ENGLISH TRANSLATION OF GROUNDS 9 AND 10 OF THE JUDGMENT OF THE COUNCIL OF STATE

Environmental Impact Assessment (hereafter EIA)

9. Greenpeace et al. and the second applicant maintain that an EIA should have been performed prior to taking the disputed decision, since the changes permitted by the disputed decision involve significant adverse effects on the environment. In support of this position, Greenpeace et al. refer to article 4, paragraph 2 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L26; hereinafter: the EIA Directive), in conjunction with Annex II, paragraph 13 to this Directive and Chapter 7 of the Environmental Management Act. These provisions must be interpreted, according to the applicants, in the light of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991; hereafter: the Espoo Convention). According to the second applicant, the failure to perform an EIA is in breach of the Espoo Convention. Greenpeace et al. contend that the Implementation Committee set up under the Espoo Convention (hereinafter: the Implementation Committee) recently concluded that the extension of the design lifetime of a nuclear power station, without it being accompanied by further physical intervention, must be regarded under the terms of the Espoo Convention as a major change that requires an EIA. The second applicant further argues that it follows from the disputed decision that article 11, paragraph 1, opening words and (c) of the Nuclear Plants, Fissionable Materials and Ores Decree is applicable, and it is therefore an established fact that the application relates to a modification to the installation. Greenpeace et al. and the second applicant maintain that the circumstance that several components of Borssele nuclear power plant (hereafter: KCB) may have to be replaced in due course likewise confirms that drastic changes will be taking place at KCB. In addition, Greenpeace et al. and the second applicant take the position that category 22.3, 5° of Part D of the Schedule to the Environmental Impact Assessment Decree (hereafter: EIA Decree) is applicable, because the disputed decision also involves a change to the time at which KCB is to be decommissioned. On the basis of the same provision, they contend that an obligation existed to perform an EIA. Greenpeace et al. further take the position that in the United States it is customary to draw up an Environmental Impact Report before deciding on a proposal to extend the design lifetime of a nuclear plant. Since the United States has had more experience in this area than Europe, argue the applicants, the Minister should have incorporated the procedures followed there into his assessment.

9.1. Besides the Netherlands, the European Union too is party to the Espoo Convention. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment was amended to bring it into line with the Espoo Convention by means of Council Directive 97/11/EC of 3 March 1997. These Directives have since been repealed and replaced by the EIA Directive. The latter has been implemented in the Environmental Management Act. It is not in dispute that the EIA Directive has been correctly implemented. The Directive does not have direct effect.

9.2. Pursuant to section 7.2, subsection 1 of the Environmental Management Act, the following activities must be designated by order in council:
a. activities that can have serious adverse effects on the environment;
b. activities in respect of which the competent authority must decide whether they may have serious adverse effects on the environment.

Under section 7.2, subsection 4 of the Act, the categories of decisions are designated, in respect of the activities referred to in subsection 1 (b), in relation to which the competent authority is required to assess, pursuant to section 7.17 or 7.19 of the Act, whether the activities will have the impact referred to in that point, and if so, that an Environmental Impact Report must therefore be drawn up as part of the preparation.

Pursuant to section 7.17, subsection 3, in making its decision, the competent authority must take into account the criteria specified in Annex III to the EIA Directive.

Pursuant to article 2, paragraph 2 of the EIA Decree, in so far as relevant here, the activities designated in section 7.2, subsection 1 (b) of the Act are those belonging to one of the categories listed in Part D of the Schedule to the EIA Decree.

The activities designated in category 22.3, 5° of Part D of the Schedule to the EIA Decree are those involving the establishment, modification or expansion of one or more related installations for the treatment and storage of radioactive waste in cases in which the activity relates to a change of more than five years to the time at which a nuclear plant is to be decommissioned or dismantled.

Part A, paragraph 2 of the Schedule to the EIA Decree clarifies certain definitions for the purposes of this Schedule as follows:

modification: includes a reconstruction or any other kind of change to installations, equipped areas, or existing plants;
expansion: includes the re-use of installations, equipped areas, or existing plants;
establishment of an installation: includes the expansion of an installation by the establishment of a new installation.

Pursuant to article 11, paragraph 1, opening words and (c) of the Nuclear Plants, Fissionable Materials and Ores Decree, the application for a permit to modify an installation within the meaning of article 6, 7, 8 or 9, if it concerns an installation within the meaning of article 6, 7 or 8 and the proposed change influences one or more pieces of data as referred to in the safety report submitted for the purposes of obtaining the permit as referred to in article 11, paragraph 1 (a), or the risk analysis as referred to in article 6, paragraph 1 (h), must in any case be accompanied by a supplementary document to the safety report and/or risk analysis.

