Newsletter

BURGES SALMON

Nuclear Law

Spring 2014

Welcome

Welcome to this Spring 2014 Edition of the Burges Salmon Nuclear Briefing. I hope you find this Briefing useful and informative. If you would like to see particular issues explored in future Editions or you have any questions you would like answered please do not hesitate to let me know. on +44 (0) 117 939 2225 or email ian.salter@burges-salmon.com

Consultation closure dates:

Electricity Market Reform (EMR) Contracts for Difference Regulations - closes 23 April 2014

Strategy for the management of Naturally Occurring Radioactive Material (NORM) waste in the UK - closes 8 May 2014.

NIA Application to justify the UK Advanced Boiling Water Reactor - closes 13 May 2014.

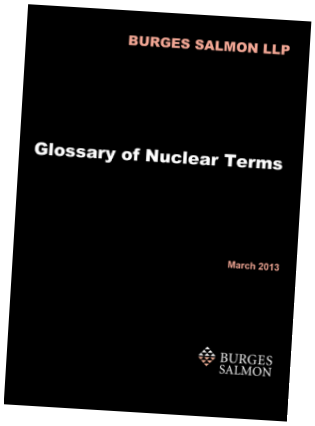
Management of overseas origin nuclear fuels held in the UK - closes 28 May 2014.

Contents

Introduction

It has been a busy Winter and Spring since our last Nuclear Briefing. Burges Salmon hosted a table at the annual NIA/NI London Dinner in December. Both the Burges Salmon team and our guests were delighted when our colleague Gareth Davies received the 2013 Young Generation Network Award for Outstanding Contribution to the Nuclear Industry.

In between assignments we have been writing the next Edition of the Burges Salmon Guide to Nuclear Law. This Second Edition will build on the themes and subjects set out in the first Edition, but update and revise them. We are also delighted to be co-writing some of the new chapters with nuclear sector expert specialists. We aim to have the Second Edition published and ready for distribution in June. If you are interested in receiving a copy please do not hesitate to contact either myself or Gareth. (If you have Edition 1 you should receive Edition 2 automatically).



We are also currently reviewing and updating the Burges Salmon Glossary of Nuclear Terms. It is out with the peer reviewers as we speak and anticipate the 2014 version release within the next 6 weeks. Again if there is anything you would like to see included in the Glossary or would simply like a copy please let Gareth or myself know.

Ian Salter, Partner, Head of Nuclear

Transportation of construction materials for nuclear new build: Is rail a viable and cost-effective logistical solution in the UK?

With the UK's nuclear new build program gathering momentum, attention is now turning not just to what can be done, but *how*. There are many logistical challenges facing nuclear new build, and the movement of construction materials is a very real one. We explore below the viability of rail as an alternative to road transportation for construction (i.e. non-radiological) materials, the main advantages, and some other important considerations.

Rail is perfectly suited to the movement of construction materials, allowing for the transportation of heavy and unusual loads which would be difficult or impossible by road. Transporting construction materials for large projects by rail is not a new or novel concept - around 50% of the construction materials required for the London Olympics were transported by rail for example.

Rail is also perceived to have other genuine advantages over road. Rail is: more *reliable* due in

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Is rail a viable and cost-effective logistical solution in the UK? *continued*

part to the absence of road congestion and reliability is improving year on year; more *cost-effective* particularly over longer journeys (with cost neutrality generally achieved at around 130 miles); *safer* with less (virtually zero) accidents/incidents; more *secure*; can sometimes be more *customer-focused*; and more *sustainable* (one tonne of materials transported **88 miles** by road produces approximately the same amount of CO2 as one tonne of materials transported **246 miles** by rail. Lower CO2 emissions may also give rise to tax advantages).

It is unlikely, however, that rail will provide the complete solution for nuclear 'new build' and will likely be used in conjunction with transportation by road and sea. Rail for example can only bring materials to the nearest rail terminal (with the remainder of the journey perhaps completed by road), unless new private sidings are constructed (bringing the track and the freight trains directly to site). New sidings represent a significant private investment, although once completed and connected to the mainline, could be maintained by Network Rail (at the site's cost). Any new sidings to be connected to the mainline must meet the minimum requirements and standards of Network Rail, and Freight Operating Companies (**FOCs**) have their own technical specification requirements which may also need to be met.

