

APPEAL BY DART ENERGY (FORTH VALLEY) LIMITED IN RELATION TO
APPLICATIONS PPA-240-2032 & PPA-390-2029

CLOSING SUBMISSIONS BY FRIENDS OF THE EARTH SCOTLAND

Introduction

1.1. Friends of the Earth Scotland (referred to as “FoES”) submit that the Reporters should refuse this appeal on one or more of the following grounds:

1. The inadequacy of the environmental statement and thus compliance with the relevant legislative requirements;
2. Due to the impacts of the proposal in relation to climate change and its compatibility with climate change policies;
3. Due to the inadequate regulatory framework;
4. For the reasons already given by Stirling and Falkirk Councils;
5. Due to the incompatibility of the project with the emerging SPP and NPF3;
6. Due to the incompatibility of the project with Falkirk and Stirling Councils emerging local plan policies;
7. Due to the lack of compliance with the legislative requirements for a Waste Management Plan.

2.1 FoES have had sight of the written submissions for CCoF and adopt their submissions in respect of the issue of the adequacy of the Environmental Statement (referred throughout this submission as the ‘ES’). FoES also adopt CCoF’s submissions in respect of numbers 4 to 7 above and accordingly make only short submissions where necessary on those points.

2.3 Alternatively, if the Reporters are minded to grant consent, FoES also make submissions on the issue of conditions.

Preliminary matters

3.1 FoES wish to make submissions on two preliminary matters.

3.2 Firstly, it will be recalled that the Reporters allowed FoES to submit documents on day 8 of the inquiry (with two of the documents formally allowed on day 9 of the inquiry). A comment was made by Mr Steele QC to the effect that FoES had not complied with the rules. At the time, this was taken to be a submission that these productions were late beyond the time period allowed. On checking the transcripts, it appears that Mr Steele QC may have made this as a more general comment on FoES complying with the rules more generally. There was a short report to that effect in a local newspaper. FoES wish to make it clear that if the applicants were criticising FoES more generally, they do not accept that such criticism is fair. FoES have generally complied with the inquiry timetable, and the Reporters accepted that the documents in question which were allowed although late were all published within days or at most weeks from the date of lodging (and all published after the various deadlines). Each of the documents had only come to the attention of FoES shortly before being lodged. In any event, FoES noted that the applicants also sought for some of the documents to be lodged.

3.3 FoES wish to raise that point should a misleading impression have been given to any party or those in the audience.

3.4 Secondly, FoES note the potential confusion in relation to the identity of appellant. FoES note that the appeal was lodged by “Dart Energy (Forth Valley) Limited” (appeal to DPEA on 5 June 2013). However, even within that document the appellant is also referred to as ‘Dart Energy (Europe) Limited’ (paragraph 1.1). Whilst this might seem an academic point, and in many developments where no other regulatory consents arise given permission runs with the land, it is important to understand that this development is not run of the mill. It is a novel development to take place over a lengthy period of time. In any event, there is a specific obligation on the Reporters under Regulation 13 of the Management of Extractive Waste (Scotland) Regulations 2010 to consider. Reference is made to the submissions for CCoF in that respect.

Issue 1: Environmental statement

4.1 FoES adopt the submissions made by CCoF on this point and ask that permission be refused due to the inadequacy of the ES, and thus the lack of compliance with the legislative requirements regarding the ES. FoES will only therefore make short submissions on this point.

4.2 The starting point for considering compliance with the requirements of an ES is a proper consideration of the legislative framework. As set out in CCoF's submission (and thus not repeated here) the obligation flows from an EU level, and thus requires careful and particular consideration so as to ensure compliance. The Reporters should however bear in mind that the requirements to allow for full and transparent consultation on a project also in turn arise from international obligations - the Convention on Access to Information, Public Participation, and Access to Justice (referred to as 'the Aarhus Convention'). The Reporters are particularly referred to the preamble of the Convention which sets out that *"Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations"*. The right to information, to public participation and to challenge environmental decisions made, all exist to allow this duty to be fulfilled. This inquiry, in testing the ES, is a mechanism for allowing the first two of those rights to be exercised and that duty to be fulfilled.

