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To: **The Aarhus Convention Compliance Committee**
Attn: Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
e-mail: ECE-Aarhus-Compliance <aarhus.compliance@un.org>

Re.: Draft report of the Compliance Committee
Compliance by the Netherlands with its obligations under the Convention
ACCC/C/2014/104 the Netherlands - Borssele nuclear power plant
STATEMENT ON BEHALF OF THE COMMUNICANT – ACCC session 9 July 2021

Amsterdam, 12 July 2021

Dear Chair, dear members of the ACCC, dear Ms Marshall,

We sincerely thank the ACCC for its rigorous assessment of this case, its clear findings and its rigorous follow-up. These were an important findings that have helped creating more clarity in general about the obligation of public participation in decisions concerning the operation of nuclear power plants. We have two observations.

1. We agree with the Committee's remarks in the compliance review concerning its recommendations in paragraph 89 of its findings.

   We would like to highlight that the proposed changes in Dutch law will likely not change the situation fundamentally, as the ACCC also has concluded in par. 36 and 37 of its compliance review, because they involve the same procedure that was also followed before the license change in 2013, which was deemed to be in non-compliance already by the Committee.

   First of all, nuclear activities always have a significant impact on the environment. The activity itself is "ultra-hazardous" as concluded by the ACCC in its findings on the cases ACCC/C/2021/71 and ACCC/C/2013/91. Public participation on environmental matters – be it under art. 6(1) or art. 6(10) – always has to take place before decisions concerning this activity.

   The proposed legal changes, however, do not oblige licensees explicitly to include environmental issues in the prescribed public participation processes – it almost seems like it that the Party concerned only recently became aware of the fact that art. 6(6)(a)-(f) contains the word "environment".
   We have strongly the impression that the Party concerned is trying to avoid having to fulfil certain obligations under art. 6 of the Convention by creating a confusing situation in the

form of this new procedure, in order to give a procedural advantage to developers of certain activities. But this is a short-sighted advantage.

The Party concerned is currently facing a wave of procedures in which the lack of EIAs before important decisions concerning the environment is challenged, and the Dutch government is increasingly loosing those.[1] It is this lack of fulfilling its obligations that is now causing delays for – from the point of view of environment – important activities.

We hope that clarity from the side of the ACCC will help the Dutch government to realise its obligations towards its citizens. This is not a case of citizens trying to slow down procedures for the sake of it – it is a case of a government not fulfilling its long standing legal obligations that exist to improve the quality of decisions made in respect to the environment and people. If the Dutch government would include EIA procedures, as it is obliged to, before decisions are taken, it can benefit from the information from public participation while taking these decision. That would hardly loose any time, but it would help prevent misconceptions as well as environmental damage and costly reparations afterwards.

2. We would also like to highlight the following issue: The ACCC focusses in its progress report only on its recommendations in paragraph 89 of the findings, but avoids drawing conclusions on the basis of paragraph 88 of the findings in ACCC/C/2014/104. This situation is abused by the Party concerned, which refuses to read paragraph 88 as a relevant and binding conclusion.

   As the ACCC was informed about, and noted in par. 25 – 27 of the compliance review, the Party concerned continued the situation of non-compliance described in paragraph 88 of the findings, by not organising public participation on the environment before two further changes of the operation license, in 2016 and 2018.

   The Party concerned argued in court that it was not bound to the findings in paragraph 88, in which the Committee finds that, *by not having at any stage provided for public participation, [...] in regard to setting the end date of 31 December 2033 for the operation of Borssele Nuclear Power Plant, the Party concerned failed to comply with article 6, paragraph 4, in conjunction with article 6, paragraph 10, of the Convention with respect to the licence amendment of 18 March 2013.*

   Art. 6(10) requires that each Party shall ensure that, when a public authority **reconsiders or updates the operating conditions** for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied *mutatis mutandis*, and where appropriate.

   The Party concerned also does not seem to intend to organise public participation before the upcoming approval of the findings of the next 10-year periodic safety review and relating decisions by the responsible authority about (potentially) resulting necessary adaptations (reconsiderations and/or updates), which will enable the Borssele NPP to operate from 2023 to 2033.

1 See for instance the recent case on wind farms: https://www.natlawreview.com/article/new-wind-parks-netherlands-frustrated-court-ruling

By not addressing the ongoing non-compliance under the obligations of art. 6(10) of the Convention in its review, the ACCC risks that on the basis of lack of clarity on the side of the Party concerned (we do not presume ill will!), further non-compliance has resulted and will result in the near future.

