Neutral Citation Number: [2021] EWHC 289 (Admin)

Case No: CO/2141/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2021

Before :

THE HON. MRS JUSTICE THORNTON DBE

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Between :

(1) Crest Nicholson Operations Limited **(2) Hallam Land Management Limited** **(3) Wilson Enterprises Limited**	**Claimants**
- and –	
West Berkshire District Council	**Defendant**
- and -	
(1) AWE Plc **(2) The Secretary of State for Defence** **(3) Public Health England** **(4) Office for Nuclear Regulation**	**Interested Parties**

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Mr Harris QC and Mr Turney (instructed by **DAC Beachcroft LLP**) for the **Claimants**
Mr Travers QC and **Ms Thomas** (instructed by **West Berkshire District Council**) for the **Defendant**
Mr Strachan QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First Interested Party**
Mr Blundell QC and **Ms Blackmore** (instructed by **Government Legal Department**) for the **Second Interested Party**
Mr Westmoreland Smith (instructed by **Government Legal** Department) for the **Fourth Interested Party**

Hearing dates: 15 - 16 December 2020

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JUDGMENT

(Approved by the court)

The Hon. Mrs Justice Thornton

Introduction

1. In May 2019, the Radiation (Emergency Preparedness and Public Information) Regulations 2019 (REPPIR 19) came into force. The Regulations impose duties on operators who work with ionising radiation and local authorities to plan for radiation emergencies. The Regulations are part of an international, EU and national response to the meltdown of three reactors at the Fukushima Daiichi nuclear power plant in Japan in March 2011 following an undersea earthquake. The earthquake was the most powerful earthquake recorded in Japan and the fourth most powerful earthquake recorded in the world, since modern record-keeping began in 1900. It triggered a tsunami, which swept the Japanese mainland killing more than 10,000 people and which caused the meltdown of the reactors. Residents within a 12-mile radius of the plant were evacuated.
2. One of the key changes to emergency planning, reflected in the Regulations, is to require risk assessment and planning for events which have a low likelihood of occurrence but high impact in the event they do occur; as with the Fukushima disaster. Another change, specific to the Regulations, concerns a shift in responsibility for deciding on the extent of a geographical zone in which it is proportionate to plan for protective action in the event of a radiation emergency. The zone is referred to in the Regulations as a 'Detailed Emergency Planning Zone' (DEPZ). Responsibility used to lie with either the Office for Nuclear Regulation or the Health and Safety Executive but now rests with the relevant local authority, who must designate the zone on the basis of a recommendation from the site operator.
3. On 12 March 2020, West Berkshire District Council designated the DEPZ around the Burghfield Atomic Weapons Establishment with a minimum radius of 3160 m from the centre of the site. The site is of national strategic importance. Nuclear weapons are assembled, maintained and decommissioned there. Under the previous regime, the DEPZ was based on a minimum radius of 1600 metres. The extension covers much of the 700 hectares of land belonging to the Claimants and previously earmarked for the development of 15000 homes.
4. The Claimants contend that the rationale for the new and radically extended DEPZ on a recommendation by the privately run operator, AWE, is simply not known. The only publicly facing document contains, at best, a partial rationale for the designation, which is insufficient, as a matter of law, to meet the requirements of the Regulations. The document was not made available to the public until after the DEPZ was designated which was procedurally improper and in breach of statutory requirements. Regulatory oversight of the designation process has been deficient.
5. West Berkshire District Council (the Defendant); AWE; the Secretary of State for Defence and the Office for Nuclear Regulation (the First, Second and Fourth Interested Parties) contend that AWE's rationale for the DEPZ and regulatory oversight of the designation process has been entirely adequate. The public was provided with the requisite information, as soon as reasonably practicable, in accordance with REPPIR 19. The Claimants' case fails to grapple properly, or at all, with the true significance in public safety terms of the designation process. Nor does it show any proper understanding of the national security issues arising from the information which underlies the decision. The claim is motivated entirely by the Claimants' private proprietary interests in the development of its site.
6. Permission to apply for judicial review was granted by Lieven J on 21st July 2020.
7. I heard oral submissions at a remote hearing using video conferencing over two days from Russell Harris (leading Richard Turney) for the Claimant; David Travers (leading Megan Thomas) for the Defendant; James Strachan (leading Sasha Blackmore) for the First Interested Party; David Blundell for the Second Interested Party and Mark Westmoreland Smith for the Fourth Interested Party.

How the Regulations work

8. The Regulations, referred to as REPPIR 19 were made under powers conferred by the Health and Safety at Work etc Act 1974. They revoke and supersede the Radiation (Emergency Preparedness

and Public Information) Regulations 2001 (SI 2001/2975) ("REPPIR 01"). Duty holders under REPPIR 01 were given a transition period of 12 months until 22 May 2020 to comply with REPPIR 19 (Regulation 28).

How the DEPZ is designated

9. There are two stages to the process of determining a DEPZ.
10. The first stage involves the operator of the premises. Regulation 4 requires the operator to undertake a written evaluation identifying all hazards arising from the operator's work which have the potential to cause a radiation emergency. The evaluation is referred to as a 'Hazard Evaluation' in the Regulations.
11. Where the evaluation reveals the potential for a radiation emergency to occur, Regulation 5 requires the operator to assess a full range of possible consequences of the identified emergencies, both on the premises and outside the premises, including the geographical extent of those consequences and any variable factors which have the potential to affect the severity of those consequences. The assessment is referred to in the Regulations as a Consequence Assessment.
12. The requirements for an assessment are set out in Schedule 3. They include consideration of: the range of potential 'sources terms' (defined as the radioactivity which could be released which includes the amount of each radionuclide released; the time distribution of the release; and energy released); the different persons that may be exposed; the effective and equivalent doses they are likely to receive; the pathways for exposure and the distances in which urgent protective reaction may be warranted for the different source terms when assessed against the United Kingdom's Emergency Reference Levels published by Public Health England.
13. In addition:

> *"3. The calculations undertaken in support of the assessment must consider a range of weather conditions (if weather conditions are capable of affecting the extent of the impact of the radiation emergency) to account for –*
>
> *(a) the likely consequences arising from such conditions; and*
>
> *(b) consequences which are less likely, but with greater impact.*
>
> *..."*

14. Regulation 7(1) & 7(2) requires the operator to produce a report setting out the consequences identified by the assessment, called a Consequences Report, which must be sent to the local authority. Regulation 7(3) provides that a Consequences Report must contain the particulars set out in Schedule 4. Regulation 7(4) requires the operator to offer a meeting to the local authority to discuss the report. Regulation 7(5) provides that the operator must comply with any reasonable request for information made by a local authority, following receipt of the report, to enable it to prepare the off-site emergency plan required by Regulation 11.
15. Schedule 4 sets out the particulars to be included in a Consequences Report. Part 1 deals with factual information. Part 2 of Schedule 4 requires the operator to include the following recommendations:

> *"(a) the proposed minimum geographical extent from the premises to be covered by the local authority's off-site emergency plan; and*
>
> *(b) the minimum distances to which urgent protective action may need to be taken, marking against each distance the timescale for implementation of the relevant action.*
>
> *3. In relation to a minimum geographical extent recommended under paragraph 2, the operator must also include within the consequences report –*
>
> *(a) the recommended urgent protective actions to be taken within that zone, if any, together with timescales for the implementation of those actions; and*

(b) details of the environmental pathways at risk in order to support the determination of food and water restrictions in the event of a radiation emergency."

16. Part 3 of Schedule 4 provides that:

"4. The operator must set out the rationale supporting each recommendation made in the consequences report.
5. In particular, the operator must set out –
(a) the rationale for its recommendation on the minimum distances for which urgent protective action may need to be taken; ..."

17. The second stage of the designation process rests with the local authority. Regulation 8(1) provides that:

"The local authority must determine the detailed emergency planning zone on the basis of the operator's recommendation under paragraph 2 of Schedule 4 and may extend that area in consideration of –
(a) local geographic, demographic and practical implementation issues
(b) the need to avoid, where practicable, the bisection of local communities; and
(c) the inclusion of vulnerable groups immediately adjacent to the area proposed by the operator."

Emergency plans

18. Regulation 10 provides that where an operator has made an evaluation that a radiation emergency might arise, the operator must make an adequate emergency plan to secure, so far as is reasonably practicable, the restriction of exposure to ionising radiation and the health and safety of persons who may be affected by radiation emergencies identified by the Hazard Evaluation.
19. Regulation 11(1) & (2) provides that where premises require a DEPZ the local authority must make an adequate off-site emergency plan covering the zone. The plan must be designed to mitigate, so far as is reasonably practicable, the consequences of a radiation emergency outside the operator's premises.

The Regulator

20. 'Regulator' is defined in Regulation 2(1) as the Office for Nuclear Regulation in the event the premises is a licensed site or authorised defence site.
21. By Regulation 4(7) the operator must provide the Regulator with details of the Hazard Evaluation within 28 days of it being made. By Regulation 7(6) the operator must provide the Regulator with details of the Consequence Assessment and the Consequences Report within 28 days of the date on which the Consequence Report was sent to the local authority. Regulation 8(3) provides that the local authority must inform the operator and regulator of its determination of the DEPZ within two months of having received the Consequences Report.

