AUG 6

EAST NORTHANTS RMF, KING'S CLIFFE

CLOSING SUBMISSIONS ON BEHALF OF AUGEAN PLC

INTRODUCTION

NATURE OF APPLICATION & SCOPE OF APPEAL

1. The appeal is concerned solely with an additional waste stream in the three remaining cells of a permitted landfill until the expiry of the existing permission in August 2013. If the appeal is allowed and assuming the Secretary of State issues his decision in mid 2011, there would be approximately two years of landfilling LLW. Although Augean have announced an intention to seek planning permission in mid 2011 to extend the area and duration of landfilling, that application would be entirely separate from the present appeal proposal and would give rise to a very different set of considerations. Augean's intentions in that regard are of no direct relevance to the considerations now before the Secretary of State. No decision has been taken whether that application will include LLW. The time horizon for considerations of issues arising in the present appeal, such as need and any impacts, is, therefore, strictly two years.

2. At the PIM I invited determination of the appeal on the basis of a stand-alone application **[AP7]** and neither Inspector has demurred. In rejecting NCC's request for a comprehensive ES assessing the combined impact of the appeal proposal and the envisaged extension application, PINS ruled (inter alia) that the appeal proposal could be dealt with independently of any future proposal for physical or temporal extension to the currently permitted site **[AP13]**. The Secretary of State is invited to confirm that ruling. Nothing has occurred at this inquiry to lead to a different decision. NCC have raised this argument in a curious manner. They declined to take any point at the PIM but instead raised the matter in a subsequent

written submission. When PINS ruled against the argument, NCC did not seek to challenge the legality of the decision and has happily taken part in a 4 week inquiry. It is extraordinary after that participation for NCC to suggest that the SoS cannot validly take a decision on this matter. Had they had any real confidence in the argument they could and manifestly should have challenged PINS' ruling before the inquiry got under way.

3. The appeal proposal is in no sense piecemeal development and/or development which can only be properly determined as part of a larger whole, as alleged in NCC's additional reasons for refusal (a) and (b) **[NCC5]**, both of which have been rejected in PINS' ruling. It is not inevitably part of a more substantial development. The development if permitted will be implemented regardless of the outcome of any further planning permission. There is in reality no cumulative or in combination situation that here arises between the two proposals, even if any implementation of a subsequent permission occurred prior to the expiry in 2013 of the consent now sought which seems unlikely. In any event, the subsequent application would require assessment of the full effects of not just the extension to the landfill area but the extension of time for the already consented area so that any such cumulative effects would be considered *then*. At present it is simply not possible to carry out that exercise, as PINS ruling has already accepted [**AP13**,(iv)].

4. There is no question of "getting a foot in the door" if the appeal is allowed given the temporary nature and short timescale of the proposal. If the appeal is allowed it will neither predicate nor prejudice the outcome of the further application; conversely, if the appeal is dismissed the further application will still be made. There has been no real attempt in NCC's evidence to explain why the appeal proposal represents piecemeal development or why the appeal outcome might prejudice consideration of the extension application. Nor has there been any suggestion that the intended application would have any bearing on how the appeal development if allowed would be carried out: in all probability the decision would be known prior to the end of June 2013, the time by which landfilling must cease to enable the site to be restored if no extension has been granted. Any concern that the intended application

might delay completion of landfilling at and restoration of the three cells the subject of the appeal proposal is without foundation. If anything, the additional waste to be landfilled if the appeal succeeds would ensure that *more* of the void space was filled rather than less. There has been no suggestion from the Council that the appellant would hold back inputs of hazardous wastes during the period to 2013 so as to increase the voidspace for the more profitable LLW during any extended timescale for landfilling. When the matter was raised by the Inspector with Mr.Miles (although not with Dr.Wilson, the more appropriate witness to have dealt with it) he explained that it was highly unlikely that Augean would turn away from its core business. It certainly would not make business sense given that there is absolutely no assurance that Augean will be granted permission for any extension of time and it is in its best interests to complete as much of the permitted landfill before the existing permission expires.

5. NCC relies on the recent case of Brown **[OD82]**. However, that case is readily distinguishable on its facts from this appeal proposal. The freight distribution centre there in question was an *integral part* of the improvement and upgrading of Carlisle airport and the section 106 agreement in connection with the permitted FDC committed the developer to carrying out substantial airport improvement works, but the ES had only considered the environmental effects of the FDC and had not dealt with the airport works at all or considered the cumulative effects of the development of the FDC and the airport. Unsurprisingly the Court held that the ES should have assessed the cumulative effects of what was undoubtedly an integral scheme of development. There is not the remotest similarity between those facts and the present case. Significantly, the Court, in distinguishing Davies **[OD84]** where a new road was to be built regardless of whether a park-and-ride facility the subject of a separate application was permitted, drew attention to the fact that the road would be built irrespective of the outcome of the separate application and was not an integral part of a larger scheme. That is exactly the position in the present case: the appeal proposal will be implemented if permission is granted whatever the outcome of any future application and it is not inevitably part of a larger scheme of development. There is no question here of a developer deliberately slicing up a larger scheme of development into smaller components so

as to defeat the objects of the EIA Regulations: the appeal application is entirely separate from the envisaged extension application and each can and should be assessed on its own quite different merits.

6. I will deal later with questions raised by the Inspector about the outcome of this appeal setting any possible precedent. Suffice it here to say, no such concerns would arise and, significantly, none has been raised by NCC or WW.

NCC'S DECISION-MAKING PROCESS

7. The manner in which NCC arrived at its decision to refuse permission and the reasons on which it resolved to refuse are highly germane. Somewhat unusually the Chairman of the Committee has given evidence and it has, therefore, been possible to investigate fully how and on what basis the decision to refuse was made, aided (more unusually still) by the existence of a full and fully agreed transcript of the Committee hearing **[AP2]**.

8. The Secretary of State clearly attaches significant weight to Officers' recommendations: the Officers' Report is required to be submitted as part of the appeal questionnaire and CLG Circular 03/2009 (para B20) makes clear that authorities must show, supported by relevant evidence, that they had reasonable grounds for taking a decision contrary to the Officers' recommendation. Where permission is refused there is a statutory duty for the decision notice to "state clearly and precisely their full reasons for the refusal specifying all policies and proposals in the development plan which are relevant to the decision" (article 22(1)(c) of the General Development Procedure Order). Those reasons then largely determine the main issues to be dealt with at the subsequent appeal, at least in terms of the cases of the authority and the appellant. It is not open to a planning authority, at least without taking formal steps, materially to depart from or add to its resolved reasons for refusal at the subsequent inquiry.

9. The Officers' Report **[PA12]** in this case was thorough and comprehensive. Cllr. Ben Smith, the Committee Chairman, confirmed in XX that, while he disagreed with some of the report's conclusions, he had no criticism of its contents or the approach taken. The report's recommendation was forthright and unhesitating: there were no 'ifs and buts' or suggestions that the issues were 'finely balanced'...the advice was unequivocal that there were "no justifiable reasons to refuse" the application and that it should, therefore, be approved (9.5). Among the many conclusions contained in the Report were (i) that there was relevant Government policy dealing with the role of planning relating to LLW management which was a material consideration carrying significant weight in this decision (8.11), (ii) that the proposal was clearly in accord with that Government policy (8.18 and 9.4); (iii) that the proposal accorded with Policy 1 of the Waste Local Plan (8.4 and 9.3); that there was no doubt that the proposed LLW facility would be a specialised facility and therefore justifiable in both a regional and national context and fulfilling a national role (8.31); (iv) that in the short term the site would be the nearest appropriate installation to possible sources of LLW in Southern England so that, as a specialised facility, the distance the waste would travel would not be a justified reason to refuse (8.34); (v) that the Environment Agency had no planning or pollution control concerns and was intending to issue an authorisation (8.41); and (vi) that perceptions of harm cannot be regarded as being based on objective grounds and accordingly would not be a justified reason for refusal. I have drawn attention to these particular conclusions because it is abundantly clear that not only was the Members' decision contrary to the Officers' overall recommendation, but the reasons advanced by the Members were flatly contrary to forthright conclusions on these particular matters.

10. Augean submit that NCC's evidence at the inquiry has fallen far short of establishing that it was correct to have rejected the Officers' recommendations. None of its four initial reasons for refusal in **PA11** or the three additional ones added in **NCC5** has been substantiated in evidence. The suggestion that Augean's announcement of their intention to seek permission for an extension of landfilling somehow invalidated or undermined the content of the Officers' Report is simply wrong. The basis upon which the appeal proposal was presented to

Members in paras 4.4 & 8.61 of **PA12** remains perfectly appropriate. Significantly, although he has been present throughout most of the inquiry, there has been no communication from Mr.Watson that he had changed his mind on account of this or any other matter. Therefore, asides to this effect from Mr.Aumonier and Cllr.Heather Smith should be accorded no weight.

11. The transcript of the Member's debate **[AP2]** is illuminating and reveals the true reasons why the application was refused: see pages 42-47. The general tenor of the Members' comments was that they were ill-equipped to reach a decision on such a technical issue (for example, "too many unknowns" and "we're just amateurs"). The main reason put forward by the Chairman was that the proposal was not BAT/BPEO as the best option was to treat the waste at source. Other reasons suggested were that policies at a regional and local level did not support the proposal, that it was contrary to the proximity principle and that, linked with the 3000 signatory petition, there were perceived fears. Reasons 3 and 4 on the decision notice correctly reflect the Members' discussion, but the first two reasons are, putting it mildly, a very creative interpretation of the Members' discussion. For example, the Members had not even mentioned national policy or considered whether the proposal involved a specialised provision.

12. Significantly, however, the only policy at any level that it was alleged the proposal conflicted with was WLP policy 1, despite Members' attention having been specifically drawn in the Officers' Report to many other national, regional and local policies. Cllr. Ben Smith confirmed that he was well experienced in development control, appreciated the significance of the plan-led system and fully understood the need to cite all relevant development plan policies in the decision notice. He accepted in XX that it followed that no other policy had been relied upon in refusing permission or could now be relied upon, especially in circumstances where NCC had written two letters to clarify it reasons for refusal **[NCC3 & 4]** and submitted a supplementary statement of case **[NCC5]** and had not in those documents relied upon any other policies.

13. Cllr.Smith also confirmed that the lack of any discussion by Members about need for LLW disposal or reliance upon the first bullet in WLP Policy 1 was because the Committee had accepted the Officers' advice and conclusions on this matter: see paras 8.20-30 of **PA12**. It will be recalled that Members were advised that the proposal was justified in need terms on the basis of national need and complied with WLP Policy 1 which contained a requirement to demonstrate need. Cllr. Smith also confirmed that Mr.Aumonier's proof of evidence had not been referred to the Committee for its endorsement of any additional issues that he raised.

BRIEF DISCUSSION ON THE REASONS FOR REFUSAL

14. Reason 1. There is, and was at the time of the decision to refuse permission, national level policy specific to LLW which deals with all aspects of, inter alia, the management of LLW including planning decision-making and directed at, amongst others, waste planning authorities, namely the 2007 Policy on LLW: see para 2 and pages 21-22 of **PP2**. As noted already, Members' attention was specifically drawn to this in the Report and again on the day (page 37 of the transcript in **AP2**). Mr.Porten has sought to distinguish between national planning policy guidance and national policy offering planning guidance, but even semantically it is a distinction without a difference. That he takes such a point at all shows how nervous NCC must be that this first reason could be characterised as unreasonable.

15. It was indeed unreasonable for the Committee not to take account of this highly significant Government policy statement on LLW. If, as plainly seems to be the case from the way this reason was formulated and the absence of any discussion by Members on the 2007 LLW Policy, the policy statement was ignored, the decision was fundamentally flawed and any attempt properly to balance the merits of the proposal in the light of all material considerations was fatally undermined. For example, no or no proper account would have been taken of the national need for alternative LLW disposal options including, importantly, off-site landfill options provided by the supply chain. Significantly, in XX Cllr.Smith accepted that there existed highly relevant national policy on LLW, that it applied to Northants, that it

should not be ignored and that he did not regard the proposal as necessarily in conflict with it. He accepted that there was other national policy on waste, such as PPS10 **[PP5]**, which, although not specific to LLW, was clearly relevant and again did not see the proposal as being in conflict with it.

16. So far as development plan policy is concerned, while there are no policies specific to LLW, there were and are waste policies which deal with all waste types, which do not seek to preclude the disposal of LLW in the County and which provide a proper context in which to assess the proposed development, as Cllr.Smith accepted in XX. He accepted that the Committee had been deliberately selective in the reliance it placed on certain but not all of the principles listed in WLP Policy 1. It had not relied on the first two or the final two principles. He confirmed that there was no suggestion by NCC of harm to the environment, human health, natural resources, local amenity and highway safety and hence reliance had not been placed on the last bullet of the policy. Indeed, his proof at 6.7 **[NCC6.1]** emphasised that the refusal was not on account of any direct health or safety reasons. He accepted that the appellant did not have to make out a positive case to "justify approval" if the proposal was compliant with the development plan. The only conflict with policy alleged in the decision was with parts of WLP Policy 1 which he accepted had been replaced by the Core Strategy **[PP15]** and no longer was part of the development plan.

17. Reason 1 was unclear on what material considerations the Council had taken into account and why it had concluded they did not justify approval. NCC responded to the appellant's request for clarification in **NCC 3**. The response is curious to say the least, given that, with the exception of the reference to safeguarding the remaining void space for hazardous waste, all the considerations mentioned concern the alleged absence of need. As mentioned already, Officers had given clear advice on need in their Report which, as Cllr.Smith acknowledged in XX, had been accepted by Members, which explained the absence of debate on the matter and the deliberate non-reliance on the first bullet of WLP Policy 1 (which required demonstration of a clearly established need to serve local and regional requirements).

Further, the SoCG **[AP2]** at 8.4 records the agreement that there is a national shortage of LLW disposal sites and a need identified for new facilities for the nuclear decommissioning programme. By the time NCC3 was written or very shortly thereafter Policy 1 had been superseded by the Core Strategy which, as Cllr.Smith accepted, no longer required need to be demonstrated.

