

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

### Voluntarism and the Public Interest

- 1 Wragge & Co LLP has been requested to advise Copeland Borough Council as a decision making body (“DMB”), and through it, the MRWS Partnership, in relation to the relative weight to be given to “the public interest” in the provision of a geological disposal facility (“GDF”), on the one hand, and the views of potential host communities, on the other.
- 2 The Partnership is particularly concerned to understand the ‘legality’ or otherwise of a DMB taking a decision not to proceed based on a position where, for example, in a specific locality a number of surrounding communities may be in favour of proceeding, but the host community or potential host community where the facility is to be sited is not.
- 3 A host community for these purposes is the local community within which the GDF would be built. The surrounding communities are taken to be other towns or villages in the general vicinity of the GDF or a community on the local transport routes. These are referred to in the White Paper as “Wider Local Interests” (see Box 6 at paragraph 6.8).
- 4 When referring to host communities in the earlier stages of the MRWS process, the White Paper generally refers to these as potential host communities. This recognises that a locality may contain a number of potential host communities and that the “Host Community” for a GDF may not emerge until after Stage 5 in the process.
- 5 The question posed is likely to be relevant at the stage that a smaller area of search comprising of a number of potential host communities or a specific proposal for a GDF has emerged and the “Potential Host Community” and “Wider Local Interests” have been identified.
- 6 The next key decision for the DMBs will be to decide whether to proceed to Stage 4 in the MRWS process. This decision will not, of course, involve consideration of any specific proposal and, would be subject to the right to withdraw (RoW). It is important to keep in mind that a decision not to participate would not necessarily

prevent the “public interest” in the provision of a GDF being met elsewhere in the UK. In that scenario, and in the absence of any other locality volunteering to host a GDF, the Government has indicated that it reserves the right to explore other approaches (paragraph 6.5 of the White Paper June 2008). A decision by the DMBs within West Cumbria does not, therefore, preclude the national interest being met elsewhere. It is also important to keep in mind that the considerations which will be material to the DMBs in deciding whether to participate in Stage 4 will not be identical to those which would need to be taken in to account at later stages or when development consent decisions come to be made in respect of a specific GDF proposal.

- 7 The local authorities within which the “Host Community” and “Wider Local Interests” lie will be important consultees for the body charged with making any decision on the grant or withholding of development consent. If, as appears to be the preferred option, a GDF is designated as a nationally significant infrastructure project, the decision to grant or withhold such consent would be taken by the Secretary of State. Other independent regulators are also likely to be decision making bodies in relation to safety matters.
- 8 The White Paper envisages that the voluntarism approach will continue up to the point at which surface investigations have determined the suitability of potential candidate sites. Beyond Stage 5, the assessments are likely to be narrowed down to one specific site or a small number of potential sites. In the light of the costs of proceeding beyond Stage 5, this is seen by the White Paper as being the final opportunity for the DMBs to withdraw from the process. It is also the stage at which it is envisaged that any community benefits package would be agreed.
- 9 At that stage, the Partnership, which may be differently constituted than at present, will report to the DMBs with a recommendation as to whether the DMBs should participate in Stage 6. That report will need to consider any adverse impacts anticipated to be experienced by the Potential Host Communities as a result of the construction and operation of the GDF alongside any potential advantages or disadvantages to the Wider Local Interests and the wider area represented by the DMBs and the public interest in the provision of a GDF.
- 10 As a decision of a public body, a decision to participate or not participate in Stage 6, may be susceptible to judicial review.

- 11 It is well established that the exercise of planning judgments and the weighing of the various issues are matters entirely for the decision maker and not for the Court (see for example *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26 and *Tesco v Secretary of State for the Environment* [1995] 1 WLR 759). That proposition applies with even greater force where the local authority is not the final arbiter as to whether a development, in this case the GDF, is to proceed.
- 12 Any challenge to a decision of a DMB to proceed or not to proceed to Stage 6 would need to be on the traditional “Wednesbury” grounds i.e. that the decision maker has failed to take relevant matters in to account or has taken in to account matters which are not relevant or has acted perversely in making the decision. Cases such as *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 have recognised that where the decision is based on a series of planning judgments and a weighing of factors which may pull in different directions, *Wednesbury* unreasonableness will be a difficult obstacle for an applicant for judicial review to surmount.
- 13 Against that background, assuming that the individual DMB concerned is properly appraised of the relevant considerations and leaves out of account matters which are not properly relevant to its decision, a decision to proceed or not to proceed to Stage 6 is capable of being a lawful decision of the DMB.
- 14 In the scenario posed by the Partnership, it is perfectly feasible that the DMBs could take the view that the impacts on the local Host Community outweigh the benefits to the Wider Local Interests; the interests of the community represented by the DMB and the wider public interest. The Wider Local Interests may in that scenario favour proceeding to Stage 6, as they will gain from the advantages to accrue from the GDF without experiencing the full range of impacts to be encountered by the Host Community. The DMB will need to take in to account the views expressed by both the Host Community and the Wider Local Interests and, indeed, the wider public interest to be furthered by the provision of a GDF. It cannot treat the views of the Potential Host Community as the sole consideration. To do so would amount to an impermissible delegation of the decision to the Potential Host Community. If it approaches the decision, however, by having proper regard to all material considerations, including giving significant weight to the views of the Potential Host Community, there is no reason to believe that a

decision to withdraw from the process after Stage 5 would be susceptible to successful judicial review. It is not, of course, possible at this time to identify the full range of matters which will be material to the decision of a DMB to proceed or not proceed to Stage 6. The DMB would need to take appropriate advice at that time as to the matters which were material to its decision.

## Summary

- 15 In answer to the question raised, it is in our view appropriate and lawful for the DMBs to give relatively more weight to the views of the locality they represent, including the localised impacts within the host community, than the national interest. It will be for the DMBs to decide on the relative weight to be given to the views of the Potential Host Community and the Wider Community Interests. So long as the DMB does not exclude consideration of the wider public interest, a decision which gives greater weight to the adverse impacts for the host community, would be within the range of permissible approaches.

Wragge & Co LLP

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