4.3 The role of this inquiry provides the compliance with the requirements of the legislative framework surrounding the ES. It is not an answer to say that other regulators will be involved further down the line. It is this inquiry alone which considers both the principle of the development and whether there is sufficient detail on its impacts to allow a proper assessment of the environmental impacts of the development. Whilst other regulators will make discrete decisions on individual matters, they are not charged with considering the principle of the development, nor all the detail of the individual impacts cumulatively. As was put to Mr Spiers (by the Reporters), the role of SEPA might fairly be said to be "Essentially if you can show that you're doing the best that you can do reasonably, then that's enough for SEPA? Is that fair?" Mr Speirs agreed that was a fair summary. Accordingly the Reporters should be extremely cautious as to any reliance on the involvement of other regulators further down the line.

4.4 In addition to the points made by CCoF regarding the inadequacy of the ES, FoES also submit that the ES is inadequate due to its lack of proper analysis of air pollution. The ES (DE19) concentrates on two pollutants, nitrogen dioxide and small particles (PM₁₀). There is also a mention of, but no further discussion of, fine particles (PM_{2.5}), even though this is acknowledged more generally to be the pollutant representing the biggest threat to health.

4.5 For nitrogen dioxide there are data from monitoring carried out by Falkirk Council, referenced in the ES, which show the background levels are higher than predicted by the

UK's national inventory. The ES uses a figure for the annual background levels of $27\mu\text{g}/\text{m}^3$ (Falkirk data from Larbert Village Primary) "to ensure the assessment is conservative" (10.61) and the Air Quality Supplemental Report (DE28, para 4.10) and Mr Dan Smyth's precognition (para 5.3) use $13\mu\text{g}/\text{m}^3$ (Falkirk data from Holehouse) without justification for this change, and also apparently "to ensure the assessment is conservative."

4.6 Mr Smyth describes the dispersion modeling carried out to show that the development would not increase pollution levels sufficiently to breach the Scottish standard as set out in the UK Air Quality Strategy and EU Directive. The background used is $13\mu\text{g}/\text{m}^3$ and the standard is $40\mu\text{g}/\text{m}^3$ (both annual averages).

4.7 For small particles (PM_{10}), there are no real measurements available nearby but the estimated background is also $13\mu\text{g}/\text{m}^3$. The Scottish objective is $18\mu\text{g}/\text{m}^3$ (DE(M)10 UK Air Quality Strategy, p.20) and the activities on site, particularly the running of diesel engines in drilling, HGVs and generators, and the flaring of gas, will create more small particle pollution. So the background level is much closer to the objective than is the case for nitrogen dioxide, yet Mr Smyth used "professional judgement" to rule out the need for measurement and modeling of PM_{10} levels (Mr Smyth, para 6.8 of his precognition).

4.8 Mr Smyth also said he was quite satisfied that fine particles ($\text{PM}_{2.5}$) posed no problem, yet the estimated background (there are no real data closer than Grangemouth) is $8\mu\text{g}/\text{m}^3$ and the Scottish objective is $12\mu\text{g}/\text{m}^3$ (this is Scottish Government policy, CCoF 251).

4.9 Given the uncertainty in background levels and the relatively much smaller gap between the estimated background levels and the objectives for both PM_{10} and $\text{PM}_{2.5}$ it is hard to see how Dart and RPS can justify carrying out modeling for nitrogen dioxide but not for the two particulate pollutants. FoES therefore submit the ES is inadequate for this reason in addition to the reasons as set out by CCoF.

Reason two: Climate change and climate change policy

5.1 The Climate Change (Scotland) Act 2009 was passed by the Scottish Parliament on 24th June 2009. Part 1 of the Act has two key targets for reducing greenhouse gas emissions: an interim 42 % reduction target for 2020 and an 80 % reduction target for 2050. The Scottish Ministers report annually to Parliament in the emissions and the progress being made.

5.2 The inquiry had before it a range of evidence on climate change, and also the specifics of emissions from this proposal. This submission firstly deals with the legislative and policy framework in Scotland and then the specifics of this proposal.

5.3 As Professor Hilson set out, the provisions with the Climate Change (Scotland) Act give public authorities not a power, but a duty. Section 44(1)(a) places a duty on public bodies, in exercising their functions “to act in the way best calculated to contribute to the delivery of the targets set in or under Part 1 of this Act”. Section 44(1)(c) then contains a further duty to act “in a way that it considers is most sustainable.” There is no doubt that the DPEA falls within the category of public authorities to whom the duty under s 44 applies to in considering these appeals.

