants

and

ATTORNEY GENERAL OF CANADA
 MINISTER OF FISHERIES AND OCEANS
 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

ORDER

UPON MOTION by the Applicants, on consent and in writing pursuant to Rule 369 of the *Federal Court Rules*, for an order granting leave to amend the Notice of Application in this proceeding, and for other related relief;

AND UPON reading the Applicants’ Motion Record, and the Consents of the parties, by their solicitors;

THIS COURT ORDERS that:

1. The applicants are granted leave to amend the Notice of Application dated April 12, 2013 by:
 - (a) removing the Minister of Fisheries and Oceans (“Minister”) as a respondent to this judicial review application;

- (b) adding the “course of action” decision taken by the Minister’s agents and servants within Fisheries and Oceans Canada (“FOC”) under section 20 of the *Canadian Environmental Assessment Act* (“CEAA”) as a statutory decision to be reviewed within the scope of this judicial review application; and
- (c) making other related and consequential amendments to the Notice of Application, in the form attached as Exhibit “G” in the affidavit of Rizwan Khan sworn June 18, 2013.
2. The Minister and/or FOC shall forthwith provide the applicants and this Honourable Court with a certified copy of FOC’s decision record respecting the proposed refurbishment and continued operation of the Darlington Nuclear Generating Station.
 3. The applicants are granted leave to serve a supplementary affidavit within 30 days of receiving FOC’s decision record pursuant to paragraph 2.
 4. The respondents’ affidavits shall be served within 45 days after service of the applicants’ supplementary affidavit.
 5. Cross-examinations on the parties’ affidavits, the filing of the parties’ records, and the filing of the hearing requisition in this proceeding shall be completed in accordance with the *Federal Courts Rules*.
 6. There shall be no costs associated with this motion.
-

Court File No. T-634-13

FEDERAL COURT

BETWEEN:

GREENPEACE CANADA
 CANADIAN ENVIRONMENTAL LAW ASSOCIATION
 LAKE ONTARIO WATERKEEPER and
 NORTHWATCH

Applicants

and

ATTORNEY GENERAL OF CANADA
 MINISTER OF FISHERIES AND OCEANS
 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

WRITTEN REPRESENTATIONS OF THE APPLICANTS (MOVING PARTIES)**OVERVIEW**

1. This is a motion under Rule 369 by the applicants for leave to amend the Notice of Application pursuant to Rules 75 and 302, and for various directions and time extensions regarding further steps in this proceeding pursuant to Rules 8, 54, and 317.

Motion Record, Tab 1: Notice of Motion

2. The respondents have consented to the relief requested in the notice of motion.

Motion Record, Tab 3: Consents of the Respondents

FACTS**(a) Background**

3. The respondent Ontario Power Generation Inc. (“OPG”) has proposed to refurbish and continue operating the Darlington Nuclear Generating Station (“NGS”).

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.2

4. In order to proceed, the refurbishment project requires statutory approvals from the Canadian Nuclear Safety Commission (“CNSC”) under subsection 24(2) of the *Nuclear Safety and Control Act*, and from Fisheries and Oceans Canada (“FOC”) under section 32 of the *Fisheries Act*.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.3

5. As Responsible Authorities under the *Canadian Environmental Assessment Act* (“CEAA”), the CNSC and FOC are both obliged to ensure that an environmental assessment (“EA”) of the refurbishment project is completed in accordance with applicable CEAA requirements before the above-noted statutory approvals can be issued to OPG.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.4

6. For CEAA purposes, the CNSC served as the Federal EA Coordinator and took the lead role in conducting the Darlington NGS Refurbishment and Continued Operation EA.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.5

7. In December 2012, the CNSC held a public hearing on the refurbishment project EA and related licencing matters, and the Canadian Environmental Law Association (“CELA”) and the other three applicants in this proceeding participated in the CNSC’s public hearings. No separate public hearings were held by FOC under the CEAA.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.6

(b) Commencement of Application for Judicial Review

8. After completion of the public hearings, the CNSC’s “course of action” decision (and reasons for decision) under section 20 of the CEEA was issued on March 13, 2013, and was summarized and web-posted on the CEEA Registry as a “decision statement” on or about March 14, 2013.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.7; and Exhibit “A”: Copy of CEEA Registry posting of the Responsible Authorities’ decision statement dated March 14, 2013

