Meeting:	NuLeAF Steering Group, 3 February 2009
Agenda Item:	5
Subject:	Approaches to Community Funds associated with Facilities for Managing Radioactive Wastes
Author:	Fred Barker
Purpose:	To seek endorsement of proposed approaches for discussion with Government

Introduction

NuLeAF has taken a number of initiatives to promote the provision of community funds in association with the siting of radioactive waste management facilities. These include publication of Briefing Paper 14 (March 08) to inform discussion about the potential development of a national framework, and meetings with NDA and Government to explore the possibility of establishing such a framework.

More recently, the NuLeAF secretariat has been researching the use of S106 ('planning obligations') and the Well-Being Power. This research has informed preparation of the draft discussion paper attached to this report.

Recommendation

That the Steering Group endorse the draft Discussion Paper as a basis for further discussion with Government.

Contribution to Achieving Strategic Objectives

Discussion of the attached paper with Government is intended to contribute to the achievement of the following NuLeAF objective:

- to seek to ensure that a consistent, proportionate and transparent approach can be taken to the establishment of Community Funds associated with key radioactive waste management facilities.

DRAFT DISCUSSION PAPER: 'PROPOSED APPROACHES TO COMMUNITY FUNDS'

1 Introduction

A meeting in August 2008 between Government, NDA and NuLeAF discussed the possibility of establishing Community Funds for certain radioactive waste management developments (other than a Geological Disposal Facility[1]). The meeting focused on the legal powers that might be available and potential criteria for when Funds might be established. The Government's preference is for the S106 mechanism to be considered when specific projects were under consideration. NuLeAF pointed out that further consideration should be given to the potential role of local government's Well-Being Power (WBP) in utilising any money that might be made available, and whether it would be possible to specify criteria which could be used to identify which types of development could be subject to such Funds. It was agreed to reflect further on these issues and meet again at a later date.

Since that meeting, NuLeAF has been researching the use of S106 and the WBP and monitoring the position at Dounreay, where a proposal has been made for a Community Fund in association with a proposed LLW disposal facility[2].

The purpose of this paper is to provide a basis for further discussion with Government. It proposes a way forward that takes into account discussion to date and further research.

2 Overview of Proposed Way Forward

The proposed way forward involves two parallel approaches to the provision of Community Funds:

- The first is the existing practice of Community Fund provision through the use of Section 106 agreements ('planning obligations'). In principle, such agreements should be applicable to any development where there is a need to mitigate local impacts or meet local needs arising from the development.

- The second is a proposed 'strategic' approach to provision of Community Funds, applicable only where a new radioactive waste management facility is developed specifically to provide a multi-site and/or multi-customer service. In this case, it is proposed that provision of a fund would not be dependent on, or constrained by, an S106 agreement. Instead, it would rely on a combination of the NDA's power to make socio-economic grants and a local authority's WBP, which would allow it to manage and utilise any Fund that is set up.

The purpose of further discussion with Government is to:

(a) seek acknowledgement that the approach based on S106 agreements is in principle applicable to any proposed development where there is a need to mitigate local impacts or meet local needs arising from the development; and

(b) seek endorsement of the proposed 'strategic' approach for new multi-site/customer facilities.

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[1] The paper does not cover community packages linked to the development of a geological disposal facility for higher activity wastes. These are being addressed as part of the Government's Managing Radioactive Wastes Safely Programme.

[2] Report to the Caithness, Sutherland and Easter Ross Planning Applications and Review Committee, 13 January 2009, item 2.1, para 7.8 (Report to Planning Committee). The discussion paper will be updated when further information is available about the proposed benefits package at Dounreay.

The rest of this paper sets out the cases for these approaches.

3 Approach Based on S106 Agreements

In essence, the case for the first approach is based on well documented national and local policy approaches to the use of such agreements for non-radioactive waste developments, and the findings of research on S106 agreements. It also takes account of the S106 agreement underpinning the Copeland Community Fund.

The key points to note about this approach are:

- Planning obligations are intended to make acceptable development which would otherwise be unacceptable in planning terms. They can be used to secure a contribution to compensate for loss or damage created by a development or to mitigate a development's impact.
- Planning obligations should be based on a clear and up to date assessment of the loss, damage or impacts likely to be created by a development, and the nature and scale of compensation or mitigation needed. A significant broadening of the concept of development impacts has taken place over the last decade.
- There is nothing inherent in the provisions of S106 which restricts the provision of planning obligations to facilities with a national or regional role.
- The question of whether an obligation is valid and material is ultimately a matter for the Courts. There are examples of where the Courts have held that obligations that go beyond the Government's policy tests do nevertheless meet statutory requirements.
- Where agreement cannot be reached between a developer and local authority about the range and amount of contributions, there is an expectation that mediation or arbitration could be used.
- If an obligation cannot be negotiated to make an unacceptable development acceptable, planning permission is likely to be refused. The applicant then has a right of appeal.
- Most local authorities include policies about the principles and use of planning obligations in their Local Development Plans. These set out broad expectations and provide a starting point for negotiation. Some authorities employ specialist officers to develop and apply policies on planning obligations.

