PPA-240-2032

CLOSING SUBMISSION

FALKIRK COUNCIL

Planning Permission Appeal: Letham Moss, Falkirk

1 INTRODUCTION

1 Introduction

1.1 Dart Energy ("Dart") submitted planning applications for the proposed development ("the Project") to Falkirk and Stirling Councils. The application to Falkirk Council ("the Council") was registered on 7 September 2012.

1.2 On 5 June 2013 Dart submitted appeals against non-determination of both applications. This Closing Submission addresses the reasons why permission should be refused for the Falkirk Council appeal. Stirling Council presented a separate case in relation to the Stirling Council appeal.

2 Above and below ground works

2.1 Falkirk Council's opposition to the Project is about the potential impacts of the below ground works; the above ground works are considered acceptable on planning grounds.

3 Determining issues

3.1 The appeals must be determined in accordance with the provisions of the development plan, unless material considerations indicate otherwise (Town and Country Planning (Scotland) Act 1997, sections 25 and 37).

3.2 The determining issues are therefore:

3.2.1 Whether the appeals accord with the provisions of the development plan;

3.2.2 Whether the material considerations support the Project.

4 The Development Plan

4.1 In relation to the Falkirk Council appeal, the Development Plan consists of the Falkirk Council Structure Plan and the Falkirk Council Local Plan. An analysis of the relevant policies is contained in the Falkirk Council reports, in particular the Report dated 25 June 2013 by the Director of Development Services to the Planning Committee, which is appended to the Report dated 27 November by the same Director to the same Committee (Falkirk Council inquiry document B3).

4.2 Mr Hemfrey's evidence is that the key policies applicable to the appeal are Structure Plan policy ENV8 and Local Plan policy EQ32. That was not challenged in Mr Hemfrey's cross-examination by Dart or by Mr Pollock's evidence on behalf of Dart.

4.3 The determining issues arising from these policies are:

4.3.1 Whether the Project poses an unacceptable risk to the amenity of communities or the local environment (Structure Plan policy ENV8);

4.3.2 Whether the Project would have a significant adverse impact on the amenity of a community or smaller groups of houses (Local Plan policy EQ32).

4.3.3 Whether the Project would have a significant adverse impact on the water environment (Local Plan policy EQ32) – Mr Hemfrey confirmed in response to a question from the Reporter that this impact did not require to be an impact on the amenity of a community or smaller group of houses, and that the impact on the water environment is still a concern;

4.3.4 Whether the unacceptable risk/ significant adverse impact can be mitigated or eliminated by the use of planning conditions or agreements (ENV8).

4.4 There is no disagreement between Messrs Hemfrey and Pollock on interpretation of these policies.

4.5 Mr Pollock agreed in cross-examination that the key issue is the level of adverse impact, which is the dispute between the parties to the appeal.

4.6 If the reporters determine on the basis of the evidence before them that there is:

4.6.1 an unacceptable risk to the amenity of communities or the local environment, which cannot be mitigated or eliminated by the use of planning conditions or agreements, then the Project is contrary to the Structure Plan;

4.6.2 a significant adverse impact on the amenity of a community or smaller groups of houses, and/ or a significant adverse impact on the water environment, which cannot be mitigated or eliminated by the use of planning conditions or agreements, then the Local Plan states there is a general presumption against the Project.

5 Environmental Impact Assessment

5.1 As mentioned above, the key issue is the level of adverse impact.

5.2 Falkirk Council consider that permission must be refused because Dart has failed to demonstrate there will be no significant adverse environmental impacts.

5.3 The Project is subject to The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 ("the EIA Regulations"). Dart provided an environmental statement with the planning applications. Following prolonged efforts on the part of Falkirk Council and its consultants AMEC, after the appeals were submitted Dart provided further clarification regarding the environmental effects, but considerable uncertainties remain. The appeal is therefore contrary to the requirements of schedule 4 of the EIA Regulations about the information for inclusion in environmental statements.

5.4 The evidence shows particular problems:

5.4.1 Inadequate baseline data – without such data, it is not possible to reliably identify potential impacts or assess whether they may or may not be significant;

5.4.2 Non-availability of baseline data – Dart's witnesses confirmed they took into account data which is not available for other parties to audit the assessment work. The reasons for the non-availability is a distraction: the real point is the lack of transparency and audit trail;

5.4.3 Assessment methodology – in cross-examination, Dart's witnesses confirmed that much of each of their assessments is contained in the precognitions, with no separate assessment document, and were unable to provide details of their methodology, in particular the criteria which they had applied to reach their conclusions. For a project of this importance, and level of public interest, this lack of transparency is unacceptable, and prevents any substantial weight being placed on their conclusions.

