

COMMUNICATION TO THE  
AARHUS CONVENTION COMPLIANCE COMMITTEE

concerning the compliance review of the Netherlands with the Aarhus Convention  
after the findings of the ACCC in **ACCC/C/2014/104**  
for the Seventh Session of the Meeting of Parties of the Convention

17 February 2021

Dear members of the Compliance Committee,

The NGOs *Stichting Greenpeace Nederland* (communicant in the case [ACCC/C/2014/104](#)) and *Vereniging World Information Service on Energy* (WISE) would like to draw your attention to a recent verdict from the highest Dutch administrative court, the *Raad van State*.<sup>1</sup>

The Dutch nuclear regulatory authority ANVS started a procedure for change of the operation license of the Borssele nuclear power station in 2018, which was followed by a change of the license on 4 December 2018. As already happened earlier with changes of the license in 2013 and 2015, also this license change was not informed by public participation concerning environmental issues. The ACCC reached [findings of non-compliance with the Convention](#) regarding the license change of 2013 on the grounds that the license change was not preceded by informed public participation on environmental issues (par. 88 of the Findings).

The latest decision to change the license took place after publication of the Findings of the ACCC on 4 October 2018.

Greenpeace and WISE brought an appeal to the *Raad van State* against the license change of 4 December 2018 on the grounds of it not having been informed by an EIA on the basis of the Espoo Convention and the EU Directives on EIA and Habitats, nor by public participation on environmental matters on the basis of the Aarhus Convention, referring to art. 6(10) of the Convention and the lack of public participation on environmental matters for the earlier license changes in 2013 and 2015. They also stated that this license change enables further operation of the nuclear power plant Borssele and is hence a part of the layered decision process that extends the lifetime of the Borssele nuclear power station from 2013 to 2033.

This appeal was dismissed by the *Raad van State* on 27 January 2021 without further possibility of appeal. The *Raad van State* argued, among others, that there was no obligation for public participation on environmental matters under the Aarhus Convention because the change of license by decision of 4 December 2018 had no impact on the operation time of the Borssele nuclear power station. The *Raad van State* did not acknowledge the need for informed public participation on environmental matters on the basis of art. 6(10) of the Convention, not even as a means to remedy the lack of informed public participation with regard to earlier license changes related to Long Term Operation and the 10 yearly safety evaluation, after this so-called Long Term Operation license change in 2013, preceded by a Covenant in 2006, prolonged the exploitation of the Borssele nuclear power station *de facto* with twenty years until 2033.

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<sup>1</sup> <https://www.raadvanstate.nl/uitspraken/@124173/201900720-1-r4/>

Complementary translation by the communicants into English attached in the Annex.

Following the Findings of the ACCC in ACCC/C/2014/104, the Netherlands did take (in our opinion insufficient – see earlier communications) steps to implement the recommendations of the ACCC in par. 89 of the Findings of ACCC/C/2014/104 by way of a minor legislative change. However, the non-compliance with regard to the decision-making process concerning the prolongation of the nuclear power plant's exploitation with twenty years has not been resolved, even though the nuclear power plant is still in operation and is planned to remain so until 2033. The national competent authorities (i.c. the ANVS) changed the license of the nuclear power plant two times (in 2015 and 2018) after the license change that was deemed in non-compliance with the Aarhus Convention according to the ACCC in its Findings par. 88 in the case ACCC/C/2014/104, without using a new decision-making procedure in compliance with art. 6(10) of the Aarhus Convention including organising informed public participation on environmental matters. Thus, in our view, the Netherlands continued to be in non-compliance with the Convention's art. 6(10).

For that reason, Greenpeace and WISE Nederland would like to inform the ACCC of their allegation that the Netherlands have repeatedly taken decisions in non-compliance with the Convention with its refusals in 2015 and 2018 to carry out its obligations under art. 6(10) of the Convention (reconsideration or update of the operating conditions), under art. 6(6) (provision of all relevant environmental information), and under art. 6(8) (the authority put aside all input on the environment as irrelevant, including requests for more information conform art. 6(6) of the Convention). In both cases all attempts for local remedy failed. This leads Greenpeace and WISE to the conclusion that the Netherlands, including the *Raad van State*, continue to fail to comply with the Aarhus Convention.