The provision of information to the public

22. Regulation 21 provides that the local authority with responsibility for an area covered by an off-site emergency plan in a DEPZ must, in cooperation with the operator, ensure that members of the public are made aware of the relevant information, and, where appropriate, are provided with it.
23. Part 1 of Schedule 8 sets out the requisite information:
    1. Basic facts about ionising radiation and its effects on the environment;
    2. The various types of radiation emergency identified and their consequences for the general public and the environment;
    3. Protective action to alert, protect and assist the public in the event of an emergency;

4. Appropriate information on protective action to be taken by the general public in the event of a radiation emergency;
5. The authorities responsible for implementing the protective actions;
6. The extent of the detailed emergency planning zone.

24. Regulation 21(10) provides as follows in relation to the Consequences Report:

> *"Where a report is made pursuant to regulation 7, the local authority must make that report available to the public as soon as reasonably practicable after it has been sent to the regulator under that regulation (except that, with the approval of the regulator, the local authority must not make available any part or parts of such report for reasons of industrial, commercial or personal confidentiality, public security or national security)."*

25. The definition of regulator, so far as relevant to this case and the relevant part of Regulation 7 is set out above (under the heading Regulator).

Approved Code of Practice and Guidance

26. The ONR and HSE have published an Approved Code of Practice (ACoP) and guidance on the Regulations. Compliance with the ACoP is said to be "*doing enough to comply with the law in respect of those specific matters on which the Code gives advice"* (page 2).
27. The ACoP stipulates that, when producing the Hazard Evaluation, operators should not discount emergencies with a low likelihood of occurrence:

> *"Evaluating a low likelihood for a radiation emergency to occur should not be used as a reason for discounting the hazard from having the potential to cause a radiation emergency. Operators should consider the possibilities for radiation emergencies with extremely low likelihoods but with significant or catastrophic consequences."* (§ 85)

28. The guidance on the content of a Consequence Assessment explains the principles for selecting the recommended distance for an urgent protective action, using the example of sheltering, which is relevant to the present case. The guidance explains that the Emergency Reference Level value (ERL) published by PHE is a measure of averted dose of radiation and is calculated using two dose calculations. In the first calculation it should be assumed that the exposed individuals are subject to no protective measures and are outside during the entire exposure period (with no protection afforded from being inside a building). The second calculation is for the dose with the relevant protective action in place. The dose averted by this protective action is the difference between the two values (§652). The guidance explains how the protective zone is identified by reference to the ERL:

> *"653 PHE's analysis... of the effect of sheltering on inhalation exposures shows a typical dose reduction factor (DRF) of approximately 0.6 (derived on the basis of a combination of modelling and literature review). This value assumes an inhalation dose to an individual sheltering during the entire passage of the plume, until both the indoor and outdoor air concentrations fall back down to zero (or close to it), with no opening of windows and doors to the external environment. Under such circumstances it may be assumed that the DRF remains constant irrespective of the release duration…. The fraction of the dose that is averted is therefore 1 – DRF = 0.4 which implies that the distance where the lower ERL for sheltering of 3 mSv is at the distance where the outdoor effective dose is 7.5 mSv (i.e. 3 mSv divided by 0.4.). For premises where inhalation is the dominant exposure pathway (other than operating reactors), this outdoor effective dose of 7.5 mSv can be used as a surrogate for identifying the*

initial candidate minimum distance for the urgent protection action of sheltering…"

29. Weather conditions are dealt with in the guidance as follows:

"656 Once the technical assessment described in the paragraphs above is complete, the operator may wish to exercise judgement to adjust the candidate distances for the urgent protective actions calculated by taking into account:

(a) in the case of releases, the range of weather conditions assumed and their likelihood;

…

657 Once these have been considered, the operator should recommend the distances for each of the relevant urgent protective actions, justifying any assumptions and judgments that are made. The minimum distance of the urgent protective action is usually taken as a radial distance in kilometres (km)."

30. The Approved Code of Practice explains at §190-191 how local authorities should go about their task of determining the DEPZ:

"190. The detailed emergency planning zone must be based on the minimum geographical extent proposed by the operator in the consequences report and should:

(a) be of sufficient extent to enable an adequate response to a range of emergencies; and

(b) reflect the benefits and detriments of protective action by considering an appropriate balance between;

(i) dose averted; and

(ii) the impact of implementing protective actions in a radiation emergency across too wide an area.

191 In defining the boundary of a detailed emergency planning zone, geographic features should be used for ease of implementing the local authority's off-site emergency plan. Physical features such as roads, rivers, railways or footpaths should be considered as well as political or postcode boundaries, particularly where these features and concepts correspondence with other local authority emergency planning arrangements."

31. The accompanying guidance states at §195 that:

"… The local planning authority should only change that area [recommended by the operator] to extend it because of local geographic, demographic and practical implementation issues, the need to avoid bisecting communities or to include vulnerable groups at the outer limit of the area. The local authority is not required to have the expertise to verify the technical basis for the minimum extent set by the operator."

32. A practical approach is suggested at §200:

"To determine the boundary of the detailed emergency planning zone, the local authority may adopt an approach as follows:

(a) review the consequences report provided by the operator;

> *(b) consider the most appropriate means of protection of the local population in relation to the types of radiation emergency identified by the operator;*
> *(c) produce proposed detailed emergency planning zone maps based on the consequences report, current planning arrangements and local geographic, demographic and practical implementation issues identified; and*
> *(d) liaise with relevant organisations to identify any issues or improvements to the detailed emergency planning area boundary/boundaries (for example emergency responders, experts in emergencies and responses, regulators, PHE, operator, adjacent local authorities). Existing local forums and liaison committees already set up to discuss emergency arrangements could be utilised for this purpose.*
> *…"*

Relevance of the EU regime and applicability of REPPIR to defence activities

33. REPPIR 19 implements, in part, provisions of EU Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation. During the hearing I asked the parties to provide the Court with an agreed note on the legal consequences of the UK leaving the EU, so far as relevant to the present case.
34. In written submissions provided after the hearing, the parties agreed that as a result of leaving the European Union, the UK is no longer part of Euratom, although the UK and Euratom signed a Nuclear Cooperation Agreement on 24 December 2020. The 2013 Directive ceased to apply to the UK directly post 31 December 2020, but the UK legislation which implements it (including REPPIR 19) remains in place by virtue of the European Union (Withdrawal) Act 2018 (as amended). REPPIR 19 is *"EU-derived domestic legislation"* and as such falls within the definition of "Retained EU law".
35. In addition, Counsel for the Defendant and Interested Parties raised the proposition that the application of the 2013 Directive and consequently REPPIR 19 to defence activities of the kind conducted at AWE Burghfield has always been a matter of unilateral choice under domestic law. The Euratom Treaty, and thereby the 2013 Directive, do not apply to defence nuclear activities as a matter of law. However, the Ministry of Defence (MOD) has taken a policy decision to apply, where practicable, the 2013 Directive to defence activities. As such, REPPIR 19 applies to defence premises in which work with ionising radiation takes place, subject to the modifications in Regulation 25. This remains the case after 31 December 2020. In reply, Mr Harris objected to the point being taken on the basis it was a new and wholly unpleaded submission. In any event, he said, the point being taken was unclear given no such exemption from the Regulations appears to have been applied in this case. In response, the Treasury Solicitor provided the Court with a contemporaneous note of the hearing in which Mr Strachan explained, in the context of an exchange about the relevant impact of the UK leaving the EU, that the 2013 Directive has applied to defence sites as a matter of policy, not law.
36. I have approached the issue as follows. During the hearing, submissions proceeded on the basis that REPPIR 19 applies to the Burghfield site. In the absence of any evidence that AWE Burghfield benefits from an exemption from the Regulations, I propose to determine the claim on the basis that REPPIR 19 applies. I deal with submissions by Mr Harris in relation to the 2013 Directive below, in the context in which they arise.

The Consequences Report

37. The Consequences Report is in three parts.
38. Part 1 sets out factual information required by Schedule 4 of REPPIR.

39. Part 2 recommends the minimum geographical extent to be covered by the local authority's offsite emergency plan as an area extending to a radial distance of 3160m from the Burghfield site centre location. This distance is recommended for the urgent protective action of sheltering which:

> *"....is the largest distance determined by detailed consequence assessment of a range of source terms and includes consideration of a range of weather conditions and vulnerable groups within the population... It is recommended that people are instructed as soon as is practical to immediately take cover in a suitable building and to stay inside with the windows and doors shut."*

40. Timescales for people to shelter are addressed as follows:

> *"Category F weather conditions typically has an associated mean wind speed of 2ms-1. There will be an average of 25 minutes from the initiation of the event until the leading edge of any plume travels to the minimum distance recommended for urgent action. Given the need to notify the Local Authority of an incident in practice this will amount to 10 minutes to inform the public and for the public to find suitable shelter in order to realise any substantive benefit from the sheltering action."*

41. Part 2 goes on to explain the pathways by which the public could be exposed to the release of radioactivity:

> *"For the majority of fault sequences, the material released would be in the form of fine particulates of plutonium oxide and the predominant exposure pathway to individuals outside the Burghfield Site during the passage of the plume would be inhalation."*

