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This briefing note provides an immediate reaction, from a legal stand point, to the steps set out in the May 2007 Energy White Paper ("EWP") and the suite of documents that support it. It addresses itself to those aspects of the EWP that deal with the role of new nuclear build in the energy mix.

We have attempted to consider the implications of the EWP for regulators, potential developers, landowners, local authorities and government.

Consultation timeline - What is happening now?

It is important to realise that in the light of the February 2007 High Court ruling in the Greenpeace case the Government is erring on the side of caution and disclosing a huge amount of information in support of its preliminary view on policy that it sets out in the EWP. That preliminary view is that there should be the option of new nuclear build for developers. That preliminary view is stated to be the subject of consultation until the end of 2007.

Many more detailed steps are set out in the EWP, many under the description of "contingent facilitative action" i.e. steps that will be taken now to assist the delivery of new nuclear developments, should the preliminary policy be adopted. Those facilitative actions are also subject to consultation, but within a timescale that suggests that would-be participants in the new build process will need to be actively participating in those facilitative steps at the same time as making consultation responses upon them.

Perhaps most central to this facilitative action is the consultation paper on proposed processes for Justification and Strategic Siting Assessment. From the indicative timetables¹ in this document a calendar for key dates over the next 12 months (linked with other ongoing consultation on planning and pre-licensing) can be constructed that looks like this :

	Justification	Siting (Planning)	Waste	Site Licensing
May 2007	Consultation on draft justification process starts	Consultation on draft SSA process starts	Consultation on implementation process for developing a long term waste management solution to begin shortly. CoRWM to be reconstituted to provide independent scrutiny and advice. (Ongoing) developing arrangements to ensure private sector operators accumulate funds to meet their share of costs of decommissioning and waste management.	(Ongoing) Assisting nuclear regulators to pursue a process of Generic Design Assessment of industry preferred designs of nuclear power stations ("pre-licensing"). Press reports indicate an application has been made on 23 May for pre-licensing of

¹ Consultation paper on proposed processes for Justification and Strategic Siting Assessment, paragraph 19, Table 1

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				Westinghouse's AP 1000 pressurised water reactor to the NII.
10th October 2007	Consultation closes	Consultation closes		
10th October to end 2007	Government considers responses	Government considers responses		
Early 2008	Government publishes guidance for applicants on justification process for new nuclear power stations. Government also announces a "call for applications" for justification relating to new power stations	Government publishes SSA process. Government prepares and consults on draft criteria and proposals for SEA, followed by assessment and revision.	Government policy decision on the ethical question of whether new waste should be created as a result of new build.	
Mid to end 2008	Receipt of applications, consultation on draft decision document and preparation of final document	(Mid 2008) Government publishes final criteria and indicates impact of exclusionary criteria and invites nominations for suitable sites, followed by an assessment		
2009	(Early 2009) Publication of decision (including the making of secondary legislation incorporating the decision)	(Early 2009) Consultation on draft list of nominated sites and Environmental Report, followed by assessment and revision as necessary. (Mid 2009) SSA policy statement issued.		
	(During 2009) Government issues National Policy Statements on various types of energy developments, including nuclear, drawing on all ongoing consultations, including the Planning White Paper ² . NPS is likely to include reference to preferred sites drawing on the SSA policy statement.			

² Planning for a Sustainable Future, DCLG, DTI, Defra, DTp, 21st May 2007

Reference to the scope of material that is expected to be included in applications for Justification, nominations for sites within the SSA, participation in discussions on decommissioning and waste management cost guarantees and Generic Design Assessment of preferred reactor designs shows that detailed work in all these spheres will need to be running now, concurrently with the consultation exercise, to have any hope of meeting the indicative timescale being suggested by Government in the EWP.

What does the Energy White Paper mean to different interest groups?

Regulators

Regulators will for now be most interested to see what the government has suggested on Justification and pre licensing. In relation to the former this has in the past proved a contentious area and disputes over interpretation have surfaced in various judicial review actions. Below we have analysed the government's statements and looked at some of the risks the approach faces.

