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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

12 December 2014

Dear Ms Marshall

RE: COMMUNICATION TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE CONCERNING COMPLIANCE BY THE UNITED KINGDOM IN CONNECTION WITH PUBLIC PARTICIPATION IN THE TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT PROCEDURE FOR TWO NUCLEAR REACTORS AT HINKLEY POINT: ACCC/C/2013/91

Dear Ms. Marshall,

I refer to your letter dated 17th November 2014, with which you enclosed eight questions from the Committee to the United Kingdom. The United Kingdom's responses to those questions are set out below.

(1) Describe the United Kingdom's approach to defining the scope of "the public concerned" for the purposes of the relevant authorisation procedures concerning: (a) nuclear activities; (b) other activities which are likely to have a significant effect on the environment, e.g. a large combustion plant

1. The United Kingdom understands that the reference to "the public concerned" in this question is a reference to article 6(2) of the Convention, and that the reference to the "relevant authorisation procedures" is a reference to the procedure in England and Wales for applications for development consent for nationally significant infrastructure projects such as Hinkley Point C. Accordingly, the United Kingdom understands that this question seeks information as to how the United Kingdom identifies "the public" who are to be notified of a proposed nationally significant infrastructure project in England and Wales that is likely to have a significant effect on the environment. For the avoidance of doubt, in this respect there is no difference between the approach adopted in the United

Kingdom to nuclear projects and that adopted to other nationally significant infrastructure projects.

2. The practical effect of the relevant domestic law is that, when notification of projects takes place, there is no differentiation between different members or sections of the public. The United Kingdom does not in practice differentiate between members of the public who are affected or likely to be affected by a project and members of the public who are not. In practice, the entire public is notified of a nationally significant infrastructure project that is likely to have a significant effect on the environment.

3. The applicable domestic law includes: (a) the Planning Act 2008 ("the Act"); (b) the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 ("the Procedure Regulations"); and (c) the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("the EIA Regulations").

4. The same rules on notification apply to all applications for development consent for nationally significant infrastructure projects (i.e. regardless of whether a project is likely to have a significant effect on the environment). The applicable rules may be summarised as follows.

   (1) Prior to the application being made, the developer of the project must publicise the proposed application by publishing a notice (the Act, section 48; the Procedure Regulations, regulation 4):
      (a) for at least two successive weeks in one or more local newspapers circulating in the vicinity of the proposed development;
      (b) once in a national newspaper;
      (c) once in the London Gazette; and
      (d) where the proposed application relates to offshore development, once in Lloyd's List and once in an appropriate fishing trade journal.

   (2) Prior to the application being made, the developer of the project must consult the public living in the vicinity of the project (the Act, section 47). The developer must also consult certain prescribed persons and bodies, including democratically-elected local authorities (the Act, sections 42-44; the Procedure Regulations, regulation 3 and Schedule 1).

   (3) When the application is made and accepted by the Secretary of State, the developer of the project must publicise the application by (the Act, section 56; the Procedure Regulations, regulation 9):
      (a) publishing a notice:
         (i) for at least two successive weeks in one or more local newspapers circulating in the vicinity of the proposed development;
         (ii) once in a national newspaper;

(iii) once in the London Gazette;

(iv) where the proposed application relates to offshore development, once in Lloyd's List and once in an appropriate fishing trade journal.

(b) displaying a notice at or as close as reasonably practicable to the site of the project at a place accessible to the public.

(4) When the application is made, it will be recorded on a register of all applications for development consent. That register is maintained as an open-access website and is therefore available for inspection by all free of charge (the Act 2008, section 39).[1] Since March 2014 it has also been possible to sign up for news updates on projects from the Planning Inspectorate, which enables recipients to get news of when new projects are received[2].

5. The effect of, in particular, the requirement to publish notification of the project in a national newspaper and the London Gazette on two occasions (before an application for development consent is made and when an application is accepted) and the fact that applications are publicised on an open-access website is that the entire public in the United Kingdom is notified of the project.

