

HSE Proposals for ‘Pre-licensing’ of New Nuclear Reactor Designs

Further consultation following
Joint Regulators’ Workshop, Bootle
17 October 2006

Response from Nuclear Free Local Authorities

1. Introduction

Nuclear Free Local Authorities very much welcomed the decision by HSE to invite us to the workshop held on 17th October and to seek specific comment on the 45 bullet points itemized under six headings and to invite other relevant comments. e.g. for regulators at the workshop (EA/SEPA/OCNS/DoT/DTI) or others. To assist other readers, the subject matter on which HSE have sought comments is set out in an Annex to this response.

We are, however, concerned that that this invitation has not been extended comprehensively to the public at large and the public’s municipal and non-governmental organizations in general and in particular for the areas which currently host nuclear reactor or nuclear waste sites or may do so in the future. For example NII attend all meetings of LLCs and SSGs and are well placed to involve such organizations and their members. We are convinced that it was appropriate and right that those mentioned should have been involved in considering the issues raised and regret this failure. We think it very unlikely that NII would not do this in the future for guidance on licensing for any future waste repository because of the accepted need for involving the public. We do not understand why this is not equally seen as axiomatic where proposals that would create additional waste would be affected.

We are also concerned at the nature of the consultation. We would have expected that prior to the workshop draft NII Guidance on the Pre-Licensing Process would have been prepared and that the workshop and the request for comment would have focused on these making the provision of comment more practicable. Certainly this is what the initial draft HSE programme of work as at 8th September suggested was to happen: draft guidelines were to be prepared in October, consultation and comments were thereafter to be invited by way of a workshop in November. Reversing this obvious order allows the HSE to maintain that it has consulted to some extent but makes it

more difficult for consultees to comment as there is no concrete detailed text to consider.

We are also very concerned that the timetable is wholly inadequate for the provision of comment on such a very wide range of matters. Both the failures to extend the invitation to comment and the failure to provide adequate time to make comment give us considerable cause for concern that the apparent commitments to public consultation within the pre-licensing arrangements proposed are not based in a thoroughgoing strategy of commitment to public involvement and that much remains to be done if this commitment is to be properly and consistently realised and not to be viewed with the cynicism which we are sure HSE will wish to prevent.

There are currently no known applications for site licences for new reactors and no known requests for design authorisation certificates. These therefore do not constitute the drivers for the short-circuiting of normal and reasonable periods for consultation. The main driver as far as we are aware is the request by Government (DTI) to develop more detailed guidance so that the pre-licensing process will be in place by the start of 2007 (see par5.134 The Energy Challenge July 2006). NFLAs are very concerned that this deadline has been set or suggested by the DTI, not by HSC or by DoWaP. Meeting this deadline at the expense of the kind of public involvement that the 21st Century requires, suggests that the part of government sponsoring the nuclear industry is too intimately involved in decisions affecting the allocation and timetabling of resources having to do with nuclear safety and/or that HSE is too ready to comply. Whether or not this evidences a failure to observe the necessary separation of functions between sponsor and regulator required by IAEA Convention and best practice is not clear to us. What is clear however is that this is the impression given. This impression would be partly dispelled

- by evidence that HSE informed DTI that it wished to build in a normal period for public consultation on its guidance and that it felt unable both to do so and to meet the January deadline; or
- by a decision now to reopen this consultation, advertise it appropriately and allow a proper period for consultation; or
- by a decision to publish the guidelines in draft and seek public comment on those if necessary at the expense of the January deadline.

For all these reasons we cannot agree to this organisation being listed as having been “consulted” as such because we do not consider that minimum requirements attendant on consultation have been properly observed.

Lastly please note that all comments are provided (a) without prejudice to our advice that the pre-licensing procedures proposed are ultra vires the HSE and require primary legislation and (b) are not intended to be a comprehensive response as this has not been possible in the time available or within the process adopted. The weakness of the legal basis for pre-licensing can be noted from HSEs own statement that “It should be noted that, although preferred, pre-licensing application will not be mandatory, and potential licensees will not be precluded from applying for a nuclear licence without going through Phase 1 above.” Our comments on this and other matters relayed to you in April this year still stand.

