Claim No AC-2023-LON-002758

<u>IN THE HIGH COURT OF JUSTICE</u>
<u>KING'S BENCH DIVISION</u>
<u>PLANNING COURT</u>

BETWEEN:

AWE PLC

<u>Claimant</u>

-and-

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) WEST BERKSHIRE DISTRICT COUNCIL
(3) T A FISHER & SONS LIMITED
(4) OFFICE FOR NUCLEAR REGULATION
(5) SECRETARY OF STATE FOR DEFENCE

<u>Defendants</u>

FOURTH DEFENDANT'S DETAILED GROUNDS

<u>References:</u>

- [SCB/x] - page x of the Supplementary Claim Bundle. These references will be updated to reflect the Hearing Bundles in due course.
- [WS/x] – paragraph x of the Witness Statement of Grant Ingham dated 7 December 2023 filed with these Detailed Grounds.

<u>Introduction and overview</u>

1. The Office for Nuclear Regulation ("ONR") supports the claim brought by AWE. The ONR considers that the Inspector's decision was unlawful and ought to be quashed for the reasons set out by AWE and in these detailed grounds. These detailed grounds are produced pursuant to paragraph 7 of the Order of Lang J dated 2 November 2023, together with a witness statement by Grant Ingham of the ONR.

2. The ONR was established under the Energy Act 2013 as the UK's statutory, independent regulator for nuclear safety, security and safeguards. It seeks to protect society by

securing safe nuclear operations. The ONR's role includes the regulation of nuclear safety in connection with AWE Burghfield ("AWE(B)"), including pursuant to the Radiation (Emergency Preparedness and Public Information) Regulations 2019 ("REPPIR19"). The ONR's role includes enforcing REPPIR19.

3. It is obviously important that new development does not compromise nuclear safety. The ONR's role includes administering Government policy on the control of population around licensed nuclear sites. The ONR provides land use planning advice as part of this role because the population which lives or works near a nuclear site has implications for nuclear and public safety in connection with that site. The land use planning advice provided by the ONR seeks to ensure that members of the public are adequately protected in the event of a radiation emergency.

4. ONR's advice is based on consideration of the potential impact of a proposed development on the credibility of the relevant Off-Site Emergency Plan ("OSEP"). There is a legal obligation under REPPIR19 for the local authority – West Berkshire Council in this case – to have an adequate OSEP to mitigate the consequences of a radiation emergency.

5. In the first instance, the ONR will seek assurance from the emergency planning function of the relevant local authority that the proposed development can be accommodated within the authority's existing OSEP arrangements or that the OSEP arrangements will be amended to accommodate the proposed development. No such assurance could be provided by the Council in this case. The OSEP for AWE(B) currently – without the appeal scheme and without other consented but as yet unbuilt development – is already stretched and under considerable pressure.

6. The National Planning Policy Framework ("NPPF") provides that local planning authorities should consult appropriate bodies – including the ONR – when considering applications for development around major hazard sites, including nuclear installations such as AWE(B), as part of mitigating the consequences to public safety of major accidents (para 45). The NPPF also provides that planning should promote public safety and take into account wider security and defence requirements by "ensuring that

operational sites are not affected adversely by the impact of other development proposed in the area" (para 97(b)).

7. The Detailed Emergency Planning Zone ("DEPZ") is the geographical area in which it is necessary to plan for protective action in the event of a radiation emergency. This is done by means of an OSEP. Protection for all people within the DEPZ must be afforded by the OSEP. The local authority is obliged to have an "adequate" OSEP (see Reg 11(1) of REPPIR19). The OSEP must mitigate, so far as reasonably practicable, the consequences of a radiation emergency outside the operator's premises (see Reg 11(2)). It must cover events which have a low likelihood of occurrence but a high impact in the event that they do occur. An event which engaged the OSEP would be a serious, national-level emergency [SCB/68, para 58]. The presumption underlying an OSEP is that a serious, national-level radiation emergency has happened.

8. The OSEP must cover not only exposure to radiation during an emergency, but also matters such as: wider health risks (including psychological impact); consequential injuries; economic consequences; and, social and environmental factors.[1] This would include looking after the needs of vulnerable groups of people. In the event of a release of radiation, there would be "widespread confusion and panic" and "ongoing social disruption and distress".[2] People will need reassurance, decontamination, and support in relation to psychological and psychosomatic effects.[3]

9. The OSEP needs to cover the provision to people sheltering within the DEPZ of medication, specialist healthcare, and food [SCB/69, para 64]. Following an initial period of sheltering for up to 48 hours, the OSEP also needs to cover the delivery of monitoring for health and reassurance purposes – and associated decontamination – the facilities for which have restricted throughput, and the provision of emergency accommodation for evacuated persons [SCB/69, para 67].