5.5 The EIA Regulations require that *as a minimum* an environmental statement must provide, among other things:

"the data required to identify and assess the main effects which the development is likely to have on the environment" (EIA Regulations, r2(1) and schedule 4 part 2(3))

The absence of baseline data and assessment methodology means that this minimum requirement for environmental impact assessment has not been met.

6 Evidence of Impacts of the Project

6.1 Falkirk Council consider that the evidence presented at the inquiry demonstrates that Dart has not provided sufficient evidence for the Reporters to conclude that there will be no significant adverse environmental impacts from the below ground works.

6.2 The evidence shows:

6.2.1 Errors and inconsistencies in the understanding of the geological environment;

6.2.2 Dart's interpretation of the geology has continued to evolve, even in the lead-up to the inquiry, which emphasises the lack of certainty;

6.2.3 Little in the way of information with respect to groundwater levels, quality or permeability;

6.2.4 No signal testing;

6.2.5 Very limited conceptualisation of the current or anticipated future flow environment;

6.2.6 Flawed/ inadequate environmental impact assessment, with incorrect assessment of surface watercourse sensitivity and a continued reliance on the unsubstantiated assertion that the strata overlying the proposed underground development are impermeable.

6.3 As a result, it remains conceivable that groundwater support for watercourses and conservation sites in the area could be significantly affected, by way of drawdown effects transmitted along faults and associated damage zones.

6.4 It also remains conceivable that fugitive gas emissions could arise during the development and significantly affect water quality in the Passage Formation regional aquifer, the overlying local aquifers and surface watercourses, and also significantly affect properties and residents in the area, by way of gas flow and dispersion through faults and/ or overlying strata.

6.5 With the current level of understanding, the implementation of an appropriate Water and Gas Monitoring Plan will be difficult to achieve without considerable further work or understanding the flow regime and the risks associated with the Project.

6.6 Dr Salmon's evidence presented the only coherent and detailed description of the flow processes in the vicinity of the vertical production wells and their associated laterals. He demonstrated there remain two overarching concerns of possible dewatering and fugitive emissions, and noted that fugitive emissions could also arise as a result of the dewatering of old mine workings in the vicinity of the proposed development. Further reappraisal of the area's fault geology, together with some form of signal testing, is the most likely means of generating sufficient information to resolve the two key issues, and to provide the basis for a comprehensive water and methane monitoring plan.

6.7 For all these reasons, there is insufficient evidence for the Reporters to conclude that there will be no significant adverse environmental impacts from the below ground works.

7 Use of conditions/ agreements

7.1 Planning conditions or agreements cannot remedy the deficiencies in the information available.

7.2 The key issue is the inability to assess whether impacts will be significant. The court decisions demonstrate that a condition cannot be used if there is insufficient information to determine the significance of the impact:

7.2.1 R v Cornwall County Council [2001] Env LR 25 - the English High Court quashed a grant of planning permission for extension of an existing landfill site, which included a condition requiring further nature conservation surveys. The Court held that the Council could not have concluded rationally that there were no significant nature conservation effects until they had the data from the surveys. Although the case involved nature conservation issues, the point is equally applicable to other environmental impacts.

7.2.2 Feeny v Secretary of State for Transport [2013] EWHC 1238 (Admin) – although the High Court upheld use of a condition, the circumstances of the case are different from the Dart appeal. The judge stated that it was not suggested that the model or data used to predict the effects were significantly flawed (paragraph 50). The condition was to deal with the limited possible effect of the limited uncertainty. In contrast, the Dart appeal involves impacts where there is limited or no data, and criticisms of the methodology. The judge also stated that the uncertainty in the predictive data could not be eliminated by baseline assessment, and it required measurement of what happened once the railway was in operation (paragraph 51). In contrast, Dr Salmon explained that signal tests should have been used pre-permission to resolve the uncertainties. Dart provided no evidence to rebut the value of signal tests.

7.2.3 The Queen on the application of Matthew Champion v North Norfolk District Council [2013] EWCA Civ 1657 – the Court of Appeal referred to the Feeny decision as illustrating the point that a condition can in principle be imposed to address a situation falling short of one that is considered to involve a likelihood of significant adverse effects. That is in contrast to the Dart appeal, where there is insufficient data to determine whether there is such a likelihood. The Court of Appeal also said that the case was stronger than Feeney because of the lack of perceived

"residual range of uncertainty" that the conditions were intended to address (paragraph 48). The Dart appeal involves much greater uncertainty than a "residual range".