18. Dealing with the particular matters set out in NCC3, the fact that Northants is not a significant producer of LLW is not the point. What is the point, especially given that WLP Policy 1 no longer exists, is that there is an urgent national need for additional disposal options for LLW and the appeal site is the only site in the central and southern parts of the country able to meet this need in the short term. Whilst there is nothing in national policy to support use of this site in preference to other available and appropriate options closer to the source of arisings, no such sites exist and thus the appeal site represents the nearest appropriate installation in these parts of the country and as such using it to dispose of LLW arising in that catchment would accord with national policy, as well as being consistent with the national role that the site fulfils, albeit in relation to hazardous waste, as recognised in local policy. Further, while the remaining life of the site is short, the appeal proposal would make an important contribution towards meeting the short term need for LLW disposal capacity referred to in the Officers' Report **[PA12]** at 8.30 and 8.34 which, according to Cllr.Smith, the Committee accepted.

19. As to safeguarding the remaining void space for hazardous waste, no concern was raised about this in the Committee debate and is clearly an afterthought. It is highly unlikely because of the reduced annual inputs on account of the downturn in the economy that the void would be filled by mid 2013, as recognised by Mr.Aumonier in his reference to under-used voidspace at 5.30 of **NCC7.1**. Cllr. Smith accepted in XX that if there would be surplus space it would be sensible to make effective use of it.

20. Reason 2. Policy 1 of the WLP was superseded by the Core Strategy and is no longer part of the development plan. Three only of its waste development principles were relied on, namely the 3rd, 4th and 5th. The 3rd sought to minimise the movement of waste across WPA boundaries and clearly remains a material consideration notwithstanding the demise of the policy. However, it contained an exception for specialised waste provision and, as mentioned already, the Officers' Report gave firm advice that the proposal was a specialised provision for a specialised waste stream similar to hazardous waste and that, therefore, the distance that the waste would travel could not be objectionable. I will return to deal with this more fully later, but none of the evidence given at this inquiry has, I submit, undermined the validity of that advice. The 4th principle raises the same point.

21. The 5th principle required the proposal to represent the BPEO for the waste stream. This was removed as a relevant planning concept by PPS10 **[PP6]** in 2005. Policy 1 in this regard was clearly inconsistent with national policy and to rely on this issue was contrary to the express guidance in PPS10 para 23 to avoid placing requirements on applicants that were inconsistent with its policies (and see para 8.25 of the Companion Guide **PP23**). BPEO is regarded by the EA as the same as BAT [**EA17** para17] and the EA had already announced in its draft Permit issued on 19 February 2010 that it considered the proposal to represent BAT [see 5.4.3 of **EA9**]. It was doubly wrong, therefore, for NCC to have raised this issue under Reason 2 and the separate Reason 3. It will be recalled, however, that this represented in the Committee's mind the main reason for refusal.

22. When pressed by Augean to explain its position, NCC maintained its reliance upon BPEO/BAT in **NCC3** and **NCC4**, claiming in NCC3 that there were other techniques for landfill disposal which were more appropriate and environmentally acceptable, particularly to reduce public perceptions of harm. It was only in its supplementary statement of case **[NCC5]** issued after the further Committee hearing at the end of July 2010 that NCC abandoned reliance on BAT, recognising that it was primarily a matter for the EA and that it could not challenge the EA's conclusions on this matter. It recast the third reason for refusal deleting all reference to

BAT/BPEO and simply asserting that there were available disposal techniques (i.e. replacing the former reference to *landfill* disposal techniques in NCC3) that would deliver better outcomes than landfill burial as proposed at King's Cliffe and which would avoid or reduce the perception of harm. Uncertainty, however, remained as to what these other techniques and outcomes were, but it is significant that NCC apparently recognise that different techniques of managing LLW at this site could *avoid* the perceptions of harm so that there could not be an in principle objection to the site's taking LLW.

23. The uncertainty about this reason for refusal has prevailed throughout the inquiry. In fact there is a direct conflict of evidence in NCC's case. Cllr. Smith, reflecting his "just crazy" outburst in Committee, holds out for a Drigg or Dounreay type of dry entombment in a highly engineered form of containment. On the other hand, Mr.Aumonier goes to the other end of the LLW options spectrum advocating that LLW is not specialised waste, requires no specialist management and can be disposed of in any landfill site able to obtain regulatory approval, whether or not a hazardous waste landfill site. These two approaches cannot be reconciled: note the evidence of Cllr.Smith at 6.5 of **NCC6.1** that there was a strong feeling that the waste could be "dry stored in vaults". Mr.Aumonier stated in XX that he had been engaged by the Council at the end of May/beginning of June 2010 and so was clearly 'on board' before the supplementary statement of case was issued. Despite that, the recast reason for refusal was clearly advocating a technique involving a *higher* degree of containment than that provided at the appeal site and so for anyone to claim that it supported landfill with a lesser degree of containment than that provided at this highly engineered hazardous landfill site would be absurd.

24. Mr. Aumonier's contention that any landfill with a permit would be suitable for LLW has not been sanctioned by the Committee and is directly contrary to the basis on which the reason for refusal was raised. Mr. Aumonier's position is certainly more in accord with national LLW policy and strategy, but this of course only emphasises how contrary to such policy and strategy the Committee's decision, even as recast, was and is. It cuts right across the key aims

of 2007 LLW policy statement to provide flexible, cost-effective management solutions that appropriately reflect the nature of the LLW concerned [para3 of **PP2**]and would preclude a management option which the policy statement at para19 had expressly not precluded. This is taken forward in the NDA UK Strategy **[NS17]** which expressly encourages the commercial supply chain to bring forward off-site landfill sites for the disposal of LLW. Cllr. Smith accepted in XX that he might be in "headlong conflict" with Government guidance by advocating that all LLW should be managed at source.

25. Finally on this matter, given that NCC do not seek to challenge the EA's judgment that the appeal proposal represents BAT, there has been no satisfactory explanation how other disposal techniques could produce *better* outcomes when BPEO/BAT produces the *best* outcome, the option providing the *most benefit* or the *least damage* to the environment. There is no satisfactory explanation. The Council's stance is not justified and indeed is fatally undermined by its own evidence given by Mr.Aumonier. The suggestion that a temporary roof should be used as at Dounreay was particularly bizarre in circumstances where NCC do not challenge Mrs.Heasman's evidence that it would provide no material benefit and would in fact give rise to health and safety concerns with achieving adequate ventilation of the enclosure. As Mrs. Heasman explained, the management arrangements at Dounreay are completely different from this site with the operational cell being worked for a much longer period, with the site being below the water table and with there being no leachate management system in place. She could not believe that any fears would be allayed by using a temporary roof for such a short period. The only sensible conclusion to make is that it would be a completely unnecessary expense and benefit no one.

26. I should add that this is not a case where the precautionary principle has any application. PPS23 [PP6] sets out at para.6 the circumstances where the principle is relevant and neither applies here. It is common ground with NCC that there would be no unacceptable impacts on human health, ecological interests or the wider environment and the level of scientific

agreement within the scientific community (Professor Wakeford and Dr. Denman certainly agree) is such that the radiation risks posed by this development can be assessed with confidence. When Cllr.Ben Smith was asked in RX whether there was any conflicting scientific information before the Committee all he pointed to was information from NuLeaf in their presentation: this, however, had nothing to do with radiation risks and related to their preference for on-site rather than off-site management of LLW.

27. Reason 4. I will deal fully with perception as a discrete topic later in these submissions. However, at this stage I would make four comments about the Council's stance and the evidence it has advanced. First, the Officers' Report contains full guidance on the circumstances in which perceived harm could be raised as a reason for refusal, in particular correctly pointing out the need to consider whether there was objective evidence to support the perception [8.45-47 of **PA12**]. This was repeated orally at the Committee [page 39-40 of the transcript in **AP2**].

28. Secondly, the clear advice the Members were given was that since the perceptions were not based on objective grounds there could not be a justified reason for refusal. The 4th reason for refusal was, therefore, raised in direct contravention of the Officer's advice. I submit that none of the perception related evidence adduced at this inquiry has raised issues that were not already contained in the representations in response to the planning application and, therefore, fully appreciated by the Officers.

29. Thirdly, from para.6.8 of **NCC6.1** it is clear that Cllr.Smith attached weight to the sheer *amount* of opposition to the proposal. Further, in XX Cllr.Smith stated that he had been impressed by and attached weight to the number of signatories to the petition. As an aside, given the alarmist terms of the headnote and the failure to convey any information about the type of radioactive waste the proposal concerned, it is perhaps surprising that so *few* people signed the petition. More importantly, the transcript reveals at page 39 that the Committee was expressly advised by Mr.Watson that it was not the *number* of objections which should

be a reason for refusal but whether those objections were based on sound and justifiable planning reasons which could be defended. That advice was, I submit, impeccable and entirely consistent with Government guidance in **PP21** para 27 that local opposition is not by itself a ground for refusing planning permission.

30. Further commentary on this is to be found at para B21 of Circular 03/2009 that the *extent* of local opposition is not in itself a reasonable ground for resisting development and that to carry weight opposition must be founded on *valid planning* reasons which are supported by *substantial evidence* and that planning authorities should therefore make their own *objective* appraisal to ensure that valid reasons are stated and substantial evidence provided. Such guidance applies to all objections including those based on perceptions and is contained in a recently issued Circular. Unless and until it is replaced by new guidance it should be accorded considerable weight, especially as it is consistent with express guidance in PPS23 and its Annex on how to approach perception objections **[PP6 & 6A]**. The West Wratting appeal **[OD65]** is a good recent example of this advice being heeded: at IR 12.16 the Inspector observes that planning applications cannot simply be determined on the basis of a poll of numbers in favour and against and that such an approach would be likely to thwart many forms of development, including many categories of public utilities, which are perceived by those affected to be unattractive neighbours but are nonetheless necessary to serve the largely silent wider community. Of course in Augean's case the wider community could extend to a large part of Southern England, but even looking at the more local community examined in **AUG3.3(12)** the signatories on the petition represent a small minority of the total population.

31. Fourthly, Mr.Aumonier explained at page 7 of NCC7.1 that he was not presenting evidence on the 4th reason for refusal which was being covered by Cllr.Smith and Professor Kemp and he reconfirmed this in XX. Therefore, such evidence as he did give on this matter is not deserving of weight. Cllr. Smith had not attended any of the public meetings or the public exhibition or

the open day and was not in the best position, therefore, to gauge the nature and extent of the perceptions other than what he heard at the Committee. The transcript reveals at page 47 **[AP2]** that it was the number of signatories on the petition which was perhaps the main factor in his decision to support a perceptions reason for refusal: there was no consideration given by him or other Members to whether the perceptions were objectively justified. Cllr.Smith was himself at pains to point out that the refusal reason was not based on *any* direct health or safety reasons [**NCC6.1** para 6.7]. Not only was the Committee made fully aware that all the statutory consultees were unanimous in concluding that the proposal would not cause any material harm to human health or the environment, but of course they knew well that the independent expert that the Council had itself engaged to advise on radiological risk had advised unequivocally that there were no radiation safety issues to prevent the proposal proceeding and that the site could be safely operated within current safety guidance. The vast gulf between the perceptions and the reality of the situation would have been obvious to Cllr.Smith and his colleagues had they bothered to consider the matter.

32. So far as Prof.Kemp is concerned, it has to be asked what value his evidence **[NCC8.1]** has been to the critical issues of whether the perceptions are *material* to a planning decision and, if so, what *weight* is to be attributed to them. He had not attended any of the consultation meetings and his knowledge of what occurred was derived solely from reading the documentation and discussions with Cllr.Smith who himself had not attended any of the consultation meetings. Surprisingly Prof.Kemp stated that, although the weight to be attached to perceptions depended in part on whether they in themselves had material effects (3.2), it was not possible to *quantify the effects* of perceived risk in this case (2.2). He made no attempt properly to assess or quantify the *scale* of the perceived risk, merely offering various and sometimes contradictory descriptions of them as being not insignificant, significant, material, predictably high, a large percentage or the majority which in XX he accepted he could not substantiate. More surprisingly still, in his EiC he volunteered that it was not his role to say exactly how the perceptions should be *weighed*. His proof certainly offered no guidance on how the weight to be attached to perceptions should be assessed or whether

and ,if so, how one should differentiate between the weight attaching to justified and unjustified or rational and irrational fears and perceptions. He offered no guidance on what positive factors would be at work helping to counteract the creation of negative perceptions: he acknowledged such factors would exist and so his proof was far from a balanced consideration of all the factors shaping the formation of perceptions. He gave no proper consideration to the importance of establishing whether the fears and perceptions were objectively justified, what this meant and how best to determine it despite having to accept in XX that this was an important ingredient of Government policy on perception. His main contention on the weight to be attached to perceptions was not about their being objectively justified, but whether they were genuine and had material effects (3.2). However, genuineness has little or nothing to do with whether the fears are objectively based and the materiality of the effects relates to the consequences rather than the causes of the perception.

33. His proof was long on the theory of risk communication and a description of all the fright factors at work in risk perception, but his comments on the appeal proposal were limited mainly to stating that most of the risk factors were here present and that a heightened level of public concern was not only unsurprising but predictable (6.3.2) which, if he will forgive me, is a glimpse of the obvious. Beyond that Prof.Kemp anticipated that the level of perceived harm in the community could not be greatly reduced and his overall message seemed to be that, away from nuclear sites themselves or their immediate environs where there would be a good appreciation of radiation risks, a high level of perceived harm was inevitable (7.6). If this was enough to prevent LLW disposal proceeding, it would thwart the achievement of key parts of the Government's LLW policy and strategy.

34. He had criticisms of some aspects of the appellant's community engagement as well as praise for other aspects, but it is difficult to see how this assists on the important issues of the materiality of the perceptions and the weight to be attached to them: whatever the rights

and wrongs of the exercise, we are where we are and what he failed to address was the weight to be attached to those perceptions. His main criticism was Augean's "decide, announce and defend" approach which he compared with the Dounreay all management options appraisal commended in one of the case studies in **T63.** However, in XX he conceded that a supply chain proposer of a landfill site was inevitably restricted to a single project at a single site and that in such a situation the other case study relating to Lillyhall was more apt. When compared with the Lillyhall pointers to good practice, the engagement carried out by Augean was not merely prodigious but closely resembled the actions taken to engage the public at Lillyhall.

