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## The Environmental Information Regulations and THORP

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# **The Environmental Information Regulations and THORP**

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# The Environmental Information Regulations and THORP

## 1. Introduction

**In December 1992 Britain acquired what, in effect is an environmental Freedom of Information Act.**

The Environmental Information Regulations 1992 implement a European directive on public access to environmental information (Directive 90/313/EEC on the Freedom of Access to Information on the Environment).

**To test these Regulations, the Campaign for Freedom of Information made a series of requests to public authorities for information about the THORP nuclear reprocessing plant.**

The Regulations require any public body with environmental responsibilities - including government departments, local authorities and other bodies which form part of the public administration - to provide to any person on request any information which they hold about:

the state of the environment

activities adversely affecting the environment

measures designed to protect the environment.

Disclosure must take place within two months. Refusals must be in writing, specify the reasons and may be challenged by judicial review.

Only information defined in the Regulations as “confidential” can be withheld. A large number of broadly defined confidential categories of information are specified, including information relating to matters affecting international relations, defence and public security; information to which any commercial or industrial confidentiality attaches; information which has been supplied to the authority voluntarily; personal information; information relating to the confidential deliberations of a body subject to the Regulations, or to the internal communications of any organisation; information relating to legal or other proceedings, including (astonishingly) public inquiries. Certain other classes of information can also be withheld.

At the time the requests under the Regulations were made, July and August 1993, the government was deciding whether to allow British Nuclear Fuels plc (BNFL) to begin operating its Thermal Oxide Reprocessing Plant (THORP) at Sellafield in Cumbria. The plant will reprocess spent nuclear fuel to separate uranium and plutonium. The decision is of considerable environmental and commercial significance. It raises serious concerns about the environmental hazards and costs of disposing of spent nuclear fuel; about any possible increase in cancer caused by radiation; about the possibility that the recovered plutonium might contribute to nuclear proliferation; about the future of the UK nuclear industry; and the economy of Cumbria and the UK.

A good deal of information about these questions is available already, and BNFL itself has published a large amount. Further information was disclosed in the course of the two public consultation exercises carried out between November 1992 and October 1993 into BNFL's application for revised authorisations to discharge radioactive wastes from Sellafield to take account of the new THORP plant.

However, much crucial information remains confidential. The issue provided a unique opportunity to test the new disclosure regulations.

**We asked for documents or information which we knew existed, were not already publicly available and appeared most relevant to the current debate.**

These included environmental monitoring results; data on the predicted impact of discharges from Sellafield on human health; assessments of the effectiveness of safety and environmental controls; information about the commercial justification for commissioning the THORP plant and information supplied by BNFL to various official bodies.

The requests were chosen in order to bring as many different authorities as possible into the survey. Not all were for different documents: in some cases the same document was sought from several different bodies.

Some bodies were asked for just one item of information. Others, whose involvement in the THORP issue is greater, were asked for several items. A relatively large number of requests were sent to BNFL, which inevitably holds the greatest amount of information about the THORP plant.

Requests were sent to:

- Department of the Environment
- Department of Trade and Industry
- Treasury
- Department of Transport
- Her Majesty's Inspectorate of Pollution
- Radioactive Waste Management Advisory Committee
- British Nuclear Fuels plc
- National Radiological Protection Board
- Health and Safety Executive (Nuclear Installations Inspectorate)
- National Rivers Authority
- National Audit Office
- North West Water plc
- Cumbria County Council
- Northern Regional Health Authority
- South Cumbria Area Health Authority
- West Cumbria Health Care NHS Trust

## **2. Results**

**Requests were made to 16 bodies. The specific information sought in each case is shown in the Appendix.**

Eight organisations supplied some or all of the information requested. Six failed to supply any of the requested information. One failed to respond to the request within the statutory period, and had not supplied any information at the time of writing. One said it did not hold the document requested.

## **3. Refusals**

Information was withheld on two grounds.

First, four bodies claimed they were not subject to the Regulations at all and had no duty to supply information. These were: British Nuclear Fuels, the Health and Safety Executive's Nuclear Installations Inspectorate, the Radioactive Waste Management Advisory Committee and the National Audit Office.

Second, two authorities claimed that the information requested was not "information relating to the environment". These were: The Department of Trade and Industry and Cumbria County Council.

Some of the information withheld may also have fallen within the categories of "confidential" information, which the Regulations permit to be withheld. However, no organisation found it necessary to cite these grounds of exemption.

Two authorities, the Treasury and HM Inspectorate of Pollution, did not hold some or all of the information requested of them.

### **3.1 British Nuclear Fuels plc (BNFL)**

The largest number of requests - for eleven items of information - went to British Nuclear Fuels. The company claimed it was not subject to the Regulations and failed to provide any of the requested information.

BNFL said it operated "an open information policy", providing "an enormous amount of information" on request. However, this was done on its "own volition and not out of any legal obligation".

BNFL did supply a number of documents. All had previously been published by the government in August 1993, at the beginning of the second public consultation on THORP. These included two documents produced by BNFL - the rest were produced by HM Inspectorate of Pollution (HMIP) and the Department of the Environment (DoE). Some of these contained some information relating to the Campaign's requests. However, the company did not supply any of the 11 specific items of information requested.

BNFL failed to supply the following information:

- the company's submissions to the government's Radioactive Waste Management Advisory Committee on its plans to keep large volumes of intermediate and low level radioactive waste in Britain while returning to customers abroad small volumes of highly radioactive waste. This so-called "waste substitution" is contentious since it increases the volume of waste that has to be disposed of in the UK
- the results of monitoring of radioactive liquid discharges to the Irish Sea from the storage ponds used at THORP to hold spent fuel rods. Although the plant was not operating at the time of the survey, a large number of fuel rods were already stored there awaiting reprocessing
- Data on the efficiency of filters used to extract radioactive particles from discharges to the air from THORP
- estimates of any additional risks to the population of cancer and genetic defects arising from radioactive discharges from THORP. (In January 1993 the government's Committee on the Medical Aspects of Radiation in the Environment complained that it had been asked to comment on the BNFL application without seeing any such estimates.)
- estimates of the collective doses of radiation people would receive as a result of radioactive liquid discharges to the Irish sea once THORP had been commissioned
- assessments of discharges of radioactivity to the environment in the past. (BNFL submitted four reports on this subject to a court during a recent compensation case, though these documents are not publicly available. During the case a senior BNFL scientist said these contained "the best assessment that has yet been made of the historic discharges from the Sellafield site and...the history of radionuclide concentrations in the environment".)
- the company's analysis of the risks of accidents leading to radioactive discharges from THORP
- notifications sent to the Department of Trade and Industry of exports to Japan of nuclear material recovered from reprocessed Japanese nuclear fuel
- submissions by BNFL to the European Commission about EC proposals to regulate the transport of nuclear materials
- the Touche Ross report (described below).
- copies of clauses in the contracts between BNFL and one of its customers on the substitution of high level radioactive waste for intermediate and low level waste. These are a crucial part of the 'waste substitution' debate since they describe how much radioactive waste from overseas will ultimately be disposed of in the UK, and how much will be returned to the customer

### **3.2 Radioactive Waste Management Advisory Committee (RWMAC)**

The two requests to RWMAC were rejected on the grounds that the Committee considered it was not subject to the Regulations. It did not supply any of the requested information:

- documents received from BNFL during the committee's 1992 inquiry into the company's plans for waste substitution
- a document it had asked for from BNFL to demonstrate that the retention in the UK of foreign intermediate level waste would not cause health or safety problems.

### **3.3 Health and Safety Executive**

The Health and Safety Executive (HSE) claimed that it was not subject to the Regulations in respect of nuclear sites. It declined to supply:

- a copy of its submission to the November 1992 public consultation on the proposed discharge authorisations at Sellafield
- the analysis it had required from BNFL of the risks of various accidents involving radioactive discharges at THORP
- the results of its audit of the software used to run THORP and its safety systems. (Concerns have been expressed that the program is too vast to be properly verified. See New Scientist, 29.8.92, page 19)
- an index to the documents submitted by BNFL to HSE in support of its application for a license to operate THORP

### **3.4 Department of Trade and Industry (DTI)**

The DTI refused to supply copies of the notifications it has received from BNFL about exports of nuclear material to Japan. It said this was not information relating to the environment. For the same reason, it also failed to provide another report, carried out by the consultants Touche Ross, and described below.

### **3.5 The National Audit Office**

In June 1993 the National Audit Office (NAO) produced a report entitled "The Cost of Decommissioning Nuclear Facilities". While preparing this it asked Sir Robert McAlpine and Sons Ltd to assess the underlying technical assumptions and methodologies adopted by various industry bodies including BNFL. The NAO declined to release the report it had obtained from McAlpines on the grounds that the NAO was not subject to the Regulations.

