

# Request for Ruling

In the Matter of Ontario Power Generation's (OPG) request to renew the operating licence for the Pickering Nuclear Generating Station (NGS).

June 25, 2018

**THE UNDERSIGNED** registered oral intervenors hereby request a ruling pursuant to Rule 20(1) of the *Canadian Nuclear Safety Commission (CNSC) Rules of Procedure*, SOR/2000-211 with respect to the need to undertake a strategic environmental assessment of Ontario Power Generation's (OPG) approach to decommissioning and managing radioactive waste at the Pickering nuclear generating station, prior to the licensee submitting a licence to decommission under the *Nuclear Safety and Control Act*.

**WHEREAS** OPG has proposed to end commercial operations of the Pickering Nuclear Generating Station (NGS) in 2024 and apply for a decommissioning licence in 2028;<sup>1</sup>

**AND WHEREAS** there is currently a legislative and regulatory lacuna related to requirements for environmental assessments, considering that the federal government's proposed Bill C-69, *An Act to Enact the Impact Assessment Act* (herein IAA), has only recently passed Third Reading and proceeded to the Senate for review, and its supporting regulations are not established;<sup>2</sup>

**AND WHEREAS** the Canadian Environmental Law Association (CELA - CMD 18-H6.57), Greenpeace (CMD 18-H6.62) and Northwatch (CMD 18-H6.55) have requested an environmental assessment to address their concern that the decommissioning of the Pickering NGS could proceed without consideration of the project's sustainability, environmental, social and economic impacts and alternative strategies to mitigate such impacts;

**AND WHEREAS**, as highlighted by the Expert Panel tasked with reviewing Canada's environmental assessment process, environmental assessments address issues not covered by the *Nuclear Safety and Control Act* (NSCA); the Expert Panel observed that an environmental assessment recognizing the following is required:

Early engagement is critical to fully inclusive and informed IA processes. Establishing relationships among proponents, interested publics, Indigenous Groups and potential regulators early in the design of activities can allow for concerns to be discussed and addressed in advance

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<sup>1</sup> Ontario Power Generation, "CMD 18-H6.1 OPG Written Submission in support of renewal of Pickering's Power Reactor Operating Licence" (4 April 2018), p 8

<sup>2</sup> Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st sess, 42nd Parl, 2018 (as passed by the House of Commons on 20 June 2018)

of critical decisions and investments. Early engagement of all interested parties will also facilitate transparent information sharing and decision-making.<sup>3</sup>

There is a need for an open and informed discussion about the nature of developments, and including the review of pros and cons of more than one option is essential. The concept of sustainability provides all the key ingredients to adequately address these needs. A sustainability approach seeks to ensure that projects are planned to avoid or minimize harm and deliver benefits for current and future generations. It requires honest consideration of both positive and negative impacts and provides space for an analysis of alternatives.<sup>4</sup>

**AND WHEREAS**, in response to the Expert Panel’s recommendations, the IAA would require responsible authorities to consider values not considered under the NSCA; for example, Section 6(1)(a) states the IAA’s purpose is to “foster sustainability” and section 6(1)(b) states it aims to “to protect the components of the environment, and the health, social and economic conditions...”;

**AND WHEREAS** CELA, Greenpeace and Northwatch do not feel that CNSC staff’s supplementary submission (18-H6.B) has provided adequate information to ensure a timely and appropriate environmental assessment of OPG’s approach to decommissioning and waste management occurs, considering the current lack of a clear legislative framework;

**AND WHEREAS** the Regional Municipality of Durham has requested more information on and action to mitigate the negative social and economic effects caused by the Pickering NGS’s closure and to be “...notified of and engaged in the decision-making process with respect to conducting an EA for PNGS decommissioning” (H6-18-67);

**AND WHEREAS** CELA, Greenpeace and Northwatch have observed that a review of alternative approaches to a project, which requires identifying options to mitigate possible environmental, social and economic effects, is a fundamental principle of environmental assessment, CNSC staff’s supplementary submission shows the Commission currently defers to the licencees preferred decommissioning strategy<sup>5</sup> without any public review of alternatives;

**AND WHEREAS** CNSC staff’s supplementary submission states that it is the licencee’s responsibility to select a preferred decommissioning strategy, although this approach is not explicitly established in CSA Standard 294-09, CNSC regulatory document G-219, RegDocs 2.9.1 and 2.11.1; similarly, there is no explicit requirement in CNSC’s guidance compelling licencees to consider alternatives to their preferred decommissioning strategy for public review;