42. Part 3 is headed 'Rationale'. It is set out in full, as follows:

> *"1) Regulation 7(3) Schedule 4, paragraph 4 – The rationale supporting each recommendation made*
>
> *a. The release of radioactive particles small enough to be respirable have the potential to result in radiological doses to the public from a range of exposure routes, most notably:*
>
> *i. First-pass inhalation of air from the plume of contamination;*
>
> *ii. Long-term inhalation after resuspension of ground contamination by the initial plume;*
>
> *iii. Ingestion of food crops contaminated by the initial plume;*
>
> *iv. Long-term external irradiation from ground contamination by the initial plume.*
>
> *b. It has been assessed that the first-pass inhalation dose is the most significant by far, for initial emergency response purposes, which has resulted in the recommendation to shelter as the most appropriate urgent protective action. This should be coupled with a restriction on the consumption of all locally produced food, until the direction of the plume and the extent of the contamination has been fully investigated, examined and understood. Appropriate local instructions should then be made available to the public based on the prevailing conditions.*
>
> *c. The recommendation for the minimum emergency action distance at the Burghfield Site originates from the Consequence Assessment carried out under REPPIR 2019. The guidance set out in the Approved Code of Practice is to use the largest candidate distances recommended for the urgent protective actions identified against*

the lower Emergency Reference Level. This 3160m distance is selected as the minimum geographical extent of the Detailed Emergency Planning Zone (see appendix C for definition) about the Burghfield Site Centre Location.

d. This distance has increased from the REPPIR 2001 ONR determination. The REPPIR 2001 determination was based on a 5mSv dose contour using 55% Cat D weather conditions. Under REPPIR 2019, the minimum distance for urgent protective actions is based on a 7.5mSv dose contour. However, in accordance with the new requirements of REPPIR 2019, the 'reasonable foreseeability' argument is no longer allowed, and several different requirements have had to be taken into consideration, these being that the assessment must:

i. Consider age, and other characteristics which would render specific members of the public especially vulnerable;
ii. Include all relevant pathways;
iii. Consider a representative range of source terms;
iv. Consider a range of weather conditions to account for consequences that are less likely, but which have greater consequences.

e. A further consideration is the geographical area around the site and the potentially significant period that these adverse weather conditions could be experienced.

f. AWE has analysed the dose from a range of weather conditions and has decided to base its proposal on a weather category that is less likely, but which could provide significantly greater doses. Consideration of less likely weather categories, which occur around 12% of the time in the local geographical area, increases the 7.5mSv dose contour to 3160m around the site centre location.

2) Regulation 7(3) Schedule 4, paragraph 5(a) – the rationale for its recommendation on the minimum distances for which urgent protective action may need to be taken:

a. The minimum distance is established from the guidance provided in support of the Regulations, for the appropriate source terms, and is based on the requirement to identify a distance that has the potential to deliver a 3mSv dose saving, when adopting the recommended urgent protective action; which in this case is sheltering.

3) Regulation 7(3) Schedule 4, paragraph 5(b) – The rationale for agreement that no off-site planning is required:

a. Given the content of this Consequences Report, this requirement does not apply to the Burghfield site."

Chronology

43. The chronology of events is as follows:

27 March 2019	REPPIR Regulations are laid in Parliament (also in March, government funding for a study into the suitability of the Claimants' land for a 'garden town' is confirmed)
26 April 2019	ONR writes to all nuclear site license holders, including AWE, informing them of actions required under REPPIR 19 during the 12 month transition period
22 May 2019	REPPIR 19 comes into force

17 July 2019	West Berkshire District Council attends a workshop on REPPIR organised by the ONR
31 July 2019	At a meeting between the ONR and AWE, AWE provided details of its Hazard Evaluation and Consequence Assessment, prepared pursuant to Regulations 4 and 5 REPPIR, to ONR Inspectors
10 September 2019	AWE presents its assessments and recommendation in the draft Consequences Report to ONR Inspectors at a second meeting. The selection of weather conditions in the assessment is discussed
26 September 2019	AWE meets with two other UK nuclear site license organisations to discuss AWE's REPPIR methodology
1 October 2019	AWE and ONR have a further discussion about the weather conditions used in the assessment in view of the significance of the selected weather conditions in the proposed expansion of the DEPZ at Burghfield. A number of more senior individuals attend this conference including ONR's Fault Analysis Professional Lead and AWE's Head of Nuclear Safety
23 October 2019	AWE and the Council met to discuss the completion of the Hazard Evaluation, Consequences Assessment and Consequences Report
20 November 2019	Consequences Report is finalised and sent to the Council
21 November 2019	AWE sends the Consequences report to the ONR
23 December 2019	The Council notifies Wokingham Borough Council and Reading Borough Council of the details of the Consequences Report
6 January 2020	A meeting is held between the Council, AWE, Public Health England (PHE) and the ONR. The Consequences Report and proposal for new DEPZ are discussed. The minutes of the meeting emphasise the notable increase in the DEPZ, which is explained and discussed. Concerns about the increase are expressed by local emergency responders present at the meeting. The Claimant's housing project is specifically raised and discussed.
6 January 2020	A specialist ONR Inspector inspects the Hazard Evaluation and Consequence Assessment at AWE's site via the company's on-site secure computer network (this was part of the ONR's sampling exercise which had selected the Burghfield designation for review).
7 January 2020	PHE sends questions on the Consequences Report to AWE. In particular, PHE raised questions about AWE's choice of weather conditions
9 January 2020	AWE answers PHE's questions by email
10 January 2020	PHE issues a statement on its assessment of AWE's work concluding that West Berkshire District Council should consider implementing the minimum distance of 3160 metres radially for the Burghfield site
27 January 2020	ONR sends the Council an email to ensure that the Council had considered and followed the ACOP/Guidance
30 January 2020	AWE answers questions posted by ONR
18 February 2020	A meeting is held between the Council, ONR, Wokingham Borough Council, the MOD and AWE. The minutes record that Wokingham Council were particularly concerned about the impact of the DEPZ on the Claimants' development project. The minutes conclude that: *'This meeting underlines the importance of ONR's presence at meetings such as this to provide independent advice and clarification of the legal requirements which will support the duty holder's (West Berkshire District Council) endeavours to achieve compliance within the tight timescales'*
February 2020	The ONR completes its assessment of AWE's work, concluding that *'the technical extent of the DEPZ given to the local authority for the AWE site is a reasonable basis for detailed radiological emergency planning purposes'*

4 March 2020	The Defendant's officers prepare a report on the DEPZ for the Council's Corporate Board
19 March 2020	The report is presented to the Defendant's Operations Board. After the board meeting, the determination of the DEPZ is made by an Officer using delegated powers and implemented the same day
24 March 2020	The Claimants became aware of the proposal for the increased DEPZ
24 March 2020	The Consequences Report is requested by the Claimants
24 April 2020	Pre-action protocol letter is sent
14 May 2020	AWE respond to the pre-action letter
1 June 2020	ONR responds to the pre action letter stating that '*under [REPPIR] the Local Authority now sets Detailed Emergency Planning Zones. The ONR played no part in the decision under challenge'*
2 June 2020	The Claimants' solicitors write to the ONR asking the ONR to *"clarify what the ONR's role is in the process that led to the determination of the DEPZ for the Burghfield AWE, given the role clearly ascribed to the ONR by the other parties to this matter?"*
5 June 2020	The ONR responds to a second letter from the Claimants stating: "*We refer you to [REPPIR] and in particular Regulation 8 which sets out the requirements in relation to detailed emergency planning zones. This regulation confirms that the Local Authority determines the detailed emergency planning zone and does not require the involvement of ONR."*
11 June 2020	Claim issued
1 July 2020	ONR reviews the Council's determination of the DEPZ set by the Council and confirm the Council's analysis and procedure were compliant with Regulation 8 of REPPIR 2019
10 July 2020	ONR Acknowledgment of Service states that: "*The Office for Nuclear Regulation ("ONR") is a regulator as set out in regulation 2 of the Radiation (Emergency Preparedness and Public Information) Regulations 2019 ("REPPIR"). ONR indicated at the pre-action stage that they did not play a role in the decision currently being challenged, since they are not part of the determination process. Therefore, with respect, the ONR wish to remain neutral and do not wish to play an active role in court proceedings"*
21 July 2020	Permission is granted by Lieven J with the observation that *"On ground two, the role of ONR in the decision making process is not clear from the documents that have been submitted to the court. It is arguable that there was not the regulatory oversight required by REPPIR 2019"*
17 November 2020	Claimants' make an application for disclosure of the Hazard Evaluation and Consequence Assessment

The ONR and PHE's assessment of AWE's work

44. On 10 January 2020, PHE issued a statement on its assessment of the Consequences Report:

> *"Based on the information provided by AWE in the Consequences Reports for the Aldermaston and Burghfield sites and the supplementary information provided by email, PHE believes that West Berkshire Council should consider adopting the recommendations of retaining the existing DEPZ distance for the Aldermaston site and implementing the minimum distance of 3160 metres radially for the Burghfield site with sheltering in both cases being the protective action."*

45. PHE's statement includes a checklist of the legal requirements in Schedule 4 of the Regulations for the Consequences Report with accompanying ticks to indicate whether AWE has complied

with the requirements. There is a tick against the requirement for a rationale for the minimum distances for which urgent protective action may need to be taken.

