

COPORATE GOVERNANCE ADVICE RELATING TO THE WEST CUMBRIA MANAGING RADIOACTIVE WASTE SAFELY (MRWS) PARTNERSHIP

Introduction

- 1 Wragge & CO LLP has been requested to advise Copeland Borough Council, as accountable body, and through it, the MRWS, Partnership in respect of the following:
 - (1) Can the Members who represent the Councils on the Partnership and participate in discussions at the Partnership then participate in any discussions and decisions taken by their respective local authorities relating to the work of the Partnership?
 - (2) Additionally, how far should pre-determination be an issue in the eventual decision? If for example, the Partnership recommends not to proceed to the next stage, is the member, regardless of how he or she voted, barred from participating in the Council decision on the basis that they have pre-determined the matter (will the question be the same?).
- 2 We have been provided with background information in relation to the work of the Partnership, together with a copy of the current Memorandum of Understanding between the three main participating Councils, Cumbria County Council, Allerdale Borough Council and Copeland Borough Council and the Terms of Reference for the Partnership.
- 3 Subsequent to the original brief, we have been supplied with a draft copy of the proposed Engagement Plan for the third round of public and stakeholder engagements (PSE 3). We have also reviewed the White Paper on MRWS and, in particular, Chapter 6 of the White Paper dealing with site selection and the voluntarism and partnership approach. We have also obtained copies of the Councillor Codes of Conduct for the three Councils and, where available, any relevant Planning codes of practice.
- 4 As implied in the way in which the questions are framed, the response inevitably involves consideration of the position of individual Councillors under the relevant codes of conduct and the wider question as to the validity of the decision of the

three Councils in deciding whether to notify Government of a Decision to Participate in the further stages towards potential siting of a geological disposal facility. Although there is some overlap, the two questions are initially considered separately.

Can the Members who represent the Councils on the Partnership and participate in discussions at the Partnership then participate in any discussions and decisions taken by their respective local authorities relating to the work of the Partnership?

5 As they are required to do, the individual Councillor codes of conduct adopted by the three Councils adopt the mandatory provisions of the model code of conduct contained in the Local Authority (Model Code of Conduct) Order 2007.

6 Insofar as relevant to the question of interests, the relevant sections of the Model Code of Conduct are contained in Regulations 8-12 of the 2007 Order.

7 Regulation 8, insofar as relevant, is in the following terms:

8(1) You have a personal interest in any business of your authority where either:

(a) it relates to or is likely to affect -

(1) any body of which you are a member or in a position of general control or management and to which you are appointed or nominated by your authority.

8 That clearly applies to Councillors who have been appointed or nominated to the Partnership by their local authority. Those Councillors have a personal interest when matters affecting the work of the Partnership are debated by their respective local authorities.

9 Regulation 9 requires that where a Councillor has a personal interest in any business of the authority and attends a meeting of the authority at which the business is considered, the Councillor must disclose to that meeting the existence and nature of that interest at the commencement of that consideration, or when the interest becomes apparent. In relation to interests arising through appointment or nomination to an outside body, regulation 9 (2) stipulates that the personal interest need only be disclosed when the Councillor concerned addresses the meeting on that business. This does not, however, preclude such councillors disclosing the interest at the commencement of the meeting and, where the

meeting is convened specifically to deal with a Decision to Participate or where this is the main agenda item for the meeting, it would seem sensible for those Councillors who are members of the Partnership to disclose that fact at the beginning of the meeting or, at the latest, at the commencement of consideration of the agenda item.

10 Regulation 10 deals with the circumstances in which a personal interest will also be regarded as a prejudicial interest and is in the following terms:

- (1) Subject to sub-paragraph (2), where you have a personal interest in any business of your authority, you also have a prejudicial interest in that business where the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice your judgment of the public interest.
- (2) You do not have a prejudicial interest in any business of the authority where that business -
 - (A) Does not affect your financial position or the financial position of a person or body described in paragraph 8;
 - (B) Does not relate to the determining of any approval, consent, licence, permission or registration in relation to you or any person or body described in paragraph 8; or
 - (C) Relates to the functions of your authority in respect of -
 - 1) (i) - (vi) (none of these are directly relevant).

