

To: Compliance Committee
of the UN ECE Convention on Access to Information, Public Participation in
Decision-Making and Access to Justice in Environmental Matters

through the Secretariat of the Convention

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AMICUS MEMORANDUM

SUBMITTED WITH REGARD TO COMMUNICATION ACCC/C/2009/37

by European ECO Forum

Introduction

1. This Memorandum is submitted with regard to communication made in relation to the Republic of Belarus, Ref: ACCC/C/2009/37.
2. This Memorandum is not filed as a communication from the public in the meaning of the Decision I/7 of the First Meeting of the Parties of the Aarhus Convention. This Memorandum does not allege a violation of the ECO Forum's rights under the Aarhus Convention (hereinafter – the Convention).
3. This Memorandum was prepared by the European ECO Forum Legal Team. For future correspondence related to this Memorandum the following contacts should be used:

Purpose and issues raised

4. By filing this Memorandum European ECO Forum wishes to bring to the attention of the Compliance Committee the deficiencies in practice of ensuring application of the rights and procedures envisaged by the Convention in the Republic of Belarus, as well as the recently adopted legislation on public participation in decision-making related to nuclear issues, including nuclear activities covered by Annex I to the Convention.

5. This Memorandum, therefore, focuses on two issues: (a) inadequate legislation on public participation in decision-making on nuclear issues recently introduced in Belarus and (b) inadequate access to information and public participation in the decision-making related to authorization of the nuclear power plant construction in Belarus.

6. We are aware of the fact that the issue of construction of the nuclear power plant (NPP) in Belarus was brought to the attention of the Implementation Committee of the Espoo Convention. Since the issue may be subject to further consideration by the Espoo Implementation Committee, we will exclusively focus on matters related to public participation and access to information on national level, without discussing transboundary aspects of the NPP construction in Belarus.

(a) Inadequate national legislation on public participation in decision-making on nuclear issues

7. The national legislation on public participation in decision-making on nuclear issues comprises the following key laws and regulations:

general:

- *The Law of the Republic of Belarus on State Environmental Expertiza* of June 18, 1993 (as subsequently amended)
- *Instructions on the Procedures for State Environmental Expertiza*, adopted by the Decision of the Ministry of the Environmental Protection of Belarus No.8, May 11, 2001.
- *Instructions on the Procedures for Environmental Impact Assessment of the Planned Economic and Other Activities in the Republic of Belarus and the List of Types and Objects of Economic and Other Activities Which Are Subject to Compulsory EIA*, adopted by the Decision of the Ministry of the Environmental Protection of Belarus No.30, June 17, 2005.

specific:

- *Regulation on the procedures for discussion of the issues in the area of the use of nuclear energy with participation of citizens associations, other organizations and citizens*, adopted by the Decision of the Cabinet of Ministers of Belarus No.571 on May 4, 2009

8. This Section includes analysis of the first three documents listed above exclusively in relation to nuclear projects and in comparison to the provisions of the forth (specific) document listed above. The application of public participation procedures provided for

under Article 6 and 7 to specific nuclear issues (decisions) is explained in Section (b) of this Memorandum.

9. State environmental expertiza and environmental impact assessment (OVOS) are the two procedures commonly considered together as a decision-making process (in the meaning of Article 6 of the Convention) in Belarus.¹ These procedures shall be applied to nuclear projects.

10. Recently adopted *Regulation on the procedures for discussion of the issues in the area of the use of nuclear energy with participation of citizens associations, other organizations and citizens* (hereinafter – the Regulation) introduced new special regime for public participation in decision-making on nuclear issues.

11. The *Regulation* sets a legal basis and order (procedures) for discussing nuclear issues with citizens, their associations and other organizations, including the public of states possibly affected by the transboundary impact of the planned activities in the area of nuclear energy (para.1 of the *Regulation*). The *Regulation* does not apply to activities in the area of nuclear energy use, information about which is classified as state secret (para.1, part 2).

12. The *Regulation* makes a direct reference to the Aarhus Convention as to the definitions of terms used in the *Regulation* (para.2), as well as to Espoo Convention and the Law on Use of Nuclear Energy. The *Regulation* itself does not provide for definitions of the relevant terms, such as public, public concerned, environmental information, etc.