46. In February 2020, the ONR completed its assessment of AWE's work. The author of the assessment explains and concludes as follows:

> *"... I am content that the hazard evaluation report... presents a comprehensive list of hazards...Overall I am content that, the process followed by AWE in evaluating hazards adequately follows that described in the REPPIR ACoP and guidance document.*
>
> *The minimum recommended extent of the proposed DEPZ is 3.16km where previously a distance of approximately 1.0km was proposed. AWE have stated (at Ref 3) that the expansion of the DEPZ is mainly due to the use of Category F weather conditions in the plume dispersion analysis where previously Cat D conditions were used. AWE assert that low dispersion Cat F weather conditions arise relatively frequently at their inland site (approximately 12% of the time) and so they have chosen to assess sensitivities across weather conditions A-F, AWE consider this to be consistent with the provisions of Schedule 3(3). I am satisfied that this change of conditions forms a reasonable basis for the change in DEPZ.*
>
> *...*
>
> *The AWE was assessed by ONR in 2018 against REPPIR01 (Ref 9). The bounding fault for determination of the DEPZ has remained the same in the latest assessment, however the proposed zone is expanded because lower dispersion weather conditions are now considered. Given the relatively high assessed frequency of the lower dispersion conditions I am satisfied that consideration of such conditions is consistent with Regulation 9(1) of REPPIR 19.*
>
> *Overall, subject to confirmation of the technical adequacy of the consequence analysis by the ONR radiological consequence inspector, I judge that the technical extent of the DEPZ given to the WBCC local authority for the AWE site in the REPPIR 19 submission is a reasonable basis for detailed radiological emergency planning purposes."*

The Claimants' evidence about the Consequence Report

47. The Claimants' evidence on the Consequences Report was given by Dr Keith Pearce, an emergency planning consultant in the nuclear industry with over 30 years' experience in the nuclear sector. Dr Pearce explains that:

> *"... From the Consequence Report, it cannot be established how the DEPZ in this case was selected at 3160m. There is simply insufficient information or analysis to constitute or to come close to constituting a rationale.*
>
> *The document does not present the conclusions of the Consequence Assessment performed as part of the new methodology. It only provides the output of that Assessment. The Consequences Report makes no mention of the frequency of the fault upon which it has based its recommended distances via the regulation 5 assessment. This is an important issue which appears in part to be based on a misunderstanding of the approach required by REPPIR 2019 to infrequent faults.*
>
> *...*

AWE might well have selected a source term based on an event that is too infrequent to require detailed planning according to the new methodology. If this is the case then on the new methodology which is meant to bring consistency and transparency, AWE's proposed minimum DEPZ range and protective actions are larger than is appropriate under REPPIR 2019 and the Guidance".

AWE's evidence on preparation of the Hazard Evaluation, Consequence Assessment and Consequences Report

48. AWE's evidence about the preparation of the Hazard Evaluation, the Consequence Assessment and the Consequences Report for Burghfield was given by XY, a safety assessment specialist contracted to AWE and formerly a Royal Navy nuclear submariner. An application for his anonymity was unopposed and is granted.
49. XY explains that the process began with a review of the radiological inventory at the site and existing risk assessments to identify all events with the potential to cause a radiation emergency (considered to be events with the potential for an annual effective radiation dose estimate of 1 millisevert, or greater, to the public over the period of one year following a radiation emergency).
50. The hazards were assessed against the REPPIR Risk Framework set out in the ACOP/Guidance. The output was a series of Risk Frameworks, one for each building on the site that had a radiological inventory that fell within the scope of the Regulations. He explains that:

> "*A specification was written to support the mathematical modelling of the dispersion associated with some of the events under assessment and the work was undertaken by members of the project team with specialist skills in this type of modelling work."*

51. As part of the production of the Consequence Assessment, the worst case scenario of an explosion was identified. The likely duration of a release was considered along with the period within which it was likely to commence and the periods over which the release could take place.
52. After release the dispersion of a contamination plume will be driven by the prevailing weather conditions. He explains that:

> *"55% Category D Weather is the weighted average weather conditions for the geographical area in which the site is located. To understand the potential dispersion of contamination, a variety of weather conditions were analysed. The output from the mathematical modelling provided details of the weather dispersion properties as a result of the analysis of Category A, Category D and Category F weather.*
>
> *Category F and Category G weather (when compared to 55% Category D) will have the effect of extending the distance over which any contamination from a radiation emergency could have an effect. Category F and Category G weather conditions combined, are experienced around 12% of the time at the site. Category F weather is experienced around 10% of the time at the site.*
>
> *Based on the need to consider conditions that 'are less likely but which could result in greater consequences', Category F weather was used to determine the Urgent Protective Action radial distance around the site, because of the greater consequences to the public. This aligned with the guidance from PHE (PHE CRCE 50 – Consequences Assessment Methodology) which required the 95th percentile of weather conditions to be considered.*
>
> *The nature of the events being analysed made the likely duration of a release short, but this was considered along with the period within*

> *which it was likely to commence and the periods over which the release of radioactive contamination could take place. These results, along with an understanding of the distribution in public areas of the contamination and the prevailing weather conditions, allowed the calculation of the averted dose estimate and the total residual effective dose for members of the public.*
> *The most likely travel time for the released contamination to first reach the limits of the minimum boundary of the DEPZ for Category F weather was also predicted.*
>
> *Using the output from the Consequence Assessment, I instructed geographical maps of the local area to be prepared to illustrate the extent of the distances calculated."*

53. He explained that he wrote the Consequences Report, using a template provided by the Ministry of Defence. In his view the rationale enabled the local authority to understand the basis of the assessment of the recommendation for the radial distance for urgent protective action. He explains that the documents were subject to internal and external review during their production, including by the ONR.

The ONR's evidence about its regulatory role

54. The ONR's evidence on its regulatory role in relation to REPPIR 19, and more broadly, was given by Mr Graeme Thomas, a Superintending Inspector within the ONR with responsibility for leading the Emergency Preparedness and Response team.

Wider regulatory role

55. Mr Thomas explains that the ONR regulates, amongst other matters, the nuclear safety and conventional health and safety at 36 licensed nuclear sites in Great Britain, including AWE Burghfield and addresses security at civil nuclear sites. It does so through various powers, including licencing and inspection powers. The organisation also sets national regulatory standards and helps to develop international nuclear safety standards.

REPPIR regulation

56. As well as publishing the REPPIR 19 Approved Code of Practice and guidance, the ONR provided advice and assistance to duty holders during a 12 month transition period after the Regulations came into force until 22 May 2020. He points to a letter to local authorities dated 29 January 2020 explaining the position:

> *"…whilst ONR no longer has a statutory role in the determination process for detailed emergency planning zones…we remain committed to assisting you in navigating the revised processes required by these regulations and in particular during the statutory implementation period running to 22 May 2020."*

57. Assistance was provided by way of correspondence, meetings and attendance at the Local Authorities Working Group Forum.

Sampling

58. Mr Thomas explains that the ONR is not required to assess all of the documents submitted by operators under REPPIR 19:

> *"However, in accordance with its wider regulatory and enforcement responsibilities… the ONR samples a select number of submissions from duty holders to determine whether there is ongoing compliance with REPPIR19. The ONR's sampling approach will take into account: the level of confidence the ONR has in the duty holder's process for*

> *producing safety submissions; the risks and hazards associated with the activities covered by the safety submission; and recent events or operating experience at the facility, or similar facilities.*
>
> *If the ONR determines as part of their sampling exercise that there has been non-compliance with REPPIR19 by a duty holder, they have a wide range of enforcement powers available to them."*

59. He explained that the use of sampling as a regulatory tool was consistent with the ONR's routine inspection approach, which is to sample the activities of duty holders representatively to determine levels of compliance and to target deployment of resources. Any issue that the ONR may identify with the adequacy of the Consequence Assessment or the Consequences Report would be for the operator to address in accordance with its duties under the Regulations and would not be a matter for the local authority.
60. He explains the ONR sampled the Consequences Reports produced by a mix of operators across a number of nuclear sites and covering a range of technology types. The ONR also sampled the approaches being taken by local authorities in setting the DEPZ. The sample sites were selected to provide the ONR with a good picture of how different types of sites were coping in meeting their REPPIR 19 duties.

Review of AWE's assessments for Burghfield

61. Mr Thomas explains that the Hazard Evaluation, Consequence Assessment and Consequences Report for AWE Burghfield were selected for review as part of the ONR's sampling. In addition to the sampling exercise, as part of the ONRs general regulatory oversight of AWE, the operator's assumptions about the weather were expressly queried by ONR staff at a meeting in September 2019 and followed up in a conference call in early October with more senior staff members:

> *"The ONR held a follow-up meeting in September 2019 to review AWE's deliverables prior to the expected date for submission of its Consequences Report to WBC. During this meeting AWE informed the ONR that the recommended DEPZ for the Burghfield site would be significantly expanded... The ONR inspectors queried the reasons for this change and AWE indicated that the change was predominantly due to the analysis of infrequent weather conditions in the Hazard Evaluation and Consequence Assessment. It was evident from the "risk matrix" presented to the ONR at the meeting that the accident forming the basis for the proposed DEPZ at Burghfield under REPPIR19 was the same as the accident which formed the basis for the (then) existing DEPZ under REPPIR01 (determined by the ONR in 2017). The ONR inspectors were therefore able to draw on their knowledge of the AWE 2017 REPPIR01 submission to inform their opinions on the adequacy of the technical basis for the proposed expansion. Based on the meeting discussions, the ONR inspectors did not consider there to be any significant concerns with respect to most aspects of the Burghfield Hazard Evaluation and Consequence Assessment. However, the ONR inspectors did query AWE's use of infrequent weather conditions in determining the minimum geographical extent for detailed emergency planning.*
>
> *A follow-up teleconference was held between the ONR and AWE (1st October 2019) to further discuss the weather assumptions applied in view of their significance to the proposed expansion of the DEPZ at Burghfield. A number of more senior individuals attended this teleconference including the ONR Fault Analysis Professional Lead and the AWE Head of Nuclear Safety. The meeting focused on the*

interpretation of REPPIR19, Schedule 3(3) which requires that "operators consider a range of weather conditions to account for the likely consequences of such conditions and consequences which are less likely, but with greater impact". AWE presented its proposed approach in relation to consideration of Schedule 3(3) noting that the infrequent weather conditions considered occur 12% of the time at the site and that this was judged by AWE to be sufficiently frequent for consideration in determining the minimum geographical extent for detailed emergency planning. The inspectors concluded that the approach AWE had adopted complied with REPPIR19 and accorded with the guidance for Schedule 3(3)."

