**TOWN AND COUNTRY PLANNING (APPEALS) (SCOTLAND) REGULATIONS 2013**

**APPEAL UNDER SECTION 47(2) OF THE TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997 BY DART ENERGY (FORTH VALLEY) LTD CONCERNING COAL BED METHANE PRODUCTION, INCLUDING DRILLING, WELL SITE ESTABLISHMENT AT 14 LOCATIONS AND ASSOCIATED INFRASTRUCTURE AT LETHAM MOSS, FALKIRK, AND POWDRAKE ROAD, NEAR AIRTH, PLEAN**

**(REFERENCES PPA-240-2032 AND PPA-390-2029)**

# RESPONSE TO THE APPELLANT'S CLOSING SUBMISSION

**BY**

**CONCERNED COMMUNITIES OF FALKIRK**
**(AND SUPPORTERS)**

## 1. Reasons for this additional submission

**1.1.** In response to CCoF's submissions that before planning permission can be granted, the requirements of regulation 48 of the Conservation (Natural Habitats etc.) Regulations 1994 ("the 1994 Regulations") must be satisfied in relation to the effect of the effluent discharge of treated water from the proposed new outfall on the Firth of Forth Special Protection Area ("the SPA"), Mr Telfer made submissions to the effect that it could reasonably be inferred that those requirements had been satisfied in relation to the current discharge consented by SEPA, that SNH had concluded there was no need for an appropriate assessment of the proposed discharge under regulation 48, and that such inferences could be drawn from the SNH letters in process. Because CCoF were concerned as to whether or not the requirements of regulation 48 had actually been satisfied, they initiated Freedom of Information [FOI] requests upon SEPA and SNH.

**1.2.** As set out hereafter, CCoF submit that it is clear from the material recovered from SEPA and SNH that in fact the requirements of regulation 48 have not only not been satisfied in relation to the effect on the SPA of the proposed discharge from the new outfall, but they have never been satisfied even in relation to the existing consented discharge.

**1.3.** CCoF submit that the Reporters should accept this submission because (one) the need to obtain this material only arose from the closing submissions made for Dart about assumptions that could be taken from the inquiry documents and so the material was not readily available at the time of the inquiry and (two) as the Reporters are bound by regulation 48, and have to comply with EU Habitats Directive legal requirements in relation to the SPA, if they accept that those requirements have not been satisfied, the Reporters cannot lawfully grant planning permission. It is submitted that it is not lawful to leave over compliance with regulation 48 to SEPA during the CAR application process that would follow the granting of planning permission.

C-201/02 *R (on app Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I - 748

"51. According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question at the earliest possible stage in the decision-making process.

52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."

Although *Wells* concerned an environmental impact assessment it is submitted that the same principles apply to assessment under the Habitats Directive. Regulation 48 makes clear that a plan or project cannot be approved unless it has been ascertained that the project will "not adversely affect the integrity of" the European site. Had Dart disclosed the likely chemical composition of the discharge such an assessment could have been carried out by Falkirk Council prior to the inquiry or could have been carried out by the Reporters.

## 2. Introduction

2.1. In paragraph 4.1 of his closing submissions on behalf of the appellant in relation to Hearing Session 3 (Ecology), Mr Telfer referred to a letter dated 25 April 2007 from SNH to SEPA which CCoF had produced during that hearing session (CCoF 324) ("the 2007 letter"). The 2007 letter contained SNH's response to an application under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 ("CAR") about which SEPA had consulted them, namely an application dated 15 November 2006 by Dart Energy (Europe) Ltd (under its previous name, Composite Energy) to increase the maximum daily volume of its existing discharge to the Firth of Forth from $140m^3$ to $1640m^3$ ("the application for variation").

2.2. In that paragraph he also referred to Sir Crispin's submission that the Reporters, as competent authority for the purposes of regulation 48 of the 1994 Regulations, did not have sufficient information concerning the chemicals that were likely to be in the effluent discharged to the Firth of Forth at the proposed outfall point to allow them to come to a view that the appellant's proposals would "not adversely affect the integrity of" the SPA.

2.3. In paragraph 4.2, he quoted from the 2007 letter to the effect that the application for variation did not contain details of the chemicals that were likely to be in the effluent discharged, that the applicant would need to provide them, and that SEPA would need to assess that information and satisfy itself that the effluent would not have a significant effect on the qualifying interests of the SPA.

