

**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

**APPLICANTS' MEMORANDUM OF FACT AND LAW**

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## Table of Contents

	<u>Page</u>
<b>PART I – CONCISE STATEMENT OF FACTS</b> .....	1
A. Introduction.....	1
B. Overview of Project.....	2
C. The Environmental Assessment Process.....	4
D. The “Course of Action” Decision under CEAA.....	7
<b>PART II – POINTS IN ISSUE</b> .....	9
<b>PART III – CONCISE STATEMENT OF SUBMISSIONS</b> .....	9
A. The Responsible Authorities Failed to Comply with CEAA.....	9
(i) Overview of the Statutory Scheme.....	9
(ii) Exclusion of Severe Accidents.....	13
(iii) Consideration of Feasible Mitigation Measures.....	18
(iv) Consideration of Likelihood and Significance of Environmental Effects.....	21
(v) The Responsible Authorities Unlawfully Delegated their CEAA Duties.....	24
(vi) The Timeliness of this Judicial Review Application.....	26
B. The Standard of Review is Correctness.....	27
C. The EA should be Remitted to the Responsible Authorities for Completion.....	29
<b>PART IV – ORDER REQUESTED</b> .....	30
<b>APPENDIX A – STATUTES AND REGULATIONS</b> .....	31
<b>APPENDIX B – AUTHORITIES</b> .....	31

## APPLICANTS' MEMORANDUM OF FACT AND LAW

### PART I – CONCISE STATEMENT OF FACTS

#### A. Introduction

1. This is an application for judicial review of the “course of action” decision by the Canadian Nuclear Safety Commission (“CNSC”) and by 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 environmental assessment (“EA”) of the refurbishment and continued operation of the Darlington Nuclear Generating Station (“NGS”) as proposed by Ontario Power Generation (“OPG”).

2. The Applicants’ overall position is that in conducting the screening EA and rendering the “course of action” decision, both the CNSC and FOC erroneously interpreted, and failed to comply with, the mandatory legal requirements of CEAA. Accordingly, as a matter of law, these Responsible Authorities<sup>1</sup> lack jurisdiction to grant any federal licences or approvals to enable the OPG project to proceed.

3. In summary, the Applicants submit that both Responsible Authorities:

- (a) undertook an *ultra vires* “bounding approach” to improperly ignore low-probability, high-consequence nuclear reactor accidents (and their environmental effects) from the EA;
- (b) failed to properly assess the likelihood or significance of adverse environmental effects that may be caused by the project, particularly in relation to fisheries;
- (c) failed to properly assess the feasibility of proposed mitigation measures, particularly in relation to emergency planning; and

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<sup>1</sup> “Responsible Authority” is defined by subsection 2(1) of CEAA as “the federal authority that is required ... to ensure that an environmental assessment of the project is carried out.”

- (d) unlawfully deferred or delegated mandatory EA considerations under CEAA to future licencing processes under other statutes.

## **B. Overview of the Project**

4. OPG is proposing to refurbish and continue the operation of four existing nuclear reactors at the Darlington NGS located on Lake Ontario in the Municipality of Clarington, Ontario. Built in the 1980s, the Darlington NGS is one of the largest nuclear power plants in North America, and among the largest 25 plants in the world.

**Applicants' Record ("AR"), Vol. 1, Tab 2: CNSC Decision (March 13, 2013) at para.1; AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para.41**

5. If the project proceeds as proposed by OPG, then the refurbished reactors will be used to generate electricity until approximately 2055. Thereafter, the reactors will be shut down and decommissioning activities will commence in 2085.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.1**

6. OPG's multi-decade, multi-billion dollar project includes a large number of environmentally significant steps, activities and physical works, such as:

- (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.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit E (Draft EA Scoping Information Document), Section 2.1, Exhibit H (CNSC Decision on EA Scoping Information Document), paras.29-31, and Exhibit M (EA Screening Report), Section 2.1**

7. In order to refurbish and continue to operate 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 *Nuclear Safety and Control Act* ("NSCA").

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.2; AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para. 42**

8. OPG's proposal also requires an authorization under section 32 of the *Fisheries Act* from the Minister of Fisheries and Oceans for the destruction of fish by means other than fishing. This is because millions of fish eggs and larvae – and hundreds of thousands of juvenile or adult fish (including species at risk) – are killed each year due to "impingement" (i.e. capture of aquatic biota on filter screens at pipe intakes in the lake) and "entrainment" (i.e. ingress of aquatic biota into and through cooling pipes and structures) during OPG's massive water-takings from Lake Ontario for the once-through cooling system used at the Darlington NGS.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras.30, 39; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, paras.13-16, 19, 23**

9. Operating licences under subsection 24(2) of the NSCA, and authorizations under section 32 of the *Fisheries Act*, are prescribed as EA "triggers" by the *Law List Regulations* (SOR/94-636) under CEAA. As Responsible Authorities under CEAA,

the CNSC and FOC are both prohibited by subsection 5(1)(d) of CEAA from issuing permits for the OPG project until an EA has been completed, and unless a “course of action” decision is lawfully taken by these Responsible Authorities under section 20 of CEAA.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.3; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para.24**

### **C. The Environmental Assessment Process**

10. After OPG filed its project description in April 2011, the CNSC commenced a screening EA in June 2011 pursuant to section 18 of CEAA. There will be no provincial EA for the project. 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.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para. 27, and Exhibit M (EA Screening Report), section 1.3; AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para.45**

11. In light of the severe multi-reactor accident at the Fukushima nuclear plant that had occurred in March 2011, the Applicants wrote to the CNSC to request that another type of EA be used under CEAA (i.e. panel review) to ensure a more comprehensive evaluation of the OPG project. However, this request was refused to and the CNSC proceeded with the screening EA.

**AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, paras. 45-46; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para.21, Exhibit C1 (Joint Letter to CNSC), and Exhibit C2 (CNSC Reply to Joint Letter); AR, Vol. 9, Tab 8: Affidavit of Brennain Lloyd, para.15; AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, paras.19-20**

12. 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 written comments that raised various legal, technical, and EA planning concerns about OPG’s project.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, paras.28-29, and Exhibit D (CNSC Notice), Exhibit E (Draft EA Scoping Information Document), and Exhibit F (Waterkeeper Submission on Draft EA Scoping Information Document); AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para.47, and Exhibit A (CELA Submission on Draft EA Scoping Information Document); AR, Vol. 9, Tab 8: Affidavit of Brennain Lloyd, para.17, and Exhibit A (Northwatch Submission on Draft EA Scoping Information Document); AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, paras.21-22, and Exhibit A (Greenpeace Submission on Draft EA Scoping Information Document)**

13. In October 2011, a single member panel of the CNSC was established to determine the scope of the project and the scope of the factors to be assessed in the Darlington NGS Refurbishment and Continued Operation EA. During this closed session, the CNSC panel member received written submissions from OPG and CNSC staff.

**AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para. 49; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para. 31, and Exhibit H (CNSC Decision on EA Scoping Information Document), para.10; AR, Vol. 9, Tab 8: Affidavit of Brennain Lloyd, para.18; AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, para.22-24**

14. In the EA scoping decision, the CNSC panel member declined to refer the matter to a review panel under CEAA, and the CNSC panel member delegated the preparation of technical support studies to OPG pursuant to section 17 of CEAA. The CNSC panel member also determined that the scope of the project to be assessed in the EA would include all components of the project as proposed by OPG.

**AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, paras. 49-50; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit H (CNSC Decision on EA Scoping Information Document), paras.11-13, 16, 28-31, 46-48**

15. The CNSC panel member also affirmed that the scope of the EA would include not only all of the considerations in subsections 16(1)(a) to (d) of CEAA, but would also address the project's purpose and the preliminary design and implementation plan for a follow-up program for OPG's project.

**AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para.51; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit H (CNSC Decision on EA Scoping Information Document), paras.33-38**

16. In December 2011, OPG submitted an Environmental Impact Study (“EIS”) and technical supporting documents to inform the Responsible Authorities’ EA of the project. The CNSC made these available for public review and comment.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.5; AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para. 52; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para.34**

17. 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 Environment Minister issued a statutory order under the new legislation that the Darlington NGS Refurbishment and Continued Operation EA would continue as a screening EA under the applicable provisions of the former CEAA.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para. 4; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para. 36**

18. 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 filed detailed written submissions on the draft EA Screening Report.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, paras. 35-42, Exhibit J (Draft EA Screening Report), Exhibit K (CNSC Request for Public Comment), and Exhibit L (Waterkeeper Submission on Draft EA Screening Report); AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, paras.55-56, and Exhibit B (CELA Submission on Draft EA Screening Report); AR, Vol. 9, Tab 8: Affidavit of Brennain Lloyd, para.21, and Exhibit B (Northwatch Submission on Draft EA Screening Report); AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, paras.32-34, and Exhibit I (Greenpeace Submission on Draft EA Screening Report)**

19. After the public comment period, CNSC staff finalized the EA Screening Report, which was submitted to the CNSC for consideration under CEAA.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para.43, and Exhibit M (EA Screening Report); AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, paras.57-58; AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, para.35**

20. In December 2012, a six member panel of 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, this CNSC panel 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.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.8**

21. The Applicants participated as interveners during the CNSC panel's public hearings and raised numerous concerns about the OPG project and the screening EA process. Like other interveners, the Applicants' presentations were each restricted by the CNSC panel to 10 minutes in total on all three matters being considered at the public hearings.

**AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, paras.61-70, Exhibit C (CELA Presentation at CNSC Hearing), and Exhibit E (Transcript of CELA Presentation at CNSC Hearing); AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, paras.46, 48-49, and Exhibit P (Transcript of Waterkeeper Presentation at the CNSC Hearing); AR, Vol. 9, Tab 8: Affidavit of Brennain Lloyd, paras.23-28, Exhibit C (Northwatch Presentation at CNSC Hearing), Exhibit D (Report by Dr. Gordon Thompson), Exhibit E (Report by Dr. Marvin Resnikoff and Melissa Belcher), Exhibit F (Sliddeck for Northwatch Presentation at CNSC Hearing), and Exhibit G (Transcript of Northwatch Presentation at CNSC Hearing); AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, paras.37-39, 41, Exhibit D (Greenpeace Report on Lessons from Fukushima), Exhibit K (Greenpeace Presentation at CNSC Hearing), Exhibit L (Transcript of Greenpeace Presentation at CNSC Hearing), and Exhibit M (Sliddeck of Greenpeace Presentation at CNSC Hearing)**

#### **D. The "Course of Action" Decision under CEAA**

22. On March 13, 2013, the CNSC panel made its "course of action" decision under section 20 of CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA. Notice of the CNSC's proposed course of action decision

(and FOC's concurrent decision) was web-posted on the Canadian Environmental Assessment Registry on March 14, 2013 and the final course of action decision was posted on April 2, 2013.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013); AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, para. 51-53, Exhibit R1 (EA Registry Posting dated March 14, 2013) and Exhibit R2 (CNSC News Release dated March 14, 2013); Affidavit of Rich Rudolph, para.62 [Application Record of the Attorney General of Canada]**

23. Among other things, the CNSC panel's decision concluded that:
- (a) the screening EA is "complete" and meets "all of the applicable requirements" under 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 CEAA; and
  - (d) pursuant to subsection 20(1)(a) of 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.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras.2, 13-14, 220-223; AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para.71**

24. On April 12, 2013, the Applicants commenced this application for judicial review, which was subsequently amended by the Applicants with leave pursuant to the Order of Prothonotary Milczynski dated July 5, 2013.

**AR, Vol. 1, Tab 1: Amended Application for Judicial Review, p.2**

## **PART II – POINTS IN ISSUE**

25. The main points in issue in this proceeding are as follows:
- (a) Did the Responsible Authorities comply with the legal requirements under CEAA?
  - (b) What is the applicable standard of review?
  - (c) What is the appropriate remedy?

