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19 August 2013

Dear Ms Smagadi

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom in connection with costs inflicted in case of refusal to grant judicial review (Ref. ACCC/C/2012/77)

1. Following your letter of 9th July 2013 we have provided responses below to the follow-up questions from the meeting with the Committee on this communication in Geneva on 27th June.
2. We would like to note that, as confirmed by the Committee at the meeting, the further information on public participation by the communicant and others in respect of the National Policy Statement is provided only to assist the Committee in understanding the background to the communication. It does not amount to an extension of the scope of this communication, which concerns articles 9(4) and (5) of the Convention.

Responses to questions

- 1) *Which issues have been closed and settled through the National Policy Statement (NPS), apart from the need for nuclear energy? Which issues remain open?*
3. The Party Concerned has set out below the range of issues covered in the NPS and the issues that would be determined on an application for development consent. The NPS sets the direction of travel and the overarching policy, but does this by providing principles and options to guide the Secretary of State as decision maker, and to inform site operators so that they can shape an application for development consent accordingly. For the main part, the NPS does not definitively close and settle certain



issues whilst leaving others open, except, as the Committee has observed, the need for nuclear power is said to have been demonstrated.

The framework set by the NPS

4. The Committee is referred to the following documents for relevant background:

(a) the Party Concerned's written submissions before the Compliance Committee, paragraphs 7, 29 and 30;

(b) the text of the Overarching NPS for Energy (EN-1) and the Nuclear NPS (EN-6), annexed to its written submissions; and

(c) the Secretary of State's summary grounds of defence to the judicial review, annexed to its written submissions. Page 6 and following sets out the legal framework for the NPS.

5. The NPS regime was introduced to avoid unnecessary delay when development consent is sought for nationally significant infrastructure projects, because "in principle" issues such as the need for nuclear power have already been settled. This then enables consideration of individual applications for development consent to concentrate on local issues.

6. The Planning Act 2008 ("the 2008 Act") provides that the NPS may, in particular, set out policies in the following areas:

- Set out the amount, type or size of development which is appropriate nationally or for a specified area;
- Set out the criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;
- Set out the relative weight to be given to specified criteria;
- Identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;
- Identify one or more statutory undertakers¹ as appropriate persons to carry out a specified description of development; and
- Set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.²

¹ "statutory undertakers" are defined in the Town and Country Planning Act 1990 as "persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power and a relevant airport operator (within the meaning of Part V of the Airports Act 1986)."

² Taken from section 5(5) of the Planning Act 2008.

7. On 19th July 2011, the government designated EN-1 to EN-6 as NPSs. The Overarching NPS for Energy (EN-1) sets out national policy for the UK's energy infrastructure. Technology-specific NPSs sit below EN1, including the Nuclear NPS (EN-6). This provides specific criteria to be applied when decisions are made on development consent for new nuclear power stations.
8. The Nuclear NPS (together with EN1) is the primary decision making document for the Secretary of State when considering development consent applications for the construction of new nuclear power stations on sites in England and Wales. The objective of the Nuclear NPS is to facilitate the delivery of new nuclear power on some or all of the sites listed in Part 4 of the document by the end of 2025. None of the sites listed in this NPS are in Scotland and Northern Ireland.

Issues to be determined on application for development consent

9. The Nuclear NPS is site specific in general terms but written in advance of knowing the detail of individual applications and does not predetermine applications. Part 2 of the Nuclear NPS sets a series of assessment principles against which applications for development of a new nuclear power station will be assessed. These principles include policy on the siting of power stations, the assessment of alternative sites, and the need to address regulatory requirements. They also address climate change adaptation and the need for effective arrangements for the management and disposal of waste.
10. Part 3 of the Nuclear NPS considers impacts and general siting considerations, for example the impact of having multiple reactors. Within this section 3.4 headed "Nuclear Impacts" sets out areas of potential impact where it is possible to provide general advice in advance of an application being made. This is expanded in sections 3.6-3.12, explaining how applicants should cover these points in their applications and how the Secretary of State³ should consider them. Section 3.5 entitled "Flags for Local Consideration" sets out siting criteria which can only be assessed when an application is made, for example proximity to civil aircraft movements. This is expanded on in sections 3.13-3.16 and by advice that in some of these areas the Secretary of State should be guided by the UK's independent nuclear regulator, the Office for Nuclear Regulation.
11. The Party Concerned's view is that, within the framework set by the NPS, which can be departed from in certain circumstances⁴, the issues concerning individual applications for development consent remain open for determination and for challenge once