The Borssele nuclear power plant is approaching its next 10-year periodic safety review, the 10EVA23, which is to be finalised in 2023 by the granting of a 10EVA23 permission or license change. This periodic safety review will undoubtedly be accompanied by the need for the foreseen last 10 years of operation of further reconsiderations and updates of the operation conditions as mentioned in art. 6(10) of the Convention, and given the state of this ageing nuclear power plant, potentially important ones. It is of paramount importance that future decisions concerning further operation and exploitation of the nuclear power plant Borssele take into account environmental considerations and public participation concerning environmental matters.

We therefore kindly request the ACCC to strongly remind the Netherlands of its obligations under the Convention in its review of compliance for the upcoming Seventh Session of the Meeting of Parties of the Convention, in the hope that the compliance of the Netherlands can at least be partially restored before any next decision is taken with regard to reconsiderations and updates of the operation conditions of the nuclear power station Borssele.

Sincerely yours,



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## **ANNEX to the communication by Greenpeace and WISE**

RULING 201900720/1/R4

ECLI: ECLI:NL:RVS:2021:174

Date of ruling: 27 January 2021:174

DEPARTMENT OF ADMINISTRATIVE JUSTICE

Ruling in the dispute between:

1. Association World Information Service on Energy Amsterdam (hereinafter: WISE), located in Amsterdam
  2. Foundation Greenpeace Nederland (hereinafter: Greenpeace), located in Amsterdam
- appellants

and

the Authority Nuclear Safety and Radiation Protection (hereinafter: the Authority),  
defendant.

Course of the process

By decision of 4 December 2018, the Authority officially amended the revised license for the Borssele Nuclear Power Plant (hereinafter: KCB) granted by decision of 12 July 2016 to the N.V. Elektriciteits-Produktie Maatschappij Zuid-Nederland (hereinafter: EPZ) under the Nuclear Energy Act.

WISE and Greenpeace have appealed against this decision.

The Authority has filed a statement of defence.

Given the opportunity, EPZ gave a written statement.

Wise Nederland, Greenpeace and the Authority have submitted further documents.

The Department heard the case in court on December 8, 2020, where Greenpeace, represented by Mr. B. N. Kloostera, attorney of law in Amsterdam, WISE, represented by [attorney A], and the Authority, represented by mr. E. Koornwinder, mr. Y.E. Staal, Mr. P.A.A. Sormani and drs. F. de Koff have appeared. Furthermore, EPZ, represented by mr. C.N.J. Kortmann, lawyer in Amsterdam, accompanied by M.W.J. Crajé and B. d'Hooghe appeared.

Considerations

Introduction

1. EPZ has a license for an indefinite period of time for the operation and maintenance of the KCB. Since then, various licenses have been issued under the Nuclear Energy Act on behalf of the KCB.

Most recently, by decision of 12 July 2016, EPZ was granted a license to change the KCB and to operate the KCB after that change. The change concerns the implementation of 11 measures resulting from the 10-year safety evaluation 10EVA13 and the Complementary Safety margin Assessment (CSA), also known as the European robustness investigation or the stress test. By a ruling of 2 May 2018, ECLI: NL: RVS: 2018: 1448, the Division [Administrative Law of the RvS, JH] declared the appeal against the decision of 12 July 2016 unfounded.

2. The Western European Nuclear Regulators Association (WENRA) published a set of standards for the operation of nuclear power plants in the period 2006-2008. These standards are called safety Reference Levels (RLs). All WENRA members agree on these RLs and every WENRA country is expected to implement them. The first set of RLs were implemented in EPZ's license in 2010. In September 2014, the RLs were revised and updated as part of the European stress test and the lessons learned from the TEPCO Fukushima Dai-ichi accident. Most of these updated RLs have already been implemented by inclusion in the Regulation on nuclear safety of nuclear installations of 13 June 2017 and in the principles of the VOBK Guide (a Safe Design and Safe Operation of Nuclear Reactors) of 19 October 2015. Via the official license change of 4 December 2018, the RLs not yet implemented will be included in EPZ's Nuclear Energy Act license for the KCB. With this, the Authority gives substance to the Dutch WENRA membership.