10. The burden of addressing these other impacts may exceed that required to address the direct health effects of exposure to radiation. The practicability of implementing off-site

[1] See Ingham proof para 13 [SCB/445].
[2] See Ingham proof para 21 [SCB/446].
[3] ONR closing para 11 [SCB/864].

counter-measures is inextricably linked to the density and distribution of people around the nuclear site [SCB/67, para 52(b)].

11. The preparation and delivery of the OSEP involves a wide range of organisations, not just the emergency services. There are real-world constraints which limit the capability and capacity of the organisations which make-up the emergency response.

12. The principal radionuclide which might be released in the event of a radiation emergency at AWE(B) is of a type that is particularly difficult to monitor and so requires greater effort and resource from responding organisations and over a longer period.[4]

13. The introduction of REPPIR19 led to the designation of a new, larger DEPZ in March 2020. This larger DEPZ included additional significant population centres, the M4 motorway and the Madjeski Stadium. The number of residential properties in the DEPZ went from 89 to 7,738 [SCB/98]. The OSEP had to accommodate these features for the first time, causing a step change in the complexity of the OSEP and the associated level of challenge in its implementation [SCB/64, para 36].

14. Following the introduction of REPPIR19, on 13 August 2021 the ONR wrote to local planning authorities which included land within the DEPZ for AWE(B) to explain that: because of the size of the DEPZ, there was a significant demographic challenge to the OSEP; this challenge had been intensified by the cumulative effect of development in the DEPZ over many years; the volume of planning applications being made in the DEPZ remained high; the safety claims in the OSEP had yet to be adequately demonstrated; and, the ONR needed to be satisfied that the OSEP was valid [SCB/7-8].

15. Subsequently, the OSEP was subject to text exercises. Exercise ALDEX 22 was the first statutory test of the OSEP covering the extended DEPZ. It highlighted several areas of the OSEP which required improvement, including areas that had a clear dependency on the population in the DEPZ.[5] The areas that required improvement included [SCB/64, para 38]:

---

[4] See Guilfoyle proof para 41(b) [SCB/461].

[5] See Guilfoyle proof para 46 [SCB/462].

(1) arrangements for people monitoring and associated decontamination;

(2) arrangements relating to evacuation holding areas for displaced persons awaiting monitoring;

(3) arrangements for managing the numbers and scale of displaced people, both those outside the DEPZ unable to return home and those inside the DEPZ who require evacuation; and

(4) arrangements for managing those who self-evacuate, especially for ensuring they undergo appropriate monitoring and decontamination.

16. The proof of Carolyn Richardson, the Council's emergency planning manager, explained that ALDEX22 identified risks associated with response, including in relation to evacuation, providing support for those who lived and worked in the DEPZ, and reassurance monitoring [SCB/102, para 7.14]. Her proof set out the limitations on capacity for activities such as radiation monitoring, the provision of rest centres, and the provision for rehousing residents. In her rebuttal proof, Ms Richardson made clear that there was a shortage of accommodation for rest centres and evacuation accommodation [SCB/411].

17. Ms Richardson also explained that the appeal scheme would place a material additional demand on such activities [SCB/120-121]. In her rebuttal proof, she explained that there would be "more vulnerable people, more people either wishing or requiring radiation monitoring, more properties requiring monitoring and potentially decontamination, more people needing to be subsequently evacuated, more rehousing needs and ultimately a greater number of people having their health and well-being affected" [SCB/416, para 1.19(g)].

18. Exercise ALDEX 23 took place in April 2023. It exposed similar issues to those which were shown by ALDEX 22. These issues would be sensitive to demographic change, as

increasing the population in the DEPZ would lead to greater demands on responders.[6] The ONR's position going into the inquiry was that the OSEP required improvement in areas that were likely to be sensitive to population increases within the DEPZ.[7]

19. The evidence from these two exercises, showing population-based weaknesses for the existing population, is clear evidence of the impact on the adequacy of the OSEP of further population increases from development [WS/45 and 47 - 48]. There is no better evidence that could have been presented to the Inspector as to the weaknesses in the OSEP than the explanation of the results of ALDEX 22 and 23.

20. ONR's assessment of the adequacy of the OSEP only takes account of development which already exists. It does not therefore include development which has been consented but not yet built-out. This is because the OSEP cannot include developed emergency arrangements for communities that do not presently exist. This means that the ONR cannot consider arrangements for those communities that do not yet exist, to judge whether the arrangements are adequate or not [WS/55]. Committed development can be constructed at any time, increasing the burdens on the already stretched OSEP at a point in time which cannot be predicted [WS/71].

21. In reaching his decision, the Inspector fundamentally misunderstood, and reached conclusions which flew in the face of, the technical evidence and expert advice provided by the ONR at the inquiry. He took into account and relied on fundamentally erroneous matters. He did not explain why he reached conclusions which necessarily involved rejecting ONR's expert advice. There was no evidence to support his conclusions. His analysis was superficial and failed to recognise the seriousness of the issues faced in respect of the OSEP.