### 3.6 Cumbria County Council

Cumbria County Council refused to disclose a report it had commissioned from a firm of consultants, Environmental Resources Limited, into the employment and socio-economic impact of THORP. The Council maintained this document did not relate to the environment.

### 3.7 The Department of Transport

The Department of Transport (DTp) failed to reply to requests within the two month period laid down in the Regulations. At the time of writing, no response had been received to requests for:

- Safety certificates issued by the DTp for containers used to carry radioactive materials to the THORP plant
- Reports supplied to it by BNFL concerning the safety of such containers
- The Department's submission to HMIP during the public consultation on THORP.

### 3.8 The Touche Ross report

As the deadline for the government's decision on THORP approached, it became increasingly clear that economic considerations were likely to be decisive. Concern had been expressed that, because of changed circumstances, the plant could be less profitable than had been predicted and any profits could eventually be wiped out by the later cost of decommissioning the plant.

Central to this debate was a report commissioned by BNFL from Touche Ross into the economic and commercial case for THORP. The report includes an assessment of the costs that would be incurred if THORP was abandoned. BNFL have published an edited version of this document, but not the full report.

We made three separate requests for this report: all were unsuccessful:

- BNFL's sponsoring department, the DTI, rejected the request on the grounds that the report was not "information relating to the environment" and was therefore not subject to the Regulations. It advised us to apply to BNFL.
- BNFL rejected the request on the grounds that the company was not subject to the Regulations.
- The Treasury told us it did not hold the report. Treasury Minister Sir John Cope MP wrote: "I understand that the Treasury is not, nor ever has been, in possession of such a document".

## 4. Requests granted

The requested information was supplied by a number of organisations.

### 4.1 Department of the Environment

The DoE sent us the one document we asked it for. This was a 150-page report, submitted by it to the European Commission, on the disposal of radioactive waste from THORP. It was supplied to the Commission under Article 37 of the Euratom Treaty which requires the government to demonstrate that the disposal of THORP waste will not affect the health of another Member State's population. The report describes the plant's operations, the anticipated radioactive discharges to the air, sea and land, monitoring arrangements and the accident scenarios which could lead to unplanned radioactive releases.

**This document had previously been described to us by officials as “confidential”. Its disclosure illustrates the practical benefits that may result from the new Regulations.**

### 4.2 HM Inspectorate of Pollution

We asked HMIP for three documents, two of which were supplied.

One was a copy of a BNFL document describing the procedures for testing the efficiency of filters used to prevent the discharge of radioactive particles into the outside air. This was one of the documents that we had unsuccessfully requested directly from BNFL.

HMIP obtained this document from BNFL after receiving our request, and may have done so in order to be able to supply it to us - a welcome step. BNFL's covering note to HMIP states that the document has “no commercial or other security classification”, suggesting that BNFL forwarded it in the knowledge that it was likely to be disclosed.

Another request was for a copy of the report submitted to the European Commission under Article 37 of the Euratom Treaty which we also obtained from the DoE. HMIP had helped to produce this report.

HMIP said they did not hold the third document requested. This was BNFL's analysis of the risk of radioactive accidents which the company supplied to the HSE under the Nuclear Installations Act. (We also requested this analysis from both BNFL and the HSE, but were refused it by both.)

### 4.3 National Radiological Protection Board (NRPB)

The Board sent both of the two documents requested:

- its submission to HMIP during the public consultation on THORP

- its report on radiation doses to the “critical group”. This estimated the maximum radiation doses to which people could be exposed as a result of discharges HMIP proposed to authorise. This report was in fact published by NRPB in July 1993.

#### **4.4 Other bodies**

A number of other bodies also supplied copies of their submissions to the HMIP consultation on THORP. These included South Cumbria Area Health Authority, West Cumbria Health Care NHS Trust and the National Rivers Authority (who also supplied their submission to the second DoE consultation on THORP).

Two bodies told us they did not consider themselves required by the Regulations to supply these submissions but nevertheless either supplied them or said they would be prepared to.

The Northern Regional Health Authority supplied its submission “in the interests of open government”, but maintained that the legal requirement “only involves actual information on the environment and not an analytical comment such as this”.

North West Water plc told us they “do not believe the disclosure, by water utilities, of the information you ask for is covered by the Regulations”. This did not make it clear whether the objection was because it believed water utilities were not subject to the Regulations, or because the information itself was not covered. North West Water told us that in fact it had not submitted any comment to the consultation.

### **5. Fees**

The Environmental Information Regulations allow reasonable fees to be charged for supplying information [Regulation 3(4)]. However, none of the organisations who supplied information to us made any charge for doing so.

### **6. Time limits**

The Regulations require requests be responded to within two months [Regulation 5(a)]. Most responses were received within this period. However the National River Authority’s response was sent to us a month and a half after the expiry of the two month deadline.

The Department of Transport did not receive the request we originally sent it. A duplicate was subsequently sent. At the time of writing it had not responded although the two month period for replies had expired.

## 7. Bodies “not subject to the Regulations

Several bodies claimed they were not subject to the Regulations. How valid are these claims?

There is no definitive list of the bodies who are covered. A list was issued in January 1992 when the DoE published a consultation paper on its proposals for implementing the European Directive on which the Regulations are based. This listed over 200 public authorities - “the main bodies which the Government believes to be covered” by the Directive.

The list did not survive. In December 1992 the Department published its Guidance on the Regulations which stated:

“Because circumstances vary and change, the Government is unable to give a definitive list of organisations subject to the requirements of the Regulations”

[Guidance on the Implementation of the Environmental Information Regulations 1992, DoE, 1992.]

The Regulations describe the bodies (known as “relevant persons”) subject to their requirements. However, instead of precise definitions, the Regulations closely follow the relatively imprecise descriptions used in the Directive itself. The DoE’s Guidance offers some clarification - though less than might be expected - adding:

“organisations will need to take a view themselves as to whether they fall into any of the above categories and thus become a relevant person. In cases of dispute, it will be for the Courts to decide”. [paragraph 10]

**The freedom offered to bodies to decide for themselves whether they are covered has made it relatively easy for organisations to argue that they are not bound by them.**

Four bodies told the Campaign that they considered that they were not subject to the Regulations, and provided none of the requested information. These are discussed in detail below.

### 7.1 British Nuclear Fuels plc

BNFL told the Campaign:

“the Company does not consider that it is subject to the Environmental Information Regulations 1992, on the basis that it does not have public responsibilities for the environment.”

A J Shuttleworth, Company Secretary and Legal Director, letter to the Campaign, 11.10.93

The apparently remarkable suggestion that BNFL has no “public responsibilities for the environment” is a reference to part of the Regulations’ definition of a “relevant person”.

“Relevant persons” are defined in Regulation 2(3):

“For the purpose of these Regulations the following are relevant persons, that is to say -

- (a) all such Ministers of the Crown, Government departments, local authorities and other persons carrying out functions of public administration at a national, regional or local level as, for the purposes of or in connection with their functions, have responsibilities in relation to the environment; and
- (b) any body with public responsibilities for the environment which does not fall within sub-paragraph (a) above but is under the control of a person falling within that sub-paragraph.”

BNFL would clearly not fall within paragraph (a) of this definition, which covers government departments, local authorities and other administrative bodies.

But it would be covered under paragraph (b) if it meets the two criteria laid down there, namely that:

- it is under the control of a minister or government department etc, and
- it has public responsibilities for the environment.

### Ministerial control

There is no doubt that BNFL meets the first criterion: it is under the control of a minister.

BNFL is a wholly government-owned company. The DoE’s Guidance on the Regulations explicitly states that such companies are regarded as “under the control” of ministers for the purposes of the Regulations. [Paragraph 10]

BNFL was set up in 1971 by the Atomic Energy Act 1971, to take over the nuclear fuel production and reprocessing activities of the Atomic Energy Authority. It is a public limited company, but all its shares, except one, are held by the Department of Trade and Industry (DTI). The remaining share is held by the Treasury Solicitor.

The DTI uses its powers as the controlling shareholder to agree nominations for appointments to the Board and to approve the appointment of BNFL’s Chairman, Chief Executive and senior Board members.

In 1989 the National Audit Office (NAO) reported:

“the Department of Energy [whose responsibilities for BNFL were subsequently assumed by the DTI] have sought to establish a monitoring environment which provides for a continuing exchange of information between themselves and the Company covering all major aspects of Company policy. Under the Department’s present arrangements they approve the annual Corporate plan; agree with the Company a medium-term financial target; monitor the Company’s performance through the shareholders’ quarterly reports; agree dividend guidelines; and maintain a wide range of contacts between the Company and departmental officials, from the Minister downwards.”