Developers

Above all Developers will be wanting to ensure that they are preparing the ground for promotion of sites if and when the Strategic Siting Assessment process begins. Care of the production of the information that will be submitted at this stage will greatly assist the successful integration of that information with the project specific application for Environmental Impact Assessment that they will hopefully be making in support of a Section 36 application post-2009.

Landowners

Chief in this class features the Nuclear Decommissioning Authority and British Energy, if for no other reason than that they are the landowners of the four existing reactor sites that have been identified by the Jackson Consulting paper³ as having the most potential for nuclear new build (Hinkley Point, Sizewell, Bradwell and Dungeness).

They of course are also the owners of the other reactors around the UK where there may also be the possibility of locating new reactors.

Consideration of new sites is not limited to existing reactor sites, so landowners in this context would include owners of land at significant conventional power generation sites and other (most likely brownfield) sites that happen to benefit from suitable grid infrastructure.

Whether those landowners look to promote those sites within the SSA themselves, or look to have that undertaken by potential developers, is likely to depend upon whether some form of option arrangement has been reached between landowner and developer. Very substantial work will be involved in promoting a site through the SSA. That work will very likely also be progressing side by side with a Justification application.

Landowners also include owners of land around potential sites where existing land holdings may be insufficient to cater for the both the erection of new reactors and the construction areas required for such major development.

Promoters of sites may not limit their representations to the sites that they are promoting. Comparative analysis may be submitted that seeks to establish the benefits of some sites over what are perceived to be the most immediate competitors. It may be difficult for a landowner to maintain a neutral stance if land that it owns is actively criticised by other promoters.

Local Authorities

The Planning White Paper has stated that where a National Policy Statement is intending to mention sites specifically there will be local community engagement. In any event, it is difficult to see how

³ Siting New Nuclear Power Stations : Availability and Options for Government April 2006, Jackson Consulting (UK) Ltd, published by DTI 24th May 2007.

local planning authorities would not be drawn into the consideration of sites in the SSA process. This could be through approaches by landowners and developers to canvas the opinion of local authorities. Similarly that motivation could come from objector groups seeking that a stance be taken by the local planning authority against new development at this stage.

Whether these facilitative actions to support new nuclear are integrated with existing and emerging development plans will turn largely on whether developers and local authorities have taken the initiative early enough and have proposed policies to do so. The suggestion from the consultation papers is that compliance with development plan policies will be an important local siting consideration, but not necessarily determinative. A tension between concentration on national policy and ensuring concurrence with local policy is already emerging for landowners, developers and local authorities.

Government

Government's most immediate role is the formulation of policy as a result of this ongoing consultation exercise. While it does so it will be keen to ensure that procedures it puts in place properly address the surrounding International, EU and domestic legislative requirements including the Euratom Treaty, the Strategic Environmental Assessment and Environmental Assessment Directives, the Aarhus Convention and the Human Rights Act.

Of great future interest though, is the way in which the Governmental role will develop moving into site application stages. The Planning White Paper has set out a firm intention to set up an independent Planning Commission to make the final site approval decisions on major infrastructure developments, including Section 36 consents for new nuclear power stations. A stated intention of doing so is that Ministers, freed from the quasi-judicial duties that go with the granting of development consents, will be able to support schemes that they believe are important, including the ability for them to be proactive, such as brokering local compromise agreements.

One of the many challenges facing Government is how to manage any switch from the present role of policy setting, which in addressing individual sites will have to proceed with quasi-judicial fairness, onto any stage where that role becomes more promotional, and potentially partisan.

Where are the pitfalls and how can the risks of them be lessened?

By pitfalls here, we are considering the points at which objection and legal challenge to these suggested processes might be launched. Challenges such as these, most likely in the High Court, have the potential of delaying progress while the challenge is heard and then setting back the process if the challenge results in steps already taken being set aside by the court.

The suggestions below are inevitably only a broad indication of where these challenges may arise and cannot be considered comprehensive.

Potential Early Challenges

Greenpeace scored an important win in its campaign against new nuclear power with its High Court judgement in February 2006 setting aside the policy statement that had been made in favour of new nuclear in the July 2006 Energy Review. It has now taken the government almost a year to get back to the position that it thought it had reached in July 2006.

