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**Response to the Government's Consultation
on the Secretary of State's proposed decisions as
Justifying Authority on the Regulatory Justification of the New
Nuclear Power Station Designs
currently known as the AP1000 and the EPR**

**Submission by
Environmental Law Foundation**

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Response to the Government’s Consultation on the Secretary of State’s proposed decisions as Justifying Authority on the Regulatory Justification of the New Nuclear Power Station Designs currently known as the AP1000 and the EPR on behalf of the Environmental Law Foundation¹

Introduction

1. This is the response of the Environmental Law Foundation to the Secretary of State for Energy and Climate Change’s proposed decision as Justifying Authority (“JA”) on the regulatory justification of two new nuclear power station designs known respectively as the AP1000 designed by Westinghouse Electric Company LLC (“the AP1000”), and the EPR designed by AREVA NP (“the EPR”).
2. The Environmental Law Foundation (“E.L.F.”) is the leading national UK charity founded in 1992 that helps people use the law to protect and improve their local environment and quality of life. Through its network of specialist lawyers and consultants across the UK, E.L.F. provides free advice and continuing support to those in need of assistance.
3. E.L.F. is committed to ensuring full and effective public participation in the consultation on these draft Justification Decisions. In particular, E.L.F. is committed to ensuring that the consultation complies with the Government’s obligations under domestic, European and International law.
4. In light of these objectives, this response exclusively considers legal issues arising from the consultation process. We are therefore not responding to each of the 9 questions posed in this Consultation, but have chosen to make comprehensive representations in response to Q 9 alone.

¹ E.L.F was assisted in the drafting of this response by Richard Wald of 39 Essex Street Chambers

Summary

5. E.L.F. consider that the consultation on the draft Justification Decisions is deficient in that:
 - i. There has been no public inquiry and, therefore, no opportunity to test technical and complex evidence;
 - ii. The consultation is premature given that it is being conducted prior to the conclusion of the Generic Design Assessment and therefore, on the basis of partial reactor designs.

6. E.L.F. invites the Secretary of State to review and address these procedural issues.

Consultation

7. On 9 November 2009, the Secretary of State opened the present consultation on two draft Justification Decisions. Volume 2 of the consultation documents concerns the AP1000. Volume 3 of the consultation documents concerns the EPR. The consultation closes on 22 February 2010. In principle, subject to the outcomes of this consultation, the decisions will become final and binding without the need for further Parliamentary scrutiny.

Legal framework

8. Regulatory justification is a requirement introduced in English law by Council Directive 96/29 Euratom² (“the Justification Directive”).

9. The Justification Directive requires Member States to make generic Justification decisions in relation to certain new classes or types of practice. The design of a nuclear reactor falls squarely within the scope of the Directive.

10. Article 6 requires Member States to ensure that all new classes or types of practice resulting in exposure to ionizing radiation are justified in advance of

² Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation

being first adopted or first approved by their economic, social or other benefits in relation to the health detriment they may cause. Article 6 (3) provides that in addition, Member States shall ensure that “(a) in the context of optimization all exposures shall be kept as low as reasonably achievable, economic and social factors being taken into account; and (b) without prejudice to Article 12, the sum of the doses from all relevant practices shall not exceed the dose limits laid down in this Title for exposed workers, apprentices and students and members of the public.”

11. The Justification Directive itself makes no provision with regard to public consultation. However, when determining the Justifying Authority’s obligations when making a justification decision, regard must be had both to European law and to domestic law.
12. The Justification Directive is implemented in English law by the Justification of Practices Involving Ionising Radiation Regulations 2004 (“the Justification Regulations”). Regulation 4 sets out various definitions and provides at subsection (2) that “justified” in relation a class or type of practice means justified by *“its economic, social or other benefits in relation to the health detriment it may cause.”* Regulation 4 (4) provides that *“a class or type of practice is “found to be justified” for the purposes of these Regulations if a justification decision has been made determining that it is justified”.*
13. Regulation 14 makes provision for the form of applications and decisions. Regulation 14 (1) provides that any justification decision required or permitted to be made by the regulations that determines a class or type of practice is justified where it was not previously shall be made by the Justifying Authority in the form of regulations, by exercising such powers as the Justifying Authority has which arise apart from these Regulations, including but not limited to powers under section 2(2) of the European Communities Act 1972.
14. Regulation 16 confers powers on the Justifying Authority to request information for the purposes of discharging its functions. Regulations 17 and 18 make

provision for the holding of inquiries and hearings and for consultation in relation to a justification decision. They provide so far as is presently material:

17. (1) Without prejudice to any other power to hold an inquiry or other hearing, the Justifying Authority may cause an inquiry or other hearing to be held if it appears to him expedient to do so in connection with the exercise of any of his functions under these Regulations.