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<sup>3</sup> Expert Panel Review of Environmental Assessment Processes, “Building Common Ground: A New Vision for Impact Assessment in Canada” (2017) online:

<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>, p 19 [Expert Panel Report]

<sup>4</sup> *Ibid*, p 20

<sup>5</sup> CNSC Staff, “CMD 18-H6.B Supplemental: A Licence Renewal, Pickering Nuclear Generating Station” (12 June 2018), p 19

**AND WHEREAS** the decommissioning policy described by CNSC and the current legislative lacuna related to environmental assessment means there is no venue provided for citizens and affected communities to evaluate the technical or social desirability of OPG's preferred decommissioning approach early in the assessment process;

**AND WHEREAS** CNSC staff's supplementary submission does not adequately address concerns raised by CELA (CMD 18-H6.57), Greenpeace (18-H6.62), and Northwatch (CMD 18-H6.55), that the Pickering site will evolve into a *de facto* long-term radioactive waste management facility without an appropriate, upfront and transparent process to develop contingency plans that could mitigate or protect the social, economic and environmental conditions at the Pickering site;

**AND WHEREAS** 51% of the used fuel waste in Canada is stored in temporary facilities at the Pickering NGS (CMD 18-H6.67A) and that the Regional Municipality of Durham has asked for action to mitigate the socio-economic impacts of waste storage as the "indefinite future host community of all the used nuclear fuel waste, refurbishment waste and decommissioning waste..." (CMD 18-H6.67A) generated by the Pickering and Darlington NGSs;

**AND WHEREAS**, in response to similar concerns, the Government of Canada in 2012 accepted the recommendations of the Joint Review Panel on OPG's proposal to build new reactors at the Darlington nuclear station, which recommended the proponent "make provisions for on-site storage" of all used fuel, low and intermediate-level radioactive waste "in the event that a suitable off-site solution[s]" are not found;<sup>6</sup>

**AND WHEREAS**, considering the Pickering NGS's proximity to a large population and Lake Ontario, CELA, Greenpeace and Northwatch do not feel that the CNSC staff's supplementary submission has adequately addressed the possibility that indefinite storage of radioactive at the Pickering site could reasonably require more robust storage facilities not currently considered in CNSC's requirements;

**ON THIS BASIS**, the significance of social, economic and environmental effects associated with decommissioning and the effectiveness of mitigation measures are uncertain, and not required considerations under existing CNSC regulations and guidance; therefore, in accordance with the precautionary principle, decommissioning should be prescribed under Canada's proposed *Impact Assessment Act* regulation;

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<sup>6</sup> See CMD 18-H6.62, p 10, citing Canadian Environmental Assessment Agency, "Government of Canada's Response to the Joint Review Panel Report for the Proposed Darlington New Nuclear Power Plant Project in Clarington Ontario" (2012), online: <http://www.ceaa.gc.ca/052/document-html-eng.cfm?did=55542>

**WE THEREFORE REQUEST THAT** the Commission in its Record of Decision state that:

- The Commission expects that the decommissioning of nuclear facilities will be a designated project under the *Impact Assessment Act*, or in the alternative refer the matter to the Minister for a strategic environmental impact assessment.
- OPG will carry out an environmental impact assessment of its plans to decommission the Pickering NGS under the *Impact Assessment Act*, including long-term waste storage options, before it applies for a decommissioning licence under the *Nuclear Safety and Control Act*.

## ***Reasons in Support of Request***

### **1. The request for ruling does not duplicate interventions**

A request for ruling is distinct in procedure and substance from an intervention. While the aforementioned intervenors jointly support and submit this request for ruling to the Commission, we submit it is distinct from our respective interventions for the following reasons.

First, the procedure required for the submission of request for rulings is distinct from interventions. For instance, interventions are submitted and approved pursuant to s 19 of the *Rules*. They require the intervenor have an interest in the matter being heard and provide expertise useful to the Commission in coming to a decision.<sup>7</sup> Request for rulings, conversely, are intended to assist during a public hearing, and may be made by “a participant...at any time”.<sup>8</sup>

Secondly, requests for rulings are distinct in substance from interventions. While intervenors may provide submissions on areas of concern or expertise, requests for rulings are issue specific and pertain to a matter requiring the Commission’s consideration per section 24(4) of the *NSCA*. As this request for ruling responds to material issues raised by CNSC staff and the licensee in its supplemental submissions, we submit that the doctrine of *res judicata* does not apply.