National Audit Office, 'Department of Energy: Monitoring and Control of British Nuclear Fuels plc', April 1989

Technically BNFL is not a nationalised industry, but in 1989 the then Permanent Secretary at the Department of Energy commented:

"for all practical purposes the regime of [departmental] monitoring and control which applies to British Nuclear Fuels is just as extensive and rigorous as that which applies to a nationalised industry."

Committee of Public Accounts, 'Monitoring and Control of British Nuclear Fuels PLC', July 1989, Evidence of Sir Peter Gregson, page 13.

## Public responsibilities for the environment

BNFL therefore meets the first criterion of Regulation 2(3)(b) - it is under the control of ministers. Does it also meet the second criterion, of having "public responsibilities" for the environment?

BNFL claims that it does not:

"The responsibilities it [the Company] has are those of any other industrial concern or private body, it does not have any public functions such as the regulation of others."

Letter to the Campaign, 11.10.93

The term "public responsibilities for the environment" is not clearly explained either in the Regulations or in Article 6 of the European Directive, from which this part of the Regulations' definition is taken. However, the DoE's Guidance states that such responsibilities could include:

"the development, management, regulation or inspection of aspects of the environment on behalf of the public" [paragraph 11]

It adds that such responsibilities "might be established through statute" - but does not suggest that only bodies with statutory responsibilities have public responsibilities.

Further guidance is suggested by a senior European Commission official, Ludwig Kramer, head of the Unit on the Implementation of Community Law in Directorate General XI, which deals with environmental matters. He has explained that Article 6 of the Directive is intended to ensure that the right of access applies to bodies who are not directly part of the public administration but who:

"have responsibilities for the environment which derive in one way or another from public authorities."

There is no suggestion that such responsibility requires a statutory duty. Indeed Mr Kramer went on to cite examples which clearly include bodies which would not be expected to have statutory functions:

“This brings to mind research institutes, environmental establishments and agencies, etc. The underlying idea...is that the right of access to information should not be affected by a delegation of responsibility by a public authority to other bodies.”

L. Kramer, ‘Focus on European Environmental Law’, Sweet and Maxwell, 1992, page 301.

So BNFL, in arguing that it “does not have any public functions such as the regulation of others” is not addressing any actual requirement of the Regulations. The Regulations do not suggest that the term “public responsibilities” applies only to bodies with either a regulatory or a statutory function. Indeed, if they were intended to have this narrow and straightforward meaning - which could easily have been defined - they might have been expected to say so, instead of offering the much broader definition.

BNFL argues that its environmental responsibilities are merely to comply with the requirements of any relevant legislation, and are no different from those of any private company.

**There are several separate grounds for concluding that BNFL’s responsibilities to or on behalf of the public are entirely different from those of an ordinary private company, and bring the company within the scope of the Regulations.**

#### ARGUMENT 1: Accountability to Parliament

One striking difference between BNFL and an ordinary company is that ministers answer questions about BNFL in parliament. These are not necessarily met with the answer that the matter is an operational one for BNFL to determine. Some questions are answered, and they include questions about BNFL’s environmental performance. (See, for example, Hansard, May 2 1986, cols 502-503.) BNFL executives are also examined about their policies by select committees; and the NAO has enquired into the adequacy of the departmental monitoring of the company’s plans. These are indicative of public responsibilities, entirely different from those of a private company.

BNFL is a public body, and one whose operations are recognised as capable of having extremely serious environmental consequences. The exercise of its environmental responsibilities is subject to parliamentary accountability. This argument alone may be sufficient to demonstrate that BNFL has “public responsibilities for the environment” and is subject to the Regulations.

#### ARGUMENT 2: BNFL as an instrument of public policy

However, a more specific line of argument is that BNFL is apparently required to implement government policy on the environment.

The main objectives set by the government for BNFL have been described by the National Audit Office. These are to seek to maximise over time the return on the government's shareholding in BNFL and to promote its efficiency and cost-effectiveness.

But these are subject to a number of conditions, including "government policy towards the nuclear industry and energy policy in general", "government policy relating to the non-proliferation of nuclear weapons" and, crucially:

**"government policy on environmental and safety matters particularly as they relate to radioactivity"**

National Audit Office, 'Department of Energy: Monitoring and Control of British Nuclear Fuels plc', April 1989, paragraph 1.7

According to Sir Peter Gregson, the then Permanent Secretary at the Department of Energy:

"we pursue them [the Department's objectives for BNFL] subject to government policy on environmental, safety matters and so on...We do take it as our job, when we discuss the Company strategy with them to make sure that the Company is being steered in a direction which is consistent with the Government's policies on all of these matters."

Committee of Public Accounts, 'Monitoring and Control of British Nuclear Fuels PLC', July 1989, Evidence, page 4, (emphasis added).

The company acknowledges that it responds to "steering":

"BNFL do take on board any suggestions that the Government make"

Evidence of Mr C G F Harding, Chairman of BNFL, to the House of Commons Energy Committee, 30.11.88

The result is reflected in BNFL's environmental strategy:

"The Company's waste management and decommissioning strategies fully reflect government policy in these areas".

BNFL, 'Further Material on the Environmental Aspects of the Operation of THORP', 22.7.93, page 7, (emphasis added)

Government policy also directs BNFL's policy of returning waste from overseas contracts to the country of origin:

"All... [May 1978] and subsequent contracts have given BNFL the option to return radioactive wastes, and it is government policy that these options are exercised." (emphasis added)

BNFL, 'The Economic and Commercial Justification for THORP', July 1993, page 9

**This renders unsustainable BNFL's claim that its environmental responsibilities are the same as those of a private company. A private company must comply with relevant**

**legislation but cannot be required to act in accordance with government policy. But BNFL is required to do so. If it resisted, ministers - like the controlling shareholders of any company - could ultimately impose their will by dismissing the board and replacing them with more compliant appointees.**

BNFL can be asked to meet environmental obligations over and above those which apply to a purely private company. This is facilitated, by BNFL's monopoly in the UK in its two areas of business - the supply and reprocessing of nuclear fuel.

The company can be asked to meet environmental obligations which - in a more competitive situation - might prove an unacceptable commercial disadvantage. The government may decide, for reasons of public policy, to accept an uncommercial rate of financial return.

The NAO's 1989 report suggests that this has happened. It found that "the Company's rates of return on closing capital employed are generally lower than those of all large United Kingdom industrial and commercial companies." (paragraph 4.6)

In his 1989 evidence to the Public Accounts Committee, Sir Peter Gregson confirmed that "Because of tighter safety and environmental standards that have been imposed on the Company over the past decade...the return on the Government shareholding has been considerably less than it would have been". (Evidence, page 3)

In effect, the UK nuclear fuels industry consists of a single company, owned by the government. If the industry presents unique environmental problems - as it does - the government can address them by exercising its powers as the sole shareholder of the sole UK entity engaged in these activities.

The government is therefore in a position to implement its policy on these environmental problems by means of its position as the company's owner. Indeed, any environmental steps which the company takes which are not directly required by legislation - and the company stresses that it goes well beyond the legal minimum - are potentially attributable to the exercise of governmental influence.

**BNFL can therefore reasonably be regarded, in part, as an instrument of public policy on the environment. It clearly has, in the words of the Regulations, "public responsibilities for the environment" and must be regarded as subject to them.**

### ARGUMENT 3. All public bodies have environmental responsibilities

The government's interpretation of the Regulations is that all public bodies have statutory environmental responsibilities. The DoE's Guidance implies that all public bodies are therefore subject to the Regulations. This would clearly include BNFL, which is recognised as a public body, though the implications are of course much wider.

According to the DoE's Guidance:

"by virtue of section 11 of the Countryside Act 1968 every Minister, Government department and public body in England and Wales is deemed to have responsibilities relating to the environment" [paragraph 11, emphasis added]

Section 11 of the Countryside Act states:

“In the exercise of their functions relating to land under any enactment every Minister, government department and public body shall have regard to the desirability of conserving the natural beauty and amenity of the countryside”

This would certainly apply BNFL, which is formally listed as a “public body” by the Cabinet Office [Public Bodies 1992, HMSO] and also falls within the definition of a public body given in the Countryside Act itself. This includes any persons who “as a public body and not for their own profit, act under any enactment for...the production or supply of any commodity or service” [section 49(2)]. As BNFL’s profits are paid to the Secretary of State and thence into the Consolidated Fund (that is, into general public funds) it falls within this definition. BNFL also has direct statutory functions relating to land under section 4(1) of the Atomic Energy Authority Act 1971.