There are a handful of FOCs operating across Great Britain. Unlike passenger services, these are not franchised by geographical location (although some FOCs tend to operate in limited geographical areas). FOCs run freight services under licence from the Office of Rail Regulation (**ORR**), although it is Network Rail's responsibility (as owner of the infrastructure) to allocate train paths. Competition with existing passenger services and other FOCs can make getting train paths a tricky and challenging process - the earlier you can engage with FOCs and Network Rail, the better.

It is equally important to engage with FOCs as early as possible to ensure that they have the necessary licences and permits to carry the loads required and access the necessary geographical locations (FOCs may need to pass on additional charges for track and depot access). FOCs will also be able to arrange and advise on available train paths within the operational timetable. Size and weight restrictions on particular routes will need to be considered. There could be further logistical hurdles to overcome in supplying the correct number and type of trains/wagons required at the right times and in the locations needed.

In summary, whilst rail can be a genuine solution to the logistical challenges faced by nuclear new build and there are a number of distinct advantages over road transportation, there are many other relevant considerations from network capacity to ORR licences and access to contend with. For rail to be able to solve these problems and deliver on time, the clear message is to engage fully with FOCs, Network Rail and ORR as early as possible.

For further details please contact Michael Bray, +44 (0)117 939 2290 or email him at michael.bray@burges-salmon.com or Philip Beer, +44 (0)117 307 6904 or email him at philip.beer@burges-salmon.com

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An Taisce v SoS for Energy and Climate Change

The Queen on the application of An Taisce (The National Trust for Ireland) v The Secretary of State for Energy and Climate Change [2013] EWHC 4161

(**Interested parties:** NNB Generation Company Limited (wholly owned by EDF); Minister for Environment; Community and Local Government, Ireland, Attorney-General, Ireland)

Background facts

This case concerned an application for judicial review by An Taisce, of the decision to grant a development consent order on the 19th March 2013 for a new nuclear power station at Hinkley Point C. An Taisce made its claim on a number of fronts:

1. the defendant had failed to comply with Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 and/or Article 7 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment;
2. the defendant did not consider "unlikely", but nevertheless possible, impacts from other scenarios;
3. the defendant omitted to take into account possible impacts arising from unplanned or accidental effects of the development; and
4. Article 7 of Directive 2011/92/EU is unclear and the court should therefore make a reference to the Court of Justice of the European Union.

The case was heard as a 'rolled up' hearing meaning the application for permission to proceed with judicial review and the substantive hearing itself were both held together.

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An Taisce v SoS for Energy and Climate Change *continued*

Judgment

The judge first addressed the issue of how Article 7 of Directive 2011/92/EU - which concerns the notification procedure where a project is “likely” to affect another member state - should be interpreted. The claimant alleged that any potential effect of the project that cannot be ruled out must be regarded as "likely". Mrs Justice Patterson disagreed with this analogy, stating that this approach was "not consistent with the scheme or language of the Directive or the 2009 Regulations."

The judge then turned to the issue of whether the defendant had failed to comply with the 2009 Regulations and/ or the Directive and what approach the court should take under this heading. It was decided that this aspect of the claim should be decided on Wednesbury review grounds. In finding against the claimant on this ground, the judge cited the that contrary to the claimant's assertions, the Secretary of State had taken into account the prospect of a severe accident in coming to his decision to grant development consent and had regarded such an occurrence as "no more than a bare possibility."

Under the above argument, the claimant had also questioned the relevance of the regulatory regime in influencing the Secretary of State’s decision to grant development consent. The judge dismissed this, stating that there was no reason that the “stringent regulatory regime” for nuclear installations should be precluded from the Secretary of State’s decision-making process, as this regime would impact future control of the site.

The judge confirmed she had heard full argument but noted that permission was not granted to bring judicial review proceedings.

Implications

This judgment can be viewed as a success for the nuclear industry in terms of the fact that once development consent for a new nuclear installation has been granted, while challenge to the decision will always be likely, a successful challenge will not. Further, the discussion of the interpretation of “likely” impacts of a nuclear installation on other member states as provided for under Article 7 of Directive 2011/92/EU indicates that contrary to the arguments posed by the claimant in this case, the interpretation of “likely” should be given its plain language meaning, and not “any effect that cannot be ruled out must be considered as “likely”.”