3. The decision of 4 December 2018 provides for the following changes:

1. Adding the not yet implemented WENRA Reference Levels from 2014;

2. Adjusting the license to the Regulation on Basic Safety Standards for Radiation Protection;

3. The removal of license requirements C18 and C21 as a result of duplication with the Regulation on nuclear safety of nuclear installations;

4. The removal or amendment of license regulations that have already been implemented;

5. Textual adaptation of regulations for clarification or to bring them in line with current practice;

6. Including two baggage scanners in the license;

7. Adding a reference number to the revision license.

4. The legal framework relating to this case is included in the appendix to this judgment. The appendix is part of this statement.

Lack of environmental impact assessment

5. WISE and Greenpeace argue that the license change should be preceded by information obtained from an environmental impact assessment on the lifetime extension of the KCB

from 2013 to 2033. They argue that there may be changed views on risk that have not been taken into account, and that the environmental conditions have changed, for example due to higher numbers of residents in the area and more nature reserves. Reference is also made to the Opinion of the Advocate General of 21 November 2018, ECLI: EU: C: 2018: 972, regarding the extended operating life of the Doel 1 and Doel 2 nuclear power plants in Belgium and the obligation to draw up an environmental impact assessment on the basis of the Convention on Environmental Impact Assessments in a Transboundary Context of 25 February 1991 (hereinafter: the Espoo Convention) and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (hereinafter: the Aarhus Convention), the European EIA Directive, as well as on the basis of Directive 92/43 / EEC of the Council of the European Communities of 21 May 1992 on the conservation of natural habitats and wild flora and fauna. WISE also points to the findings of the Aarhus Convention Compliance Committee. Now that there was no participation in the decision-making about the extension of the operating time, this should have been done in the current decision, according to WISE.

Greenpeace and WISE further argue that the decision to grant a license leads to an amendment of a decision under the Nuclear Energy Act whereby an activity is licensed for which an environmental impact assessment is required. The project type 'nuclear power plants' in Annex I, point 2b, of Directive 2011/92 / EU of the European Parliament and of the Council of 13 December 2011 on the environmental impact assessment of certain public and private projects as amended by Directive 2014/52 / EU of the European Parliament (hereinafter: the EIA Directive), according to the Advocate General, is not limited to its construction. Partly in the light of Article 1, paragraph 5, of the Espoo Convention, the renewal of a license for the operation of a nuclear power plant should therefore be considered in the first place as a project within the meaning of Article 1, second paragraph, under a, of the EIA Directive, on the basis of which, for an extension of a period that may have significant environmental impacts, a prior environmental impact assessment must be carried out. This is the case when for the KCB the originally planned 40 years of operation are extended to 60 years. Pursuant to Article 1 (2) (a) of the EIA Directive, the extension of the operation time should therefore have been subject to an environmental impact assessment.

According to Greenpeace, the foregoing also means that the Environmental Impact Assessment Decree (hereinafter: the EIA Decree) wrongly does not prescribe an obligation to conduct an environmental impact assessment for changes such as the extension of the period for electricity production of a nuclear power plant. According to Greenpeace, the category of projects as referred to in the appendix to the Environmental Assessment Decree, part C, point 22.3, must be interpreted in such a way as to include decisions to modify or expand a nuclear power plant.

