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Our File:

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RE: Draft Agreement to Establish a Joint Review Panel for the New Nuclear Plant Project

Introduction

I am writing to provide the comments of the Environmental Law Centre (ELC) respecting the Draft Agreement to Establish a Joint Review Panel for the New Nuclear Plant Project by Bruce Power within the Municipality of Kincardine, Ontario (JRP Agreement). The ELC is an Edmonton-based charitable organization incorporated in 1982 as a public source of information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. A common thread running through the ELC's participation in the development of environmental law and policy in Alberta over the past 25 years has been a consistent emphasis on ensuring that regulatory decisions are made in a manner that is open and transparent and that ensures meaningful opportunities for stakeholder engagement are provided.

Recently, there has been significant discussion respecting the possibility of nuclear power plants being built in Alberta. It is in this context that the ELC has previously provided its comments to the Canadian Nuclear Safety Commission (CNSC) with respect to the draft regulatory document RD-346 Site Evaluation for New Power Plants. The comments of the ELC respecting the JRP Agreement are focused on the extent to which the draft document facilitates meaningful participation by stakeholders in the environmental impacts assessment process. The ELC is pleased to have the opportunity to provide these comments.

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Summary

The JRP Agreement appears to be inconsistent with the requirements of *Canadian Environmental Assessment Act*¹ (CEAA) in the manner in which it provides for appointments to the JRP Panel. This is a concern to the ELC as the proposed mechanism for appointments does not allow the Minister of the Environment to make an appointment free of interference from the Ministry of Natural Resources.

The JRP Agreement relies upon the CNSC's Rules of Procedure², which provide limited and uncertain public participation opportunities. Specific hearing procedures created in the JRP Agreement appear to reflect some of the same limits and uncertainties, specifically, the limited ability of intervenors to cross-examine and the imposition of arbitrary time limits.

Confidentiality provisions in the JRP Agreement seem to track generally the abilities provided under the Rules of Procedure and the CEAA relating to confidentiality but neglect to include the provisions designed to balance the public interest in open hearings and the disclosure of information.

Appointments to Joint Review Panel

Section 3.1 of the JRP Agreement proposes that the JRP will consist of three members, two of which, including the Panel Chair will be appointed by the President of the Commission, with approval of the Minister of Environment; the third member is to be proposed by the Minister of Environment and appointed only if first approved by the President of the Commission, recommended by the Minister of Natural Resources and appointed by the Governor in Council as a temporary member of the Commission.

Section 41(a) of the CEAA deals with the appointment of panel members. That section requires the Minister of Environment to appoint or approve the chairperson or appoint a co-chairperson. Section 41(a) also requires the Minister to appoint at least one other member. However, the JRP Agreement does not enable the Minister of Environment to appoint a member; the Minister must propose a candidate to be a panel member, but that candidate may become a panel member only through a series of approvals by other parties, including the Minister of Natural Resources, who is also responsible for the development of Canadian policy on the use of nuclear energy and who has oversight over the Crown corporation Atomic Energy Canada Limited. This complicated approval process appears to be inconsistent with section 41(a) of the CEAA.

The International Atomic Energy Agency's (IAEA) Nuclear Law Handbook discusses, in detail, the principle of independence and states that

[n]uclear law places particular emphasis on the establishment of a regulatory authority, whose decisions on safety issues are not subject to

¹ S.C. 1992, c.37.

² SOR/2000-211.

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interference from entities involved in the development or promotion of nuclear energy.³

ENGO groups have repeatedly expressed concern about the close relationship between the regulator and the regulated in the Canadian nuclear context. The ELC is concerned that the JRP appointment process as described in the JRP Agreement is inconsistent with the requirements of *CEAA* and appears to enable the Minister of Natural Resources to appoint the entire JRP.

Part III of TOR – Procedure

Part III, paragraph 3 of the draft Terms of Reference provide that opportunities for public participation will be timely and meaningful. Further, Part III, paragraph 1 provides that the JRP hearings will be conducted in accordance with the *Nuclear Safety and Control Act (NSCA)* and the Rules of Procedure. However, the ELC is concerned that this means that the potentially limited opportunities for public participation under the Rules of Procedure will apply to this assessment and future assessments for which the JRP Agreement may serve as a precedent. Specific concerns relate to the uncertain ability of intervenors to cross-examine witnesses, and imposed time limits on the presentation of submissions

The JRP Agreement allows intervenors to make a 40-minute presentation, after which the JRP may allow for a question and answer period during which other intervenors can pose questions, through the JRP, to the presenter. The JRP has further discretion to allow direct questioning of presenters by intervenors. This process does not ensure that intervenors will have an opportunity to effectively ask questions and respond to submissions. Intervenors should have this ability. This comment also relates to the CNSC Rule of Procedure's restriction of intervenor participation to "Day 2" of a "two day hearing". All intervenors, broadly defined as in the JRP Agreement, should be able to question any witness that appears before the JRP. This includes cross-examining applicants.

Further, to extent that discussions are relevant and material, intervenors should not be required to adhere to time restrictions. The information upon which the parties and intervenors may wish to present evidence is technical and, in practice, it can be very difficult for intervenors to fully participate and provide meaningful input on the issues of concern within a short timeline. The JRP should have the power to limit irrelevant, immaterial or repetitive submissions but where intervenors can bring valuable information to the discussion, arbitrary time limits should not apply.

The ELC considers that loosening the restrictions on public participation can better ensure a rigorous consideration of the issues by the JRP.

³ International Atomic Energy Agency, "Nuclear Law Handbook" (Vienna, IAEA, 2003) at 9, online: http://www-pub.iaea.org/MTCD/publications/PDF/Pub1160_web.pdf.

Confidentiality

Part III, paragraph 4 of the TOR deals with confidentiality and enumerates a number of circumstances in which a public hearing may be compromised for the sake of confidentiality. Paragraph 4 of the TOR reads somewhat like an amalgamation of sections 12(1) of the CNSC Rules of Procedure and section 35(3) of the *CEAA*. However, the provisions of 12(2) of the Rules of Procedure were not included in the TOR. These provisions provide that the protection of information must outweigh in importance the public interest in public hearings and disclosure of evidence and also require the confidentiality measures to be designed so as not to affect the public nature of the proceeding any more than is necessary. Openness and transparency of regulation is a principle of international nuclear law that should not be quickly put aside. This balancing is critical and must be kept in mind.

Conclusion

Thank you for the opportunity to provide these comments. As discussion about the possibility of nuclear energy in Alberta grows, Albertans are becoming increasingly interested in the regulatory processes associated with this energy source. The ELC hopes that these comments are helpful and enable the CNSC to create an appropriate environmental assessment process.

Yours truly,

Original signed by:

Dean Watt
Staff Counsel

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