

## **Information on non-compliance by Belarus with Espoo Convention (NPP construction)**

**submitted by:**

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### **Introduction**

The *Information on non-compliance by Belarus with Espoo Convention (NPP construction)*, hereinafter the *Information*, is attached to Form on the Information on Non-Compliance as *Description of the issue*.

It alleges non-compliance by Belarus with the requirement of the Espoo Convention in the course of construction (planning) a nuclear power plant on the territory of Belarus.

This *Information* is not confidential. However, if confidentiality would be possible, the communicant (Ecoclub) would be able to provide more documentary information.

This *Information* has four annexes itself.

### **I. LEGAL BASIS**

#### **1.1 Signature & Ratification by Belarus**

The Republic of Belarus signed the Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter Espoo Convention) on February 26, 1991 and accepted it on November 10, 2005. The Convention is entered into force for the Republic of Belarus on February 8, 2006.

#### **1.2. Key legislation and implementation measures**

##### **1.2.1. EIA legislation**

Like in many post-Soviet countries the EIA system in Belarus comprises *OVOS* (EIA carried out by the developer as part of project documentation) and *environmental expertiza* (EIA review having permitting nature and carried out by environmental authorities). These procedures are subject to the following key legislation:

(1) OVOS:

*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.

(2) Environmental expertiza:

- *The Law of the Republic of Belarus on State Environmental Expertiza* of June 18, 1993 (as amended on July 14, 2000)
- *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.

The documents listed above neither require consultations with the neighbouring countries, nor have a reference to the Espoo Convention.

These documents require EIA for nuclear power plants in Belarus.

### **1.2.2. Relevant special legislation for nuclear projects**

- *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 (*Annex IV to this Information (in Russian)*).

This *Regulation* is a special legislative instrument, applicable only in the area of nuclear energy. It basically covers two issues: public participation in nuclear decision-making and procedures for application of Espoo Convention for nuclear projects.

This *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*). However, scope of this *Regulation* does not include activities in the area of nuclear energy use, information about which is classified as state secret (para.1, part 2).

Section 2.4 *Obligation to introduce necessary legislation* of this *Information* includes the legal analysis of the relevant provisions of this *Regulation* in conjunction with the requirements of the Espoo Convention and relevant national legislation.

## **II. THE PROPOSED ACTIVITY**

### **2.1. Past experience & Current situation**

No nuclear reactor was ever operated in Belarus. There's no nuclear reactor under construction. Therefore, Belarus has no technical, administrative or legislative experience in constructing or operating a nuclear power plant.

At the same time, large amount of people suffered from a nuclear accident in Chornobyl, Ukraine, in 1986. Numerous health rehabilitation measures are still being taken to help Chornobyl accident victims in Belarus.

### **2.2. Decision to introduce nuclear energy**

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, neighboring states or the public in the neighboring states.

The key 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”, *Annex I to this Information (in Russian)*

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”, *Annex II to this Information (in Russian)*

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.

- **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).

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

## 2.3. Planning Steps & Other Relevant Actions

### 2.3.1. Planning activities

The following information on the practical planning activities under way is available<sup>1</sup>:

- Development of national legislation in the area of nuclear energy
- Development of national nuclear safety authority
- Personnel training
- Selection of technology (sub-contractor for nuclear reactor)
- Selection of location

On December 20, 2008: State Commission on selection of the location chose *Ostrovetskaya* site as a “primary site” (Ostrovetskiy rayon, Hrodna oblast). Two alternative locations to be covered are: *Kukshynovskaya* and *Krasnopolanskaya* (both in Magilevskaya oblast). The Commission considered that geological conditions in these two locations are not suitable because of soils strength and the level of ground waters in those two areas. For these reasons those two sites were left as “alternative”.

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<sup>1</sup> From official press-releases and presentations by the officials from the Cabinet of Ministers of Belarus, the Ministry of Energy, Ministry of Environmental Protection.

The primary site – *Ostrovetskaya* – is located just 20 km from the border with Lithuania and about 60 km from Vilnius, its capital. The Hrodna oblast is bordering with Poland and Lithuania. See a map, *Annex III to this Information*.

- Informational campaign

The information campaign is carried out by state authorities to inform the public about benefits of a nuclear energy. No information is given on possible threats to the people safety and the environment. Therefore, the campaign does not provide the public with comprehensive and full information about nuclear power plant project and, in turn, depriving the public from a meaningful possibility to develop and express its opinion.

- EIA (*OVOS*)

The project developer – *Directorate for the Construction of the Nuclear Power Plant* through the main sub-contractor *Belniperprom* – has started preparation of EIA documentation. No specific information was made available on the content and progress of EIA preparation. No environmental impact statement was published as required by national legislation.

