

**KEY ISSUES AT THE PUBLIC
INQUIRY INTO THE DISPOSAL
OF LOW LEVEL RADIOACTIVE WASTE
TO THE LANDFILL SITE AT KING'S CLIFFE,
NORTHAMPTONSHIRE**

**Briefing Paper 11,
March 2011**

This note provides an overview of the main arguments, as summarised in closing submissions to the Inquiry on behalf of Northamptonshire County Council (NCC) and Augean Plc¹ (AUG).

The site is currently permitted for disposal of hazardous wastes, but is due to be closed and restored by the end of August 2013. The application is for the disposal of LLW which is at the lower end of the range of radioactivity in the LLW category. The proposed development would not change the closure and restoration date (but see arguments under 'piecemeal development?' below).

The note covers the following issues:

- Consistency of the application with local plans
- Consistency of the application with national policies/strategy
- The role of self-sufficiency/proximity
- The question of need
- Option assessments (including the views of recipient communities)
- Perception of harm as a material consideration
- Piecemeal development?
- The question of precedent

The purpose of the note is simply to summarise key points for the information of readers, not to attempt to assess the strength of argument or reach conclusions. It is anticipated that the Inspector's report and Secretary of State decision will be published in May 2011.

The paragraph references in brackets below refer to the relevant paragraphs in the two closing submissions.

¹ 'Closing Submission on behalf of Northamptonshire County Council', NCC10, Anthony Porten QC, 24 November 2010 and 'Closing Submission on behalf of Augean Plc', AUG6, Richard Phillips QC, 24 November 2010.

Consistency of the Application with Local Plans

AUG

- There is nothing in local waste policies that would preclude LLW being landfilled at this site (para 60).
- The Minerals and Waste Core Strategy (CS) identifies the appeal site as one serving a national catchment area for hazardous wastes and the same considerations should apply to LLW (para 64).
- The emerging Control and Management of Development Document states that facilities with a national catchment area will be appropriate in Northamptonshire if they are of a specialised nature (relating to the type of waste, or process of management) (para 67).
- LLW should be recognised as specialised (because of its radioactivity, its specific national policy and strategy, its specific regulation, the pre-acceptance procedures and on-site acceptance, handling and monitoring procedures) (paras 70-71).

NCC

- NCC does not accept that the wastes concerned are of a nature requiring specialist facilities. LLW disposal to landfill is not different from other landfill disposals, subject only to the necessary safety assessment to the satisfaction of the environmental regulator. UK LLW strategy makes the point that management of LLW is not a particularly high-tech process (paras 6-7).
- The CS recognises the specialist role of the site for hazardous waste with a national catchment, but this does not support its use for any other waste stream. The addition of a new waste stream would reduce the capacity of the site for hazardous waste. The CS makes it clear that the management of radioactive waste is an issue to be addressed at review in the light of emerging national policy (paras 9-12).
- The appellant's claim that the proposal fully accords with the emerging Control and Management of Development Document is not correct, as the proposals are not of a specialist nature (para 14).
- The proposal cannot be fully in accord with the Development Plan (DP) when the DP contains no policies that relate specifically to the development proposed. In the absence of such policies, the appeal must be determined by reference to national policy, and on its merits (para 6).

Consistency of the Application with National Policies/Strategy

AUG

- PPS10, PPS23 and the Waste Strategy for England (WSE) contain relevant national policy guidance. The appeal proposal accords with this policy guidance, including the Key Planning Objectives (KPO) in PPS10 (para 38).
- The appeal proposal accords with the national policy statement on LLW, including: adoption of a risk-informed approach; the need for flexible, cost-effective, fit for purpose solutions; the presumption in favour of early solutions; and the need to balance consideration of the proximity principle and transport against these factors (paras 47-52).
- The appeal proposal is fully in accord with the NDA UK LLW Strategy, including the need to make best use of the LLW Repository near Drigg, the need for new, fit for purpose waste management routes, and the preference for management at higher

levels in the waste hierarchy (as only residual wastes will be disposed) (paras 53-54).

NCC

- The proposal does not accord with national planning policies, as it would relieve Waste Planning Authorities (WPAs) elsewhere of their obligations to include provision for the LLW management needs of nuclear sites in their areas, and engender a mindset which does not seek in full to implement a step-change away from disposal (paras 22-24).
- The proposal does not accord with the national policy statement on LLW as: it is of a short term nature, rather than arising from a long term management plan based on a formal assessment of all practicable options; does not pay sufficient regard to the proximity principle; and the host community has not been involved in its development (para 25).
- The proposal does not accord with the NDA UK LLW Strategy as: it is a short-term decision taken on an ad hoc basis without assessment of the options for long-term management; and it would prejudice strategy objectives by reducing the prospects for enduring and more localised solutions (para 27-28).

