



Canadian
Environmental Law
Association
EQUITY. JUSTICE. HEALTH.

GREENPEACE



Thursday, September 28, 2017

Canadian Nuclear Safety Commission
P.O. Box 1046, Station B
280 Slater Street
Ottawa, ON K1P 5S9

via email: consultation@cnsccsn.gc.ca

Re: Consultation on Draft REGDOC-3.2.1, *Public Information and Disclosure*

To the Commission:

The Canadian Environmental Law Association (CELA), Greenpeace Canada and Northwatch, welcome this opportunity to review and comment on the Draft RegDoc 3.2.1 *Public Information and Disclosure* published by the Canadian Nuclear Safety Commission (CNSC) on August 15, 2017 and open for comment until September 28, 2017.¹

1. Scope of Public Information and Disclosure

Recommendations - Preface

The Preface of RegDoc 3.2.1 outlines the intent of the disclosure protocol. It is important that the preface speak directly to a diverse range of citizens, and explain the purpose and deliberative process which led to the RegDoc's enactment.²

¹ Online: <http://nuclearsafety.gc.ca/eng/acts-and-regulations/regulatory-documents/history/regdoc3-2-1.cfm>

² Kent Roach, "The Use and Audiences of Preambles in Legislation," (2001) 47 RD McGill 129, p 143

Canadian Environmental Law Association

T 416 960-2284 • 1-844-755-1420 • F 416 960-9392 • 55 University Avenue, Suite 1500 Toronto, Ontario M5J 2H7 • cela.ca

More importantly, the RegDoc must strive to do more than “improve the level of understanding” and create an “atmosphere of openness, transparency and trust.” We submit that the RegDoc must also ensure an accountable and transparent safety culture among licensees, and include language to this effect.

The disclosure program envisioned by RegDoc 3.2.1 must serve the dual purposes of keeping licensees accountable, while empowering the public and civil society to participate in the oversight of nuclear safety. As concluded by the Fukushima Nuclear Accident Independent Investigation Commission:

The TEPCO Fukushima Nuclear Power Plant accident was the result of collusion between the government, the regulators and TEPCO, and the lack of governance by said parties. They effectively betrayed the nation’s right to be safe from nuclear accidents. Therefore, we conclude that the accident was clearly “manmade.” We believe that the root causes were the organizational and regulatory systems that supported faulty rationales for decisions and actions [emphasis added], rather than issues relating to the competency of any specific individual.

It is thus reasonable that an objective of this RegDoc be to put in place mechanisms to mitigate the propagation of faulty rationales and beliefs among government authorities by ensuring transparency and disclosure allowing the public to scrutinize and challenge possibly faulty rationales and assertions about safety.

The dysfunctional regulatory oversight and flawed beliefs that informed decision-making in Japan pre-Fukushima were enabled by institutions with cultures that were both secretive and antagonistic to public participation in decision-making. In response to Fukushima, it is critical to reflect and strengthen the oversight and disclosure of the governance of nuclear risks, including requiring greater transparency, strengthening the independence of government authorities, and empowering citizen scrutiny and participation in decisions related to public safety.³

The Preface of RegDoc 3.2.1 is uniquely placed to increase dialogue between public audiences with the Commission and therefore CELA, Greenpeace and Northwatch also recommend the following inclusions:

- **A ‘culture of openness’ must serve as a pre-requisite to meaningful participation in the CNSC regulatory process.** A culture of openness is based on the principle that information should be available to the public, as part of the democratic process, and restrictions on this right to access should be limited and specific. CELA, Northwatch and Greenpeace have previously been deprived of meaningful participation in CNSC reviews because of protective mindset held by licensees.

³ Pablo Figueroa, “Nuclear Risk Governance in Japan and the Fukushima Triple Disaster: Lessons Unlearned,” chapter 13 in *Disaster Governance in Urbanising Asia*, M.A. Miller, M. Douglass (eds.), Springer Science+Business Media Singapore 2016.

- **The Preface should reference the entirety of section 9 of the *Nuclear Safety and Control Act (NSCA)*.** The existing text in the preface only references subsection 9(b), which outlines the objects of the Commission as it relates to the dissemination of information. We submit that subsection 9(a) is also relevant to RegDoc 3.2.1 and should be expressly mentioned in the text.