Requirements on public notice (Article 6(2) of the Convention)

13. Paragraph 11 of the *Regulation* states that the “public discussions” (or discussions with the public) shall be carried out (a) on national level if the consequences of the planned nuclear activities have national character or (b) on local level if the consequences of the planned nuclear activities have regional character. There’s no reference to what is meant by “having national character” or “local character”. In our view, this provision is unclear and limits public participation only to the public concerned living (or active) in a specific region or city, at least in case of activities falling under (b). In particular, that would mean that national NGOs would not be able to participate unless they are registered or located in that specific region.

14. Paragraph 15 of the *Regulation* says that the public notice about planned nuclear activity shall be given (distributed) to the public, including population, living in the area where the proposed planned activity is envisaged to take place, as well as on areas (territories) possibly affected by the planned activity. This requirement substantially limits the scope of “public concerned” in the meaning of the Convention by using only one (locational) criteria for defining the public to be notified. **This is in contradiction with the requirements of Article 6(2) of the Convention to inform the public concerned of the proposed activity.**

15. Paragraph 14 of the *Regulation* states that public notice about **commencement** of public consultations may be made through publication of the EIS, publication and distribution of flyers and other brochures, direct informing via mail, electronic mail,

¹ Strictly speaking, OVOS is a separate procedure which does not qualify as decision-making itself.

electronic networks. Under paragraph 17 of the *Regulation* the developer together with local authorities shall inform the public via mass-media and other means about periods, date and place of the public hearings, place where the public can examine environmental impact statement and report on EIA (OVOS report). There's no direct requirement to publish environmental impact statement (except when organizing nation-level public hearings, para. 18). **These requirements are clearly in violation of those imposed by Article 6(2) since they are only related to the commencement of public consultation procedures (subparagraph d) of the Article 6(2).**

Requirements on reasonable timeframes (Article 6(3) of the Convention)

16. Paragraph 19 of the *Regulation* states that public consultations shall not be held, **as a rule**, earlier than 30 days after the public notice about commencement of public consultations was given. Moreover, it says that **during** that period [30 days] the developer should distribute the environmental impact statement. Paragraph 20 further says that the period of public consultations shall not exceed, as a rule, one month. This is the minimum period of time established in the EIA legislation of Belarus. It is also unclear, at what time this period of consultations starts while strict reading would suggest that from the time of public notice. Altogether these two provisions mean that a public may be notified of a planned nuclear activity and then shall wait until EIS is distributed, then develop and provide comments within a single month. **We consider this to be in violation of the requirements under Article 6(3) since periods established are not reasonable, especially as related to the possibility envisaged by the legislation to held hearings after 30 days of public notice whereas no obligation is imposed to make EIS available at the time of public notice is made.**

Requirements on due account to be taken of the outcomes of public participation (Article 6(8) of the Convention)

17. The *Regulation* requires that the EIA report (OVOS report) shall include records of the public consultations (paragraphs 25-26). The records shall include all comments received as well as grounds for accepting or declining that. Since EIA report is a document prepared by the developer and further submitted to the public authority for approval (state environmental expertiza) it cannot be qualified as "decision". **This contradicts the requirement of the paragraph 8 of the Article 6 of the Convention.**

Requirements communicating final decision (Article 6(9) of the Convention)

18. The *Regulation* lays down public participation procedures to be applied during the OVOS process (environmental impact assessment by the developer). The OVOS process cannot end with a decision since it is not a decision-making procedure. National legislation does not provide for any other possibilities to participate in decision-making on nuclear issues. **Therefore, the procedures established by the Regulation inevitably leads to violation of the requirements under paragraph 9 of the Article 6 of the Convention.**

19. The *Regulation* provides for the requirement to publish the EIA (OVOS) report (para.28) together with a note on comments (proposal) declined with explanations of grounds for declining. However, at the same time EIA legislation and the *Regulation* itself require that the EIA report includes full list of comments and proposals received from the public, together with explanations for accepting and declining them (para's 25-26). This is

not the only contradicting provisions of the Regulation. Paragraph 4 of the *Regulation* provides that EIA report is subject to public consultations, while EIA legislation clearly states that EIA report is a final stage of OVOS process. Neither EIA legislation, nor the *Regulation* provide for any possibilities to discuss EIA report.