22. Although not necessary, as these detailed grounds could raise additional grounds of challenge to the DL, the ONR considers that the points made in these detailed grounds fall within the ambit of AWE's statement of facts and grounds dated 18 September 2023 ("SFG").

---

[6] See Ingham proof para 24 [SCB/446].
[7] See Ingham proof para 27 [SCB/447].

The Inspector's Decision Letter

23. The Inspector identified as main issues in the appeal, first, "the effect of the proposal on the safety and wellbeing of future residents of the proposed development, and the wider public, with regard to the proximity of the Atomic Weapons Establishment site at Burghfield (AWE B)" and, secondly, "the effect of the proposal on the future capability and capacity of AWE B to operate effectively" (DL3).

24. The Inspector concluded in DL61 that "the proposed development would result in limited harm to the safety and wellbeing of the future residents of the proposed development" and "very limited harm to the operational capability and capacity of AWE B", such that the benefits of the scheme were "of sufficient weight to outweigh the level of harm" and "to justify determining the appeal other than in accordance with the development plan".

25. On the first main issue, the Inspector concluded that the proposal "would not harm the safety and well-being of the wider public" and "would result in limited harm to the safety and wellbeing of future residents of the proposed development" (DL35). This assessment of harm was based on the Inspector taking into account what he called "moderating factors" (DL34).

26. The "moderating factors" the Inspector took into account included his conclusions that "sufficient emergency services and facilities already exist" for the "existing OSEP provision around AWE B" (DL26) and "the existing OSEP is adequate to ensure public safety in the DEPZ" (DL30). Stated in bald and unqualified terms, this did not reflect the true position as shown by the unchallenged evidence presented by the ONR and the Council at the inquiry.

27. Moreover, when considering the concerns of the ONR, AWE, MOD and the Council (DL30-31), the Inspector based his conclusion that "the proposed development would not result in appreciable diminution of emergency services response levels in the area" (DL32-33) on his statement in DL31 that no one had "presented" in evidence a "substantive tipping point assessment" which demonstrated by "quantification" that the appeal development "would tip the OSEP into a state of being inadequate". It would

have been impossible to have provided such quantified evidence, especially as to a future position, and therefore the absence of it showed nothing relevant.

28. Also, the Inspector in DL31-33 wrongly confined his consideration of the adequacy of the OSEP only to consideration of the position of emergency services. This was only one element of the action required under the OSEP and could not have been a firm basis for the conclusion that the OSEP would be adequate with the appeal development built-out.

29. It was on the flawed basis set out above that the Inspector concluded that the appeal development was "unlikely to tip the OSEP over the edge of adequacy" (DL33).

30. On the second main issue, the Inspector concluded that AWE's "future operational flexibility and expansion plans might be constrained" in the event that the OSEP was judged inadequate (DL37). He said that he could not rule out the possibility that the appeal proposal would contribute to the potential for future constraints on AWE's operational flexibility and capacity (DL38).

31. The Inspector went on, however, to take into account four matters set out in DL39-40 which he said "together" limited the likelihood of adverse effects for AWE (DL41) and in "combination" "moderated" the degree of adverse impact on AWE (DL39). As a result, he concluded that there was only a "very limited likelihood" of the appeal development causing constraints for AWE (DL41). He therefore concluded that "the proposed development would result in very limited harm to the operational capability and capacity of AWE B" (DL41). Each of the four matters on which the Inspector relied were fundamentally flawed.

32. First, the Inspector's own conclusions on the first main issue (DL39). These were flawed as set out above.

33. Secondly, that there was "no evidence presented that the ONR has, for example written to AWE to raise a REPPIR19 regulation 10(4) concern if this appeal was to be allowed".[8] This was flawed as the ONR would not do this.

34. Thirdly, that "a recently granted planning permission for a residential development with more (49) dwellings" had not "tipped the OSEP into inadequacy" (DL39).[9] This was flawed as permitted but unbuilt development could never have that effect.

35. Fourthly, the Secretary of State for Defence ("SSD") could "potentially consider invoking the exemption on restriction of operations at AWE B, to re-establish OSEP adequacy" (DL40).[10] This was flawed and irrational. An exemption could not render the OSEP adequate and would not affect the real-world need to have an adequate emergency plan. There was in any event no evidence that the SSD would consider doing this.

36. These fundamental errors by the Inspector are explained in more detail below.

37. Further, as to Policy CS8, the Inspector concluded that the reference in the policy to the inner consultation zone ("ICZ") distances stated in the policy and shown on the proposals map should be taken as they stood when the plan was produced despite the fact that the ICZ had in the real world subsequently been superseded by the DEPZ. The Inspector therefore treated the appeal scheme as being subject to the second, and not the first, sentence of CS8 (DL12). This was a weaker policy provision.