Ensuring information is publicly available will directly assist in the CNSC's regulative activities, per s 9(a), aimed at the prevention of unreasonable risk to the environment and the health and safety of persons. For example, in the lead up to the Point Lepreau nuclear power plant re-licensing hearing in May 2017, the province's offsite emergency response plan was not publicly available. While CELA was able to obtain a copy through a freedom of information request, it was not available to the public at large and therefore apart from CELA and other intervenors with whom the document was shared, the offsite plan lacked broader public review. Knowledge of emergency procedures and response in the event of an accident is crucial to emergency preparedness. Therefore, the provision of publicly accessible documents will facilitate the CNSC in fulfilling its regulatory oversight powers per s 9(a).

- **The Preface must apply equally to licenced activities, licensees and licence applicants and the function of the CNSC, as a regulator and quasi-judicial tribunal.** Public access to information about nuclear activities and facilities in Canada is undeniably an important issue. However, the Preface demonstrates that the intended scope of the RegDoc is licensed facilities and activities, licensees and licence applicants. CELA, Greenpeace and Northwatch submit that the CNSC, in the performance of its regulatory duties and function as a quasi-judicial tribunal, must also include itself within the gamut of disclosure obligations. Public participation and the right to know should not be limited to licensee and license applicants when other interests stand to be adversely affected by administrative action or decision-making.⁴
- **There must be ongoing document release and disclosure opportunities, beyond the context of licence application or renewal.** With the trend to longer, ten-year nuclear power plant and nuclear facility licences, it is important that the scope of disclosure not be restricted to licence application or renewal stages. Rather, CELA, Greenpeace and Northwatch submit that the text of the Preface should expressly recognize an *ongoing obligation to disclose information, by licensees and the CNSC*.
- **The statement 'improve the level of understanding of the public' must be clarified and expanded.** The Preface states, as one of its objects, that it seeks to "improve the level of understanding by the public." While this is a commendable action, we are concerned that this statement may not result in enough detailed information being made publicly available. For

⁴ Gus van Harten, *Administrative law: cases, texts, and materials*, 6th ed, (Toronto: Emond Montgomery Publishing, 2010), p 33 [Administrative Law]

instance, if the proponent or licensee can demonstrate an ‘improvement in understanding’ of their activity, is this threshold sufficiently met and ongoing disclosure ceases? How is an ‘improvement in understanding’ determined and is this threshold selectively applied or does it cut across all aspects of licenced activities?

CELA, Greenpeace and Northwatch submit that while public information programs can and should be a part of this RegDoc, in order to ensure that the provision of information does not stop once there is an ‘increase in understanding,’ all public information disclosures must also be accompanied by raw data – which is crucial to enhancing the rigour of the information and understanding the methodology and assumptions upon which the findings are based.

- **A key purpose which we recommend be added into the text of the Preface is to “*facilitate the participation of the public in proceedings of the CNSC.*”** This principle is reflected in s 21(1)(b.1) of the NSCA in reference to the facilitation of the public via the Participant Funding Program.

Recommendation - 1.1 Purpose

The RegDoc’s existing purpose statement in section 1.1 reads:

A program for public information includes a public disclosure protocol regarding events and developments involving their facilities and/or activities.

CELA, Northwatch and Greenpeace propose the following language be added to the existing purpose statement:

A program for public information includes a public disclosure protocol regarding events and developments involving their facilities and/or activities ***as well as information requests from the public related to regulatory compliance, safety analysis and submissions to the CNSC.***

This amendment reflects our submission, as noted above, that disclosure serves the dual purposes of providing oversight of licensee activity while empowering the public to participate in decision-making related to these facilities.

Recommendations - 1.2 Scope

Section 1.2 of the RegDoc narrows the scope of disclosure and dissemination of public information envisioned in the text’s Preface. In response to our specific comments, outlined below, CELA, Northwatch and Greenpeace propose the following text amendment:

This document provides guidance on how licensees and licence applicants can meet the regulatory requirements by providing explanatory information, ***respond to information requests***

from the public, proactive disclose regulatory applications and submissions, process and procedural guidance, and examples of good practices currently in use in the nuclear sector.