35. When it came to the critical elements of Government policy guidance on perception in PPS23 and its Annex **[PP6 & 6A]**, Prof.Kemp was surprisingly unfamiliar with the requirement that for actual or perceived risk to be material to the consideration of a planning application the land use consequences of such risks or perceptions should be clearly demonstrated and he conceded that his proof at para 7.9 was in error. Despite the claim at 3.3 that the perceptions will have real consequences and impacts for the local community, these were never explained. He did not suggest that any land use planning impacts would arise and merely pointed to common health effects such as headaches, sleeplessness and malaise. As made clear in the Ince Marshes case study in HPA14, it is the uncertainty caused by the planning process rather than the development itself which gives rise to anxiety and stress. Anxieties should be allayed once the decision on the appeal is announced. Significantly, no objector giving evidence in person complained of any such effects (only after hearing Mr.Miles' evidence, has one objector written complaining of anxiety exacerbating a diabetes condition). In any event, if such effects had been or would be experienced they would represent *actual* harm to health which NCC have emphasised they do not seek to rely upon. As stated in its statement of case [**NCC1** para 50], the risks associated with the landfill would be small and tolerable. Even in RX when asked what would be the planning impact or consequences of the public perceptions, all the Professor offered was that it would lead to an "effect on amenity".

What this effect would be was never explained, but even if such an unspecified effect did arise it was not explained why this would have a land use manifestation.

36. All in all, it is submitted that the Professor's evidence was of little value in assessing whether the perceptions and fears are material and if so what weight is to be attributed to them. He accepted that the evidence given at the Belvedere EfW inquiry by Professor Furedi was similar to his own [**OD63** IR7.203-213], but it had little persuasive effect on the Inspector who commented on the intangible nature of the evidence and that he had been unable to detect any specific or convincing evidence of land use or planning consequences arising from the negative perceptions of the local community [IR12.183-186]. The same conclusions could apply in this case to Prof.Kemp's evidence. He accepted that here, as at Belvedere, there is a "clear gulf" between the technical assessment of the risk and the public perception.

37. Additional Reasons (a), (b) and (c). I have already dealt with these at paragraph 2 above.

POLICY

NATIONAL WASTE POLICY

38. PPS10 **[PP5]**, PPS23 **[PP6]** and the Waste Strategy for England 2007 (WSE) **[NS1]** do not deal specifically with LLW but nonetheless contain relevant national policy guidance for the appeal proposal, as with all proposed waste management facilities. They were all addressed in the Officers' Report **[PA12]** and Members were advised at para.9.4 that the proposal accorded with the policy statements in PPS 10 and 23. There was no suggestion of any conflict or discord with WSE. The Council's reasons for refusal do not allege any conflict with these national policy documents. The Council's statement of case **[NCC1]** (at paras 37-41) refers only to PPS10, but then only in connection with the proximity principle: significantly, there is no suggestion of any conflict with its provisions.

39. Mr.Aumonier was the Council's witness on planning policy. His proof **[NCC7.1]** refers briefly to PPS10 (at paras 4.8 and 5.27) and even more briefly to PPS23 and WSE (at 4.58-59). At other places in his proof Mr.Aumonier makes fleeting references to these documents when considering issues such as the waste hierarchy and proximity. There is no suggestion of outright conflict with any of the provisions of these national policy documents and the closest he gets to this is the suggestion at 6.3 that the transport of LLW to the appeal site could not be consistent with one of the key planning objectives of PPS10. Despite the full coverage of these documents by Mr.Miles in his main proof, Mr.Aumonier did not respond in his rebuttal. However, in his EiC Mr. Aumonier, no doubt reflecting on the XX of Cllr.Smith which had established that there was no alleged policy conflict remaining in the Council's case, claimed for the very first time that the appeal proposals were in conflict with PPS10 taken in its entirety. That claim is, I submit, wholly untenable.

40. Mr.Miles' main proof **[AUG1.2]** deals fully with PPS10 and 23 at 6.5-14 and 6.70-105, in particular with PPS10's KPOs and the site suitability factors in para.21. He concludes that the appeal proposal is fully compliant with these provisions. This evidence attracted extremely limited XX from Mr.Porten. It is not necessary for me to repeat that evidence here, especially as it was essentially unchallenged. However, I would seek to emphasise the following matters. First, the opening two paragraphs of PPS10 highlight the critical role ("pivotal") that the planning system should play in ensuring the adequate and timely provision of needed, new waste management facilities: there is a compelling need now for additional disposal routes for LLW including supply chain landfill sites and the appeal proposal is genuinely a facility of the right type, in the right place (given that there is no other available site) and at the right time.

41. Secondly, with regard to the KPOs, there is an excellent fit with these objectives. The first, dealing with the **waste hierarchy**, acknowledges that, although disposal is at the bottom of the hierarchy, it is an option that still *must* be provided for. Although the LLW policy and strategy **[PP2 & NS17]** seek to avoid the use of disposal wherever possible, it is recognised

that there are limitations to the application of the hierarchy in the management of legacy wastes (**PP2** para18) which forms a large proportion of the LLW envisaged for disposal at the appeal site and both documents give strong encouragement to the disposal of LLW in landfill sites as an alternative to disposal at LLWR. (See also **NS18A** para1.1 where the limited opportunities to apply the hierarchy to non nuclear industry LLW are recognised). If the appeal is allowed the Fawley incinerator will be able to treat larger volumes of LLW higher up the hierarchy.

42. The 2nd KPO deals with what is sometimes called the **self sufficiency principle** under which communities are encouraged to take more responsibility for their own waste. This cannot sensibly refer to a single district, county or even region where, as here, the waste involved has a national dimension. Significantly para.36 of PP2 applies this principle only to n*on-nuclear* industry LLW arisings and not to the much larger quantities of LLW generated by the nuclear industry. Mr.Aumonier considered that in future WPAs around the country would be encouraged to make appropriate provision within their own areas for any LLW arising within those areas. This may be so, but whether such encouragement will actually lead to such provision being made is quite another matter given the current antipathy of most authorities towards doing that, given the envisaged non-binding nature of Inspectors' recommendations on DPDs in the future, given the expected hostility of host communities to any such provision and their increased ability to influence plan-making under the new localism agenda and given the reluctance of waste operators to take forward and operate facilities for LLW. As Mr.Miles emphasised, whatever may happen in the future, it was "very, very unlikely" that any such plans would be in place before expiry of the 2006 permission. Even if they were, there is really no prospect within that timescale of new facilities coming on stream even if there was an operator willing to take up the challenge.

43. The 3rd KPO relates to the **national waste strategy** and supporting targets. The appeal proposal would directly assist in meeting the needs identified in the national LLW policy

statement and the national LLW strategy, in particular by providing an early solution for dealing with legacy wastes which are delaying the nuclear decommissioning programme in central and southern England. The NDA and RSRL are strongly in support of the proposed development, as are other potential consignors of LLW to the site. The appeal site currently caters for a national catchment area in terms of its hazardous waste specialism and the disposal of LLW here would be entirely complementary to that role.

44. The 4th KPO deals with **the protection of human health and the environment** as well as with the proximity principle. So far as the former is concerned, sections 5&6 of the SoCG **[AP2]** record that there is no disagreement between the appellants and NCC on non-radiological and radiological impacts and NCC accept that any risks associated with the development would be low and tolerable [**NCC1** para50]. So far as the **proximity principle** is concerned, the inflexibility of the former principle that waste should generally be managed as near as possible to its place of production **[PP5A]** was considerably relaxed in the 2005 reformulation: all that is required now is that the waste should be disposed of in *one of* the nearest *appropriate* installations. Use of the word 'appropriate' immediately shows that factors other than distance have to be considered, including, for example, cost-effectiveness, economies of scale, deliverability and environmental performance. Any distinction which may have formerly existed between disposal and treatment in the application of the principle has been removed by the revised 2008 WFD article 16 **[INT13]** which takes direct effect in the UK next month. I will deal more fully later with issues of transport and proximity, but suffice it here to say the appeal proposal would, assuming planning permission and the EP are obtained, without any doubt be the *nearest appropriate* installation to the source of arisings in central and southern England that Mr.Miles identified as the most likely consignors of LLW to the site.

45. The 5th KPO relates to, amongst other matters, the meeting of **needs** and encouraging **competitiveness**. The appeal proposal would meet the urgent needs of the nuclear industry as well as the non-nuclear industry for an alternative disposal route for LLW and it would

indeed encourage competitiveness with other disposal routes even though the site would enjoy an inevitable headstart over other potential landfills in this part of the UK.

46. The 6th KPO relates to the Green Belt and is not here relevant. The final KPO seeks to ensure that the design and layout of the site supports sustainable waste management. There is no change proposed to the consented design and layout of the site. The development would provide a new sustainable management facility for LLW.

NATIONAL LLW POLICY & STRATEGY

47. The national policy statement on LLW **[PP2]** has been exhaustively examined at this inquiry. Its contents are directly relevant to and very supportive of the appeal proposal. It was in force at the time of NCC's decision and , as noted already, although Members were advised that it should carry significant weight in their decision, it was largely ignored by them on the misconceived basis that it was not itself national planning policy or guidance.

48. A key theme throughout the document is that a risk-informed approach should be adopted to ensure the safety and protection of the public (paras.12-16 and Annex 1 paras.37-40). It sets dose constraints and risk targets which the proposal would comfortably meet and indeed exceed (i.e. be better). A risk of less than one in a million per year is stated to be a very low level of risk and one that is broadly acceptable without concern. The maximum dose that a member of the public would receive under the unrealistically conservative assumptions in the radiological risk assessment would be the equivalent of this "acceptable without concern" risk target and, of course, as soon as a person moves away from the immediate presence of the LLW deposit the dose received would be a small fraction of that risk target. Prof.Kemp was critical of the use of "technically assessed levels of risk", but this is precisely the approach that the Government commends and, therefore, cannot be ignored in risk communication and in the evaluation of perceived risks. The policy statement seeks to put the dose constraints that it sets into a proper context by comparing them with the average annual

doses that people in the UK receive from background radiation. Again, Prof.Kemp appeared critical of the use of such comparisons but in so doing he parts company with national policy.

49. Perhaps the most important theme throughout the policy statement is the emphasis on the need for flexible, cost-effective, fit for purpose management solutions to be brought forward to deal with the types of LLW that do not require the much higher degree of engineered containment provided at LLWR and thereby husband such a precious and costly resource. The specific endorsement of the use of landfill sites for LLW final disposal (para.19) represented a marked shift from the previous guidance. See also **PP22** (p.24 para.12.1) where the Government states its belief that landfill (and incineration) is a viable and important option for the management of LLW. The appeal proposal is a direct response to this clear encouragement of the use of suitably engineered landfill sites and would be entirely consistent with this key focus on fit for purpose management solutions.

50. The policy statement raises a presumption in favour of early solutions. Para.22 refers to management solutions which can be implemented "early rather than late" and at the "earliest possible stage" and states that the *objective* is to put such solutions in place *prior* to the implementation of management plans *wherever possible*. It makes clear that early solutions does not necessarily equate with early disposal. However, where, as here, the only LLW that the site could receive would be genuinely residual and incapable of being managed higher in the hierarchy (by virtue of the requirement for every consignor to have satisfied the EA as part of the authorisation process that the hierarchy has been properly addressed) there is nothing in the statement to suggest that early and indeed the earliest possible disposal should not occur.

51. Mr.Aumonier was critical of "ad hoc" solutions being proposed in advance of completed management plans but that is wholly misplaced in relation to this appeal proposal: first, management plans are the responsibility of the waste producer and are not required from or are relevant to supply chain initiatives and, secondly, there is specific encouragement to bring

forward management solutions in advance of the preparation of management plans. It is to its great credit that the appeal proposal comes forward as an early response to the new LLW policy statement capable of meeting a short term but pressing need of RSRL and others. As RSRL have pointed out in their letters to the inquiry [OD67], the lack of suitable disposal routes for their LLW is holding up decommissioning and each year their sites are extended will cost the UK taxpayer tens of millions of pounds (8 October 2010 3rd page). Further, as Mr.Miles explained in XX it was essential that supply chain sites were brought forward *before* producer management plans were finalised as otherwise it would be impossible for such plans properly to consider all the available options and would prevent the required consultation with host communities taking place if the sites had not already been identified and approved.

52. The policy statement seeks to avoid excessive transport of waste and requires consideration to be given to the proximity principle with transport being expressly considered in any options appraisal. However, it emphasises that these considerations should be balanced with all the other relevant factors on a case by case basis, thereby clearly acknowledging that distance of travel is neither an overriding consideration nor one that is to be given priority over any other relevant factor. That this is the approach is perhaps seen most clearly in **PP22** (at p.15 para.5.1) where it is stated that minimisation of transport is "just one of a number of factors" to be taken into account and that transport minimisation and the proximity principle are "simply two factors amongst many".

53. The NDA UK LLW Strategy for the Nuclear Industry **[NS17]** was approved by Government **[NS17A]** in August 2010. It is specifically directed at, amongst others, planning authorities, waste producers and the supply chain. It is of direct relevance to the appeal proposal and is deserving of considerable weight. The appeal proposal is fully in accord with its contents which take forward and amplify the main policies enshrined in the national LLW policy statement. One of its three strategic themes (p.9) is making the best use of existing LLW management assets. In Figure 1, which graphically depicts the strategy, the disposal level of

the hierarchy refers explicitly to making the best use of LLWR. Page 25 explains that continuing to manage LLW as we have done in the past with a focus on disposal at LLWR is *not sustainable* and that appropriate alternative waste management routes *must* be used for wastes diverted from LLWR. The strategy seeks to extend the life of the facility to ensure capacity for the long term and it does this by insisting that the types of LLW which do not require its high degree of engineered containment should no longer be accepted there. Measures are already in place to prevent such waste being disposed of at LLWR (see p.25 and the 3rd page of RSRL's letter of 8 October 2010 in **OD67**). Although the strategy envisages that a successor to the Repository will not be required before the end of the century and that new repository capacity will not be required for many decades (p.36-37), Mr.Aumonier's claim that there was, therefore, no rush and that we could continue to consign LLW to Drigg was totally wrong: that extended capacity at LLWR is achieved only because the unsustainable past practice is stopped and the precious remaining capacity reserved for the higher level wastes that require the greater level of protection. The very promotion of such an argument directly contravenes two of the three strategic themes of the Strategy, namely to make the best use of existing facilities and the need for new, fit for purpose waste management routes.