9. The CEEA Registry posting also included a brief reference to FOC, but otherwise provided no further reasons, details or information about FOC’s “course of action” decision under the CEEA.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.8; and Exhibit “A”: CEEA Registry posting of the Responsible Authorities’ decision statement dated March 14, 2013

10. On April 12, 2013, CELA and the other three applicants jointly commenced an application for judicial review on the grounds that the EA for the refurbishment project did not comply with the applicable requirements of the CEEA.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para 9; and Exhibit “B”: Notice of Application dated April 12, 2013

11. The Notice of Application names as respondents the Attorney General of Canada, the Minister of Fisheries and Oceans (“Minister”), and OPG. The Notice of Application claims, *inter alia*, certain injunctive relief against the Minister, and includes a Rule 317 request that both the CNSC and Minister provide a copy of their respective decision records under the CEEA to the applicants and to this Honourable Court.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.10; and Exhibit “B”: Notice of Application dated April 12, 2013

(c) Communications with Fisheries and Oceans Canada

12. Prior to the issuance of the judicial review application, CELA's student-at-law made verbal inquiries on behalf of the applicants to the Minister's agents and servants in FOC to clarify the existence, status and content of FOC's own "course of action" decision under the CEAA in relation to the refurbishment project.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.11

13. In particular, CELA's student-at-law contacted FOC staff located at Prescott, Ontario to ask whether the FOC had issued an official "course of action" decision under the CEAA concerning the EA of the Darlington NGS refurbishment project.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.12

14. However, CELA's student-at-law received no response to his inquiries to FOC before the issuance of the Notice of Application on April 12, 2013.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.13

15. On April 15, 2013, after the judicial review application had been commenced, the student-at-law spoke by telephone with Mr. Thomas Hoggarth, Team Leader, Client Liaison, Partnership, Standards and Guidelines at FOC, and he requested confirmation on whether or not FOC had issued a "course of action" decision as an RA in the Darlington NGS refurbishment project EA. Mr. Hoggarth informed CELA's student-at-law that FOC had rendered a decision as an RA, that it was the same decision as the CNSC, and that he would forward the decision to CELA via email.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.14

16. On April 15, 2013, CELA's student-at-law received an email from Mr. Thomas Hoggarth that simply provided a link to the above-noted CEAA Registry posting. No

other explanation, documentation or reasons for decision was provided by FOC to CELA's student-at-law in relation FOC's "course of action" decision under the CEAA.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.15; and Exhibit "C": FOC dated April 15, 2013

17. On April 23, 2013, the CELA office received a letter from counsel for the Minister and Attorney General of Canada ("AGC") indicating that the applicants' Rule 317 request to the Minister was "improper", that the Minister's decision record would not be provided, and that the judicial review application should be amended accordingly.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.16; and Exhibit "D": Letter to CELA dated April 23, 2013

18. On April 30, 2013, counsel for the applicants wrote to counsel for the Minister and AGC to seek further clarification regarding FOC's decision under the CEAA, as reflected in the decision statement posted on the CEAA Registry.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.17; and Exhibit "E": CELA's letter to counsel for the Minister and AGC dated April 30, 2013

19. On May 8, 2013, the CELA office received a letter from counsel for the Minister and AGC indicating that while the decision statement on the CEAA Registry was "jointly posted" by the FOC and CNSC, FOC had made its own separate "course of action" decision regarding the refurbishment project, based on information submitted to the CNSC.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.18; and Exhibit "F": Letter to CELA dated May 8, 2013

20. A copy of the CNSC's record was received by CELA on or about May 24, 2013. No decision record has been received to date from the Minister or FOC.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.19

21. In light of the foregoing information and recent developments, the applicants now seek leave to amend the Notice of Application issued on April 12, 2013 to better reflect, and more efficiently address, the legal issues in dispute in this proceeding.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.20; and Exhibit "G": Draft revised Notice of Application containing amendments proposed by the applicants

22. At the present time, and on the basis of the CNSC record received to date, the applicants have prepared and served four affidavits upon the respondents in this proceeding, and the respondents' affidavits are due to be served by mid-July 2013. No cross-examinations have been conducted to date, and the respondents have taken no other steps in this proceeding aside from filing their respective Notices of Appearance.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.21

23. If the applicants' motion is granted and the Minister and/or FOC is directed to provide the FOC record pursuant to Rule 317, the applicants intend to expeditiously review the disclosed record to determine whether – or to what extent – it may be necessary to attach materials from the FOC record as exhibits in a supplementary affidavit in this proceeding.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.22

24. At the present time, the CNSC has not amended OPG's operating licence under the *Nuclear Safety and Control Act* to permit the proposed refurbishment and continued operation of the Darlington NGS, and FOC has not issued an authorization under section 32 of the *Fisheries Act* in relation to the project.