11 Subject to the issues considered under the second question in relation to potential pre-determination, participation in the work of the Partnership, on its own, does not inevitably lead to the conclusion that a prejudicial interest will arise under Regulation 10 (1). In deciding whether a prejudicial interest has arisen, the individual circumstances of each member would need careful consideration. Leaving aside personal interests arising from the ownership or occupation of property potentially affected, participation in the work of the Partnership short of indicating a pre-determination, would not give rise to a prejudicial interest barring

participation in discussion and voting on the Decision to Participate at a meeting of the local authority.

- 12 If a particular councillor has a personal interest arising through participation in the work of the Partnership, the Councillor, when expressing any view when acting as a member of the Partnership should make it clear that this does not represent the final or concluded view of the councillor.
- 13 Subject to the question of pre-determination, which is considered in the next section, the following view expressed by the democratic services manager at Copeland Borough Council (as Accountable Body) is endorsed;

“A Member who is appointed by his/her authority as a representative on an organisation, has a personal interest when matters affecting that organisation are discussed in meetings of the authority. The personal interest should be registered and declared at the meeting, but would not normally prevent the member from participating in the meeting and voting, unless the member’s interest was prejudicial as well as personal”.

- 14 In this context, the reference to the member’s interest being prejudicial as well as personal, is taken to mean an interest other than arising solely from participation as a member of the Partnership. Clearly, if the Councillor concerned has a personal interest arising separately from such participation then, subject to application of the tests in Regulation 10, that interest would need to be declared and may bar participation and voting in the decision.

Additionally, how far should pre-determination be an issue in the eventual decision? If for example, the Partnership recommends not to proceed to the next stage, is the member, regardless of how he or she voted, barred from participating in the Council decision on the basis that they have pre-determined the matter? [will the question be the same?]

- 15 This question raises two related issues. Firstly, the extent to which an individual member may be properly excluded from participating in their Council’s decision on whether to Participate in the next stage; and the effect of participation on the validity of the decision of the local authority where there is a perception of pre-determination. The two issues are linked in that decisions on the first may influence the outcome of the second.

- 16 It is clear that pre-determination of a question on the part of an individual councillor may have an effect on the validity of the decision of the local authority. Such pre-determination can arise independently of any question of personal interest. Pre-determination can arise from the simple and proper participation by the councillor concerned in the work of the Partnership.
- 17 Notwithstanding the potential enactment of clause 14 of the Localism Bill, which is currently before Parliament, there remains a risk that participation by a councillor in such circumstances may encourage a claim in judicial review on grounds related to, but going beyond, questions of predetermination. It would, therefore, be prudent to ensure that those councillors on the Partnership who may be wishing to take part in the Decision to Participate within their own local authority do not give the impression that they have reached a final view at the time of debate within the Partnership. Although clause 14, if enacted in its current form before any Decision to Participate is made, may have a bearing on the outcome of any related judicial review claim, it would nevertheless be beneficial to avoid any criticism or potential challenge on the basis of predetermination.
- 18 Instances in which such pre-determination may arise are familiar in a local government context where members will often have a role on different committees within the authority, or as appointed members on outside bodies or, independently, as a member of another local authority in the locality.
- 19 In this context, the decision of the High Court in the case of *Georgiou v London Borough of Enfield and Others* in 2004 is of particular relevance. In that instance, the role of members on a conservation advisory group and their subsequent participation in the main planning decision fell to be considered. In that context, Mr Justice Richards summarised the legal principle in the following way:

“I therefore take the view that in considering the question of apparent bias in accordance with the test in *Porter v Magill*, it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues. That is a question to be approached with appropriate caution since it is important not to apply the test in a way that will render local authority decision-

making unduly difficult. I do not consider, however, that the circumstances of local authority decisions are such as to exclude the broader application of the test altogether”.