54. The 3rd strategic theme is the waste hierarchy. There is a preference for management of LLW at higher levels in the hierarchy, but where that cannot be achieved disposal is clearly seen to be acceptable provided the impact on people and the environment is minimised. In the case of the appeal proposal it has been agreed in the SoCG [**AP2** at 8.3] (after Mr.Aumonier's engagement by NCC) that the only LLW that would be deposited at the site would be residual waste which could not be subject to management measures higher up the hierarchy. Mr. Aumonier stated in XX that he did not resile from this , although he came very close to trying to do just that. However, unusually in this case because of the requirement for every waste consignor to obtain an EP, there is a very high degree of confidence that the waste will genuinely be residual and RSRL's letters are a further confirmation of that. At the disposal level the Strategy gives strong encouragement to the supply chain to bring forward landfill sites (see pages 13, 26 and 32). The 2nd sentence of 3.2 on p.32 states that it is *essential* that

the supply chain be able to take part in the delivery of the strategy. Particular factors in favour of the supply chain are stated to be its maturity and that the operators have the expert capability and techniques required.

55. Key outcomes of the Strategy are threefold: protection of people and the environment, flexibility for early solutions and value for money (see Fig.1 on p.10). The appeal proposal would deliver all three. There is no dispute with NCC on the 1st. In relation to early solutions, the Strategy makes particular reference to legacy wastes at p.34: it clearly recognises the difficulties such wastes present for the decommissioning programme and requires legacy wastes to be cleared from the site of generation "as soon as practicable", stating that dealing with such wastes is a key part of NDA's mission. It would be difficult to conceive of greater weight being placed on this matter and it is to the great credit of the appeal proposal that it can provide an early disposal route for RSRL to clear the legacy wastes from its sites which are delaying decommissioning. As to value for money, the Strategy at p.13 clearly sees the supply chain as delivering cost-effective, affordable waste management facilities. Direct evidence has been supplied by the NDA and RSRL to the inquiry demonstrating very considerable cost savings to the public purse that would be achieved by diverting waste away from LLWR to a landfill sites such as the appeal site (see **AUG1.3** Appx D and **OD67** 22 June 2010 letter pages 9 & 15). It regards affordability as a key consideration (p.13) and so this must be accorded significant weight, particularly at a time when Government has taken exceptional measures to reduce public expenditure.

56. Finally in relation to the Strategy, further guidance is given on the proximity principle. It expressly contemplates (p.13) that LLW may be transported a considerable distance from where it is generated and draws a comparison with hazardous waste which is, of course, particularly pertinent to this appeal site. In the box on p.14 it is stated that the proximity principle is appropriately considered as part of the BAT assessment undertaken by the waste producer as part of the application for an EP to send waste off site for treatment or disposal. Exactly so. This is virtually a fail-safe assurance that no LLW would be received at the site

unless the consignor has either demonstrated to the EA's satisfaction or could so demonstrate if challenged by the EA that the transport of LLW to the appeal site was in accord with the proximity principle. Given that the site would, if permitted, represent the only available installation in the central and southern parts of England from where the bulk of the LLW would be received, it is difficult to conceive how it could offend the proximity principle for at least the duration of the appeal proposal. Although Mr.Aumonier stated that a planning authority could reach a different decision on transport issues from the EA's BAT decision, this was never properly explained and in any event is not a tenable argument for him to raise given that he agreed there was no other landfill more proximate to the sources of the LLW able to take such waste.

57. Of course BAT is not a one off process but a continuous process and the position may change in the future if other landfill sites became available to take LLW, but that would be beyond the timescale of this proposal. The Post Adoption SEA of the Strategy **[NS19]** emphasised at pages 4-5 that the impact of LLW transport were so small that transport was not a strong differentiator between management options and a similar message is contained in the Post Consultation Response **[NS19]** at p.16. Page 20 of the same document looks at other factors relevant to the proximity principle including the dispersal of producing sites, the small quantities involved and economies of scale. In the light of all these matters there is really no justification for contending that the appeal proposal offends the proximity principle.

58. Mr.Aumonier attempted to establish that rail transport to LLWR was a realistic option for LLW generated by Harwell once it became clear that his own Wrate analysis demonstrated that for road transport the journey to the appeal site was substantially shorter than that to Drigg. The final paragraph of RSRL's letter of 8 October 2010 **[OD67]** explained that rail transport would be unlikely ever to be cost-competitive with road haulage given the small volumes involved, the absence of rail freight infrastructure on-site and the need for road haulage to reach such facilities. Its letter of 4 November 2010 on p.14 repeats that matter and states that to transport LLW to a rail terminal would require a fully compliant road shipment

to be prepared and once it was in place the additional cost of driving to King's Cliffe would be marginal. These points have been completely overlooked by Mr.Aumonier in his commentary on p.12 of NCC7.5 on the cost-competitiveness of "road haulage" (he meant rail haulage): distance and payload are factors cited by RSRL, but he has missed out the equally important requirement that there should be "little or no road haulage needed at either end". Further none of the rail facilities he identified could be described as within reasonable proximity to Harwell: all would involve a fairly lengthy road journey and as RSRL explained constructing such a facility on site would be a non-starter.

59. The October 2010 draft version of the LLW Strategy for the Non-Nuclear Industry **[NS18A]** has not yet been published. I would make only two comments about it. First, there is a notable change from the previous draft [NS18] in relation to the proximity principle: the former reference at para.30 p.18 to giving "greater attention" to the issue is replaced by the more modest "appropriate consideration" at 2.15 p.19 of the latest draft. Secondly, the latest draft goes to considerable lengths to reassure readers about radioactivity and the risks of LLW management and putting the various dose limits, constraints and risk targets into context by comparing them with the public's everyday exposure to radiation (see,e.g.,p.30-31 and 72-74). Not only should this give reassurance to the public but it endorses components of the risk communication exercise undertaken by the appellant in this case.

DEVELOPMENT PLAN

60. The Council's refusal notice cited conflict only with certain parts of Policy 1 of the WLP 2006. That policy no longer forms part of the Development Plan having been replaced by policies in the Core Strategy. The Council has not alleged conflict with any policy in the CS or any other part of the development plan. As Cllr.Smith accepted, NCC has no longer any development plan policy objection to the appeal proposal. Mr.Aumonier, whilst he devotes many pages to explaining relevant development plan policies, does not assert conflict with any particular policy. The fact that there is no specific content on LLW is not something to hold against the appellant or against this proposal. The simple fact is that there is nothing in the general waste

policies which *do* apply to the appeal proposal which would preclude LLW being landfilled at this site. Mr.Miles has comprehensively reviewed the relevant development plan policies and concluded that the appeal proposal was fully compliant with them [**AUG1.2** para.6.133]. His assessment attracted little XX. If he is correct in that conclusion, as I contend he is, the proposal would enjoy the statutory presumption in favour of permission being granted unless other material considerations indicate otherwise: section 38(6) of the 2004 Act.

61. The **East Midlands Regional Plan [PP7]** has (briefly, I suspect, in view of **PP7A**) re-emerged as part of the development plan. There is nothing in it with which the appeal proposal would conflict.

62. The **WLP** contains a number of relevant 'saved' policies which have been considered by Mr.Miles at 6.26-28 of his proof. In particular, he concludes- as did Mr.Watson in the Officers' Report- that the proposals accord with policy 2. This has not been disputed by NCC. Significantly, no reliance has been placed by the Council on the numerous policies which seek to protect the natural, built and historic environments, which confirms that the Council had no concerns in relation to these matters.

63. So far as the **MWCS** is concerned, the only policy of direct relevance to the appeal proposal is CS14. Mr.Miles carefully assessed the appeal proposals against its provisions (see his proof 6.55-64) and concludes that there is full accord. Again, this was not challenged. The safeguarding policy CS11 has not been invoked or even cited by NCC and in any event no conflict with its provisions would here arise.Reference has been made to the commentary in the CS on catchments and the role of the appeal site. Para.4.1 recognises that Northants is not aligned to any particular region but functions as part of the wider south east. As such it would be appropriate for the appeal site to serve such an area: a large proportion of the LLW arisings that would be consigned to the site will be generated in this area. Para.4.16

recognises the inevitability of cross-border waste flows because some management facilities have a highly specialised role and therefore draw from a larger catchment area.

64. While the CS seeks to avoid the County becoming a key sub-national location for waste management, it states that it is not appropriate to oppose facilities serving wider catchment areas. This, I submit, applies equally to LLW as it does to hazardous waste and the similarities between the functioning of hazardous waste and LLW management facilities is clearly recognised in the LLW Strategy as seen already. Para.6.28 of the CS identifies the appeal site as one serving a national catchment area since it is one of the few hazardous waste facilities in the country and the only one in the E Midlands, E of England, the SE and London. Exactly the same considerations would apply to LLW management at the site. The CS states that the current national specialisms in hazardous wastes should continue as well as its regional role in supporting the management of the region's hazardous wastes. The appeal proposal would in no sense interfere with or diminish either of those roles, especially since it seems that there is no real prospect of the landfill being completed before the current permission expires. Rather the proposal would be entirely consistent with those national and regional roles.

65. Other elements of the development plan have been examined including the Structure Plan, the E.Northants District Local Plan and the N.Northants Core Strategy. No conflict is alleged with the many policies that seek to protect all facets of the environment. Clearly the planning authorities and statutory consultees have no concerns about any harmful impacts on interests such as the historic environment, cultural heritage, landscape, groundwater and surface water, highway safety, the rural economy or tourism as otherwise numerous policies dealing with these matters would have been cited.

OTHER POLICY DOCUMENTS

66. The **Regional Waste Strategy [PP29]** is not part of the development plan. Its policy RWS1.6 requires WPAs to make provision for the management of hazardous waste in the context of

regional and *national* needs showing that it is appropriate for specialised waste management facilities to cater for a national catchment.

67. This subject is taken forward in the emerging **Control & Management of Development DPD [PP32]**. While it contains no reference to LLW, there is an interesting commentary on the different catchment areas served by different waste facilities. Para.3.12 states that facilities with a national catchment area will be appropriate in Northants if they are of a specialised nature, which expression is defined as relating either to the *type of waste* to be managed or to the *nature of the processes* involved in its management. It is also stated that if the facility is only one or two of its type nationally then a national catchment would be appropriate.

68. There has been considerable discussion during the inquiry whether the appeal proposal would qualify for a national catchment area under these provisions. One has to question why NCC is so keen to establish that the site would not be a national facility in relation to LLW. It seems to be related to Mr.Aumonier's contention that the proximity principle would be offended: the Council recognise that if it serves a national catchment then inevitably the waste will travel considerable distances and such a contention would fall away. It has to be remembered that the appeal proposal is concerned solely with adding another waste stream to a consented landfill which the Council accepts is appropriately serving a *national* catchment. Given the surplus capacity that will remain on the expiry of the permission in 2013, given the similarities in the catchment areas from which the currently permitted and proposed waste types would be drawn and given the similarities between the management procedures that Augean would apply to both waste types, it is difficult to discern what planning harm would arise if LLW is permitted to be infilled at the site.

69. The site if permitted for LLW would indeed be one of only a very few such sites in the country: Clifton Marsh and Lillyhall are at present the only two supply chain LFs capable of taking LLW or VLLW and both are located in the NW of the country. Lillyhall is essentially committed to Sellafield's waste and Clifton Marsh's ability to take waste from outside its own region is

extremely limited. There are no facilities to serve the central and southern parts of the country. The appeal site would clearly qualify as a national facility for LLW on this basis alone.

70. However, as a *waste type* LLW should surely be recognised as specialised: it is precisely categorised by reference to its particular qualities and radioactivity, has given rise to a specific national policy statement and strategy, has specialist bodies that regulate every aspect of its transport and management, is the subject of particular international regulations and has spawned a plethora of scientific and sociological papers that have stimulated individuals such as Dr. Busby in a manner that I strongly suspect 'ordinary' waste would not.

71. As to the *nature of the processes* involved, here again LLW would clearly qualify for a national catchment. The processes involved, including all the pre-acceptance procedures, the transport procedures and the on-site acceptance, handling and monitoring procedures are at least as rigorous and specialised than those relating to hazardous waste which NCC happily accept as a specialist process.

72. When asked for his view on this issue Mr.Leuchars had little difficulty in answering that he thought LLW was indeed a specialist waste. Dr.Wilson's table **[AUG3.3 (19)]** is the clearest possible confirmation that the waste type and the processes involved are specialised. Mr.Aumonier's reponse in **NCC7.6** does not detract from the force of this table. Most of his comments on the table miss the point that hazardous waste and LLW are both specialised and that LLW's specialist nature, type, catchment and processing is recognised and accepted by operators, planners, regulators and Government. On particular points he raises on the table, I would comment that consignors of LLW require a permit whereas IPPC sites do not require a permit to dispose of waste off-site; there are specialist consignment processes, specific transport requirements and specialised packaging requirements which relate to the specialised *type* of the waste; the acceptance procedures are specified in the permit and are not left to the discretion of the operator; in respect of health monitoring, a lead battery reprocessing plant would surely be a specialist facility; and with regard to catchments areas,

he helpfully acknowledges that the point applies to all LLW management facilities, i.e. including landfill. As to the numbered paragraphs in Mr.Aumonier's response, I would comment on (2) that Dr.Wilson's comparison was with the specialised management and handling procedures already adopted at the site for hazardous waste. Those procedures are accepted by NCC as being specialised and it must follow that if those measures are applied to LLW (and there is no challenge to Dr.Wilson's proof **[AUG3.2]** at 8.5 that the measures for LLW would be similar to those for hazardous waste) they must be specialised too.

NEED

73. Government policy guidance does not require the appellant to prove need for the appeal proposal; to the contrary, para.22 of PPS10 **[PP5]** states that where proposals are consistent with an up-to-date development plan the WPA should not require the applicant to demonstrate need. The proposals are consistent with the development plan which, comprising a recently adopted CS and saved policies of the WLP, can be regarded as reasonably up-to-date. No policy in the development plan requires the appellant to demonstrate need. There is no equivalent in the MWDF to the former policy 1 of the WLP.

74. However, if a need for the development can be demonstrated this would clearly be a material consideration and one which, I submit, is deserving of considerable weight. There are three aspects of need here relevant. First, there is a need to make full and effective use of a scarce land resource before its permission expires in 2013 in circumstances where there is absolutely no guarantee that a permission for any extension of time or geographical extent of the landfill will be permitted, even for hazardous waste alone. The reluctance of NCC to make and indeed its resistance to making the site the subject of any allocation in the emerging MWDF is clear evidence of its hostility to any extension of the life of the site and local residents can be sure to resist this too. In circumstances where it is agreed that there is surplus capacity which will not be consumed by hazardous waste during the remaining life of the site, there is a clear need for additional waste to be landfilled to ensure the fullest and most effective use of the site is made (as Cllr.Ben Smith accepted in XX).