Motion Record, Tab 2: Affidavit of Rizwan Khan, para.23

ISSUES

25. The issues in this motion are:

- (a) Should the applicants be granted leave to amend the Notice of Application pursuant to Rules 75 and 302?
- (b) Should the Minister and/or FOC be directed to provide a certified copy of the FOC decision record pursuant to Rule 317?
- (c) Should this Honourable Court grant the time extensions and procedural directions requested by the applicants regarding further steps in this proceeding?

SUBMISSIONS

(a) Amending the Notice of Application

General Test

26. Rule 75 of the *Federal Courts Rules* provides that the “Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.” This Honourable Court has held that amendments should be allowed at any stage for the purpose of determining real questions in controversy and the amendment would serve the interests of justice.

Musqueam Indian Band v. Canada (Governor in Council), 2004 FC 1564 at paras.15-20

27. The applicants respectfully submit that their proposed amendments to the Notice of Application would serve the interests of justice because they:

- (a) are being sought at an early stage of the proceedings;
- (b) will not appreciably delay the expeditious hearing of the application;

- (c) will not cause any injustice or significant prejudice to the respondents;
- (d) provide more notice and greater detail about the legal arguments that the applicants intend to raise in this proceeding; and
- (e) will greatly facilitate the Court's consideration of the merits of the judicial review application.

Scanner Industries Inc. (Receiver of) v. R. (1993), 69 F.T.R. 310 at para.27
Canada (Attorney General) v. Canada (Information Commissioner), 2002 FCT 127 at para.12

Adding the FOC "Course of Action" Decision

28. Rule 302 of the *Federal Courts Rules* provides that an application for judicial review must be limited to a single order or decision, unless leave is granted by the Court. However, Rule 302 is inapplicable (and leave is not required) where the application focuses upon multiple decisions which form part of a continuing course of conduct.

Whitehead v. Pelican Lake First Nation, 2009 FC 1270 at para.52
Ferron v. Canada Revenue Agency, 2011 FC 481 at para.21

29. In the instant case, the "course of action" decisions made under the CEAA by the CNSC and FOC form part of a continuing course of conduct because:

- (a) both decisions pertain to the same refurbishment project;
- (b) both decisions arose out of the same EA process;
- (c) both decisions were made under the same statute by agencies which were acting together in a coordinated manner under the CEAA;
- (d) both decisions were made contemporaneously and were web-posted on the CEAA Registry on the same day;

- (e) both decisions are virtually identical and factually indistinguishable, particularly since both decisions reach the same conclusions about the potential adverse environmental impacts of the refurbishment project;
- (f) the legal issues which are raised by the judicial review application in relation to the CNSC decision also apply directly to the FOC decision; and
- (g) the amended Notice of Application raises an issue relating to the erroneous reliance by FOC on the record of decision by the CNSC, thereby requiring both decisions to be considered contemporaneously by this Honourable Court.

30. Accordingly, the applicants respectfully submit that amending the Notice of Application to specifically include the FOC “course of action” decision does not contravene Rule 302. In the alternative, if Rule 302 is applicable in the instant case, the applicants respectfully request leave to add the FOC decision to the judicial review application for the foregoing reasons.

Removing the Minister as a Respondent

31. If leave is granted to amend the Notice of Application to specifically include the FOC decision, then it is improper for the Minister responsible for FOC to remain named as a respondent in the application for judicial review. Moreover, governmental agencies (such as FOC) are not legal entities and cannot be named as respondents in a judicial review application.

Rootenburg v. Canada (Attorney General), 2012 FC 1289 at para.21
Gravel v. Canada (Attorney General), 2011 FC 832 at paras.5-6

(b) Production of the FOC Decision Record

32. If leave is granted to amend the Notice of Application to specifically include the FOC decision, then a certified copy of the FOC record of decision should be provided to the applicants and this Honourable Court pursuant to Rule 317 of the *Federal Court Rules*.