Annex 1 sets out further details on:

- the basic principles of planning obligations
- the extent of use of planning obligations
- local authority policies and approaches to planning obligations
- use of S106 with regard to developments for radioactive waste management
- potential impact of the Community Infrastructure Levy

4 Approach Based on the Well Being Power

Where there are proposals for developing new radioactive waste management facilities, there could be strong 'capacity' and 'cost efficiency' drivers for developing the facilities so that they can take wastes from a number of different customers or sites.

Where such proposals are for facilities at or adjacent to existing nuclear sites, this approach is likely to conflict with concerns of local stakeholders about major departures from what is perceived as 'business-as-usual', involving an assumption that 'imports' of radioactive wastes from other customers or sites will not be accepted.

A 'critical enabler' that may help gain the acceptance of local communities to proposals for new radioactive waste management facilities that are intended to provide a multi-site and/or multi-

customer service is an associated Community Fund. Such a Fund could help convince local stakeholders that the overall balance of pros and cons is in favour of the proposal.

In this case, it is proposed that provision of a fund should not be dependent upon, or constrained by, an S106 agreement. This is because the Fund would address a clear strategic need, in addition to meeting local planning needs and impacts. In these circumstances, a Fund could rely on a combination of the NDA's power to make socio-economic grants and a local authority's WBP, which would allow it to manage and utilise any Fund that is set up. Annex 2 sets out information about the nature of the WBP, evaluation of its usage and practical examples. This indicates that the WBP is likely to be ideally suited to such a role.

ANNEX 1: NATIONAL AND LOCAL POLICY APPROACHES TO THE USE OF PLANNING OBLIGATIONS UNDER SECTION 106

This annex provides an overview of the following:

- The basic principles of planning obligations
- Extent of use of planning obligations
- Local authority policies and approaches to planning obligations
- Use of S106 with regard to developments for radioactive waste management
- Potential impact of the Community Infrastructure Levy

The Basic Principles of Planning Obligations

The Town and Country Planning Act 1990 – Section 106 provides that a developer may enter into a planning obligation enforceable by the local planning authority. Planning obligations can be entered into by means of a unilateral undertaking by a developer or by an agreement between a developer and a local planning authority.

As explained in Government guidance[3], planning obligations are intended to make acceptable development which would otherwise be unacceptable in planning terms (para B3). They can be used to secure a contribution from a developer to compensate for loss or damage created by the development, or to mitigate a development's impact.

Where compensation or mitigation impacts are required, planning obligations should be based on a clear and up to date assessment of the impacts likely to be created by development and the nature and scale of the measures needed to address these impacts (para B28).

The guidance adds that there "are not hard and fast rules about the size or type of development that should attract obligations" (para B4).

There is an expectation that a planning obligation should meet all of the Secretary of State's policy tests. It should be:

- Relevant to planning
- Necessary to make the proposed development acceptable in planning terms
- Directly related to the proposed development
- Fairly and reasonably related in scale and kind to the proposed development and
- Reasonable in all other respects.

However, the guidance notes that while the Secretary of State sets out the policy tests for planning obligations, the question of whether or not an obligation is valid and material is ultimately a matter for the Courts. On a number of occasions, the Courts have held that planning obligations that go beyond the policy tests nevertheless meet statutory requirements (Circular 05/05, para 3).

Where there is a dispute or a problem in negotiating a planning obligation, Government advises that independent expert mediators could be used (para B37). It explains that:

[3] Circular 05/05: Planning Obligations, Office of the Deputy Prime Minister 2005. The circular encourages local planning authorities to use planning conditions in preference to planning obligations wherever possible.

> Although there will always be circumstances where no amount of mediation may lead to a solution and planning permission may have to be refused, third parties can provide valuable means of mediating an agreement … [4]

The guidance adds that if a local planning authority seeks unreasonable planning obligations, it is open to the applicant to refuse to enter into them (B56). A right of appeal then applies where an application has been refused planning permission due to the developer not agreeing to the inclusion of an obligation (B51).

Extent of Use of Planning Obligations

Over the last decade or more, the actions required by planning obligations have broadened beyond the direct provision of infrastructure to include features of general benefit to the community[5]. This has been accompanied by a significant broadening of the concept of development impact. These now incorporate aesthetic and environmental impacts requiring mitigation and demands for social facilities and services arising from schemes.