Errors of law

38. Save for the misinterpretation of policy CS8, which is addressed separately below, the errors made by the Inspector can be characterised as errors of law in various ways. They represent:

[8] This error is repeated by the SSLUHC in his summary grounds of defence ("SGD") dated 6 October 2023 at para 36.
[9] This error is repeated by the SSLUHC in SGD para 37.
[10] This error is repeated by the SSLUHC in SGD para 37.

(1) taking into account irrelevant considerations (ie the incorrect statements made by the Inspector and the incorrect matters on which the Inspector relied);

(2) leaving out of account relevant considerations (ie the correct position);

(3) conclusions reached without any evidential basis;

(4) irrational conclusions, including conclusions which flew in the face of ONR's evidence and/or which fundamentally misunderstood the actual position;

(5) failures to engage and grapple with significant issues raised at the inquiry;

(6) conclusions reached without providing adequate reasons or reasons to explain why the ONR's advice was being rejected.

39. The ONR endorses the points made by AWE in its SFG at paragraphs 56 and 62, namely that the expert advice of the ONR should be given great and considerable weight in planning decisions, and any departure from that advice must be explained by cogent and compelling reasons.[11]

40. All these errors of law apply to each of the six fundamental errors made by the Inspector.

The precautionary principle

41. It was common ground at the inquiry that the Inspector had to adopt a precautionary approach to addressing the ONR's concerns.[12] The SSLUHC accepts that the precautionary principle was relevant,[13] as does the developer, who contends that the Inspector adopted a precautionary approach.[14] It is obviously right for the parties to

[11] An obligation on the Inspector to explain why he disagreed with ONR's advice is accepted by the SSLUHC in SGD para 18(iii).
[12] See AWE/MoD's Statement of Case at para 1.8 [SCB/30], AWE/MoD's opening at para 22 [SCB/862], ONR's opening at para 9 [SCB/847], AWE/MoD's planning evidence at paras 4.3, 4.15 and 5.8 [SCB/598, 600, 606], AWE/MoD's closing at para 17 [SCB/873], and the developer's closing at paras 7 and 7.2 [SCB/904].
[13] See the SSLUHC's SGD at para 40, which simply contends that the principle was not engaged on the facts because of the Inspector's factual findings.
[14] See the developer's SGD dated 10 October 2023 at para 35.

accept that the precautionary principle applies to the Inspector's decision where it concerns the public health impacts of a nuclear emergency. If this does not engage the precautionary principle, it is hard to see what would. Consideration of the effect of new development on the adequacy of the OSEP presupposes that a nuclear emergency has happened.

42. The precautionary principle involves taking preventative or restrictive measures in respect of risks whose extent is disputed or cannot be ascertained with certainty, but where the likelihood of real harm to public health exists should the risk materialise, so as to give priority to the objective of protection of health or the environment over the restriction of other interests (*Afton Chemical* at paras 61 and AG94;[15] *FACT* at paras 92-93).[16] The proper application of the precautionary principle by a decision-maker requires the identification of the potentially negative consequences for health of the proposal and a comprehensive assessment of the risk based on the most reliable information available (*Afton Chemical* at para 60).

43. Accordingly, when considering the evidence to judge whether the appeal scheme would affect the adequacy of the OSEP, it was necessary pursuant to the precautionary principle for the Inspector to be cautious and rigorous in the assessment of the evidence, exercising careful scrutiny of that evidence. The Inspector did not follow this approach in the DL.

44. Moreover, pursuant to the precautionary principle, the absence of hard evidence cannot amount to an obstacle to taking precautionary measures (*FACT* at para 95). The essence of the precautionary principle is that, where there are threats of serious harm, a lack of certainty in the evidence should not be posed as a reason for not taking preventative measures. The Inspector did not follow this in his approach in DL31-32 when he relied on the absence of evidence he wanted – a so-called substantive quantified tipping point assessment – to justify a conclusion that the adequacy of response was unlikely to diminish appreciably.

---

[15] *Afton Chemical Ltd v SSfT* [2011] 1 CMLR 435.
[16] *R (Friends of Antique Cultural Treasures) v SSEFRA* [2020] 1 WLR 3876.

The Inspector's fundamental errors

45. In addition to misinterpreting policy CS8, the Inspector made six fundamental errors in his decision amounting to errors of law. Any one of these seven matters would be enough to render the decision unlawful so that it should be quashed. Each of these matters is dealt with in turn below.

Existing OSEP provision sufficient and adequate to ensure public safety in the DEPZ

46. This issue is raised in AWE's SFG at paragraphs 68 and 70.

47. The Inspector's conclusions that "sufficient emergency services and facilities already exist" for the "existing OSEP provision around AWE B" (DL26) and "the existing OSEP is adequate to ensure public safety in the DEPZ" (DL30) – stated in bald and unqualified terms – did not reflect the true position as shown by the unchallenged evidence presented by the ONR and the Council at the inquiry.