2.4. In paragraph 4.4, he then referred to Sir Crispin's submission "*that if neither SNH nor SEPA had sufficient evidence before them concerning the chemical content of the treated produced water and it was accepted by SNH in the absence of such information SEPA would not be in a position to assess whether the current proposal would have a significant impact on the SPA, it followed that without that information being before [the Reporters] now as part of the evidence supporting the appeals neither would [the Reporters]*".

2.5. In paragraph 4.5, Mr Telfer responded to that submission at length.

2.6. The purpose of this response is to correct several misrepresentations, mistakes or mistaken assumptions in paragraph 4.5 of Mr Telfer's submissions.

**3. The 2006 application for variation and the 2009 variation**

3.1. In paragraph 4.5.2, Mr Telfer says that the 2007 letter sets out SEPA's position. In fact it sets out SNH's position. It is accepted that this is probably a typographical error.

3.2. Also in that paragraph, Mr Telfer correctly quotes SNH's statement in the 2007 letter that the effluent would be "*unlikely to effect the invertebrates present within the mud ...*", but inaccurately paraphrases SNH's reasons for making that statement and the nature of the statement. He writes: "*So far as SNH was concerned, given what it already knew about the content of 'treated water' from CBM boreholes it had no hesitation in concluding that*" the discharge would have no significant effect on the qualifying interests of the SPA. But there is nothing in the 2007 letter to indicate that SNH knew anything about the content of treated water from CBM boreholes, that it had come to a conclusion about the effect of the effluent on the basis of such 'knowledge', or indeed that this was a 'conclusion' at all. What the 2007 letter said is simply that the statement was "based on the information provided in the application". The statement is then clearly qualified by the caveat in the following paragraph, namely that "the application does not include any details on what pollutants may be present in the water being discharged or the treatment necessary prior to discharge" and that, before granting the application, SEPA would need to assess the information it had requested from the applicant about the pollutants and demonstrate that they would not have a significant effect on the qualifying interests of the SPA, either alone or in combination with other plans and projects, failing which an appropriate assessment would be necessary by virtue of regulation 48 of the 1994 Regulations. In the next paragraph of the 2007 letter, SNH says that SEPA should seek further advice from SNH if there are any changes to the details of the application, i.e. presumably when SEPA received the requested information. At best, therefore, SNH's statement was a statement of its interim position, pending the receipt of details about the pollutants in the effluent; it was far from being a conclusion reached without hesitation, as Mr Telfer represents it.

3.3. In paragraph 4.5.4, Mr Telfer refers to the application for variation as "*the application which the Appellant had submitted in 2007*". In fact, as stated above, the application for variation was submitted in 2006. It is accepted that this is a minor mistake.

3.4. In paragraph 4.5.4 Mr Telfer states that this application "*resulted in CAR licence CAR/L/1017224 being issued by SEPA on 11th August 2009*". In the following paragraph he states that "*the 2009 licence was varied on the application of the Appellants on 17th March 2010 when SEPA issued the current CAR licence CAR/L/1017224VN01*". In fact, SEPA determined the 2006 application for variation by issuing first the CAR licence then a notice varying the CAR licence. The appellant produced both of these documents for the inquiry sessions (both numbered DE(J)6). The issue of the licence on 11 August 2009 was a purely administrative step, converting the existing consent to discharge (produced as document DE(J)5) – which had been issued under a previous legislative regime – into a CAR licence without any change to its substantive terms. That licence was then varied by notice of variation dated 14 December 2009, which took effect on 17 March 2010. It is accepted that these are administrative details but their significance is that any environmental risk assessment SEPA undertook in relation to the application for variation was only given substance when SEPA varied licence CAR/L/1017224 on 14 December 2009 by issuing notice of variation CAR/L/1017224/VN01, with the changes taking effect on 17 March 2010.

3.5. Mr Telfer's statement in paragraph 4.5.4 that "*ahead of the grant of the licence SEPA would have been in receipt of [further information from the Appellant regarding the 'pollutants' that might be present in the produced water and the treatment to which it would require to be subjected prior to discharge]*" is only partly correct. SEPA did receive information about the pollutants – see paragraph 2.8.3 below – but it is not clear whether or not SEPA received the information SNH had deemed necessary about the treatment process.