As highlighted by the Audit Commission[6], planning obligations have become increasingly important to the provision of public services associated with a wide range of developments:

> They are essential to delivering the necessary infrastructure for creating sustainable communities. They can: … mitigate the impact of development on communities; compensate for loss or damage created by a development; and support basic off-site infrastructure such as access roads.

Recent research[7] finds that new policies and good practice are becoming more embedded with positive outcomes for the number and value of planning agreements. In 2005-06, the average number of planning agreements per local planning authority was 27, with direct payment obligations rising far more than in-kind planning obligations. Consequently, the average value of direct payment obligations agreed per authority rose from just over £1.5m to £2.6 m.

Local Authority Policies and Approaches to Planning Obligations

Government guidance highlights that:

> Development plan policies are … a crucial pre-determinant in justifying the seeking of any planning obligations since they set out the matters which, following consultation with potential developers, the public and other bodies, are agreed to be essential in order for development to proceed. (B8)

It also stresses that local planning authorities should include policies about the principles and use of planning obligations in their Development Plan Documents (B25). It adds that more detailed policies – for example on the likely level and types of contributions – ought then to be included in Supplementary Planning Documents (B26).

Most local authorities have followed this advice. In 2001, it was reported that 85% of local planning authorities have specific policies relating to planning obligations in their development plans[8]. This helps to provide clarity, legitimacy and provides a starting place for negotiation.

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[4] Planning Obligations: Practice Guidance, Department for Communities and Local Government, July 2006.
[5] 'Planning Obligations and the Mediation of Development', H Campbell et al, RICS Foundation Research Paper, Nov 2001, p7.
[6] Audit Commission, 'Securing Community Benefits through the Planning Process', August 2006.
[7] 'Valuing Planning Obligations in England: 2005-06', DCLG, August 2008.
[8] 'Planning Obligations and the Mediation of Development', H Campbell et al, RICS Foundation Research

Government practice guidance also explains that some local authorities have appointed specialist S106 officers, with responsibility for developing and applying policies on planning obligations.

In 2006, the Audit Commission made a number of recommendations that sought to build on this approach. These included:

- Engaging Chief Executives, Leaders and Portfolio Holders to integrate potential contributions of S106 agreements with the delivery of community strategy and;
- Ensuring that other building blocks are in place, including the setting up of a system to deal with S106 agreements and draw on the experience of other councils.

An example of local authority policy on planning obligations is provided by Lancashire County Council[9]. This policy points out that if a particular planning obligation is necessary in order to make a development proposal acceptable, planning permission will not be granted without it (p13). It also states that:

- As a general principle, the local planning authority will expect each development proposal to consider all the negative impacts it may have on the local area and the environment. If a specific methodology in this document applies to a proposed development, the developer should expect to pay a contribution. However, it is entirely up to the local planning authority whether it imposes the full range of costs for planning obligations.
- Before buying land, developers need to consider the likely costs of any planning obligation. This document provides guidance on the range and amount of contributions a developer may have to pay. Discussion between developers and local planning authorities should take place at the earliest possible stage of a development scheme.
- If a proposal is viable but the developer and authority cannot agree on the range and amount of contributions, independent mediation and arbitration may be used. The authority and developer must agree on who should mediate, but the developer will normally have to pay any mediation costs.

Use of S106 with regard to Developments for Radioactive Waste Management

A recent notable use of S106 is in association with development of Vault 9 at the Low Level Waste Repository (LLWR) near Drigg in Cumbria[10].

Government and NDA agreed to the establishment of a fund, recognising the contribution that the local community will provide to the nation by hosting the LLWR. The NDA has committed to contributing £10 million to the fund to be paid in two stages, and to paying £1.5 million per year, for the period of operation of Vault 9 (around 10 years). The income or capital from the fund will be available to be spent on initiatives that are consistent with the NDA's socio-economic policy, including employment, education and skills, economic and social infrastructure and economic diversification[11]. The NDA's invoking of its socio-economic policy to guide use of the Community Fund sets a precedent for use of that policy in meeting local needs and mitigating impacts that will arise from proposed waste management facilities.

The basis for the fund is set out in the unilateral undertaking provided by the NDA to Cumbria County Council (dated 18 January 2008). The accompanying letter states that:

Paper, Nov 2001.
[9] Lancashire County Council, Sept 2008.
[10] Copeland Community Fund Case Study, Nov 08
[11] NDA Socio-Economic Policy (2008)

> Under the terms of the undertaking, the NDA offers to be bound, pursuant to section 106 of the Town and Country Planning Act 1990 and sections 7 and 10 of the Energy Act 2004, to set up a Community Benefit Organisation to administer a fund for the benefit of the residents of the Borough of Copeland in recognition of the national benefit derived from the future accommodation of low level radioactive waste from across the United Kingdom at the LLWR.