## **PART III – CONCISE STATEMENT OF SUBMISSIONS**

### **A. The Responsible Authorities Failed to Comply with CEAA**

26. This case raises fundamental questions of jurisdiction and statutory interpretation under CEAA, and does not require this Court to assess the quality of evidence before the Responsible Authorities, or to otherwise become an “academy of science.” Instead, this Court’s role is to ensure compliance with CEAA.

*Bow Valley Naturalists Society v. Canada*, [2001] 2 F.C. 461 at para. 78 [AR, Vol. 11 Tab B1]; *West Vancouver (District) v. British Columbia (Minister of Transportation)*, 2005 FC 593 at para.56 [AR, Vol. 11, Tab B3]

#### *(i) Overview of the Statutory Scheme*

27. The Supreme Court of Canada has described EA as “a planning tool that is now generally regarded as an integral component of sound decision-making”, and that has “both an information-gathering and decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development.”

*Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para.103 [AR, Vol. 11, Tab B4]; see also *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2010 SCC 2 at para.14 [AR, Vol. 11, Tab B7]

28. The overall aim of CEAA is to establish an EA process that achieves sustainable development by integrating environmental considerations in federal

decision-making regarding projects. The objects and purposes of CEAA include “timely and meaningful public participation” in the EA process, and ensuring that projects (and their environmental effects) receive “careful and precautionary consideration” as “early as is practicable in the planning stages of the project and before irrevocable decisions are made.”

**CEAA, preamble, subsections 2(1), 4(1), 4(2) and 11(1); Beverley Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (Aurora: Canada Law Book, 2011), at II-2 [AR, Vol. 12, Tab B28]; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5<sup>th</sup> ed, (LexisNexis Canada, 2008) at pp.1-3**

29. Subsection 4(2) of CEAA specifically requires “all bodies subject to the provisions of this Act”, including Responsible Authorities, to “exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.” The Supreme Court of Canada has endorsed the precautionary principle, adopting a definition from international law that “where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

**CEAA, subsection 4(2); *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 at para.86 [AR, Vol. 11, Tab B8]; *11497 Canada Ltee (Spraytech, Societe d’arrosage) v. Hudson (Town)*, 2001 SCC 40 at para.31 [AR, Vol. 11, Tab B9]; *Sierra Club of Canada v. Canada*, 2002 SCC 41 at para.84 [AR, Vol. 11, Tab B10]**

30. The type of EA conducted in this case is known as a screening, which is defined by CEAA in the following manner:

“screening” means an environmental assessment that is conducted pursuant to section 18 and includes consideration of the factors set out in subsection 16(1) (emphasis added).

**CEAA, subsection 2(1) definition of “screening”**

31. Subsection 18(1) of CEAA imposes a two-fold duty upon Responsible Authorities to ensure that “a screening of the project is conducted,” and that “a

screening report is prepared.” Subsection 18(2) further provides if a Responsible Authority opines that it has insufficient information to make a course of action decision, then it “shall ensure that any studies and information that it considers necessary for that purpose are undertaken or collected.”

**CEAA, subsections 18(1) and (2)**

32. Pursuant to subsection 15(1) of CEAA, the Responsible Authority is empowered to determine the scope of the project to be assessed in the screening EA. However, subsection 15(3) of CEAA specifies that where the project is in relation to a physical work, then the screening EA shall be conducted in relation to “every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent,” or that is likely, in the opinion of the Responsible Authority, to be carried out in relation to that physical work.

**CEAA, subsection 2(1) definition of “project”, subsections 15(1) and (2)**

33. In this case, there is no dispute that the proposed refurbishment and continued operation of the Darlington NGS is an undertaking in relation to a physical work, and is therefore a “project” within the meaning of CEAA. In addition, the CNSC’s project scoping decision in October 2011 confirmed that the project to be assessed was the project as proposed by OPG. No changes in OPG’s project description were imposed by this scoping decision, which accords with the Supreme Court of Canada ruling in the *MiningWatch* case.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit E (Draft EA Scoping Information Document), Section 1.2, and Exhibit H (CNSC Decision on EA Scoping Information Document), paras.29-31; *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2010 SCC 2 at paras.28-30, 34, 40-42 [AR, Vol. 11, Tab B7]**

34. Subsection 16(1) of CEAA establishes the mandatory factors which shall be considered by Responsible Authorities when conducting a screening EA:

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered (emphasis added)

35. The scope of the subsection 16(1) factors to be considered in the screening EA is determined by the Responsible Authority. In this case, the scope of the factors to be assessed was determined by the CNSC in October 2011, and properly included all subsection 16(1)(a) to (d) factors without any limitations or restrictions. This scoping decision also stipulated that pursuant to subsection 16(1)(e), the screening EA would include two additional matters (i.e. purpose of project and preliminary follow-up program). The Applicants do not dispute the validity of the discretion to scope that was exhausted under section 15 in 2011.

**CEAA, subsection 16(3); AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit H (CNSC Decision on EA Scoping Information Document), paras.32-38; Canada (Minister**

*of the Environment) v. Bennett Environmental Inc.*, 2005 FCA 261 at para.89 [AR Vol. 11, Tab B11]

36. After completing the screening EA (and considering public comments, if any), a Responsible Authority must then make one of the following three “course of action” decisions mandated under subsection 20(1) of CEAA, depending on whether significant adverse environmental effects are “likely” or “uncertain”:

- (a) exercise its statutory authority to permit the project to proceed;
- (b) refuse to exercise its statutory authority to permit the project to proceed; or
- (c) refer the project to the Environment Minister for referral to mediation or panel review.

**CEAA, subsection 20(1)**

37. In order for a valid “course of action” decision to be made by a Responsible Authority, the screening EA must be conducted in full compliance with the substantive requirements of CEAA, particularly in relation to the section 16(1) factors to be considered in relation to the project. For the reasons outlined below, the Applicants submit that the screening EA in this case did not comply with applicable CEAA requirements, thereby depriving the Responsible Authorities of jurisdiction to make their “course of action” decision under subsection 20(1)(a).

*Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, at paras. 79-80 [AR, Vol. 11, Tab B12]; *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483, at paras.17-18 [AR, Vol. 11, Tab B14]

(ii) Exclusion of Severe Accidents

38. Subsection 16(1)(a) of CEAA expressly requires a screening EA to consider the environmental effects of malfunctions or accidents that “may” occur in connection in with the project. When enacting this subsection, Parliament placed no qualifications or restrictions on the nature, types or likelihood of accidents to be

considered, and Parliament provided no authority in section 16 to restrict the EA to a sub-set of accidents regarded as “credible”, “likely” or “plausible” by the proponent or Responsible Authorities. Having regard to the objects of CEAA, and applying a broad and purposive approach to the interpretation of subsection 16(1)(a), the Applicants submit that the effects of major malfunctions and accidents must be fully considered by Responsible Authorities. Even if such events are viewed as unlikely, their impacts may be catastrophic if the malfunction or accident occurs, and must therefore be rigorously assessed in EAs under CEAA.

**CEAA, subsection 16(1)(a); Meinhard Doelle, *The Federal Environmental Assessment Process* (Markham: Lexis Nexis Canada, 2008), pp.115, 138 [AR, Vol. 12, Tab B29]**

39. As noted by a leading text on CEAA:

Given limited time and resources, the responsible authority may be wise to concentrate its efforts on important malfunctions and accidents, based on the significance of the potential environmental effects, rather than on the likelihood of their occurrence.

For example, while the risk of a nuclear accident may be low, the severe consequences of such an accident require careful consideration of its effects (emphasis added).

**Beverly Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (Aurora: Canada Law Book, 2011), at II-97 [AR, Vol. 12, Tab 28]**

40. Read together with subsection 15(3) of CEAA, subsection 16(1)(a) means that the screening EA in this case was required by law to consider the environmental effects of accidents or malfunctions that “may” occur during all phases of the entire OPG project over the course of its lengthy lifespan (i.e. construction, operation, decommissioning and abandonment).

**CEAA, subsections 15(3), 16(1)(a)**

41. Despite these statutory requirements, the screening EA Report unlawfully ignored consideration of a severe, multi-unit reactor accident at the Darlington NGS.

This was the very type of accident that occurred at the Fukushima plant just before the screening EA process was commenced in 2011. The Applicants made written submissions to the CNSC to stress the need for the EA to include a comprehensive assessment of severe, multi-unit reactor accidents.

**AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, para.19-20; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit C1**

42. The draft EA Scoping Information Document prepared by CNSC staff, after the scoping decision had been made, suggested that the proponent's discussion of accidents and malfunctions in OPG's EIS should "include" information on various matters, such as "postulated accident sequences leading to radiological release that could occur with a frequency greater than  $10^{-6}$  per year" (i.e. greater than a 1 in a million chance yearly). Given that this restricted analysis of accidents would ignore the environmental effects of severe, multi-unit reactor accidents, the Applicant Greenpeace Canada objected to this proposed direction to OPG on the grounds that it unduly constrained the assessment of accident scenarios at the Darlington NGS.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit E (Draft EA Scoping Information Document), section 3.4.4; AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, para. 21 and Exhibit A (Greenpeace Submissions on Draft EA Scoping Information Document)**

43. Notably, the term "EIS" does not appear in CEAA, and the EIS prepared by OPG in this case is not the screening EA Report that the Responsible Authorities were obliged to prepare in accordance with CEAA requirements prior to making their "course of action" decision. Even if OPG did not provide this accident information, the Responsible Authorities remained obliged to collect and consider such information under CEAA.

44. Further, the CNSC scoping decision in October 2011 did not specifically mention or address the Applicants' concerns about excluding severe accidents from

OPG's EIS. At the same time, the scoping decision did not specifically direct or compel the Responsible Authorities to prepare a screening EA Report that ignored the environmental effects of severe, multi-unit reactor accidents. To the contrary, the scoping decision expressly confirmed that "potential" malfunctions and accidents would be addressed in OPG's EIS.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit E (Draft EA Scoping Information Document), and Exhibit H (CNSC Decision on EA Scoping Information Document), paras. 26, 39-41**

45. Nevertheless, in December 2011, OPG filed its EIS and supporting technical documents (including one dealing with certain accidents), but failed to identify or evaluate any environmental effects from major reactor accidents that OPG characterized as low-probability events.

**AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, para.29, and Exhibit G (OPG Technical Support Document - Accidents)**

46. The draft EA Screening Report subsequently prepared by CNSC staff in June 2012 (based largely upon OPG's EIS) similarly failed to consider or evaluate the ecological, socio-economic and human health effects of low-probability, high-consequence accidents at the refurbished Darlington NGS, contrary to subsections 16(1)(a) and (b) of CEEA.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit J (Draft EA Screening Report); AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, paras.29, 31-35, 46-48**

47. When the draft EA Screening Report was made available for public comment by the CNSC, OPG had separately web-posted a risk summary report that outlined two "realistic" accident scenarios at the Darlington NGS that could result in large radioactive releases, abandonment of land due to contamination, and other adverse impacts. The Applicant Greenpeace Canada then submitted written comments to the

CNSC to object to the draft EA Screening Report's failure to assess these accident scenarios that OPG itself recognized as "realistic."

**AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, paras.31-34, Exhibit H (OPG Darlington Risk Summary Report), and Exhibit I (Greenpeace Submission on Draft EA Screening Report)**

48. However, when the EA Screening Report was finalized by CNSC staff, it still lacked any assessment of the adverse effects that may be caused by severe, multi-unit reactor accidents at the refurbished Darlington NGS, despite repeated comments and concerns from the Applicants on this critically important matter prior to and during the public hearing held by the CNSC panel.

**AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, para.35-39, 41, Exhibit J (CNSC Comment Disposition Table), and Exhibit L (Transcript of Greenpeace Presentation to CNSC); AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit M (EA Screening Report)**

49. The ongoing failure of the screening EA to assess the environmental effects of low-probability, high-consequence reactor accidents was also raised by Emergency Management Ontario (EMO), a provincial agency that oversees emergency response planning and implementation. EMO advised the CNSC that "in order to better evaluate the impact of the proposal, we request that the accident scenarios considered by this EA be expanded." However, this EMO request was not acted upon by the CNSC, and did not result in any changes in the EA Screening Report.

**AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, para.36; AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, Exhibit D (EMO Letter to CNSC)**

50. On the final day of the public hearing, CNSC staff conceded that it was indeed possible to assess the environmental and human health effects of severe reactor accidents, but confirmed that no such analysis was contained in the EA Screening Report. OPG and CNSC staff then indicated that an accident scenario

report pertaining to the Darlington NGS would be prepared after the conclusion of the screening EA process.

**AR, Vol. 3, Tab 5, Affidavit of Shawn-Patrick Stensil, paras.42-43, and Exhibit N (Transcript of CNSC and OPG Testimony)**

51. In its reasons for decision, the CNSC reviewed the OPG and CNSC staff claims about “credible” radiological accidents, and improperly accepted the OPG and CNSC staff position that a low-probability Fukushima-type accident was outside the scope of the EA. The CNSC then broadly concluded that “nuclear accidents are not likely to cause any significant adverse effects”, although severe multi-unit reactor accidents had been ignored in the EA Screening Report.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras.151-152, 157**

52. In the CNSC reasons for decision, there was no acknowledgement of, or response to, the Applicants’ repeated submissions that, as a matter of law, CEAA required the Responsible Authorities to assess the consequences of severe accidents as an integral part of the screening EA process. Despite these submissions, neither Responsible Authority asked or answered the key jurisdictional question of whether they had statutory authority to limit the types of accidents considered in the screening EA, nor was this statutory non-compliance rectified before either of them purported to make their “course of action” decision under CEAA.

**AR, Vol. 3, Tab 5: Affidavit of Shawn-Patrick Stensil, paras.46-48**

(iii) Consideration of Feasible Mitigation Measures

53. The CNSC’s above-noted finding that “nuclear accidents” were unlikely to cause significant adverse environmental effects was premised on its view that there are “sufficient measures in place” to mitigate such effects.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras.157, 172**

54. “Mitigation” is defined under CEAA as including measures that eliminate, reduce or control adverse environmental effects of a project. Subsection 16(1)(d) of CEAA requires Responsible Authorities to consider whether there are any technically and economically feasible means of mitigating any significant adverse environmental effects of the project.

**CEAA, subsections 2(1), 16(1)(d)**

55. In this case, the primary means of potentially mitigating the off-site effects of major radiological accidents include mass evacuations, sheltering in place, and distribution of potassium iodide pills to the public. However, the feasibility or efficacy of such measures in the context of a severe, multi-unit reactor accident at the Darlington NGS was not considered by the Responsible Authorities on the erroneous legal grounds that such accidents – and the nature and extent of mitigation measures needed for such accidents – could be ignored in the EA. The CNSC further suggested that these matters would be addressed in extraneous proceedings, such as the CNSC’s Fukushima Task Force initiative, which was limited in scope and was not a project-specific EA process under CEAA.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.153-156; AR, Vol. 3, Tab 5: Affidavit of Shawn Patrick Stensil, paras.25, 27-28, 41**

56. The draft EA Screening Report contained scant consideration of emergency planning matters, despite the requirements of section 16(1)(d) of CEAA and despite the CNSC’s 2011 scoping decision that mitigation measures would be addressed in the screening EA process. The final EA Screening Report failed to remedy this significant omission and, more alarmingly, continued to illegally ignore consideration

of the effects (or their mitigability) of severe multi-unit reactor accidents from the EA process.

**AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, paras.56, 58, 63, Exhibit B (CELA Submission on Draft EA Screening Report), and Exhibit C (CELA Slidedeck on Emergency Planning); AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit H (CNSC Decision on EA Scoping Information Document), paras.34, 39**

57. In particular, the EA Screening Report failed to assess emergency preparedness for large-scale releases of radiological substances from severe reactor accidents, including: adequacy of existing or future communications/public notification procedures; ability to effectively evacuate and relocate persons beyond a 10 km zone around the Darlington NGS for prolonged periods of time; assessment of whether further land use controls were necessary to control or redirect population growth in the vicinity of the Darlington NGS; or assessment of the claimed effectiveness of sheltering in place during severe reactor accidents.

**AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, paras. 63-70, Exhibit C (CELA Slidedeck on Emergency Planning), Exhibit E (Transcript of CELA Presentation), Exhibit F (Transcript of Durham Nuclear Awareness Presentation), and Exhibit G (Transcript of Testimony on Accident Consequences and Emergency Planning)**

58. In its reasons for decision, the CNSC briefly mentioned some of the foregoing concerns, and simply opined, in a single paragraph, that emergency planning had been “sufficiently considered” in the screening EA. This finding was made despite the fact that low-probability, high-consequence accidents (i.e. those with a frequency less than one in a million) had been illegally ignored in the EA. Accordingly, the Applicants submit that there is no air of reality to the CNSC’s claims regarding the mitigability of adverse effects arising from severe reactor accidents.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.156; AR, Vol. 2, Tab 4: Affidavit of Kathleen Cooper, para. 73**

(iv) Consideration of Likelihood and Significance of Environmental Effects

59. The Responsible Authorities further erred in law and committed jurisdictional error by purporting to render a “course of action” decision without completing an EA Screening Report that properly assessed the likelihood or significance of environmental effects of the OPG project upon fisheries.