2. Public involvement

HSE seek comment under the following headings on the matters relevant to public involvement mentioned:

“Application – Design, safety and environmental case submission based on generic site envelope (HSE Phase One - Step 1)

...

- Scope of submissions, including documents assisting public understanding;
- Open, transparent, national security and commercial confidentiality matters;

Generic design assessment (HSE steps 2, 3 & 4, EA steps 1 & 2):

...

- Involving the public and handling public comments;

Phase Two: Nuclear Site Licensing, Authorising

...

- Public inquiry.”

We were struck by the fact that OCNS and HSE had really nothing meaningful to say at the workshop about the conflicts between commercial confidentiality, security and access. There are real conflicts here, which threaten the possibility of meaningful public involvement and for public trust. There was no evidence that these had been considered effectively. The references to OCNS’s document as providing the answer to where the balance lay were too simplistic and underscored our concerns. There was no

evidence that these guidelines, produced under the aegis of the Government Department which sponsors nuclear energy, had been challenged at any point by the safety regulator. The initial draft programme as at 8th September stated that HSE were to discuss safety case information in the public domain and the handling of sensitive information with OCNS this month. The workshop previously planned for November would have enabled feedback from such discussions but the revised programme has prevented that.

There is no legal framework to guarantee timely public access to information for comment because:

(a) requesters are under no clear obligation under FoI or EIR to provide the public with information and HSE rely on voluntarism;

(b) although the public can use FoI and EIR to access information from HSE that has been provided by requesters, the conflicts identified above will lead to very considerable delays of up to two or more years whilst appeal mechanisms are pursued

(i) internally within HSE

(ii) to the Information Commissioner

(iii) to the Information Appeal Tribunal

(iv) to the Minister

(v) to the Aarhus Convention Compliance Committee.

Consultees would meantime seek judicial review to seek delay in HSE decision-making which might otherwise be taken without allowing the public to comment on information, which might become available through the appeals mechanism.

Secondly the public right of access does not apply where current and proposed ceilings on the cost of access requests apply. HSE would need to waive these if it was to engender trust. Currently, requests can be refused by HSE if the cost of locating and retrieving the information is more than £600. The Government now intend to add another factor which can be calculated against this cost - the time spent considering whether the information should be released. This is highly relevant to the conflict between security and openness as the more time HSE and OCNS officials and indeed ministers spend debating whether to disclose information, the more expensive the cost of the application becomes. The Government also intend that requests over a

three-month period from one organisation, no matter how large, would be combined. By "aggregating" these requests the cost cap would soon be breached, allowing HSE to reject them as "too expensive". HSE must say whether if these two alterations to the FoI Act were introduced, it would observe them.

In the light of these concerns we believe that it is necessary that the rights of the public to comment are provided through enforceable and not grace-and-favour mechanisms. IAEA Safety Standards Series Legal and Governmental Infrastructure for Nuclear, Radiation, Radioactive Waste and Transport Safety Requirements No. GS-R-1 IAEA Vienna, 2000 clearly states

”Legislative

2.4. Legislation shall be promulgated to provide for the effective control of nuclear, radiation, radioactive waste and transport safety. This legislation:

...

(16) shall define how the public and other bodies are involved in the regulatory process;”

We are concerned that there no specific reference to “Involving the public and handling public comments” in Phase 2 Site licensing. We have already had occasion to point out that section 3(3) NIA, which gives HSE the power to consult public authorities on the occasion of an application for a nuclear site licence, does not not apply *by virtue of* section 3(4) to an application in respect of a site for a generating station where a consent under section 36 of the Electricity Act 1989 is required for the operation of the station.

Our Legal Adviser’s analysis on this point has been accepted as correct by HSE: “...in the event of a licensing application for a power station subject to Section 36 of the Electricity Act the provision for 'public body notification' under s3(3) of the Nuclear Installations Act is not applied. In the past the Secretary of State has generally called planning inquiries for new nuclear power stations and hence the s(3)3 provision for local notifications would have been superfluous.”email Gail.Scowcroft to Mr Woolley 26 July 2006)

The lack of any need for consultation under section 3(3) was therefore justified on the assumption that these matters would be considered in the context of the public inquiry. It is our view that the public inquiry will inevitably for various reasons consider safety issues and that HSE should spell out in its guidance how it proposes to consult the public during the site licensing and public inquiry phases.

