

To the

Secretary to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and the Protocol on Strategic Environmental Assessment

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Comments on the draft guidance on the applicability of the Espoo Convention to the lifetime extension of nuclear power plants

With the following notes, ÖKOBÜRO – Alliance of the Austrian Environmental Movement, the Resource & Analysis Center "Society and Environment (RACSE), the European ECO Forum, ClientEarth and the European Environmental Bureau (EEB) would like to comment on the draft guidance on the applicability of the Espoo Convention to the lifetime extension of nuclear power plants¹ which will be subject to discussion at the 9th meeting of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment.

General remarks

We highly appreciate the work done so far by the members and especially the co-chairs of the Ad Hoc Group on the Applicability of the Espoo Convention on Lifetime Extension of Nuclear Power Plants. We consider it of utmost importance that the work will be taken further so that the guidance can be adopted at the 8th session of the Meeting of the Parties to the Espoo Convention (MOP8).

Taking into account that there has already been a Decision by the Espoo MOP on the lifetime extension of a specific nuclear power plant (NPP) and given that many more cases are to be decided within the Espoo community, it is time to ensure clarity and create a basis for future decisions. Guidance, therefore, is at this point urgently needed.

¹ Comments in this statement refer to the draft version published on the UNECE webpage of the 9th meeting of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment at https://www.unece.org/fileadmin/DAM/env/eia/documents/WG.9_2020/Informal_documents/Espoo_LTE-Guidance_WG-Draft_15.07.2020-clean.pdf (14 August 2020).

To that end, we consider that especially sections IV.C (Likely to cause significant adverse transboundary impacts) and V.C (Characteristic features of a “decision”) of the draft guidance need essential review.

For further elaboration on legal aspects we refer to the Analysis of Legal aspects “Lifetime Extensions on Nuclear Power Plant” published by ÖKOBÜRO and RACSE in June 2020 and available at https://oekobuero.at/files/456/oekobueroracse_legal_analysis_lte_final.pdf

Scope of the guidance and applicability of Appendix I

In para 1 of the draft it is noted that “the text of the Convention is not sufficiently specific” and “‘lifetime extensions’ are not specifically mentioned” in Appendix I to the Convention.

In this regard we would like to recall that Decision VI/2 has already clarified that **the “activities” listed in the Appendix should be understood broadly by taking into account wording used in the Appendix I, i.e. construction, extraction, etc.** The Implementation Committee also held that “for the purpose of the procedures under the Convention, in particular Article 2, paragraph 3, such an [proposed] activity includes not only construction but also operation and maintenance works”.²

We therefore appreciate the clarification in para 56 that “the whole lifecycle of a nuclear power plan[t] is within the scope of the Convention. Lifetime extensions must therefore be considered to be covered by the list of activities even though they are not explicitly mentioned.”

Section II.A: Factors limiting the lifetime of nuclear power plant[s]

Para 35 of the draft notes that, “there are some structures, systems and components that are considered non-replaceable or for which replacement is not technically or financially viable.[...] The design life of safety critical, non-replaceable structures, systems and components may therefore limit the design life of a plant as a whole.” Considering this, the wording of para 33 of the draft, according to which “[f]rom a technical and safety perspective, there is no fixed design life or formally established operating lifetime for a nuclear power plant in its entity,” seems misleading. We therefore suggest to delete or adapt this first sentence of para 33.

Section II.B: Understanding of the term lifetime extension

We would also like to stress that **a definition of the term “lifetime extension” would be needed** in order to remove any uncertainties in relation to the scope of application of the guidance. Instead of

² Decision IV/2, ECE/MP.EIA/10, Annex I, para 41.

limiting the scope of the guidance to the specific situations discussed in chapter II,³ a general definition of what should be covered would be more comprehensive and ensure a broad application of the guidance. This would also concord with the express intention of the guidance as mentioned in para 36 of the draft.

Section II.C: Situations understood as possible lifetime extensions

Regarding situation 1, described in paras 43 *et seq* of the draft, the title is somewhat misleading. From the wording, "The end date of a time limited licence *has been reached*", one could assume that only power plants with an already expired license are concerned. However, in some cases decisions or consents to extend, update or renew a license are taken or given already *before* this date. As these cases should clearly be covered as well, the title should rather read, "Situation 1: Operation beyond the end date of a time limited license." This respectively applies to situation 2, which should rather read, "Situation 2: The nuclear power plant has a time-limited license, but shall be operated beyond its initial design life."

For all 4 situations mentioned in this section, a clear statement should be added that these situations are to be described as examples of lifetime extensions.

