

Planning Appeal PPA-240-2032
Development for coalbed methane production, Letham Moss, Falkirk (“CBM Development”)

Representations by Concerned Communities of Falkirk

Introduction

On 29 August 2012, applications for planning permission for the CBM Development were submitted to Falkirk Council (under reference P/12/0521/FUL) and Stirling Council (under reference 12/00576/FUL) by Dart Energy (Europe) Limited (the “Applicant”). An appeal against non-determination of the applications was lodged by the Applicant with the Scottish Ministers on 5 June 2013. Further to the appeal, having lodged a holding objection with Falkirk Council, we now make these representations.

Our representations fall under 4 heads, as set out below¹:

1. The Community Charter (enclosed) is a “material consideration” which the Scottish Ministers/Appointed Person (the “Planning Authority”) must have regard to when making its decision on the application;
2. The Community Charter is an expression of cultural heritage which must be assessed under the EIA Directive. There is insufficient assessment of cultural heritage aspects for the Planning Authority to make a decision and the application should be refused for this reason; and
3. In making its decision, as there is no local or national planning policy relating to unconventional gas extraction, the Planning Authority should apply the Precautionary Principle and should also apply a standard of proof of “beyond reasonable doubt” to the Applicant’s evidence.
4. A public inquiry or hearing is the only fair way for the issues raised by the Community Mandate (enclosed) and Community Charter (enclosed) to be addressed.

Further details on each of these heads is set out below.

A. The Community Charter as a “material consideration”

Section 37(2) of the Town and Country Planning (Scotland) Act 1997 (as amended) (“1997 Act”) requires the Planning Authority to “have regard to the provisions of the development plan, so far as material to the application, *and to any other material considerations.*” (our emphasis)

¹ These representations have been drafted with the assistance of Mothiur Rahman (community rights and planning law consultant) with support from Ian Cowan of Highland Environmental Law.

Furthermore, section 25(1) of the 1997 Act provides that, “where in making any determination under the Planning Acts regard is to be had to the development plan, the determination shall be made in accordance with the plan *unless material considerations indicate otherwise.*” (our emphasis)

It is at the Planning Authority’s discretion as to what is a material consideration, and what weight to attach to that material consideration. We would respectfully submit that the Community Charter is a material consideration to which the Planning Authority should place great weight, for the following reasons:

(1) Creation of Charter: Community-led Empowerment

- (a) The basis for the Charter was the communities of Falkirk coming together due to their concern over the application. From discussions emerged the realisation that, what we felt was important was not being adequately protected. These discussions led to the Community Mandate being drafted and submitted (which has been separately been submitted by over 2100 residents);
- (b) Subsequently, in order to answer the question “why isn’t our community being adequately protected?” a public meeting was held in which we looked into our values, aspirations and beliefs about ourselves as a community. We asked ourselves the following questions:
 - (i) When we were considering buying a house here, what did we picture?
 - (ii) How would we like our children to enjoy this place in 20 years’ time?
 - (iii) What are the local places in the landscape that are important to me and why?
 - (iv) What do we enjoy about living here and why?
 - (v) CBM production here in Falkirk is a concern for me because....
- (c) The response to these questions led to the principles for the Charter, as well as the tangible and intangible assets being drawn up. Such community led action is exactly what the community empowerment agenda advocates, which we provide further detail on below in relation to our submissions on the weight to be attached to this material consideration.

- (d) The Community Charter has now been adopted by the Community Council of Larbert, Stenhousemuir and Torwood and has been separately submitted by it. We submit the Community Charter with these representations to represent the peoples directly.