(2) In respect of any inquiry or other hearing held pursuant to paragraph (1)

(a) if the inquiry or hearing is held in England or Wales, subsections (2) to (5) of section 250 of the Local Government Act 1972 (which contain supplementary provisions with respect to local inquiries held in pursuance of that section) shall apply as they apply to inquiries under that section, but as if -

(i) references to the person appointed to hold the inquiry included references to the Justifying Authority;

(ii) references to the Minister causing an inquiry to be held were references to the Justifying Authority;

(iii) the words "not being the property of a local authority" were deleted from paragraph (b) of subsection (2); and (iv) the words "local authority or" in subsection (4) were deleted;

...

(d) the Justifying Authority shall take such steps as he considers appropriate to publish or otherwise give notice of the time and place of the inquiry or hearing to any person likely to be affected by it.

18(1) Before making a justification decision, a determination under regulation 12 or serving a contravention notice under regulation 22, the Justifying Authority or Secretary of State (as the case may be)–

(a) shall consult–

(i) the Health and Safety Executive;

(ii) the Food Standards Agency;

(iii) [the Health Protection Agency; and

(iv) where the class or type of practice involves a radioactive substance, the Environment Agency, the Scottish Environment Protection Agency and the Department of the Environment for Northern Ireland;

(b) may consult any other person whom he considers it appropriate to consult;

(c) shall take such steps as he considers appropriate to bring the proposed decision, determination or contravention notice to the attention of any person likely to be affected by it.

(2) Before exercising any function under Part 3 or under regulation 16, 17, 22, 26 or 27, the person proposing to exercise the function shall consult the other persons listed in regulation 6(1).

15. It follows that in accordance with Regulation 18 (1) (a), the JA is required to consult certain bodies. In addition, the JA has a discretion to consult such other persons as it is considered appropriate. In relation to the draft Justification Decisions, the JA has exercised this discretion to conduct what purports to be a full, open, public consultation.

16. The Regulations do not define the scope of any given consultation procedure. However, in accordance with Regulation 17 (1), there is a power to hold a public inquiry in to any exercise of the functions under the Regulations and this logically includes a power to hold inquiry prior to making a Justification decision as part of a consultation process. The power may be exercised where the Justifying Authority considers it expedient to do so.

17. In addition to the consultation requirements established by the Justification Regulations, the UK is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”).]

18. The Preamble to the Aarhus Convention records the parties to the Convention:

“Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the

implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment. ...”

19. Article 1 of the Aarhus Convention provides

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

20. Article 7 of the Aarhus Convention is entitled “Public participation concerning plans, programmes and policies relating to the environment.” It provides:

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

21. Article 6 of the Aarhus Convention provides so far as is presently material:

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

22. Article 8 of the Aarhus Convention makes provision for public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments. It provides:

“Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

To this end, the following steps should be taken:

- (a) Time-frames sufficient for effective participation should be fixed;
- (b) Draft rules should be published or otherwise made publicly available; and
- (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.”

23. E.L.F. consider that the draft Justification Decisions fall within the scope of Article 7 of the Aarhus Convention on the grounds that the proposed designs constitute a plan, programme or policy relating to the Environment:

- i. the building of nuclear power stations has an effect on the environment as acknowledged by the Secretary of State in relation to the draft National Policy Statement (NPS) on Nuclear power;
- ii. the scope and nature of the environmental impacts of any given nuclear facility are directly affected by the design of that facility.
- iii. the draft Justification Decisions analyse a range of issues including radiological health detriment, radioactive waste and environmental detriment and reach conclusions on whether those issues preclude the approval of the reactor design.

24. It follows, that the consultation procedure for the draft Justification Decisions must comply with the requirements outlined in Article 7 and with those provisions of Article 6 which have been incorporated by reference. In particular, there is an overriding requirement to ensure open and effective public participation.³

25. Alternatively, E.L.F. consider that, as a final justification decision must be made in the form of regulations⁴, it plainly falls within the scope of Article 8 of the Aarhus Convention. As such, the JA is required to strive to promote effective public participation and to enable the public to comment, whether directly or indirectly during the preparation of those regulations. In the present context, this clearly corresponds to promoting effective public participation during this consultation on the draft Justification Decisions.

³ Article 6 (4) Aarhus Convention

⁴ Regulation 14(1) Justification Regulations

26. The Aarhus Convention does not further define “effective public participation”. The obligations arising under its provisions should be interpreted in light of principles established by domestic caselaw.
27. As a matter of English law, it is well established that once a public authority embarks on a consultation procedure, it must be carried out properly: *R. v North & East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213⁵. Thus a consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.
28. Equally, irrespective of whether a consultation process is the result of a statutory requirement or is undertaken voluntarily, it must be underpinned by a requirement of fairness: *R v Secretary of State for Transport, ex parte Medway Council et al* [2002] EWHC 2516 Admin para. 29 per Maurice Kay J.

Compliance

29. E.L.F. consider that this consultation procedure does not ensure open and effective public participation as required by the Convention⁶:
- i. the failure to hold a public inquiry to enable consultees to make oral representations and to challenge the technical evidence undermines the validity and fairness of the consultation procedure as a whole;
 - ii. the consultation procedure is being undertaken on the basis of partial designs which undermines any attempt to determine those designs as being “justified” in regulatory terms.

