

Dart Energy (Forth Valley) Limited

DPEA Reference:

PPA-390-2029 and PPA-240-2032

**Proposed Development for Coal Bed Methane production, including Drilling, Well Site Establishment at 14 locations, Development of Inter-site Connection Services, Site Access Tracks, a Gas Delivery and Water Treatment Facility, Ancillary Facilities, Infrastructure and Associated Water Outfall Point
Letham, Falkirk**

Rebuttal of Submissions presented to the Reporters by CCoF regarding the requirements of Regulation 48 of the Conservation (Natural Habitats etc.) Regulations 1994.

1. Introduction

- 1.1 As I understand it, CCoF's legal representatives, Messrs Cowan and Rahman wish to introduce new evidence to the Inquiry which they believe supports the submission which they advanced on behalf of CCoF in closing that the requirements of Regulation 48 of the Conservation (Natural Habitats etc.) Regulations 1994 ("the 1994 Regulations") have not been met. This is because there is, according to them, insufficient information before you, Ma'am and you, Sir to allow you to properly assess "the effect of the effluent discharge of treated water from the proposed new outfall on the Firth of Forth Special Protection Area ("the SPA)".
- 1.2 I note for the record that the concerns expressed by Messrs Cowan and Rahman do not extend to the construction of the new outfall but rather with its operation. If I am correct in that assumption, it is important to note that whilst the appellant is also seeking planning permission to use the outfall, it will not be able to do so, as you are aware, until it has obtained a CAR licence. As will be explained in more detail later in this submission, SEPA also have a statutory duty when considering the proposed application for the new CAR licence that will determine the chemical content of the discharge to have regard to the requirements of the 1994 Regulations. This is a material consideration which you will be entitled to take into account when assessing the level of information which you believe is needed to allow you to be satisfied that when it operates, the new outfall facility will have no significant adverse effect on the SPA.
- 1.3 The new evidence presented by Messrs Cowan and Rahman takes the form of the responses which Mr Cowan has received from both SNH and SEPA to his requests for further information. For the purposes of this submission, I would wish to draw your attention to the terms of the:
- (i) letter from SEPA to Mr Cowan dated 1 July 2014;
 - (ii) document entitled "2009 Composite Energy sampling";
 - (iii) document entitled "Determination of Significant Effect", and
 - (iv) letter from SNH to Mr Cowan dated 10 July 2014.
- 1.4 Again as I understand it, having read the advice set out in the foregoing letters and documents the grounds on which Messrs Cowan and Rahman wish to base their primary submission, as set out in paragraph 1.1 above, are that the new evidence confirms that contrary to the advice which I gave to you in my closing submissions on behalf of the appellant :
- (i) SEPA, ahead of granting the appellant's November 2006 application to vary the terms of the its historic 1993 discharge consent, failed to provide SNH with any details "on what pollutants may be present in the water being discharged or the treatment necessary prior to discharge";
 - (ii) the legal outcome of that failure to provide that detail to SNH ahead of the grant of the appellant's November 2006 application by SEPA in December 2009 was that in breach of the requirements of Regulation 48 no consideration was given by SEPA as to whether or not the discharge activity for which authorisation had been granted under CAR would be likely to have a significant effect on the SPA;
 - (ii) in respect of its appeal proposals the appellant has still failed to disclose "the likely chemical composition of the [treated produced water] discharge";

- (iv) SNH has confirmed that it has "not considered" the effect of the discharge from the proposed new outfall on the SPA;
 - (v) without the foregoing disclosure and consideration you, Ma'am and you, Sir will be unable to decide whether or not the project will adversely affect the integrity of the SPA, and
 - (vi) as the requirements of Regulation 48 have not been satisfied in respect of the appeals, planning permission for the project should be refused.
- 1.5 Essentially, these six grounds can be broken down into two main points, namely, that in terms of Regulation 48 compliance :
- (i) no reliance can be placed on the fact that there is already an existing CAR licence (CAR/L/1017224/VN01) in place which authorises the same volume and type of discharge into the Firth of Forth as is proposed in terms of the appeals, and
 - (ii) the alleged absence of information concerning "the likely chemical composition of the discharge" and, consequentially, any advice on its potential impact on the SPA from SNH means that you as the competent authority are not in a position to determine whether or not the use of the outfall is likely to have a significant effect on the SPA.
- 1.6 I would propose to deal with each of those two main points in turn.