3.6. Mr Telfer's statement in the following sentence that "*the grant of the licence in 2009 is in itself evidence of the fact that ahead of issuing that licence SEPA would have been required, as a matter of law, to have satisfied itself following further consultation with SNH that with a permitted discharge volume of up to 140m3 per day the 'pollutants' in the treated produced water would have no adverse effect on the qualifying interests of the SPA*" is plainly wrong. It is moot whether SEPA was required, as a matter of law, to do this: the CAR licence contained the same maximum discharge volume as the original consent issued in 1993, before the 1994 Regulations came into effect. In any case, whether or not it was required to do so, SEPA neither consulted SNH nor assessed the discharge, at that volume, in terms of its likely effect on the qualifying interests of the SPA.

3.7. Mr Telfer's statement in paragraph 4.5.5 that with effect from 17 March 2010 "*the permitted discharge volume of treated produced water was increased from 140m$^3$ to 300m$^3$*" is correct.

3.8. However, his assumption in the following sentence that SEPA, before varying the licence thus, "*following further consultation with SNH would first have satisfied itself that the increase in the volume of treated produced water would again have no significant effect on the Natura interest in the European site*" is again mistaken. In this case SEPA was definitely required, as a matter of law, to do this in relation to the application for variation, as SNH had pointed out in the 2007 letter, and it would be reasonable to assume that SEPA had complied with its statutory obligations. But it is now clear, from what follows, that SEPA did not do so.

3.8.1. CCoF sent SEPA a copy of the 2007 letter from SNH and requested information from SEPA by email dated 12 June 2014, a copy of which is attached as Appendix 1, including, at numbered paragraph 4, the following requests: "(a) Please provide a copy of any information subsequently received from the applicants on what pollutants may be present in the discharge, as referred to in SNH's letter. (b) Please also provide a copy of either SEPA's subsequent determination that the discharge would not have a significant effect on the qualifying interest of the Firth of Forth SPA or SEPA's appropriate assessment of the discharge against the site's conservation objectives."

3.8.2. Numbered paragraphs 4a and 4b of the letter from SEPA dated 1 July 2014, a copy of which is attached as Appendix 2, respond to those requests as follows: "Please refer to the document '2009 Composite Energy sampling'" and "Please refer to the document 'Determination of significant effect'". Copies of each of these documents are attached as Appendices 3 and 4 respectively.

3.8.3. The Reporters will note that Appendix 3 is almost identical to information already put before the inquiry as part of CCoF document 208, which was a letter from SEPA referring to and enclosing an "analysis of water supplied from Dart Energy ... [as] the result of a screening exercise of the discharge composition which was undertaken in 2009". (The only difference is that the spreadsheet forming part of CCoF 208 includes a final column headed "Mean", but Appendix 3 does not.)

3.8.4. The Reporters will also note that Appendix 4, despite bearing the filename 'Determination of significant effect', is no such thing. It is a document explaining, by reference to SEPA guidance and the 2009 sampling results, the derivation of proposed numerical limits in the varied CAR licence for cadmium, mercury and iron and justifying the setting of no limits for arsenic and cobalt. It contains no mention of the effect of any of these pollutants (or of any of the other pollutants found in the samples) on the qualifying interests of the SPA, either at the maximum consented volume or at the maximum proposed volume (more than twice the consented limit), so it cannot possibly be regarded as in any way fulfilling SEPA's obligations under the 1994 Regulations in relation to the SPA.

3.8.5. CCoF also sent SNH a copy of the 2007 letter and requested information from SNH by email dated 12 June 2014, a copy of which is attached as Appendix 5, including, at numbered paragraph 2, the following request: "Please confirm whether or not SEPA provided any further information to SNH about the proposed variation, and if so, please provide copies of any further advice given by SNH to SEPA as competent authority". Numbered paragraph 2 of the letter from SNH dated 10 July 2014, a copy of which is attached as Appendix 6, responds to that request as follows: "SEPA did not provide any additional information to SNH".

3.8.6. It is therefore clear that, in spite of SNH's advice in the 2007 letter, SEPA failed not only to re-consult SNH about the 2009 sampling results but also to determine whether or not the pollutants that those results showed were present in the treated effluent would, at the proposed maximum discharge volume of 300$m^3$, have a significant effect on the qualifying interests of the SPA, either alone or in combination with other plans

and projects, as required by regulation 48 of the 1994 Regulations. Nor did SEPA carry out an appropriate assessment before authorising the increase in discharge volume.