The Secretary of State's evidence about national security

62. On behalf of the Secretary of State, Dr AB gave evidence on the significance of national security risks arising from disclosure of the information sought by the Claimants. He explains that the risks include terrorism, espionage, subversion (action to undermine the morale, loyalty or reliability of key sectors of the state) and organised crime. He explains that control of information regarding the materials, processes and risks of accidents on the Burghfield site is essential to combat all the risks referred to. The release of seemingly limited information can, when collated by motivated and effective actors, contribute to presenting a clear danger to UK interests.
63. An application for Dr AB's anonymity was unopposed and is granted.

The Claimants' submissions

64. Mr Harris submits that the deliberate decision of the Council (with the knowledge of the ONR) not to make the key and only publicly facing REPPIR 19 document explaining "the rationale" for the DEPZ available until after the decision was made was procedurally improper and by itself should result in the quashing of this decision. By Regulation 21(10), the Consequences Report must be produced prior to the Council's decision on the DEPZ. There is no other requirement for public notification that would allow the public to begin to understand what is happening. In this case there was no publicly available indication that the DEPZ was being reset in such a profound way. Regulation 21(10) is consistent with the transparency provisions of the 2013 Directive. It cannot have been the intent of the legislature that the setting of the hugely important DEPZ a decision largely driven by a private company with profound consequences for tens of thousands of people and businesses should take place in circumstances where a positive decision had been taken deliberately to keep the public (including the Claimants and other developers) away from the rationale for the decision or from an understanding that the process was ongoing at all until after the important decision.
65. He submits that the requirement for a rationale for the operator's recommendations is a precise and particular requirement of the statutory framework and should be understood in light of the other requirements of the new system which is meant to be more transparent and more consistent across sites. The rationale must include the conclusions of the Consequence Assessment whose results it must also reflect. The provision of a partial rationale is insufficient as a matter of law. The content of the rationale is a matter for the Court and not a matter of discretion for the local authority. The adequacy of judgments of a generalised nature in an environmental statement under the Environmental Impact Assessment regime (EIA) or an environmental report (the Strategic Environmental Assessment regime) addressed by the Court in R(Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 is not apt for the present case. Nonetheless the Divisional Court in Plan B recognised that where an environmental statement is lacking a mandatory component, the Court can conclude that there is non-compliance with the Directive (§ 1640). The better analogy for present purposes is with the law on reasons, which is a matter for the Court. R(CPRE) v Dover District Council [2018] 1 WLR 108 sets out the relevant test laid down in South Buckinghamshire DC v Porter [2004] 1 WLR 1953 at §35 (reasons for a decision must be intelligible and adequate. They must enable the reader to understand why the matter was

decided as it was and what conclusions were reached on the 'principal important controversial issue', disclosing how any issue of law or fact was resolved).

66. He submits that the ONR self-evidently failed in its regulatory responsibilities. It was, at least, a tacit party to the withholding of the Consequences Report. The selection process for its sampling regime was not rigorous or transparent leaving many operator driven DEPZ's effectively unregulated. It also colours the way in which the ONR has operated in the circumstances of this case. The organization did not see itself under any duty to consider the documentation with the result that the assessment consisted of an internal report which was not to be exposed to the rigours of publication. The conclusion that the choice of weather conditions is *"a reasonable basis for the change in the DEPZ"* implies that other less onerous DEPZ were also capable of falling within a reasonable range of conclusions. It mistakes the ONR's role as restricted to a rationality assessment of the operator's decision. This is applying a review threshold of reasonableness to the operator's decision. The ONR relies on prior information which lay in the Inspector's personal knowledge and understanding of the site from previous dealings with the site and also critical information contained in the Hazard Evaluation and Consequence Assessment, neither of which are contained or even summarised in the rationale.
67. He submits, in passing, that Article 1 First Protocol to the ECHR is engaged by the decision but said it adds little to his arguments and did not address the Court further on the point.

Submissions on behalf of the Defendant and Interested Parties

68. Counsel for the Defendant and the Interested Parties supported and adopted each other's submissions. To avoid duplication during the hearing Counsel focussed, in part, in their submissions on discrete limbs of the case against the Claimants. Mr Strachan explained the technical underpinnings of AWE's work. Mr Westmoreland-Smith focussed on regulation by the ONR. Mr Blundell addressed the national security implications of the information in question. Mr Travers explained the Council's position on publication of the Consequences Report in May 2020. Taken together, their submissions may be summarised as follows.
69. Counsel submit that the rationale for AWE's minimum distance for the DEPZ is known and set out in the Consequences Report. The Claimants have misunderstood the objective of requiring a rationale, which is to enable the local authority to carry out its statutory function of setting the boundary of the DEPZ. The local authority does not have any statutory responsibility for, or regulatory role in, reviewing AWE's performance of its duties under REPPIR 19. Where a Consequences Report, as here, contains the necessary legislative requirements, then the question of the adequacy of that information is ultimately a matter of discretion for the local authority as the relevant decision-maker, subject only to challenge on grounds of Wednesbury rationality. They rely, by analogy, on the decision of the Court of Appeal in Plan B in the context of the regimes for Environmental Impact Assessment (Town and Country Planning (Environmental Impact Assessment) Regulations 2017), Strategic Environmental Assessment (Environmental Assessment of Plans and Programmes Regulations 2004) and Habitats Regulation Assessment (the Conservation of Habitats and Species Regulations 2014). Each of these regimes give effect to different European Directives that specify content to be included in an environmental statement, environmental report or habitats assessment respectively. Tested against the Wednesbury standard the Claimants' case is hopeless.
70. They submit that the ONR has performed its statutory regulatory role entirely satisfactorily. It not only reviewed the Consequences Report, but also AWE's underlying internal assessments (the Hazard Evaluation and Consequence Assessment). The ONR was satisfied that each of these documents complied with REPPIR 19 and that AWE has met its statutory duties under REPPIR 19.
71. Counsel submit that the Consequences Report was made public as soon as reasonably practicable. A decision was taken to work up the local authority's emergency plan, which was formally approved on 20 May 2020 and, importantly, the REPPIR Public Information booklet before publishing the Consequences Report. The booklet is sent out to the public. It describes what protective measures to take in the event of an emergency and needed to be carefully worded so as not to cause undue alarm or concern to the public. Producing the booklet also put the local

authority in a good position to answer questions from the public. The booklet was published on 18 May 2020. Further, it made no sense to publish the Consequences Report before the extent of the DEPZ was finalised to avoid creating confusion amongst members of the public as to whether they reside within the zone or not.

Discussion

Introduction

72. It is a well-established principle of judicial review that the scrutiny of the Court's review is dependent upon the circumstances of a particular case ("In law, context is everything": Lord Steyn in R v Secretary of State for the Home Department ex parte Daly [2001] 2 AC 532 at §28). Factors upon which the scrutiny of review particularly depend include: i) the nature of the decision under challenge; ii) the nature of any right or interest the decision seeks to protect; iii) the process by which the decision under challenge was reached; and iv) the nature of the ground of challenge (Plan B Earth at §66 citing from the judgment of the Divisional Court at §151).
73. The requirements of procedural fairness depend on the context, including the statutory framework within which the decision sought to be impugned was taken (R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531 at 560 E)).
74. In my judgment, the following aspects of the present case are of particular relevance to the Court's scrutiny and provide the context for an assessment of procedural fairness; i) the regulatory context of REPPIR 19; in particular the allocation of roles under the regime and the circumscribed access to relevant information; ii) the particular sensitivity of the information underlying the decision under scrutiny; iii) the technical, scientific and predictive assessment underpinning the geographical extent of the DEPZ ; and iv) the specialist expertise of the ONR and PHE.

REPPIR 19

75. The scope of judicial review is acutely sensitive to the regulatory context (R(Mott) v Environment Agency [2016] EWCA Civ 564 (Beatson LJ at §75).
76. The REPPIR Regulations are concerned with emergency planning for radiation emergencies. They are made under the Health and Safety at Work Act 1974. The purpose of the 'Detailed Emergency Planning Zone' (DEPZ) is to set a zone around a site where it is proportionate to pre-define 'protective actions' which can be implemented for public safety in the event of a radiation emergency. The word 'planning' in the term DEPZ is used in the sense of planning to deal with a radiation emergency to mitigate radiological risk to members of the public. The Regulations are not land use planning regulations. Significantly, given the present challenge to the timely provision of information to the public, there is no requirement to consult the public about any land use implications of the designation.
77. The Regulations carefully prescribe the decision making required and, in particular, the roles of the site operator and the local authority. The site operator must produce the Hazard Evaluation, the Consequence Assessment and Consequences Report (Regulations 4,5 and 7). The operator must determine the minimum geographical extent of the emergency planning zone (Regulation 7 and Schedule 2 paragraph 4). The local authority is then responsible for determining the boundary of the emergency planning zone. In doing so it must decide how to translate the operator's recommendation into a workable emergency plan on the ground (Regulation 8). It may extend the area recommended by the operator, to make the zone workable in practice, but it cannot reduce it (Regulation 8). The local authority has no discretion to exclude property interests from the DEPZ where beneficial urgent protective action should be taken in the event of a radiation emergency. Accordingly, the Claimants' commercial aspirations to develop land within the zone are irrelevant to the statutory scheme.
78. The Consequences Report prepared by the site operator must include a 'rationale' for the geographical extent of the zone. The objective of the rationale is to enable the local authority to set the boundary of the DEPZ. Given the nature of the present challenge it is important to emphasise that the local authority does not have any statutory responsibility for the operator's performance of its duties or a regulatory role in reviewing the operator's work. As explained in

the Approved Code of Practice and Guidance for REPPIR 19 *"The local authority is not required to have the expertise to verify the technical basis for the minimum extent set by the operator"* (§195).