5.4 Professor Hilson explained the duty (to act in the way “best calculated” to meet the targets) as neither a wholly objective nor subjective duty. It is not a duty to meet a particular target, but rather to act in the way best calculated to contribute to meeting the target. Reference was made by Professor Hilson to the guidance available to public authorities. Professor Hilson expressed the opinion that the duty under s 44 of the Climate Change (Scotland) Act might alone or together with the precautionary principle and or the sustainability ‘rider’ (as described by Professor Hilson) points towards refusal of this type of application (paragraph 5 of his precognition).

5.5 Whilst Professor Hilson’s evidence was criticised for referring to judicial review as a means of challenging decisions rather than a statutory appeal (as would arise from the determination of these appeals) it is submitted that this line of cross-examination was misguided. Professor Hilson’s precognition was designed to assist the Reporters in considering what duties arise for the Reporters by the Climate Change (Scotland) Act 2009 in light of the Reporter’s assessment of known or unknown climate impacts. His precognition was not, as seemed to be suggested to him, to be read as specific advice regarding a challenge in this case. It would have been inappropriate to seek to introduce such evidence. Rather it was a detailed consideration of his expert view on the interpretation of the duties under the Climate Change (Scotland) Act.

5.6 Professor Hilson’s evidence was in stark contrast to Mr Dan Smyth’s evidence for the appellant. Mr Smyth thought the planning system had a limited role to play in achieving climate change targets (day 7 cross-examination by Ms McCartney). Mr Alan Pollock for the appellant’s expressed a similar opinion although in not quite such stark terms. FoES submit that such evidence is wrong and must be wrong in the light of the Climate Change

(Scotland) Act 2009. Reference is also made (should there be any doubt) to the draft SPP at paragraph 208 and the existing SPP at paragraph 42.

5.7 Mr Smyth did accept that climate change targets for Scotland are being missed; reference is made to the Reducing emissions in Scotland: 2014 progress report published by the Committee on Climate Change March 2014 (FoES inquiry document 43). This report sets out that 2011 targets were missed and that emissions are likely to have increased for 2012 (page 14 of the document; reference is also made to page 15 where the document states "...this would suggest a level of emissions higher than the target in this [2012] year.").

5.8 Many of Mr Smyth's conclusions were based on assumptions on the work of others. That of itself is not necessarily a criticism, but Mr Smyth himself accepted that if there were fugitive emissions of methane for example, then that would be a significant consideration for his assessment. He gave evidence that the potency of methane over carbon dioxide is often quoted as 25 times that of carbon dioxide over a 100 year period, but accepted that the IPCC has a working draft document (not yet formally adopted) which gives the figure as 34 times as potent over a 100 year period (Mr Dan Smyth day 7 cross examination by Ms McCartney).

5.9 In relation to climate change policy, Mr Pollock for the appellants accepted under cross-examination that his precognition did not give the full picture on energy policy, and in particular, he had not set out energy policy issued by the Scottish Government. He accepted he had quoted selectively from the NPF2 and the emerging NPF3 and that his precognition in setting out Scottish Government policy was not the whole picture in that it did not set out the context and importance put on renewables in Scotland. He accepted that the broad direction of travel in Scotland was towards renewables. He accepted that to give a fuller picture of the policy framework relevant for this inquiry his precognition would also need to quote from Low Carbon Scotland's Meeting the Emissions Reduction Target 2013-2027 (DEP 35), Electricity Generation Policy Statement (FoES document no 36) and additional parts of the NPF2 (DEP 9) at paragraphs 17, 163 and 164.

5.10 Further FoES would submit that insofar as the NPF2 purports to give support to the principle of this development, in fact all the current NPF2 does is at paragraph 156 is require local authorities to consider the potential for this type of development within their local plan policies. It does not require local development plans to necessarily support this

type of development; FoES would submit that the NPF2 is not a mandatory direction from the Scottish Government to be read as the appellants would like.

5.11 In relation to the draft NPF3 (DE 32) Mr Pollock was also referred to the vision at paragraph 1.2 (at the second bullet point). He accepted he had not referred to this in his precognition and initially referred to it as 'wishful thinking'. He did however accept it set out the direction of travel in Scotland, and the context for interpreting the remainder of the document. He was also referred to paragraph 3.7 of the NPF3 and his summary of it in his precognition, and accepted that his precognition was not entirely accurate in its summary of that particular paragraph. The Reporters are asked to have particular regard to those paragraphs to which Mr Pollock was taken in cross-examination.