- 20 Although a number of the decided cases are in the context of judicial or quasi judicial decisions, the principles are nevertheless capable of being applied to a decision on the part of any of the three Councils to proceed to the next stage of participation in the MRWS process. Although such a decision by any of the three Councils will not determine whether any particular proposal for a GDF will come forward or receive consent, the White Paper recognises the Decision to Participate as a distinct and important stage in the overall process and, on that basis, it should be assumed that such a decision would be susceptible to judicial review on a claim by a party with sufficient standing. The Courts have generally taken a wide view on the question of standing and, it is likely that any ratepayer in the area of search would have sufficient locus to bring a claim.
- 21 It is equally clear that participation as a member of the Partnership does not lead to the inevitable conclusion that the member will approach the Decision to participate with a closed mind or without the ability to impartially consider all relevant issues.
- 22 If they are to take part in any decision of their own local authority on moving to the next stage, the councillor should ensure that nothing which is said prior to that point could be argued to give the impression that the councillor has closed his or her mind to material considerations.
- 23 In answer to the example given in the question, a member would not be barred from participating in their Council’s decision on the basis of a recommendation by the Partnership not to proceed to the next stage. It may be that further information comes to light or further representations are made, which would need to be considered by the individual member. So long as the individual member is open to such considerations when considering the matter within their own authority then, no valid criticism of pre-determination should arise.

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Introduction

1 Wragge & CO LLP has been requested to advise Copeland Borough Council, as accountable body, and through it, the MRWS Partnership, in relation to the potential for the process of community engagement and consultation to be subject to successful judicial review. In particular, Copeland Borough Council and the Partnership are keen to understand:

- The nature and potential scale of these risks;
- Where the key areas of challenge might be;
- What actions are required/available to protect against them consistent with conducting a proper consultation; and
- The level of exposure that this constitutes for the Council.

The Council and Partners also wish to understand the range of options that might be available to deal with such risks.

2 We have been provided with background information in relation to the work of the Partnership, together with a copy of the current Memorandum of Understanding between the three main participating Councils, Cumbria County Council, Allerdale Borough Council and Copeland Borough Council and the Terms of Reference for the Partnership.

3 Subsequent to the original brief, we have been supplied with a draft copy of the proposed Engagement Plan for the third round of public and stakeholder engagements (PSE 3). We have also reviewed the White Paper on MRWS and, in particular, Chapter 6 of the White Paper dealing with site selection and the voluntarism and partnership approach.

4 Although there is inevitably some overlap, the remaining sections of this note address the general issues associated with the risk of judicial review, followed by responses to the specific bullet points.

General Issues

- 5 For the purposes of this note, a distinction needs to be made between the role of the Partnership and that of the individual constituent local authorities. The work of the Partnership will inform any decision of the constituent Councils in relation to the Decision to Participate but, on its own, the work of the Partnership is unlikely to be susceptible to proceedings in judicial review. It will be for each constituent local authority to take its own view on whether to participate in the next stages of the MRWS process and, it is quite possible that different decisions will be made by individual Councils based on the reports provided to them by the Partnership. Leaving aside questions as to whether the Partnership is a sufficiently distinct legal entity to be subject to judicial review proceedings, any attempt to bring proceedings is likely to be rejected on the grounds that such challenge would not be to a sufficiently distinct part of the process and would, in any event, be premature.
- 6 The target of any judicial review process is likely to be the decision of individual Councils.
- 7 There are two main features of the nature of the decision on the MRWS which can be argued to weigh against the availability of judicial review. The Courts will generally not entertain a claim for judicial review where there is an alternative remedy available to the aggrieved claimant. Secondly, the Courts will not generally give permission for judicial review proceedings to continue where the decision in question is susceptible to further review or does not itself determine the outcome. An alternative way of expressing this second principle is to look to see whether the challenge can be said to be premature.
- 8 In relation to the first question, the discussion of the voluntarism approach and the nature of any Decision to Participate, as discussed in Chapter 6 of the White Paper, make it clear that any Decision to Participate is an early stage in the site selection processes and will be subject to a number of further stages.
- 9 The main focus of any challenge is likely to be on the credibility of the evidence base for the Decision to Participate. Paragraph 6.22 of the White Paper advises that credibility might be demonstrated on the basis of a local consultation process applying established good practice. Paragraph 6.25 of the White Paper makes it clear that the credibility of any Decision to Participate will be examined by

Government having regard to the approach taken to engagement, the outcomes of that engagement and the basis of the decision.