### **2.3.2. Public participation in EIA**

The public in all three locations expressed their concerns about construction of a NPP. The concerns were related to safety and environmental issues. Several formal and informal campaigns were started by local people and NGOs, mostly environmental. In most cases those people are threatened by police and other enforcement agencies and cannot organize public meetings and discussions.

At several meetings with public authorities the NGOs expressed their willingness to participate in the decision-making process, including EIA. However, as of today they have no possibility to do so.

At the same time, Belarus officials claim that the public was notified through various newspapers, interviews and TV programs which are part of the informational campaign mentioned.

### **2.3.3. Other relevant steps**

In July, 2008, Belarus sent a letter to several neighbouring countries, including Ukraine, indicating its intention to construct a NPP and asking whether the countries would be interested in consultations under Espoo Convention. However, that letter was not sent as a formal notification under the Convention, was not based on the available notification form and did not include information required under paragraph 2 of Article 3 of the Convention.

In May 26, 2009, at a special meeting, the Ministry of Environment has informed representatives of embassies of several neighbouring countries about its intention to construct NPP. Again, this event cannot be taken for a formal notification under Espoo Convention.

## **III. Convention's Applicability and Violations Alleged**

### **3.1. Applicability of the Espoo Convention**

Article 2, paragraph 2 requires parties to

take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, *with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact*, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II. *(emphasis added)*

Nuclear power plants are listed in Appendix I (para.2) and are considered to likely cause significant adverse transboundary impact. Environmental effects (consequences) of a serious nuclear accident are key factors requiring transboundary consultation process for a NPP under the Convention because a severe accident - no matter how likely it is - will very likely cause significant transboundary impacts.

The EU legislation (Directive 85/337/EC) explicitly refers to risk of accidents as one of the screening criteria (Annex III).

Depending on particular project's design and conditions various other characteristics of a NPP may require application of the Espoo Convention, such as radioactive waste management, nuclear fuel transportation, cooling facilities, etc.

In recent years the Convention was applied to several nuclear power plant projects, including four nuclear reactors in Finland (*Olkiluoto 3, Olkiluoto 4, Loviisa 3 and Fennovoima*), Denmark and Sweden (Barsebaeck nuclear power plant).

## **3.2. Violations Alleged**

### **3.2.1 Obligation to conduct EIA**

Belarus is not in compliance with the requirement to conduct an EIA which evaluates reasonable alternatives.

Article 2, paragraph 2 requires parties to

take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, *the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II. (emphasis added)*

Article 3, paragraph 3 requires that

the Party of origin shall ensure that in accordance with the provisions of this Convention an *environmental impact assessment is undertaken* prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. *(emphasis added)*

Under Appendix II to the Convention:

“the information to be included in the environmental impact assessment documentation shall, as a minimum, contain [...] (b) a description, where appropriate, of reasonable

alternatives (for example, *locational* or technological) to the proposed activity and also the *no-action alternative*". (*emphasis added*)

At this stage four most relevant planning issues for the purpose of the compliance with these requirements of the Espoo Convention are:

- Selection of location
- Selection of technology
- EIA (OVOS)
- Decision to construct

These four issues are clearly inter-related and, from Espoo Convention's perspective, can be considered in the context of EIA requirements (Appendix II to the Convention). Legal analysis of the steps taken reveals non-compliance with Espoo Convention.

First, it is clear that Belarus already took a decision to construct a nuclear power plant. Therefore, it does not plan to assess "no-action alternative" and, thus, violates Espoo Convention requirements as to content of the EIA.

Second, the public officials in Belarus made numerous statements acknowledging that the consultations with the public will be held *after* the decision on *location* and technology will be taken. Even if EIA will cover any locational alternatives, a decision was already taken on December 20, 2008, as to the key site (*Ostrovetskaya*).

**Therefore, Belarus is in violation with the requirements of the paragraphs 2 and 3 of the Article 2 of the Convention and Appendix II by pre-defining two key alternatives of the nuclear power plant construction – location and no-action alternative.**

### 3.2.2. Public participation in EIA

Article 2, paragraph 2 requires parties to

take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an *environmental impact assessment procedure that permits public participation* and preparation of the environmental impact assessment documentation described in Appendix II. (*emphasis added*)

Available public participation procedures do not permit effective, early and meaningful public participation.

The developer is already in violation with these procedures by not publishing an environmental impact statement which would allow for early preparations of the public and its early involvement.

No other documents identifying any details of the NPP preparation were released to the public, such as assessments of locational alternatives, EIA terms of reference, etc.

