Newsletter

BURGES SALMON

Nuclear Law

Summer 2014

Welcome

Welcome to this Summer 2014 Edition of the Burges Salmon Nuclear Briefing. I hope you find this Briefing useful and informative. If you would like to see particular issues explored in future Editions or you have any questions you would like answered please do not hesitate to let me know on +44 (0) 117 939 2225 or email ian.salter@burges-salmon.com

Ian Salter will be attending the International Nuclear Law Association 'INLA' Congress in Buenos Aires, 20-23 October 2014

STOP PRESS:

UK Department of Energy & Climate Change 'DECC' published on 8 August an updated Order which will amend the Nuclear Installations Act 1965 and implement the 2004 Protocols to the Paris and Brussels Conventions on nuclear third party liability.

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Next issue:
Regulation of Small Modular Reactors 'SMRs'

The Queen on the Application of An Taisce (The National Trust for Ireland) v Secretary of State for Energy and Climate Change and NNB Generation Company Limited

On 1 August 2014 the Court of Appeal dismissed the claim for judicial review brought on appeal by An Taisce, the National Trust for Ireland. An Taisce had challenged the decision of 19 March by the Secretary of State to grant development consent for the construction of an EPR nuclear power station at Hinkley Point C.

An Taisce claimed that there was a breach of the Environmental Impact Assessment 'EIA Directive' because the secretary of State had not carried out transboundary consultation under Article 7 of that Directive.

The Secretary of State argued that he was not required to carry out such consultation as Hinkley Point 'C' was not a project likely to have significant effects on the environment of another Member State.

The judgement considered each element of that test in detail and by reference to all recent authorities. It also considered by way of comparison the leading authorities on the Habitats Directive and Appropriate Assessment. In an important ruling in its own right, the Court of Appeal held that these two strands of authority were distinct, and there was no automatic read-across, for example of the *Waddenzee* Habitats Directive case to the application of the EIA Directive test.

The Court of Appeal also upheld the judgement of the Judge at first instance by confirming that the Secretary of State was entitled to rely on the existence of a stringently operated requlatory regime available to control future operations, and he was entitled to take that into account in assessing what is reasonable when making a development consent application.

Alice Yan of Burges Salmon's Nuclear Law team was on secondment to NNB Generation Company Limited, and was able to assist the in-house legal team in preparing their defence to this important judicial review challenge.

White paper: ‘Implementing geological disposal’

In July 2014 the UK government issued (for England and Northern Ireland) a new White Paper as its framework for the long term management of higher activity radioactive waste. This represents an important update on the policy frameworks for implementing geological disposal and preparing for a geological disposal facility (GDF). However, preparatory work before full engagement with communities which might host a GDF is anticipated to last at least until 2016, or the other side of a general election, after which the whole policy may be reviewed by the next government.

Key features of the new White Paper are:

- a re-statement of the policy commitment to geological disposal, in line with the 2011 European Directive that endorsed this as the safest and most sustainable option;
- a revision based on the 2013 UK Radioactive Waste Inventory of the volume required of 650,000 cubic metres (over half of Wembley Stadium);
- (in accompanying documents) an announcement of the re-organisation of the relevant part of the Nuclear Decommission Authority ‘NDA’ into a wholly owned subsidiary Radioactive Waste Management Limited ‘RWM’, to be the developer of the GDF;
- Planning for the GDF to be subject to ‘staged regulation’ under the Environmental Permitting regime (for England), and as a nuclear installation by the ONR;
- National Geological Screening undertaken by RWM as developer;
- National land-use planning changes, with amendments to the Planning Act 2008 to make the GDF a Nationally Significant Infrastructure Project, with all the usual appraisals;