75. Secondly, NCC accept that there are residual LLW arisings for which disposal is the only practicable option [**NCC5** AppxB para46 and **NCC7.1** para7.4] and it is common ground with NCC that there is a *national shortage* of sites at which LLW can be disposed **[AP2,8.4]**. The need for alternative ways for managing LLW and to husband the life of LLWR, and specifically the need for alternative disposal routes for LLW including the use of landfill sites brought forward by the supply chain, is well documented in the policy statement and LLW strategy **[PP2&NS17]**. The Strategy on p.5 refers specifically to the need for alternative ways to manage LLW. The NDA's letters of 2 October 2009 [**AP4** p.55] and 15 September 2010 [**AUG1.3** AppxD] confirm that there is a *national need* for additional disposal routes and stress the need for early solutions.

76. The policy to divert lower activity LLW away from Drigg to new fit-for-purpose, cost-effective facilities is already in operation (see AUG 1.3 Appx D) and is not something which is being introduced over an extended period of time. The strategy for dealing with legacy waste is uncompromising: it is to be cleared from the nuclear sites as soon as practicable. NDA's first letter stresses that it is a *priority need* to cater for the lower activity LLW arising from the decommissioning programme and that existing LFs capable of accepting LLW would provide a *significant* opportunity especially in the *near term*. Its 2nd letter states that in the short term existing commercial landfills represent the only alternative to disposal at LLWR and that the availability of appropriate disposal routes for LLW is essential to the decommissioning process and its core mission. In short there is a compelling and urgent national need for additional disposal facilities to be brought into operation at the earliest possible time. The appeal site represents the only realistic opportunity for this in the period to mid 2013. Significantly, national LF operators such as SITA and WRG with whom RSRL have been in discussion over potential LLW disposal have not offered any sites other than those in the NW, Clifton Marsh and Lillyhall that I have already mentioned.

77. The third level of need relates to the situation in central and southern England which has been researched in detail by Mr.Miles and summarised in his Table 1 [**AUG1.2**,p.40]. Mr.Aumonier in XX did not dispute the numbers in this table, subject only to his points about the hierarchy/BPEO in relation to Harwell and the need for authorisation at Fawley. The waste figures in Mr.Miles' table were supplied by the potential consignors and therefore represent the best possible data. Further, whatever may be said about the reliability of estimates of LLW arisings in the longer term, Mr. Aumonier accepted that there was a fair degree of certainty about the numbers in the table for the period to 2013, especially since to a large extent they reflect legacy waste that was awaiting disposal. The table is not comprehensive; it does not, for example, include the smaller quantities of LLW generated by the non-nuclear industry or military establishments nor does it include the "orphaned" drummed waste referred to in RSRL's letter of 8 September2010 **[OD67]**.

78. The overall quantity of LLW shown in the table may not seem significant when compared with arisings of MSW/C&I, but it is highly significant to the producers of it and Mr.Aumonier made clear that references in his proof to the quantity being "trivial"(eg 4.75) were in no sense suggesting that the quantities were not significant to the producers. Indeed they are not. Nor could the need which the appeal site could meet in the period to 2013 be described as trivial and to compare the quantity of some 38000 tonnes which it is likely to receive with arisings over a 120 year period of 3 million cu.m is pointless. As RSRL have made plain, they have no further capacity to store LLW on site and the legacy wastes already in existence are holding up decommissioning at their sites (p9 of letter 22 June 2010), a situation which they state exists on all the major decommissioning sites which do not have access to a disposal route (p17 of the same letter). RSRL have confirmed that the entirety of the LLW that they estimate would be suitable for consignment to the appeal site in the period to mid 2013 would not be acceptable to LLWR under BPEO considerations and that the inability to dispose of this material will have an immediate impact on their decommissioning plans and an immediate impact on the taxpayer (5th page of 8 October 2010 letter).

79. Mr.Aumonier conceded in his proof [**NCC7**.1,5.32] that he could not comment in detail on RSRL's statements about the effect on decommissioning. He had not spoken to RSRL before preparing his evidence and still has not done so; had he done so the unfounded comments about RSRL in his main proof and particularly his rebuttal would probably not have been made and, therefore, the chain of correspondence that this gave rise to would, again probably, have been unnecessary. RSRL are not, I submit, to be criticised for not giving direct evidence at the inquiry. It is easy with hindsight to say it could perhaps have been handled better, but when RSRL took the decision that it would not appear as a witness for the appellant (as described by Dr.Wilson) it did not know or could reasonably have been expected to know that matters would turn out as they have done with, for example, Mr.Aumonier seeking to impugn its integrity by producing a series of late documents in an attempt to show that there were disposal routes available for its legacy wastes. RSRL have throughout attempted to assist the inquiry by providing highly pertinent information and correcting errors and misinformation contained in NCC's evidence.

80. Turning to Mr.Aumonier's reservations about Mr.Miles' Table 1, there is no reason to doubt that the Fawley incinerator will obtain the necessary permit from the EA and so the quantity of waste estimated from that source can be regarded as entirely reliable. So far as Harwell is concerned, the considerable quantity of documentation produced by NCC in no way undermines the validity of RSRL's evidence conveyed in its letters to the inquiry. The BPEO exercise carried out in 2007 **[OD66]** did not represent a final decision and preceded the national LLW policy statement published later in the same year. That policy statement marked a fundamental change of approach to commercial LFs as a disposal option for LLW and therefore represented a significant change in circumstances for the BPEO study which had marked down off-site LF disposal on account of feasibility only but which had recognised that its scoring may improve through subsequent government policy changes.

81. The two subsequent updates to the BPEO study **[OD55&56]** have taken account of the policy statement and the most recent one of May 2010 expresses a clear preference for off-site

disposal to a commercial LF for the reasons there set out, all of which it is submitted are entirely sensible and indeed compelling. (A similar situation exists with the Magnox South sites**. NS24** shows that the business case for on-site management of LLW is being fundamentally reviewed in the light of the 2007 LLW Policy Statement which has opened up a new disposal route, namely off-site disposal at commercially operated landfills: see p.72, 78 & 105-6). Given the urgency of RSRL's need to deal with its legacy waste and given the need for cost effectiveness and affordability (both key considerations of the UK Strategy), it surely makes sound sense to utilise an existing LF immediately capable of receiving the waste once the necessary permissions have been obtained rather than embarking on a far more costly and time-consuming process of constructing a permanent storage facility on-site.

82. RSRL has explained in its letter of 4 November 2010 [**OD67**,p.8] that the disposal options referred to in **T83** do not address the immediate need for disposal capacity at the low activity end of the LLW range and that there is no authorised disposal route for this material. It explains in its earlier letter of 8 October 2010 that the quantity identified is irreducible and uncompactable. Harwell has sought a variation of its permit to allow off-site disposal to a commercial LF and has drawn particular attention to the appeal site [**T78**, see especially p.29]. There is no reason to assume that the variation will not be issued early in 2011, probably before the Secretary of State's decision on this appeal is published. Preparation of the necessary Environmental Case is unlikely to be particularly time consuming: RSRL's latest letter in **OD67** confirms that the constituent elements are in place (p.11). There is a requirement as part of the BAT process to *consider* local community issues at the receiving site [**NS17**p.26] which is not to be equated with a requirement in every case to consult with the host community at the receiving site. The Policy Statement [**PP2**,p.10] makes clear that the responsibility for such consultation rests with the EA and that they should take account of operator's consultations and adopt a proportionate approach. In this case the EA would obviously have full regard to the extensive consultation exercises already carried out by the appellant (involving RSRL) and NCC in connection with this appeal application as well as its

own consultation exercises on the permit. It may well take the view that no further consultation is required.

83. With regard to the transport implications of moving Harwell's waste to the appeal site, Mr.Aumonier's own Wrate analysis [**NCC7.1**, tables 6 (as corrected) and 7] demonstrated convincingly that the global warming potential of conveying the material to LLWR was far greater than the movement to the appeal site. The CO_2 emissions involved in the road trip to Drigg would be some three times greater than that generated by taking the waste to the appeal site. The suggestion that the material could be moved by rail is untenable given the absence of nearby rail freight facilities; and providing such facilities from new would, as RSRL have demonstrated, be hugely costly and in any event wholly impractical in the timescale that the inquiry is concerned with. Such a delay and such a cost could not be justified and, above all, as RSRL have shown such waste could not in any event be received at LLWR on BPEO grounds.

84. I submit, therefore, there is no reason not to accept the data contained in Mr.Miles' Table 1 in its entirety. Coupled with the information contained in letters from NDA, RSRL and the other potential consignors, together with the important policy imperatives contained in the national LLW Policy Statement and Strategy, this amounts to a powerful demonstration of a compelling and urgent need to permit the appeal site to receive LLW during its remaining life. There is no requirement on the appellant in a case of this nature to consider alternative landfill sites, but in any event consideration has been given to this and it is common ground that there is no available alternative LF able to receive LLW anywhere in central or southern England. The Carsington Judgment **[OD78]** contains nothing to suggest a comparison of alternative sites is required: there is nothing in statute or policy guidance (paras.36-37) to require it and this case falls well outside the category of case referred to in the Trust House Forte decision (para16). There might under BPEO procedures be a requirement to consider alternative sites in connection with the proximity principle, but that would be a matter for the

consignor. In any event, as just stated the appellant has considered whether alternative sites exist and its conclusion is accepted by NCC.

85. The other aspect of need that requires to be considered is that for hazardous waste as NCC in its clarification of the reasons for refusal **[NCC3]** has expressed concern that the taking of LLW into the site would deplete capacity which should be reserved for hazardous waste. Mr.Aumonier [**NCC7.1**,8.8] took the concern to an extreme extent by suggesting that the site might be lost entirely to hazardous waste since there was no constraint on the quantity of LLW up to 250Ktpa that could be received. This is a wholly unrealistic position. Augean have never envisaged more than tens of thousands of tonnes of LLW and, in any event, any concerns that the Council entertained could, as Mr.Aumonier accepted, be addressed by imposing a suitable condition. Mr. Miles has demonstrated, using Dr.Wilson's unchallenged data on likely hazardous waste arisings, that there would be ample capacity for the site to accommodate the quantity of LLW envisaged in his table 1 and that this would still leave considerable headroom for unexpected quantities of hazardous waste to be received. There is no disagreement on the appropriateness of a condition if it is concluded to be necessary, but there is dispute over what the limit should be. Augean consider that 25000 t/a is too low and wishes there to be greater flexibility. Concerns raised about the longer term position are beyond the scope of this inquiry and should be ignored.

PERCEIVED HARM

86. There are two quite separate issues to consider: first, is perceived harm a material *consideration* and, secondly, if it is, what *weight* should be given to it? The first is ultimately a question of law for the Courts to determine, whereas the second is entirely a matter for the decision-maker (subject only to intervention by the Courts if the decision-maker's exercise of discretion is legally flawed). The House of Lords in Great Portland Estates (1985) **[OD57]** held that the test of what is a material consideration is whether it serves a *planning purpose* and that a planning purpose is one which relates to the *character of the use of the land*. The issue in that case was the materiality of a development plan policy which sought to protect

specified industrial activities. It was held that the human factor is always present indirectly as the background to the consideration of the character of the land use and that it can and sometimes should be given direct effect as an *exceptional or special circumstance*. The Court explained that such circumstances fell to be considered not as a general rule but as *exceptions to the general rule to be met in special circumstances* (see Lord Scarman at p.6).

THE LAW

87. In Gateshead MBC (1994) **[OD59]**the relevance of public concern was considered by the Court of Appeal. Lord Justice Glidewell at p.17 held that public concern was a material consideration that had to be taken into account "but that if in the end that public concern is not justified it cannot be conclusive. If it were, no industrial development-indeed very little development of any kind-would ever be permitted." In other words the Court did not question the planning *materiality* of the public concern in that case, but concluded, in relation to the separate issue of the *weight* to be attached to it, that it was important to establish whether or not the concern was justified. The case concerned a clinical waste incinerator which had given rise to widespread fears of pollution and in particular dioxin emissions. The Inspector concluded that the plant would be built to meet the various standards set by the regulatory authorities but that the impact on air quality and agriculture had been insufficiently defined and public disquiet could not be sufficiently allayed to make the development acceptable. The Secretary of State, however, rejected the recommendation to dismiss the appeal and granted planning permission, holding that the concerns about emissions could and would be addressed by the regulatory authorities and that he was confident that the emission controls available would ensure that there would be no unacceptable impact on adjacent land. The Court upheld the Secretary of State's decision.

88. Perceived harm was again considered by the Court of Appeal in Newport B.C (1997) **[OD58]**, in relation to a chemical waste treatment plant. It was an unusual situation where the legal challenge concerned, not the substantive decision, but the award of costs. In the substantive decision it was clear that the Inspector and Secretary of State had accepted that even

unjustified perceptions and fears were a material consideration (see p.50G "a factor which counts against the development"), but in the costs award it was concluded that public perception could not be a reason for refusal unless supported by substantial evidence. The Court quashed the costs award because of the overt inconsistency of approach between the two decisions. The decision tells us no more than that public perceptions about safety can be material even though not objectively justified and can amount to a good reason for refusal, although Aldous LJ in a short judgment stressed on no fewer than three occasions that that would be rare. The Court clearly accepted that the weight to be attached to the perception was for the decision-maker; indeed it had been common ground between the parties that the public concern should be "given such weight as may be appropriate in the particular facts of the case" (p.53G-H).

89. The case should not be seen as in conflict with Gateshead (as some commentators have suggested); both decisions confirm the *materiality* of public concern and Glidewell LJ's conclusion about justification for the concern relates to *weight,* which Newport recognises is for the decision-maker. The facts in Newport are instructive: the Inspector set against the public perceptions of hazards and risks the "actual evidence regarding the foreseeable risks to health" including the Council Officers and statutory bodies and the experts consulted by the Council all of whom had concluded that there would be no significant impact and had agreed with the conclusions of the ES (p.50H-51B). In those circumstances (which are remarkably similar to those in the present case) the Inspector concluded that the perceptions were insufficient to override the acceptability of the proposals. So although the perceptions were a material consideration, the weight attached to them was insufficient to lead to dismissal of the appeal. There was no challenge to this decision.