(2) The Community Charter as an expression of “Sustainable Development”

- (a) Section 3E of the 1997 Act requires planning authorities to carry out their development planning functions with the objective of contributing to sustainable development.
- (b) We note the support in the draft Scottish Planning Policy (“Draft SPP”) to the guiding principles of “sustainable development” set out in the UK Shared Framework for Sustainable Development (2005) being living within the planet’s environmental limits, ensuring a strong, healthy and just society, promoting good governance, using established science responsibly and achieving a sustainable economy;
- (c) Resolution 42/187 of the United Nations General Assembly which sets out the most commonly used definition for sustainable development, being “meeting the needs of the present without compromising the ability of future generations to meet their own needs.” (our emphasis).
- (c) The Falkirk Structure Plan additionally provides that “sustainable development refers to the integration of all environmental, social and economic factors which have a bearing on quality of life, now and for future generations.” (our emphasis)²
- (d) The question then follows, what are those needs that bear on quality of life for present and future generations? In developing its Local Plan, Falkirk Council may have diligently followed a process for discovering those needs, but that does not mean that process has necessarily addressed all actual needs. The planning framework specifically allows for that possibility by making provision for a local authority to take into account other material considerations.
- (e) As emerged from the community envisioning process, the needs which contribute to our quality of life are not just material needs but intangible qualities which relate to the values by which we create meaning in our lives, the bonds which bind us together to each other, our families and our environment. Some of these qualities may be contained within service provisions by the Council, but others are not. There is growing evidence that these qualities, often named intangible assets of a community, are fundamental to well being and for building stronger, more

² Falkirk Structure Plan 2007, para. 2.18

sustainable communities for the future³.

- (f) We note that the recently published National Planning Framework 3 (“NPF3”) also emphasises tangible assets with a lack of recognition of such intangible assets as the Charter seeks to establish. For example NPF3 states that, for its spatial strategy to be sustainable, it is essential that the most efficient use of existing assets are made – natural resources, land, towns and cities and infrastructure. These are all physical tangible assets. In the same manner, the “cultural heritage” to be protected in the NPF 3 and Draft SPP only relate to built heritage and National Parks.
- (g) One example of the difference between intangible assets and service provision is the Falkirk Greenspace Initiative (“FGI”) which has been shortlisted for a national award in July by the Royal Town Planning Institutes Awards for Planning Excellence. The FGI project has already been awarded gold in the Scottish Awards for Quality Planning and was the overall winner for outstanding achievement. In the Council’s own words, the project is an innovative and visionary one which significantly enhances the natural and cultural heritage value of the area, now and for the future⁴. However, what we the community feel is just as important as the service provision of the green space is the participation of the community in the creation of those spaces, those relationships built and created with each other, with the Council, and with the land. This lived experience is the intangible asset of the community that goes towards sustainable development because it builds pride and hope for a better future. Even where the CBM Development does not directly impact on the FGI, our growing sense of pride in what we have achieved will be diminished by the re-industrialisation of the area should the project go ahead.

(3) Tangible and Intangible Assets as an expression of community cohesion and cultural heritage

- (a) We respectfully submit that the tangible and intangible qualities we express through our Community Charter are aspects of our cultural heritage which binds us together as a community.
- (b) “Cultural heritage” has no single definition but we submit that it is much more than just tangible national and protected monuments as set out in the Falkirk Local Plan, and which was scoped in for the purposes of the Applicant’s EIA. A useful definition is that in the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, being “a reflection and expression of constantly evolving values, beliefs, knowledge and traditions,

³ See e.g. Asset Based Community Development Institute (www.abcdinstitute.org)

⁴ http://www.falkirk.gov.uk/about_council/news/article.aspx?pid=2714

which includes all aspects of the environment resulting from the interaction between people and places through time.”⁵ Those tangible and intangible assets listed in the Charter are our reflection and expression of the values, beliefs, knowledge and practices which we hold dear for the cohesion and identity of our community. We recognise the UK is not a signatory to the Framework Convention but that is not relevant for the purposes of attempting to understand what is meant by cultural heritage. We have expanded on the definition in the Framework Convention for the purposes of the Charter, something expressly provided for by the Framework Convention which, in the Preamble, speaks of the need to involve everyone in society in the ongoing process of defining cultural heritage.