20. The conclusions of the state environmental expertiza can be considered to qualify as a decision in the meaning of the Article 6 of the Convention. Those conclusions are not subject to publication or distribution to the public. **Therefore, national legislation does require communicating decision to the public as required by paragraph 9 of the Article 6 of the Convention.**

21. In summary, Belarus has failed to comply with its obligations under Article 3(1) by not taking necessary legislative and regulatory measures to implement provisions of paragraphs 2, 3, 8 and 9 of the Article 6 of the Convention with regard to planned nuclear activities.

(b) inadequate access to information and public participation in the decision-making related to authorization of the nuclear power plant construction

22. This section of the Memorandum describes the deficiencies in practical application of the public participation procedures in Belarus to proposed nuclear activities on the example of a proposed project to construct a nuclear power plant.

Facts²

Decision to introduce nuclear energy

23. Belarus has already taken a policy decision to construct a nuclear power plant (NPP) by 2016. This decision was taken without any consultations with the public.

24. The key policy and planning decisions taken in Belarus to construct nuclear power plant were:

- **June 14, 2007:** Directive No.3 of the President of Belarus “Economy and Saving – Key Factors for Economic Security of the State”

Paragraph 1.3.1 Directive obliges the Cabinet of Ministers and National Academy of Sciences to speed up works to construct nuclear power plant.

- **November 12, 2007:** Decree of the President of Belarus No.565 “On Some Measures to Construct Nuclear Power Plant”

This Decree has established several state bodies responsible for the construction of the nuclear power plant, including main developer (Directorate for the Construction of the Nuclear Power Plant), newly created nuclear safety authority (within the Ministry of Emergency Situations), etc.

² The Facts partly reproduce relevant parts of the information submitted to the Espoo Implementation Committee by the non-governmental organization from Ukraine, available at:
http://www.unece.org/env/eia/implementation/implementation_committee_letters.htm.

- **January 15, 2008:** a decision by the Security Council to construct a nuclear power plant

National Security Council had a discussion on this issue at its meeting on January 15, 2008. The meeting was chaired by the President of Belarus. The meeting took a formal decision to construct a nuclear power plant. The decision itself was further drafted and signed at the end of the month by the President of Belarus.

- **January 31, 2008:** President of Belarus signed the Decision of the Security Council No.1 “On the Development of Nuclear Energy in the Republic of Belarus”.

The decision stipulates that the Government of Belarus plans to construct two nuclear reactors, 1,000 Mwt each, commissioning years 2016 (first reactor) and 2018 (second reactor).

25. In addition, Belarus has adopted the *Energy Security Strategy* in 2007, which includes a task to develop nuclear power plant in the country.

26. These are the decisions which are known to be taken from official sources. There must have been other decisions taken of which the public is not aware (such as choice of technology, see below).

EIA and public participation

27. The following steps were taken in the course of EIA and public participation related to construction of the nuclear power plant:

- **July 31, 2009:** the web-sites of the Ministry of Energy, Ministry of Environment and Directorate for the Construction of the Nuclear Power Plant published a **public notification** (in Russian and English) about commencement of public consultations. The notification is reproduced in *Annex I* to this Memorandum.
- **September 9, 2009:** the the web-sites of the Ministry of Energy, Ministry of Environment and Directorate for the Construction of the Nuclear Power Plant published EIA documents (in Russian and English), including (a) *Brief overview of the environmental impact assessment during construction and operation of the nuclear power plant in the Republic of Belarus*, (b) *Statement on possible environmental impact of Belarusian NPP (preview report on EIA of Belarusian NPP)*.³
- **September 9, 2009:** a public notice (in Belarusian) and *Brief overview of the environmental impact assessment during construction and operation of the nuclear power plant in the Republic of Belarus* (in Russian) are published in the Ostrovetskaya Pravda newspaper (photocopies attached as *Annex II* to this Memorandum).

28. It should be noted, that since July 31, 2009 the web-site of the Directorate for the Construction of the Nuclear Power Plant (www.dsae.by) has not been operating on a regular basis.

³ It is unclear what is meant by “preview report on EIA” (or preliminary report on EIA).

Violations in place

29. Several violations of the public participation requirements of the Convention are already in place.

Applicability and violations of Article 6

30. Article 6(1)(a) sets that:

“Each Party [s]hall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I”.

31. Nuclear power stations are listed in paragraph 1 of the Annex to the Convention.

32. The state environmental expertiza is widely recognized as a permitting decision-making procedure in the context of Article 6.

