



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT



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**Re: draft Process Improvement Initiatives for Screening Environmental Assessments  
at the CNSC**

Dear Commission Members,

Please find enclosed comments from Lake Ontario Waterkeeper, Canadian Environmental Law Association, Sentinelles Petitcodiac Riverkeeper, and Ottawa Riverkeeper/Sentinelles Outaouais on the above-mentioned matter. If you have any questions or comments, please do not hesitate to contact us.

Yours truly,

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## EXECUTIVE SUMMARY

Lake Ontario Waterkeeper, Canadian Environmental Law Association, Sentinelles Petitcodiac Riverkeeper, and Ottawa Riverkeeper/Sentinelle Outaouais (“we”) offer this comment in response to the Canadian Nuclear Safety Commission’s (“CNSC”) draft document entitled *Process Improvement Initiatives for Screening Environmental Assessments at the CNSC*. We oppose the proposed “process improvements” because they fail to improve on the current process. More specifically:

- The projected “efficiency gains” are dubious
- There is a false distinction between “complex” and “smaller” projects
- The elimination of meaningful public consultation is unacceptable
- The elimination of public consultation in the early stages of environmental assessment contradicts the CNSC’s stated goals
- The Integrated Approach for environmental assessments will lead to confusion and the appearance of bias
- Licencing and environmental assessment processes have different aims
- The relationship with the MPMO contributes to the appearance of bias
- Delegation of decision-making to CNSC staff further weakens the Commission’s authority
- There has been inadequate public consultation on the restructured process

## BACKGROUND

On June 20, 2008, the CNSC sent out an email message inviting the public to comment on a draft document entitled *Process Improvement Initiatives for Screening Environmental Assessments at the CNSC*. This “Restructuring Document” creates the framework for significant changes in the way that the CNSC conducts environmental assessments (“EAs”) and issues some licences.

According to its website, the CNSC was established in 2000 under the *Nuclear Safety and Control Act* (“NSCA”) and reports to Parliament through the Minister of Natural Resources. The CNSC was created to replace the former Atomic Energy Control Board (“AECB”), founded in 1946. The CNSC is composed of two distinct divisions: the

Commission Tribunal, which is comprised of seven appointed members including the President and CEO, and the CNSC Staff, which includes some 600 employees. The phrases “Canadian Nuclear Safety Commission” and “CNSC” used throughout this submission refer to the entire organization; the phrase “the Commission” refers to the appointed Tribunal.

The Commission issues licences pursuant to the *NSCA*. Generally, these licences are required before any person possesses, transports, mines or processes nuclear substances or constructs or decommissions nuclear facilities (see s. 26). Often, applications for licences under this Act trigger the federal EA process mandated in the *Canadian Environmental Assessment Act* (“*CEAA*”).

Under the *CEAA*, there are three kinds of EA: screening assessments provide the lowest level of scrutiny and are often conducted by the proponent; comprehensive study assessments are somewhat more thorough and are triggered when a proponent applies for a specific licence listed in the “Comprehensive Study List Regulations”; panel reviews and mediation provided the highest level of scrutiny and independent-decision making and are typically discretionary.

The CNSC’s Restructuring Document separates screening-level EAs into two-tiers. This proposed framework creates a “streamlined” process for what the CNSC labels “Smaller or Lower-Risk Projects” and “Screenings”. The primary purpose of these new procedures is to reduce the amount of time that it takes for an applicant to complete the EA and licencing processes: Section 4.3 of the Restructuring Document lists the expected “efficiency gains” of the new process and estimates that EAs in the future will take 173-262 calendar days, a reduction of up to 724 days.

According to the CNSC’s invitation to comment, this restructuring proposal is aligned with the “Cabinet Directive on Streamlining Regulation”, which came into effect on April 1, 2007. The primary aim of this Cabinet Directive is to streamline regulation in Canada: that is, to determine where the approvals process can be streamlined and where resources should be focused.

The CNSC calls the new Major Projects Management Office (“MPMO”) a “change driver” for this restructuring. The MPMO was established to “improve” the performance of the federal regulatory system for major natural resource projects. The Office reports to the Minister of Natural Resources; its creation was supported by industrial lobby organizations

such as the Canadian Energy Pipeline Association, the Prospectors & Developers Association of Canada, and the Mining Association of Canada.