We are concerned that HSE should not be seen to be offering the public the opportunity to comment during Phase 1 as a quid pro quo for denying them, in accordance with DTI proposals, the opportunity to cross-examine HSE on safety issues at any public inquiry. NFLAs are concerned that DTI and industry are using the Sizewell Inquiry to argue for the elimination of any substantial role for the NII at a public inquiry and in so doing fail to take account of the special factors that applied at Sizewell:

- the licensing system had never been reviewed in any depth at a public inquiry before;
- the Chernobyl accident was highly topical and made it crucial that safety issues were properly and publicly examined;
- the PWR was the first of a kind;
- subsequent enquiries for a series of PWRs if pursued in a timely manner would have accepted much of the safety evidence as read. The length of time between Sizewell and Hinkley does not correspond with the short space of time that would elapse between future proposals if the role of nuclear in CO2 emissions reductions is being seriously contemplated.

In the light of this and the need for HSE to stress its regulatory independence from DTI we consider that it is important that HSE also spell out its proposals to

- consult with the public in Phase 2
- to assist any public inquiry.

NFLAs are also urging a joint inquiry under statutory powers affecting HSE functions, EA/SEPA functions, DTI's function as justification authority and DTI/Scottish Ministers' functions as Electricity Act consent authority. NFLAs would like to see HSE support for a generic inquiry within this format into the safety of any generation III reactor type for which a Design Certification Approval is requested, under Section 14(1) and (2B) Health and Safety at Work Act 1974.

3. Integrating the permissioning process

We have suggested a joint inquiry as above.

Insofar as Government intends to issue a statement of need, this effectively pre-determines and prejudices the proper use of its Electricity Act consent powers and the determination of one of the factors requiring examination for the purpose of justification. DTI should be advised that there are legal consequences that derive from this proposed premature decision that prejudice the permissioning process.

Greater clarity is needed on the interaction and timeline for the establishment of

- updated siting criteria: this cannot be the function of DTI because of the need to separate out safety regulation from sponsorship;
- the specification of minimum requirements for a generic site envelope and the involvement of the communities and their local government representatives for the concrete sites known to be taken account of in establishing the generic site envelope.

HSE/EA/SEPA/OCNS should plan for each to be much more involved in any public inquiry than industry or government proposes. The inspector can be expected to be under enormous and legitimate pressure to allow safety in all its aspects to be fully considered at an inquiry because the impact of any plant in ordinary and accidental function, any attack/sabotage of any plant and any waste disposal operations on its local community is central to the consideration of local impact and the discharge by Government of its proper responsibilities to local people for national needs in a democracy is vital for public trust and accountability. The drift of its current thinking is unrealistic and unacceptable.

HSE should ensure that SEA in accordance with the Directive is properly undertaken. Both HSE and EA clearly see this as necessary. If Government fails to provide for statutory SEA, this would put at risk HSE and EA/SEPA regulatory decision-making which logically cannot be brought to the point of actual decisions in the absence of a prior lawful process of SEA.

4. Design freezing

HSE has stated that elements of the design considered in depth during pre-licensing would be regarded as 'frozen' and not re-examined unless significant modifications were proposed. NFLAs are not convinced that such an approach would be lawful if safety improvements to frozen designs available at reasonable cost were not incorporated in follow-on reactors.