5.12 Whilst Mr Pollock did not accept a 'downgrading' of support for coal bed methane extraction between the NPF 2 and the draft NPF3, Falkirk Council's planning witness gave evidence to that effect when asked by the Reporter on his view (Mr Colin Hemprey day 9).

5.13 Given that further evidence is to be allowed on NPF3 later in the year, FoES will make fuller submissions on NPF3 at that stage.

5.14 In terms of Mr Pollock's evidence, FoES would submit that the situation was similar in relation to the draft SPP. Mr Pollock again was taken to paragraphs 9, 167, 208 and again accepted that his precognition was a selective quotation from the draft SPP. The Reporters are asked to have particular regard to those paragraphs.

5.15 Lastly in relation to the SPP position statement, he accepted, with some initial reluctance, that the position statement did not accurately summarise the responses in relation to opposition to unconventional gas extraction, and accepted the terms of Ian Mitchell's email regarding the erroneous analysis of consultation responses (FoE hearing document 37).

5.16 In summary, in relation to Mr Pollock's evidence, FoES submit that his precognition does not contain the full picture, and as such, that some caution should be attached to his conclusions on national planning policy as outlined in that precognition.

5.17 Turning to specifics of climate change of this development, the ES does not provide any substantive information on methane emissions other than by venting (para 10.88 of the ES; DE19 at electronic page 166) and the release of methane from the water pipeline

(paragraph 10.51 of the ES; DE19 at electronic page 162). Emissions by venting are said in the ES only to be done in an emergency and would be avoided; the release from the water pipeline is said in the ES to be 'small' at the order of .14m³ per day. Otherwise the ES provides no information or analysis on the risk of fugitive emissions of methane.

5.18 On the issue of venting, Mr John Speirs for DART agreed under cross-examination from Sir Crispin that the control of venting would come through the PCC licence, and that the degree to which venting or flaring would be allowed by that licence would not be before this inquiry (day 1, cross-examination by Sir Crispin). Mr Speirs did not make any specific calculations as to the frequency of such events. He was unable to advise if the plant would be continually manned. He told the inquiry that no risk assessment had been carried out on the risk of failure at either the well heads or at the gas treatment plant (day 1, cross-examination by Sir Crispin). Further, he was unable to advise on the exact amount of carbon dioxide to be released into the atmosphere.

5.19 Mr Speirs referred in his precognition at 3.1.5 'best available industry standards to minimize fugitive emissions'. This appears to contradict the ES which does not properly analyse the risks of fugitive emissions across the site. By referring to best available techniques to minimize the risk, the absence of a proper exploration of the risk within the ES renders the ES flawed. At paragraph 3.4.6 of his precognition Mr Speirs states that "fugitive gas emissions from equipment and piping would be minimized through application of appropriate recognized industry standards...". His precognition does not say there is no risk, and against that background the absence of any exploration of the degree of risk within the ES is a fundamental flaw. In any event, Dr Cuff accepted there was no doubt that methane leakage does occur from infrastructure (cross examination by Ms Church Day 4). Dr Cuff was referred to Fugitive Greenhouse Gas Emissions from Coal Seam Gas Production (FoES inquiry document 24), and accepted that there was a scarcity of peer reviewed papers examining whether there was fugitive emissions of methane from developments of this type. Whilst much is likely to be made of the evidence of Dr Cuff (and to some degree Professor Smythe) that there is an absence of evidence on the existence of fugitive emissions from developments of this type, given that Dr Cuff accepted the scarcity of work in the area, no great weight can be placed on any such. If the issue has not been probably studied and considered by way of peer reviewed papers, then the absence of evidence does not prove that fugitive emissions do not occur.

5.20 There was however evidence before the inquiry on the risk of fugitive emissions. Mr Salmon's evidence was that "the RPS decision not to adopt a conservative approach to the

impact assessment was problematic especially the failure to reappraise the geology fault and mine workings in the area in sufficient detail and to accept that for the purposes of the assessment faults should have been considered as potential pathways for de-watering and fugitive gas emissions.” (day 4 evidence in chief). In other words, Mr Salmon considered that the risk of fugitive emissions exists, and as such, FoES would submit that the appeals should be refused on the basis of that risk.