In August, 2007 the CNSC signed a Memorandum of Understanding (“MOU”) with a number of federal agencies including Natural Resources Canada. The purpose of the MOU is to affirm the CNSC’s commitment to meeting the policy objectives contained in another document, the “Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects.” This Directive mandates Project Agreements for major projects (such as those undergoing EA at the CNSC); these agreements will spell out the timelines for regulatory reviews, approvals and permitting.

Also in June, 2008, the CNSC released a document entitled *Licensing Process for New Nuclear Power Plants in Canada*. This document is similarly influenced by the above-mentioned Cabinet Directives; it addresses construction of new nuclear plants and the streamlined panel review EA process. Public consultation on this document has not been solicited. In our view, the process described this document is significantly flawed. While we have limited our commentary below to the proposed restructuring of the lower-level EA process, we encourage the CNSC to undertake public consultation on this document as well. The proposed process for new-build EAs shares and magnifies many of the problems described below; furthermore, it may fail to satisfy the requirements of the CEAA.

Our comments below respond primarily to the proposed restructuring of screening-level EAs at the CNSC. We have included recommendations for improvement in order to be of assistance to the Commission. All references to page numbers and sections relate to the draft document entitled *Process Improvement Initiatives for Screening Environmental Assessments at the CNSC*, prepared by the CNSC and released for comment June 20 to July 18, 2008.

## COMMENTARY

### The projected “efficiency gains” are dubious

Sections 3.6 and 4.3 of the Restructuring Document list the anticipated “efficiency gains” of the new process. In essence, the CNSC is projecting it will save up to 724 days by eliminating among other things 40-120 days of public consultation, 90-190 days of technical review, and 239-339 days of Commission oversight. These eliminations

jeopardize the independence and the efficacy of both the EA and the licencing processes for reasons described in our commentary.

These projections are also entirely unrealistic for the following reasons:

- CNSC will save up to 40 days in the Guidelines stage and up to 124 days in the Guidelines hearing stage by eliminating public participation. This gain will not apply to every project: in the event that the CNSC solicits public consultation during the EA, the *CEAA* states that an opportunity to comment on Guidelines is mandatory. Furthermore, we submit that eliminating public participation does not result in an efficiency “gain”, as it may sacrifice substantial quality and result in confusion and prolonged consultation later in the process.
- CNSC staff assumes that it can eliminate up to 100 days of technical review time through its streamlined review. There is no rationale for this suggestion. Furthermore, it contradicts the position that the purpose of the streamlined review process is to do more analysis at the staff level and less analysis at the Commission level. It appears that the CNSC intends to eliminate some analysis altogether.
- CNSC staff assumes that it can eliminate up to 30 days of drafting time for streamlined screening reports. There is no rationale for this suggestion.
- CNSC staff anticipates that it can eliminate up to 40 days of public participation for streamlined EAs, potentially eliminating participation altogether. Given that this may be the public’s first opportunity to review EA documents, more time is likely required, not less. Similarly, the CNSC expects the public to review and comment on both EA and technical documents in the same or less period of time than it currently grants for reviewing EA documents alone. This is an incredibly unrealistic timeframe, that contributes to the appearance of bias.
- The CNSC expects to eliminate up to 100 days for streamlined EAs by eliminating the screening report hearing. This reduces the public’s opportunity to participate even further and prevents the Commission from soliciting clarification on issues, seeking consensus, and so on. Furthermore, since the CNSC intends to integrate licencing issues with the EA hearing of more “complex” projects, it will need to allocate more hearing time, not less.
- The CNSC assumes it will save up to 90 days by eliminating the technical review of licencing information after the EA process. Given that the technical review during the EA process has already been reduced by up to 100 days but the amount of information to be reviewed has doubled, this projection is unrealistic.

- The CNSC projects a savings of up to 115 days by eliminating the need for the licencing hearing and simply issuing the amendment or licence approval. We explore the problems with this proposal in our commentary below.

It is also important to note that most of the EA work is typically performed by the project proponent. In our experience, it is the proponents who organize and host most of the meetings, retain the consultants, prepare draft reports, and make recommendations to decision-makers. The Restructuring Document does not recognize this, and the timeline does not appear to allow for proponent-imposed delays, explorations, consultations, studies, or similar proceedings.