### **2. Request for rulings are not limited to procedural considerations**

In its Record of Proceeding for the licence renewal of the Pickering NGS in 2013, the Commission noted that while it chose to consider multiple request for rulings received, request for rulings “normally refer to procedural considerations” and “it could be disputed whether some of the requests fall within such

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<sup>7</sup> *Canadian Nuclear Safety Commission Rules of Procedure*, SOR/2000-211, s 19(1) [CNSC Rules]

<sup>8</sup> *Ibid*, s 20(3)

an interpretation.”<sup>9</sup> Based on the CNSC’s past acceptance of rulings which dealt with substantive matters, and an ordinary reading of the CNSC’s *Rules*, we submit requests for rulings are not limited to procedural matters.<sup>10</sup>

The *Rules* frame requests for rulings as a “ruling on a particular issue.” Neither the term ‘procedure’ nor ‘procedural’ appear in the text of Rule 20. Thus, to limit requests for rulings to procedural matters would be overly restrictive and contrary to the ordinary meaning of the regulation. The interpretation of statutory provisions properly begins with its ordinary meaning and if the Commission wishes to depart or modify the ordinary meaning, it must provide plausible reasons which are sufficiently justified.<sup>11</sup>

In the alternative, if the Commission remains of the view that request for rulings are limited to purely procedural matters, we note the Commission has previously accepted requests substantive in nature and therefore, the present request is not barred from review.<sup>12</sup>

### **3. The request for ruling is within the scope of the hearing**

This request for ruling is within the scope of this hearing as it is directly related to the activities proposed by the licensee in its licence application. The consideration of environmental protection is an enumerated purpose of licencing hearings, per section 24(4) of the *NSCA*. It is also a guiding purpose of the Commission, as set out in sections 3 and 9 of the Act.

Furthermore, there is no parallel or alternative process which allows for the resolution of issues as presented in this request for ruling. We submit that annual regulatory oversight reports are not a stand in for licensing hearings due to their limited disclosure and response opportunities.

### **4. The request for ruling is not time barred**

We submit the request for ruling is not time barred as we have attempted to exhaust other administrative procedures,<sup>13</sup> such as seeking an adjournment of the hearing and seeking disclosure, before commencing these requests for ruling.<sup>14</sup>

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<sup>9</sup> CNSC, “Record of Proceedings, Including Reasons for Decision: Application to Renew the Nuclear Power Reactor Operating Licence for the Pickering Nuclear Generating Station” (9 August 2013), para 7 [**CNSC Pickering Decision**]

<sup>10</sup> See *CNSC Rules*, *supra* note 7, s 20

<sup>11</sup> Ruth Sullivant, “Sullivan on the Construction of Statutes,” 5th ed (Markham: LexisNexis, 2008), p 24

<sup>12</sup> See for instance: Request for Ruling from CELA to CNSC (August 19, 2015), “File/dossier 6.01.02 – OPG application for 13 year licence renewal at Darlington Nuclear Generating Station”; CNSC Pickering Decision, *supra* note 9; CNSC, “Record of Proceedings, Including Reasons for Decision: Application to Renew the Nuclear Power Reactor Licence for the Darlington Nuclear Generating Station” (2 March 2016), para 210

<sup>13</sup> Donald JM Brown and The Honourable John M Evans, “Judicial Review of Administrative Action in Canada,” Vol 2 (Toronto: Thomson Reuters 2017) at 3 - 61.

<sup>14</sup> CELA, Greenpeace, Letter to the CNSC, “Extension of Hearing or Intervention Deadline for Bruce and Pickering NGSS” (3 April 2018)

As a matter of procedure, the Commission has previously accepted request for rulings during Part 2 of the hearing process.<sup>15</sup> Therefore this request is not time barred as it falls within the Commission’s previously noted practice. Furthermore, we submit this request prior to the start of the Part 2 hearing to ensure it does not delay or prejudice the hearing process.

All of which is respectfully submitted this 25th day of June 2018.

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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<sup>15</sup> See for instance: Request for Ruling from CELA to CNSC (August 19, 2015), “File/dossier 6.01.02 – OPG application for 13 year licence renewal at Darlington Nuclear Generating Station”; CNSC Pickering Decision, *supra* note 9; CNSC, “Record of Proceedings, Including Reasons for Decision: Application to Renew the Nuclear Power Reactor Licence for the Darlington Nuclear Generating Station” (2 March 2016), para 210