Section III.C: Lifetime extension as an "activity"

Paragraph 57 seems to suggest that only a nuclear reactor that has seized operation for a certain period could amount to "an activity in its own right". We agree that not all situations mentioned in Section II.C. must be considered "new" activities for some of them are rather changes to already existing activities.

Both outcomes, an activity as well as a major change thereto equally fall under the definition "proposed activity" if they are subject to a decision of a competent authority in accordance with an applicable national procedure. Under this aspect we consider it less relevant to differ between these two situations.

Section III.D: "Major change"

Considering the different situations described in Section II.C of the draft, the wording of paras 61 and 75 seems confusing. **If a lifetime extension falls under one of these situations, it must trigger the applicability of the Convention irrespective of whether it is covered by an existing license.**

³ See para 19 of the draft.

Otherwise it would be unreasonable to list the different situations in Section II.C. In order to avoid any misunderstanding, we therefore suggest revising paras 61-75.

In the case on the lifetime extension of the Ukrainian NPP Rivne, the MOP decided that “the extension of the lifetime of the nuclear power plant, subject of the proceedings, after the initial licence had expired, should be considered as a proposed activity under article 1, paragraph (v), of the Convention, and is consequently subject to the provisions of the Convention [...]”⁴ The MOP thus refrained from identifying the lifetime extension in the certain case as “new” activity or major change to an activity and did not tie this outcome to works being performed.

Present case-law of the Implementation Committee shows that the **definition of “major change” is applied quite broadly**, including “resuming construction works after an extended time interruption in construction”⁵, “extension of the lifetime of a nuclear power plant, even in absence of any works”⁶, or “the modernization of motorways and express roads”⁷. **In the sense of a non-discriminatory approach, the present guidance should reflect this broad approach.**

Under this aspect, we do not consider it necessary to have separate Annex II listing factors determining lifetime extension as a “major change”.

If the Parties do not agree with this approach, we propose at the very minimum the following changes to this section:

1. Physical works and modified operation conditions

In para 65, the draft states that if the renovation works itself are of a scale that is comparable to when the plant was first put into service, this is to be regarded as major change. The draft refers in this regard to the judgement of the Court of Justice in Case C-411/17 but it misquotes it. In this case, the Court held that where renovations works “combined with” the extension was to be considered comparable to the first commissioning of the power plant (emphasis added):

*„The measures at issue in the main proceedings, which have the effect of extending, by a significant period of 10 years, the duration of consents to produce electricity for industrial purposes with respect to both power stations in question, which had up until then been limited to 40 years by the Law of 31 January 2003, **combined with** major renovation works necessary due to the ageing of those power stations and the obligation to bring them into line with safety standards, **must be found to be of a scale that is comparable, in terms of the risk of environmental effects, to that when those power stations were first put into service.**“*

⁴ Decision VI/2, Annex I, para 68.

⁵ ECE/MP.EIA/IC/2011/2, para 26 (a).

⁶ ECE/MP.EIA/IC/2013/2, para 21.

⁷ ECE/MP.EIA/IC/2009/2, para 30.

The renovation works itself must therefore not be of the same scale as the construction of the power plant itself; it is sufficient that the combination of works and continued operation are comparable, **in terms of the risk of environmental effects**, to the first commissioning of a nuclear reactor.

This should also be the approach for this section 1 relating to physical works and modified operating conditions.

2. "Lifetime extension per se"

We believe that this is crucial section that needs to form part of the guidance, including the addition in para 70.

It should further be made clear that also shorter extensions than those of 10 years can amount to a life-time extension. Whether this is the case should be determined by a screening taking a precautionary approach and considering all relevant factors, including the environmental impacts of the continued operation, changes in the natural environment surrounding the plant and the potential extent of the effects if an accident would occur, even if the risk of an accident is very small.

Section IV: Likelihood to cause significant adverse transboundary impact⁸

As mentioned before, LTE falls under the "nuclear reactors" activity listed in Appendix I to the Espoo Convention. **Under current Espoo approach, LTE is considered "by default" to have likely significant adverse transboundary impact unless it can be excluded on the basis of EIA documentation:**

As a general approach, the Espoo Implementation Committee has held that "even a low likelihood of a [significant adverse transboundary] impact should trigger the obligation to notify affected Parties", and that "notification is necessary unless a significant transboundary impact can be excluded".⁹

Specifically as regards nuclear activities, the MOP recognized that such activities require a precautionary approach, by, "[r]eiterating that nuclear energy-related activities by their nature can lead to significant transboundary and long-range adverse environmental impacts and imply special challenges owing, inter alia, to national interests and, in some countries, greater public concern" (emphasis added).¹⁰

This approach is also reflected in decisions of other international and regional bodies. The Aarhus Convention Compliance Committee has held that:

„It is clear to the Committee that with respect to nuclear power plants, the possible adverse effects in case of an accident can reach far beyond State borders and over vast areas and

⁸ For further information see ÖKOBÜRO/RACSE (2020) Lifetime Extension of Nuclear Power Plants – Analysis of Legal Aspects, pp 42 et seq.