(4) Weight to be attached to the Community Charter: community empowerment agenda

- (a) It is the Planning Authority’s discretion as to what weight should be attached to a material consideration.
- (b) The Community Charter is a direct expression of community empowerment, in accordance with the Scottish Government’s own promotion of such empowerment. A recent manifestation of this promotion is the proposed Community Empowerment and Renewal Bill. Although the specific aims of that Bill are different to what is expressed through this Charter, the principles are the same e.g. to “support communities to achieve their own goals and aspirations through taking independent action and by having their voices heard in the decisions that affect their area.”⁶ The Charter is bringing out the intangible assets embedded in peoples lived experience of community, a direct reflection of the words of Derek Mackay MSP when he states “Scottish communities are a rich source of creativity and talent. Our people are our greatest asset.”⁷
- (c) With regards to the community empowerment agenda and the fact that the Community Charter expresses what we feel is valuable to our community, we submit the Planning Authority should therefore place great weight to the voice of that which it is of service to.

For all these reasons, we submit that the Community Charter is a material consideration which the Planning Authority must have regard to and that great weight should be attached to it. We have set out in our Community Mandate the impact of the development on the tangible and intangible assets in our Community Charter and for those reasons, even if the development is found to be in accordance with the development plan, the application should be refused due

⁵ Although the UK has not ratified this convention that is not relevant for these purposes as we are only seeking to set out a useful definition rather than assert any of the obligations set out in this Convention.

⁶ <http://www.scotland.gov.uk/Topics/People/engage/cer>

⁷ <http://www.scotland.gov.uk/News/Releases/2012/06/CommEmpower060612>

to the CBM Development's impact on these material considerations.

B. Impact Assessment of Cultural Heritage

The Applicant states that it carried out its environmental impact assessment in accordance with the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 ("EIA Regulations").

We note that the EIA Regulations do not refer to "cultural heritage" as an aspect of the environment which needs to be assessed⁸ but that the Environmental Impact Assessment Directive ("EIA Directive")⁹ does refer to this aspect at Article 3(c), differentiating between "material assets and the cultural heritage."

What was scoped in for the purposes of the EIA's baseline data on cultural heritage were material cultural heritage assets. On that basis its baseline data was that "there are no features of cultural heritage interest located within the application boundary (with the exception of Dunmore Park)"¹⁰.

We acknowledge that the Applicant may have followed due process in the scoping process, but the key question for the Planning Authority is whether that process satisfies the obligations under the EIA Directive to assess cultural heritage.

We submit that it does not, for the following reasons:

(1) Incorrect transposition of EIA Directive

A submission has been made by Gerard Brophy asserting that the EIA Directive has not been correctly transposed and we support this assertion, on the same basis made there and which we do not feel a need to repeat here. We enclose Gerard Brophy's submission with these Representations for your convenience.

(2) Draft EIA Directive as a material consideration

We note that the EIA Directive is in the process of being reviewed and amended. The purpose of this review is in part to "correct shortcomings, reflect ongoing environmental and socio-economic changes and challenges [...] contribute significantly to the duty of the Union to take cultural aspects into account in all its policies and actions."¹¹

We note that paragraph 7 of the Preamble to the Draft EIA Directive states that "Protection and promotion of cultural heritage [...] which are an integral part of the cultural diversity that the Union is committed to respect and promote in accordance with Article 167(4) of the Treaty on the Functioning of the European Union, can usefully build on definitions and principles developed in relevant Council of Europe Conventions, in

⁸ paragraph 3 of Part 1 to Schedule 4 of the EIA Regulations

⁹ Directive 85/337/EEC as amended and codified by Directive 2011/92/EU

¹⁰ EIA Non-Technical Summary, pg. 14

¹¹ Pg. 2, Proposal for a Directive amending Directive 2011/92/EU (COM(2012) 628) ("Draft EIA Directive")

particular [...] the Framework Convention on the Value of Cultural Heritage for Society.”

We have referred to the definition of cultural heritage in the Framework Convention above and we submit it is these aspects of values and beliefs which the Planning Authority should take into consideration when evaluating whether or not there has been sufficient assessment of the effect of the development on these aspects.

Those values and beliefs and aspects of community cohesion and identity are set out in our Community Charter and we submit that, without an assessment of the impact of the project on the intangible assets described in the Community Charter, i.e. our cultural heritage, the application cannot go ahead.

C. Test of “Beyond Reasonable Doubt” to be applied

Inadequacy of Scoping Approach

We note that in the Scoping Response by the Council, in relation to “General Principles for Mineral Working”, the Council’s response was “in the absence of any specific policies on coal bed methane extraction the proposal will be assessed against the development plan minerals policies as far as appropriate.” (our emphasis).