2. CAR/L/1017224/VN01

- 2.1 The appellant's primary position in respect of its existing CAR licence CAR/L/1017224/VN01 is that, absent a court challenge regarding the propriety of the decision-making process undertaken by SEPA in December 2009 when it was granted, you, Ma'am and you, Sir are entitled to proceed to determine the appeals on the basis that it is valid. The comments which follow, therefore, are made entirely without prejudice to that primary position.
- 2.2 According to Messrs Cowan and Rahman, Regulation 48 "makes it clear" that it is not open to you to uphold the appeals unless it has been ascertained that the project will "not adversely affect the integrity of" the SPA (their emphasis).

Regulation 48

- 2.3 It may assist matters if I set out Regulation 48 in full for ease of reference.
- (1) *A competent authority before deciding to undertake or give consent, permission or authorisation for a plan or project which-*
 - (a) *is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans and projects), and*
 - (b) *is not directly connected with or necessary to the management of the site,*
- shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.*

- (2) *A person applying for such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.*
- (3) *The competent authority shall for the purposes of the assessment consult the appropriate nature conservation body within such reasonable time as the authority may specify.*
- (4) *They shall, if they consider it appropriate, take the opinion of the general public, and if they do so, they shall take such steps for that purpose as they consider appropriate.*
- (5) *In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.*
- (6) *In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent permission or other authorisation should be given.*
- (7) *This regulation does not apply in relation to a site which is a European site by reason only of regulation 10(1) (c) (site protected in accordance with Article 5 (4)).*

2.4 Two points should be noted. The first is that a formal "appropriate assessment" of the impact of the discharge on the SPA would only require to be carried out by you, Ma'am and by you, Sir in circumstances where you, as the competent authority, had first concluded on the basis of the presented evidence that the appellant's proposals were likely to have a significant effect on the SPA either individually or on in combination with other projects.

2.5 The second is that, so far as consultation by SEPA with SNH regarding an application for a CAR consent is concerned, Regulation 48 (3) also makes it clear that such consultation is only mandatory in circumstances where having scoped an application for its effect on a European site, SEPA has concluded that it is likely to be significant. It follows, therefore, that if the view taken by you is that on the basis of the evidence the discharge of treated produced water from the new outfall is likely to have no significant adverse effect on the SPA, there is no requirement in law for you to formally consult with SNH.

The Water Environment (Controlled Activities) (Scotland) Regulations 2005 and 2011

2.6 The following provisions of The Water Environment (Controlled Activities) (Scotland) Regulations 2005 ("the 2005 Regulations") and The Water Environment (Controlled Activities) (Scotland) Regulations 2011 ("the 2011 Regulations") are also relevant to your consideration of this matter, namely:

- (i) Regulation 54 and paragraphs 1 and 9 of Part 1 of Schedule 10 of the 2005 Regulations (superseded by the 2011 Regulations on 31st March 2011), a person who held a consent under Section 34 of the Control of Pollution Act 1974 either had to apply, or if the consent was not subject to an annual charge under the relevant statutory charging scheme, was deemed to have applied, to SEPA for an authorisation to carry on their existing controlled activity through the deemed grant of a CAR consent under respectively Regulation 9 or 8 of the 2005 Regulations.*
- (ii) Regulation 54 and paragraphs 4 and 12 of Part 1 of Schedule 10 of the 2005 Regulations, an application or deemed application to SEPA made under paragraphs 1

and 9 respectively, of Part 1 of Schedule 10 of the 2005 Regulations, did not require to be assessed by SEPA in accordance with the requirements of the 1994 Regulations.