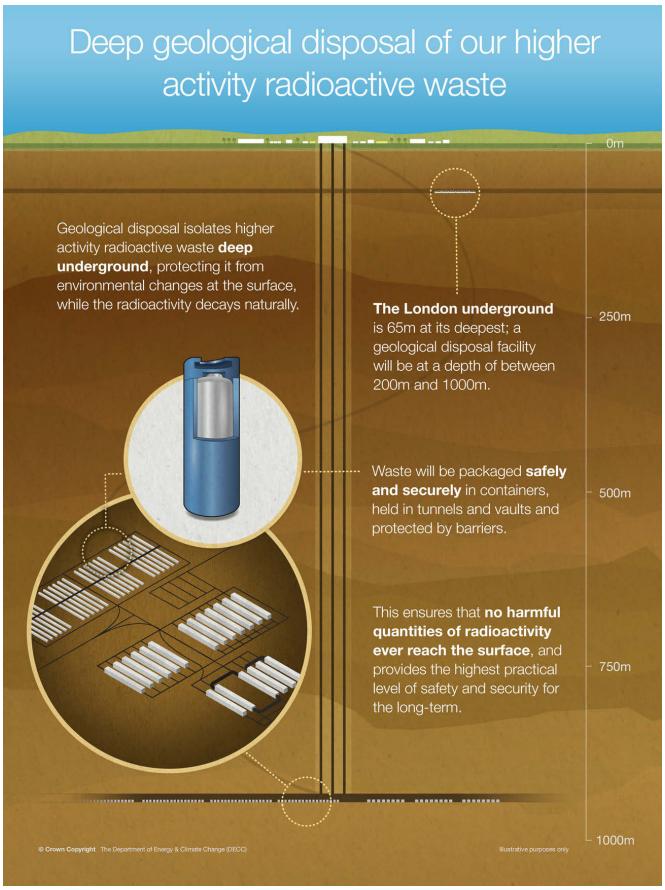
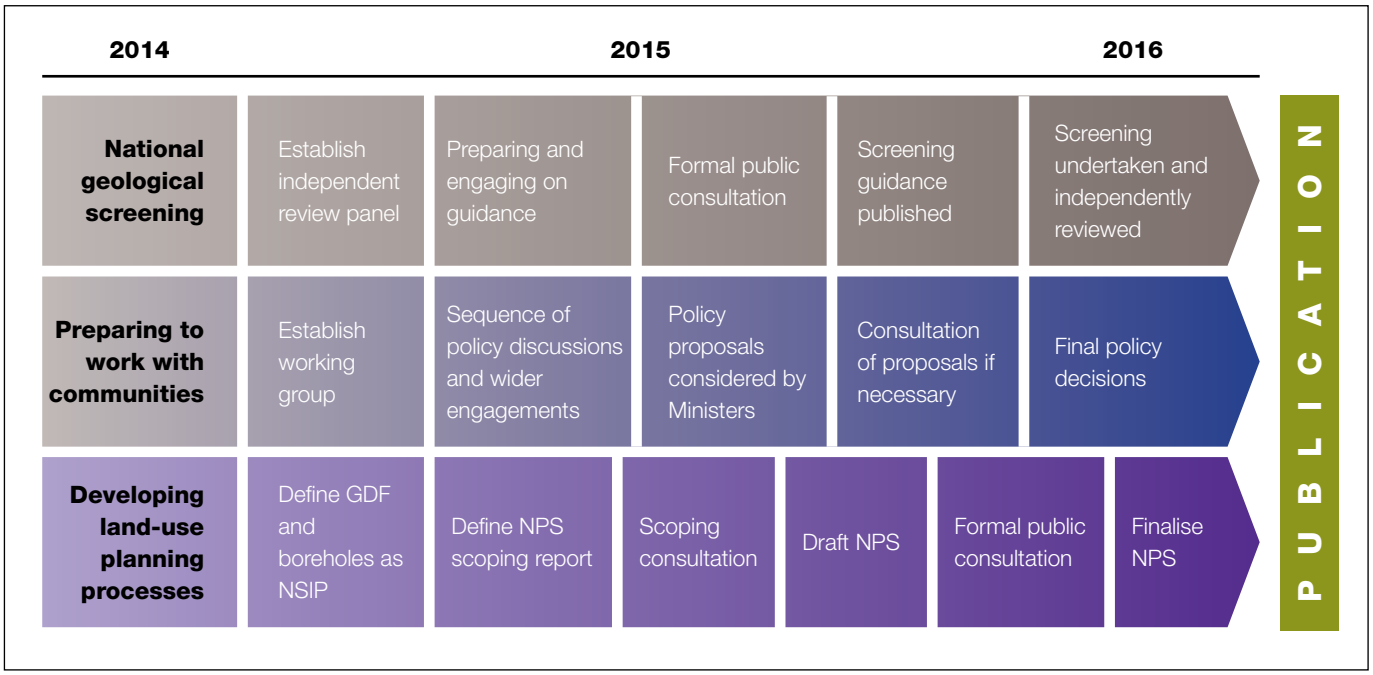


Image courtesy of DECC

- New ways of working with communities on representation and engagement, also likely to involve community investment of £1m per year for involved communities, rising to £2.5m per year where intrusive investigations and borehole drilling starts.

Subject, once again, to electoral uncertainties, the (present) government proposes that the process might look like this:



Revised Nuclear Safety Directive

On 8 July 2014, the EU Council adopted the revised Council Directive 2014/87/Euratom, which amends the earlier Directive 2009/71/Euratom establishing a Community framework for the nuclear safety of nuclear installations.

The new Directive is in large part a response to the Fukushima disaster. It develops and extends provisions in the 2009 Directive in the light of lessons learned, for example in the area of functional separation and independence of regulatory authorities. It also reflects the work undertaken across the EU on the European nuclear reactor 'stress tests' following Fukushima.

As anticipated in earlier Burges Salmon briefings on the draft Directive, it is not so much the content or intent of these changes that may cause concern, as their prescriptive nature, which in some areas cuts across the goal-based approach of some EU regulators.