### **There is a false distinction between “complex” and “smaller” projects**

A central complaint regarding the current EA process is that, “no distinction is made between complex and smaller, lower-risk projects, and there is no adjustment of the EA decision-making process or public participation process in consequence,” (p. 7). This statement is misleading. There is a clear distinction between truly smaller, low-risk projects and those requiring special scrutiny. Truly low-risk projects do not require licencing by the CNSC and do not trigger the federal EA process. Of those projects that do require licencing and do trigger EA, the *CEAA* provides a clear framework for dealing with low, medium, and high-risk projects: it provides for screening, comprehensive study, and panel review approaches.

We cannot convey strongly enough how significant the EA process is to local communities. Even a project that seems “small” to the CNSC and to industry may have the potential to permanently change the environmental and socio-economic face of a community. What the CNSC sees as a lack of distinction is, for the outside world, splitting hairs. We emphatically suggest that no matter how familiar or comfortable CNSC staff have become with nuclear-related undertakings, the general public still expects the highest level of objectivity, oversight, and transparency. We strongly caution against comparing nuclear-related projects to other nuclear-related projects to determine whether a proposal is low or high risk. Such comparisons will distort the CNSC’s judgement and do little to address the concerns and interests of our communities.

One specific distinction that CNSC staff has posed in the past is that of the “brownfield” sites (see, for example, CNSC Transcript of March 23, 2005 hearing). At times, the CNSC has referred to lands with existing nuclear facilities or historic nuclear-related contamination “brownfields”. The implication is that these lands are more suitable for future nuclear-

related undertakings and that a project may be deemed “smaller” by virtue of its presence on already-contaminated or industrialized land. We caution that communities may have a starkly different opinion on this matter. Lands that have been polluted or developed in ways that render them unfit for non-nuclear uses are not “brownfields” and the nuclear industry should not be rewarded by receiving easy access to them. This is a matter of pride and a matter of hope for many communities who seek remediation, not the status quo. They seek intergenerational equity. And they hope that even those communities with a legacy of contamination will receive the same protections as Canada’s most pristine areas.

### **The elimination of meaningful public consultation is unacceptable**

Even though the Restructuring Document contains references to the importance of public consultation, the actual proposed process for EAs virtually eliminates all opportunities for public consultation. This appears to be based on a number of factors, including the desire to promote the wishes of industry over due process. This issue is addressed in our commentary below. Two other reasons for reducing public consultation opportunities are provided in section 1.5, page 12.

The Restructuring Document states that the CNSC typically receives “few or no comments on the majority of small projects at the EA stage, and in some cases, public hearings of the Commission have attracted very little attention from stakeholders.” This position is troubling. It is not just the number of comments that the CNSC receives that it should be concerned with; it is also the substance of those comments. If only one member of the public has a comment, concern, or suggestion that could help to protect the health and safety of his or her community, that individual should be heard. And if members of the public have chosen not to participate in the EA process to date, that is no justification whatsoever for eliminating public consultation in the future. Imagine if this logic was applied to other civic rights, such as voting!

What is more, the sentence implies that there have been differing levels of participation during the EA and licencing processes (i.e., the “majority of small projects” for EAs, as compared to “in some cases” for licencing). We recognize that the restructured EA process would be coupled with licencing. If some people more commonly participate only in the licencing process, the restructured system may actually discourage participation.

The second reason for reducing public consultation opportunities is equally concerning. The CNSC writes:

For a large number of complex Screening-level EAs, comments received by Staff during consultations at the EA Guidelines and the Screening Report stages are similar (if not identical) to those filed as hearing interventions in the context of each EA Commission hearing.

Typically, this duplicate information does not add significant new evidence to be considered by the Commission, particularly when all public comments are already part of the record in staff's EA submissions to the Commission, (p.12).

This statement does not suggest that public consultation should be reduced; on the contrary, this statement suggests that the public feels as though its concerns are not being heard, its questions are not being answered, and its recommendations are not prompting action. A private citizen facing demands from family, work, friends, and other day-to-day matters rarely takes the time to carefully submit the same comments to the same regulators over and over. An NGO with limited financial and human resources will rarely re-submit comments on matters it feels confident have been addressed. If the CNSC is finding that the public continually submits the same comments, perhaps the CNSC should invest more - not less - time in the consultation process. With respect, we submit that making a concerted effort to respect and respond to input from the community would probably do more to improve the efficacy and the efficiency of the regulatory process than the proposal contained in the draft Restructuring Document.