7.3 This analysis of the principal court decisions shows that the circumstances in the Dart appeal are closest to those in the Cornwall County Council case, in which the Court found the condition could not be imposed.

7.4 The court decisions therefore demonstrate that conditions and/ or legal agreements cannot be used, and the appeal is therefore contrary to the structure and local plan policies.

7.5 This is also consistent with Dr Salmon's evidence that the proposed monitoring condition has a different purpose from the baseline monitoring required for EIA purposes in advance of the grant of planning permission. The condition is in effect premature, because the environmental effects have not been assessed fully yet. He confirmed there is no technical reason why early baseline monitoring could not be done. It is not an either/ or situation, contrary to the evidence from the Dart witnesses – while Dr Salmon accepted baseline monitoring is required close to when the development commences, he explained a long baseline is appropriate. He also clarified that the monitoring condition does not involve any signal testing, which is best considered a pre-permission activity.

8 Other regulatory controls

8.1 Dart's case emphasises the existence of other regulatory controls, the lack of objection from SEPA, and the advice from the Scottish Government in PAN51. For instance, paragraph 2.3.2 of its hearing statement for session 2 states that "by a process of deduction" certain elements of Dart's proposals fall to be "restricted and regulated by the two local planning authorities by means of planning conditions". That implies that other aspects of the development will not be a matter for the planning authorities. This is clearly wrong in law and runs contrary to the matters Dart had agreed in the Joint Statement of Common Understanding. Paragraph 5.2 of the Joint Statement deals with this point. It says (from the third sentence):

"… The law is clear that the environmental impacts of a proposed development are capable of being material planning considerations, even if regulated under another statutory regime, such as those above. However, in considering such issues, the Reporters are entitled to take any such regime into account"

There is then a reference to the case of Hopkins Development v First Secretary of State [2006] EWHC 2823 (Admin) and also a reference to PAN51, which makes a similar point.

8.2 In the Hopkins case, the English High Court considered advice in PPS23, the English equivalent of PAN51. This states (at para 10):

"The planning system should focus on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than the control of processes or emissions themselves. Planning authorities should work on the assumption that the relevant pollution control regime will be properly applied and enforced. They should act to complement but not seek to duplicate it."

8.3 The appellant, who had been refused planning permission for construction of concrete plant on grounds of dust impact despite there being no objection from the Environment Agency, sought to make the argument that "in view of the existence of the pollution control regime, the conclusion [of the planning inspector] that

dust would cause serious harm to the amenities was *Wednesbury* unreasonable" (in other words, so perverse as to be unlawful). The Court, in upholding the planning inspector's decision, responded as follows:

"this is an argument that is superficially attractive. But it is dependent on the underlying assumption that, in relation to the likely impact of pollutants to which the 2000 Regulations apply, primacy must be accorded to the judgement of the regulator above that of the planning authority. I can see no basis for such an assumption, and it does not appear to me that the passage [from PPS23] that I have quoted above provides support for it. It would effectively mean that, unless it was clear to the planning authority that the plant could never achieve a permit … the potential impact of pollutants could never enter into its consideration of whether planning permission should be granted. The thrust of para 10 is that planning authorities should focus on the impacts rather than the control of emissions, not that they must subordinate their judgement on the impacts to those of the pollution control authority."

8.4 The earlier Scottish Case Di Ciacca v The Scottish Ministers 2003 SLT 1031 took a similar approach in refusing an appeal against a planning permission condition limiting hours of operation of a pub, despite an apparent overlap with liquor licensing powers.

8.5 As Dr Salmon noted, if the existence of SEPA's CAR powers is the answer, the EIA process would be redundant.

8.6 The starting point, as endorsed by the EIA Regulations, is that the planning decision maker must take into account the environmental impacts of the proposed development. It is only if there is sufficient information on the impacts that that decision-maker can proceed to take into account the existence of other regulatory controls. Falkirk Council considers that Dart have provided insufficient information for the Reporters to conclude that there are no significant environmental impacts. Permission must therefore be refused, irrespective of the existence of other regulatory controls.

8.7 This is endorsed by PAN51, which makes it clear that the existence of other regulatory controls does not absolve the planning decision-maker from the responsibility of addressing the planning issues. Scottish Planning Policy (paragraph 237) mentions as material planning considerations (Agreed Joint Statement, paragraph 5.5):

"disturbance and disruption from noise, potential pollution of land, air and water, impact on communities and the economy, cumulative impact, impact on the natural heritage and historic environment, landscape and visual impact and transport impacts".