5.21 Similarly Professor Smythe considered there was a real risk of fugitive emissions referring to the possibility of a small fraction of the gas may escape upwards in fractures above and below the coal.

5.22 Reference is also made to Dr Cuff’s evidence that he accepted that there are fugitive emissions around infrastructure (cross examination by Ms Church Day 4).

5.23 The Reporters cannot have confidence that fugitive methane emissions are not in issue in this development. As such, for that reason alone, the Reporters should refuse the appeal given the duties under the Climate Change (Scotland) Act 2009 arising on the Reporters, and given the precautionary principle.

5.24 However the arguments on climate change go further than simply the risks of fugitive emissions. Reference is made to the conclusions of the report (commissioned by FoES for this inquiry) by Dr Broderick and Dr Sharmina. That report ‘The Greenhouse Gas Emissions Profile of Coal Bed Methane (CBM) Production: A Review of Existing Research (FoES production 08) should be carefully considered by the Reporters. In short, Dr Broderick in that report and his evidence argues that exploitation of new areas of fossil fuels are incompatible with Scotland’s climate change legislation and policies. Reference is made to his evidence, particularly in relation to the report from MacKay and Stone (FoES production 3).

5.25 Thus the issue of climate change does not require that the Reporters accept the evidence of risk of fugitive emissions to refuse the application on climate change grounds, or to be sufficiently concerned as to the leakage (as accepted by Dr Cuff) from infrastructure. Dr John Broderick gave evidence on the more strategic picture on climate change. His evidence was that the domestic legislative framework in the UK arguably did not go far enough, but as such, it was crucially important that the domestic legislation was adhered to.

5.26 FoES' submission is that these applications should be refused because of impacts on climate change even without consideration of the risk of fugitive emissions or emissions from infrastructure.

5.27 Whilst the appellant led evidence as to the supposed benefits of the proposal, FoES firstly takes issue with the benefits as claimed by the appellant, but alternatively if the Reporters accept that benefits exist (whether to the degree claimed by the appellants or a lesser degree) those benefits must be weighed up against the potential harm, particularly in environmental terms.

5.28 Mr Bain gave evidence on behalf of the developer in relation to the alleged benefits of the proposal. It is submitted that his evidence should be treated with some caution. This is both in relation to the alleged benefits generally and the specific issue of energy. He accepted that he did not have any knowledge of Scottish energy policy (cross-examination by Ms McCartney day 9). His precognition referred to a limited overview of UK energy policy and specifics of energy generated in Scotland. He claimed to have given this in the context of security of supply, but accepted that the energy market was outwith his remit and his expertise (day 9 cross examination by Ms McCartney, tapes day 9 part two at 8 mins). He readily and fairly accepted that energy policy was outwith the scope of his expertise. He also accepted that he had limited knowledge about the Scottish context to energy policy. He also accepted that insofar that his precognition spoke about the general benefits for gas, he also accepted that one could not understand the benefits of gas without looking at the energy market as a whole. As such, given his fair concession as to the limitations of his knowledge on the energy market (and particularly the Scottish energy market), limited weight can be attached to his evidence in respect of energy.

5.29 Mr Bain was unable to say what fraction of either the UK or Scotland's production of gas this development would provide. He did not appear to greatly dispute the First Ministers' statement regarding the existing level of Scotland's production of hydrocarbons (FoES rebuttal statement paragraph 5.3).

5.30 Much was made of claims of employment that would be created by the development. However, the 20 jobs asserted to be created by the development were in fact not all dependent on this development; Mr Bain was unable to say how many of the 20 jobs were directly dependent on the development and would continue to be employed if other aspects of Dart's business fell away. Mr Bain explained the 20 jobs would be 'kickstarted' by planning permission being granted for this development (day 9 cross examination by

Sir Crispin, tapes day 9 part two at 59 mins); that was not the same as 20 jobs being created by the development. Mr Bain also accepted that EU procurement rules would impact on the ability of the developers to automatically award contracts to local firms (day 9 cross examination by Sir Crispin, tapes 9 part two at 39 mins on tapes) and as such, although there would undoubtedly be constructive jobs created, many of those jobs may not go to local firms. Much was made in evidence of chief that there were no plans to expand the development although the application for the gas treatment facility was three times larger than was required. Whilst Mr Bain made reference to a Geometric Drilling Limited as a local company which had expertise in drilling, and that there were local people with those skills that travelled to work elsewhere, he also accepted that Geometric Drilling Limited was in fact no longer operating as a company. At best, therefore, the references to local persons with drilling expertise who travel elsewhere for work are unlikely to be a significant number.