Appeal

We understand in the last few days that permission to bring judicial review proceedings has been granted by the Court of Appeal. We will report in future briefings the outcome.

For further information please contact Patrick Robinson on +44 (0)117 902 2740 or email him at patrick.robinson@burges-salmon.com.

New Environmental Offences definitive guidelines

The following article appears in the Spring Edition of **Nuclear Connect** magazine. Burges Salmon has a regular legal column in this magazine.

On 26 February 2014 the Sentencing Council published new guidelines for judges and magistrates on sentencing environmental offences. These guidelines will impact upon those both working in the nuclear industry and elsewhere and take effect from 1 July 2014.

This is the first time guidelines have been produced for environmental offences and it sets out twelve clear steps to be followed whenever sentencing individuals or organisations of such an offence. One of the aims of the guidance is to help categorise offences and offenders in order that a consistent approach can be taken and that the calculation of fines is proportionate to the size of the offender and the seriousness of the offence. This follows the conclusions of the Sentencing Council that the levels of some fines

were previously too low and did not reflect the seriousness of the offence committed.

The development of sentencing guidelines over time

Sentencing in the past has been based on a number of recognised mitigating or aggravating factors which have been developed through various cases.

These factors were established by the Court of Appeal to determine penalties in the health and safety case of *R. v F Howe & Son (Engineers) Ltd [1999] 2 All E.R. 249* and can be seen reflected in the new guidelines.

New Environmental Offences Definitive Guidelines *continued*

The *Sea Empress case* then applied the same factors to an environmental offence. This was the memorable case from 2000 in which the Milford Haven Port Authority was fined after the Sea Empress oil tanker was grounded upon rocks as she was being guided into port by a pilot employed by the Port Authority. In this case the Court held that it was not necessary to frame guidelines for sentencing, but there were a number of factors relevant to sentencing which should be considered. In applying *Howe*, the Court of Appeal considered the size, structure and financial position of the Port Authority, and concluded that, whilst a substantial fine was needed to mark the seriousness of the offence, it should not be so heavy to destroy the Authority's business with consequent impact upon the local economy. The Port Authority successfully argued the fine was manifestly excessive and consequently had it reduced to £750,000 from £4m.

Recently, in January of this year, the Court of Appeal dismissed an appeal by Sellafield Ltd regarding a fine of £700,000 for offences relating to the disposal of radioactive waste. In dismissing the appeal the Court considered the same factors for determining the appropriate level of fines. It however concluded that in this case a £700,000 fine represented only 2% of the company's weekly turnover and therefore could not be criticised.

The Sellafield Ltd appeal was heard in conjunction with an appeal by Network Rail Infrastructure Ltd, another huge national company with a weekly turnover of £119m and profits of £14.4m. Network Rail was appealing against a fine of £500,000 following a collision at an unmanned level crossing which resulted in very serious injuries to a child. The Court of Appeal again considered the structure of the company and found that any fine imposed would not inflict any direct punishment on shareholders and could be said to harm the public. They concluded however, that a fine of £500,000 already reflected a sizable discount for the mitigation advanced and a materially greater fine again could not be criticised.

The new guidelines

However, once the guidelines come into effect on 1 July 2014, the courts will be required to consider all twelve of the sentencing steps. In particular, the following steps are key in setting the level of the fine:

Step 3
Determining the offence category

This considers both the culpability of the offender and harm caused:

(a) The culpability of the offender can fall into Deliberate, Reckless, Negligent, Low or No culpability.

(b) Harm caused is categorised into four categories with examples provided of the seriousness of the harm caused or risk of harm caused.

Step 4
Starting point and category range

This provides a sliding scale of fine taking into account the size of the organisation. By applying the offence categories to the sliding scale for the offending company the starting point of the fine in pounds and the range of fine can be calculated. These go up to a quoted maximum of £3m but may be greater for companies falling into the 'Very Large' category. The company size is broken into five categories:

(a) Micro - Turnover or equivalent: not more than £2 million;

(b) Small - Turnover or equivalent: between £2 million and £10 million;

(c) Medium - Turnover or equivalent: between £10 million and £50 million;

(d) Large - Turnover or equivalent: £50 million and over;

(e) Very Large - Where a defendant company's turnover or equivalent very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

Once the starting point for the fine has been calculated then there are a series of factors that increase or reduce the seriousness of the offence and these can trace their roots back to the cases considered above.