This environmental responsibility is relatively modest - it applies only to the conservation of land. However, the resulting duty of disclosure is not limited to information about conservation. Once a body is classed as a “relevant person”, on the basis of any environmental responsibility, however restricted, all environmental information held by it, including information which does not relate to its direct environmental responsibilities, is subject to disclosure.

This view is confirmed by the DoE’s Guidance, which states that any environmental information held by a relevant person is subject to the Regulations:

**“whether or not it was obtained as a result of that body’s environmental responsibilities”** (paragraph 15)

**The government’s own interpretation of the Regulations therefore also leads to the conclusion that BNFL is subject to them.**

### Other statutory environmental responsibilities

The government’s view, described above, is that a single statutory environmental responsibility, however narrow, is enough to bring all environmental information held by a public body within the scope of the Regulations. It is however worth noting that BNFL’s statutory responsibilities for the environment are not limited to the conservation duty described above.

BNFL has other statutory environmental responsibilities under, for example:

- *the Nuclear Installations Act 1965*, under which BNFL holds a site licence. Section 7(1) of the Act requires a licence holder to ensure that no “injury to any person or damage to any property” occurs as a result of an incident involving nuclear material on the site.

Any part of the environment which is owned constitutes “property”. Livestock, crops, plants, wells, land, and buildings are all forms of property which also fall within the Regulations’ definition of “the environment” [Regulation 2(2)(a) and DoE Guidance, paragraph 17]. BNFL, as a licence holder, is under a duty to prevent damage to such parts of the environment and injury to the public.

- *the Radioactive Substances Act 1960*. Its duties under this Act include the obligation to use the “best practicable means” to minimise the rate and radioactivity of its discharges.

Private companies are of course also subject to these statutory duties. But they could not be held to be subject to the Regulations, because they are under the control of a minister or government department. However, in the case of a publicly owned company or other body a statutory environmental duty of this kind may be enough to bring it within the scope of the Regulations.

## Public statements

Finally, although BNFL rejects the suggestion that it has “public responsibilities for the environment” in the legal sense of the Regulations, it does describe what it sees as its public responsibilities - both for the environment and for disclosure - in strikingly similar terms:

“British Nuclear Fuels plc (BNFL) acknowledges a ‘duty of care’ for the environment...In addition to meeting statutory requirements for environmental protection, BNFL confirms that the health and safety of the public and protection of the environment are primary concerns in carrying out all activities.”

BNFL, Environment Annual Report 1992

“During 1992, we have continued to develop our environmental policy. This process has taken full account of national and international trends; most notably the development of management systems within industry and the commitment to making environmental information even more widely available to the public.”

BNFL, Environment Annual Report 1992 (emphasis added)

“The Company will make available to its workforce, the general public and their representatives such information as is appropriate in relation to their health and safety and to the protection of the environment including any event or incident which is deemed to be of possible concern to them.”

Health and Safety Annual Report 1992

“BNFL is dedicated to a continuous improvement in safety standards, and devotes considerable resources to achieving this. The Company also understands that both the workforce and the public must be confident that a high safety standard is actually being achieved. To help gain this confidence, it is essential that we make available the information necessary for people to see for themselves.”

Neville Chamberlain, BNFL Chief Executive, Health and Safety Annual Report 1992 (emphasis added)

## 7.2 The Radioactive Waste Management Advisory Committee (RWMAC)

The government's Radioactive Waste Management Advisory Committee told the Campaign:

"The Committee in its discussion of the Regulations, has come to the conclusion that it does not consider that the RWMAC is covered by these Regulations".

Professor John Knill, Chairman of RWMAC, Letter to the Campaign, 2.10.93

Professor Knill later told the Campaign that in his view the Committee had no "public responsibilities" for the environment and was also "not under the control of the government". These are the two criteria of a "relevant person" found in Regulation 2(3)(b).

Even on the face of it this is remarkable because:

- in a January 1992 consultation paper, the DoE published a list of bodies which the Government believed were subject to the Directive. RWMAC was specifically included in this list.
- responding to this consultation, RWMAC itself accepted that it would be subject to the Directive. It told the DoE that the proposals: "will allow RWMAC to satisfy the Directive through publication of its annual report with additional information being made available on request". (Letter from RWMAC Secretary to DoE, 8.4.92)
- In November 1992, responding to another DoE consultation, RWMAC made no suggestion that it considered itself outside the Regulations' scope. (Letter from RWMAC Secretary to DoE, 30.11.92)

**Not only did RWMAC formerly accept that it was subject to the Regulations, but its structure and functions appear to bring it directly within the Regulations' scope.**

RWMAC was set up in 1978, in response to a recommendation in the sixth report of the Royal Commission on Environmental Pollution. The Royal Commission found "insufficient appreciation of long-term requirements" of radioactive waste management and called for a new advisory committee to advise the Secretary of State for the Environment.

The result was RWMAC. The Committee is described as an "independent committee", in that none of its members are civil servants. Its members include academics and scientists some of whom come from other public authorities. Six of its 21 members come from the nuclear industry.

### Public responsibilities for the environment

RWMAC's terms of reference are:

"To advise the Secretaries of State for the Environment, Scotland and Wales on the technical and environmental implications of major issues concerning the development and implementation of an overall policy for all aspects of the management of civil

radioactive waste, including research and development; and on any such matters referred to it by the Secretaries of State”.

RWMAC, 13th annual report, HMSO, 1993

The Committee is clearly a formal part of the process by which public policy on environmental protection is determined. It reports publicly on its work, and its annual report is published by HMSO - a useful sign of a “public” responsibility.

Unlike BNFL, which is clearly not part of the public administration, RWMAC arguably may be. The Committee may meet the criteria set out in Regulation 2(3)(a): it “carries out functions of public administration” and in connection with those functions it has “responsibilities for the environment”.

The DoE’s Guidance states that the bodies falling within these criteria include:

“Ministers, Central Government Departments...Local Authorities, any constituent Advisory and Ad hoc Groups or Committees not having a separate legal identity”  
(paragraph 9, emphasis added)

If it is not covered by this definition, then it covered by the criteria in Regulation 2(3)(b), described above under the discussion on BNFL. This applies to other “controlled” bodies which have “public responsibilities for the environment”.

This implements Article 6 of the Directive. Ludwig Kramer’s guidance on Article 6, quoted above, explains:

“The underlying idea...is that the right of access to information should not be affected by a delegation of responsibility by a public authority to other bodies.”

L. Kramer, ‘Focus on European Environmental Law’, Sweet and Maxwell, 1992, page 301 (emphasis added)

**Advising ministers is the normal function of civil servants, and government scientists. This function has, in part, been delegated to RWMAC, making it precisely the kind of body, to which the Directive is intended to apply.**

## Ministerial control

The other question is whether RWMAC can be regarded as “under the control of” ministers.

The DoE’s Guidance on the Regulations offers the following comment on the meaning of “control”:

“Control is taken to mean a relationship constituted by statute, rights, contracts or other means which either separately or jointly confer the possibility of exercising a decisive influence on a body”.

[paragraph 10]

No-one suggests that ministers control the Committee in the sense of dictating their conclusions; indeed, from the point of view of ministers, their advice may sometimes have been uncomfortably independent.

But while the advice may be independent, the committee itself is clearly part of the government machinery:

- RWMAC's members are all appointed by the Secretaries of State
- it is entirely funded by the government
- its sole function is to advise ministers
- its Secretariat is provided by and located in the Department of the Environment
- government departments receive copies of RWMAC papers [13th annual report, page 1]
- representatives of interested government departments attend parts of Committee meetings
- it is officially listed as a public body "for which ministers have a degree of responsibility" [Public Bodies 1992, Cabinet Office, HMSO]
- it has no statutory basis, and can be wound up by ministers at any time.

**A body whose membership is within the exclusive control of ministers, and which is set up, funded and can be abolished by ministers is, by any reading, susceptible to their "decisive influence".**

Moreover the DoE's Guidance specifically cites "Non Departmental Public Bodies" as bodies which are under the control of ministers and are (if they also have environmental responsibilities) subject to the Regulations [Paragraph 10].

The term "Non Departmental Public Bodies" (NDPBs) has a formal meaning: it refers to

"a body which has a role in the processes of national government, but is not a government department and accordingly operates to a greater or lesser extent at arm's length from Ministers".

[Non Departmental Public Bodies: A Guide for Departments, Cabinet Office and HM Treasury, 1992]

The same source lists advisory committees as one of the main classes of NDPBs, describing them in terms which precisely match the characteristics of RWMAC:

"Advisory committees and commissions. This group consists mainly of bodies (other than committees of officials) set up by Ministers to advise them and their departments on particular matters."

"Advisory bodies are normally set up by administrative action, their staff support and accommodation being provided by the departments whose Minister they advise and their expenses and other support costs being carried on the Vote for the relevant departmental function."