- 10 Although there are a number of further stages in the process towards site selection, a claimant could no doubt argue that a Decision to Participate may begin to impact on the rights of individuals at this stage in the process. The decision is an operative and effective decision as far as the local authority is concerned. It does not require another stage to make it effective as a Decision to Participate. Any Decision to Participate will only be credible if it has demonstrated that, within the community concerned, there are potential sites for a geological disposal facility. At that stage in the process, the work of the British Geological Survey (BGS) is likely to have narrowed the spatial area of search. Those living in the potential area of search may seek to argue that, even at that early stage, there will be some impact on property prices arising from the inclusion of their locality in the area of search.
- 11 It would be prudent for the constituent Councils to act on the basis that the decision may be amenable to judicial review.
- 12 In line with other forms of litigation, the judicial review process is subject to a pre-action protocol. The judicial review protocol is designed to allow the decision making body to be aware of potential grounds for challenge and, insofar as those grounds are arguable, to review its decision in the light of the potential challenge. Given that the Decision to Participate is subject to review by the local authority and potentially a later decision to withdraw, the protocol would require that any potential claimant should bring any concerns to the decision maker shortly after the decision is taken and allow a reasonable opportunity for the decision to be reviewed, and any shortcomings to be made good, before any proceedings in judicial review are initiated. The protocol should provide an opportunity for the constituent Councils to review any potential grounds of challenge and, if it accepts that there have been any shortcomings in the engagement process, to take further steps to resolve the issue short of being a defendant to a judicial review claim.
- 13 Given that there is the potential for claims in judicial review, the next section of this note considers the areas which may be susceptible to challenge.

The Key areas of Challenge

- 14 Insofar as judicial review is available, the usual principles will apply.

- 15 Having regard to those principles, the two main areas of challenge are likely to be the adequacy of the consultation and the factual basis for the Partnerships recommendation.

Adequacy of Consultation

- 16 In relation to the former, the Courts have established certain minimum requirements for an adequate consultation exercise:

- The consultation must be conducted at a time when proposals are still at a formative stage;
- Those consulted must be provided with adequate information and time to allow a proper and informed response; and
- There must be a conscientious and open minded consideration of relevant matters.

- 17 Until Round 3 of the Public and Stakeholder Engagements (PSE) Process, the Partnership has not put forward any specific proposal for consideration. From the documentation we have seen, it is clear that the consultation undertaken in Rounds 1 and 2 has been conducted at a formative stage and would meet the first requirement.

- 18 At PSE 3, the Partnership will be publishing its draft advice to the constituent local authorities and will be asking for feedback on it from stakeholder organisations and the public. That advice will have been informed by the results of PSE 1 and PSE 2.

- 19 To comply with the second requirement for adequacy of consultation, the Partnership will need to make available, in suitable locations and formats, its reasons for the draft advice and the factual basis for it. From what we have seen, the Partnership, through its engagement process so far and on its website, have adopted an open and transparent approach to the provision of information. The proposals we have seen for PSE 3 continue that approach. On the basis that the material issued during the PSE 3 stage will be sufficiently reasoned and with adequate access to all relevant material setting out the factual basis for the recommendation, the Partnership can be reasonably confident that the second requirement for adequate consultation will be met.

- 20 In relation to the third requirement, we have seen a draft timetable which envisages production of a draft Final Report in the second half of August 2011, with formal consultation on that report commencing on 19 September and inviting responses by 9 December 2011. The timetable envisages that the Partnership will be reviewing the results of the public consultation during January and the early part of February 2012 prior to a meeting of the Partnership on 21 February. Although there will always be arguments that more time should be allowed for consideration of the draft Final Report and the formulation of responses to it, a period of 12 weeks for responses is in line with the requirements of the Code of Practice on (Public) Consultation used by the Better Regulation Executive in the Department for Business Innovation and Skills and, subject to the underlying information being readily available, should, on any objective basis, be considered adequate.
- 21 Depending on the number and nature of representations received, the Partnership should adopt a flexible approach to the arrangements for consideration of the representations. It may be, for example, that if the representations raise real and genuine concerns over the factual basis for the draft Final Report then, the Partnership should allow sufficient time for testing of the robustness of the factual material. This may necessitate putting back the date for finalising the advice to the constituent Councils.
- 22 Many challenges to the adequacy of consultation processes relate to the adequacy of the information provided to the decision maker. This generally arises where the decision maker is provided with a summary only of the responses to consultation. In such cases, there will always be room for aggrieved parties to argue that the summary does not do justice to the points made. To avoid challenge on such grounds, the safest approach is to ensure that the full body of representations is made available to the Partnership along with any summary and, the Final Report. Any representations which raise credible issues over the factual basis for the Final Report should be the subject of comment and, where necessary and undertaken, the outcome of further testing of the underlying factual basis for the recommendation.
- 23 Although it may be arguable that the adoption of the Final Report is not itself a decision susceptible to judicial review, the constituent Councils will be basing any Decision to Participate on that Final Report and, any shortcomings in the process