The willingness of the Court to intervene in such high level policy making was demonstrated in the judgement, so it is reasonable to assume that there is the potential for further such challenges if campaign groups such as Greenpeace spot inconsistencies in the approach that has been taken between consultation and policy that is formulated upon it.

The announcement of new policy is clearly a trigger point for such challenges and the timeline above indicates that a large number of such policy announcements are due to take place in the next 12 months.

Avoiding these pitfalls is largely in the government's hands as author of the policies that would be subject to challenge.

Mid Point Challenges

To an extent these may merge with the policy challenges referred to above, but in this group we are thinking about examples such as the individual elements of facilitative action that have been referred to above.

Justification is an example of this. This is an area where in the past green NGOs have shown themselves to be particularly expert. As an ICRP and Euratom treaty concept, it is unique to civil nuclear and radioactive substances issues. Its application is still therefore untested and uncertain in some areas and disagreements over its scope give rise to potential for challenge – most famously in the past when used to challenge the production of Mixed Oxide fuel (MOX) and before that at the THORP facility.

The government has said clearly in their paper that this will be a justification exercise based on generic not site specific principles. They have however not speculated on the types of 'practices' which developers might seek to justify. This is a key question. Until it is answered it would not in our view be possible to determine whether site specific issues were to be considered. For instance, on one level one could ask whether nuclear power was justified? Such a wide generic question would arguably lead to meaningless results. One could narrow the question to a specific design. Is a new reactor design a 'new practice' in need of justification? This in itself is an apparently simple question but not something where a clear answer necessarily exists. If it is, should one take into account its potential economic benefits for deployment in one or more site specific locations (and the impact for instance on the local economy there). The sunk (site specific) costs at the MOX plant were held not to be part of the justification process by the Court of Appeal in 2001 but that was clearly only ever going to be constructed at a single site. The initial costs where a number of sites are foreseeable (such as new build) may be able to be taken into account. The government has clearly stated in the consultation paper (correctly) that the justification test is generic and not site specific. However that does not mean site specific issues, where capable of identification, are irrelevant. The conclusions from the justification evaluation, particularly on the issue of economics, will almost certainly have to be tested against the specific prospects for the reactor types in question. It is very difficult in practice for the government to control the justification test, and the way it is applied, as closely as it might like.

The justification process involving as it will complex issues of weighing up environmental discharges and impacts, radiological effects, economics, safety and security will be a lengthy process and one which those opposing plans will scrutinise heavily. Developers, regulators and governments will need to give due consideration as to how practices seeking justification are framed and then evaluated.

Strategic Environmental Assessment is another such area. SEA is an emerging area of regulation but is likely to be interpreted in a similar way to EIA as imposing mandatory minimum requirements on the information that is considered to support plans and programmes that effect the environment. When documents such as the Strategic Siting Assessment are published there will be the opportunity for objectors to consider a challenges at that point as to whether it has met those minimum mandatory requirements.

Again, avoidance of these pitfalls would appear to principally be in the hands of government. However, the two examples of challenges given here will centre on processes where developers will have supplied the factual material upon which the decisions being challenged will have been based. Developers can do much to lessen the risk of challenge by submitting information that anticipates the legal requirements of these processes and adopts a form consistent with them.

Individual Site Authorisation Challenges

In many respects these may be the most worrying for developers. They can attach to any aspect of process or irrationality in decision making, but in light of the complicated chain of interim

assessments and facilitative action that the government is looking to put in place now to save debate on issues at the site specific consenting stages, they may particularly focus on :

- ▶ inconsistency between information supporting site specific applications and the information that supported earlier interim policy decisions ;
- ▶ changes in circumstance since interim policy was fixed but which have not been assessed (or even more poignantly, could not be assessed because the interim policy could not be re-opened at the site specific stage)

These two examples hint at the strategies that developers must already be looking to put in place to ensure that there is consistency between data that is prepared now in support of the early stages of policy making and that which is eventually submitted in support of site specific development consents. Further, robust application strategies will not be over-reliant upon interim policy, but instead will adopt an approach that is sufficiently rigorous and flexible to look behind the policy that it seeks to rely upon, and to demonstrate at the site consenting stage that such policy remains reliable.

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