Additionally, CELA, Greenpeace and Northwatch provide the following comments:

- **Licences for the use of nuclear substances and the CNSC's oversight of this sector should be included within the scope of RegDoc 3.2.1.** As the CNSC highlighted in its recent *Regulatory Oversight Report on the Use of Nuclear Substances in Canada: 2016*, there are 2,233 licences for the use of nuclear substances in the medical, industrial, academic, research and commercial sectors and furthermore, approximately one million packages containing nuclear substances are transported each year in Canada.⁵ While accidents involving this class of licence involve fewer numbers of people, they can nonetheless be serious and as noted by the International Atomic Energy Agency, accidents involving radiation sources occur more frequently than reactor accidents.⁶

Therefore, it is crucial that licences involving radioactive devices and substances not be exempt from the scope of RegDoc 3.2.1. While recognizing that it may be difficult for public information and disclosure to be put in place for each of these over 2000 licensees, we submit that in order for the CNSC to perform its regulatory and oversight functions, the transparent relay of information upon request from interested persons or members of the public must be required. Requiring and facilitating the transparent and open provision of information among all licences and CNSC activities, will increase the public's trust in the CNSC, its oversight and administration of the NSCA.

As will be expanded upon in Section 3 (see page 9) of our submissions, an online registry would be ideal for housing this information. This online database could contain a standard set of information for each licence, such as the proponent's licence, general location(s), substances and purpose (ie. medical, manufacturing, industrial, recycling, waste disposition, etc.) This database could be similar to the NRC's ADAMS online registry which exists in the United States.⁷

- **The scope of information to be made public under RegDoc 3.2.1 must include raw data.** Section 1.2 references the type of documents the CNSC envisions resulting from this RegDoc, listing 'explanatory information, process and procedural guidance and examples of good practices currently in use.' To this suggested list of public information inclusions, CELA, Greenpeace and Northwatch recommend including the unadorned, raw data. Undoubtedly, the CNSC is the single

⁵ Canadian Nuclear Safety Commission, *Regulatory Oversight Report on the Use of Nuclear Substances in Canada - 2016*, p 41

⁶ Online: http://www-pub.iaea.org/MTCD/Publications/PDF/te_1162_prn.pdf, p 1.

⁷ See online: <https://www.nrc.gov/reading-rm/adams.html>

most important repository of information related to the use and existence of nuclear and radioactive devices and infrastructure. All of this information has been generated with public funds and it is only through the open and public transmission of this data, that citizens can participate in licensing decisions, and avoid the duplication and cost that would result from hiring external experts.⁸

Furthermore, there are many specialists, experts and members of the scientific community that are quite capable of reviewing primary data, study methodologies and corroborating findings and analysis. Enabling the release of this type of information will increase its rigour and the public's confidence in its use and reliance. In the event the document or data being sought contains proprietary information, there is no reason why the balance of the file cannot be released.

- **Section 1.2 Scope should contain a clear statement of the type of information which is freely available and subject only to the general exemptions found in most freedom of information laws (ie. cabinet records, advice to govern, etc.).** Absent this express statement, there is no duty for either the CNSC or proponent to produce the requested information.

Recommendation - 2.1 Overview

CELA, Northwatch and Greenpeace request the CNSC to reference the principles of the federal *Access to Information Act*, whose provisions require that disclosure of information be provided in a timely manner, without bias to the requestor, and through a process which provides every reasonable effort to assist the person.⁹ This is reflected in subsection 4(2.1) which reads:

Responsibility of government institutions

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

The CNSC's current regulatory approach is not prescriptive and depends upon negotiations between staff and licensees. This serves as a barrier to public scrutiny which must be mitigated in RegDoc 3.2.1. As many licensees are private companies and not subject to freedom of information laws, RegDoc 3.2.1 can aid in the forthright disclosure of information.

⁸ John Swaigen, ed, *Environmental Rights in Canada* (Toronto: The Butterworth Group, 1981), p 292

⁹ *Access to Information Act*, RSC 1985, c A-1.

Furthermore, documents need to be made available in a more timely manner in order to provide the public with a reasonable opportunity to participate and the Commission with the full benefit of public input.

Therefore, we suggested the following amendments to the text of section 2.1:

The primary goal of the public information program, as it relates to the licensed activities, is to ensure that information related to the health, safety and security of persons, and the environment, **as well as regulatory compliance and submissions** and other issues associated with the lifecycle of nuclear facilities are effectively communicated to the public.

As a component, where the public has indicated an interest to know, the program shall include a commitment to and protocol for ongoing, timely communication of information related to the licensed facility during the course of the licence period, **including responding to information requests**.

The public information program and disclosure protocol should be developed taking into consideration:

- the type of facility and activities being regulated
- the risks to public health, safety and security, and the environment posed by the facility or activity
- the level of public interest or concern
- **values of openness and pro-active disclosure**

2. Mandatory Disclosure

Recommendations - Section 1.2 Scope and Section 2.2.2 Target audience(s)

Please note, as it appears that section 2.2.2 of the text is not open for comment, the following submissions which discuss section 2.2.2 can be incorporated in the text of section 1.2 Scope.