Current practice of public participation in environmental decision-making in Belarus does not meet key international standards and requirements. The public has little, if any, possibilities to participate in EIA for projects listed in Appendix I of the Espoo Convention. These violations are subject to a

communication considered by the Aarhus Convention Compliance Committee (case No.ACCC/C/2009/37).

Article 2, paragraph 6 requires that

The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

Belarus did not send a notification under Espoo Convention to Ukraine or other affected parties. Belarus does not provide its own public with opportunities to participate. In fact, Belarus is equally depriving the public in Belarus and in Ukraine (and other affected parties) from opportunity to participate in the EIA of the proposed NPP. It is therefore violating a requirement to provide the public in the affected parties with opportunities to participate.

The recently adopted *Regulation* creates further confusion by contradicting existing national EIA legislation (see *Section 3.2.4* for more details).

**Belarus did not establish an environmental impact assessment procedure that permits public participation and does not provide its own public and the public in the affected parties with opportunities to participate, and is in violation of the Article 2 paragraph 6.**

### **3.2.3. Obligation to notify**

Article 2 paragraph 4 requires that

The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties *are notified* of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. (*emphasis added*)

Article 3 paragraph 1 requires that

For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party *as early as possible* and *no later than when informing its own public* about that proposed activity. (*emphasis added*)

Belarus did not send a formal notification to any possibly affected party, including Ukraine. The proposed activity is subject to notification (see *Applicability of the Convention* section of this Information).

The public in Belarus *must have been* notified already under national legislation, but has not been. Environmental impact statement was not published and, in accordance with information available, is unlikely to be published until EIA documentation is done. Alternatively, Belarus officials claim that the public *was* notified through various newspaper publications and TV programs. Either way, Belarus failed to comply with the requirement to notify affected parties, including Ukraine, “*no later than when informing its own public*” as required by Article 3.1.

In addition, Belarus took several important decisions and started preparatory work to construct its NPP. It is clear that Belarus is also violating the requirement to notify “*as early as possible*”.

**Therefore, Belarus is in violation of the paragraph 4 of the Article 2 and paragraph 1 of the Article 3 by not notifying affected parties about planned construction of a NPP.**

### **3.2.4 Obligation to introduce necessary legislation**

Article 2, paragraph 2 requires parties to

*take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II. (emphasis added)*

On May 4, 2009, the Government of Belarus introduced a special legal instrument to implement the provisions of the Convention – the *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*.

We claim that Belarus is in violation of its obligation to take necessary legal measures to implement the provisions of the Espoo Convention by adopting secondary legislation which is late, has restricted applicability and is inadequate to ensure implementation of Espoo requirements to nuclear projects.

- **Restricted applicability**

This *Regulation* is the only legislative measure adopted to implement Espoo Convention in Belarus. At the same time, it is only applicable to the nuclear projects, subject they are not classified as state secrets. It is clear, that all other activities listed in the Appendix I to the Convention will not be subject to Espoo procedures since no secondary legislation was introduced. Article 2, para.2, requires introduction of measures in relation to all obligations under the Convention, including on procedures that would apply to all projects listed in Appendix I to the Convention. **Therefore, Belarus did not take necessary legal measures to implement the provisions of the Convention.**

- **The Regulation was not timely adopted**

This *Regulation* was introduced while planning process of a NPP was already in process and Espoo violations took place (see the preceding paragraphs of this Section). In fact, this Regulation was adopted when several decisions were already taken (including on the need to construct the NPP itself). As argued above, the Espoo Convention was already applicable when the Government took a decision to construct NPP (January 31, 2008). **Therefore, Belarus is in violation with it obligations under Espoo Convention by initiating planning process for NPP construction without prior adoption of the necessary legislation to implement its provisions in relation to nuclear power plant projects.**

- **Regulation is not an adequate legal measure**

An obligation to “take the necessary legal...measures to implement the provisions of this Convention” means that the measures should be adequate to enable application of the Convention



when/where needed. The *Regulation* adopted cannot ensure or enable application of the Convention because it itself contradicts Espoo Convention requirements and national EIA legislation.

Several provisions of the *Regulation* are not in compliance with Espoo Convention requirements.

**The Regulation incorporates Espoo procedures into a stage where state authorities play little, if any, role and, therefore, are unlikely to be engaged in a meaningful manner.** The *Regulation* is applicable only to *OVOS* procedure (EIA prepared by the developer). *OVOS* procedure is not a permitting procedure at all, it is a process of developing project documentation by the developer (with some initial approval of a technical tasks by the environmental authority). Later on this documentation is submitted for a state environmental review (environmental *expertiza*) as explained in Section 2.1 of this *Information*. The environmental review (*expertiza*) process has indeed a permitting nature. Instead, the *Regulation* requires consultations between the developer and component authorities of the affected parties (see paragraphs 10.9-10.12 of the *Regulation*) leaving out any responsibilities of the state authorities. This contradicts current practice of the Espoo Convention application which separates roles of competent authorities, contact points and focal points.