9.3. By decision of 18 June 1973, a permit was issued to EPZ for putting KCB into operation and keeping it operational for an indefinite period. Condition I.1 of this permit states that KCB must be equipped and operated in accordance with the provisions of section 1.1 and Chapters 3 to 21 inclusive of Safety Report VR-KCB93, as amended and supplemented by the revisions with reference numbers VR-KCB93 REV.1, VR-KCB93 REV.2, VR-KCB93 REV.3, VR-KCB93 REV.4, VR-KCB93 REV.5 and VR-KCB93 REV.6. A number of the design analyses in this Safety Report were based on a design lifetime of 40 years.

The Voluntary Agreement on KCB entered into effect in 2006. This voluntary agreement provides *inter alia* that KCB's design lifetime is continued until 31 December 2033 at the latest, which provision has been incorporated into section 15a of the Nuclear Energy Act.

The requested changes relate to the updating of the safety report. They are set down in the revision document VR-KCB93 REV.7, which was appended to the application. The updating of the safety report relates to the extension of KCB's design lifetime from 40 to 60 years.

9.4. The requested changes do not involve any actual modifications within KCB. They relate solely to the updating of the safety report. The requested changes are not activities such as those listed in Part D, category 22.3, 5° of the Schedule to the EIA Decree, first and foremost because they do not involve any modification, expansion or establishment as referred to in Part A, paragraph 2 of the Schedule to the EIA Decree. The fact that they may mean that some of the KCB's components will need to be replaced in the future does not alter what has been stated above. Nor – contrary to what the second applicant maintains – does it follow

from the fact that the Minister examined the permit application in the light of article 11, paragraph 1, opening words and (c) of the Nuclear Plants, Fissionable Materials and Ores Decree that any actual modifications are being made at KCB. It cannot be inferred from the recent opinion of the Implementation Committee, which is quoted by Greenpeace et al., that the requested changes do involve an actual modification. There are no grounds for the view that the Minister should have taken into account the procedure followed in the United States for the issuing of a comparable permit as part of the permit procedure in the Netherlands.

Having regard to the above, there are no grounds for the view that the Minister wrongly adopted the position that no EIA was required before taking the disputed decision.

The grounds for review are rejected.

10. In so far as the requested changes do not in themselves require the competent authority to assess whether an Environmental Impact Report must be drawn up by the permit applicant, Greenpeace et al. argue, alternatively, that the introduction of section 15a, subsection 1 of the Nuclear Energy Act has the effect of changing the time at which KCB is to be decommissioned within the meaning of Part D, category 22.3, 5°, of the Schedule to the EIA Decree, so that the aforementioned obligation on the competent authority arises nonetheless on these grounds. The applicants argue that changing by law the time at which the plant is to be decommissioned has the effect of imposing an obligation on the competent authority to assess whether an Environmental Impact Report must be drawn up by the permit applicant at the time at which the next decision is made about a subsequent change. In support of this position they cite the judgment of 17 March 2011 of the European Court of Justice, C-275/09, *Brussels Hoofdstedelijk Gewest* (www.curia.europa.eu). In their opinion, the requested changes must be regarded as one phase of a procedure composed of different phases in relation to which the competent authority ultimately has the obligation described above.

10.1. Pursuant to section 15a, subsection 1 of the Nuclear Energy Act, as from 31 December 2033, the permit issued under section 15b of the Act for the continued operation of KCB, which first became operational in 1973, as it relates to the production of nuclear energy, will expire.

10.2. In the judgment of 17 March 2011 cited by Greenpeace et al., the ECJ considered that a permit that does not relate formally to an activity that requires an EIA within the meaning of Annexes I and II to Directive 85/337 (now: the EIA Directive) may nonetheless impose an

obligation to perform an EIA, according to settled case law of the Court, if the measure constitutes a stage of a procedure that is ultimately geared towards obtaining approval for an activity that is a project within the meaning of article 2, paragraph 1 of Directive 85/337. According to this same case law, if national legislation prescribes that the permit procedure should proceed in several stages, the EIA of a project will be performed in principle as soon as it is possible to identify and assess all the environmental effects that may ensue from the project. The changes requested here do not constitute a stage of a permit procedure consisting of different stages that is ultimately geared towards the implementation of activities in respect of which the competent authority is required to assess whether the permit applicant must draw up an Environmental Impact Report.

The alternative ground for review is likewise rejected.