

ENVIRONMENTAL & ENERGY LAW

PANEL CHAIR REFUSES TO DISQUALIFY HERSELF FOR BIAS AT ONTARIO HEARING ON NUCLEAR WASTE REPOSITORY

Stan Berger, B.C.L./L.L.B., Certified Specialist, Environmental Law

In last week's newsletter we reported that the Chair of the U.S. Nuclear Regulatory Commission refused to disqualify herself from hearing the U.S. Department of Energy's licensing application for the construction of the high level used nuclear fuel repository at Yucca Mountain. A local County claimed that her previous opinions as a scientist would prevent unprejudiced consideration of the issues at the hearing. The Chair rejected the suggestion.

On September 17, 2013, the Chair of the Joint Review Panel, conducting a combined environmental assessment and licensing hearing into the proposal by Ontario Power Generation Inc. (OPG) to build a deep underground repository for the long-term management of low and intermediate level radioactive waste in Tiverton, Ontario, refused to disqualify herself on grounds of reasonable apprehension of bias.

The waste in question included radioactive contaminated clothing, component parts, and resins and the proposal was to bury it by the shores of one of the Great Lakes approximately 680 metres below ground in low permeability, limestone and shale formations. The lake in question, Lake Huron, borders on the State of Michigan and the proposed site is part of the traditional territory of the Saugeen Ojibway Nation.

A local resident made a presentation on the second day of the hearing in which he claimed that the Chair, Dr. Stella Swanson, was in a conflict of interest and that she should disqualify herself from the hearing on grounds of reasonable apprehension of, or actual bias. He pointed out that the reports upon which the deep geological repository was based were written by Golder Associates and that the Chair of the Joint Review Panel had been an employee of Golder Associates "during the very time period that these reports that I've referred to were being compiled." Further, referring to her filed resumé, the presenter indicated that Dr. Swanson had apparently done some work for the applicant, OPG, in an environmental assessment for the return to service of OPG's Pickering nuclear facility. Dealing with these allegations, Dr. Swanson stated the following at pages 253-254 of the transcript (see <http://www.ceaa-acee.gc.ca/050/documents/p17520/94489E.pdf> or CNSC website at <http://nuclearsafety.gc.ca/eng/>):

"If you had concerns around apprehension of bias, you should have raised this during a preliminary request for ruling.

...All I can say is that if I had, as a professional, any concerns about my ability to be independent, I wouldn't have accepted the invitation. My resume is a public document, as you have so clearly illustrated, and in this field those of us who are in this field will have resumes that read very similar to mine, which is we worked for industry, government, First Nations, NGOs. If you dig into my resume a little further, you will see that I actually worked for Greenpeace. So I have a very broad and I would submit non - unbiased and un-conflicted role to play today."

The hearing continues.



Albert M. Engel, Partner
416.864.7602
aengel@foglers.com



Stanley Berger, Partner
416.864.7626
sberger@foglers.com



Yadira Flores, Associate
416.365.3744
yflores@foglers.com



Tom Brett, Partner
416.941.8861
tbrett@foglers.com

Fogler, Rubinoff LLP
Lawyers
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K1G8

Tel: 416.864.9700
Fax: 416.941.8852
foglers.com