- (iii) Regulation 21 (2) of the 2005 Regulations before determining a request for a variation of a CAR consent that had been deemed to have been granted under either Regulation 8 or 9, SEPA in its capacity as competent authority had to both assess the risk to the water environment generally by the carrying on of the activity referred to in the application and have specific regard to the 1994 Regulations, and
- (iv) Regulation 15 (1) (f) and Regulation 23 (1) of the 2011 Regulations, before determining an application respectively for a CAR consent or a variation thereof, SEPA in its capacity as competent authority must have regard to the 1994 Regulations.

SNH Policy

2.7 Another important matter for you to take into account Ma'am and Sir when considering the fact that SEPA have not formally consulted SNH regarding the effect of the discharge from the new outfall on the SPA, is the advice which Messrs Cowan and Rahman received from SNH on how, as a matter of policy, that organisation deals with situations, such as the one with which they are presented here, where a planning application involving an ancillary CAR regulated operation that has the potential to have an impact on a European site is submitted in advance of the application for the CAR licence.

2.8 This policy advice is set out under the heading "Additional Information" in Document 1.3 (iv). In that section SNH confirms that this information is intended to address the queries raised by Mr Cowan as regards whether or not :

"SNH will only consider the effect of the proposed discharge [on the SPA] when consulted by SEPA as competent authority on the anticipated application for the discharge from the proposed new outfall under ...CAR", and

"that [the provision of a response only if it is asked for by SEPA] is SNH's standard approach when a planning application has been made and a CAR application is anticipated."

2.9 In response to these two queries from Mr Cowan SNH advised him that in cases such as this where the planning application involves a CAR regulated activity but is not accompanied by a CAR application, *"there may be sufficient information presented with the planning application for [them, SNH] to be confident that the CAR licence can also be granted noting that the proposal will also require a CAR licence. If [they, SNH] anticipate substantial potential impacts [on the conservation objectives of a European site] will arise through the CAR process, [they, SNH] might submit a holding objection to a planning application until sufficient information to inform an overall assessment [by the relevant competent authority] can be provided. [SNH's] responses are tailored to the individual circumstances of the case, the information initially available, and the likelihood that potential impacts are substantial enough to risk being unable to ever satisfy the CAR licensing regime."* [my emphasis]

2.10 SNH also make it clear in the Additional Information section of Document 1.3 (iv) that:

"SNH will advise SEPA on the effect on the SPA of the proposed discharge when asked to do so by SEPA."

2.11 When taken together with the provisions of Regulation 15 (1) (f) and Regulation 23 (1) of the 2011 Regulations, which require SEPA to have specific regard to the requirements of the

1994 Regulations when determining an application for a CAR licence, the clear inference to be drawn from this advice from SNH is that if they are consulted by a planning authority in relation to either an application for planning permission which involves a requirement for a CAR licence or by SEPA in relation to a CAR licence application, SNH will require to consider whether they have sufficient information before them to allow them to conclude whether the requirements of the CAR licensing regime (including the statutory obligation to have regard to the 1994 Regulations) are capable of being satisfied.

- 2.12 It follows, therefore, that if SNH are of the view that the information submitted to a planning authority by an applicant is sufficient to allow them to conclude that the potential impacts on the European site in question are likely to be sufficiently mitigated through the CAR licensing process then, by statutory implication, they will also be deemed to have concluded that the proposed activity will not be likely to have a significant effect on the site's conservation objectives.
- 2.13 Similarly, if SNH are of the view, having been consulted by a planning authority or SEPA, that, either as a consequence of the nature of a particular proposal or a lack of relevant information, issues arise as regards whether or not any potential significant effect on a European site arising from the controlled activity is capable of being mitigated through the CAR licensing regime, the Additional Information set out in Document 1.3 (iv) confirms that in those circumstances they will, as a matter of policy, either object to the proposal outright or table a "holding objection" until such time as the applicant has presented them with sufficient additional information which persuades them that the feared adverse impact was capable of being satisfactorily addressed through conditions attached to the CAR licence.
- 2.14 Put simply if a discharge into the Firth of Forth SPA is confirmed by SEPA and SNH (with all the experience that they have of dealing with discharges into the Firth of Forth and their potential impact on the SPA - see precognition of Mr Zisman) as being capable of being licensed and monitored under CAR, it follows that SEPA in its capacity as competent authority will have already concluded that the volume, content and timing of release of the discharge in question can be controlled through the licensing process in such a way as to ensure that that discharge will be likely to have no significant adverse effect on the SPA's conservation objectives.
- 2.15 The Additional Information advice confirms, therefore, that in circumstances such as this where the application for planning has been submitted ahead of the CAR licence application the absence of an outright objection or a holding objection from SNH can be taken by the planning authority as confirmation that SNH have concluded on the basis of the information before them that any potential significant effect arising from the proposed activity on the European site can be satisfactorily addressed through the CAR licensing regime and that, consequently, no "significant effect", such as would necessitate a requirement on the part of the competent authority to carry out an "appropriate assessment" will be likely to arise.
- 2.16 (It is noteworthy that Messrs Cowan and Rahman make no mention of the advice set out in the Additional Information section of Document 1.3 (iv) in their submission.)