There is, for example, confusion on the side of the Party concerned about the use of the word "duration" in the findings and the reporting by the ACCC. The operation time ("duration") of the Borssele NPP is only but one of the issues that can constitute a reconsideration or update under art. 6(10). We presume that the ACCC also thought that that was clear.

However, the Party concerned is of the opinion that the Borssele NPP has received permission to operate until 2033 and that further reconsiderations or updates of its operation conditions, including license updates and updates on the basis of 10-year evaluations, do not have to be informed by public participation concerning the environment on the basis of art. 6(10) of the Convention, because they do not explicitly concern "duration". It therefore refuses to have the licensee deliver information on the environment to the public before the mentioned license changes and 10-year safety evaluation, and it refused explicitly to take remarks made during public participation concerning the environment in its decisions concerning the mentioned license changes into due account.

Currently, none of the decisions concerning the Borssele NPP in the operation period after 2013 are informed by public participation on environmental issues – the very basis of argumentation behind the found non-compliance in par. 88 of the findings of the ACCC in case ACCC/C/2014/104, i.e. on the basis of non-compliance with art. 6(10). For example, the Dutch authorities continue to fail to take into account changes in the environment in their decisions, in our view resulting in too little adequate technical updates and hence an increase in risk of the activity for the environment and public health.

Just as the ACCC found the Party concerned in non-compliance for the license change in 2013, the Party concerned was therefore in non-compliance for the license changes in 2016 and 2018. And again will be in non-compliance with the Convention when it approves the 10-year safety evaluation and related measures in 2023 without being informed by public participation on environmental issues.

Whether or not the reconsiderations or updates of the activity are small, should not be relevant. We would like to repeat that we do not consider a full round of public participation with all thinkable environmental information necessary for small, incremental reconsiderations and/or updates of operating conditions. If such a full round of public participation on the basis of art. 6(1) (for instance after construction or a change in the project) or art. 6(10) (for instance after a change in operation duration) has been carried out in the past and the information as well as the conclusions from public participation of that procedure fully cover the further operation time of the activity as well as the potential impacts of certain incremental reconsiderations and/or updates, a simple reference to that earlier procedure would suffice. However, in the current case, the ACCC has concluded in par. 88 of its findings that the license change in 2013 had not been preceded by public participation on the environment already before the covenant in 2006 – nor after that, and therefore was in non-compliance with the Convention. There was in the case of the 2013

license change no procedure that covered the operational time beyond 2013. Nor is there for the license changes in 2016 and 2018.

We have noticed that the ACCC considered this to fall outside of the scope of its findings on ACCC/C/2014/104. We argue that there is from the point of view of art. 6(10) no qualitative difference between the license changes in 2016 and 2018, and the one in 2013, and therefore urge the ACCC to consider the allegation of ongoing non-compliance in this review.
If this would not happen, we kindly, but sincerely ask the ACCC, whether it is in its view fair practice towards the communicants to expect them to mount another communication to the ACCC on a completely similar matter (see par. 27 of the review) – from which new findings will come far after the next moment where a decision under the obligations of the Convention should be informed by public participation on the environment, i.e. in 2023. The communicants already went in the cases of the 2016 and 2018 license changes through the entire process of local remedy (with all the time, effort and costs involved), without success. By not taking up the alleged non-compliance in these two consecutive similar cases as the one in ACCC/C/2014/104, the ACCC would *de facto* facilitate a salami-slicing tactic from the side of the Party concerned (repeating incremental reconsiderations and/or updates of operating conditions without fulfilling its obligations under the Convention) – to the detriment of the right of the public to be involved in decision processes in the form of public participation on the environment on the basis of art 6(10).

We therefore request the ACCC to explicitly conclude in its compliance review that the two cases of license change in 2016 and 2018 were, or at least can be considered, further acts of non-compliance with the Convention, because also these license changes were not preceded or informed by public participation on environmental issues, as obliged to under art. 6(10), and to urge the Party concerned to take all necessary administrative measures to ensure that its obligations under art. 6(10) are also met in upcoming decisions when the legal and administrative changes the Party concerned is preparing to make as a result of the recommendations under par. 89 have not yet been implemented in a way that satisfies the obligations of the Party under the Convention.

Sincerely,

Jan Haverkamp
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In the name of:
Greenpeace Netherlands (communicant in ACCC/C/2014/104)
WISE Nederland (observer – co-complainant in the appeal procedures in 2016 and 2018)