6. Further, where it is identified that a project is likely to have a significant effect on the environment in another EEA member state, the Secretary of State must notify the relevant member state and publish a notice in the London Gazette (EIA Regulations, regulation 24). It is then a matter for the relevant member state to determine what action is appropriate for the purposes of notifying the public in that state. This accords with the United Kingdom's obligations under article 3(1) of the Espoo Convention and article 7 of the EIA Directive.

7. Additional information as to the notification that occurred in the case of Hinkley Point C is set out in paragraph 21 of my letter to the Committee dated 16th May 2014 and in the opening statement presented to the Committee on 23rd September 2014.

8. All members of the public are entitled to participate in the development consent process. The law in England and Wales does not adopt an approach that differentiates between different members or sections of the public (whether on the basis of whether they are "the public concerned" or otherwise). In particular, there is no restriction on participation on grounds such as citizenship, nationality or domicile. For example, as explained in response to question 7 below, the

[1] http://infrastructure.planningportal.gov.uk/projects/register-of-applications/.

[2] http://infrastructure.planningportal.gov.uk/feed.

Communicant was entitled to, and did, participate in the development consent process relating to Hinkley Point C.

9. Notification of other applications for planning permission in England (i.e. not applications for development consent for a nationally significant infrastructure project, but ones which are nevertheless likely to have a significant effect on the environment) is governed by the Town and Country Planning (Development Management Procedure) (England) Order 2010, regulation 13, and the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, regulations 16 and 17. In summary, the requirements here are (a) the application must be advertised locally; (b) notice of the application must be displayed on the site of the proposed development; (c) persons who are or are likely to be affected by the application, but who are not likely either to see the advertisement or the notice, must be notified directly; and (d) notice of the application must be published on a web-site maintained by the relevant local planning authority.

(2) Does the United Kingdom have any guidelines regarding "impact" for the purposes of environmental impact assessment, for example, defining a radius within which for certain activities an impact is deemed? If so, please provide the Committee with a copy of these guidelines, indicating the relevant sections

10. The United Kingdom understands that this question is directed at how the United Kingdom identifies which members or sections of the public are affected or likely to be affected by a project and, in particular, how the United Kingdom identifies the likely geographical scope of any significant effects on the environment to which a project may give rise.

11. As explained above, in the case of an application for development consent for a nationally significant infrastructure project in England or Wales, the practical effect of the applicable legislation is that the entire public is notified of a nationally significant infrastructure project and therefore it is not generally necessary for this purpose to identify the likely geographical scope of any significant effects on the environment to which a project may give rise or the particular members or sections of the public who are affected or likely to be affected by a project.

12. As also explained above, in the case of an application for planning permission for other types of development, the practical effect of the applicable legislation is that all persons who are likely to be affected by the project must be notified. There is no specific guidance on how such persons are to be notified. Accordingly, where it is necessary to do so, the appropriate authority (a) undertakes identification of the likely geographical scope of any significant effects on the environment; and (b) undertakes identification of the members or sections of the public that are affected or likely to be affected by a project, by having regard to the particular circumstances case by case. This allows the appropriate authority to take into

account matters such as the precise nature of the individual project, its location, the surrounding environmental conditions, and the type of effects concerned.

13. For the avoidance of doubt, it will be necessary to identify the likely geographical scope of any significant effects on the environment for the purposes of ensuring that the environmental statement includes the required information. There is a range of guidance available on the assessment of environmental effects generally, and there is provision for specific guidance to be given by way of scoping opinions (on which statutory nature conservation bodies will give advice). In relation to nationally significant infrastructure projects, the UK Planning Inspectorate currently provides the following standard guidance to developers in Appendix 3 of its scoping opinions on the content of environmental statements.[3]

"*Physical Scope*

In general the Secretary of State recommends that the physical scope for the EIA should be determined in the light of:

- the nature of the proposal being considered
- the relevance in terms of the specialist topic
- the breadth of the topic
- the physical extent of any surveys or the study area, and
- the potential significant impacts.

The Secretary of State recommends that the physical scope of the study areas should be identified for each of the environmental topics and should be sufficiently robust in order to undertake the assessment. This should include at least the whole of the application site, and include all offsite works. For certain topics, such as landscape and transport, the study area will need to be wider. The extent of the study areas should be on the basis of recognised professional guidance and best practice, whenever this is available, and determined by establishing the physical extent of the likely impacts. The study areas should also be agreed with the relevant consultees and, where this is not possible, this should be stated clearly in the ES and a reasoned justification given."