60. In this case, the primary impacts upon fisheries are caused by impingement and entrainment of aquatic biota, and by thermal pollution caused by the continuous, high-volume discharge of warm water into Lake Ontario from the once-through cooling system at the Darlington NGS. Biocides (pesticides to kill mussels and other organisms that clog water intake) are also discharged into water at the Darlington NGS. The impacted fisheries include not only forage species that form the foundation of the local food chain, but also vulnerable, threatened or endangered species, such as round whitefish and American eel.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras.29-30, 51; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, paras.13-16, 19, 37-39, 48-49, 54-55, Exhibit L (Waterkeeper Submission on Draft EA Screening Report), and Exhibit P (Transcript of Waterkeeper Presentation)**

61. In its reasons for decision, the CNSC adopted the CNSC staff’s conclusion that there are residual adverse impacts that are “likely” to be caused by impingement and entrainment. However, these impacts were not considered “significant” by the CNSC because these fish losses cannot be observed or measured at the population level across all of Lake Ontario, and because some of the impacted species are common, invasive or not commercially valuable. A similar conclusion was reached by the CNSC in relation to the allegedly insignificant impacts of thermal pollution

upon the round whitefish, although FOC staff expressed concern about this species and indicated that OPG and the CNSC were continuing to assess such impacts.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras.30-35, 39, 48, 56, 162-64**

62. Having regard for the objects and purposes of CEAA, the Applicants submit that Responsible Authorities utilized the wrong legal standard for assessing the significance of predicted residual impacts upon fisheries. For example, subsection 16(1)(b) makes no reference to species type, population status or geographic distribution for the purposes of determining “significance.” In addition, it appears that the Responsible Authorities in this case gave no consideration to the issue of whether localized impacts (or local extirpations) may themselves constitute “significant adverse environmental effects” within the meaning of CEAA. Similarly, section 32 of the *Fisheries Act* makes no distinction between local, regional or lake-wide populations of fish, or between native and non-native species of fish.

***Fisheries Act*, RSC 1985, c.F-14, section 32; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit F (Waterkeeper Submission on Draft EA Scoping Information Document), paras. 30-31, 33**

63. Under similar federal EA legislation in the United States (i.e. *National Environmental Policy Act*), US Courts have held that it is incorrect for an agency to assess wildlife impacts on a population scale in order to make a finding of no significant impact. Local extirpation or losses may constitute significant impacts, particularly for species at risk, even if the overall population is not jeopardized.

***Sierra Club et al. v. Norton et al.* (2002), 207 F. Supp.2<sup>nd</sup> 1310 (U.S. Dist. Ct.), p.20 [AR, Vol. 11, Tab B15]; See also *Anderson et al. v. Evans et al.* (2004), 371 F.3d 475 (U.S. C.A.), pp.16-17, 19-20 [AR, Vol. 11, Tab B16]**

64. Although the above-noted fisheries impacts can be mitigated through the use of a “closed loop” cooling tower system (instead of once-through cooling), the

Responsible Authorities failed to ensure that this mitigation measure was included or evaluated in the Screening EA Report.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.42; AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, paras. 17, 20-21, 39-42, 54-55**

65. Similar legal concerns arise in relation to the Responsible Authorities' sparse (if not wholly inadequate) consideration of the environmental effects posed by the generation, handling, storage or transportation of low, intermediate and high-level (i.e. used fuel) radioactive wastes over the lifespan of the project. Despite the requirements of section 16(1) of CEEA, and despite the confirmation in the CNSC's 2011 scoping decision that the EA would address "all" waste management activities associated with the OPG project, the Responsible Authorities failed to ensure that the centuries-long risks posed by radioactive wastes (or accidents or malevolent acts involving such wastes) were thoroughly identified and evaluated in the EA Screening Report prior to making their "course of action" decision under CEEA.

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit E (Draft EA Scoping Information Document), Section 2.1, and Exhibit H (CNSC Decision on EA Scoping Information Document), paras.30-31; AR, Vol. 9, Tab 8: Affidavit of Brennain Lloyd, paras. 17, 21, 23-28, Exhibit A (Northwatch Submission on Draft EA Scoping Information Document), Exhibit B (Northwatch Submission on Draft EA Screening Report), Exhibit C (Northwatch Submission on EA Screening Report), Exhibit D (Report by Dr. Gordon Thompson), Exhibit E (Report by Dr. Marvin Resnikoff and Melissa Belcher), Exhibit F (Sliddeck for Northwatch Presentation at CNSC Hearing), Exhibit G (Transcript of Northwatch Presentation at CNSC Hearing), and Exhibit H (Transcript of Waste Management Testimony)**

66. In its reasons for decision, the CNSC briefly mentions the waste-related concerns raised by the Applicant Northwatch and other intervenors, but fails to address or resolve those concerns consistent with section 16. The CNSC decision also confirms that transportation accidents involving radioactive waste were not assessed "in detail" in the screening EA due to the allegedly "robust" regulatory framework for such activities. Moreover, while the CNSC decision requires OPG to complete

certain actions prior to or during future licencing stages, none of these involve the management of radioactive wastes at the Darlington NGS.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras. 14, 138-39, 202; AR, Vol. 9, Tab 8: Affidavit of Brennain Lloyd, para.31**

*(v) The Responsible Authorities Unlawfully Delegated their CEAA Duties*

67. The Applicants submit that the Responsible Authorities failed to fulfill their CEAA duties by purporting to delegate the consideration of mandatory section 16(1) factors to other entities in future licensing processes, or in other extraneous, non-EA exercises not specific to the OPG project (i.e. the Fukushima Task Force proceedings). The subject-matter of this impermissible delegation includes key matters such as thermal effects on aquatic biota, the public health effects of a severe reactor accident, and other issues that the Responsible Authorities themselves were obliged to assess in the screening EA process. Moreover, the timeline for the future consideration of these delegated matters was specified by the Responsible Authorities to occur well after their March 2013 “course of action” decision was made.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para. 14**

68. The attempted delegation of certain CEAA duties in this case is not in compliance with the provisions of subsection 17(1) of the Act, which empowers a Responsible Authority to delegate to any person, body or jurisdiction any part of the screening or comprehensive study of a project; the preparation of the screening report or comprehensive study report; and any part of the design and implementation of a follow-up program.