The provisions in the undertaking are stated to be planning obligations for the purposes of Section 106 of the 1990 Act. The undertaking further states that:

> In entering this planning obligation the NDA recognises that although the design of the Development has had due regard to minimising local impacts and although the total benefit from the Development in terms of contributing to meeting a national need will outweigh any residual adverse impacts of the Development it is appropriate to make financial provision to meet local needs arising from the Development including assisting participation of the community in the Development and to mitigate the residual economic and other impacts that will be caused by the Development. (para 12)

The undertaking also states that the NDA's powers under Sections 7 and 10 of the Energy Act 2004 enable it to give encouragement and support to activities that benefit the social or economic life of communities living near designated sites, or that produce other environmental benefits for such communities, including the power to make grants and loans.

Although the NDA has made it clear that the LLWR Community Fund is based on recognition of the national role of the LLWR, there is nothing inherent in the provisions of Section 106 of the Town and Country Planning Act, or Sections 7 and 10 of the Energy Act, which restricts the provision of benefits to facilities with a national role.

Potential Impact of the Community Infrastructure Levy (CIL)

Government has stated that the facility to enter into a negotiated planning obligation will remain when the CIL is introduced[12]. It adds that this is because planning obligations can be a useful tool to ensure that the specific impacts of a development can be mitigated. The Government is considering whether restrictions on the use of planning obligations should be made once CIL is introduced.

[12] 'The Community Infrastructure Levy', DCLG, August 2008.

ANNEX 2: ENCOURAGING GREATER USE OF THE WELL BEING POWER

This annex provides an overview of the following:

- The nature of the Well Being Power (WBP)
- Evaluation of the usage of the WBP
- Practical use of the WBP

The Nature of the Well Being Power

The WBP within the Local Government Act 2000 is intended as a tool to encourage local authorities to innovate in the range and nature of their activities. It enables local authorities to undertake any action to promote or improve the social, economic and environmental well-being of their area. It is intended to be used as a 'power of first resort' and addresses concerns about local authorities overstepping the limits of more specific powers.

As stated in a recent letter to local authorities from the Minister for Local Government:

> The well-being power was introduced in the Local Government Act 2000 to increase local authorities' capability to act to support their areas' economic, social and environmental well-being. It is a wide power of competence …[13]

Although some local authorities have made effective use of the WBP, Government wants to make its use more universally considered as a way of achieving objectives set out in Sustainable Community Strategies and Local Area Agreements[14].

Evaluation of the Usage of the PWB

Between 2003 and 2007, researchers undertook an evaluation to examine local authorities' take-up of the Power and the factors which had affected it[15]. Key findings included:

- Efforts to promote awareness of the Power were hampered by the complexity of the legal power, confusion amongst users between the WBP and the broader concept of 'well-being', and the difficulty of communicating information in constantly changing organisations.
- National and local government needs to be specific in their use of terms, proactive in their identification of opportunities for using the Power, and tailor advice and information to different stakeholder groups.
- Awareness and understanding of the Power is affected by a range of factors, including: the capacity and capability of the local authority, the strength of local partnership relationships, and the nature of interactions between the centre and the locality.
- Recent policy changes, particularly the opportunities available to local authorities in their 'place-shaping' role, provide new impetus for local authorities to innovate in making use of the Power.

Practical Use of the WBP

Further research[16] has shown that where the Power has been used, local authorities have been able to:

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[13] 'Use of the Well Being Power: Research, Report and Further Actions', Letter to Local Authorities, Minister for Local Government, 17 November 2008.
[14] Minister for Local Government, as above, 17 November 2008.
[15] 'Evaluation of the take-up and use of the Well-Being Power', DCLG, November 2008.
[16] 'Practical Use of the Power of Well-Being', DCLG, November 2008.

- Incur expenditure and give financial assistance
- Make arrangements, and agreements, and facilitate, incorporate, and coordinate (including supporting partners, and setting up contracts, companies, trusts and joint ventures)
- Exercise functions on behalf of other bodies (including lead/joint commissioning, integrating services, and pooling budgets)
- Provide staff, goods, services or accommodation.

Some authorities have used the Power as a power of first resort, for example, where it was known that other powers were available but that using the Power meant that they would not have to mine all the different functions and specify all the different pieces of legislation that it might otherwise have had to do.

Researchers outline a number of case studies, including:

- Social housing in Wakefield
- A Development Agency in Torbay
- A waste transfer station in South Hams
- Woodheat technology in Nottinghamshire
- An employment agency in Greenwich
- Street lighting in North Tyneside and Newcastle
- A community hospital and medical centre in Wychavon

Researchers point out that although the Power is wide-ranging, there are some legal limits to bear in mind. In particular, the Power cannot be used to undertake a specific activity if that activity is subject to any prohibition, restriction or limitation in other legislation. Use of the power must also have regard to statutory guidance and sustainable community strategy.