79. The Regulations carefully circumscribe the publication of information. In particular, in designating the DEPZ, the local authority does not have access to the Hazard Evaluation or the Consequence Assessment. It is provided only with the Consequences Report.

The sensitivity of the information in question

80. The work undertaken at AWE Burghfield is the assembly, maintenance and decommissioning of nuclear weapons. The Secretary of State for Defence considers some of the information in play in the decision making under scrutiny to be of the utmost sensitivity to the national security of the UK. This includes the materials held at the site, the circumstances under which they are held; the potential risk of accidents involving the materials; the nature of those accidents and their consequences. This sensitivity is recognised and reflected in REPPIR 19 (see above). The sensitivity of the documents mean that the Hazard Evaluation and Consequence Assessment have not been put before the Court. Instead AWE and the Secretary of State have provided witness evidence explaining the technical aspects and the national security context. The Claimants' application for disclosure of the Hazard Evaluation and Consequence Assessment is strongly resisted by the Secretary of State.

The scientific, technical and predictive assessment underpinning the designation of the DEPZ

81. The Court should allow an enhanced margin of appreciation to decisions involving or based upon 'scientific technical and predictive assessments' by those with appropriate expertise. Where a decision is highly dependent upon the assessment of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament) the margin of appreciation will be substantial (R(Mott) v Environment Agency cited by the Court of Appeal in Plan B at §68).
82. The decision at the heart of this challenge is a paradigm example of a highly scientific, technical and predictive assessment. It concerns an assessment of the consequences for public safety of a radiation emergency at the Burghfield site. The assessment has been undertaken by AWE which has contracted in appropriate specialist skill to oversee the project (witness XY) and has employed a project team with specialist skill in mathematical modelling. Through its work the project team identified the worst case scenario to be planned for as an explosion at the site releasing plutonium (an Alpha emitting actinide) in the form of fine particulates of plutonium oxide. The primary safety concern is the public's exposure to *"first-pass inhalation of air in the plume of contamination"*. The project team modelled the resulting plume based on weather conditions which are likely to occur for 12% of the time. In doing so, the team identified a radial distance of 3.16 km from the centre of the site as the distance where taking the recommended urgent protective action of sheltering indoors with doors and windows closed would avert the public's exposure to a specified lower 'Emergency Reference Level', of 3 millisieverts (mSv).

The specialist expertise of the ONR and PHE

83. The ONR is a specialist nuclear regulator established under the Energy Act 2013. Its regulatory objective is to ensure that operators of the 36 licensed nuclear sites in the UK conduct their operations safely and can account for and control nuclear material. In addition it regulates those sites, which include AWE Burghfield under the REPPIR 19 regime. Along with the HSE, the ONR published an Approved Code of Practice and Guidance on REPPIR 19.
84. Public Health England is an operationally autonomous agency of the Department of Health and Social Care. Its Centre for Radiation Chemical and Environmental Hazards have, under contract to the Department for Business Energy and Industrial Strategy (BEIS), published its own guidance on REPPIR 19. The guidance sets out a PHE recommended methodology for Consequence Assessments. The methodology is said to be commensurate with scientific evidence and international good practice. PHE is a consultee under the Regulations for the making of operator

and local authority emergency plans. ONR/HSE REPPIR guidance advises local authorities to liaise with PHE when deciding on the boundary of the DEPZ.

85. The Courts have recognised the need for judicial restraint where the issue under scrutiny falls within the particular specialism or expertise of the defendant public authority. In R(Mott) v Environment Agency Beatson LJ observed that *"a regulatory body such as the [Environment] Agency is clearly entitled to deploy its experience, technical expertise and statutory mandate in support of its decisions, and to expect a court considering a challenge by judicial review to have regard to that expertise"* (§63). In this case the defendant public authority is the local authority which does not itself hold the technical expertise itself to assess AWE's work. Nonetheless it drew on assistance and advice from the ONR and PHE. I consider this to be akin to the position where the defendant public authority relies on experts, which the Courts have acknowledged entitles the public authority to a margin of appreciation (relevant that the defendant *"had access to internal expert advice and the views of external bodies"* in deciding whether there was material before the defendant on which it could rationally be decided that the approval should be made: R(Christian Concern) v Secretary of State for Health and Social Care [2020] EWHC 1546 (Admin)(Divisional Court) at §30 (Singh LJ)) (see also *"Where a screening decision is based on the opinion of experts, which is relevant and informed, the decision maker is entitled to rely upon their advice"*; Lang J in R (Swire) v Secretary of State for Housing Communities and Local Government [2020] EWHC 1298 (Admin) at §61).

Drawing the threads together

86. Drawing these threads together: first; it is apparent from the regulatory framework that a number of the concerns about the decision making which Mr Harris raised in oral submissions are an undisputed product of the regulatory framework which the Court must respect (pursuant to the principle of legislative supremacy). Concerns of this nature expressed by Mr Harris include the autonomy given to, in his words, the 'privately run' site operator, AWE, to determine the minimum geographical extent of the DEPZ; the consequent shift in responsibility away from the, in his words, 'independent' ONR; the restriction of information available to the local authority and public as well as the absence of public consultation on a proposed DEPZ.
87. Secondly; the Claimants challenge the local authority's decision to designate the boundary of the DEPZ based on a radius of 3160m yet their real aim is AWE's technical assessment of the appropriate distance. In these circumstances, it must be borne in mind that the local authority does not have any statutory responsibility for the operator's performance of its duties or a regulatory role in reviewing its work. The local authority's role is limited to deciding how to translate the operator's recommendation into a workable emergency plan on the ground.
88. Thirdly; the Court must afford a margin of appreciation to the highly technical, scientific predictive assessment by AWE which was reviewed by a specialised statutory regulator (ONR) and statutory consultee (PHE).
89. Separately, the process by which the decision under challenge was reached is one of the factors which influences the degree of judicial scrutiny (Plan B (see above)). This is a case where the Claimants contend that a key document produced during the regulatory process is unlawful and that regulatory oversight of the process has been deficient. The document in question was reviewed as part of the regulatory oversight. Moreover, absent an order for disclosure, which is strongly resisted on grounds of national security, the Court does not have all the material relevant to the decision making before it. In these circumstances I consider it appropriate to analyse the nature and quality of regulatory oversight before turning to the criticisms of the particular document. This is because my approach to the review of the document may be coloured by my assessment of the regulatory oversight. Accordingly, I start with Ground 2 of the challenge.

Regulatory oversight of the designation process (Ground 2)

90. When the Claimants initiated these proceedings and at the point at which the Court granted permission, the ONR's position was expressed by its terse statement that *"The ONR played no part in the decision under challenge"*. It maintained this position in pre-action correspondence and its Acknowledgement of Service despite assertions to the contrary by the other parties.

Unsurprisingly, permission for judicial review was granted by Lieven J with the observation that *"the role of ONR in the decision making process is not clear from the documents that have been submitted to the court. It is arguable that here [sic] was not the regulatory oversight required by REPPIR 2019".*

91. Since then, the ONR has provided the Court with detailed evidence of its regulatory oversight. It instructed Mr Westmoreland-Smith for the substantive hearing. There is now a wealth of material before the Court, summarized above in the chronology of regulation and the outline of Mr Thomas' evidence.
92. The material now before the Court demonstrates that ONR provided multi-layered oversight through 2019 and 2020 in its role as a specialized regulator. There were three elements to its oversight:
    a. general advice and assistance to duty holders under REPPIR 19 during the transition period. This extended to correspondence with the Council on the Burghfield designation; participation in meetings organized by the Council and reviewing its determination. Evidence of the significance of the assistance provided is apparent from the Council's minutes of a meeting on 18 February 2020:
    "This meeting underlined the importance of ONR's presence at meetings such as this to provide independent advice and clarification of the legal requirements which will support the duty holder's (West Berks Council) endeavours to achieve compliance within the tight timescales."
    b. A detailed review of AWE's recommendation for the DEPZ pursuant to its regulatory tool of 'sampling' by which it selected and reviewed the work of particular operators and local authorities.
    c. A wider ongoing regulatory relationship with AWE which it drew upon to inform its assessment of AWE's work.
93. AWE's recommendation that the minimum geographical extent of the local authority's off site emergency plan should be a radial distance of 3160m from the site centre location was assessed and approved by both the ONR and Public Health England:

> *"Overall, subject to confirmation of the technical adequacy of the consequence analysis by the ONR radiological consequence inspector, I judge that the technical extent of the DEPZ given to the WBCC local authority for the AWE site in the REPPIR 19 submission is a reasonable basis for detailed radiological emergency planning purposes."* (ONR (February 2020))
>
> *"Based on the information provided by AWE in the Consequence Reports for… Burghfield … and the supplementary information provided by email, PHE believes that West Berkshire Council should consider adopting the recommendations of… implementing the minimum distance of 3160 metres radially for the Burghfield site…"* (PHE (January 2020))

94. The choice of weather conditions was understood by the ONR and PHE to explain the significant enlargement of the DEPZ compared with the previous designation of 1600m under REPPIR 01. In particular, the move away from assessing the dispersion of any radiation plume by reference to weather conditions present at the site for 55% of the time to weather conditions at the site 12% of the time. This aspect of AWE's work was carefully scrutinised by the ONR at a meeting in September 2019 and a follow up teleconference with more senior representatives from both organisations. Separately, PHE questioned AWE's choice of weather conditions in its assessment.
95. The ONR also reviewed the Council's determination of the DEPZ and confirmed the Council's analysis and procedure were compliant with Regulation 8 of REPPIR 19.

