

**Pre-cognition of Professor Chris Hilson in  
Planning Permission Appeal PPA-240-2032**

**COAL BED METHANE PRODUCTION, INCLUDING DRILLING, WELL  
SITE ESTABLISHMENT AT 14 LOCATIONS AND ASSOCIATED  
INFRASTRUCTURE AT LETHAM MOSS, FALKIRK FK2 8RT Falkirk (P-  
12-0521-FUL) and Stirling (12/00576/FUL)**

on behalf of FoE Scotland; FoE Falkirk; FoE Stirling; and supported by Transition Stirling  
(referred to as 'FoE Scotland')

**Statutory Climate Duties**

I am a Professor of Law and Head of the School of Law at the University of Reading. I hold a BA/MA (Cantab) in Law from the University of Cambridge and a PhD in Law from the University of Sheffield. I was Editor-in-Chief of the *Journal of Environmental Law* (OUP) between 2007-2012. I have published widely in both domestic and European environmental law and policy. I was a policy advisor to the waste industry for a period during the 1990s and am currently an occasional legal advisor to ClientEarth. The current statement is written in my personal capacity and should not be taken to represent the views of any of the above organisations.

The evidence that follows details how relevant statutory climate change duties apply in the context of the current appeal.

1. Part 1 of the Climate Change (Scotland) Act 2009 sets out a key target, for Scottish emissions of greenhouse gases (GHGs) to be at least 80% lower than the relevant baseline by 2050, with an interim target of 42% lower by 2020. Shorter term *annual* targets are also provided for. Part 4 of the Act covers "Duties of public bodies relating to climate change" or "climate change duties". 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."

2. Local authorities clearly fall within the Act in relation to their spatial or land use planning functions, as indeed do those determining planning appeals, who are similarly bound by the climate change duties. The Act covers not only 'direct' GHGs from the public body's own sources (e.g. energy used in local authority buildings), but also 'indirect' emissions arising from the effect of public decision-making on external sources. Planning decisions on coal bed methane (CBM) fall within the latter.

3. The initial climate change duty at issue here is not a pure outcome-based one to achieve a target<sup>1</sup> – it is, rather, to act "in the way best calculated" "to contribute to the delivery of the

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<sup>1</sup> Unlike e.g. the duty on the Secretary of State in section 1 of the UK Climate Change Act 2008 (on which see further e.g. Aileen McHarg, 'Climate Change Constitutionalism? Lessons from the United Kingdom' (2011) 2 *Climate Law*

targets”. ‘Best calculated’ is, it is submitted, neither to be read as wholly subjective (purely at the original decision body’s discretion) nor wholly objective (with a court potentially replacing its own view of the best calculation): rather, the courts would likely adopt a rationality-based review such that the calculation would only be set aside on judicial review if it were considered *irrational*. The duty is not purely outcome-based because public bodies are required only to ‘contribute to’ the delivery of the targets rather than to ensure that a target is met.

4. A legal challenge to public bodies could be based on a *procedural* failure to incorporate formal, explicit consideration of their climate change duties in their policy, decision-making and corporate planning processes, including decisions on CBM.<sup>2</sup> Alternatively, there could be a *substantive* challenge, as outlined in paras 5-6 below.

5. It is important to distinguish between two likely scenarios in which a public body decision might be substantively challenged by way of judicial review in relation to this climate change duty involving CBM. First, one might have a ‘positive’ case where a local authority (or appellate planning body) has decided that the climate impacts of CBM (both through e.g. fugitive emissions and eventual intended usage of the gas for heating or power generation) are such that denying planning permission (or at the very least, imposing very stringent conditions) is the way best calculated to contribute to the delivery of Scotland’s GHG targets. The precautionary principle might well underpin such a decision: given current scientific uncertainty, admitted by SEPA, over fugitive emissions,<sup>3</sup> a local authority might reasonably decide to adopt a precautionary approach. As ‘major players’ within the government guidance, more will also be expected of local authorities in terms of action.<sup>4</sup> The challenger in this scenario is likely to be industry. Second, with a ‘negative’ case, it may happen that a planning body does *not* take action against CBM – whether through denying permission or imposing sufficiently stringent conditions – and that decision is challenged, by the public/NGOs, as having failed in terms of a best calculation on contributing to Scottish targets.

6. Because rationality-based review is likely to be the one with which the courts are most comfortable in such a polycentric policy area, the two scenarios are likely to face very similar outcomes. If a planning body does decide that its climate change duty (N.B. not just ‘power’) compels it to act strongly on CBM, then it is very unlikely that the courts would intervene to find this irrational. Equally, however, if a planning body decides to act weakly, then it is also unlikely that the courts will consider this irrational.

