

## **Questions for the ACCC regarding the implementation of article 6(10) of the Convention**

The Netherlands understands that, under article 6(10) of the Convention, a party holds a certain margin of discretion in determining whether to apply paragraphs 2 to 9 of article 6 *mutatis mutandis* to reconsiderations and updates to the operating conditions for an activity. The '*significance test*' that should be applied involves assessing, on a case-by-case basis, if the reconsideration or update is capable of significantly changing the activity's basic parameters, or whether it will address significant environmental aspects of the activity.

The Netherlands has taken note of the report of the ACCC on general issues of compliance,<sup>1</sup> and has taken into account the Implementation Guide.<sup>2</sup> Nevertheless we would like to submit a request to the ACCC for additional advice and guidance on a number of questions we have in relation to the implementation of article 6(10) of the Convention.

We understand that situations where public participation is '*appropriate*' under article 6(10), and thus required, are not limited to those where the reconsideration or update '*may have significant effects on the environment*' as previously proposed by the Netherlands.

The Netherlands intends to improve the implementation of this article on public participation in decision-making. As the Committee has found the proposed phrase '*may have significant consequences for the environment*' too narrow to ensure compliance with article 6(10) of the Convention,<sup>3</sup> the Netherlands would like to receive further guidance on how to determine the scope of this margin of discretion.

Therefore, we call upon the Committee to provide more practical guidance on implementing article 6(10), more specifically how to address the scope of the margin of discretion. We have the following questions:

### 1. Relationship between article 6(1) in conjunction with point 22, annex I and article 6(10)

The Netherlands would, first of all, appreciate more clarification on how paragraph 10 relates to point 22 of annex I.

The Netherlands infers from case law the following system. In addition to the general significance tests of article 6(1)(b), there are two other significance tests: the test of point 22, last sentence, of annex I, in conjunction with article 6(1)(b) and the test of article 6(10). They apply in different situations.

If a change or extension of an activity for which the annex envisages criteria or thresholds does not meet the criteria or thresholds set out in the annex, the test to be carried out is the same as the general significance test under article 6(1)(b): whether the change or extension '*may have a significant effect on the environment*'.

If a change or extension of a permitted activity for which no criteria or thresholds are envisaged in the annex, in principle all changes or extensions to such activities are subject to article 6, according to the findings in ACCC/C/2009/41. However, because such a change or extension requires a reconsideration or update of the existing permit, the provisions of article 6 apply '*mutatis mutandis*' and '*where appropriate*', as stipulated in article 6, paragraph 10.<sup>4</sup>

The significance test to be applied to reconsiderations or updates of operating conditions under article 6(10) differs from the test under article 6(1)(b). The test under article 6(10) entails checking whether the reconsideration or update is '*capable of significantly changing the basic parameters*' or whether it will '*address significant environmental aspects of the activity*'.

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<sup>1</sup> ECE/MP.PP/2021/45.

<sup>2</sup> Aarhus Implementation Guide, second edition, 2014.

<sup>3</sup> ECE/MP.PP/2021/54, para. 56.

<sup>4</sup> ACCC/C/2009/41, ECE/MP/PP/2011/11/Add.3, Slovakia (point 58).

Do we understand this correctly? In particular, can it be assumed that for a change or extension of a permitted activity for which no criteria or thresholds are envisaged in the annex only the significance test of article 6, paragraph 10 applies?

In the case of an activity with criteria or thresholds, can a proposed measure fall within the scope of both articles and therefore both tests? How do the two tests relate to each other in these cases and how should they be dealt with in practice? Is the fact that the proposed measure does not lead to a physical intervention relevant for which test should be carried out?

2. 'Operating conditions'

What constitutes 'operating conditions' as referred to in article 6(10)? In the Committee's view, is it possible that, for example, changes in certain administrative obligations, which require a reconsideration or update of the existing permit, are not considered to be 'operating conditions'? Examples of such administrative obligations could be:

- adaption of the description of the management system, such as the description of the organizational structure, the organizational units or the required functions, or of the description of quality assurance systems, etc.;
- changes in certain reporting or monitoring requirements;
- changes in requirements related to knowledge management;
- etc.

3. 'Changing basic parameters' v. 'will address significant environmental aspects'

What is the difference between 'capable of significantly changing basic parameters' and 'whether it will address significant environmental aspects of the activity'?

4. 'Will address significant environmental aspects'

Could you please provide practical guidance on what constitutes 'significant environmental aspects' or examples of cases that 'will address significant environmental aspects', in general and especially for nuclear activities? We would expect that the term 'environmental aspects' relates to article 2(3) of the Aarhus Convention which mentions the nature of environmental information. Is it possible that what constitutes 'significant environmental aspects' differs from case to case? When is an environmental aspect 'significant'?

5. 'Basic parameter'

Could you please provide practical guidance on what constitutes a 'basic parameter' or examples of cases that are 'capable of significantly changing the basic parameters' in general and especially for nuclear activities?

The Aarhus Implementation Guide, second edition, 2014 states the following:

- i. *In the light of the EIA and Industrial Emissions Directives, public participation is required in all EU member States at an early stage in the approval of activities that are likely to have significant effects on the environment (**when the basic parameters, including type, size and location, are being decided**) and then again at later stages (up until the stage where the precise technology and resulting emissions are approved in the integrated permit).*

We understand from the description above that basic parameters may include type, size and location. Could you please confirm that this is what constitutes a 'basic parameter'. Are there other basic parameters?