³ The NPSs provided to the Committee refer to decisions being made by the Infrastructure Planning Commission ("IPC"). The Localism Act 2011 abolished the IPC and provided that examining applications would be the responsibility of a new body, the Major Infrastructure Planning Unit ("MIPU"), established within the Planning Inspectorate. MIPU reports to the relevant Secretary of State, who is responsible for determining the application. For energy projects the relevant Secretary of State is the Secretary of State for the Department of Energy and Climate Change.

⁴ See paragraph 18 of the Defendant's Summary Grounds of Defence.

determined. That this is the case is evidenced by the communicant's current application for judicial review seeking to quash the order made on 19th March 2013 granting development consent for a new nuclear power station at Hinkley Point C.

2) Was there any correspondence with the communicant before the pre-action protocol of 16 August 2011, requesting to reopen discussion on certain issues of the NPS, further to the Fukushima events? And in general, what is the usual impact of such letters?

12. The Party Concerned is not aware of any letter from Greenpeace about Fukushima and the NPS and has been unable to locate any such correspondence on its filing systems.
13. In response to the second question concerning the impact of such letters, following the Fukushima disaster the Department undertook a review of the draft NPS (which at that time had been consulted on twice but not finalised). It asked the Chief Nuclear Inspector, as part of his review of the implications of Fukushima for the UK, to consider specifically whether he thought the Office for Nuclear Regulation's previous advice on the NPS was still valid. He confirmed that it was and the Party Concerned proceeded to complete the NPS. This would be the approach to consideration of correspondence from someone concerned that Fukushima meant that the NPS needed reviewing.
14. This correspondence was published on the DECC website and is referred to at paragraph 12 of the Party Concerned's response to the Compliance Committee:

<https://www.gov.uk/government/publications/letter-from-mark-higson-dr-mike-weightman-and-the-secretary-of-state-for-energy-and-climate-change-regarding-issues-relating-to-npss-and-the-interim-report-on-fukushima>

3) How would the amendments introduced in April 2013, in following up with decision IV/9i of the Meeting of the Parties to the Convention, influence the outcome of the costs in the specific case?

15. Following the recent amendments to the Civil Procedure Rules in England and Wales a claimant may state in their claim form that the claim is an Aarhus Convention claim. Where a claimant does this and does not opt out from the rules on recoverable costs Rule 45.43 will apply (unless there is a successful challenge by the defendant as to whether it is an Aarhus Convention claim). Rule 45.43 provides that a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount specified in Practice Direction 45. The amounts specified for claimants are £5,000 for an individual not acting as or on behalf of a business or other legal person and £10,000 in all other cases.
16. If this specific case were to have taken place after the new rules had come into force, and Rule 45.43 applied in the circumstances described above, the costs exposure of the communicant would have been limited to £10,000. The costs the communicant was ordered to pay by the court was £8,000 following the rejection by the court of the arguments it submitted, an amount within this new limit. The £10,000 cap applies to

all the first instance stages, including the permission stage, providing a collective overall limit for these stages.

17. As was discussed at the meeting, it was open to the communicant prior to the adoption of the new rules for it to have applied to the court for an interim protective costs order to limit its costs exposure at the permission stage. The communicant did not do so.

Yours

A handwritten signature in blue ink, appearing to be 'Ceri Morgan', written in a cursive style.

Ceri Morgan