7. Mention should also be made of the sustainability ‘rider’ added to the initial climate change duty. It is couched in terms of acting in a way that the public body “considers” is most sustainable which, again, would not be regarded as wholly subjective but rather subject to rationality review.

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469; Colin Reid, ‘A New Sort of Duty? The Significance of “Outcome” Duties in the Climate Change and Child Poverty Acts’ [2012] Public Law 749.

<sup>2</sup> On the need for such incorporation, see the government guidance, ‘Public Bodies Climate Change Duties: Putting them into Practice’, Guidance Required by Part 4 Of The Climate Change (Scotland) Act 2009 <http://www.scotland.gov.uk/Publications/2011/02/04093254/0> p 13.

<sup>3</sup> SEPA, ‘Regulatory Guidance: Coal Bed Methane and Shale Gas’ (Version 121119) [http://www.sepa.org.uk/system\\_pages/quicklinks\\_2/unconventional\\_gas\\_guidance.aspx](http://www.sepa.org.uk/system_pages/quicklinks_2/unconventional_gas_guidance.aspx) para 24. Social scientific (economic) uncertainty over the level and thus effect of unconventional gas prices on renewables might be another type of uncertainty warranting precautionary action.

<sup>4</sup> (n 2) p 11.

8. The guidance on the climate change duties<sup>5</sup> defines sustainable development as “development that aims to allow everyone to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations.” The guidance points to the three-pronged nature of the principle, encompassing social, economic and environmental aspects and the need to consider all of these in reaching properly balanced decisions.<sup>6</sup>

9. Industry and the UK Government have been keen to point to the social benefits of unconventional gas in the form of lower fuel bills, and economic benefits in the form of e.g. local jobs, while downplaying environmental risks. My other evidence to the inquiry has suggested that the existing, complex regulatory system does not sufficiently address the environmental risks posed by CBM in Scotland. Neither are the social and economic benefits as straightforward as has been claimed. First, many, including industry commentators, have questioned the extent to which unconventional gas will bring down gas prices given the nature of the European gas market.<sup>7</sup> Second, the number of jobs – and in particular local jobs – that would be created by the unconventional gas industry has also been queried.<sup>8</sup> As importantly, the potential, detrimental knock-on impact of investment in unconventional gas on already existing, tangible jobs in the thriving Scottish renewable industry also needs to be weighed carefully in the balance.<sup>9</sup>

10. A sustainable development-based legal challenge to public bodies could again be based on a procedural failure to incorporate formal, explicit consideration of sustainability in their climate-related decision-making, including decisions on CBM.<sup>10</sup> Alternatively, there could be a substantive challenge based on an irrational decisional outcome in terms of sustainable development. Again, however, it seems unlikely that the courts would seek to interfere with most substantive decisions, whether decisions to rule out or strictly control CBM on sustainable development grounds on the one hand (because of a view taken by a local authority that environmental concerns and economic disbenefits in relation to renewables jobs outweigh unproven social and economic benefits), or decisions to allow CBM to proceed on the other.

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<sup>5</sup> (n 2).

<sup>6</sup> *ibid*, pp 10-11.

<sup>7</sup> E.g. the CBI, Lord Stern and Deutsche Bank: BusinessGreen, ‘CBI Rejects Calls For All-Out ‘Dash for Gas’ <http://www.businessgreen.com/bg/news/2208266/cbi-rejects-calls-for-allout-dash-for-gas>; Tom Bawden, ‘Baseless economics’: Lord Stern on David Cameron’s claims that a UK fracking boom can bring down price of gas’, *The Independent*, 3 Sept 2013

<http://www.independent.co.uk/news/uk/politics/baseless-economics-lord-stern-on-david-camerons-claims-that-a-uk-fracking-boom-can-bring-down-price-of-gas-8796758.html>; Deutsche Bank, ‘European Gas: A First Look At EU Shale-Gas Prospects’ (2011) Global Markets Research, Commodities Special Report [http://www.shalegas-europe.eu/en/docs/Deutsche\\_Bank\\_Report.pdf](http://www.shalegas-europe.eu/en/docs/Deutsche_Bank_Report.pdf)

<sup>8</sup> See e.g. J Pickard, ‘Fracking jobs now forecast to be a third of what Cameron quoted’, *Financial Times*, 15 Oct 2013 <http://www.ft.com/cms/s/0/a4e24b70-35ac-11e3-b539-00144feab7de.html?siteedition=uk#axzz2pGmOHW6c>, citing an AMEC report identifying that at Preese Hall, Lancashire, only 17% of jobs had gone to local people.

<sup>9</sup> Scottish Environment Link, Parliamentary Briefing, June 2013 <http://www.scotlink.org/files/policy/ParliamentaryBriefings/LINKBriefingFUGJune13.pdf>

<sup>10</sup> As advised by the government guidance (n 2) p 11.