towards the adoption of that Final Report are likely to be a focus of any challenge to the decision of the constituent councils.

Factual basis for Partnership's Recommendation

- 24 From what we have seen, those wishing to challenge any Decision to Participate are likely to argue that the geology of any proposed area of search is unsuitable for the proposed repository. In making its recommendation, the Partnership will be heavily reliant on the reports produced by BGS and other technical consultants. Almost inevitably, there will be other consultants available to those who oppose nuclear power and there are already indications that opponents may produce technical reports arguing that the locality is unsuitable for the long term repository. If such reports emerge during the twelve week consultation period, the Partnership will need to be in a position to form a view on any conflicts with the technical reports produced for the Partnership. The programme should allow for review of any such reports by BGS and, where relevant, other technical consultants engaged by the Partnership. The contents of that review would then need to be made available to those submitting the contrary technical information with the opportunity to make final comments for consideration with the Partnership's Final Report. Adopting this approach should ensure that the Partnership have the best available information and will minimise the prospects for conflicting technical information to be the grounds for successful judicial review.

What actions are required/available to protect against the risk of challenge consistent with conducting a proper consultation?

- 25 In relation to the two main areas of likely challenge, the previous section has indicated the manner in which the risk of successful judicial review can be minimised. In our separate paper, we dealt with the risk that the decision of the constituent Councils could be challenged on the grounds that individual councillors have, through their role on the Partnership, indicated a pre-determination in comments made as part of their role on the Partnership. As indicated in that separate paper, that risk can be minimised by ensuring that individual councillors do not make statements which might give the impression that they have reached a final and unshakeable view on the merits of proceeding to the next stage of the process. In the event that any individual councillors, for political or other reasons, feel disposed to align themselves with one side or the other, the Monitoring Officer or Chief Executive of their Council would need to provide appropriate advice on the

advisability of that councillor taking any part in the decision to proceed to the next stage. Notwithstanding the potential enactment of clause 14 of the Localism Bill, which is currently before Parliament, there remains a risk that participation by a councillor in such circumstances may encourage a claim in judicial review on grounds related to, but going beyond, questions of predetermination. It would, therefore, be prudent to ensure that those councillors on the Partnership who may be wishing to take part in the Decision to Participate within their own local authority do not give the impression that they have reached a final view at the time of debate within the Partnership. Although clause 14, if enacted in its current form before any Decision to Participate is made, may have a bearing on the outcome of any related judicial review claim, it would nevertheless be beneficial to avoid any criticism or potential challenge on the basis of predetermination.

26 Picking up the threads from this and the previous section, the main points for the constituent Councils and the Partnership to take into account in seeking to minimise the risk of successful judicial review are as follows:

- (i) To ensure that Round 3 consultations are undertaken in full compliance with the principles established by the Courts, as set out in paragraph 22 and as detailed in the Code of Practice referred to in paragraph 26 above;
- (ii) In particular, the consultation programme should be sufficiently flexible to allow time for further review of the technical basis for the recommendation in the Final Report;
- (iii) Those participating in the decision of the Partnership in relation to the Final Report should be provided, or have ready access to, full copies of the responses received during the Round 3 consultation;
- (iv) The Final Report should set out a response to the substantive points raised by the consultation responses and, where technical issues have been raised, appropriate responses from the technical consultants commissioned by the Partnership;
- (v) Any further technical advice received by the Partnership in response to consultations which raise technical issues should be made available to the relevant consultee prior to publication of the Final Report;