96. Mr Harris criticized the ONR's use of sampling as a regulatory tool, which he said meant that the merits of a designation were not considered in all cases. However, this is not a relevant criticism in this case where the ONR *did* engage in detailed oversight of the work by AWE and the Council. The ONR's Enforcement Policy Statement (April 2019) makes clear that sampling is a tool used by the ONR in performance of its regulatory duties. Mr Westmoreland-Smith explained that sampling accords with the BEIS Regulator's Code which advises basing regulatory activities on risk.
97. Mr Harris criticised the ONR's assessment that the choice of weather condition "*forms a reasonable basis for the change in DEPZ"* on the grounds that it did not signify a transparent comprehensive regulatory assessment. It was, he said, only an assessment of reasonableness of AWE's decision not an assessment of its merits. I do not accept that the use of the word 'reasonable' should be interpreted as if it appeared in an Administrative Court judgment. The ONR were simply expressing a judgment that the scientific analysis was reasonable. REPPIR 19 guidance makes clear that the operator is entitled to exercise its judgement in taking account of the range of weather conditions provided it can justify assumptions and judgments made (§656/7). In turn, the ONR has exercised its judgement in assessing AWE's position. Where a decision maker has a wide discretion conferred by statute, it is for the decision maker to decide the manner and intensity of inquiry to be undertaken subject only to Wednesbury review (Laws LJ in R(Khatun) v Newham [2005] QB 37). It is not unlawful for a regulator to draw on its wider knowledge and experience of a company it regulates in the course of its regulatory assessment.
98. I do not accept Mr Harris' criticism that the ONR's approval was recorded in an unpublished internal document. There is no requirement for publication under REPPIR 19.
99. Ground 2 fails.

The Consequences Report – rationale and provision to the public (Ground 1)

The rationale

100. Part 3 of Schedule 4 REPPIR requires the operator to set out the rationale for its recommendation on the minimum distances for which urgent protective action may need to be taken. There is no definition or further explanation in the Regulations, the ACoP or the guidance as to what the rationale must cover.
101. There is clearly a rationale of some sort in the Consequences Report. Part 3 is headed 'Rationale' and there follows seven paragraphs of text. Paragraph f) of the text explains that the extension of the DEPZ to a minimum radius of 3160m was due to the consideration of the weather conditions that occur for 12% of the time. I reject the Claimants' initial case that there was 'no rationale'. Mr Harris' concession that the rationale is 'at best a partial rationale' was sensible.
102. The question becomes, therefore, whether the rationale is adequate and whether this is a matter for the Court, as Mr Harris submitted, or the local authority decision maker, as the Defendant and Interested Parties submitted.
103. It is now well-established in the context of environmental impact assessment under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, strategic environmental assessment under the Environmental Assessment of Plans and Programmes Regulations 2004 and habitats regulation assessment under the Conservation of Habitats and Species Regulations 2017, each of which give effect to different European Directives that specify content to be included in an EIA, SEA or HRA respectively, that questions as to the adequacy of the information provided in such documents is a matter for the relevant decision-maker. The various cases were considered most recently by the Divisional Court in R(Plan B Earth) v Secretary of State for Transport [2019] EWHC 1070 (Admin) at § 419-431 and referenced in the Court of Appeal's judgment upholding the Divisional Court's approach ([2020] EWCA Civ 214) at §126 onwards. Moreover, the standard of review by the Court of conclusions reached by the decision-maker in addressing those processes is one of standard Wednesbury rationality (even for HRA under the Habitats Directive where the 'precautionary approach' applies and the Directive imposes substantive, as opposed to merely procedural, processes).
104. As the Divisional Court in Plan B stated in respect of the SEA Directive at §434:

> *"434. Where an authority fails to give any consideration at all to a matter which it is explicitly required by the SEA Directive to address, such as whether there are reasonable alternatives to the proposed policy, the court may conclude that there has been non-compliance with the Directive. Otherwise, decisions on the inclusion or non-inclusion in the environmental report of information on a particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the plan-making authority. Where a legal challenge relates to issues of this kind, there is an analogy with judicial review of compliance with a decision-maker's obligation to take reasonable steps to obtain information relevant to his decision, or of his omission to take into account a consideration which is legally relevant but one which he is not required (e.g. by legislation) to take into account ([Secretary of State for Education and Science v Tameside Metropolitan Borough Council[1977] AC 1014, at p.1065B]; [CREEDNZ Inc. v Governor-General [1981] N.Z.L.R. 172; [In re Findlay [1985] A.C. 318, at p.334]; [R. (on the application of Hurst) v HM Coroner for Northern District London [2007] UKHL 13; [2007] A.C. 189, at paragraph 57]). The established principle is that the decision-maker's judgment in such circumstances can only be challenged on the grounds of irrationality (see also [R (on the application of Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37, at paragraph 35]; [R (on the application of France) v Royal London Borough of Kensington and Chelsea [2017] EWCA Civ 429; [2017] 1 WLR 3206, at paragraph 103]; and [Flintshire County Council v Jeyes [2018] EWCA Civ 1089; [2018] ELR 416, at paragraph 14])..."*

105. Having cited the quotation above, the Court of Appeal in Plan B put matters shortly:

> *"The question here goes not the principle of an appropriate role for the Court in reviewing compliance with [the SEA Directive]. That principle is of course uncontroversial. We are concerned only with the depth and rigour of the Court enquiry. How intense must it be?*
> *The answer, we think, must be apt to the provisions themselves..."*

106. Turning then to the REPPIR 19 regime: the purpose of the Consequences Report is to assist the local authority in deciding on the boundary of the DEPZ. Like an EIA, SEA or HRA, Regulation 7 of REPPIR 2019 sets out requirements as to what must be included in a Consequences Report. It must include the particulars set out in schedule 4. They include: specified factual information (Part 1); the recommendations as to the proposed minimum geographical extent of the off-site emergency plan and zone for urgent protective action (Part 2); and the rationales supporting each recommendation made in the Consequences Report (Part 3).
107. The Regulations do not envisage that the Consequences Report is the only source of information for the authority in its decision making. Regulation 7(4) requires the operator to offer a meeting to the local authority to discuss the report. Regulation 7(5) provides that the operator must comply with any reasonable request for information made by a local authority, following receipt of the consequences report. REPPIR 19 guidance suggests the local authority liaise with relevant organisations to identify any issues or improvements to the DEPZ boundaries, including emergency responders; regulators and PHE (§200). Parallel provisions of the SEA regime were considered in the Supreme Court's decision in Plan B [2020] UKSC 52 which was handed down during the course of the hearing. The Court stated that:

> *"66. In Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2, Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the*

> *SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111-126). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88; [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48-54). We agree with this analysis.*
>
> *67. It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7."*

108. I accept there are differences between the environmental regimes and REPPIR 19. In particular, the local authority is not required to assess the operator's work and does not have the technical expertise or information to do so. This difference may well assume more prominence in circumstances where the ONR and PHE have not reviewed the work of the operator but that is not this case. Accordingly, I consider that the differences do not, in the circumstances of this case, justify a divergence in the intensity of the review.
109. Even if I am wrong on the parallels between the regimes, the analysis of the Divisional Court in Plan B was rooted in broader public law principles which are applicable to the present case:

> *"Although any administrative decision-maker is under a duty to take all reasonable steps to acquaint himself with information relevant to the decision he is making in order to be able to make a properly informed decision (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1997] AC 1014), the scope and content of that duty is context specific; and it is for the decision-maker (and not the court) to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor (R (Khatun) v London Borough of Newham [2004] EWCA Civ 55; [2005] QB 37 at [35]). Therefore, a decision ... as to the extent to which it considers it necessary to investigate relevant matters is challengeable only on conventional public law grounds."*
> (R(Jayes) v Flintshire County Council [2018] EWCA Civ 1089 Lindblom LJ said at [14]; referred to by the Court of Appeal in Plan B at [434 above])

110. I do not accept Mr Harris' reliance on the South Bucks v Porter test as to the adequacy of reasons. The Consequences Report is produced as part of a process which leads to the designation of the DEPZ. It is not akin to the grant of planning permission under scrutiny in R(CPRE) v Dover [2018] 1 WLR 108 or the Planning Inspector's decision letter in South Bucks v Porter [2004] 4 All ER 775.
111. Applying the Wednesbury test to the facts of this case, I am not persuaded that the local authority can be said to have acted irrationally in circumstances where (1) the Consequences Report sets

out a rationale for the recommended minimum distance; (2) the rationale has been produced by an operator with specialist skills; (3) the rationale has been independently reviewed by ONR who have confirmed that it meets the requirements of REPPIR 19; (4) it has been further independently reviewed by PHE CRCE who have also confirmed it meets the requirements of REPPIR 19; (5) there is no suggestion from the Council that it was not able to carry out its function on the basis of the rationale provided.