5.1. In its earlier ruling of 2 May 2018, the Division considered that to the extent that Greenpeace relies on the Espoo Convention and the Aarhus Convention, it wrongly assumes that the application extends the life or the term of operation of the KCB. In the judgment of 2 May 2018, it was held that the Meeting of the Parties of the Espoo Convention, cited by Greenpeace, in which a decision was taken on the nuclear power plants in Rivne, Ukraine, was of no significance in this regard. The license for the nuclear power stations in Rivne had expired, so that extension of the lifespan of those power stations had to be assessed as a new activity. According to the Division, the judgment of the Constitutional Court of Belgium of 22 June 2017, in which preliminary questions were

submitted to the Court of Justice of the European Union about the life extension of the Belgian nuclear power plants Doel 1 and Doel 2, was also irrelevant in this procedure. Pursuant to Article 15a, first paragraph, of the Nuclear Energy Act, the license granted in 1973 to keep the KCB in operation will end with effect from December 31, 2033, insofar as it concerns the release of nuclear energy. Contrary to the case of the Belgian nuclear power plants, according to the Division, this procedure did not concern changing the expiry date determined by law. In addition, the Division considered that the requested change to the KCB is not a phase of a licensing procedure consisting of several phases. The by Greenpeace referred to judgment of the Court of Justice of 17 March 2011, Brussels-Capital Region, ECLI: EU: C: 2011: 154, and the Maastricht Recommendations on "Multi-stage decision-making" to which it refers, gave according to the The Department also not rise to the conclusion that the Espoo Convention or the Aarhus Convention requires an environmental impact assessment report to be made because an environmental impact assessment was not included in the LTO license. The proceedings before the Aarhus Convention Compliance Committee regarding a complaint from Greenpeace (ACCC/C/2014/410) also did not lead to that judgment.

5.2. As further explained at the session of the Division by Greenpeace and WISE, the appeals should not be construed as a request for a review of the Division's ruling of May 2, 2018. The arguments of Greenpeace and WISE, however, amount to the conclusion that the earlier ruling of the Division of 2 May 2018 is incorrect in view of the new facts and circumstances cited by them, and that it has not been recognized that an environmental impact assessment report should have drawn up out at the time. According to Greenpeace and WISE, this must then be done with the next decision concerning the KCB, namely the addition of the WENRA RLs to the decision of 4 December 2018. The Division will therefore assess in this procedure whether after the aforementioned decision of the Department there are new facts and circumstances that mean that when the WENRA RLs were added, an environmental impact assessment report should have been drawn up prior to the decision-making.

5.3. The Division states first of all that in this procedure, as in the previous procedure, no change to the life of the KCB is permitted. This lifespan is laid down in Article 15a of the Nuclear Energy Act. With the license granted, only the WENRA RLs that had not yet been taken over are included in the license. This means that only a set of extra safety regulations is included as a prescription. As further explained by the Authority at the session of the Division, there are no physical changes to the KCB and the decision has no consequences for the radiation from the KCB.

5.4. As one of the new facts and circumstances, reference is made in particular to the opinion of October 4, 2018 of the Aarhus Compliance Committee (hereinafter: the ACCC) on the LTO license granted by decision of March 18, 2013. The Division sees, as in the decision of 2 May 2018, that the advice of 4 October 2018 does not give rise to the opinion that a decision adding conditions to the license requires the Authority to draw up an environmental impact statement report. While this advisory report recommends applying Articles 6 and the provisions of paragraphs 2 to 9 to this Article of the Convention when reconsidering or updating the duration of each nuclear activity, this situation is not applicable here. In the "First progress review of the implementation of the Committee's findings and recommendations on communication ACCC/C/2014/104 (Netherlands)" of February 2020, submitted by Greenpeace, the Division also sees no ground for a different opinion. It also refers to decisions extending or updating the lifespan of a nuclear activity, and here it concerns the linking of a set of additional safety regulations.

5.5. The judgment of the Court of Justice of 29 July 2019, ECLI: EU: C: 2019: 622, on the Doel 1 and Doel 2 nuclear power plants in Belgium also gives no grounds for the judgment to think differently about the judgment of the Division of May 2018 and that the Authority should have prepared an environmental impact assessment report prior to the decision of December 4, 2018. In this judgment, an explanation is given of the concept of a project and an opinion is given on physical renovation works that cannot be seen independent of the extension of the use of the power plant, and the question whether this is a project as referred to in the EIA Directive. In the decision in this procedure, no physical activities are licensed and the duration of the KCB is not extended either. For that reason alone, a comparison with this judgment is not valid.