If the CNSC follows through with its two-tier screening EA process, every environmental assessment should automatically be assigned to the upper tier. In the event that the proponent requests a streamlined EA, the public should be provided written notice and the decision on whether or not to conduct a smaller project assessment should be made by the Commission at a public hearing, following arguments. Furthermore, the public should retain the right to request and receive increased levels of public consultation at any time during the EA process.

### **The elimination of public consultation in the early stages of environmental assessment contradicts the CNSC's stated goals**

The last time the CNSC considered changing its process for conducting EAs, one of the primary needs articulated by staff was the need to, "get the consultation going early," (B. Howden addressing the CNSC, March 23, 2005). The CNSC complained that it often heard from members of the public for the first time at the hearing stage and sought new ways to solicit input during the preliminary stages of the environmental assessment, such as the EA Guidelines stage.

The Restructuring Document fails to create new opportunities for early consultation. It even eliminates the opportunities that exist under the current process. In this way, the restructured EA process can be expected to make the process more - not less - challenging.

### **The Integrated Approach for environmental assessments will lead to confusion and the appearance of bias**

In our June 18, 2008 comments on the proposed Bruce Power New Nuclear Power Plant Project Joint Review Panel Agreement, Waterkeeper and others expressed concern that the proposal to integrate licencing and the review panel process would undermine an effective EA. We adopt this same position regarding the integration of licencing and screening EAs.

Integrating EAs with licencing centralizes all decision-making authority with the CNSC. It may not always be the case that the CNSC is the only - or even the lead - responsible authority under the *CEAA*. The restructured process has the potential to minimize or dilute the power and authority of every party other than the CNSC, including that of the Minister of the Environment.

Integrating EAs with licencing also confuses the purpose and focus of each stage of the process. In some cases, EAs are primarily planning tools. In most cases, the CNSC has jurisdiction over some - but not all - aspects of a project. In every case, licencing issues are limited to specific land-uses, construction activities, or nuclear-related emissions. We submit that it is an ineffective and inefficient use of government, industry and volunteer time to attempt to address every aspect of the project, planning and technical, simultaneously.

We are concerned that the nature of the Integrated approach creates the reasonable apprehension of bias. By conducting EAs and licencing simultaneously, the CNSC links the two processes and weakens them both. An effective EA considers all the potential impacts (environmental, economic, cultural, and social) of a project and attempts to determine whether or not a project should proceed. By contrast, the licencing process assumes that a project will proceed and seeks the most technically appropriate manner for going forward. A fair EA should never begin with this assumption in mind. This appearance of bias is unavoidable, and it is likely to lead to confusion, cynicism, and frustration.

The proposal to make licencing decisions 1 to 30 days after the EA decision strengthens the appearance of bias and undermines the public's ability to comment and/or seek judicial review of an EA decision. In the event that public comment is solicited during an EA process, the responsible authority must allow the public an opportunity to comment on the screening report before making its decision [CEAA, s. 18(3)(b)]. Planning to make a licencing decision within the 1 to 30 day time period assumes either the CNSC does not plan to allow for public consultation in the future or, in the event that it solicits public comments, does not intend to incorporate those comments into the screening report in any meaningful way. Furthermore, federal court rules allow a party to seek judicial review of the EA decision, typically within 30 days [*Federal Courts Act*, s.18.1(2)]. By issuing a licencing decision within that 30-day period, the CNSC may be complicating and frustrating this process.

### **Licencing and environmental assessment processes have different aims**

The Restructured EA process attempts to manage the public in a way that is neither realistic nor conducive to effective decision-making. It assumes that the public will be willing and able to comment at the precise stage CNSC staff determines most appropriate, and that the public will not attempt to comment at all on “smaller” EAs. The Restructuring Document notes that “members of the public and other stakeholders can be granted the status of ‘intervenor’ at a public hearing of the Commission,” (p. 34). With respect, this process is far too formal, too rigid, and too bureaucratic to serve as an effective forum for the only public consultation opportunity. The Commission rarely, if ever, allows members of the public to ask questions. It requires significant advance written notice of the content of oral presentations, cutting into the amount of time intervenors have to read through volumes of documents and prepare their statements.