- (vi) Appropriate advice should be given to councillor representatives on the Partnership on the need to avoid giving the impression that they have adopted a fixed and final position when undertaking their role on the Partnership, particularly if they wish to participate in decision making within their own local authority;
- (vii) Councillors who decide that they wish to be aligned with the case presented by one side or the other to the debate should not participate in the decision within their own local authority, whether in formal meetings or through other contacts with officers or members;
- (viii) Councillors participating in decisions within their own local authority on whether to Participate in the next stage of the process should be provided with a full copy of the Final Report of the Partnership and have access to the consultation responses received by the Partnership during the Round 3 consultation; and
- (ix) The constituent councils should be responsive to any letters received under the pre-action protocol and, where appropriate, undertake further consultations or review of the decision where there are any substantive grounds, after receipt of appropriate legal advice, for successful judicial review.

27 Although taking the above steps would reduce the risk of successful judicial review, those vehemently opposed to the hosting of the depository may nevertheless seek to challenge any decision to move to the next stage of the process. The next section of this advice briefly considers the implications for such challenge to the constituent councils.

Implications for the Constituent Councils in the event of a Claim in Judicial Review

28 In the event that the response to the pre-action protocol does not dissuade the aggrieved party from seeking judicial review, the constituent Councils may find that they are the defendant to such proceedings.

29 Part 54 of the Civil Procedure Rules requires that such claims be made within three months of the decision under challenge and, in any event, promptly. Given the long term nature of the process for MRWS, it is likely that the Administrative Court

would be sympathetic to claims lodged towards the end of the relevant three month period.

- 30 Potential claimants are required to seek permission from the Administrative Court to proceed with a judicial review claim. Such requests for permission are dealt with initially by a single judge through review of the grounds of claim and the Defendant's grounds for resisting the claim. Apart from the question of delay, the judge will need to consider whether the claimant has made out an arguable case. Any grounds for resisting the claim will need to respond in reasonable detail to the grounds of claim and, insofar as relevant, raise issues discussed earlier in relation to prematurity and the availability of alternative remedies.
- 31 Any party aggrieved by the decision at the permission stage may seek to have the matter re-determined following a hearing before the same or an alternative judge. Any further appeal to the Court of Appeal following the grant or refusal of permission would need to be made with the leave of the determining judge or the leave of the Court of Appeal. Such leave will generally only be given if there is a reasonable prospect of success or where the issue involved raises wider issues of public interest.
- 32 In the event that permission is granted, the judicial review claim will proceed to a substantive hearing, usually again before a single judge of the Administrative Court. The evidence considered by the Court will normally consist of an agreed set of documents comprised in a Court bundle together with witness statements filed by the parties. It is not usual to hear oral evidence.
- 33 In the event that the claim succeeds, it would be normal for the claimant to be awarded costs against the defendant local authority. The order of the Court would normally be to quash the decision in question and remit the decision back to the local authority concerned. Absent any successful appeal, the local authority would then reconsider the matter in the light of any findings of the Court. Any further decision of the local authority would again be susceptible to judicial review.
- 34 Judicial review proceedings would not finally determine whether the local authority/community concerned moved to the next stage in the process. That decision would remain with the local authority or community notwithstanding any successful judicial review. Apart from the question of costs and adverse publicity,

the level of exposure for the individual council/community in relation to the long term decision is, therefore, relatively limited.

- 35 As a standalone document, the Partnership's proposals for the round 3 consultation process go as far as it is practical to go in reducing the risk of successful judicial review. We have not of course, been able to review the consultation papers which will be issued by the Partnership. They should contain sufficient information to allow consultees to provide an "intelligent" and "informed response". they may well need to disclose technical annexes setting out the results of the geological surveys.
- 36 We would advise, therefore, that the consultation papers undergo a process of legal review when they have been prepared.
- 37 If they have not already done so, the Partnership may wish to consider whether any indemnity could be made available by central Government to the constituent councils to cover the risk of costs being incurred through judicial review proceedings. The Partnership and constituent councils may wish to be aware that such an indemnity may bring with it a higher level of scrutiny from central Government than would be desirable.