**RWMAC is such an advisory committee; advisory committees are classed as NDPBs, and the DoE's view is that NDPBs are subject to the Regulations. How RWMAC contrived to reach a contradictory decision remains a mystery.**

### 7.3 The Health and Safety Executive

The Health and Safety Executive (HSE) also told us it was not subject to the Regulations in relation to its nuclear responsibilities:

“The Health and Safety Executive has no statutory or other formal responsibility relating to the environment in respect of licensed nuclear sites. The Executive is therefore not a relevant person for the purpose of the Regulations and consequently the Regulations themselves are of no application”.

R Haworth, Principal Inspector, Nuclear Safety Division F1, Health and Safety Executive. Letter to the Campaign, 12.8.93

The HSE’s main statutory responsibilities are to protect human health and safety - not just that of employees but of the general public too, where they are at risk from work activities.

However, the HSE has a number of explicit environmental responsibilities. According to Roderick Allison, the HSE’s Director of Safety Policy:

“When it comes to the non-human environment, our responsibilities are more limited. But we do have some, in particular:

- our regulations and enforcement arrangements for control of major hazards - that is, toxic or flammable substances in major hazard quantities - are designed to prevent major environmental accidents as well as to protect humans...
- we enforce controls over pesticides with a view to protection of the natural environment as well as humans;
- similarly, we enforce protection of the environment from the release of genetically modified organisms”

‘HSE’s Role and the Current Legislation on Freedom of Environmental Information’. Paper given at a conference on ‘The Business Implications of Public Access to Environmental Information’ held in London 28-29 September 1992, organised by IBC Technical Services.

Mr Allison acknowledged that information held by the HSE in these three areas was subject to the Environmental Information Regulations. But he added that the Regulations applied only in such areas where the HSE has “direct statutory responsibilities for the environment”. It would not apply, he argued, to environmental information held in connection with the HSE’s non-environmental responsibilities.

**But this is not what the Regulations, or the DoE’s Guidance, state. The DoE’s view, described above, is that any environmental information held by a relevant person is subject to disclosure under the Regulations. The HSE accepts that it is a relevant person. It cannot argue that environmental information which it holds about nuclear hazards is exempt from disclosure.**

## Environmental responsibilities

**Moreover, the HSE is wrong to claim that it has no environmental responsibilities for the nuclear industry.**

HSE's responsibility for the safety of the public inevitably give it an environmental responsibility. Usually, a risk to the public occurs if an incident at an industrial site causes the release of a dangerous substance to the outside air, water or land - the environment. The steps the HSE takes to protect the public's health and safety involve preventing such environmental contamination.

"The environment" has an extremely broad meaning under the Regulations. "Information which relates to the environment" is defined, in part, as information which: "relates to...the state of any water or air...or...land" [Regulation 2(2)]. The DoE's Guidance adds that "air", for example, "should be taken to include the air within buildings" (paragraph 17).

**The breadth of this definition means that information about anything the HSE does to prevent contamination of the air is subject to the Regulations.**

This is not just a theoretical argument, it corresponds to the reality of the HSE's work. The titles of two incident reports published by the HSE graphically demonstrate its environmental responsibilities:

- A 1979 HSE report was entitled "*The Leakage of Radioactive Liquor into the Ground, British Nuclear Fuels Ltd, Windscale, 15 March 1979*".
- The title of a 1984 HSE report was "*The Contamination of the Beach Incident at British Nuclear Fuels Limited Sellafield, November 1983*".

The first report was produced after "Unexpected radioactive contamination was discovered during a hydrogeological survey, commenced by BNFL in 1978, to investigate the water table beneath the site...Analysis of water samples revealed the presence of short-lived fission products below ground which indicated that a recent leak of radioactive liquor had occurred".

The second report followed an incident during BNFL's annual maintenance when highly radioactive solvent and waste material from the reprocessing plant was flushed out into the Irish Sea - instead of being removed for storage and disposal. The HSE report investigated possible breaches of BNFL's site licence, which included conditions requiring the company to "prevent leaks or escapes".

In 1985 the HSE's Chief Nuclear Installations Inspector, Mr R D Anthony told a committee of MPs:

"Clearly the environment departments have responsibilities for the environment. Clearly we have responsibilities for safety under our legislation...Inevitably there is an overlap".

House of Commons Environment Committee 'Radioactive Waste', January 1986, 191-II, Volume II, page 236.

**This is more than just an incidental overlap. HSE has a direct statutory responsibility for environmental matters in the nuclear industry.**

Low level, routine radioactive discharges to the air, sea and land are authorised from nuclear sites under the Radioactive Substances Act 1960 by the Ministry of Agriculture, Fisheries and Food (MAFF) and HM Inspectorate of Pollution. Nuclear plants however must also be licensed by the HSE under the Nuclear Installations Act 1965.

Under section 4(1) of that Act the HSE can impose conditions:

“necessary or desirable in the interests of safety”.

But under section 4(2) it may also impose:

“such conditions as the [Executive] may think fit with respect to the handling, treatment and disposal of nuclear matter”.

Significantly, section 4(2) makes no reference to “safety”. Conditions under this section may be made on other grounds - the most likely being environmental.

This is confirmed by section 3 of the Act. The HSE can direct a person seeking a site licence to notify the National Rivers Authority, local fisheries committees and water companies of the application. They are entitled to make representations to the HSE before the granting of the licence. The purpose of this section appears to be to allow representations to be made about possible water pollution - the obvious interest which these three bodies have in common. The HSE is obliged under the Act to consider any such representations before granting the licence. This is an explicit environmental responsibility.

**Ironically, the HSE has itself refuted the arguments it is using to avoid its responsibilities under the Environmental Information Regulations.**

The HSE’s 1988-89 annual report, published jointly with the Health and Safety Commission’s, stated:

“its [HSE’s] regulatory role and expertise in relation to most industrial processes means it is inevitably heavily involved in certain aspects of environmental protection: such protection in practice often being inseparable from the safeguard of workers and the public from industrial risks.

Later chapters describe areas where HSE’s regulatory role implies substantial concern with environmental issues. They include...policy and enforcement responsibilities under various regulations controlling risks from nuclear or other major hazard installations”.

Health and Safety Commission, annual report 1988-89, page 3 (emphasis added)

**It is clear that even by its own criteria, HSE is required by the Regulations to disclose environmental information about the nuclear industry, and was not entitled to refuse the requests made to it.**

### **A legal bar on disclosure?**

**The HSE's response to the Campaign contained a further misrepresentation. Having claimed that it had no duty to disclose the requested information it added that it was also legally prohibited from doing so:**

“Accordingly, it is not open to the Executive to release to you the information you request since its disclosure is restricted by virtue of Section 28 of the Health and Safety at Work etc Act 1974.”

Letter to the Campaign, 12.8.93

Section 28 of the Health and Safety at Work Act prohibits the disclosure of information obtained by the HSE in the exercise of its statutory responsibilities unless the person who provided it consents, or disclosure is for the purpose of the HSE's statutory functions or for legal proceedings.

For the first 11 years of its existence, from 1975 to 1986, the Health and Safety Commission (HSC) and Executive argued that this provision prevented the HSE from disclosing virtually any information to the public. The only significant exception was where someone had to be given information because their safety was under immediate threat.

However, in 1986, after reviewing its disclosure policy, the HSC acknowledged that it had been misinterpreting the law. It realised that section 11(2) of the Act placed it under a duty to make appropriate arrangements to keep the public informed about matters relevant to the general purposes of the Act. The general purposes of the Act are given in section 1(1) and include the protection of the public from hazards caused by work activities.

**Protecting the public from radiation hazards involves preventing the release of radiation into the environment. In most cases, the HSE is therefore free to disclose information about this subject, without contravening section 28.**

The Commission in fact introduced a new disclosure policy in 1986 involving, in particular, the release of information about complaint investigations and incidents involving releases of hazardous substances “into the environment”.

But it argued that, for practical reasons - including the difficulty of knowing whether genuine trade secrets might be involved - other requests for information about particular premises should be referred to the company concerned.

**Internal guidance issued to HSE and HSC staff in 1987 told them that section 28 was not an obstacle to disclosure:**

“Section 28 should not be regarded as a general restraint on the disclosure of relevant information. Indeed its effect is to empower the Commission and Executive to disclose this information, subject to certain conditions, regardless of the private rights of the suppliers, where to do so would be for the general purposes of the Act.”

“It follows that the Commission and Executive may disclose and use ‘relevant information’ for the purpose of providing information to bodies and persons concerned with matters relevant to the general purposes of the Act.”

“Whether in any case disclosure is for the general purposes of the Act depends on the facts of the case, but it is probably true to say that there will be few occasions when the Executive is required to withhold information it wished to release.”