⁵ See in particular para 108 per Woolf M.R.

⁶ Whether under Article 7 or Article 8

Failure to hold a Public Inquiry

30. Although E.L.F. concedes that the Justification Regulations do not require the JA to hold a public inquiry⁷, given the importance of the draft justification decisions and the significance of the potential radiological health impacts, this is a clear case where an inquiry is both expedient and a prerequisite to ensuring effective public participation.
31. The importance of the decision to be consulted upon is a material consideration: Sullivan J at paragraph 51 of his decision in R. (on the application of Greenpeace) v Secretary of State for Trade and Industry [2007] EWHC 11; [2007] Env. LR 29:
“Given the importance of the decision under challenge—whether new nuclear build should now be supported—it is difficult to see how a promise of anything less than “the fullest public consultation” would have been consistent with the Government's obligations under the Aarhus Convention.”
32. Greenpeace raised issues that are directly analogous to the present draft Justification Decisions. The “fullest public consultation” in the present circumstances demands a public inquiry for the following reasons.
33. First, much of the evidence underpinning the draft Justification Decisions is of a technical nature. This is a point that has been repeatedly emphasised by the consultation documents themselves. Thus, for example, paragraph 1.1. of Volume 2 of the Consultation document states that Regulatory Justification is a “high level generic process”.
34. It is precisely because this evidence is technical in nature that it should be subjected to additional scrutiny and cross-examination in the context of a public inquiry. The consultation documents themselves indicate that the aim of the consultation is to test the proposed decisions and the evidence on which they are based⁸. However, absent an inquiry, this aim will not be achieved.

⁷ Regulation 17 (1) Justification Regulations

⁸ Vol 1 Section A, paragraph 2.

35. Second, the technical information contained in the draft Justification Decisions is being relied upon by the Secretary of State in the draft Nuclear National Policy Statement (“NPS”) which forms the subject of a separate consultation process. This duality of purpose raises two issues. On the one hand it reinforces the imperative of ensuring that the evidence on radiological health is robust. On the other hand, it highlights that the JA (the Secretary of State) has already formed a policy view on the merits of new nuclear build and a need for new reactors. In these circumstances, independent scrutiny of the design proposals is essential to establish a fair and transparent consultation procedure.
36. Given that the draft Justification Decisions are expressly excluded from the ambit of the Select Committee hearings on the draft Nuclear NPS, the only means of ensuring that they are subject to an adequate level of scrutiny is to either:
- (a) re-open the Select Committee hearings on the NPS to include the draft Justification Decisions;
 - (b) hold a public inquiry in relation to the draft Justification Decisions in accordance with Regulation 17 of the Justification Regulations.⁹
37. Finally, given the level of public interest that has been expressed regarding these decisions including at the application stage, it is plainly expedient to hold a public inquiry to allow all issues to be considered in an open forum.
38. In light of the above, E.L.F. consider that the Secretary of State should, contrary to his current position¹⁰, conclude that a public inquiry is necessary at this stage.

Inadequacy of consultation on partial designs

39. Both draft Justification Decisions concern designs for nuclear reactors which are not finalised. In particular, consultation is being undertaken at a time when the Generic Design Process (GDA) being conducted by the Nuclear Installations Inspectorate (NII) / Health and Safety Executive (HSE) is not yet complete. Nor

⁹ E.L.F. has submitted a separate response to the consultation on the draft Energy NPSs.

¹⁰ Vol 2 Para 1.60

is it scheduled to complete until June 2011, by which time it is presumed that the regulatory justification process will be concluded.¹¹

40. The draft Justification Decisions explicitly acknowledge that they are being taken in the absence of operational data and on the basis of preliminary assessments under the GDA process¹². The difficulties with this approach are highlighted by the most recent report by the HSE on the progress of the GDA dated 2 February 2010¹³. This indicates that there are several respects in which the designs are still falling short of expected standards, and in which they have yet to be finalised.
41. It follows that any appraisal of health detriment undertaken at this stage is necessarily premised on incomplete information. This further undermines the fairness and openness of the consultation and highlights that the regulatory justification process has been conducted prematurely.

Conclusion

42. This response has identified two respects in which the consultation on the draft Justification Decisions is deficient. These deficiencies undermine the fairness, effectiveness and transparency of the consultation as a whole. The E.L.F. invite the Secretary of State to revise and address the issues identified.
43. In the event of a fresh, full and proper round of consultation (as is sought in this response), E.L.F. reserves its right to raise issues outside the scope of this document.

¹¹ Vol 3. Paras 122 – 126.

¹² Vol 2, Chapter 10, para 10.9, Vol 3, Chapter 10, para 10.10

¹³ <http://www.hse.gov.uk/newreactors/reports/gda-q4-09.pdf>