14. If it would be of assistance to the Committee to have further information about the range of guidance referred to above, please do not hesitate to let me know.

(3) Describe the United Kingdom's approach to the "worst case scenario" in environmental impact assessment (EIA) generally, and in EIA for nuclear activities

[3] Similar guidance was provided to the developer of Hinkley Point C, albeit in a different format.

15. An environmental impact assessment is only required where a project is likely to have significant effects on the environment or where it is a project listed in Schedule I to the EIA Regulations. (Nuclear power stations other than certain research installations are listed in paragraph 2(b) of Schedule I to the EIA Regulations, and therefore an environmental impact assessment will always be required for a nuclear power station such as Hinkley Point C.) The environmental report on a project prepared by a developer is only required to address the likely significant effects of the proposal. These requirements are in accordance with the provisions of the EIA Directive.

16. Whether or not a significant effect is "likely" is approached on the precautionary basis: see the judgment of the Court of Appeal in the *An Taisce* case, a copy of which has previously been provided to the Committee. In its judgment in that case, the Court of Appeal concluded that it is necessary to consider whether there is a "real risk" of a significant effect on the environment, and that both the degree of probability and the level of impact must be considered (see judgment at paragraphs 23 and 43).

17. The advice note published by the Planning Inspectorate ("Screening, Scoping and Preliminary Environmental Information") is to the same effect. A copy of this advice note is enclosed with this letter.

18. The most relevant part of that guidance is the section headed *"assessment of effects and impact significance"*. It states the following.

> "The EIA Regulations require the identification of the 'likely significant effects of the development on the environment' (Schedule 4 Part 1 paragraph 20).
>
> As a matter of principle, the Secretary of State applies the precautionary approach to follow the Court's reasoning in judging 'significant effects'. In other words 'likely to affect' will be taken as meaning that there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect.
>
> The Secretary of State considers it is imperative for the ES to define the meaning of 'significant' in the context of each of the specialist topics and for significant impacts to be clearly identified. The Secretary of State recommends that the criteria should be set out fully and that the ES should set out clearly the interpretation of 'significant' in terms of each of the EIA topics. Quantitative criteria should be used where available. The Secretary of State considers that this should also apply to the consideration of cumulative impacts and impact inter-relationships.
>
> The Secretary of State recognises that the way in which each element of the environment may be affected by the proposed development can be approached in a number of ways. However it considers that it would be helpful, in terms of

ease of understanding and in terms of clarity of presentation, to consider the impact assessment in a similar manner for each of the specialist topic areas. The Secretary of State recommends that a common format should be applied where possible."

19. It follows that there is no fixed approach to the "worst case scenario"; a "worst case scenario" is not required to be considered as a matter of course. The relevant question under the EIA Directive is not "what is the worst case scenario?", but rather "what are the likely significant effects on the environment?". If there is a real risk that events comprising a "worst case scenario" will occur, then those events will be treated as a likely significant effect for the purposes of environmental impact assessment. For the avoidance of doubt, in this respect there is no difference between the approach adopted in the United Kingdom to nuclear projects and that adopted to other projects.

20. The United Kingdom observes that there is nothing in the Convention that requires consideration of the "worst case scenario". On the contrary, article 2(5) defines "the public concerned" as "the public affected or likely to be affected or having an interest in" the relevant project. The Convention therefore adopts the same approach as the domestic legislation and the EIA Directive by referring to "likely" effects. If by use of the phrase "worst case scenario" the Committee has in mind something different to the likely effects of a proposal, the United Kingdom would be grateful for an explanation of the meaning of the phrase "worst case scenario" in this context, and the legal basis for that meaning (whether within the Aarhus Convention, the EIA Directive, or otherwise).