48. The OSEP is already stretched and under considerable pressure based only on the development within the DEPZ existing at the time of the inquiry, and this strain will only increase with additions to the population of the DEPZ beyond that current at the time of the inquiry [WS/64].

49. In his oral evidence-in-chief for the ONR, Grant Ingham explained that the ONR was concerned that the OSEP was not tolerant to further development, and could not accommodate future development, because population-sensitive areas of the OSEP had already been identified as needing improvement and those areas had not been addressed [WS/63]. He also explained that there were commitments for new developments already which would affect the adequacy of the OSEP because each new development would add a burden [WS/67]. In cross-examination, Mr Ingham explained there were areas of weakness in the current OSEP which needed to be addressed and that the OSEP was stretched already for the DEPZ as it existed then [WS/64].

50. The evidence given orally at the inquiry on behalf of the ONR included that: the OSEP is not infinitely scalable; the OSEP is stretched and already under considerable pressure;

the OSEP faces a real challenge in remaining adequate in light of the already increasing burden of developments with consent; and, there is evidence of risk and pressure to the current adequacy of the OSEP [WS/63, 64, 66]. Mr Ingham also explained orally that the areas for improvement which are affected by population levels would be "challenging" to resolve [WS/63]. He stressed that the Council had said that no more development could be accommodated within the OSEP [WS/63].

51. The ONR made clear to the Inspector that its position was that the OSEP was stretched, already under considerable pressure, and was subject to the need to make the improvements identified in ALDEX 22 and ALDEX 23.[17] The ONR also made clear that the adequacy of the OSEP was subject to risk and pressure.[18]

52. Ms Richardson said in her oral evidence that the OSEP was only "borderline adequate" and "barely adequate" [WS/53]. She had said in her proof that the current position was that "the plan and responders would be under exceptional pressure" [SCB/103, para 7.15]. Her oral evidence was that the appeal development would have an impact on the adequacy of the OSEP and would put the OSEP at significant risk of failure [WS/61].

53. The closing submissions of AWE/MoD also recorded that the evidence from the Council and the ONR was that the OSEP was "already strained", and "already" and "currently" "under pressure" [SCB/867, paras 1-2; SCB/871, para 11(1); SCB/874, para 20].

54. For the developer, Dr Pearce had accepted in cross-examination that he was unable to comment on whether the OSEP had reached the point of inadequacy.

55. In concluding in DL26 and DL30 that the OSEP was sufficient and adequate – simply and baldly, and without any reservation, qualification or nuance – the Inspector failed to understand and take into account the current position as it really was, as shown by the evidence presented at the inquiry. He took into account an erroneous and more optimistic view of the current situation than was shown by that evidence.

[17] ONR closing paras 12 and 15 [SCB/865].
[18] ONR closing para 12 [SCB/865].

Quantified substantive tipping point assessment

56. This issue is raised in AWE's SFG at paragraph 70.

57. The issue of a "substantive tipping point assessment" which could demonstrate by "quantification" whether the appeal development "would tip the OSEP into a state of being inadequate" was not raised at the inquiry by anyone.

58. There was general reference at the inquiry to the 'tipping point' as the point at which the OSEP would be found inadequate,[19] and the developer did refer in its closing submissions at the end of the inquiry to tipping point assessment or analysis (without any reference to quantification).[20] However, none of the ONR witnesses were asked about this issue by either the developer's advocate or the Inspector.

59. Had ONR's witnesses been asked, they would have explained that this point was misconceived and that there was, and could be, no such thing as a "substantive tipping point assessment" which could demonstrate by "quantification" whether the appeal development "would tip the OSEP into a state of being inadequate".

60. The notion of a quantified tipping point assessment suggests that there exists some methodology that can forecast in advance the impact that a given development, when built, will have on the adequacy of the OSEP, even amidst the uncertainty of thousands of other properties that have been granted planning permission but are yet unbuilt – and which will be built at some unknown point in the future. There is no such methodology [WS/71]. There is no guidance, policy or established practice which supports the idea that there could or should be a "substantive tipping point assessment" which set out a "quantification" of how much more development would "tip the OSEP into a state of being inadequate" (DL31). It is not feasible and it does not happen in practice [WS/71].

61. It is not possible to undertake an assessment of the adequacy of the OSEP in advance in a future scenario eg with committed development assumed to be constructed. This means

[19] See eg SCB/920, para 29.
[20] See SCB/910 at para 18 and SCB/921 at para 30.2.

that the impact of new development on the adequacy of the OSEP cannot be established in any way except retrospectively. The judgement on whether the OSEP has tipped into inadequacy is necessarily made retrospectively after the tipping point is crossed and cannot be predicted in advance [WS/56, 71].

62. It should also be remembered that this development's impact will be cumulative with all the other developments that have been permitted but not yet built-out – and whose impact on the adequacy of the OSEP has not yet been established – as and when they come to be built.