The Role of Self-Sufficiency/Proximity

AUG

- The second KPO in PPS10 encourages communities to take more responsibility for their own waste. This cannot sensibly refer to a single district or county where, as here, the waste involved has a national dimension. The current antipathy of most authorities and the expected hostility of host communities, makes more localised provision for nuclear industry LLW very unlikely (para 42).
- The fourth KPO in PPS10 requires that waste should be managed in one of the nearest appropriate installations. The word 'appropriate' shows that factors other than distance have to be considered. The appeal proposal would without any doubt be the nearest appropriate facility in central and southern England (para 44).
- The NDA UK LLW Strategy expressly contemplates that LLW may be transported a considerable distance and that the proximity principle should be appropriately considered as part of a Best Available Technology (BAT) assessment undertaken by the waste producer. The BAT assessment must satisfy the Environment Agency (EA), thereby ensuring that any transport required would be in accordance with the proximity principle (para 56).

NCC

- Throughout all of the policy documents the emphasis is on disposal to one of the nearest appropriate facilities. Kings Cliffe (KC) is not near to any of its expected main customers. The thrust of the strategies is that communities should take more responsibility for their own waste and WPAs are expected to make allocations within their boundaries rather than export to distant authorities. The strategies are recent and time must be allowed for their implementation. A short-term decision to allow the import of LLW from across the UK must be contrary to the underlying objectives of those policies. (para 35)

The Question of Need

AUG

- Government policy guidance does not require the appellant to prove need. No policy in the MWDF requires the appellant to demonstrate need. However, if need can be demonstrated this would be a material consideration deserving of considerable weight (paras 73-74).
- There are three aspects of need here. First, for additional waste to be landfilled at KC to ensure the fullest and most effective use of the site during its remaining life. Second, the national need for additional disposal routes and early solutions. Third, the urgent need for Research Sites Restoration Limited (RSRL) to find a disposal route for the lower activity LLW arising at its Harwell site. There is no available alternative landfill able to receive LLW anywhere in central or southern England (paras 74-85).

NCC

- The limited and uncertain volume of predicted LLW for disposal does not represent such a quantity and urgency that it justifies the permission sought, when virtually no time has yet elapsed for any effect to be given to the strategies (para 39).
- A sufficient database for nuclear industry and WPA planning is still lacking. Only one local DP reflects current policy guidance. Emerging DPs will be bound to have regard to the policies. The potential for other landfill sites throughout the country has yet to be explored but will have to be when those DPs come forward (para 39).
- The appellant's case muddies the waters by seeking to introduce longer term needs, in particular, by asserting a deficit requiring alternative disposal based on a five year figure of arisings (300,000m³), rather than a two year figure of residuals for disposal. The urgency of finding a disposal route for the shorter term figure of 38,000m³ is supported, if at all, only by the untested written submissions of the operators (para 40).
- RSRL assert that LLW storage capacity at Harwell is now full and the lack of an alternative disposal route may impact on decommissioning progress. We were not told what the capacity is, we have seen no inventory of volumes held, and we were told that it may hold up progress: equally, it follows, it may not (para 48). RSRL must know what they will do from now until 2013 if Augean's appeal fails, but we have not had the opportunity to assess their options (para 57).

Option Assessments (including the views of recipient communities)

AUG

- The Best Practicable Environmental Options (BPEO) assessment carried out by RSRL for Harwell LLW in 2007 did not represent a final decision and preceded the national LLW policy statement published later that year. That policy opened up commercial landfill as a LLW disposal option. The BPEO had previously marked down off-site landfill on account of feasibility but recognised that this may improve through subsequent policy changes (para 80).
- The two subsequent updates to the BPEO have taken account of the policy statement and the most recent one expresses a clear preference for off-site disposal to a commercial landfill (para 81).

- There is a requirement as part of the BAT process to consider local community issues at the receiving site, which is not to be equated with a requirement in every case to consult with the host community. The responsibility for such consultation rests with the EA and they should take account of the operator's consultations and adopt a proportionate approach (para 82).

NCC

- The appellant's case presents in part what is effectively a joint case with RSRL. RSRL have submitted various written submissions, but not allowed their evidence to be examined and tested. Limited weight should be given to their written evidence (para 47)
- The original Harwell LLW BPEO concluded in favour of a new engineered disposal facility on site. A May 2007 update, which took account of the 2007 policy, confirmed that conclusion. A further update was apparently issued in May 2010, but without any fresh BPEO exercise. This concluded that the BPEO was offsite disposal (para 54).
- The UK LLW Strategy requires the consignor BPEO process to include consideration of local community issues at the receiving site. The importance of this is emphasised by the strategy's overarching expectation of a high standard of public acceptability. It is difficult to see how the EA can give an authorisation without (a) the consignor first engaging with the Council and residents at the receiver site and (b) being satisfied that the consignment would achieve the necessary high standard of public acceptability at the receiver site (para 51).
- The results of the Augean consultation so far must indicate that the local community would raise objections and express the view that the proposal is unacceptable. Consequently, the Strategy requirement for a high standard of public acceptability would not be met (para 55).