(4) Was the "worst case scenario" examined in the EIA for Hinkley Point C? If so, what was the "worst case scenario" assessed to be? Please provide the Committee with copies of the relevant documentation

21. The points made at paragraphs 15 – 20 above are repeated. As explained in those paragraphs: (a) the United Kingdom does not adopt a fixed approach to the "worst case scenario"; (b) the "worst case scenario" is not required to be considered as a matter of course; and (c) this is in accordance with the provisions of the EIA Directive and the Convention.

22. In the present case, and in accordance with the EIA Directive and the Convention, the United Kingdom considered the significant effects on the environment to which Hinkley Point C was likely to give rise (i.e. those in respect of which there was a "real risk" that they would occur).

23. Insofar as it might be contended that the "worst case scenario" for Hinkley Point C is a serious accident causing an emission of radiological material that could have a significant effect on the environment in another state, I wish to make it clear that the Secretary of State, having considered the information available to

him, did not consider that there was a "real risk" that such an accident might occur.

24. In particular, in paragraph 6.6.2(iii) of the decision letter dated 19th March 2013, the Secretary of State stated as follows

"The Austrian Expert contends that in assessing the likely environmental effects of HPC project, I should take into account the effects of very low probability, extreme (or severe) accidents. Effectively the report says that unless it can be demonstrated that a severe accident (involving significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However, in my view such accidents are so unlikely to occur that it would not be reasonable to 'scope in' such an issue for environmental impact assessment purposes."

25. The United Kingdom intended to provide the Committee with a copy of the Secretary of State's decision letter under cover of its letter to the Committee dated 16th May 2014. By reason of an oversight this letter was not so provided. I apologise. A copy of the decision letter dated 19 March 2013 is enclosed with this letter.

26. On the evidence available to the Secretary of State at the time of his decision a serious accident causing an emission of radiological material that could have a significant effect on the environment in another state is likely to occur no more frequently than once in every 10,000,000 years. Such an extremely low probability event cannot be characterised as "likely" and it cannot be said that there is a "real risk" of such an event occurring. This is the same evidence as is available to the Committee. The Communicant has not provided any different evidence.

(5) Please provide the Committee with copies of the correspondence between the Governments of Austria and the United Kingdom regarding the decision-making procedure on Hinkley Point C, together with any comments on the correspondence you would like to make

27. The relevant correspondence is attached. Please note that the opportunity afforded to the Government of Austria to participate in the decision-making procedure on Hinkley Point C arose because the Government of Austria expressly requested such an opportunity. The United Kingdom did not notify Austria pursuant to either the Aarhus or the Espoo Conventions and did not purport to consult Austria pursuant to either of those Conventions; any suggestion to the contrary by the Communicant is incorrect. In this respect, please note that the letter from the United Kingdom Government dated 17th January 2013 expressly states that *"the United Kingdom has seen no evidence to*

suggest that there would be any significant transboundary effects which might affect Austria as a result of this development".

(6) Were the comments of the Austrian public taken into account in the decision-making procedure on Hinkley Point C? If yes, please indicate how their views were taken into account, referring to specific paragraphs of the decision where appropriate.

28. The comments of the Austrian public were taken into account in the decision-making procedure on Hinkley Point C, where relevant. Those comments are expressly referred to in section 6.6.2 of the Secretary of State's decision letter dated 19 March 2013.

(7) In his letter to the communicant of 15 March 2013 (annex 2 to the communication), Mr. Giles Scott states that *"I can assure you that [the Secretary of State] will take your representation into account before taking his decision on whether to grant development consent for the construction of the proposed Hinkley Point C…"*. Please indicate how the communicant's views were taken into account, referring to specific paragraphs of the decision where appropriate

29. The Communicant's representations on Hinkley Point C were set out in her letter dated 13th March 2013. In that letter, the Communicant complained about the lack of a trans-boundary consultation with the public in Germany and requested such a consultation. The only substantive point that the Communicant made about Hinkley Point C was that Germany might be affected in the event of a serious accident at Hinkley Point C. In this respect, the only information relied upon by the Communicant was the evidence provided by the Austrian Government.