90. In West Midlands Probation Committee (1997) **[OD69]**, which related to a proposed extension to an existing bail and probation hostel, the Court of Appeal was concerned not with unjustified public perceptions, but with concerns which the Inspector found were fully justified given that the existing hostel had already given rise to considerable disturbance to

local residents living in a quiet residential street. He concluded that the proposed expansion of the hostel would be likely significantly to increase disturbance in the area. This was clearly a land use planning impact. Pill LJ at p.7 summarised three propositions arising from the legal authorities: (1) the impact of a proposed development upon the *use of and activities upon neighbouring land* may be a material consideration; (2) in considering the impact regard may be had to the *use to which the neighbouring land* is put and (3) *justified* public concern in a locality about emanations from land as a result of its proposed development may be a material consideration. In the 1st two propositions the Judge is clearly stressing the need for the perceptions to relate to land use planning considerations (contrary to Mr.Porten's suggestion in XX of Mr.Miles that there was no judgment which defines perception in terms of land use consequences) and in the 3rd proposition the importance of the perception being justified is recognised. While the report in the CDs does not contain it, the JPL report of the case **[OD86]** records that the Inspector emphasised that in that case there were reasonable grounds for the fears expressed by the local residents and therefore for that to be a material consideration, but added that "unsubstantiated fears-even if keenly felt-would not have warranted such consideration" (see 1998 JPL 388).

91. In Broadland DC (1998) **[OD60]** the Court was concerned with a proposed hostel for single lonely people which had attracted a substantial number of objections from local people that the unemployed, unemployable, anti-social and mentally unstable occupants would pose a security risk to people and property in the area. Officers had recommended that these concerns should be left out of account as they were not material planning considerations. The Court held that these were material to planning as they could affect local residents in the enjoyment of their homes and their use of the highway. However, it declined to quash the decision because the Committee had been advised that even if those considerations were taken into account they would not justify a refusal. All this judgment confirms is that perceptions which relate to the use of land are material, but that the weight to be attached to them is a totally different matter.

92. In Trevett (2002) **[OD68]** the Court was concerned with telecom equipment. The sole ground of challenge was that the Inspector had failed to have regard to a material consideration, namely residents' fears about health implications. The Court had little difficulty in rejecting that challenge because the perceived adverse effects on health had been identified by the Inspector as one of two main issues and had been properly addressed by him. What is interesting and instructive is the Inspector's reasoning, which the Court supported, for only the limited *weight* he was prepared to attach to those fears. In relation to the research papers and scientific opinion on health effects cited by the objectors, the Inspector attached greater weight to the findings of national and international bodies which had drawn on a broader range of expertise and concluded that the locals' fears were not supported by the available technical evidence. The Judge observed in para 25, "...it is equally erroneous to assert...that merely because there are perceived risks to health that justifies a refusal of planning permission without any regard to the extent to which those fears are *objectively justified* in the circumstances of the particular case and given the particular characteristics of the site in question". That is particularly apt in the present case. The technical evidence supplied in the Radiological Risk Assessment has demonstrated that, applying standards approved nationally and internationally, there would be no material safety implications arising from this proposed development, a position which has been unequivocally endorsed by all the technical consultees and the Council's appointed independent expert. That technical evidence and unanimous endorsement of it by the mainstream scientific community is deserving of significantly greater weight than the extreme hypotheses advanced by Dr.Busby, a maverick who sits at and rants from the farthermost extremity of the scientific community.

POLICY GUIDANCE

93. PPS23 **[PP6]** at Appx A, in advising on what may constitute a material consideration, refers in the 1st indent to the possible impact of potentially polluting development on health, the natural environment or general amenity. This is clearly addressing the proposal's propensity to give rise to *actual* impacts. Of course, in the present case NCC do not allege that the

proposal would give rise to any *actual* harm and its case is confined to concerns about the effects of perceptions. These are dealt with in the penultimate indent of Appx A which refers to the *objective* perception of unacceptable risk to the health or safety of the public. The separate Annex 1 to the PPS **[PP6A]** at para 1.58 states that for the actual or perceived level of risk to be material to the consideration of a planning application the *land use planning consequences* of such risks or perceptions should be clearly demonstrated.

94. The advice, therefore, distinguishes between actual harm and perceived harm. Both types of harm it recognises can be material so long as they relate to land use planning matters and in the case of perceptions it clearly advises that they must be objectively held. This advice is, I submit, fully in accord with the legal authorities and, as I shall seek to demonstrate, is clearly followed and supported by Inspectors and the Secretary of State in deciding planning appeals. Professor Kemp accepted that the guidance should normally be followed and did not suggest there was any reason to depart from it in this case. He accepted that his proof had been in error in disagreeing with the proposition that the perception of harm could only carry weight if it had land use consequences [**NCC8.1**,7.9].

95. PPS23 does not offer guidance on how the objectivity of the perception should be assessed. However, the Costs Circular 03/2009 at B21 advises that in assessing the weight to be given to local opposition authorities should make *their own objective appraisal* and ensure that there *is substantial evidence* to support any objections relied on. This approach I suggest is equally applicable to assessing the weight to be given to perceptions and shows that something more than the *objector's own* perception is required: otherwise it would be purely subjective. Further, the perception needs to be supported by evidence: otherwise it would be little more than an unsubstantiated assertion.

96. Further, PPG8 **[PP33]** in relation to telecommunications advises that where proposed equipment meets the internationally recommended guidelines for public exposure to radiation it should not be necessary to consider further the health impacts *and concerns*

about them. In other words, perceptions of harm to health in relation to proposals which meet international standards are not to be accorded weight.

APPEAL DECISIONS

97. In Kirk Sandall **[OD40]** there was a huge volume of opposition to the proposed regional waste treatment centre (IR9.8.4). The Inspector concluded on the question of public perception that if the development proceeded there would be very many people who would feel constantly ill-at-ease irrespective of the reassurances that any dangers or health risks would be remote (IR9.8.9) and drew particular attention to the fact that the proposed plant would be too close to the population living and working in the area (IR9.14.29). Significantly, he combined his consideration of this issue with the effects on the local economy and on this issue concluded that there would be serious damage to the prospects for the strategically identified industrial estate (IR9.8.15) largely on account of the perceived risks of contamination of food at nearby factories which he concluded were unacceptable (IR9.15.10). Thus the Inspector had clearly been satisfied that the perceptions in that case were justified and would give rise to seriously harmful land use impacts: it is far from being an example of an unjustified perception alone leading to a recommendation of refusal, even ignoring the many other reasons the Inspector gave for his recommendation. In the event, the Secretary of State adroitly side-stepped the issue altogether by dismissing the appeal solely on the ground of risk to the aquifer (DL10&16) and in relation to the public's health fears only stating that he "noted" those fears and took them into account "insofar as they are relevant to the land use planning decision"(DL9).

98. At Leominster **[OD42]** while the Inspector considered that unsubstantiated health fears were not irrational and should as a material planning consideration be weighed in the balance, the appeal was dismissed because of actual harm that the antenna would cause to the living conditions of the neighbours a mere 8.5-9m away.

99. At Chesterfield **[OD43]** the Inspector was concerned, not with perceptions at all, but with whether the proposed WTS would give rise to unacceptable risks to the health and well-being of the surrounding sensitive receptors (para16) which is certainly not NNC's case at King's Cliffe. The Inspector was very critical of the proposal and the evidence given in support of it and concluded that it would give rise to serious actual harm to the health, safety and amenity of surrounding businesses and residents.

100. At Yanley Quarry, Bristol **[OD44]** there were a number of harmful impacts that the proposed landfill would give rise to which led the Inspector to recommend dismissal of the appeal, including impact on the green belt and landscape (IR11.58). So far as residents' concerns about health impacts were concerned, he found that the risk of direct harm was so small that it did not carry significant weight. With regard to perceived harm, the Inspector applied guidance in the former PPG23 (which is similar to that in PPS23) and concluded that the fears, although strong and genuinely held, were insufficient in themselves to justify refusal but added weight to the harm that the proposals would otherwise cause.

101. The windfarm proposal at Helmsdale **[OD45]** was rejected not on account of perceptions even though the Reporter regarded them as powerful material considerations. It failed because of the particularly harmful landscape impact and harm to tourism and the local economy (RR5.20&5.30).

102. In the Sowerby Bridge appeal **[OD46]**, the Inspector took account of perceptions, but dismissed the appeal because of the unacceptable risk of fire caused by the particular geography of the site and an unacceptable risk of odour nuisance. Although he accepted the site *could* be operated in compliance with the Health and Safety Act, he clearly was cautious about accepting the regulator's advice because of its having overlooked the presence of nearby houses.

103. In the Margam opencast coal site appeal **[OD47]** the proposal was rejected because of actual landscape and visual impact and dust nuisance to local residents. The Inspector specifically rejected perceptions of harm to health because there had been no objection from the local health bodies or any statutory consultee and in the absence of "any reasoned objection on practical grounds" (IR14.93).

104. In the Aldershot appeal **[OD48]** the Inspector found that the proposal would cause serious harm to the character and appearance of the area. Health issues also featured in the case. The Inspector was satisfied that there was no actual risk to health and that health considerations did not justify dismissal of the appeal. However, he found that the perceptions of harm caused by the telecom mast would given its particular siting represent a detrimental impact on residential amenity. At Fareham **[OD49]** the same Inspector on a similar proposal reached very similar conclusions. Neither case is an example of justified perceptions, still less unjustified perceptions, leading to dismissal; at best the perception of harm was taken into account as an additional reason to that on actual harm.

105. In the Gaerwen appeal **[OD54]** the proposal was dismissed by the Minister contrary to the Inspector's recommendation because, exceptionally, it was considered that substantial weight should be given to the perceived fears that the food industry, so critical to the economy of Anglesey, would be damaged by contaminating emissions from the proposed clinical waste incinerator. The disagreement between the Minister and the Inspector related to the weight to be attached to the perceived harm. Significantly, the concerns raised by the food industry were shared by the various other public agencies concerned with economic development (DL10), which is of course very different from the present appeal. The Minister did not disagree with the Inspector's conclusion that only restricted weight could be attached to perceived health fears (IR12.47), which is perhaps the main concern of the local community at King's Cliffe. The Minister also concluded that there would be material conflict with development plan policy and the proximity principle. He found there was no strong need for the proposal.

106. Having reviewed all the appeal cases relied on by NCC it is clear, as Prof.Kemp accepted, that in none did the appeal fail because of perceived harm on its own, whether the perception was justified or not. Where perceptions feature in the reasoning, they are at best additive factors in situations where actual harm has already been found likely to result from the development. Inspectors are astute to consider whether land use impacts would result and in considering what weight to attach to the perceptions usually have regard to whether they can be objectively justified by reference to, for example, particular site or siting factors and the opinions of statutory consultees.

107. Appeal decisions introduced by the appellant are highly relevant to the issue of perceived harm. The recent Garston decision **[OD73]** is instructive. In paras.53-57 the Inspector reviews the legal authorities and concludes, entirely rightly I submit, that there is little legal support for turning down development on the sole basis of unjustified perception. She concluded that, despite the strength of feeling on the matter, there was no reasonable basis for the fears that the development would harm the area's regeneration, that those fears were based on misconceptions and were not supported by a robust evidence base (DL 23). Accordingly she attached little weight to what she found to be largely a baseless perception (DL57). Similar conclusions could and, I suggest, should be reached in the present case.

108. In the Eastcroft incinerator appeal **[OD61]** the Inspector reviewed a number of appeals relied upon by that WPA, including Kirk Sandall and Gaerwen, but did not consider any of them supported dismissal of the proposal (IR317-324). In relation to the many concerns about health risks, the Inspector drew attention to the need for a realistic interpretation in relation to other risks that are present in society generally. He attached weight to Government advice on the health risks of incinerators and, despite objections from local GPs about actual harm to health and the PCT HIA's conclusion about perceived risks, concluded there was nothing to lead him to recommend refusal.

109. In the Ineos Chlor **[OD62]** decision the Secretary of State whilst acknowledging the concerns about health impacts concluded that he should not seek to duplicate the role of the EA and that he was satisfied that such concerns could be addressed in the EP process.

110. At Belvedere **[OD63]** there were considerable concerns and fears about health and other impacts that the incinerator would give rise to: perceived harm was a main issue raised not just by the local community but also by the WPA who called an expert witness in risk communication, Professor Furedi, to give evidence. Prof. Kemp agreed that that evidence had been very similar to his own. These concerns were dealt with by the Inspector at DL12.183-186. He found there was a "clear gulf" between the public perception and the results of expert and objective appraisal of the merits of EfW generally. Prof.Kemp agreed that that gulf exists in the present case too, answering "it unfortunately does appear to be the case". In relation to the expert evidence, the Inspector considered it to be "somewhat intangible" and had been unable to detect any specific or convincing evidence of land use or planning consequences arising from the negative perceptions of the local community. Exactly the same criticism applies to Prof.Kemps' evidence. In XX he accepted that nowhere in his proof did he articulate a particular land use or planning impact; of course, when he prepared his evidence he was of the view that it was not necessary to do so. His only reference to impact was at 7.9 of NCC8.1 but only in connection with the *common effects* of heightened perception of harm, namely anxiety and headaches, sleeplessness and malaise which he accepted were of universal application and not specific to this proposal. In any event, not a single person who has spoken at the inquiry has referred to experiencing such effects notwithstanding the concerns in the community that the application made in July 2009 is said to have given rise to (one concern only was raised after hearing Mr.Miles' evidence **[AP15.33]**).

111. The final decision to which reference has been made is Ince Marshes **[OD64]**.The Inspector records at 11.19 and 11.22 that there were widespread concerns and perceptions about health problems in the local community which were shared by local GPs and apparently supported by the PCT's HIA. Nonetheless the Inspector considered (11.24 & 11.27) that

considerable weight can and should be given to formal expressions of official opinion contained in WSE **[NS1]**. A similar approach should, I suggest, be adopted in relation to the guidance in PPS10 [**PP3**] para 30. He found there was no reason to assume, contrary to the advice in PPS10, that the pollution control regime would not be properly applied. That should apply here too. The Inspector at 11.28 concluded that the widespread concern which had given rise to anxiety was in direct conflict with the position taken by Government in a statement of national policy, that that should act to allay anxiety in the public at large and that in those circumstances public anxiety should not carry great weight in the planning decision. I submit that exactly the same reasoning should apply in the present case.