Perception of Harm as a Material Consideration

AUG

- Circular 03/2009 explains 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. Planning authorities should therefore make their own objective appraisal to ensure that valid reasons are stated and substantial evidence provided (para 30).
- NCC evidence made no proper attempt to assess or quantify the scale of the perceived risk, to demonstrate the land use consequences of such perceptions, to say how it should be weighed, and to establish whether the fears and perceptions were objectively justified (para 32-36).
- The two key issues are: is perceived harm a material consideration (which is ultimately a question of law for the courts); and if it is what weight should be given to it (which is a matter for the decision maker). There are cases where the Courts confirm the materiality of public concern, but clarify that it should not be a reason for refusal (ie given weight) unless justified and supported by substantial evidence. Justification relates to there being reasonable grounds for the fears expressed (paras 86-92).
- In this case, the technical evidence shows that there would be no material safety implications. That evidence and its endorsement by the mainstream scientific

community is deserving of significantly greater weight than the extreme hypotheses advanced by mavericks (para 92).

- Annex 1 to PPS23 makes it clear that for perceptions of risk to be a material consideration the land use planning consequences should be clearly demonstrated (para 93). None have been demonstrated in the current case (para 115).
- Having reviewed all the appeal cases relied on by NCC it is clear 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 (para 106).

NCC

- The position in law is clear and is established in *Newport BC v SoS Wales (1998)*. Relevant extracts are that: perceived fears of the public are a planning factor which can amount (perhaps rarely) to a good reason for refusal; local fears which are not, in fact, justified can rank as part of the human factor and could be given direct effect as an exceptional or special circumstance (para 66).
- Policy guidance cannot override the law, thus: the word 'objective' cannot mean that fears cannot justify refusal unless 'objectively justified' – it can only mean that the fears are genuinely held; the reference to land use planning consequences is not found in the *Newport* judgements, and is either not a proper part of the test, or must be applied as explained in the *Broadland* judgement (to the extent that the development could affect local residents in their enjoyment of their own land or in their use of the highway); and where the perception of harm is genuinely held it will be a material consideration and the weight to attach to it is for the decision maker (para 68).
- In the present case there is ample evidence that local inhabitants' fears are genuinely held (para 69). The perception of fear is therefore a material consideration and the weight to be attached is for the decision maker. The WPA considers it to be of such weight as to give grounds to a reason for refusal and the SoS is requested to uphold their decision (para 70).
- An over-arching objective of any programme of stakeholder engagement is to build public confidence and trust. The local community does not trust the appellants not only because of Augean's lack of experience in radioactive waste management, but because of the changing nature of the company's intentions regarding the future extension of the site and the public's exclusion from any meaningful influence over decisions. If the WPA's decision were to be overturned that would be seen as development being imposed on the community in contradiction to the spirit of localism (para 74).
- The acknowledged effects of perceived harm in this case are considerable and include: anxiety and loss of personal amenity; inevitable psycho-somatic health effects; stigma; and direct negative socio-economic impacts (para 76).
- The balance of perceived harm and local benefit is heavily weighted against the proposal, and the argument for national benefit is unconvincing (para 78).

Piecemeal development?

AUG

- PINS ruled that the appeal proposal could be dealt with independently of any future proposal for extension to the currently permitted site (para 2).

- The appeal proposal is in no sense piecemeal development. It is not inevitably part of a more substantial development. The subsequent application would require full assessment and any cumulative effects would be considered then (para 3).
- 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 (para 4).

NCC

- The planning application now subject to appeal was presented on the clear basis that all operations would cease and that the site would be restored by August 2013 (para 83).
- Augean only disclosed their intention to make an application for extensions of the life and area of the site following refusal. The obvious inference must be that they had hoped to first have the deposit of LLW accepted on the basis of a short-term temporary permission before declaring their long-term ambitions (para 86).
- It is now apparent that the application does not embrace the full extent of the development. It explains why the Appellants have sought to influence the decision by introducing evidence on the alleged need beyond 2013. It means that the cumulative effects of the total development intended have not been assessed and have not been subject to Environmental Impact Assessment (para 87).

The question of precedent

AUG

- The essential ingredients for a precedent argument to be valid are that similar development is proposed on two or more sites where the same circumstances apply (para 136). It is impossible to speculate whether allowing this appeal would have any bearing on other applications that may come forward. A precedent argument cannot be a proper reason for not granting the proposal. But consideration should be given to the consequences of dismissing the appeal: 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 (para 139).

NCC

- To allow this proposal would set an undesirable precedent, suggesting that the proximity principle be given little weight, and reducing the likelihood of the strategies achieving the necessary step changes towards more enduring and localised solutions (para 39).