But it added:

“that does not mean that the HSE is under an obligation to disclose information even though it may be legally permissible to do so...”

Disclosure of Information to Members of the Public’ HSAM 43 GAP, February 1987.

**The HSE is therefore generally free to disclose information of the kind requested by the Campaign, and its letter misrepresents the legal position.**

Indeed, one of the four documents the HSE claimed it was legally barred from disclosing (its submission to HMIP during the THORP consultation) was published shortly afterwards - not by HSE itself, but by HMIP in its report on the consultation exercise.

**The HSE’s misrepresentation of the legal position must deter people from asking for information which ought to be available. There may be good reasons for withholding certain information. If so, the Executive should explain them, not evade responsibility for these decisions by blaming the law.**

The Campaign has previously complained to the Health and Safety Commission, as far back as 1986, that inspectors were misrepresenting the legal position in this way. It is astonishing to find that the practice still continues.

#### 7.4 The National Audit Office

The National Audit Office (NAO) stated it was not subject to the Regulations:

“the National Audit Office works directly to Parliament in carrying out its statutory audit functions and is not a government department. It has no specific functions or responsibilities in relation to the environment. Accordingly the National Audit Office is not a ‘relevant person’ under the Regulations”

Sir John Bourn, Comptroller and Auditor General, letter to Campaign, 7.10.93

The NAO does appear to be in a different category from the other bodies described in this section.

The NAO was established by the National Audit Act 1983. It is headed by the Comptroller and Auditor General (C & AG), although his office predates this Act by almost a century. The C & AG’s primary function is to report to Parliament on the accounts of public authorities.

Under section 6 the 1983 Act the C & AG also has the function of examining “the economy, efficiency and effectiveness” of government departments and certain public authorities. The

Campaign's request to the NAO referred to a report commissioned by it in the course of such a study into the cost of decommissioning nuclear facilities.

The Comptroller and Auditor General is an officer of the House of Commons [National Audit Act 1983, section 1(2)] and can only be removed by a vote of both Houses of parliament. The 1983 Act gives him "complete discretion in the discharge of his functions" [Section 1(3)], provided that he complies with any statutory duty.

He is clearly not under the control of any minister, government department or other public authority and does not fall within the scope of Regulation 2(2)(b) which deals with controlled bodies.

Moreover, the House of Commons and its officers would not normally be regarded as exercising functions of public administration, and would therefore not be caught by the definition under Regulation 2(2)(a).

The report requested by the Campaign was commissioned by the NAO from McAlpines during its report into the cost of decommissioning nuclear facilities. It assessed the underlying technical assumptions and methodologies adopted by various industry bodies including BNFL.

The NAO's reports are made to Parliament and published. They occasionally include, as an appendix, a commissioned report, though the one requested in this study was not published. The NAO report merely describes its main conclusions:

"The National Audit Office commissioned specialist advice from McAlpines on the underlying technical assumptions and methodologies adopted by the Central Electricity Generating Board, South of Scotland Electricity Board and British Nuclear Fuels as evidenced by the reports prepared for the Department. This concluded that, whilst British decommissioning estimates are high by international standards, reflecting the uniqueness and variety of design, the engineering methodology proposals were robust. Moreover, since they were based on present day technology, the resulting figures were very conservative. McAlpines concluded that the reference cases prepared by the companies overstated the engineering difficulty of commissions and substantial savings might be identified in future revisions."

It is perhaps a matter of regret that this was not published, given the importance of these issues to the debate on THORP and the nuclear industry generally.

## **8. "Non environmental" information**

The discussion so far has dealt with bodies which claimed that the Regulations did not apply to them. However, some requests were refused on the grounds that the information itself was not subject to the Regulations, which apply only to information which "relates to the environment" [Regulation 2(1)(a)]

Three requests were refused on these grounds:

- The DTI refused to release details of notifications which it is required to give to the European Atomic Energy Community before exports of nuclear material are returned by BNFL to Japan, after reprocessing.
- Cumbria County Council refused to release a report produced for them by independent consultants, Environmental Resources Limited, dealing with the employment and socio-economic implications of the THORP project.
- The DTI refused to release a report by consultants Touche Ross on the commercial and economic case for THORP, commissioned by BNFL and relied on heavily both by the company and the government in support of the THORP project.

The justification for regarding the first of these requests as outside the scope of the Regulations may be questioned. Notifications of all overseas shipments of nuclear materials are required under European Community regulations designed to ensure that nuclear material is not sabotaged, stolen or diverted for military purposes. However, while the primary purpose of these is to prevent nuclear proliferation, there are also environmental implications. For example, any attempt to attack a shipment containing nuclear material would risk the release of the material at the site of the attack - with potentially disastrous environmental consequences.

The Touche Ross report, the subject of the third refusal, has become a controversial document. The case for THORP has increasingly centred on the economic and commercial advantages of the plant to the company and the country. The Touche Ross report, which was based on BNFL figures, attempted to quantify the financial implications of both proceeding with and cancelling the project. A summary of the findings has been published in a BNFL document, released by the government in August 1993. The complete figures and the assumptions on which they are based remain confidential.

The validity of even the summary data published has been questioned. For example, the environmental bulletin ENDS reported:

“as the Government has refused to require the publication of the full Touche Ross report it is hard to assess the reliability of BNFL’s figures. Even the edited version reveals at least one major flaw. If THORP was blocked, it is highly likely that BNFL would offer a replacement fuel management service based on constructing dry stores, either at Sellafield or in the country of origin. The report includes the costs of building replacement storage facilities - but fails to allow for any income that BNFL would receive from providing such a service to its overseas customers.

Other inconsistencies emerge. In recent months BNFL has claimed, with backing from Energy Minister Tim Eggar, that scrapping THORP would expose it to compensation claims from customers of up to £5 billion. The company’s report lowers this to £4 billion - and then makes the crucial admission that there is ‘robust legal protection in the contracts’ against such claims.”

ENDS, August 1993, page 23

**Significantly, the Campaign also applied for certain extracts from BNFL contracts with its customers: these too have not been released.**

Does such information also “relate to the environment”, or is it outside the scope of the Regulations?

Regulation 2(2) states:

“For the purposes of these Regulations information relates to the environment if, and only if, it relates to any of the following, that is to say -

- (a) the state of any water or air, the state of any flora or fauna, the state of any soil or the state of any natural site or other land;
- (b) any activities or measures (including activities giving rise to noise or any other nuisance) which adversely affect anything mentioned in sub-paragraph (a) above or are likely adversely to affect anything so mentioned;
- (c) any activities or administrative or other measures (including any environmental management programmes) which are designed to protect anything so mentioned.”

**Though it may at first seem surprising, it can be argued that the reprocessing of spent nuclear fuel itself is a measure “designed to protect” the environment, which therefore falls within paragraph (c) above. Indeed, if this can be established, a much broader range of information about THORP would be subject to the Regulations.**

The alternative to THORP was the long-term underwater storage of spent fuel. The relative merits of the two were the central theme of the Windscale public inquiry held before Mr Justice Parker in 1977. At this inquiry BNFL argued that reprocessing “is essential on waste management grounds” [‘The Windscale Inquiry’, Report by the Hon. Mr Justice Parker, HMSO 1978, paragraph 5.1, emphasis added]

In his report Mr Justice Parker concluded that a new UK plant to reprocess spent fuel “is desirable” and that the alternative, of prolonged storage of growing volumes of unprocessed spent fuel was not in the country’s best interests. The inquiry’s support for reprocessing - and THORP - was largely justified on environmental grounds:

“Such a decision [long term storage without reprocessing] appears to be unlikely and not to be in the best interests of ourselves or future generations. This is because

- (i) It involves throwing away large indigenous energy resources and, for so long as there is a nuclear programme of any kind, making us wholly dependent on foreign supplies....
- (ii) **It involves committing future generations to the risk of the escape of more plutonium than is necessary. If the plutonium is extracted by reprocessing the total inventory can be greatly reduced.**
- (iii) **It involves committing future generations to a greater risk of escape of the remaining content of the spent fuel since the spent fuel is likely to be more vulnerable to leaching by water than solidified highly active waste.”**

“The Windscale Inquiry”, Report, paragraph 17.7

The Government’s decision to approve the THORP project in 1978 was also presented in environmental terms. The Secretary of State for the Environment, Peter Shore, told the House of Commons:

"I find the inspector's [Mr Justice Parker's] view convincing that highly active waste in the form of glass [the form in which high level waste from THORP would be stored] is likely to be safer for long-term disposal. My conclusion, therefore, is that for environmental reasons we should pursue the reprocessing and vitrification route to long-term disposal, where our research and development is much further advanced..."