THE POSITION HERE

112. I have already commented on Professor Kemp's evidence. I suggest it contributes little to assisting the Secretary of State's decision on the materiality of the perceived harm and the weight to be attached to it. First, the Professor's focus on risk communication, while perhaps understandable given his particular expertise, is of little assistance now, at the end of the community engagement on the application, when we are surely concerned with the results of that exercise rather than with what else should have been done in that process. In any event, his main criticism that Augean should have adopted a Dounreay type full options appraisal rather than a "decide, announce and defend" approach on a single option was shown, and indeed accepted by the Professor, to have been misplaced and that the more appropriate template was Lillyhall (in **T63)** which Augean closely followed. When the Professor's paper to PINS **[OD37]** is considered, it is clear that Augean followed many of the suggestions for communicating risk suggested at the 1st two levels on p.20. The Professor praised Augean for their prodigious efforts to inform the public and for their carefully planned and professionally executed consultation steps. As he pointed out, however, in an area such as this with no familiarity with the nuclear industry, the level and nature of the perception of harm was to a large extent inevitable and little could be done to alleviate it. There was nothing novel or unusual about the many risk factors he listed: they have been around since at least the 1980s and, as it happens, virtually all of them were addressed in RSRL's letter of June 2010 **(OD67)**

before the Professor was engaged by NCC. Augean's consultation exercise is agreed to have complied with NCC'c SCI [see **AP2**,9.1] and satisfied the requirements of the EA in **EA3** requirement 2 (see **EA9**,p.49,12.3). No-one challenged Dr.Wilson's evidence that there had been compliance with **OD32.**

113. Secondly, Prof.Kemp did not deal with the weight that should be attached to perceptions raised in this case claiming that it was not his role. But he did not in his proof even offer any suggestion on how that weight should be assessed, other than erroneously claiming that whether there was a planning impact was not relevant. This point was abandoned in XX and he also conceded that lesser weight would attach to unjustified perceptions. He expressly agreed with Glidewell LJ's formulation in the Gateshead case which he had himself quoted in his proof, namely that unjustified fears could not be conclusive. He made no attempt to deal with assessing whether perceptions were objectively justified. He concentrated throughout on negative drivers of perception and nowhere sought to deal with the positive factors which exist or to present a balanced position.

114. Thirdly, his point at 2.3.1 that there was now a widely accepted argument against distinguishing between real risk and perceived risk is at odds with the approach in PPS23. Likewise his comments about technically assessed levels of risk (4.6) are contrary to the risk informed approach of the 2007 LLW policy statement. He agreed that the risk assessment had been properly conducted, was clear and had employed very conservative assumptions. He respected Dr. Denman's expertise and the advice given to the Council and agreed that a risk of less than one in a million per year was acceptable to most people and should give rise to no concern. He accepted that these are matters which people should take into account together with the advice in PPS10 about the acceptability of modern, properly run and controlled LFs and the assumption that the EA would perform its tasks properly. He had no concerns about actual health impacts and agreed that the public should be reassured by the unanimous position taken by PCT, HPA, HSE, FSA, EA, NCC and Dr.Denman. In addition, great weight should be given to the evidence of Professor Wakeford who has spoken with

considerable experience and authority that this development will not give rise to any material risk to the community. That evidence should reassure local people and demonstrate that Dr Busby's extreme views are wholly untenable. Any objective assessment of perceptions should give full account to Professor Wakeford's evidence.

115. Fourthly, as noted already, Prof.Kemp identified no specific land use impact that would arise from the negative perceptions. General concerns about anxiety fall within the province of the EA and are only tenuously material, if at all, to a planning decision and are deserving of little weight, as the appeal cases have shown. Simply to claim that the change of use would be seen to be harmful, as NCC has contended, does not of course move from the perception itself: what has to be shown is a harmful land use *consequence*.

116. Mr.Porten in XX of Mr. Miles suggested that affecting other people's enjoyment of their homes and land would be a planning consequence, but the Council has not demonstrated what that effect would be. Prof.Kemp in RX simply referred to an "effect on amenity" but did not explain what the effect would be. This is really no more than the intangible, unspecific and unconvincing assertions that the Belvedere Inspector was so critical of (**OD63**.p.279). Despite the 24 years of experience of landfilling LLW at Clifton Marsh, there is no evidence that it has given rise to any harm in the area **[OD6]**.

117. The SEA of the NDA Strategy **[NS19]** p.4 did not reveal any negative effects on property values or other impacts that were materially different from those associated with non radioactive landfills and, significantly, the local community has raised no real concerns about Augean's operations at this hazardous waste site over the last 4 years or so. The EA state that they have no evidence that any radioactive waste disposal authorised by them has had any effect on house prices **[EA2]**. Cllr.Heather Smith raised a concern about impact on a proposed major tourism development nearby, but the promoters of it have not themselves attended the inquiry to object and are apparently proceeding with an application in full knowledge of the appeal proposal. There has been no suggestion from the recipient of the permission for 150

dwellings on the northern side of King's Cliffe that its implementation would be affected by this proposal. A written objection from Howards Farms has been made and supplemented by Mr.Andrew Howard's evidence at the inquiry. Their concern about insurance is misplaced as Mrs. Heasman demonstrated and it is difficult to understand why the addition of LLW to the permitted hazardous waste stream would have any incremental detrimental effect on the farm or haulage business. In his representations to the inquiry **[AP15.31]** Mr.Howard does not suggest any specific land use impact on his businesses. Any concerns about compromising the safety of his staff and employees at the business operated on the other side of the road from the appeal site are not justified given the HSE's satisfaction that workers on the *appeal site itself* would have a safe work place and an exposure to radiation significantly below recommended standards for the workforce. Concern was raised about two small businesses in the locality, one producing eggs and the other making baskets: again it is difficult to see if those businesses happily co-exist with the hazardous waste landfill that the appeal proposal would give rise to any incremental effect. Mr. Leuchars in EiC explained that the "most significant" aspect of the three he raised in relation to the perception of harm was the effect on house prices. He candidly recognised that he was not supposed to discuss house prices. Indeed, even the actuality of such an effect is plainly not a valid planning consideration and so a perception of such an effect is even less of a planning issue. In any event there is no evidence to suggest that there would be any harmful effect on property values.

118. The appellant's witnesses recognise that the fears and perceptions of local people are genuine, not malicious or hysterical. That, however, does not mean that they are necessarily material in a land use planning sense or, even if they are, that they are deserving of weight. The appellant's principal contention is that, however sincere they may be, the perceptions are neither rational nor reasonable and have not been objectively justified or are capable of objective justification. They are in direct conflict with clear official guidance from Government, diverge radically from the common opinion of all the statutory technical consultees, are in part based on an irrational distrust of the competence of the EA and fail to pay proper regard to the results of the RRA, which have been reviewed and approved not just

by NCC and its officers and all the statutory consultees but by Dr.Denman specifically engaged as an independent expert by the Council. There is a very wide gulf between the scientific evidence/ technical assessment and the lay opinion in the locality, based on misperceptions, misconceptions and misinformation. The maximum radiation dose that a member of the public could receive is, even adopting extremely conservative assumptions, so tiny that it should when objectively assessed give rise to no concern. As Professor Wakeford explained, anyone concerned about this level of risk would have to lead a very strange lifestyle that would rule out moving around the country, visiting shops, friends' houses and so forth. To the extent that the perceptions have been caused or exacerbated by the provocative headnote to the petition, the information circulated in the community by Waste Watchers or to the grossly alarmist and misleading information disseminated by Dr.Busby, that only serves to reinforce the irrationality of and lack of objective justification for those perceptions.

119. All in all, the perceived harm is unjustified, cannot be accorded any significant weight and certainly cannot be regarded as conclusive. Indeed, if this appeal fails on account of perceived harm it is difficult to conceive where a supply chain landfill site would ever gain approval.

WASTE WATCHERS

120. One should perhaps commend Mr.Leuchars and his fellow Waste Watchers for their industry and tenacity, but while their activities have certainly heightened awareness of the appeal proposal in the local community they have also spread unjustified fear and alarm. WW rapidly formed itself into a protest group implacably opposed to the proposals even before the application was lodged. Despite a seemingly never-ending catalogue of criticisms of Augean's community engagement, WW never took up Augean's 'open door' invitation to meet and discuss the proposals and instead sought open public confrontation which was unlikely to inform and potentially would radicalise public opinion further. Their decision to call Dr.Busby as an expert witness and to rely on and widely disseminate his views throughout the community knowing full well (as they must have done from his extensive and self-publicised track record in low level radiation) the inflammatory and extreme nature of his views can

only be described as unfortunate. Perhaps even they could not have anticipated the full extent of invective and perversion that Dr.Busby would unleash when giving evidence (although anyone reading his proof would have been put on notice of what was likely to occur), but the fact that WW has not attempted to disassociate itself from Dr.Busby's torrent of abuse is of no credit to them.

121. One has also to question whether WW's evidence is fairly representative of community opinion. They have no membership and WW appears to be a loose association of a small number of individuals; Mr.Leuchars referred somewhat vaguely to a core group of 10-12 people living mainly in King's Cliffe, most of whom it seems have given evidence at the inquiry. It seems extraordinary that he was unaware of the existence of the KCCLG, but if so suggests a lack of familiarity with village life. WW's actions certainly led a number of Parish Councils to object to the proposals but, significantly, there are other local Parish Councils that have not done so (only 6 out of the 25 Councils consulted objected, according to Augean's assessment). Compared with the size of the local population, the number of households that have objected is not impressive and, despite the alarmist headnote to their petition, the number of signatories represents only a small proportion of the community that WW claim is at risk from this proposal.

122. WW boldly seek to attack recently announced Government policy on LLW. They and Dr.Busby claim that LLW should never be moved from the site where it arises. If it does have to move, then WW contend that it should be held in Dounreay/Drigg type vaults and seeks to rule out LF as an option for LLW. This, of course, is fundamentally in conflict with the Government's policy and strategy. Mr.Leuchars contended that Government guidance was misguided and regards this inquiry as a 'test case' of the policy. Dr.Busby has seemingly used the inquiry and its attendant media attraction as another means of pursuing his crusade against the alleged iniquities of the ICRP risk model, introducing us to the delights of his "thesis" on the problems of that model.

123. Much of WW's case at this inquiry is well beyond the scope of a land use planning inquiry. PPS10 and 23 **[PP5&6]** are clear about the separate roles of the planning and regulatory authorities. The prevention of harmful emissions from the site, the assessment of radiological risks and the assessment of the health implications, for example, are plainly matters for the EA and other regulatory authorities and planning decision-makers are required to assume that such authorities will perform their roles properly, yet WW have taken up much time at this inquiry in its evidence and questioning of the appellant's witnesses repeating all the many issues and concerns they previously raised with the EA, each of which the EA laboriously responded to and refuted. Many of the concerns were based on simple misunderstandings, misconceptions or misinterpretations of technical information, which was perhaps understandable for a person without specialist knowledge in this area, but unfortunately the publication of such views in the local press, Mr Leuchars' proof of evidence and other media had the predictable effect of exacerbating public concern.

124. NCC in its statement of case referred to Harrison **[OD80]** [**NCC1**,para.51] where it was held that, although the thrust of the PPS guidance was that planning authorities should focus on the impacts of any harmful emissions rather than the control of the emissions which was a matter for the regulatory authority, this did not mean that they should subjugate their judgment on impacts to the pollution control authority or that all pollution issues could be left to the EA. However, in this case NCC does not, of course, suggest that the development would cause any direct, actual harm to human health or the environment.

125. When it came to actual land use planning issues, Mr.Leuchars' evidence for WW is remarkably thin. Despite a lengthy section on the effects of the development on the local community (sections 34-39), the proof says very little about possible land use impacts .In supplementary EiC on the perception of harm he referred to three areas: first, the prospect of real physical harm; secondly, mental anxiety; and thirdly (and most significantly he said), the effect on house values. I have already submitted that the last matter is not a material issue and that, in any event, there is no evidence to support the assertion. The first matter is not perceived

harm at all, but a concern about actual, direct harm which NCC is satisfied the development would not give rise to. The second matter about mental anxiety is not, as already submitted, objectively justified and it is to be hoped that the inquiry process, including the Inspector's report and the decision letter, if the appeal is allowed will assist in dispelling those fears and any anxiety caused, not that-significantly-the inquiry has heard any substantial evidence that such mental anguish has yet been caused.

126. Mr.Leuchars was also in his EiC critical about the suitability of this location for the proposal. The fact that the existing hazardous waste LF operations have not under Augean's ownership of the site given rise to any material off-site impacts is powerful evidence that the addition of limited quantities of LLW to the waste stream would not do so either. Para 35 of Mr.Leuchars' proof refers to the "security, peace and a tranquil life in a beautiful setting" and in his XX of Dr Wilson stated that the community has "rubbed along more or less OK with the hazardous waste site" (It is noteworthy that Mr Andrew Howard in AP15.31 stated that "The site appears to operate with minimal impact to both our business and the local community."). Its suitability for the currently consented use would apply equally to the appeal proposal. The area is relatively sparsely populated, there are only very few dwellings within 1 km of the site, centres of population are well removed from the site, the area is not the subject of any landscape or other designation, there is easy and safe road connection to the strategic highway network, there would be no impact on the natural, historic or cultural environment and the site is suitably engineered under the current permission to accommodate LLW. There is no justification for claiming that tourism in the area would be affected or that the local economy would be harmed in any way. Mr.Leuchars professed to wish to avoid the community's becoming dependent on financial "handouts", but failed to take account of the considerable benefits the community has already derived from the LF Tax credit scheme and Augean's direct sponsorship of local activities and would in the future derive from the proposed community fund which NCC required to be provided in the section 106 agreement. Much was made of local people's life-style choices; they seem content to live in an area containing a hazardous waste LF and to experience much higher levels of radon gas than

other parts of the country and it appears illogical to be so opposed to the addition of LLW to the waste stream when the maximum dose that anyone could receive (making extreme assumptions) is such a tiny fraction of the radiation levels they are already exposed to and which would be 500 times less than the radon action level in their homes.