The Position in December 2009

- 2.17 It follows, therefore, that against that regulatory and policy background when SEPA granted the appellant the CAR licence CAR/L/107224/VN01 on 14th December 2009 they would have been aware that:
- (a) the application or deemed application to renew the appellant's (then known as Composite Energy) historic 1993 consent to discharge treated produced water into the

Firth of Forth granted by the Forth River Purification Board in terms of the Control of Pollution Act 1974 did not require to be assessed for compliance with the 1994 Regulations and

- (b) the advice given by SNH in 2007 when it was consulted by SEPA in respect of what at that time was an application to increase the historic consented volume of discharged treated water from the 140m³ per day authorised in terms of the 1993 consent (which itself was being taken through for registration under the new provisions of the 2005 Regulations) to "a mean daily volume of 1000m³ and a maximum 1640m³" was that, even with what would have been a tenfold increase over its historic authorised volume, the discharge emanating from the existing outfall would still "be unlikely to affect the invertebrates present within the mud";
- (c) the advice given by the appellant (see response "2b" in Document 1.3 (i) above) since it had originally submitted its application on 15th December 2006, was that it only required to increase the volume of discharged treated water above its historic consented threshold of 140m³ per day by 160m³ to 300m³ per day;
- (d) additional information had been provided in any event by the appellant in 2009 in response to its request that the appellant screen the discharge for "List 1 and List II substances" (see response 2a in Document 1.3 (i) and Document 1.3 (ii) above);
- (e) it had subsequently assessed the screening information provided (see Document 1.2 (iii) above), and
- (f) it proposed to address the fact that in terms of the draft Regulation of Priority and Dangerous Substances and Specific Pollutants WAT-RM 14 document if it "could be > 95% confident that the discharge exceeded the relevant concentration assessment criteria through a mitigation measure in the form of the numeric conditions for iron, cadmium and mercury that it subsequently attached to the grant of the CAR/L/107224/VN01 consent (see Document 1.2 (i) above),

and, consequently, had clearly taken the view as evidenced by the grant of CAR licence CAR/L/107224/VN01 that the continued release of the treated water at a more onerously regulated discharge rate of 300m³ per day into the Firth of Forth was likely to continue to have no significant effect on the SPA.

- 2.18 Having reached that conclusion, it followed that there was no statutory requirement for SEPA to carry out an "appropriate assessment" in terms of Regulation 48 (1) and, consequently, no requirement for it either to consult with SNH in terms of Regulation 48(3).
- 2.19 In advancing the first main ground of their argument Messrs Cowan and Rahman have failed to consider the impact on SEPA's determination of the 2006 application arising from the fact that, subsequent to SNH giving their consultation response to SEPA in 2007, the application as originally submitted to discharge a maximum volume of 1640m³ of treated produced water per day would be unlikely to have a significant effect on the SPA, the appellant advised SEPA that in fact only a marginal increase in its existing consented discharge rate from 140m³ to 300m³ per day was required. Given that SNH had already advised SEPA that it was unlikely that a volume of discharge some 1000% higher than the historic consented volume of 140m³ per day would have any adverse effect on the SPA, it is self-evident, having also received and considered the screening information that it had requested, that SEPA were entitled to take precisely the same view when it finally granted the "varied" consent CAR/L/107224/VN01 in 2010.