Hansard, 22.3.78, col 1544 (emphasis added)

THORP is no longer justified in this way. Indeed, in its 1990 annual report the Radioactive Waste Management Advisory Committee concluded that "there are no compelling waste management reasons to reprocess oxide fuel early, late, or at all". However, the 1978 decision that the plant should be built was justified - by BNFL, by Mr Justice Parker and by the government - on the grounds that it was necessary on environmental grounds.

**It is arguable, therefore, that the THORP project is itself a measure "designed to protect" the environment. Information relating to THORP would therefore be information "which relates to the environment" and as such would be subject to disclosure under the Regulations. This would cover a wider range of information about the implications of the project, not merely information about its direct environmental impact.**

A separate argument also suggests that the refused information should be disclosed.

The decision on whether to approve the plant is being taken under the Radioactive Substances Act 1960. Technically, the issue to be decided is whether BNFL should be issued with a new authorisation under the Act, to accommodate the new environmental discharges from the THORP plant.

In June 1993 the government announced that it was satisfied that the proposed new discharge limits would "effectively protect human health, the safety of the food chain and the environment generally". This would normally have been the end of the matter.

However, the government's policy on nuclear waste is that all activities which give rise to radioactive wastes "must be justified". A decision to approve THORP taken without reconsidering the justification for the plant might expose the government to judicial review, a step threatened by Greenpeace. Perhaps in response to this possibility, the government announced a further round of public consultation in August 1993. This would deal with questions which, "because of the wider issues raised", had not been considered during the initial consultation.

The "wider issues" identified by the government included the risk of nuclear proliferation, employment and regional policy, overseas trade relations and the commercial benefits of reprocessing at THORP. The three requests refused because they involved "non-environmental" information concerned some of these issues.

However, the government has presented this consultation in rather unusual terms, suggesting that it is consulting about issues which it regards as irrelevant:

"The Ministers consider that the wider policy questions raised during consultation, which were not dealt with by the Inspectorates, are not relevant matters in the context of the exercise by them of their functions under the legislation. However a number of respondents [to the previous consultation] argued that these questions should be

considered. They also argued that circumstances have changed significantly since the planning inquiry in 1977, and that the Government should in any case reconsider the case for the operation of THORP before authorisations are granted.”

As a result the Government commissioned additional papers on these wider issues, which it says ministers have considered and which, they say, have not caused them to change their minds:

“Having considered these documents, the Ministers have formed the view that even if the wider issues had been relevant they would still have been minded to conclude that the authorisations should be granted on the terms proposed by the Inspectorates”

‘Radioactive Substances Act 1960. BNFL Sellafield Further Public Consultation’, DoE and MAFF, 4.8.93

Having announced what appears to be their conclusions on the wider issues, the documents dealing with these wider issues were then circulated for public comment in a second round of consultation. (These are the documents which BNFL supplied in response to the Campaign’s request.)

The government’s acknowledgement that these wider issues should be considered even though they are held not to be relevant, has implications for the present study.

- (1) The three Campaign requests which were refused because they were held to involve “non-environmental” information, all relate to these “wider issues”.
- (2) The government has now acknowledged that these issues and the public’s views on them, should be considered by Ministers even though it maintains that they are not relevant to the decision on whether to grant the discharge authorisations.
- (3) The decision on THORP is being taken under an environmental statute, the Radioactive Substances Act, which deals with the controls necessary to prevent or minimise plant’s radioactive discharges.
- (4) If these wider issues are to be considered by the Government in the context of a decision taken on environmental grounds under an environmental statute then information about them must in some sense “relate to the environment”.

**This argument suggests that information such as the Touche Ross report should, therefore, be accessible under the Environmental Information Regulations. If it is not, the implications are, paradoxically, that information on which a decision of great environmental importance hangs, and which is taken under environmental protection legislation, is held not to “relate to the environment”.**

## 9. Conclusions

**This survey produced a number of positive responses, notably from the DoE and HM Inspectorate of Pollution, involving the release of information which probably would not have been made available in the past.**

The actual number of documents requested from these bodies was however extremely small, so the survey provides no more than a brief indicator of the potential of the Regulations.

**Many requests to other bodies were denied - often with little or no apparent justification. Despite the new disclosure law, information central to an understanding of the implications of a crucial environmental decision has been withheld.**

**The most striking finding of the survey is the number of bodies which deny that they are subject to Regulations which appear expressly designed to cover them.** There are indications, from organisations not covered by this survey, that others are also adopting this position.

**That they can do so is partly the result of the government's failure to specify in detail precisely who is covered, and its strange invitation to public authorities to decide this matter for themselves. This is a recipe for evasion. It has allowed BNFL, the HSE and RWMAC to exempt themselves from their legal obligations on the basis of eccentric and often self-serving interpretations of the Regulations and their own functions. It is likely that the courts would rule that each of these bodies is subject to the new law.**

Of the three, British Nuclear Fuel's response was perhaps the most predictable. At the time of the study the company was awaiting a make-or-break decision on THORP, in the face of intense public opposition. It was not anxious to release documentation which - if not sound - could undermine its case.

The considerable public interest in ensuring that the case is sound - or that any flaws are exposed - has been frustrated. Even if the company's interpretation of the Regulations is subsequently overturned in the courts, BNFL appears to have avoided disclosure during this crucial period, when the information might be used to influence the government's decision.

The Health and Safety Executive is in some ways one of the more open government agencies: its response to the Regulations is therefore all the more depressing.

The Executive's conclusion that it has no duty to disclose information about the nuclear industry under the Regulations:

- directly contradicts the government's published Guidance on the Regulations
- is built on a misrepresentation of the HSE's own environmental responsibilities for nuclear sites
- is supported by a false claim that the HSE is legally prohibited from disclosing such information.

This is an deplorable response, by any standards. What makes it extraordinary is that the government has recently promised a new statutory right of access to safety information,

modelled on the Environmental Information Regulations ['Open Government', White Paper, Cm 2290, July 1993]. It is government policy that such information should be disclosed.

The Radioactive Waste Management Advisory Committee's evasive response is equally disappointing. The Committee plays a central part in the formation of government's policy on nuclear waste disposal. For it to argue that it has no public responsibilities for the environment is singularly implausible. Its sole purpose is to advise the government in the formulation of public policy on the environment.

Ironically, RWMAC also justifies its decision on the grounds that it is not "under the control" of ministers - one of the criteria in the Regulations. Yet this claim is refuted in its own annual report, which states:

"RWMAC advice will be published if the Minister agrees that these reports should have a wider circulation" [13th annual report, 1993, page 5].

If Ministers control RWMAC's freedom to disclose information, then one part of the Committee's already dubious interpretation of the Regulations is swept away entirely. And if ministers do exercise such influence on disclosure, their willingness to leave it to the Committee to decide for itself whether to comply is a remarkable abdication of responsibility.

**However much these bodies and their ministers may find it convenient to deny it, ministers exercise significant control over each. Ministers are the sole shareholders in BNFL; they have statutory powers to give directions to the Health and Safety Commission (which in turn can direct the HSE) and they fund and determine the terms of reference for RWMAC. They should tell these, and similar, bodies to comply with the Regulations, not wait for the courts to do so.**

This report offers an insight into the prospects for the government's 'open government' policy.

**Bodies which genuinely believed that they were not legally obliged to disclose could nevertheless have attempted to supply at least some of the requested information voluntarily. In most cases they made no effort to do so.**

The Department of Trade and Industry was one such offender. Regardless of the Regulations, ministers are free to publish crucial documents such as the Touche Ross report on the economic implications of THORP. They should do so.

**The study reveals the inadequacy of an access law which is capable of addressing only one aspect of a complex issue, such as the THORP decision. There is little logic in providing a legal right of access to "environmental" information, while maintaining a regime of secrecy for information about closely related matters such as the employment, safety, proliferation, commercial and economic implications of the same decision.**

Few decisions about the environment are taken purely on environmental grounds. For example, the legal obligation on firms under Part 1 the Environmental Protection Act 1990 is to adopt "the best available techniques not entailing excessive cost" for minimising pollution [section 7(2)(a)]. If information about the costs of environmental decisions can be defined as non-environmental information, then even the most apparently straightforward request may be frustrated.

The government has accepted the case for widening the present access right. Its promised safety disclosure law will eventually close off one of the loopholes revealed here - though as yet, no date for introducing this legislation has been given.