**CEAA, section 17(1); Sara Blake, *Administrative Law in Canada, 5th ed.* (Toronto: LexisNexis, 2011) at 143-46 [AR, Vol. 12, Tab B30]**

69. Subsection 17(2) further provides that a Responsible Authority must be satisfied that any delegated duty or function has been carried out in accordance with CEAA and the regulations before it makes a “course of action” decision. Responsible Authorities are solely responsible for ensuring compliance with the Act before making a course of action decision under section 20 and cannot become mere passive recipients of information.

**CEAA, subsection 17(2); *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 FC 461 (FCA) at para.63 [AR, Vol. 11, Tab B2]; *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] 4 FC 340 at para.17 [AR, Vol. 12, Tab B17]**

70. In this case, the Responsible Authorities did not refer the implementation of mitigation or follow-up programs as permitted under sections 20 and 38 of CEAA. Instead, the impermissible delegation undertaken by the CNSC and the FOC was intended to generate critically important information to fill the significant evidentiary gaps in the EA Screening Report.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.14; CEAA, sections 17, 20, 37 and 38; *Environmental Resource Centre v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1937 at paras.154-59 [AR, Vol.12, Tab B19]; *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at paras.20, 60-62, 67, 69 [AR, Vol. 11, Tab B12]**

71. The CNSC and FOC further erred in law by purporting to delegate to OPG the future design of follow-up programs pursuant to section 17 of CEAA. Subsection 17(2) requires that a Responsible Authority must be satisfied that any function delegated under section 17(1) of CEAA has been carried out before it makes its “course of action” decision. This section does not provide authority for delegation of future development of follow-up programs or mitigation.

**AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), paras. 168-170**

72. While subsection 38(1) of CEAA requires a Responsible Authority to design a follow up program, there is no statutory authority in CEAA that permits a Responsible Authority to delegate the design of the follow-up program prospectively to the proponent, as the CNSC and FOC did in this case after their “course of action” decision was made.

**CEAA, subsections 20(1.1), 38(1); AR, Vol. 1, Tab 2: CNSC Decision (March 13, 2013), para.168**

73. CEAA is aimed at ensuring “that projects are considered in a careful and precautionary manner before federal authorities take action.” As held in the *Pembina* case, Responsible Authorities must base their decisions on “a robust understanding of the projects’ effects.” In this case, neither the CNSC nor the FOC met the test of acquiring “a robust understanding of the projects’ effects” before they made their course of action decision, and their legally flawed attempt to obtain missing essential information via future licencing processes warrants the intervention of this Court.

**CEAA, subsection 4(1)(a); *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, at para.79 [AR, Vol.11, Tab B12]**

(vi) The Timeliness of this Judicial Review Application

74. Pursuant to subsection 18.1(2) of the *Federal Courts Act*, this application was commenced within 30 days of the public release and web-posting of the “course of action” decision made under CEAA by the CNSC and the FOC.

***Federal Courts Act*, subsection 18.1(2)**

75. In this case, there was no need for the Applicants to seek judicial review of the earlier statutory decision made by the CNSC in October 2011 regarding the scope of the project to be assessed, and the scope of the factors to be assessed, in the screening EA as this scoping decision was made in accordance with CEAA

**AR, Vol. 5, Tab 6: Affidavit of Mark Mattson, Exhibit H (CNSC Decision on EA Scoping Information Document)**

76. It would have been premature and inappropriate for the Applicants to seek judicial review of the interlocutory scoping decision in 2011, or to risk disrupting or fragmenting the administrative proceedings under the CEAA in the absence of any special circumstances. This is particularly true since the legal errors at issue in this case (i.e. exclusion of severe accidents, improper consideration of the significance or mitigability of environmental effects, etc.) did not begin to materialize until after the scoping decision was rendered. At every opportunity thereafter (including the public hearing), the Applicants consistently objected to these fundamental legal errors; however, these errors remained uncorrected by the Responsible Authorities when their “course of action” decision was made.

**Brown and Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing, 2009), at 3-36 to 3-65 [AR, Vol. 12, Tab B31]; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at para.36 [AR, Vol. 12, Tab B20]**

77. Furthermore, the Federal Court of Appeal has held that the lack of legal challenge to an earlier statutory step cannot confer jurisdiction upon the Responsible Authorities to act in contravention of CEAA requirements when making their “course of action” decision.

***Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 FC 483, paras.14-22 [AR, Volume 11, Tab B14]; see also *Hamilton-Wentworth (Regional Municipality of) v. Canada (Minister of the Environment)*, 2001 FCT 381, at paras.65-66; affd. 2001 FCA 347[AR, Vol. 12, Tab B21]**

**B. The Standard of Review is Correctness**

78. The standard of review in this matter is correctness. As per the Supreme Court’s direction in *Dunsmuir*, there is no need to revisit the standard of review applicable to the issues raised in this case, namely compliance with legal standards

set out in section 16 of CEEA, as this specific issue has been considered and settled in previous jurisprudence of this Court.

*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras.57, 59, 62 [AR, Vol.12, Tab B22] [“*Dunsmuir*”]; see also *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28 at para.54 [AR, Vol.12, Tab B23]

79. CEEA jurisprudence establishes that the correctness standard of review applies to the question of whether there has been compliance with legal duties under CEEA by Responsible Authorities. Courts have held that compliance with CEEA raises a serious and justiciable question of law reviewable on a correctness standard.

*Mining Watch Canada v. Canada*, 2007 FC 955 at para.135-37, 178 [AR, Vol.11, Tab B5]; rev. on other grounds 2008 FCA 209 [AR, Vol.11, Tab B6]; rev. 2010 SCC 2 [AR, Vol.X, Tab BX]; *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 30, at paras.37, 41 [AR, Vol.11, Tab B12]; *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 FC 425 at paras.22-24, 26 [AR, Vol.11, Tab B13] [“*Alberta Wilderness Assn*”]; *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263 (FCA), at paras.9-10 [AR, Vol.12, Tab B18]; *Prairie Acid Rain Coalition v. Canada*, 2006 FCA 31 at paras.9-10 [AR, Vol.12, Tab B24]; *Environmental Resource Centre v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1937, at para. 138 [AR, Vol.12, Tab B19]

80. In the alternative, if this Court is of the view that the jurisprudence is not settled, *Dunsmuir* directs that Courts are to conduct a contextual analysis of various factors such as: (i) presence or absence of a privative clause; (ii) purpose of the tribunal as determined by the enabling legislation; (iii) the nature of the question at issue; and (iv) the expertise of the tribunal.

