



Unconventional Fossil Fuels: Supporter briefing on Legal and Constitutional issues

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There's been a lot of discussion in anti-fracking circles about some of the legal and constitutional issues around the moratoriums on shale gas, coalbed methane and underground coal gasification. Common questions centre around:

- the difference between a moratorium and a ban
- the legal status of the current moratoriums in Scotland
- whether the Scottish Government currently has the powers to implement a ban on unconventional fossil fuels
- if the Scottish Government did put a ban in place, the risks of being taken to court by a fracking company or even the UK Government

The bad news is that there are no straightforward answers to these questions; but the good news is that Ian Cowan, an environmental law expert (and FoES board member), has given his take on them, without too much legal jargon, in this great blog post:

<https://talkingmince.wordpress.com/2016/02/17/its-not-easy-being-green-part-two-along-came-a-lawyer/>

FoES highly recommends you read the whole thing, because these are important and complex issues that take some understanding.

However, in brief, the key points are:

1. Most people probably think of a ban as permanent, and of a moratorium as a temporary ban. A ban, whether permanent or temporary, has no real teeth unless legal steps are taken to enforce it. For instance, the Scottish Parliament passed legislation to make it an offence to smoke in public places. This is the most effective way to ban something permanently.
2. The legal status of the current moratoriums on shale gas and oil, coalbed methane and underground coal gasification is based on steps taken using existing powers under planning and environmental regulation that are devolved to the Scottish Parliament under the 1998 Scotland Act.
3. The Scottish Government could use the same powers to ban unconventional fossil fuels: the existing ban on new nuclear power plants in Scotland is delivered through the use of planning powers. However, while planning decisions on new power stations are taken by the Scottish Government (using devolved powers under the Electricity Act), planning decisions on shale gas or coalbed methane developments would generally fall to local authorities, so politically it's a little bit harder, but far from impossible, to implement a ban in the same way. This, rather than promoting new legislation, is what the Scottish Government are likely to do if – as FoES hopes and expects – the research programme and public consultation conclude that a ban is the only sensible outcome.

However, FoES thinks there is a strong case for introducing new legislation to ban unconventional fossil fuels in the context of climate change.

Following the independence referendum and the Smith Commission proposals, powers over the licensing of onshore petroleum (including natural gas) are to be devolved to Holyrood, giving the Scottish Government another tool to prevent unconventional gas development. However, underground coal gasification (UCG) does not require a petroleum licence, but a licence from the Coal Authority, and as there are currently no plans to devolve such licensing to Scotland, a ban on UCG would have to be enforced by way of existing planning or environmental powers.

4. The Scottish Government would potentially be open to legal challenge if it were to put a ban in place before completing the research programme and holding the promised public consultation. They may already be open to legal challenge over the current moratoriums, although whether such a challenge would stand up in court is a different matter. Industry bodies have taken the Scottish Government to court over new legislation, for example on recent alcohol pricing laws. However the nuclear industry hasn't taken legal action against the Government over its use of planning powers to ban new nuclear. Nor has the UK Government, despite the clear differences on energy policy. So there is a clear precedent for using planning powers to achieve energy policy objectives based on public safety and environmental concerns.

Crucially, even if the threat of legal challenge from big corporations is real, FoES believes it should not stop a democratically elected Government from doing the right thing.

For more info: www.foe-scotland.org.uk/fracking

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Friends of the Earth Scotland's work on unconventional fossil fuels is part of our campaign for a Fossil Free Scotland: A just transition to a 100% renewable, nuclear-free, zero-fossil-fuel Scotland

find out more at: www.fossilfree.scot