5. Regulatory independence

We have previously indicated our concern regarding the legal requirement to respect the boundary between sponsorship and regulation as between DTI and HSE and by DTI in the proposed screening process: this is not consistent with IAEA Convention and best practice requirements. We believe that the correct position is as stated by HSE when it advises that “

“HSE staff will not:

- Express an opinion or preference for a vendor, licensee or reactor design.”
- [see Nuclear Installations Inspectorate’s (NII) approach towards interactions with prospective new build vendors and licensees prior to commencement of pre-licensing, para 3]

The location of OCNS within the DTI is also cause for concern on this basis particularly within any integrated decision-making process where safety and security issues interact. OCNS is within the sponsoring department for the industry and accountable to the Secretary of State for Trade and Industry. Decisions by OCNS, and positions taken by it in anticipation of and whilst attending regulatory coordination forums, appear to be likely to influence

- the policy and the allocation of resources of HSE in screening, safety design and reactor operation;
- decisions by HSE whether or not to restrict information otherwise available to the public in processes otherwise designed to take advantage of the public’s knowledge and views with a view to heightening and improving the review of health and safety and environmental impact issues.

Our anxiety on this score is not lessened by the explanation that the aims of the forum include:

- The integration of guidance for pre-licensing assessment.
- The coordination of any regulatory design assessments undertaken.
- The sharing of information between nuclear regulators, and the resolution of issues of mutual concern.

Whilst OCNS remains in its current location and with its present line of accountability, HSE’s complete independence within IAEA requirements is not being respected. NFLAs retain the right to report on the range of concerns about separation-of-power issues directly to the IAEA and to state members attending the next relevant review conference.

6. Further consultation on other material

HSE/NII has stated that it is currently working on a range of material, which will provide guidance on the design assessment and licensing of new nuclear power plants. This will include the following new materials, and updated existing guidance:

- The design acceptance process
- How to apply to become a nuclear site licensee
- NII's 'Notes for Applicants' will be replaced by 'The regulation of nuclear installations in the UK'
- Revised Technical guides, e.g. 'Contents of a Safety Report'

HSE does not state which is any of this material will be subject to prior consultation. The practice of allowing comment on prior drafts of these is encouraged by NFLAs.

End

3 November 2006

Annex: Subject matter of consultation

To assist HSE and the other regulators in preparing guidance, comments have been particularly sought on the subjects set out below:

Integrating the permissioning process:

- Overall relationship between permissioning steps for new nuclear build – e.g. Justification, generic siting assessment, Strategic Environmental Assessment, generic design assessments, site specific assessments, Euratom 37, planning, etc;
- Specific relationship between assessments of generic design and site specific licensing and authorisation processes.

Requirements for guidance:

- Process;
- Expectations of and suitability of applicants (at generic and site specific phases);
- Application requirements;
- Terminology, including consistency;
- Assessment principles.

Prioritisation / Screening process:

- Objectives of prioritisation process;
- Relevant criteria;
- Who is decision maker;
- Utility/industry/other involvement.

Application – Design, safety and environmental case submission based on generic site envelope (HSE Phase One - Step 1)

- General content and timing of submissions;
- Scope of submissions, including documents assisting public understanding;
- Open, transparent, national security and commercial confidentiality matters;
- Probabilistic safety Assessment;
- Life cycle - construction to decommissioning and site clearance;
- Waste strategy, management and disposability - radioactive and non-radioactive;
- Discharges to the environment;
- “Conventional” plant including pollution prevention measures;
- Radiological and non-radiological environmental impacts;
- Management systems, including management of change;
- Generic Site characteristics/envelope;
- Operation;
- Safety and environment management, implications for operators;
- Maturity/completeness of design;
- Engineering employed;

Generic design assessment (HSE steps 2, 3 & 4, EA steps 1 & 2):

- Credit for overseas regulator assessments

- Applicable standards;
- International Guidance;
- International harmonisation;
- Research;
- Public statements by Regulators;
- Regulatory uncertainty;
- Transfer of knowledge from vendor to licensee;
- Involving the public and handling public comments;
- Formal consultation and dealing with responses;
- Recovery of regulators' costs;
- Design Acceptance/Acceptability statement content, status, caveats and period of validity.

Phase Two: Nuclear Site Licensing, Authorising

- Site selection and assessment;
- Specifying the generic assessed design;
- Identifying and assessing design changes;
- Operator management systems assessment;
- Determining site specific permissions;
- Public inquiry.

Others:

Any other relevant comments e.g. for regulators at workshop or others.