63. Mr Ingham for the ONR had explained in his oral evidence that the ONR's judgement of OSEP adequacy is only based on information which the ONR has for the DEPZ as it is currently found. He also explained orally that ONR's assessment of adequacy could not include properties that did not yet exist, because it would not be possible to test OSEP arrangements for these properties as the OSEP did not include any arrangements for them [WS/55]. And he explained orally that the impact on the adequacy of the OSEP of the additional burden imposed on it by any future development could not be known today [WS/64].

64. It is obvious that, before the adequacy of OSEP arrangements in respect of new developments could be tested, those arrangements had to be devised and set out in the OSEP. The ONR could not consider the adequacy of OSEP arrangements which do not exist and will not exist for some time into the future. It should have been apparent to the Inspector from the ONR's oral evidence at the inquiry that it would be impossible to produce a "substantive tipping point assessment" which could demonstrate by "quantification" whether the appeal development "would tip the OSEP into a state of being inadequate".

65. There was *qualitative* analysis from Ms Richardson which concluded that the appeal development would have an impact on the adequacy of the OSEP, including in relation

to alternative accommodation, rest centres, staffing, and vulnerable people [SCB/401-402].[21] This evidence was supported and endorsed by the ONR.

Consideration of the emergency services

66. This issue is raised in AWE's SFG at paragraphs 84 and 93.

67. The Inspector concluded and took into account that "the proposed development would not result in appreciable diminution of emergency services response levels in the area" (DL32-33). It is apparent that in DL31-33 the Inspector confined his consideration of the adequacy of the OSEP to consideration of the position of emergency services. This was, however, only one element of the action required under OSEP. This could not therefore have been a firm basis for the conclusion that the OSEP would be adequate with the appeal development built-out.

68. Moreover, this conclusion was essentially irrelevant to consideration of the adequacy of the OSEP, since no party opposing the appeal scheme advised against it only on the basis of the impact on the emergency services. The Inspector addressed and rejected a point which no one was making, and failed to address the points which the objectors – the Council and the ONR included – *were* making [WS/68].

69. The preparation and delivery of the OSEP involves a wide range of organisations, not just the emergency services. Ms Richardson's proof explained the wide range of organisations involved in the OSEP beyond the emergency services, including local authorities, government departments, the Environment Agency, the Food Standards Agency, and health services including Integrated Care Boards and hospitals [SCB/99, para 7.2].

70. The Inspector was also provided with a copy of the OSEP which set out in terms which organisations would be involved in delivering the various elements of the OSEP, including also the UK Health Security Agency (previously Public Health England), a

[21] This analysis, in Appendix 5 to Ms Richardson's proof, was cited in AWE/MoD's closing [SCB/868, para 5] and the Council's closing [SCB/883, para 4; SCB/893, para 64; SCB/895, para 73].

number of NHS Trusts, and the Met Office.[22] Radiation monitoring would be carried out by the UKHSA and various NHS hospitals [SCB/247-248]. Reception centres and rest centres would be provided and run by local authorities [SCB/252-255].

71. The Inspector in DL31-33 wrongly confined his consideration of the adequacy of the OSEP only to consideration of the position of emergency services. It is apparent from the focus in DL31-33 on the emergency services that the Inspector gave no consideration to the position of all the other organisations involved in delivering the OSEP, despite the evidence given by Ms Richardson, supported by the ONR, to the effect that their resources were limited. The Inspector failed to consider the position of the bodies involved in dealing with those areas which had been highlighted in evidence at the inquiry as the real concerns, including radiation monitoring, reception and rest centres, dealing with the needs of vulnerable people, rehousing and alternative accommodation (including staffing). The Inspector did not grapple with these matters at all.

72. As a result of this, the Inspector failed to consider in the DL two critical areas for the adequacy of the OSEP currently, which would only be exacerbated by additional population in the DEPZ:

    (1) The provision of reassurance monitoring for those concerned that they may have been exposed to contamination. This is performed by radiation monitoring units (RMUs). Both the ONR and the Council explained in evidence that the two ALDEX tests have shown that the arrangements for RMUs may not be able to cope with current demand. The ONR explained in evidence that RMUs are operated by specialists (not the emergency services) with very limited capacity [WS/67]. The Council had explained in evidence that the population of this one development would occupy one third of the daily throughput of an RMU, which would be a significant burden [WS/67]. The Inspector did not grapple with this at all.

    (2) The management of vulnerable groups. This is a particular challenge for the OSEP, as health and social care and support has to be provided for residents – not

[22] See the organisations identified at: SCB/184-186, 215-216, 327, 338.

just schools and care homes, but for individuals at home with special needs. This support would not be provided by emergency services but by social and health support workers who would be enormously stretched across the entire DEPZ whose whole population would be sheltering [WS/59(c)]. The ONR's evidence explained that the presence of vulnerable persons in just a couple of homes on the appeal scheme would add a significant burden to this already stretched resource [WS/60]. The Inspector did not grapple with this at all.