Access to other information will be governed by a new non-statutory Code of Practice, described in the Open Government white paper, and due to come into force in April 1994. This is a modest step in the right direction, but far short of the answer. The Code suffers from an overwhelming defect: people will be given information, but not access to actual documents - they will not be allowed to see for themselves. Important areas of government will be excluded from the Code altogether. And while the Code will be supervised by the Ombudsman, it will not be enforceable. [Campaign for Freedom of Information, Secrets Newspaper No 26, August 1993]

**The government continues to resist a freedom of information act, arguing that equivalent openness can be achieved without legislation. The present study suggests otherwise. The Whitehall response has been, with some honourable exceptions, to exploit every available excuse for secrecy. Nothing less than the most explicit, comprehensive and enforceable right of access is likely to succeed.**

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## APPENDIX

### **Bodies to whom requests were made and information requested**

#### **British Nuclear Fuels plc**

- (i) The report of December 1992 commissioned by British Nuclear Fuels plc from Touche Ross on the economic case for THORP.
- (ii) All submissions that BNFL made to the Radioactive Waste Management Advisory Committee, from March 1992 onwards, as part of that committee's examination of the technical basis of BNFL's proposals for 'waste substitution' and their likely radiological and environmental impact on the UK.
- (iii) All notifications of exports of nuclear material to Japan sent to the Department of Trade and Industry's Safeguards Office for forwarding to the European Commission under paragraph (c) of Article 24 of Commission Regulation (Euratom) No 3227/76.
- (iv) Any submission relating to proposals from the European Commission on the regulation of the transport of nuclear materials made by BNFL, or any of its subsidiary companies, during the Commission's drawing up of COM 92/520/FINAL.
- (v) The annual monitoring figures since 1989 of the THORP pond recirculation bleed, broken down by radionuclide and type of activity.
- (vi) Any analyses, projections or test results BNFL have of the efficiency of the High Efficiency Particulate Air filters used in the THORP plant.
- (vii) Any probabilistic risk analysis of accident scenarios (not limited to reference accidents) relating to THORP - also referred to as the Plant Safety Case - that BNFL have submitted to the Nuclear Installations Inspectorate or the European Commission under Article 37 of the Euratom Treaty.
- (viii) Any estimates produced by BNFL of the possible detriment to the population in terms of fatal and non-fatal cancers and genetic effects resulting from all radiation doses arising from the actual discharges from Sellafield proposed in BNFL's April 1992 application for revised discharge authorisations.
- (ix) Any estimates of the collective radiation doses resulting from the proposed actual liquid discharges from the Sellafield site which have been produced in the light of the discharge limits proposed in November 1992 by HMIP.
- (x) The four reports by Professor Stephen Jones on the assessment of historic discharges from Sellafield which were submitted to the court in the case of Hope vs BNFL and Reay vs BNFL, and referred to on days 5,6,7 and 8 of the case.
- (xi) Any clauses from and appendices to the contract between BNFL and Gemeinschaftskernkraftwerk Neckar GmbH for reprocessing at THORP which relate to: (a) return of waste, (b) allocation and quantity of waste, residues, and disposable

residues and (c) substitution of High Level Waste for Intermediate Level Waste and Low Level Waste. We recognise that disclosure of these will require the consent of Gemeinschaftskernkraftwerk Neckar GmbH and would appreciate it if their consent could be sought.

### **Health and Safety Executive**

- (i) An index, if there is one, to the documents submitted to the NII by British Nuclear Fuels (BNFL) in support of an application for a license for the Thermal Oxide Reprocessing Plant (THORP) under the Nuclear Installations Act 1965.
- (ii) Any probabilistic risk analysis of accident scenarios (not limited to reference accidents) relating to THORP that BNFL have submitted to the NII under the Nuclear Installations Act 1965.
- (iii) The NII's audit of the control software (distributed control system) for THORP. (This was referred to in an article entitled "Faults highlight problems of nuclear software" in New Scientist magazine on 29 August 1992. A copy is attached.)
- (iv) The submission that the NII sent to HMIP/MAFF as part of the consultation process following the issuing to BNFL of draft certificates of authorisation to discharge radioactive wastes from its Sellafield site.

### **Radioactive Waste Management Advisory Committee**

- (i) The document that the RWMAC recommended BNFL draw up, in its report of 10 October 1992, on return of waste from THORP, demonstrating that retention in the UK of foreign Intermediate Level Waste resulting from reprocessing will not cause health or safety concerns.
- (ii) Any documents submitted to the RWMAC by BNFL since March 1992 for the purposes of the committee's report on the return of waste from THORP.

### **National Audit Office**

A copy of the study commissioned by the National Audit Office from Sir Robert McAlpine and Sons Ltd into the underlying technical assumptions and methodologies adopted by the CEGB, SSEB, and BNFL as regards decommissioning of nuclear installations. This was referred to on page 16 of the report published in June 1993 by your office, "The Cost of Decommissioning Nuclear Facilities".

### **Department of Trade and Industry**

- (i) The Touche Ross report of December 1992 which...was commissioned by British Nuclear Fuels plc and has been supplied to your department on the economic case for THORP.
- (ii) Copies of all advance notifications of exports of nuclear material sent to your Department's Safeguards Office for forwarding on to Euratom under paragraph (c) of Article 24 of Commission Regulation (Euratom) No 3227/76 as a result of BNFL's exports of nuclear material to Japan.

### **Cumbria County Council**

A copy of Volume 2 (Annex E) of the report produced in December 1992 by Environmental Resources Limited for Cumbria County Council on THORP and the revised Sellafield discharge authorisations.

### **HM Treasury**

A copy of the report of December 1992 commissioned by British Nuclear Fuels plc from Touche Ross on the economic case for the thermal oxide reprocessing plant (THORP).

### **Department of the Environment**

A copy of the document relating to the thermal oxide reprocessing plant at Sellafield entitled "General Data Relating to the Arrangements for Disposal of Radioactive Wastes as Called for under Article 37 of the Euratom Treaty", which the DoE submitted to the European Commission in October 1991.

### **Her Majesty's Inspectorate of Pollution**

- (i) Any probabilistic risk analysis of accident scenarios (not limited to "reference accidents") relating to THORP - also referred to as the Plant Safety Case - that BNFL have submitted to HMIP either (a) as part of their April 1992 application for certificates of authorisation to dispose of radioactive wastes from their Sellafield site or (b) for forwarding - via the Department of the Environment - to the European Commission under Article 37 of the Euratom Treaty.
- (ii) A copy of any analyses, projections or test results that BNFL have supplied to HMIP relating to the efficiency of the High Efficiency Particulate Air filters used in the THORP plant.

### **National Radiological Protection Board**

- (i) Any submission by the NRPB to HM Inspectorate of Pollution as part of the consultation process following the issuing to British Nuclear Fuels in November 1992 of draft certificates of authorisation to discharge radioactive wastes from its Sellafield site.
- (ii) The NRPB calculations of critical group doses arising from the proposed discharge levels at the BNFL Sellafield site, which are referred to in paragraph two of the COMARE submission to HMIP dated 22 January 1993.

### **National Rivers Authority**

A copy of any submissions made by the National Rivers Authority to HM Inspectorate of Pollution as part of the consultation process following the issuing in November 1992 to British Nuclear Fuels of draft certificates of authorisation to dispose of radioactive wastes from its Sellafield works.

### **Northern Regional Health Authority**

A copy of the submission by Northern Regional Health Authority to Her Majesty's Inspectorate of Pollution as part of the consultation process following the issuing in

November 1992 to British Nuclear Fuels of draft discharge authorisations for their Sellafield works.

**West Cumbria Health Care NHS Trust**

A copy of any submissions made by West Cumbria Area Health Authority to HM Inspectorate of Pollution during the consultation concerning the November 1992 draft certificates of authorisation issued to BNFL to dispose of radioactive wastes from its Sellafield works.

**South Cumbria Area Health Authority**

A copy of the submission by South Cumbria Area Health Authority to Her Majesty's Inspectorate of Pollution as part of the consultation process following the issuing in November 1992 to British Nuclear Fuels of draft discharge authorisations for their Sellafield works.

**North West Water plc**

A copy of the submission made by North West Water to HM Inspectorate of Pollution as part of the consultation process following the issuing in November 1992 of draft certificates of authorisation to dispose of radioactive wastes to British Nuclear Fuels for the Sellafield works.

**Department of Transport**

- (i) Any package design approval certificates granted by your department since January 1993 for the transportation of radioactive materials to the Thermal Oxide Reprocessing Plant at the British Nuclear Fuels plc Sellafield site. (These were referred to in Written Answers, 6 May 1993 col. 171)
- (ii) Any reports on the safety of such package designs which were submitted as part of the applications for the above certificates.
- (iii) The submission that the Department of Transport sent to Her Majesty's Inspectorate of Pollution/MAFF as part of the consultation process following the issuing in November 1992 to BNFL of draft certificates of authorisation to discharge radioactive wastes from its Sellafield site.