For the reasons stated in our Community Mandate, we are of the firm view that the policies for mineral extraction are wholly inadequate for unconventional gas extraction and the policy cited is inappropriate.

Application of Precautionary Principle

In our Community Mandate we have set out a number of uncertainties regarding the effects of the CBM Development on the health of the public. Falkirk residents have previously been exposed to processes which we alleged caused harm, despite those processes being granted consent by environmental authorities. During the years that Rechem operated at Bonnybridge, from 1974 to 1984, there were claims that fall-out from its incinerator contained toxins such as PCBs and dioxins which, it was alleged, caused eye defects in children and deaths and illness among cattle. Rechem claimed to be adhering to environmental legislation and regulators gave the facility a clean bill of health.

We submit that, where processes are new and novel, adhering to environmental legislation is not sufficient to safeguard human health. The risks to human health by CBM extraction are of such magnitude, and the uncertainties around scientific evidence of sufficient size, that the Precautionary Principle be applied and the Applicant first prove that harm will not be caused as a result of its operations, rather than just claiming to have adhered to legislation and policies which Falkirk Council have itself admitted are absent.

Applicable Standard of Proof in the absence of applicable planning policy

As there is no applicable planning policy for unconventional gas extraction, we

submit that there is a case for the Planning Authority to seek principles set out in policy for similar types of projects.

We note that the Council has concerns about particular aspects of the operations in relations to the geology, in particular:

- the possibility of works causing geological instability;
- the possibility of the process drawing water from more than the coal seam;
- the possibility of the process causing dewatering of local aquifers;
- the possibility of the process encouraging methane migration and promoting fugitive emissions through the vertical bores and through potential cracks in the geology following dewatering;
- the preclusion of hydraulic fracturing potentially being applied to the proposed operations; and
- any other matters arising following assessment of the above investigations

Similar issues arise in relation to underground gas storage projects and, unlike with unconventional gas extraction, there is UK planning policy which considers what is required in terms of geological data, in the form of National Policy Statement EN-4 and in particular paras 2.8.8 - 2.8.9.

In relation to an application for Underground Gas Storage in the Preesall Salt Fields in Lancashire, a decision has recently been issued by the Secretary of State refusing the application (against the recommendation of the Planning Inspectorate which recommended the grant of permission). The Secretary of State refused the application on the evidence because:

- (a) the Applicant failed to prove beyond reasonable doubt that the geological strata was suitable as required by Policy EN-4 (see para 14 of the decision letter¹²)
- (b) What was required to prove beyond reasonable doubt, which the Applicant failed to provide, was the detailed geological data as required at para 2.8.9 of Policy EN-4, which includes an assessment of not only the construction and operational phases, but also "the decommissioning phase and should cover the long term integrity of the affected strata after decommissioning or closure of the [...] facility."

We acknowledge that the facts will be different between these two cases and that National Policy Statement EN-4 is not directly applicable to Scotland, but it is the principles which we submit should be applied in a case where relevant policy is absent, namely:

- (a) a test of "beyond reasonable doubt" be applied when making

¹² <http://infrastructure.planningportal.gov.uk/projects/north-west/preesall-saltfield-underground-gas-storage/?ipcsection=reps>

decisions on the reports of the Applicant and AMEC, as a consequence of this lack of policy, the seriousness of the potential consequences, and the application of the Precautionary Principle;

- (b) assessment of the decommissioning phase of the operations, as well as to the long term integrity of the affected strata after the decommissioning of the site.

D. Need for a hearing or public inquiry

We have enclosed a letter to Falkirk Council where we request that, in its response to the appeal, it request a hearing be held due to the number of objections by residents, the seriousness of the issues, and for an opportunity for residents to express the impact of the CBM Development on its Cultural Heritage. We make these same submissions to the Planning Authority.

For all these reasons, we submit the application must be refused, or a hearing/inquiry held should the Planning Authority be minded otherwise.

Concerned Communities of Falkirk

Date: 1st July 2013