5.31 Overall in respect of the benefits of the proposal, the Reporters must weight up the benefits against the proposal against the impacts and risks regarding climate change. In this respect, the appellant might be seen as wanting to on the one hand portray the development as having benefits to secure a further source of domestic gas, but at the same time minimising the overall impacts of the development on the move towards renewable sources of energy. The Reporters are asked to contrast evidence of Mr Bain and Mr Pollock; Mr Pollock said in cross-examination that the development would not prevent targets being met for renewable electricity by 2030; he was being referred to DEP 35 (Low Carbon Scotland Meeting the Emissions Reduction Targets) whilst Mr Bain made much of a domestic supply of gas. Either the development is providing significant amounts of gas that it impacts on the move towards renewables (as accepted by Mr Pollock) or it provides insignificant amounts of gas that it cannot deliver the other benefits as set out by Mr Bain.

5.32 Accordingly FoES seek the Reporters to refuse these appeals on the basis of the lack of support from climate change legislation and policies as set out above, and in respect of the risks of fugitive emissions and other emissions of carbon from the development. Fundamentally however it is submitted that this development (as per the evidence of Dr Broderick) is at odds with climate change legislative requirements and in principle, should be refused on that basis.

Issue three: Inadequacy of regulatory framework

6.1 FoES also submit that the appeals should be refused on the basis of the inadequacy of the regulatory framework. Reference is made to the precognition of Professor Hilson on this topic provided for the hearing session on regulation. There was no dispute by SEPA that gaps exist in the regulatory framework; reference was made in the hearing session to potential legislation that was being contemplated.

6.2 The submissions of CCoF are adopted by FoES on this issue (pages 22 – 24 of CCoF's closing submissions). However, FoES would add to those submissions by reminding the Reporters that the impacts on climate are a real environmental risk likely to arise from this development. Whilst reference was made on a number of occasions to 'duplication' of regulation particularly in relation to uncontrolled methane emissions, in fact, FoES do not see that there would be duplication. Rather, in their submission, the regulation of methane may not be there at all, and if controlled at all, would be done in a patched up way, which is likely to leave gaps. Reference is made to the potential difficulties with enforcement (particularly if the criminal law had a role to play) and questions arise as to whether this can be achieved by the correct regulator being given the correct powers.

6.3 Professor Hilson expressed some concern about such an approach, and the Reporters are asked to have regard to his evidence in this respect, given both the expert background that he has, and his neutral position as an academic commentator with no particular position to take.

Issue four : For the reasons already given by Stirling and Falkirk Councils

7.1 CCoF's submissions are adopted on this matter.

Issue five: Due to the incompatibility of the project with the emerging SPP and NPF3

8.1 CCoF's submissions are adopted on this matter.

Issue six: Due to the incompatibility of the project with Falkirk and Stirling Councils emerging local plan policies

9.1 CCoF's submissions are adopted on this matter.

Issue seven: Due to the lack of compliance with the legislative requirements for a Waste Management Plan

10.1 CCoF's submissions are adopted on this matter with the additional point regarding the treatment of methane as a waste. The Reporters are asked to note this fundamental point which arises separately from the issue of methane in respect of climate change.

10.2 The Management of Extractive Waste (Scotland) Regulations 2010 ('the MEWs Regulations') define extractive waste as "waste produced from an extractive industry and resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries, but does not include..."

10.3 The regulations then define "waste" is as defined in Article 1(a) of Directive 2006/12/EC of the European Parliament and of the Council on waste(15);

10.4 The Waste Framework Directive (found at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32006L0012>) says in Article 1(a) says:

"1. For the purposes of this Directive:

(a) 'waste' shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard..."

10.5 In turn, Annex 1 defines waste as:

"ANNEX I

CATEGORIES OF WASTE

Q1 Production or consumption residues not otherwise specified below

Q4 Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap

Q8 Residues of industrial processes (e.g. slags, still bottoms, etc.)

Q11 Residues from raw materials extraction and processing (e.g. mining residues, oil field slops, etc.)

Q14 Products for which the holder has no further use (e.g. agricultural, household, office, commercial and shop discards, etc.)