## 4. The current proposal

4.1. At paragraph 4.5.7 of his submission, Mr Telfer invited the Reporters, in considering issues associated with the proposed new outfall, "*to consider the significance of the environmental impacts arising from the construction work separately from those arising from its actual operational use*". That is a useful distinction to make and one adopted in this response.

4.2. At paragraph 4.5.8, dealing firstly with the construction of the outfall, Mr Telfer refers to a letter from SNH to Falkirk Council dated 21 March 2013 and states that SNH "*have carried out an appropriate assessment of the implications of the proposed development in view of the SPA's conservation objectives*", and at paragraph 4.5.9, he says that "*the construction of the outfall has been appropriately assessed by SNH*". This is a misinterpretation of the 1994 Regulations: SNH does not do appropriate assessments. It was the responsibility of Falkirk Council, and is now the responsibility of the Reporters, as competent authority, to carry out any such appropriate assessment. SNH is the "appropriate nature conservation body" in terms of regulation 48(3) of the 1994 Regulations, whose representations that provision requires the competent authority to have regard to.

4.3. At paragraph 4.5.11, dealing with the actual discharge of treated produced water at a rate of 300m$^3$ per day, Mr Telfer states that it would be "*remarkable*" if, as CCoF suggested, SNH had, in giving its advice to Falkirk Council, not considered the possible impact of the effluent on the SPA. In the ensuing paragraphs his argument proceeds on the basis that "*SNH had carefully considered the terms of the ecology chapter in the ES, including the details of the water treatment process*" (4.5.12), that the appellant's witness Dr Zisman was equally "*confident that the discharge on the inter-tidal mudflat habitat would have been properly considered by SNH*" (4.5. 14), and that "*the conclusion that SNH self-evidently drew as regards the impact of the discharge of the effluent was that it would have no significant effect*" on the SPA (4.5.14). None of these assumptions is correct, as is clear from what follows.

4.3.1. In its request for information from SNH by email dated 12 June 2014 (Appendix 5), CCoF asked, at numbered paragraph 1, for confirmation as to "whether or not SNH has to date considered the effect on the qualifying interests of the Firth of Forth SPA of the discharge from the proposed new outfall". Numbered paragraph 1 of the letter from SNH dated 10 July 2014 (Appendix 6), responds to that request as follows: "SNH has not considered the effect of the discharge from the new outfall on the Firth of Forth SPA".

4.3.2. In response to CCoF's additional request (Appendix 5) to "provide copies of any SNH advice given in relation to the existing discharge, whether to Composite Energy/Dart Energy, Falkirk Council or SEPA", SNH provided copies of documents as attached at Appendix 7. The Reporters will note that none of that information does, in fact, relate

to the contents of the actual discharge, confirming that SNH has given no advice in relation to the discharge itself.

## 5. Conclusion

5.1. The attached correspondence makes it clear that in 2009, contrary to Mr Telfer's assumptions, SEPA authorised an increase in the maximum daily volume of the discharge from the existing outfall without sharing details of the chemical composition of the discharge with SNH, despite SNH's advice, and without assessing the likely effect of the discharge on the qualifying interests of the SPA, in breach of the 1994 Regulations and the Habitats Directive.

5.2. It is also clear that, contrary to Mr Telfer's and Mr Zisman's assumptions, SNH has not yet considered the impact of the same volume of discharge from the proposed new outfall or given to Falkirk Council or the Reporters advice upon which the Reporters could proceed to determine whether an appropriate assessment is required.

5.3. It is also very likely that, in spite of regulation 50 of the 1994 Regulations, which requires a competent authority, as soon as reasonably practicable, to review any consent, permission or authorisation given for a plan or project affecting a site before it became a European site – such as is the case here – neither Falkirk Council nor SEPA has conducted such a review of this project, meaning that no public authority has ever put its mind to considering the effects of the discharge on the qualifying interests of the SPA.

5.4. It is essential therefore that, if they intend to allow the appeal and grant planning permission, the Reporters first share all the information that SEPA holds about the pollutants contained in the discharge with SNH, then have regard to SNH's representations thereon, in accordance with regulation 48(3) of the 1994 Regulations.

5.4.1. In this regard, the Reporters may wish to have copies of information SEPA provided in response to CCoF's request (Appendix 1, numbered paragraph 3) to "provide copies of all monitoring records held by SEPA in relation to discharge consent R6452/licence CAR/L/1017224 since 1 January 2006", which consists of three further sets of sampling results. CCoF can forward these if the Reporters so wish.