As far as WISE argues that in C.22.2 (read: C.22.3) of the appendix to the EIA Decree it is wrongly not stated that an environmental impact statement must be drawn up in the event of a change or extension of a nuclear power plant and other nuclear reactors, in this case there is no question of a change or expansion of a nuclear power plant. Regardless of whether this argument is correct, the Division does only for that reason not get around to answering the question whether in the EIA Decree. there is an incorrect implementation of the EIA Directive.

5.6. All in all, the Division sees no grounds in what has been submitted by Greenpeace and WISE for the opinion that the decision incorporating the WENRA RLs in EPZ's existing license could not be granted without drawing up an environmental impact report in advance. Neither have Greenpeace and WISE put forward any new facts and circumstances that make it impossible to follow the judgment in the earlier judgment of 2 May 2018. The arguments fail.

In view of the judgment of the Court of Justice of 6 October 1982, Cilfit, ECLI; EU: CL1982: 335, point 16, there is therefore no reason for the Division to refer questions for a preliminary ruling on the scope of the project concept, as requested. In addition, the Division also sees no reason to ask preliminary questions about the extension of the lifespan and the consultation to be carried out by the competent authority, because such a decision is not relevant in these proceedings.

ALARA principle

ALARA principle

6. According to WISE and Greenpeace, failure to guarantee the WENRA RLs cannot make an assessment of whether the permit granting complies with the ALARA principle either.

6.1. Article 15, paragraph 3, of the Nuclear Energy Act states that a license is subject to the conditions necessary to protect the interests designated by or pursuant to Article 15b. Insofar as the adverse consequences of the activity concerned for humans, animals, plants and goods cannot be prevented by attaching provisions to the license, provisions shall be attached to this that offer the greatest possible protection against those consequences, unless this not reasonably can be required. In this case, no other or more extensive activities are licensed to EPZ by the decision of 4 December 2018. WISE and Greenpeace have not specified in more detail which standards the decision of December 4, 2018 would not comply with, so that the Division sees no ground in the ALARA principle put forward by WISE and Greenpeace for the opinion that more or different regulations

should have been associated with the decision.

The arguments fail.

Final and conclusions

7. The appeals are unfounded. WISE has requested the Division to annul the granted license, to impose a public consultation procedure and to suspend the business operations during the performance of this public consultation procedure and to add a provision to the granted license requiring the performance of an environmental impact assessment with public participation before the next prescribed 10-year evaluation. In view of the dismissal of WISE's appeal, the Division sees no reason to grant these requests.

8. There is no reason for an order on process costs.

Decision

The Administrative Jurisdiction Division of the Council of State:

declares the appeals unfounded.

Thus established by mr. E.A. Minderhoud, chairman, and mr. C.M. Wissels and Mr. J.M.L. Niederer, members, in the presence of mr. S. Vermeulen, registrar.

The chairman is unable to sign the decision.

The registrar is unable to sign the decision.

Released in public on January 27, 2021

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ANNEX

The Nuclear Energy Law

Articles 15a, 15c, 19 [On nuclear licensing, JH]

The Law on Environmental Protection

Articles 7.2, 7.17 [On how categories are decided for which an assessment needs to be made prior to a decision to carry out an EIA]

The Annex to the Decree EIA

Part C. Activities, plans and decisions, in relation to which making an environmental impact assessment is obligatory

C 22.2 The construction, change or extension of a wind turbine park

C 22.3 The construction of a nuclear power plant and other nuclear reactors, including the end of service or decommissioning of such power stations or reactors, with exception of research installations for the production and management of fissile and breeder material, with a constant capacity of maximally 1 thermal kW.

Part D. Activities, plans and decisions to which the procedure as referred to in Articles 7.16 to 7.20 of the Law applies [Assessment whether an EIA is necessary or not, JH]

D 22.3 The change or extension of a nuclear power plant and other nuclear reactors, including the end of service or decommissioning of such power stations or reactors, with exception of research installations for the production and management of fissile and breeder material, with a constant capacity of maximally 1 thermal kW.

The Convention of Aarhus

Art. 5(1a-c)

Art. 6 (1), 6(2)

The Annex to the Convention's