112. Mr Harris submitted that one of the main functions of the Consequences Report was to present the conclusions of the Consequence Assessment. He took the Court to a flow diagram in the ACOP (Appendix 2 Figure 8 (c)) and suggested that the tasks set out in the diagram must be performed (or something close to them) in order to produce a transparent rationale for the recommended distance. He pointed to the guidance explaining that for premises where inhalation is the dominant exposure pathway the outdoor effective dose of 7.5mSv can be used as a surrogate for identifying the initial candidate minimum distance for the urgent protective action of sheltering. The rationale, he submitted, simply did not explain how that surrogate dose of 7.5 mSv was translated by AWE into a distance of 3160m on the ground. Where that is on the ground, he said, will depend upon the detailed radiological consequence assessment and calculations required in the Hazard Evaluation and Consequence Assessment. In turn, this would depend on the nature and types of isotopes released; their quantities; the form of the released materials; the nature of the release in terms of the nature of the explosion and explosive distribution and how the isotopes travelled; their speed; release height and building effects, amongst other factors. Nor was it sufficient to simply state that the change in weather conditions relied on since REPPIR 01 was responsible for the extension. The question, he submitted, was why the specific distance of 3160m is justified on the new analysis.

113. In my view Mr Harris' submissions elide the Consequence Assessment and the Consequences Report which are separate documents with different functions under REPPIR 19. The purpose of the Consequences Report is to assist the local authority in designating the boundary. It is not to enable the local authority to review AWE's work. The detail sought by Mr Harris is not necessary for the task of the local authority.

114. I do not accept Mr Harris' criticism that the rationale was too focused on the change in extent of the zone since 2001. There is an explanation of the change but it does not represent the entirety of the rationale. The analysis extends more broadly.

115. Mr Harris pointed to the minutes of a meeting between ONR and AWE on 10 September 2019 which highlights that AWE was working to an earlier version of the ACoP/guidance. He suggested that it showed that AWE had failed to appreciate that later guidance enabled the company to exercise its judgement about the choice of less likely weather conditions. In my view there is nothing unlawful about this ordinary piece of regulatory dialogue and advice. The Court was told during the hearing that ACoP draft versions being produced on a regular basis and there can no legitimate basis for criticism of this. The regulatory dialogue continued with further meetings before the ONR's regulatory assessment in February 2020.

Was the Consequences Report provided as soon as reasonably practicable?

116. The requirement in Regulation 21(10) that the local authority make the Consequences Report available to the public 'as soon as reasonably practicable' must be assessed in the context of the Regulations. This timescale appears in several places in the Regulations. Thus, the operator must prepare a Consequences Report *"as soon as reasonably practicable"* on completion of the consequence assessment which must be sent to the local authority *"before the start of any work with ionizing radiation"* (Regulation 7(2)). In the event of a radiation emergency the local authority must assess the situation *"as soon as reasonably practicable in order to respond effectively to the particular characteristic of the radiation emergency"* (Regulation 17(4) & (5)). It is clear that 'as soon as reasonably practicable' in the above two examples could vary materially. In the case of the radiation emergency the timescale may need to be minutes. Elsewhere the Regulations are more prescriptive. Thus, the operator must produce the Hazard Evaluation *"before any work with ionizing radiation is carried out for the first time at those premises"* (Regulation 4(1)) and review it within 3 years (Regulation 6(1)). The Consequence Assessment

must be completed within two months of completion of the Hazard Evaluation (Regulation 5(2)). Work with ionizing radiation must not be carried out before the production of the emergency plans by the local authority and operator (see Regulation 10(4)).

117. Regulation 21(1) requires the local authority to ensure that members of the public are made aware of relevant information which is said to include basic facts about ionising radiation and the nature of potential emergencies (Schedule 8). Regulation 21(1) does not specify a timescale for the provision of the information. Significantly however; the information required by Regulation 21(1) and the Consequences Report required by Regulation 21(10) is not provided for the purpose of public consultation on the extent of the DEPZ. There is no such requirement in Regulation 21 or elsewhere in the Regulations. In this context, the Consequences Report may be published before finalization of the DEPZ but it need not be.

118. The Consequences Report was sent to the Council on 20 November 2019 and the ONR on 21 November 2019. It was disclosed to the Claimants six months later on 22 May 2020. Mr Travers explained that this timetable was driven by a decision to finalise the DEPZ, the Emergency Plan and a public information booklet before publishing the Consequences Report. This was so as to avoid causing undue alarm or confusion amongst the public. In my judgement, that is a legitimate and rational exercise of the local authority's discretion on timings under Regulation 21(10). The minutes of a meeting organized by the Council on 18 February 2020 provide evidence for the prudence of this approach:

> *"The meeting was emotionally charged for a number of reasons:*
> - *Two of the councils had only very recent knowledge of the Burghfield site and learning how some of their residents could be affected in an emergency was alarming."*

119. I reject therefore Mr Harris' submission that the Council's approach in this respect was 'improper'.

120. No evidence has been put forward to counter the Council's case that it was not reasonably practicable to finalise the DEPZ; the emergency plan and the public information booklet before May 2020. Mr Harris submits that the failure to inform the Claimants was particularly egregious because they were in weekly contact with the local authority about its proposed development. It is clear from the documents before the Court that both the local authority and Wokingham Borough Council were alive to and concerned about the implications of the DEPZ on the Claimants' development project. Nonetheless, the Claimants' commercial aspirations to develop their land are not relevant to the legislative regime.

121. To support his argument, Mr Harris pointed to Articles 76 and 77 of the 2013 Euratom Directive and, in particular, the stipulation in Article 77 which is titled 'Transparency' and provides that:

> "*Member States shall ensure that information in relation to the justification of classes or types of practices, the regulation of radiation sources and of radiation protection is made available to undertakings, workers, members of the public, as well as patients and other individuals subject to medical exposure. This obligation includes ensuring that the competent authority provides information within its fields of competence. Information shall be made available in accordance with national legislation and international obligations, provided that this does not jeopardise other interests such as, inter alia, security, recognised in national legislation or international obligations."*

122. Even before the UK ceased to be an EU Member State, the starting point for any legal analysis was the domestic implementing legislation. In the vast majority of cases that would provide the answer. Only exceptionally in cases where the law was unclear or failed properly to implement the underlying EU instrument was it necessary to look to the latter. The legal developments consequent upon the UK ceasing to be an EU Member State on 31 January 2020 make it even more important that any legal question involving rights or obligations said to be derived from EU

law should now be approached in the first instance through the lens of domestic law (Polakowski & Ors v Westminster Magistrates Court & Ors [2021] EWHC Civ 53 at §17 & 18).

123. Article 77 is a broad obligation aimed at the provision of information for the protection of public safety, which is the function of Regulation 21(10). It does not assist the Court with an analysis of the domestic requirement to publish 'as soon as reasonably practicable'. The Article cannot be equated with any right for the Claimants to make representations to reduce the emergency safety zone, which may be said to necessitate speedier publication. Nor can it be said that the Article has not been implemented properly. The last sentence of the Article makes clear that the transparency obligation is subject to security interests which are at the forefront of REPPIR 19 which enables information to be provided to relevant interested parties, as and when appropriate, and in a manner which respects both the relative expertise and competence of those parties, as well as the highly sensitive nature of the information in question.
124. Ground 1 fails.

The Claimants' Application for Disclosure

125. The Claimants initially sought disclosure of the Hazard Evaluation and Consequence Assessment as a final, rather than an interim, remedy. In his Summary Grounds of Defence, the Secretary of State made clear his resistance to the disclosure of those documents. In their Reply, the Claimants acknowledged, that *"the Hazard Evaluation and Consequence Assessment would ordinarily not need to be disclosed"*, but the disclosure application was maintained, it was said, because the Consequences Report did not contain the required information. The Claimants sought a hearing of the disclosure application 'promptly'. When granting permission in July 2020 Lieven J left over the question of the Claimants' disclosure application until after the service of Detailed Grounds of Defence and evidence and made clear that any such application should be made promptly at that stage. The Secretary of State maintained his resistance to disclosure in his Detailed Grounds and Evidence (filed 15 September 2020). The Court has been told that despite repeated requests from the Secretary of State and AWE to make their position clear, the Claimants refused until the disclosure application was renewed by way of application dated 17 November 2020 in which it was proposed that the application be dealt with at the substantive hearing.
126. In oral submissions, Mr Harris explained the Claimants' position as follows. The primary claim is that the decision should be quashed and the decision remade. In these circumstances disclosure will not be required. If the decision is not quashed then, the information within the Hazard Evaluation and Consequence Assessment dealing with the rationale *"will be hugely important to the Claimants' proper understanding of the impact on the DEPZ on its land going forward and particularly its deliverability in whole or in part"*.
127. Mr Blundell contends that the Claimants are not entitled to disclosure in principle of either document.

The test for disclosure

128. It is well-established that the position in respect of disclosure in judicial review proceedings is that "disclosure of documents has usually been regarded as unnecessary and that remains the position": Tweed v. Parades Commission for Northern Ireland [2006] UKHL 53, [2007] 1 AC 650, per Lord Bingham at [2]. The test for disclosure is whether *"disclosure appears to be necessary in order to resolve the matter fairly and justly"*, per Lord Bingham at [3].
129. I am entirely satisfied that disclosure is not necessary to resolve the matter fairly and justly. Mr Harris conceded the point in submissions when stating that disclosure was sought in the event the Court did not quash the decision, on the basis it *"was hugely important to the Claimants' understanding of the impact of the DEPZ on its land going forward"*. Acceding to an application for disclosure made on this basis would subvert the statutory regime in the Regulations which contain a carefully formulated regime of information disclosure which Parliament has endorsed.
130. In these circumstances the application for disclosure is refused.

Conclusion

131. For the reasons set out above the claim fails and the application for disclosure is refused.