

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

Making “Voluntarism” Legally Binding

Introduction

- 1 Wragge & Co LLP has been requested to advise Copeland Borough Council, as an accountable body, and through it, the MRWS partnership, in relation to the potential for making “voluntarism” and the Right of Withdrawal (RoW) legally binding, or at least on a firmer footing than that contained in the White Paper. In particular, we have been asked to consider whether this could be achieved through a National Policy Statement issued under the Planning Act 2008 or whether other options are available.
- 2 Underlying the question are concerns that a decision to proceed to the next stage of the MRWS process could result in a site being identified for the geological disposal facility (“GDF”), which may result in the provision of the GDF despite a decision by the host community to withdraw from the process or in circumstances where the commitments associated with the voluntarism principle are not carried through.
- 3 As indicated in our separate advice paper on the relative weight to be afforded to voluntarism and the public interest, the Government has made it clear that it reserves the right to explore other approaches in the event that voluntarism and partnership does not look likely to work. A decision by the only community which has expressed an interest in hosting a GDF to withdraw would, of course, be a clear indication that the voluntarism and partnership approach has not worked. In that event, the need to provide a solution would remain and solutions outside the voluntarism approach would need to be considered. Those solutions may involve imposing a GDF on a host community. Depending on the stage reached and the investment incurred by the Nuclear Decommissioning Authority and the Government, that solution could be a GDF within West Cumbria.
- 4 It is also the case that a decision not to proceed to Stage 4 could also lead Government to the view that voluntarism and partnership has not worked. In that event, there would be nothing to preclude a proposal coming forward in the usual way outside the voluntarism approach.

Consideration

- 5 The Government has not determined as yet how a GDF would be granted development consent. There are broadly three alternatives:
- A grant of planning permission by the waste planning authority or by the Secretary of State on an application made by the NDA delivery organisation under the Town and Country Planning Act 1990;
 - By designation of GDF as a nationally significant infrastructure project for the purposes of the Planning Act 2008. Development consent being granted by the Infrastructure Directorate on an application made by NDA's delivery organisation; and
 - Approval to the GDF being granted in principle by a hybrid Act of Parliament.
- 6 The first point to make is that these alternative consent mechanisms do not depend on the host community volunteering to host the facility.
- 7 The previous Government indicated a preference (in the White Paper) for designation of a geological disposal facility as a nationally significant infrastructure project under the 2008 Act. Such a designation would take any site specific proposal outside the remit of the Town and Country Planning Act 1990 and, as legislation currently stands, would make the Secretary of State the decision maker on any application.
- 8 It is perhaps useful, therefore, to explore the possible avenues for enshrining "voluntarism" as a legally binding concept in that context.
- 9 It is not clear as yet at what stage any decision by the Secretary of State would be made to designate geological disposal of nuclear waste as a form of development which is designated as a nationally significant infrastructure project. It is also not clear at what stage any national policy in respect of such a facility would be designated by the Secretary of State.
- 10 The addition of geological disposal as a nationally significant infrastructure project by the Secretary of State would be by secondary legislation subject to affirmative resolution of Parliament. A National Policy Statement ("NPS") could only be formally designated after the completion of that process.

- 11 There would be two broad choices available to the Secretary of State in relation to timing of any NPS. Assuming that geological disposal had been designated as a nationally significant infrastructure project, the Secretary of State could designate an NPS during Stage 4 of the MRWS process. Such an NPS could indicate a broad area of search and could set out a list of criteria to be met by any GDF. Assuming that there had been no decision to withdraw from the process at that stage, the NPS could, if the Secretary of State so decided, indicate that community support would be one criterion to be met by any GDF i.e. an absence of exercise of the RoW. This could be argued to be consistent with the White Paper at least during the period when the voluntarism approach was seen to be potentially effective.
- 12 As a programme or plan for the purposes of the UK regulations on strategic environmental assessment, the NPS would need to be informed by a strategic environmental impact assessment, including consideration of any alternatives considered by the policy maker.
- 13 An issue has already been raised as to whether alternatives outside the local authority areas of the DMBs should be assessed.
- 14 Without detailed consideration at this stage, there is at least an argument that a selection based on voluntarism would be in line with the SEA Directive and the UK Regulations, which implement the Directive. If that line is followed, however, if the voluntarism approach falls away, indicated by a decision by the host community to withdraw from the process then, the basis for limiting consideration to sites within the host community also, arguably, falls away. There would then be no basis to prefer sites in West Cumbria simply on the basis of a previous and by then historical decision to participate in the MRWS process.
- 15 It follows, therefore, that if any NPS is limited to consideration of sites within West Cumbria pursuant to the voluntarism approach set out in the White Paper, a decision by the DMBs to withdraw from the process and, therefore cease to volunteer, should lead to reconsideration of the policy for the provision of any geological disposal facility, which would not necessarily be within West Cumbria.
- 16 In that context, a decision to proceed with a proposal for a GDF in West Cumbria could be challenged by the DMBs at two specific stages:

- The status of an NPS based on the voluntarism approach could be challenged in the Courts in the event that the Secretary of State did not review the NPS following any exercise of the RoW by the DMBs;
- In the event that the NPS was not amended and a proposal received a development consent order without meeting the voluntarism criteria, the decision to grant the order would be susceptible to challenge through judicial review proceedings within six weeks of the decision.

17 There is no reason in principle why the commitments associated with the voluntarism approach in relation to, for example, community benefits, should not be made legally binding in any decision to grant development consent for a GDF. In so far as these benefits go beyond the tests set out in Regulation 122 of the Community Infrastructure Regulations, however, amending legislation would be necessary to make these benefits a material consideration for the decision maker.

18 Subject to that amending legislation, such benefits could be set out in the legislation as requirements of any development consent or alternatively scope to accept or impose them through completed planning obligations or requirements or conditions of the consent could be given by the legislation.

Summary

19 In the likely event, therefore, of geological disposal being designated as a nationally significant infrastructure project, the concept of voluntarism, if enshrined in the NPS, would make the concept relatively more binding than the current expression in the White Paper. The consequences of a decision to exercise the RoW should cause the catchment for consideration of suitable sites to extend beyond the area represented by the Partnership.

20 Similar considerations are likely to apply, albeit with differences of detail, in the event that the alternative mechanisms under the 1990 Act or a project specific Act of Parliament were chosen. In both cases, a departure from the voluntarism approach should logically lead to a reassessment of potentially suitable sites and, logically, there would be no basis for limiting the area of search to West Cumbria. A site selection approach limited to West Cumbria, in that context, would be open to legal challenge.

- 21 Ultimately, there may be logical reasons for selecting a site for geological disposal in West Cumbria. If those arguments are defensible following a wider site selection process, a GDF in West Cumbria could emerge in circumstances where the decision approval would not be amenable to successful challenge.

- 22 Irrespective of whether the RoW had been exercised, there would be scope to impose the range of community benefits either through negotiated planning obligations or requirements/conditions of any consent or through legislation.