- 2.20 When read against the background of that additional advice, it is clear that the "headline" advice which SNH have given to Mr Cowan in their EIRs response letter of 10th July that they have "not considered the effect of the discharge from the new outfall on the Firth of Forth SPA" simply reflects the fact that they have not at any time been asked by SEPA to advise them on the effect of the proposed discharge. This is because SEPA had taken the view, as confirmed at the relevant hearing session, that they were satisfied that any likely significant effect arising from the discharge from the new outfall could be effectively mitigated through the new CAR licence that the appellant intends to apply for should the appeals be upheld.
- 2.21 As Mr Caswell put it, SEPA are satisfied that there are no "show-stoppers". And, as the Additional Information provided by SNH confirms, the fact that they did not table either a full objection or (as they did in respect of the construction works associated with the new outfall) a holding objection as regards the effect of the new outfall on the SPA means that SNH too can be taken to be satisfied on the basis of the information tabled in the ES and its knowledge of the site's conservation objectives (as explained by Mr Zisman in his unchallenged evidence at the hearing session dealing with ecology) that the discharge of 300m³ per day of treated produced water into the Firth of Forth will have no significant adverse effect on the SPA such as cannot be satisfactorily addressed through the CAR licensing regime.
- 2.22 For the foregoing reasons, I would respectfully ask you Ma'am and you, Sir to reject the submissions of Messrs Cowan and Rahman on the grounds that they are misdirected and accept (a) that the appellant's CAR licence CAR/L/1017224VN01 was validly granted in accordance with the provisions of Regulation 48, and (b) my submissions relative thereto as set out in paragraph 4.5 of my closing submissions.
- 2.23 I would propose now to deal with the second of the submissions which supports their principal contention ie that you have insufficient information before you concerning the likely composition of the discharge to allow you as the competent authority to competently determine whether or not it would be likely to have a significant adverse effect on the SPA if planning permission for its use were to be granted.
- 3. Absence of information concerning "the likely chemical composition of the discharge"**
- 3.1 Messrs Cowan and Rahman advise at paragraph 3.1 of their most recent submission that *"[h]ad Dart disclosed the likely chemical composition of the discharge such an assessment [of whether or not it would adversely affect the integrity of the SPA] could have been carried out by Falkirk Council prior to the inquiry or could have been carried out by the Reporters"*.
- 3.2 In making this assertion Messrs Cowan and Rahman simply highlight again the extent to which they appear to have failed to understand the evidence that has been submitted on behalf of the appellant and indeed SEPA in relation to the treatment of produced water and its subsequent discharge into the Firth of Forth via the new outfall facility.
- 3.3 It is self-evident from the description of the discharge that what the appellant proposes to discharge into the Firth of Forth via the new outfall is water that has been pumped to the surface as part of the proposed de-watering activity of the target coal seams. The unchallenged evidence presented to the inquiry on behalf of the appellant by Mr Shehu Saleh was that the majority of radiotoxic and chemotoxic substances brought to the surface in produced water during the de-watering operations would be removed during treatment at the GDWTF prior to its discharge. As Mr Saleh explained, the designers of the GDWTF estimate that the removal rate for iron and for other metals including radium from the produced water following its treatment will be "in excess of 99%". He also confirmed that the outcome of an assessment of the impacts of NORM in produced water on non-human species (carried out on

the basis of the ERICA approach and ERICA tool using conservative assumptions) was that the "risks to representative animals and plants" are "several orders of magnitude below levels at which adverse effect would be expected to occur." (see Section 3 of Mr Saleh's precognition)

- 3.4 In his precognition at page 4 Mr Jonathan Marsh explained by reference to the discharge water quality standards set out in the appellant's existing CAR licence CAR/L/1017224/VN01 that the chemical composition of the produced water would require to contain no more than:

200mg L⁻¹ of suspended solids;

150mg L⁻¹ of biochemical oxygen demand;

15mg L⁻¹ of iron;

15mg L⁻¹ of hydrocarbon oil concentration;

pH of less than 5.0 or greater than 10.0;

20ug L⁻¹ of cadmium, and

5ug L⁻¹ of mercury.