Section 2.2.2 Target Audience(s) states that the public information program designed by a licensee should have a target audience, such as an intervener. CELA, Greenpeace and Northwatch do not agree with the proponent being able to define the public information which is relevant to a specific audience, especially as it relates to interveners. Interveners, by the very nature of intervention, are supposed to raise arguments which augment the record before the hearing panel. Therefore, CELA, Greenpeace and Northwatch instead recommend that that the CNSC require public information programs which are responsive to the requests of interveners and absent an express list of disclosure exemptions (noted in our comments above), the information requested should be freely available.

We recommend the text of this provision be amended to read:

This should include key opinion and political leaders, community and media groups, ***civil society organizations, municipal governments***, interveners, and Aboriginal groups.

While s 2.2.2 states that “the size and variety of these audiences depends on the type and location of the facility,” we remind the Commission that citizens and municipalities extending to 100 km may be legitimately interested in reactor operations, as a result of the accidents at the Fukushima and Chernobyl nuclear stations where communities at great distances were negatively impacted.

Recommendations - Section 2.2.4 Public information strategy and products

Section 2.2.4 of the draft RegDoc outlines the type of information to be released and possible procedural means to facilitate disclosure. CELA, Greenpeace and Northwatch provide the following comments on this section:

- **There must be ongoing document release and disclosure opportunities, beyond the context of licence application or renewal.** The current text of RegDoc 3.2.1 could be interpreted to mean that public information products listed in this provision only have to be provided before a licence renewal. Given the move to ten-year licences, the wording of the text should require information to be proactively released when it is produced, and not contingent on relicensing. Therefore, we suggest the following text:

As part of this program, if a licensee is required to conduct an environmental risk assessment (ERA) and/or a probabilistic safety assessment (PSA), ***and/or a Periodic Safety Review (PSR)*** the ERA, **PSR reports**, and a summary of the PSA must be posted on the licensee’s website ***timed to their required submission to the CNSC and not solely in advance of relicensing applications.***

And, the addition of a bullet to the list of what is contained in the public information strategy, specifically, ***how informal information requests will be processed.***

- **RegDoc 3.2.1 must expressly state what is required to be disclosed, rather than relying on permissive language, such as “should” and “may”.** The CNSC must require all proponents to provide publicly available information. Absent this express requirement, differing levels of disclosure will result. Public involvement already varies by federal agency and by regulator and therefore, to introduce a proponent based system which allows the licensee to decide upon the level of disclosure and the means for delivering information frustrates an already divergent field. Instead, CELA, Greenpeace and Northwatch recommend that the CNSC require proponents to publicly provide information.

- **RegDoc 3.2.1 must guarantee the provision of raw or primary data.** While the suggested information list in section 2.2.4 lists provides the environmental risk assessment and probabilistic risk assessment (where applicable), it does not state that the accompanying methodology, primary data or reports referenced within the document will be provided. Without this express requirement, the integrity of the RegDoc 3.2.1 to truly deliver public information and facilitate disclosure can be undone.

For instance, in a recent review of the draft environmental impact statement for the proposed near surface disposal facility project, CELA sought the project's waste acceptance criteria document. Despite being referenced in the report and likely containing information pertinent to the overall project, the waste acceptance criteria report provided to CELA was redacted nearly in full. CELA's inability to obtain the report, even in part, reflects a process which is neither transparent nor conducive to public review.

Furthermore, because the CNSC as an administrative-tribunal lacks cross-examination, the CNSC must facilitate the disclosure of information which could otherwise result from this type of quasi-judicial, public hearing. Absent the ability to cross-examine during licensing hearings, there is a lack of opportunity to examine the assumptions upon which an expert has based their findings. It is paramount that the Commission also be aware of these assumptions, in order to draw its own conclusion.¹⁰

3. Public Information Dissemination

Recommendations - Public information strategy and products (2.2.4)

As previously discussed, CELA, Greenpeace and Northwatch object to a proponent-led disclosure process where, on the guidance of the CNSC, each licensee within the scope of RegDoc 3.2.1 devises a public information program. Instead, we recommend that the CNSC provide a 'one stop' location for all data, which moves beyond the cursory information envisioned in RegDoc 3.2.1 and instead requires the public release of detailed reports, data and analysis as it relates to existing licenses, their approvals and ongoing compliance actions.