Step 6
Check whether the proposed fine based on turnover is proportionate to the means of the offender

The guideline states that: "The combination of financial orders must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance."

This final point is one which large companies will need to be aware of and which has caused concern that fines against large companies may be likely to rise once the guidelines come into effect.

In conclusion, it will be interesting to see how the guidelines are used and applied when they come into force in July and, in particular, whether the levels of fines set will differ greatly from those we have seen to date.

For further information please contact Cheryl Parkhouse on +44 (0)117 902 6640 or email her at cheryl.parkhouse@burges-salmon.com.

Nuclear liability update on implementation of revised Paris Convention

We understand that most signatory countries have now completed the changes to their national legislation, or will soon do so, and DECC are preparing to lay the UK Order in Parliament possibly before the summer recess. There is apparently agreement with co –signatory countries to work towards ratification by the end of this year – although a meeting of the Contracting Parties will review the position in September.

DECC are we understand continuing to work on means of excluding VLLW/LLW from the regime.

In the office

Burges Salmon advises Nuclear Decommissioning Authority on Magnox/ RSRL decommissioning contract

Burges Salmon has advised the Nuclear Decommissioning Authority (NDA) in the competition that has led to the appointment of Cavendish Fluor Partnership as the preferred bidder to take over ownership of Magnox Limited and Research Sites Restoration Ltd.

The other participants were CAS Restoration Partnership (CH2M Hill, Areva and SERCO), UK Nuclear Restoration Ltd (AMEC, Atkins, Rolls Royce) and Reactor Site Solutions (Energy Solutions and Bechtel).

Nuclear Institute/Young Generation Network Legal and Commercial Seminar to be hosted at the Burges Salmon London Office on 24 April

After the success of last year's YGN Legal and Commercial Seminar, and for the third year running, Burges Salmon is pleased to have been asked again to host this year's annual event, which will be held on 24 April 2014 at our London office. This year's Seminar will focus on the legal and commercial aspects of the nuclear new build process (from green-field site and UK policy to generation). Building on previous years, soft commercial skills training will be included, with an afternoon slot on decommissioning (from end of generation back to green-field). The Seminar aims to be both informative and practical.

All YGN members and non-members are very welcome. Please **click here** to see the flyer and booking form for more information about the day and the list of excellent speakers already confirmed.

For further details please contact Michael Bray, +44 (0)117 939 2290 or email him at michael.bray@burges-salmon.com.

New Employment Law changes of interest to Employers

On 13 March, the Children and Families Act 2014 received Royal Assent. It introduces a number of changes for working parents, including a new shared parental leave and pay system, to be introduced for children due or adopted on or after 5 April 2015. The government is currently consulting on the shared parental leave and pay regulations and intends to publish further guidance later in the summer. Burges Salmon is holding a seminar on the new shared parental leave system in **London** on 11 June 2014 and in **Bristol** on 17 June 2014.

Education and training

Barrister William Wilson from the Burges Salmon Nuclear Law team, has been appointed as Tutor for the module in Nuclear Law to be offered as part of the Distance Learning LLM by De Montfort University, Leicester, one of only two such courses in the UK. The course was set up and taught for many years as 'Nuclear Energy and Environmental Challenges' by Peter Riley, who wrote a book on Radioactive Waste and was a regular contributor to the conference of the International Nuclear Law Association 'INLA'. William aims to revise the content to be specifically focussed on the main elements of Nuclear Law, and the revised course will be open to students on the LLM course from the second half of 2014. Work on the academic side of Nuclear Law will complement William's other work at Burges Salmon as part of the core nuclear law advisory group, and also working on new nuclear legislation and offering nuclear law training in a number of new nuclear countries.

For further information please contact William Wilson on +44 (0)117 939 2289, or email him at william.wilson@burges-salmon.com.

Visit our website at www.burges-salmon.com

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0) 117 939 2000
Fax: +44 (0) 117 902 4400

6 New Street Square
London EC4A 3BF
Tel: +44 (0)20 7685 1200
Fax: +44 (0)20 7980 4966

www.burges-salmon.com

BURGES SALMON