Gaudes v. Canada (Attorney General), 2005 FC 351 at para.16

33. The materials contained within the FOC record (and relied upon for the FOC’s “course of action” decision) are relevant to the central legal issues raised in the judicial review application (i.e. did the Responsible Authorities comply with CEEA requirements?). To date, these materials have not been produced by FOC to the applicants despite the Rule 317 request contained in the judicial review application.

(c) Time Extensions and Procedural Directions regarding Next Steps

34. Rule 8 of the *Federal Courts Rules* provides that “the Court may extend or abridge a period provided by these Rules”, while Rule 54 empowers the Court to provide “directions concerning the procedure to be followed under these Rules.”

35. In the instant case, the applicants are requesting procedural directions and brief time extensions to enable this proceeding to move forward in a fair and reasonable manner. In particular, if this Honourable Court grants leave to amend the Notice of Application, and if FOC is ordered to provide its decision record, then the applicants propose the following litigation timetable:

- (a) the applicants would serve a supplementary affidavit within 30 days of receiving the FOC decision record;

- (b) the respondents would serve all of their responding affidavits within 45 days of service of the applicants' supplementary affidavit; and
- (c) cross-examinations on the parties' affidavits, the filing of the parties' records, and the filing of the hearing requisition in this proceeding would be completed in accordance with the *Federal Courts Rules*.

ORDER REQUESTED

36. For the foregoing reasons, the applicants respectfully request:
- (i) An order granting the applicants leave to amend the Notice of Application dated April 12, 2013 by:
 - (a) removing the Minister of Fisheries and Oceans ("Minister") as a respondent to this judicial review application;
 - (b) adding the "course of action" decision taken by the Minister's agents and servants within Fisheries and Oceans Canada ("FOC") under section 20 of the *Canadian Environmental Assessment Act* ("CEAA") as a statutory decision to be reviewed within the scope of this judicial review application; and
 - (c) making other related and consequential amendments to the Notice of Application, in the form attached as Exhibit "G" in the affidavit of Rizwan Khan sworn June 25, 2013.
 - (ii) An order directing the Minister and/or FOC to forthwith provide the applicants and this Honourable Court with a certified copy of FOC's decision record respecting the proposed refurbishment and continued operation of the Darlington Nuclear Generating Station.

- (iii) An order granting the applicants leave to serve a supplementary affidavit within 30 days of receiving FOC's decision record pursuant to paragraph 2.
- (iv) An order extending the time for service of the respondents' affidavits to 45 days after service of the applicants' supplementary affidavit.
- (v) An order directing that the cross-examinations on the parties' affidavits, the filing of the parties' records, and the filing of the hearing requisition in this proceeding shall be completed in accordance with the *Federal Courts Rules*.
- (v) An order that there shall be no costs associated with this motion, or, in the alternative, that the costs of this motion are in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 25, 2013

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SCHEDULE A
LIST OF AUTHORITIES

Musqueam Indian Band v. Canada (Governor in Council), 2004 FC 1564

Scanner Industries Inc. (Receiver of) v. R. (1993), 69 F.T.R. 310

Canada (Attorney General) v. Canada (Information Commissioner), 2002 FCT 127

Whitehead v. Pelican Lake First Nation, 2009 FC 1270

Ferron v. Canada Revenue Agency, 2011 FC 481

Rootenburg v. Canada (Attorney General), 2012 FC 1289

Gravel v. Canada (Attorney General), 2011 FC 832

Gaudes v. Canada (Attorney General), 2005 FC 351

**SCHEDULE B
LIST OF RULES CITED**

FEDERAL COURTS RULES:

Rule 3

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Rule 8

8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.

(3) Unless the Court directs otherwise, a motion to the Federal Court of Appeal for an extension of time shall be brought in accordance with Rule 369.

Rule 54

54. A person may at any time bring a motion for directions concerning the procedure to be followed under these Rules.

Rule 75

75. (1) Subject to subsection (2) and Rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

(a) the purpose is to make the document accord with the issues at the hearing;

(b) a new hearing is ordered; or

(c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

Rule 302

302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

Rule 317

317. (1) A party may request material relevant to an application that is in possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

(2) An applicant may include a request under subsection (1) in its notice of application.

(3) If an applicant does not include a request under subsection (1) of its notice of application, the applicant shall serve the request on the other parties.

Rule 369

369. (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.