Q16 Any materials, substances or products which are not contained in the above mentioned categories."

10.6 Whilst Article 2 indicates that gaseous effluents emitted into the atmosphere are excluded from the scope of the Directive, the MEWS Regulations specifically use the

definition 'as defined in Article 1(a)' rather than 'as defined in the Directive,' so it could be argued that the MEWS Regulations are using only the wording of Article 1(a) and the gaseous exclusion from Article 2 was not intended to apply.

10.7 It is also noted that the MEWS Regulations implement the 2006 Mining Waste Directive 2006/21/EC which defines waste in terms of an earlier waste Directive which refer to:

“Definitions

For the purposes of this Directive:

(1) 'waste' is as defined in Article 1(a) of Directive 75/442/EEC”

10.8 It is submitted that at the very least there is an argument that methane is covered by the MEWS Regulations and the Reporters should consider this.

Submissions on Conditions

11.1 Given that Dart Energy (Forth Valley) Limited own the PEDL (Mr Bain's evidence in cross by Sir Crispin; 34 min on tapes) and would be the applicant and operator for all purpose of the licences and permissions. Under cross-examination, Mr Bain's evidence was that no staff would be employed by Dart Energy (Forth Valley) Limited and it may not have money in the bank (Mr Bain's answer to whether it would have its own money was 'probably'; cross-examination by Ms McCartney, Day 9). As such, it is crucial to ensure the correct mechanism of bond or guarantee is put in place. FoES gave various suggestions during the hearing session on that topic, but are mindful of the ongoing review of such matters following the devastating collapse of Scottish Coal and the resulting problems.

11.2 Whilst Mr Bain gave evidence that such a set up was standard practice in the oil and gas industry for an operating company to be set up which would be the holder of all licences (re-examination by Mr Steele, day 9). Given the novelty of this type of application, there cannot be a standard practice for this particular industry. But if the only explanation to be offered is that it is standard practice in the oil and gas industry, that is not a sufficient explanation to simply accept the position.

11.3 The question of the identity of the true applicant (and holder of the various licences) is a matter for the appellants to decide themselves. But it raises issues as to the Waste Management Plan (as already indicated) and given the novelty of this matter, it also places

a great onus on the Reporters and the planning authorities in respect of mechanisms to ensure restoration of the site. Ongoing monitoring would be required over a lengthy and sustained period of time. Restoration will arise far down the line, and with uncertain costs. Given the uncertainty as to why there were problems arising from the Scottish Coal permissions, and the ongoing work by Scottish Government in looking at this issue, great care must be taken to find the correct mechanism to properly safeguard both the public and environmental interests at stake. As indicated, this is a heavy onus on the regulating authorities to achieve.

11.4 Reference is also made to the articles on 'orphan wells' (FoES hearing documents 46 for the BBC news report, FoES hearing document 50 for the full paper). Reference is also made to the response to the written submission by Mr Andy Sloan on the issue; a short written response was prepared by FoES and lodged on 7th April. That additional written response by FoES is adopted for the purpose of this submission and in particular the analysis of the figures set out in that paper (responding to Mr Sloan's analysis). In summary, FoES consider the issue raised by the 'orphan wells' paper gives cause for concern. FoES would refer to the comments by Professor Davies as reported in the BBC news article that a legal issue has been raised as to responsibility for such wells in later years. FoES primary position is that the appeals should be refused which avoids this issue arising; if however the Reporters are minded to grant consent, the Reporters are asked to carefully consider whether all future legal issues which may arise are clear and whether a future uncertain liability may arise.

11.5 In respect of monitoring, FoES support a condition that there should be payment by the appellant to the regulatory authorities for dedicated monitoring officers. Given the split of responsibilities between local authorities and SEPA, the Reporters are asked to consider adequate resources being made available across agencies.

11.6 Given the issue of buffer zones will be the subject of further evidence later in the year, FoES only wish to make a short submission on that point and would remind the Reporters of the Parliamentary debate which were submitted (FoES hearing document 47 and 48). FoES specifically refer to the comments as reported at paragraph 95 of the Economy, Energy and Tourism Committee 4th Report 2014 (session 4) (FoES hearing document 48) that the Minister advised there would be "some sort of buffer environmental protection". The Minister indicated that it was likely a distance would be fixed.

Conclusions

12. 1 FoES submit these appeals should be refused for the reasons outlined above.