33. Therefore, a decision making process to grant permit on construction of the nuclear power plant falls under para.11 of Annex I, and therefore falls under the scope of Article 6.

34. **Publishing a notification to the public about commencement of public consultations in the Internet is not adequate informing of the public concerned as required by Article 6(2).** According to the most recent assessments, only 29.1% of the population of Belarus have access to Internet (<http://www.internetworldstats.com/stats4.htm#europe>).

35. **Publishing a notification to the public about commencement of public consultations on nuclear power plant in a local newspaper is not adequate informing of the public concerned as required by Article 6(2).** *Ostrovetskaya Pravda*, the only newspaper where public notice was published about proposed nuclear power plant, is a local newspaper with a circulation of about 5,500 issues. It is distributed only in the region where the proposed nuclear power plant is to be constructed.

36. **Publishing a notification to the public about commencement of public consultations on nuclear power plant in a local newspaper and Internet do not comprise together an adequate informing of the public concerned as required by Article 6(2).** Construction of a nuclear power plant is an issue of national concern and not a local issue. In particular, this is supported by the fact that its construction went through approval by various national authorities, including the President of Belarus.

37. **The public notice published in the newspaper clearly lacks several elements required by Article 6(2) a)-e).** The public notice, as published, covers only the following information:

- Public discussions on NPP EIA will be held in Ostrovets city on October 9.
- Brief information on EIA can found on pages 3-5 of the newspaper
- Name, address and date since when full EIA can be obtained.

38. For example, it provides for no information as to where the public concerned can send its comments as required by subparagraph d) indent v. No information is given as to public authority responsible for making a decision, as required by subparagraph c). This information is not provided in the brief EIA published in the newspaper.

39. **The public consultations process was started at a late stage when most important options are closed already in violation of the requirements of the Article 6(4).** Three most important alternatives are not subject to public discussions:

- No-action alternative
- Choice of technology
- Locational alternative

40. The Brief EIA provides for no alternatives as to the choice of technology. In fact, both Brief EIA and EIS say that Russian project [of the nuclear power plant] “was adopted” (see, e.g, page 5 of the *Brief information on EIA*). No reference was given as to who and when adopted this. Discussion of other types of technology in the EIS makes no sense in light of such statement.

41. Brief EIA provides no information on no-action alternative therefore misleading general public about the options it has. The EIS (130 pages in total) discusses no-action alternative only in the context of construction of heat power stations, disregarding completely so called demand-management (i.e., energy saving) since the purpose of the power plant is not to generate electricity for its own sake but to meet the demand for it in the country. In addition, various decisions already taken (see part *Facts*) clearly left no-action alternative out of the discussion.

42. The locational alternatives are presented in a way where only one location has no complicating factor (see page 5 of the Brief EIA).

43. **Brief EIA – as a key document for understanding of the project by general public – cannot ensure effective public participation as required by Article 6(4).** It focuses attention of the public only two issues: so called locational alternatives and socio-economic benefits. In fact, the only alternatives given for public discussion in the Brief EIA are these location alternatives.

44. These violations already limit participation of the environmental NGOs and the public concerned from other regions of Belarus in the taking decision to permit construction of the nuclear power plant.

Applicability and violations of Article 7

45. Some - if not all - of the decisions described paragraphs 24-25 in the part *Facts* above fall under the scope of Article 7 of the Convention.

46. While none of the decisions to introduce nuclear energy uses the term “plan or program” in its title, it is clear that they fall under that category since they were required by law, adopted by highest executive bodies and create the basis for future nuclear projects.

47. The public had no possibility to participate in the development of the decisions referred to in paragraphs 24-25 of this Memorandum.

48. Lack of any public participation in the adoption of the decisions to introduce nuclear energy in Belarus constitutes a violation of Article 7 of the Convention.

Future violations

49. Taking into account the arguments presented in Section (a) of this Memorandum, there are reasonable grounds to believe that future decision-making on planned nuclear activities in Belarus, including further developments under current nuclear power plant project, will lead to additional violations of the Article 6 and 3 of the Convention.

Conclusions

50. We kindly ask the Compliance Committee to take into consideration, when dealing with respective issues raised by communication ACCC/C/2009/37, the arguments and facts related to decision-making on nuclear issues presented in this Memorandum.



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