Key features of the new Directive include:

- Provisions re-stating requirements for the national legislative, regulatory and organisational framework to deliver nuclear safety, with the functional separation and operational and budgetary independence of the national regulator strongly underlined in the law;
- Safety responsibilities of licence holders enhanced, with more emphasis on their prime responsibility, regular review and functional and specific responsibilities;
- Education and training requirements become part of the required national framework;
- Requirements on regulatory transparency and information for workers and the public are re-emphasised;
- 'High level EU-wide' Nuclear Safety objective to prevent accidents and avoid radioactive releases outside a nuclear installation, to be applied to all new construction licences after 14 August 2014;
- European system of peer reviews on specific safety issues to be carried out every six years by Member States through their regulatory authorities, the first to take place in 2017;
- Defence-in-depth applied to specific check-list of impacts, operations and conditions;
- Nuclear safety culture to be promoted in specific ways by licence holder and management systems;
- Installation initial safety assessments, then periodic safety reviews at least every 10 years;
- On-site emergency preparedness and response provisions revised;
- International peer review and reporting on national framework every 10 years;

Implementation of the revised Directive by Member States is due to take place by 15 August 2017.

Nuclear liability: Convention on Supplementary Compensation 'CSC'

On 7 July, the United Arab Emirates joined the United States, Argentina, Morocco and Romania in ratifying the Convention on Supplementary Compensation for Nuclear Damage (the 'CSC'). Whilst the CSC was opened for signature in September 1997 it is not yet in force as, in addition to requiring 5 signatories to ratify, such signatories together must hold 400,000 units of nuclear power to enter into force. However, the IAEA has indicated that it is expected that Japan will complete its own preparations for ratification in autumn of this year or beginning of next. Once Japan ratifies the CSC, its installed nuclear capacity will bring the CSC into force. Canada's preparations for ratification (but with a much lower installed nuclear capacity) are also far advanced.

The CSC was developed post-Chernobyl to improve and modernise the existing liability regime for nuclear damage to third parties (contained within the 1960/2004 Paris Convention and 1963/1997 Vienna Convention regimes). It is founded upon the basic principles of nuclear liability law, namely: exclusive and strict liability of the operator for a nuclear incident; exclusive

jurisdiction of claims to the courts of the incident state; limitation of compensation amounts; and limitation of liability in time. It however builds upon these principles by providing higher levels of compensation in the event of a nuclear incident; a broader

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Nuclear liability: Convention on supplementary compensation 'CSC'

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definition of nuclear damage for which compensation can be claimed; and develops the jurisdictional principles to encompass incidents occurring in a member states' exclusive economic zone.

It operates on a tiered system of compensation. The first tier is fixed at 300m Special Drawing Rights (SDRs - currently approximately £270m) to be made available by each Member State. Member States are also required to contribute to an international fund, a second tier, with contributions calculated on the basis of the number of power plants in that Member State to supplement the first tier provided.

The CSC is an umbrella instrument designed to encompass and establish "a worldwide liability regime" in which all States may participate. It is open to both generating and non-generating States that incorporate the basic principles of nuclear liability law into their domestic law and that adopt a common approach on compensation, the definition of nuclear damage and the jurisdiction of courts. Due to this, it is often heralded as the one instrument which could create a foundation for a common global nuclear liability regime. However, the practical achievement of this is highly dependent upon an increase in the creation of treaty relations between States with respect to nuclear liability.

A direct (but not necessarily popular, particularly currently for Paris Convention member States) option to achieve this would be, of course, for more countries to sign the CSC. However, a country such as the UAE that is party to the Vienna Convention and Joint Protocol, in addition to the CSC, illustrates the wide-reaching potential envisaged by the CSC, as the CSC requires that the installation State cannot exclude from the first tier of compensation other States with which it has treaty relations, i.e., Vienna Convention States, Joint Protocol States and CSC members. Therefore, for some Paris Convention States, entry into the Joint Protocol, has been viewed as an initial, less obtrusive but potentially progressive step towards increasing treaty relations and creating more consistent nuclear liability law throughout the world. However, a number of grave concerns regarding the real application of 'bridging' instruments such as the Joint Protocol, such as the extensive inconsistencies in the implementation of the nuclear liability principles, in particular the minimum liability amounts (and therefore available compensation for third parties), in different States still remain and will need to be addressed if any global regime is to succeed. Implementation of the 2004 Amending Protocol in the Paris regime and the 1997 Vienna Conventions have been the focus of much attention in recent years, and are seen to be a much needed step in the right direction. However, attention is now moving on towards (or even back to) the Joint Protocol and the CSC. France, for example, following its Joint Statement on Liability for Nuclear Damage with the US earlier this year, has now ratified the Joint Protocol with effect from 30 July 2014. As a result, States, such as the UK, that have not yet ratified the Joint Protocol, may need to reassess and evaluate their initial reasons for not ratifying this instrument and/or address the pertinent question of what the next steps need to be to move closer to a more effective nuclear liability regime.

Cheryl Parkhouse, Senior Associate with Burges Salmon's nuclear law team, attended the meeting of the World Nuclear Transport Institute on nuclear liability and insurance for transport in Paris on 8 July 2014, and contributed this item to the Newsletter.

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