- 3.5 At paragraph 3.5 of his precognition and in his evidence under cross examination to the inquiry, Mr John Speirs explained on behalf of the appellant how a sampling facility for the treated water would be provided as part of the GDWTF and how the design of the facility could be refined in such a way as to ensure that the quality of the treated water at all times met the emission limit requirements of SEPA.

- 3.6 Against that background, it almost beggars belief that Messrs Cowan and Rahman would seek to assert that you Ma'am and you, Sir have insufficient information before you regarding the "likely chemical composition of the discharge". Not only do you have sufficient information concerning its likely chemical composition, you also have confirmation in the unchallenged evidence presented by Mr Saleh that the "risks to representative animals and plants" from that chemical composition are "several orders of magnitude below levels at which adverse effect would be expected to occur."

- 3.7 The point that Messrs Cowan and Rahman appear to have missed is that you (as the Scottish Ministers' delegated representatives) and SEPA, as the respective competent authorities in respect of the planning appeals and the prospective CAR licensing application, do not need to have before you the precise details of what the chemical composition of the produced water will be at the point at which it reaches the surface before you can make a valid decision as regards whether or not its proposed discharge into the Firth of Forth is likely to have a significant adverse effect on the conservation objectives of the SPA. What the law does require you, Ma'am and you, Sir to be satisfied of for the purposes of your determination of the planning appeals in accordance with the provisions of Regulation 48 is whether or not you have sufficient information before you that the discharge from the outfall once it becomes operational is capable of being controlled by SEPA in such a way through the CAR licensing process as will ensure that no significant adverse effect on the SPA will occur. And, as advised, it is also a very relevant material consideration in terms of your consideration of that factual and legal issue that you will know at the point of your determination of the appeals that, if you were to grant planning permission, SEPA would have to be seen to have reviewed the position concerning potential significant adverse impact on the SPA again at the point at which they are presented with an application for the CAR licence for the new outfall.

Summary of the Evidence confirming that there will be No Significant Adverse Effect

- 3.8 In addition to the written and parole evidence presented by SEPA to the inquiry that it was satisfied that the discharge could be satisfactorily controlled through the CAR licensing process, you also have no objection or holding objection from SNH. Had there been any "show stoppers" in terms of likely significant adverse impact on the SPA, given their respective obligations in terms of law and policy, objections from both SEPA and SNH (holding or otherwise) to the grant of planning permission would have been before you.
- 3.9 This, when added to the "betterment" evidence presented by Mr Speirs and Mr Marsh, and considered against a backdrop where the grant of the existing CAR licence by SEPA was itself supported (as the new evidence presented by Messrs Cowan and Rahman confirms) by an appraisal of the potential impact of the discharge on the SPA, provides more than sufficient evidence, in my respectful submission, to allow you to conclude that the requirements of Regulation 48 of the 1994 Regulations have been met.

4. Conclusion

- 4.1 For the foregoing reasons, I would respectfully request that you find that the existing CAR licence CAR/L/1017224/VN01 is valid and that you have sufficient evidence before you regarding the likely chemical composition of the discharge, and reject the latest submissions tabled on behalf of CCoF by Messrs Cowan and Rahman.

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on behalf of Dart Energy (Forth Valley) Limited

*Note for the Reporters: when read against the backdrop of this legislative requirement, it is clear that the "administrative" process set out in paragraph 3.4 of the recent submission presented by Messrs Cowan and Rahman involved the deemed grant of CAR licence following the deemed granting process that arose automatically by application of the provisions of Regulation 54 and paragraph 9 of Part 1 of Schedule 10 of the 2005 Regulations. This process automatically converted the historic 1993 consent granted to the original CBM exploration company by the Firth of Forth Purification Board into CAR licence CAR/L/1017224. This is the licence which was subsequently varied on the application of the operator in 2006 through the grant of CAR licence CAR/L/1017224/VN01.