**The Regulation is unclear about roles and responsibilities of actors involved.** The *Regulation* puts all obligations under Espoo Convention on the developer, including to notify affected parties (para.10.9), to provide EIA report (*OVOS* report) to competent authorities of the affected parties (para.10.10), to participate in public hearings on the territory of affected parties (para.10.11) and to prepare replies on comments, proposals and questions given in such hearings (para.10.12). The *Regulation* gives no role to the Ministry of Environment (Focal and Contact Point of Belarus for the Espoo Convention), Ministry of Energy (which plays a leading role in nuclear energy projects).

**The Regulation contradicts Espoo by obliging the developer to conduct EIA on the basis of EIA Report.** Paragraphs 10.10 and 13.4 of the *Regulation* oblige the developer to conduct discussions with affected parties on the basis of the EIA report (*OVOS* report). Under national EIA legislation, EIA report (*OVOS* report) is a final stage of the EIA (*OVOS*) procedure (para.26 of the *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). The report is submitted, among other documentation, for state environmental review (*expertiza*). The *Instructions* clearly require that public consultations should take place before the report is prepared (while results of public participation should be reflected in the report, in particular, as a separate annex). The *Regulation* itself makes a reference to these *Instructions* as legislation covering preparation of EIA documentation, including the EIA report (e.g., para.26 of the *Regulation*).

**The Regulation contradicts Espoo by obliging the developer to notify affected parties by providing information “in accordance with national legislation”.** Paragraph 10.9 of the *Regulation* obliges the developer to notify affected parties by providing information “in accordance with national legislation”. Since the *Regulation* itself is intended to be implementing legislation, it is clear that this reference is not made to the Convention itself. Instead, it makes reference to some unidentified piece of national legislation which would undoubtedly be in non-compliance with the requirements of Article 3.2 as to content of the notification since no other implementing legislation was adopted.

**The Regulation limits the timing for consultations for one month.** Article 19 of the *Regulation* says that the public consultations should as a rule take place for no more than month. This

requirement, especially put for the nuclear projects, would result in violation of the requirements for consultations under Article 4.2 of the Espoo Convention.

**The Regulation does not require communication of the final decision.** The Regulation only requires the developer to communicate final EIA report, with replies to comments from the public and parties concerned. EIA report a document and the final stage of OVOS procedure. EIA report is a privately own document and part of full project documentation made by the developer. In no way it is a decision by a public authority. A decision of the public authority authorizing the activity is conclusions of the state environmental review (*expertiza*). Such conclusions are final stage of the state environmental review. The Regulation is completely silent on the *environmental expertiza* process.

Lastly, the *Regulation* contradicts existing national legislation on EIA by obliging the developer and other persons involved to conduct public consultations on the basis of EIA Report. As argued above, *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* clearly require that public consultations should take place before the report is prepared (while results of public participation should be reflected in the report, in particular, as a separate annex). Instead, the *Instructions* require preparation of the Environmental Impact Statement (statement on possible environmental consequences of the planned activities), the content of the EIS is regulated by a separate chapter of the *Instructions* (Chapter 5, para's.38-40).

**Therefore, Belarus is in violation with its obligation under the paragraph 2 of the Article 2 to take necessary legal measures to implement the provisions of the Espoo Convention by adopting secondary legislation which is late, has restricted applicability and is inadequate to ensure implementation of Espoo Convention requirements to nuclear projects.**

#### IV. CONCLUSIONS

The Government of Belarus took a decision to construct a two-reactors nuclear power plant in Belarus.

Belarus is in violation with its obligation under the paragraph 2 of the Article 2 to take necessary legal measures to implement the provisions of the Espoo Convention by adopting secondary legislation which is late, has restricted applicability and is inadequate to ensure implementation of Espoo requirements to nuclear projects.

Belarus is in violation with the requirements of the paragraphs 2 and 3 of the Article 2 of the Convention and Appendix II by pre-defining two key alternatives of the nuclear power plant construction – location and no-action alternative.

Belarus did not establish and environmental impact assessment procedure that permits public participation and does not provide its own public and the public in the affected parties with opportunities to participate, and is in violation of the Article 2 paragraph 6.

Belarus is in violation of the paragraph 4 of the Article 2 and paragraph 1 of the Article 3 by not notifying affected parties about planned construction of a NPP.