ONR writing to AWE to raise a REPPIR19 regulation 10(4) concern

73. This issue is raised in AWE's SFG at paragraph 88(2).

74. The Inspector took into account in DL39 that there was "no evidence presented that the ONR has, for example written to AWE to raise a REPPIR19 regulation 10(4) concern if this appeal was to be allowed".

75. Regulation 10(4) provides that an operator such as AWE must not carry out work with ionising radiation unless the Council has complied with its duties in connection with OSEPs in Regulation 11, and confirmed to AWE that it has complied with its duties.

76. Whilst the developer did refer in its closing submissions at the end of the inquiry to this point,[23] it had not been raised with any of the ONR's witnesses by the developer's advocate or by the Inspector. If it had been, the ONR's witnesses could have explained that this point was misconceived and represented a fundamental misunderstanding of how the ONR worked. The ONR would not do this. Therefore, the absence of such a letter showed nothing relevant.

77. The ONR would not write to AWE, in advance, to identify a Regulation 10(4) concern, because that is not how the ONR regulatory regime works. The ONR does not seek to assess adequacy prospectively before committed development is constructed. Moreover, ONR regulatory action would only happen retrospectively, after there is evidence of non-compliance. The ONR would only take action in connection with Regulation 10(4)

---

[23] SCB/920, para 30.1.

where the Council had withdrawn confirmation that it had complied with its duties under Regulation 11, ie where the Council had withdrawn confirmation that it had an adequate OSEP [WS/74].

78. In cross-examination, Person MD for AWE said, in response to the point that the ONR had not already threatened to constrain AWE's activities, that regulators do not make threats and that they deal with the situation as they find it [WS/75].

79. Whilst the ONR had not "written to AWE to raise a REPPIR19 regulation 10(4) concern if this appeal was to be allowed", it had taken a range of action which did in fact involve raising concerns [WS/77]. Since the ONR's policy is only to contest a planning decision where it presented a serious safety concern, the involvement of the ONR in this inquiry – with evidence from three witnesses and submissions from counsel – was a strong signal that the ONR was seriously concerned about the appeal being allowed [WS/76].

Recent planning permission had not tipped the OSEP into inadequacy

80. This issue is raised in AWE's SFG at paragraphs 27, 70 and 88(3).

81. The Inspector took into account in DL39 that "a recently granted planning permission for a residential development with more (49) dwellings" had not "tipped the OSEP into inadequacy" (DL39). This was flawed, as permitted but unbuilt development could never have that effect. Therefore this point showed nothing relevant.

82. The ONR made clear to the Inspector that it could only look at the current position and could not take account of prospective development.[24] Mr Ingham explained in his oral evidence that ONR's judgement on adequacy of the OSEP only relates to the existing communities in the DEPZ and does not consider future development or populations [WS/73]. Ms Richardson also made clear in cross-examination that the OSEP incorporates new development only when it is built-out [WS/55].

[24] ONR closing para 11 [SCB/864].

83. Neither the developer nor the Inspector raised with the ONR's witnesses the position in relation to the Kingfisher development – which had only been approved a few months before this inquiry – and the proposition that that development might already have tipped the OSEP into inadequacy (DL39). The ONR did not therefore have the chance to explain that this suggestion was misconceived, because a judgement on the adequacy of the OSEP including this development would not be made until a considerable time in the future, once the development had been built-out and occupied.

Invoking an exemption to re-establish OSEP adequacy

84. This issue is raised in AWE's SFG at paragraph 88(4).

85. Regulation 25(2) of REPPIR19 provides that the SSD may, in the interests of national security, exempt any person engaged in work with ionising radiation for or on behalf of the SSD, from all or any of the requirements imposed by REPPIR19.

86. The Inspector took into account that the SSD could "potentially consider invoking the exemption on restriction of operations at AWE B, to re-establish OSEP adequacy" (DL40). This was flawed. An exemption would not render the OSEP adequate. Nor would it affect the real-world need to have an adequate emergency plan.

87. In their proof of evidence, Person MD of the MoD explained that the SSD "could not simply certify an exemption to dispense with compliance with the safety requirements of REPPIR 2019". They also explained that, even if the MoD had an exemption, it was the SSD's policy to "put in place arrangements that produce outcomes which are, so far as is reasonably practicable, at least as good as those required by UK legislation" [SCB/555, para 7.3]. In their rebuttal proof, Person MD explained that, even if there was an exemption, the MoD would be required to put in place arrangements that were at least as good to avoid exposing local residents to an increased level of risk [SCB/820-821, paras 3.4, 3.7].

88. In these circumstances, an exemption would not affect what AWE was required to do in practice, nor would it reverse the impact of the appeal scheme on the adequacy of the OSEP.