*Dunsmuir*, at paras.55, 64 [AR, Vol.12, Tab B22]

81. Applying these factors, the Applicants note that CEEA contains no privative clause shielding the Responsible Authorities from judicial review. The Responsible Authorities have no special expertise in interpreting CEEA, and they do not serve as adjudicative bodies that Parliament has empowered to decide questions of law. The overarching legal question in this case does not involve a “choice of science”, but

asks whether the Responsible Authorities correctly interpreted their duties under CEAA. This constitutes a true question of jurisdiction, and does not involve the application of policy or discretion. Thus, the Applicants submit that the Responsible Authorities' non-compliance with CEAA is reviewable on a correctness standard.

*Mining Watch Canada v. Canada*, 2007 FC 955 at paras.135-37 [AR, Vol.11, Tab B5]; rev. on other grounds 2008 FCA 209 at paras.34-35 [AR, Vol.11, Tab B6]; rev. 2010 SCC 2 [AR, Vol.11, Tab B7]; *Environmental Resource Centre v. Canada (Minister of Environment)*, 2001 FCT 1423 (CanLII), at para.138 [AR, Vol.12, Tab B19]; *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, at paras.88-90, 96-105 [AR, Vol.12, Tab B25]

82. In the further alternative, if this Court finds that the standard of review is reasonableness, then *Dunsmuir* makes it necessary to consider whether the Responsible Authorities' decision "fits comfortably" with the principles of justification, transparency and intelligibility. The Applicants submit that the Responsible Authorities' interpretation of their CEAA duties are not "rationally supported" and do not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Accordingly, the Applicants submit that the Responsible Authorities' decision is neither reasonable nor correct.

*Dunsmuir*, at paras.47, 74 [AR, Vol.12, Tab B22]; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para.54, 59 [AR, Vol.12, Tab B26]

### **C. The EA should be Remitted to the Responsible Authorities for Completion**

83. The Applicants respectfully submit that the "course of action" decision should not only be declared invalid for the reasons set out above, but additionally, that the EA should be remitted back to the Responsible Authorities to complete in compliance with CEAA, consistent with previous decisions of this Court. There are no factual, legal or practical reasons which disentitle the applicants to these and the other

prerogative remedies claimed in this application for judicial review pursuant to section 18.1 of the *Federal Courts Act*.

*Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, at para.80 [AR, Vol.11, Tab B12]; *Federal Courts Act*, R.S.C. 1985, c.F-7, subsections 18.1(3) and (4); *Alberta Wilderness Assn.*, at paras.86-87, 91 [AR, Vol.11, Tab B13]; *Friends of the Island v. Canada (Minister of Public Works)*, [1993] 2 FC 229 at para.96 [AR, Vol.12, Tab B27]

**PART IV – ORDER REQUESTED**

84. For the foregoing reasons, the Applicants respectfully request this Court to allow the application with costs, and to grant the declaratory, prohibitory and *certiorari* orders requested in the Amended Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 29, 2013

\_\_\_\_\_  
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## **APPENDIX A – STATUTES AND REGULATIONS**

1. *Canadian Environmental Assessment Act*, S.C. 1992, c.37
2. *Law List Regulations*, SOR/94-636
3. *Fisheries Act*, R.S.C. 1985, c.F-14
4. *Federal Courts Act*, R.S.C.1985, c.F-7

## **APPENDIX B – AUTHORITIES**

### **CASES**

1. *Bow Valley Naturalists Society v. Canada*, [2001] 2 F.C. 461
2. *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 FC 461 (FCA)
3. *West Vancouver (District) v. British Columbia (Minister of Transportation)*, 2005 FC 593
4. *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3
5. *MiningWatch Canada v. Canada*, 2007 FC 955
6. *MiningWatch Canada v. Canada*, 2008 FCA 209
7. *MiningWatch Canada v. Canada*, [2010] 1 SCR 6
8. *R v. Hydro-Quebec*, [1997] 3 SCR 213
9. *11497 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241
10. *Sierra Club of Canada v. Canada*, 2002 SCC 41
11. *Canada (Minister of the Environment) v. Bennett Environmental Inc.*, 2005 FCA 261
12. *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302
13. *Alberta Wilderness Assn. v. Cardinal River Coals Ltd*, [1999] 3 FC 425  
[“Alberta Wilderness Assn.”]

14. *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 FC 483
15. *Sierra Club et al. v. Norton et al.* (2002), 207 F Supp 2<sup>nd</sup> 1310 (US Dist Ct)
16. *Anderson et al. v. Evans et al.* (2004), 371 F 3d 475 (US CA)
17. *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] 4 FC 340
18. *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263 (FCA)
19. *Environmental Resource Centre v. Canada (Minister of the Environment)*, [2001] FCJ No 1937
20. *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364
21. *Hamilton-Wentworth (Regional Municipality of) v. Canada (Minister of the Environment)*, 2001 FCT 381; affd. 2001 FCA 347
22. *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190
23. *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28
24. *Prairie Acid Rain Coalition v. Canada*, 2006 FCA 31
25. *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40
26. *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339
27. *Friends of the Island v. Canada (Minister of Public Works)*, [1993] 2 FC 229

## **TEXTS**

28. Beverley Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (Aurora: Canada Law Book, 2011)
29. Meinhard Doelle, *The Federal Environmental Assessment Process* (Markham: Lexis Nexis Canada, 2008)
30. Sara Blake, *Administrative Law in Canada, 5th ed.* (Toronto: LexisNexis, 2011)

31. Brown and Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing, 2012)
32. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5<sup>th</sup> ed, (LexisNexis Canada, 2008)