The Restructured EA process encourages proponents to hold consultation sessions in lieu of CNSC-sponsored outreach. This overlooks the very important point that the public usually wants to speak to the decision-maker, not the corporate body behind the project. The public is desperately seeking an independent authority at which it can direct comments, concerns, and suggestions. The CNSC is all but abandoning this important role under the restructured process.

### **The relationship with the MPMO contributes to the appearance of bias**

One of the stated goals of the restructured EA process is to “enable the CNSC to meet its timeline commitments to the MPMO and fulfill the requirements of the Government of Canada on streamlining regulation,” (p. 15).

We wish to clarify that the CNSC is not a regulator, for the purposes of the federal EA process. It has no power to make the rules and it has no power to change the rules. The EA process is spelled out in the legislation, and only an act of Parliament can change it. The CNSC's MOU with the Major Projects Management Office could be construed as an effort to minimize the authority of the *CEAA*. At the very least it suggests that the CNSC chafes against the mandated procedures in the *CEAA* and sends a message to those it regulates that it is perfectly acceptable to strive for the least that a law requires.

The CNSC's Memorandum of Understanding with the MPMO also creates a potential conflict. The MPMO is spearheaded by the very Minister to which the CNSC reports. In the event that there is a conflict between the goals of the MPMO and the interests of the public in an EA process, it is not clear that the CNSC will be in a position to defend the public interest. We witnessed, very recently, a similar situation; Parliament did not hesitate to intervene and override the decision of the CNSC. The MPMO serves to muddy - not clarify - the lines of accountability in the EA and licencing processes.

## **Delegation of decision-making to CNSC staff further weakens the Commission's authority**

The "Canadian Nuclear Safety Commission" was created to be a specialized tribunal of seven members, with some support staff. Over the years, the corporate body of the CNSC has grown to include more than 600 staff. At the same time, the Commission's authority is being slowly eroded. To wit:

- It is not clear if the Commission is a specialized body any longer; public servants supervised by the President now make many of the Commission's decisions regarding licencing and, soon, EAs.
- Intended to be a "court of record", the CNSC now makes numerous decisions and engages in frequent consultation without complete or formal record-keeping.
- Parliament has set a precedent of intervening and overturning a Commission decision.
- Power is centralizing in the President & CEO's office. According to the *Nuclear Safety and Control Act*, s. 12(1), the President supervises and directs the work of both the members and the staff. Also, the President is the liaison to the MPMO and the primary ambassador for executive branch policies.

Of greatest importance is the fact that CNSC staff and Commission members all work under the supervision of the President. Because of this organizational structure, the Commission is not so much delegating its decision-making powers as it is transferring them. Decision-making authority under the restructured EA process will rest not with an independent, specialized tribunal but in the hands of public service staff members who report, via the President, to the Minister of Natural Resources. This structure undermines the very reason for being of the Commission.

### **There has been inadequate public consultation on the restructured process**

We are dismayed that a document of this importance was not more easily available to the general public, that it was not presented and discussed with the NGO community, and that the public consultation process was so short (less than one-month long).

We therefore recommend that the the Restructuring Documented be posted to a clearly identifiable location on the CNSC website and that a notice be published in the Canada Gazette seeking comments and recommendations. This is consistent with Section 4.1 of the “Cabinet Directive on Streamlining Regulation”. We further recommend that a process be established by which the public can send comments directly to the Commission.

Because the document entitled *Licensing Process for New Nuclear Power Plants in Canada* so closely relates to this matter, we also recommend that the CNSC solicit public comments on this publication.

## **CONCLUSION**

In light of the above commentary, we submit the following recommendations:

1. That the CNSC reject the proposed *Process Improvement Initiatives for Screening EAs at the CNSC* on one or more of the following grounds:
  - The projected “efficiency gains” are dubious
  - There is a false distinction between “complex” and “smaller” projects
  - The elimination of meaningful public consultation is unacceptable

- The elimination of public consultation in the early stages of EA contradicts the CNSC's stated goals
  - The Integrated Approach for EAs will lead to confusion and the appearance of bias
  - Licencing and EA processes have different aims
  - The relationship with the MPMO contributes to the appearance of bias
  - Delegation of decision-making to CNSC staff further weakens the Commission's authority
  - There has been inadequate public consultation on the restructured process
2. And, that the CNSC only proceed with process improvements following a meaningful public consultation process and after addressing the concerns articulated in this submission.