Having an online repository of information in a consolidated location would greatly assist the CNSC during public hearings. Lack of public openness not only detracts from the level of meaningful public engagement during the hearing, but needlessly redirects the participant's efforts to the act of information collection. Additionally, there have been instances where we have sought a document or information by way of

¹⁰ *Administrative Law, supra* note 4, p 423

information request to the CNSC and after days of awaiting a copy, are informed it exists on the proponent's website. While we commend licensees who post information publicly on their website, the onus should not be on an intervenor or member of the public to discern what information exists on individual sites, which will inevitably have varying degrees of searchability and user-friendliness.

CELA, Greenpeace and Northwatch submit that in order to enhance transparency and accountability, the CNSC must maintain a public database which consolidates the documentation, decision and orders which informs their advisory and oversight functions. This database must also enable the easy access of information and incorporate a user-centred design.

As we previously noted, an online registry would be ideal for housing this information and it could contain a standard set of information of each licence. From preliminary decommissioning plans to financial guarantees, the online portal should also house all documents referenced in Commission Member Documents, license applications and draft documents currently open for comment. The CNSC website could be more valuable as an information depot, with links to documents, repositories and licensee information. Currently, the CNSC website severely lacks this functionality and its document management system is opaque.

We also encourage the CNSC to host more stakeholder workshops (such as the upcoming workshop on RegDoc 2.13.1, Safeguards and Nuclear Material Accountancy) and adopt a process where each comment opportunity or consultation is commenced with stakeholder engagement workshops with in person, webinar and teleconference options.

Recommendations - Section 2.3.2 Guidance for a public disclosure protocol and Proposed Section 2.3.2.1 Guidance on balancing transparency and sensitive information

CELA, Northwatch and Greenpeace have encountered a barrier in receiving documents on the basis that they are deemed, by the licensee, to be 'security sensitive.' Since the events of September 11th, we have observed licensees over-using security to hold back information in bad faith. We have many *Freedom of Information and Privacy Act* appeals filed to this effect.

Section 2.3.2 of RegDoc 3.2.1 provides the following in regards to exemptions:

Licensees should ensure that the public disclosure protocol does not prescribe the release of sensitive information, such as security-related information and trade secrets or scientific, technical, commercial, financial or labour relations information.

We request that there be an additional section, titled '**2.3.2.1 Guidance on balancing transparency and sensitive information**' that provides explicit guidance on how licensees balance the 'culture of openness' with possible security issues. For instance, the updated RegDoc 2.4.2 Probabilistic Safety Assessment for

Nuclear Power Plants, s 5 Guidance on Public Disclosure, provides a more exact description of what may be 'security sensitive':

It should be noted that any information pertaining to the specific fault sequences and vulnerabilities of a facility include security-sensitive information and is subject to applicable information security provisions.

In response, we suggest the following language for incorporation in a new, section 2.3.2.1:

2.3.2.1 Guidance on balancing transparency and sensitive information

Licencees should be encouraged to shift from a protective mindset to a culture of openness in information disclosure.

A culture of openness should be based on the principles that information should be available to the public in timely manner, and that necessary exemptions from access should be limited and specific. Exemptions should not simply be claimed because they are technically plausible, but only be claimed if they genuinely apply to the information at issue.

Security exemptions may be applied to information pertaining to the specific fault sequences and vulnerabilities of a facility.

Recommendation - Section 2.3.3 Public disclosure notification

With regards to section 2.3.3, CELA, Northwatch and Greenpeace provide the following text amendment:

It is CNSC policy to promote open and transparent public relationships between licensees and applicants and their target audiences ***as well as civil society organizations*** and to assist in the broader dissemination of information to the general public where appropriate.

Conclusion

Fostering public engagement in federal regulatory processes and industry oversight requires investment in making information publicly available and CELA, Northwatch and Greenpeace appreciate this opportunity to provide comments on RegDoc 3.2.1. Access to information not only undergirds Canada's democratic decision-making processes, but provides the basis for tracking and understanding *why* a decision was made and on *what* basis.

To be an effective tool for oversight, engagement and public awareness, we encourage the CNSC to recognize the utility of disclosure and its importance to democratic processes and public action. As enunciated by the Supreme Court of Canada in *Dagg v Canada*, "the overarching purpose of access to

information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.”¹¹

Truly,

NORTHWATCH



Brennain Lloyd
Project Coordinator

GREENPEACE CANADA



Shawn-Patrick Stensil
Senior Energy Analyst

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Kerrie Blaise
Counsel

¹¹ (1997) 2 SCR 403