30. The one substantive issue raised by the Communicant, and the information relied upon by her, was considered in the decision letter. Section 6.6.2 of the decision letter expressly considered the complaint that, based on the evidence provided by the Government of Austria, there should have been a transboundary consultation. Accordingly, although the Communicant's letter was not referred to expressly in section 6.6.2, the substance of her complaint was considered and addressed on its merits. For the avoidance of doubt, and as a matter of law, the Secretary of State was not required to refer expressly to the Communicant's letter in his own decision letter. The law in England and Wales recognises that in many instances it will not be practical for a decision letter to refer to each and every representation received. Thus in the present case and in this respect, the Secretary of State's decision letter complied with all requirements under domestic law.

31. For completeness sake I should also draw your attention to paragraph 6.6.3 of the Secretary of State's decision letter. Section 6.6.3 of the decision letter

explained that many of the representations received since the close of the examination period raised matters that the Secretary of State was entitled to disregard under section 106 of the Act. (Section 106 of the Act permits the Secretary of State to disregard representations if they vexatious or frivolous, if they relate to the merits of a policy set out in a national policy statement, or if they relate to compensation for the compulsory purchase of land.) The point made at paragraph 6.6.3 of the decision letter was that representations received since the close of the examination period had been disregarded if and to the extent that they did no more than repeat matters raised in representations received during the examination period. The point raised by the Communicant was to the effect that by reason of the information provided by the Austrian government, trans-boundary consultation should have taken place. This was a point considered by the Secretary of State – see above at paragraph 30.

(8) With respect to the preparation of the United Kingdom's National Policy Statement for Nuclear Power Generation (NPS), please specify when and how the German Government was notified of the NPS' preparation and provide copies of the exchange of correspondence between the Governments of the United Kingdom and Germany with respect to its preparation. Please identify all references to Hinkley Point C in (i) the NPS, and (ii) the exchange of correspondence between the Governments of the United Kingdom and Germany regarding the preparation of the NPS

32. A summary of the United Kingdom's consultation of other states on the nuclear NPS is set out in paragraphs 96 to 100 of the witness statement of Giles Scott (provided to the Committee with my letter dated 16 May 2014).

33. The initial notification of other states was by way of an e-mail in November 2009, which was sent to relevant contacts in all EEA States. Regrettably, it has not been possible to locate a copy of that e-mail, but the relevant notification is referred to in the letter from the Government of Austria dated 19th February 2010 and the e-mail dated 28th October 2010 referred to below. The United Kingdom therefore believes that this e-mail was sent to the Government of Germany.

34. The notification of the revised nuclear NPS was by way of an e-mail dated 28th October 2010, a copy of which is enclosed. The e-mail was sent to Martina Frauer and Mattias Sauer of the Bundesministerium fur Umwelt.

35. Links to the relevant documentation was included in these e-mails (the documents have since been archived, therefore the links set out in the footnotes below differ from the links included in the e-mails). The material relating specifically to Hinkley in NPS EN-6 is contained in Volume 2, Annex C5 of the

nuclear NPS (at pages 105-132, with maps at pp 256-257).[4] This material is in part a summary of the Appraisal of Sustainability (AoS)[5] and Habitats Regulations Assessment (HRA)[6] site reports for Hinkley Point.[7]

I hope that the above addresses the matters raised in your letter. If there are any points on which I can be of further assistance, or if there are any points arising from the matters set out above, please do not hesitate to contact me.

Yours sincerely

Ahmed Azam

Ahmed Azam
United Kingdom National Focal Point
to the UNECE Aarhus Convention

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[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/37052/1943-nps-nuclear-power-annex-volII.pdf.

[5] http://webarchive.nationalarchives.gov.uk/20110302182042/https://www.energynpsconsultation.decc.gov.uk/nuclear/nominated_sites/hinkleypoint/new_material/aos

[6] http://webarchive.nationalarchives.gov.uk/20110302182042/https://www.energynpsconsultation.decc.gov.uk/nuclear/nominated_sites/hinkleypoint/new_material/hra

[7] The versions of the AoS and HRA originally consulted on in 2009 can be found at http://webarchive.nationalarchives.gov.uk/20110302182042/https://www.energynpsconsultation.decc.gov.uk/nuclear/nominated_sites/hinkleypoint/old_material/original_aos_and_hra.