⁹ Decision IV/2, ECE/MP.EIA/10, Annex I, para 54.

¹⁰ MOP Decision VII/6, ECE/MP.EIA/23.Add.2–ECE/MP.EIA/SEA/7.Add.2, recital 3.

*regions. For decision-making that relates to complex and ultra-hazardous activities such as nuclear power plants, it is therefore important to secure public participation appropriate to that activity with respect to these areas and regions both within and beyond the State borders of the Party concerned.*¹¹

The Court of Justice of the European Union (CJEU) has held that a decision to continue operation of a nuclear power plant:

„form part of a project that is likely to have significant effects on the environment in another Member State, and that project must undergo an assessment procedure of its transboundary effects in accordance with Article 7 of the EIA Directive, which takes account of the requirements of the Espoo Convention, as indicated by recital 15 of the EIA Directive.”¹²

We would like to stress that this precautionary approach must also be reflected in the present guidance. This would also correctly consider the clarification in para 80 of the draft that the same principles to assess significant adverse transboundary impact if Nuclear Power Plants is to be constructed also apply to an NPP’s lifetime extension. A profound revision of Section IV.C is therefore necessary.

The guidance should therefore acknowledge that, unless significant transboundary impact can be excluded, the question of likelihood of significant adverse transboundary impact must be assumed if the lifetime of nuclear installations is to be extended, including when a request for notification is received from party alleging to be affected.

In this respect, we also suggest to choose Option 1 as mentioned in para 90 of the draft.

Section V: Decision of a competent authority

On the question which features constitute a decision according to the Convention, the parties should accept an approach that for the purpose of the Espoo Convention activities listed in Appendix I that are likely to cause significant adverse transboundary impacts must be subject to a decision, as also stated in para 26 of the draft. This is in line with the principles of the Convention, and also reflected in its article 2 (2) and (3). We fully agree with the opinion of the Implementation Committee¹³ in this regard.

¹¹ Aarhus Committee findings on communication ACCC/C/2013/91 (UK), ECE/MP.PP/C.1/2017/14, para 75.

¹² Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, ECLI:EU:C:2019:622, para 161.

¹³ See enclosure to the opinion on the Draft guidance on the applicability of the Espoo Convention to the life time extension of nuclear power plants of 4 June 2020, available at https://www.unece.org/fileadmin/DAM/en/v/eia/documents/WG.9_2020/Informal_documents/2020_06_04_Letter_from_IC_to_Ad_hoc_group_NPP_LTE.pdf (14 August 2020).



In this respect we would like to refer to the Aarhus Convention Compliance Committee noting in its observations on the draft terms of reference for possible guidance on the applicability of the Espoo Convention to the lifetime extension of nuclear power plants that, "any future guidance not take an overly formalistic approach to what constitutes a 'decision'. The key point should be whether or not the lifetime of the existing NPP will in fact be extended."¹⁴

Therefore we fully support that Option 1 mentioned in para 115 of the draft should be included in the final guidance.

Regarding the "Characteristics of a Decision" we consider the understanding of the different terms "decision" and "final decision" confusing. Section V.C.1. refers in its title to the term "decision", while paras 118 and 120 contain references to the term "final decision". The passages on "final decision" should however, be treated under Section V.C.2. At the same time, to correlation between a "final decision" and an "initial permit" is incomprehensible.

Respectful of the ad Hoc group's work and deliberations so far we hope our suggestions will be considered within the guidance's finalisation phase.

Faithfully

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¹⁴ Observations by the Aarhus Convention Compliance Committee on the draft terms of reference for possible guidance on the applicability of the Espoo Convention to the lifetime extension of nuclear power plants, May 2018, https://www.unece.org/fileadmin/DAM/env/documents/2018/EIA/WG_7/Workshop_on_LTE_of_NPPs/Observations_on_Espoo_s_draft_ToR_on_LTE_of_NPPs_07.05.2018_final_002.docx (17 August 2020).