89. In cross-examination at the inquiry, Person MD said that the exemption did not mean what the developer was arguing it meant (which was ultimately also what the Inspector concluded it meant) [WS/79]. In closing, the MoD made clear that the suggestion that an exemption could be used to resolve the problem was not credible [SCB/879, para 30].[25] There was no evidence before the inquiry to show that an exemption might be utilised in this case by a responsible SSD.

90. Using an exemption would not "re-establish OSEP adequacy" as the Inspector stated in DL40. The adequacy of the OSEP would be unaffected. There would still be, in the real world, an inadequate emergency plan which would not provide the protection it ought to provide to the local community.

91. Neither the developer nor the Inspector raised with any of the ONR's witnesses the point that the SSD might invoke an exemption [WS/78]. Had they done so, the ONR's witnesses would have explained that this suggestion was misconceived.

Misinterpretation of Policy CS8

92. This issue is raised in AWE's Ground 2. The ONR endorses the legal propositions set out by AWE in its SFG at paragraph 52, including that policies fall to be interpreted in their context, bearing in mind the underling aims of the policy, avoiding an unduly strict interpretation, and remembering policy is not an end in itself but a means to an end.

93. As to Policy CS8, the Inspector concluded that the reference in the policy should be taken to be the inner consultation zone ("ICZ") distances stated in the policy and shown on the proposals map, and not the DEPZ which had in the real world taken the place of the ICZ. This was because, he said, that "would fundamentally change this adopted Policy's meaning and intent" (DL11). The Inspector therefore treated the appeal scheme as being subject to the second, and not the first, sentence of CS8 (DL12). This was a weaker

[25] The Statement of Case of AWE/MoD had made clear that an exemption was not the answer or solution to the impact of the appeal scheme [SCB/50, para 7.22].

policy provision. In particular, the first sentence of CS8 included a policy presumption against residential development which the Inspector decided not to apply.

94. In reality, the DEPZ had taken the place of the ICZ and the Inspector's interpretation of CS8 was flawed. That the DEPZ had replaced the ICZ was explained to the Inspector in evidence [SCB/592, paras 3.4-3.5].[26] The Council also explained how its policy CS8 should be read, with the DEPZ in place of the ICZ [SCB/887, para 30 on].

95. The consultation zones included in policy CS8 as published were ONR's land use planning consultation zones as they were in 2012. The ICZ now equates to the DEPZ land use planning consultation zone.[27] They have the same consultation criteria for all residential or non-residential developments.

96. Policy CS8 itself, through footnote 60, makes clear that the "consultation zones are defined by the ONR" [SCB/1064]. This is echoed in paragraph 5.41 of the supporting text, which says that the consultation zones are "provided by the ONR" [SCB/1065]. There are also references to the zones being shown on the Proposals Map, but it is obvious that the Proposals Map (and the plan text) could only identify the consultation zones as they stood at the time the plan was adopted. Paragraph 5.44 of the supporting text, however, makes clear that there are likely to be changes to the zones during the plan period and that "the consultation zones may change" [SCB/1066].

97. The proper interpretation of policy CS8, reading the words used in the policy (including footnote 60), in context and in light of its explanatory text and aim, is that the inner zone would be taken to be as defined by the ONR from time-to-time. The DEPZ has taken the place of the ICZ and therefore the inner zone for the purposes of policy CS8 is now the DEPZ.

[26] See also AWE/MoD's opening at paras 10 and 12 [SCB/859-860] and closing at para 9 [SCB/869].

[27] In his SGD, the SSLUHC has confused the OCZ (Outer Consultation Zone) with the OPZ (Outline Planning Zone). The OPZ is a REPPIR19 emergency planning zone but, unlike the DEPZ, it is not also a land use planning zone. The OPZ requires "outline planning", which is substantially less onerous than detailed emergency planning, and is not equivalent to the DEPZ. The OCZ is not a REPPIR19 emergency planning zone and does not require an OSEP.

98. The Inspector took an unrealistic and inappropriately rigid approach to the interpretation of CS8. It cannot have been intended that the ICZ would remain fixed for the duration of the plan period, until both the policy table and the proposals map were revised in a new development plan document,[28] when the position which underlay and informed the setting of the policy changed. The Inspector was wrong to characterise AWE's position as being an alteration to the wording of the policy. The issue was how you read the policy when the position on which it was based and drafted had changed. The Inspector's approach involves ignoring entirely the context and aim of the policy and fixing only and rigidly on the text of the policy.

Conclusion

99. For the reasons given above, and the additional reasons given by AWE, the DL should be quashed and the Defendant should be ordered to pay the ONR's costs.

RICHARD HONEY KC

MICHAEL FRY

7 December 2023

[28] The developer argues in its SGD that the consultation zone remains fixed until "the adoption of a new development plan policy to replace CS8" (para 23.2).