127. Dr.Busby lamented the 'ad hominem' attacks on his credibility, saying "it's always the way". But it is hardly any wonder given the nature of his evidence, his agenda and 'previous form', the way in which he seeks to denigrate anyone who opposes his views and the very point he makes in his proof [**KCWW2.2**,p.3] that "this area is very much one of credibility". I suspect few at the inquiry (Professor Wakeford excluded as he has seen it all before) will have previously experienced such an ill- judged and intemperate condemnation of the entire international, European and national mainstream scientific community and regulatory authorities as witnessed during Dr.Busby's tirade at this inquiry. He cannot excuse himself for being provoked into making off-the-cuff remarks which he later regrets: his proof is generously larded with abuse and accusations of criminal and other reprehensible conduct and, of course, this is the man's style as seen in the CERRIE Report [**T21**,p.5,para.18]. No one came off lightly: Prof.Wakeford was affectionately described as "rather daft" before being accused of scurrilous blogging and lacking all knowledge of biology. Memorably the EA was described as a "bunch of idiots" and those serving on august bodies such as UNSCEAR, ICRP, COMARE and HPA were variously dismissed as spin doctors, desk jockeys, circular witch doctors and the like, all of whom were engaged in a potentially criminal conspiracy with the nuclear industry to suppress the truth and to enable the industry to continue to function, earning vast profits but knowingly killing people in the process.

128. Dr.Busby's credibility is hard to discern. He stepped down from the only two official bodies that he was invited to join, DUOB and CERRIE. His record of peer-reviewed papers in the mainstream scientific journals is extremely limited. His self- created and self-publicised ECRR is of dubious status; its membership is difficult to identify and apparently has included individuals who had no knowledge they were members or in one instance are no longer alive.

The status of the grandly sounding Lesvos Declaration has been called into question and its 2nd declaration is hardly a ringing endorsement of Dr.Busby's key claim that the ICRP risk model is out by a factor of 1000-10,000. That claim that the risk model is seriously underestimating the risks associated with internal emitters has been very carefully addressed by CERRIE, COMARE and HPA: while it has been accepted that the model may vary in either direction by a factor of up to 10 for internal emitters (**AUG4.3(3)**p.29) as compared with a factor of 3 for external exposure (**T21**,p.9), these bodies have rejected in forceful terms that the magnitude of the variance is anything like that which Dr.Busby claims. The HPA has repeatedly confirmed their confidence in the ICRP risk model which was of course revised and updated following CERRIE and the 9th COMARE report; see **HPA8, 9 &12** and the HPA's response **HPA13** to Dr.Busby's proof. These documents were variously traduced as a 'whitewash' or 'demonstrable nonsense', as was ICRP's own commentary in **ICRP9** (see p.195-196).

129. Many of the claims Dr.Busby made were described by Professor Wakeford as irresponsible and serving to spread fear and alarm in the community, such as the comparison with the Chernobyl exclusion zone and the Windscale fire and the references to the KiKK study (T26) and clusters of childhood leukaemias (for a more balanced view on this see T43 p.6 on Chernobyl and HPA8 p.12 on KiKK). Dr.Busby had not read any of the evidence to the inquiry (he'd been so busy he hadn't had the time), was not familiar with the relevant planning policy and guidance (he didn't see the point) and had no recollection of reading Dr.Denman's report (who's Dr.Denman?). He displayed a cavalier approach to facts as Dr.Valentin's letter (AUG4.4) revealed. His condemnation of the EA's competence was itself a display of *his own incompetence*: as Mrs.Heasman explained he was profoundly wrong and there was of course no question of radionuclides being missed off the list in the draft EP. Professor Wakeford explained that all children in the UK in 1963 received a radiation dose of 0.2 mSv from nuclear weapon testing fallout and that had Dr.Busby's claims about the effects of very low doses of radiation been correct that would have resulted in waves of leukaemias across the northern

hemisphere; however, that had not occurred as demonstrated in the nine good data sources available for that period.

130. Whatever view is taken about Dr.Busby's contribution to the inquiry, it surely could not lead to the abandonment of the ICRP risk model that forms the foundation for risk assessment in the UK and internationally. This inquiry cannot properly grapple with such issues and should not attempt to do so as they are plainly beyond the scope of the inquiry. It would be impossible to conclude that the risk model is "dead" or that there is any *credible* scientific disagreement over the risk coefficients derived from it. His suggestion that radioactive waste should remain for-ever at the site of its origin and be simply fenced off is totally impracticable and reveals a complete lack of understanding of Government policy on decommissioning. Any value that WW considered they would derive from his evidence in terms of risk perception has demonstrably back-fired on them, as I am sure WW in their heart-of-hearts would recognise. Perceptions of harm to human health have been and continue to be irresponsibly stirred up in the community (eg Dr.Busby's delayed reappearance at the inquiry giving an alarmist media interview) but only serve to show how unjustified those perceptions are. It would, I submit, be impossible to characterise those perceptions as objective or reasonable or based on fact.

LOCALISM

131. It is currently unclear what this concept means and what changes to current procedures and guidance may be introduced. As matters stand, there is no reason not fully to apply current guidance on the weight to be given to local opinion. It is not, of course, the case that the existing procedures do not give proper ability for local opinion to affect the decision-making process. No-one could deny that in this case local people have had a very full opportunity to influence the decision of NCC. Indeed, had it not been for the local objection it could well be that the Committee would have taken a very different view about the acceptability of the proposal, particularly given the emphatic nature of the Officers' advice. Augean's efforts in engaging the public were described as "Heraclean" by no less a person than a professor of

risk communication and other similar commendations have been made (see, e.g., Cllr.Ben Smith's "considerable consultation": **NCC6.1**,6.8). In addition there have been consultation exercises carried out by NCC in connection with the application and the EA in relation to the permit and King's Cliffe Parish Council also carried out what they described as an "extensive consultation process" (see their letter in **AP4**). Considerable local media coverage heightened public awareness, supplemented by pantomime stunts, WW propaganda and Louise Bagshawe's electioneering. Further, this inquiry has given WW and individual objectors the fullest opportunity to give evidence and to articulate their objections in person or in writing.

132. The Inspector and the Secretary of State will, of course, have to decide what weight should be given to those objections, but as indicated earlier planning decisions, at least on the basis of current procedures and guidance, are not made on the basis of polls, plebiscites or petitions. The meaning of the reference to "public acceptability" as an overarching expectation in section 2.1 of the LLW Strategy [NS17] is no-where explained, but cannot mean that the proposal must be supported by the totality or any particular proportion of the local populace. In any event, in the present case the number of objectors is but a small proportion of the total population of the area claimed to be at risk from this proposal. If a crude head count of those in favour and those against proposed development of this nature were to be the basis for decision making, Mr.Watson, the Inspector and I would be out of our jobs and replaced by a single bean-counter. It may save money but would not be a very satisfactory way of reaching decisions and no doubt would result in locally unpopular land uses never receiving permission whatever the need for them.

133. Significantly in this case the Secretary of State decided that it was necessary for him to recover jurisdiction to decide the appeal himself rather than the Inspector because it related to development of "major importance having more than local significance" **[AP12]**. As Mr.Miles explained in his additional EiC, it is precisely in cases like this, where the benefits and disbenefits of the proposed development are not confined to the local level or experienced only in a local community (unlike, say, additional housing or shops), that the

decision needs to be taken at a higher level than the local community, whether that means the County, District, Parish or neighbourhood. It is, in this case, only at the national level, as the Secretary of State recognises, that the decision can give proper weight to the national dimension that the case involves, particularly if this is the first "test" of the new LLW policy and strategy as some have claimed. (The principle of landfilling LLW is of course not novel in the UK and the recent permission for the extension at Clifton Marsh was taken subsequent to the publication of the 2007 policy statement.)

134. There seems to be, at least on this matter, little disagreement between Messrs. Miles and Aumonier. Mr.Miles did not accept that localism required more weight to be given to the views of Parishes and local people. Mr.Aumonier explained that he had difficulty understanding what localism meant in the absence of any explanation of what it was and how it was to be delivered. However, he thought it would not make a great deal of difference because considerable weight was already attached to local opinion and had, therefore, not even thought it necessary to address in his proof. He did not think it would lead to decisions being taken below a district level.

PRECEDENT

135. There are two aspects to this; first, would approval of the appeal application set a precedent or in some way predetermine the outcome of any application that Augean makes in mid 2011 for an extension to the site? Secondly, would the outcome of this appeal set a precedent for or have a material bearing on applications relating to LLW that may be made by others on other sites?

136. The Courts from time to time have to consider the materiality of precedent. An early authority, but which remains good law and represents perhaps the classic exposition on the matter, is Collis Radio (1975) **[OD85]** where Lord Widgery CJ stated that if planning permission is granted for a particular form of development on site A it is very difficult to refuse *similar development* on site B if the *circumstances are the same*. The essential

ingredients, therefore, for a precedent argument to be valid are that similar development is proposed on two (or more) sites where the same circumstances apply.

137. These ingredients would be lacking in the first situation referred to above. This appeal concerns only an additional waste stream into a permitted void for a strictly limited period to mid 2013. There is no change to the permitted landfill area, the permitted void space, the permitted restored landform and its after-use or the timescale of the permission itself. The extension application would be quite different involving an extension of time of some 13 years beyond the current permission and the creation of an entirely new void space. The considerations relevant to that application would be totally different from those applying to the present appeal proposal, as indeed was put in XX to Dr.Wilson by Mr.Porten. Considerations of need would be very different from the short-term, temporary timescale of the present appeal: consideration would have to be given, for example, to the provision being made by other WPAs for LLW management capacity in their own areas. Considerations relevant to the waste hierarchy and proximity principle may well be very different if other management options for LLW disposal including other LFs become available or are likely to do so over the extended timescale of that proposal. Considerations of impact from operations at the site over that extended period would clearly be different from those currently under review involving, as they do, no extension beyond the permitted lifetime of the site. Landscape and visual impact issues would have to be addressed along with hydrogeological, hydrological and ecological impact assessments unnecessary for the current appeal. Different transport and highway issues may arise. There may well be different development policies in force. I could go on.

138. Given that neither the development nor the circumstances applicable to the envisaged extension application would be the same as those applying to the current appeal, it is difficult to see that the outcome of this appeal would predetermine the outcome of the further application or in any way prejudice the consideration of it on its own merits. If he grants permission on the current appeal the Secretary of State is able to make it clear in his

reasoning that his decision is not to be seen as influencing the outcome of any further application that may be made. Significantly, while NCC have claimed that the appeal application ought to be determined together with and on a comprehensive basis with the extension application, it has not raised any concern still less objection to the appeal application based on its setting a precedent. PINS have already ruled in **AP13** that allowing the appeal would not necessarily or inevitably lead to the grant of permission for an extension of time or area.

139. So far as other sites are concerned, it is impossible in the abstract to speculate whether allowing this appeal would have any bearing on other applications which may come forward. There may well be widespread interest in the outcome of the appeal, particularly as it will be the first appeal under the new LLW policy and strategy, but that is inevitable whenever new policy is promulgated and cannot be a proper reason for not granting the first proposal to come forward. There is no evidence that it would have any *deterrent* effect. Any "cornering of the market" would of course only apply for the temporary two year period, but in reality the grant of permission does not give Augean any monopolistic position in view of the continuing requirement for LLW consignors to comply with BAT/BPEO and the proximity principle. Nor would permission here lead to other WPAs not making suitable provision in their own WDFs for LLW given the very short timescale that this appeal is concerned with. Any *encouragement* that it may give to other applications would be no bad thing and would perhaps help the industry overcome its reluctance to grapple with LLW (as described by Dr.Wilson and see also **NS13**,5.19-20) and thereby assist in delivering the disposal opportunities that the UK policy and strategy are so clearly seeking to promote and in an early timescale too. Consideration should also be given to the consequences of *dismissing* the appeal and what message this might send to the market and what effect that would have on achieving the new policy's objective of providing new, fit-for-purpose, cost-effective disposal options generally and landfill sites in particular. The probable message would be that there is no point in applying because strong local objection, whether or not objectively justified, will result in rejection. That surely cannot be the message that Government wants to convey.

CONCLUSIONS

140. In submissions that may be thought already to be over lengthy, I shall be brief.

141. There can be no tenable suggestion that Augean are not suitable operators to manage disposal of LLW. The EA is satisfied with Augean's suitability and Dr.Denman was impressed by their management ethos to follow safety requirements.

142. There can be no tenable suggestion that the appeal site does not possess suitable engineered containment to accommodate LLW. Landfill techniques offering a higher degree of containment are not necessary and would provide no material benefit.

143. There is every expectation that the EA will shortly issue the EP. It is satisfied that disposal of LLW at the site would not cause material harm to human health or the environment.

144. All statutory consultees are unanimous that the site would be operated well within appropriate international, European and national radiation safety standards, as confirmed by Professor Wakeford.

145. The independent expert appointed by NCC is satisfied that the site would be operated safely. NCC does not suggest that the proposed development would cause actual harm to health or the environment.

146. The maximum assessed radiation dose received by a member of the public, even making extremely conservative assumptions, would verge on the trivial. There is no rational or justifiable basis for fears and perceptions of material harm to human health or the local economy which, accordingly, should not be accorded much weight.

147. There would be no off-site non radiological impact.

148. There is a compelling and urgent need for LLW disposal capacity in the period to 2013. Legacy waste from nuclear installations in central and southern England should be disposed of as soon as practicable. The nuclear decommissioning programme is being delayed by the lack of an appropriate disposal route and the resultant delay and management costs to the taxpayer are very substantial.

149. The appeal site represents the nearest appropriate installation for such waste. Any LLW disposed of at the site would represent BAT and therefore accord with the waste hierarchy and proximity principle.

150. There is surplus void capacity at the site for the remainder of its permitted life; the disposal of the modest quantities of LLW envisaged would not displace any hazardous waste that would otherwise be accommodated here.

151. There would be no change to the permitted engineering or landform or restoration of the site. It is a stand-alone development in no sense dependent on any further application to be made. It would not lead to any predetermination of that further application which would be considered on its own merits in the light of a totally different set of circumstances from those applying to this appeal.

152. The proposal would represent an appropriate sustainable form of waste management in locational, transportational, technical, environmental and policy terms.

153. Officers recommended unequivocally that permission should be granted. NCC has been unable to show that it had good reasons to reject that advice.

154. The proposal would represent an excellent fit with the UK LLW Policy Statement and Strategy as well as relevant guidance in PPS10 & 23. It would accord with relevant policies in the development plan.

155. Any residual objections that may exist to the proposed development are substantially outweighed by the need for LLW disposal capacity.

156. In all the circumstances the proposal is well deserving of support and the Inspector is urged to recommend that the Secretary of State should allow the appeal and grant planning permission, subject to conditions and the section 106 agreement.

24 November 2010

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