8.8 Moreover, PAN51 acknowledges that planning permission can be refused even where the environmental body is satisfied that its requirements can be met (paragraph 43). The lack of objection from SEPA is not therefore conclusive. Dr Salmon confirmed in re-examination that, based on his experience, SEPA would probably have given the proposed development little consideration at this stage. He *"strongly suspected"* it had not undertaken as detailed an assessment as he had done, and that he has more knowledge about the Project than SEPA do. SEPA did not participate in the inquiry sessions, so there was no opportunity to clarify this point with it.

8.9 The cross-examination on behalf of Dart emphasised the role of SEPA, but the evidence also shows that there are uncertainties about the extent of SEPA's regulatory controls. Although SEPA referred to on-going

discussions with the Scottish Government, the Reporters have to determine the appeals on the basis of the current situation, and cannot give weight to potential changes/ clarifications which might emerge. It was also telling that Dart chose not to inform SEPA of the Kennet borehole incident.

8.10 The Agreed Joint Statement summarises the Regulatory Position (section 5). It is important to note that many of the regulatory agencies mentioned do not have a specific environmental protection responsibility. Their powers will not necessarily be exercised for environmental protection purposes.

8.11 The Agreed Joint Statement identifies aspects of the Project which are not regulated by another statutory regime (paragraph 5.6.7), most importantly:

8.11.1 Potential air quality impacts at locations outwith the PPC permit area during construction and operations;

8.11.2 Potential ground and surface water contamination during construction and operations.

8.12 In particular, fugitive emissions via the geology will not be regulated by SEPA.

8.13 For these reasons, Falkirk Council consider that the existence of other regulatory controls, the lack of objection from SEPA, and the advice from the Scottish Government in PAN51, are not sufficiently strong material considerations in the circumstances of this case to justify a departure from the development plan provisions.

9 Planning History

9.1 The Falkirk Council Reports to Committee outline the substantial history of coal bed methane developments in the area.

9.2 The appeal must be determined on its individual merits. Given the substantial difference in scale from previous developments, Falkirk Council considers that the previous permissions have limited relevance in the determination of the appeal.

10 Other material considerations

10.1 Falkirk Council considers that no evidence has been provided of any other material considerations of sufficient weight to justify a grant of planning permission, given the lack of information on significant environmental effects.

11 Weight to be given to evidence

11.1 It is clear from exchanges during inquiry and hearing sessions that there are differing views of what witnesses actually said at the inquiry. Although the parties have not agreed to a transcript being prepared, Dart has prepared a transcript from audio recordings. Falkirk Council has not had sufficient time to review that transcript. Its initial review indicates the transcript is not an accurate record of the proceedings.

11.2 As the Reporters confirmed, they will refer to their own notes and not take account of the transcript. It is of course essential that the witness's answer is considered in the context of the question that was put to him/ her.

11.3 Falkirk Council called two witnesses. Significant weight should be given to their evidence:

11.3.1 Dr Salmon – his testimony at the inquiry was professional and measured, and demonstrated a good understanding of the issues and evidence. His precognition, and the AMEC Technical Notes (DE(J)3), demonstrated an openness and transparency lacking in the approaches taken by the Dart team.

In cross-examination it was implied that Dr Salmon was taking advantage of the difficulties of proving that something does not exist, with mention of the Loch Ness monster as an analogy. But as Dr Salmon noted, signal testing is easy to do, because Dart has most of the infrastructure in place, and it would have provided important information regarding the presence (or absence) of connectivity between the proposed development at depth and the surface and near-surface potential receptors.

Dart's witness Richard Graham made an extraordinarily personal attack against Dr Salmon and AMEC in his rebuttal precognition. This went well beyond justifiable criticism, and was highly unprofessional, especially since he confirmed on cross-examination that, not only had he never discussed the case with Dr Salmon or corresponded with him, but he had no direct involvement in responding to the AMEC technical notes.

Mr Graham also seemed to believe that Dr Salmon had been influenced by Professor Smythe's report, but conceded on cross-examination that the AMEC technical notes had raised the relevant issues before Smythe's report. The implication was that Dr Salmon should not have taken account of Professor Smythe's evidence, despite Mr Graham himself taking a similar approach in taking account of Mr Goold's evidence. Dr Salmon also confirmed in re-examination that Professor Symthe's evidence had very little effect on his evidence; in cross-examination he said that the force of his evidence would not be reduced if Professor Symthe's evidence was wrong.

Cross-examination demonstrated that the contents of the AMEC technical notes wholly refuted the criticisms made in Mr Graham's rebuttal. As his comments in the rebuttal precognition form part of the official record, the Reporters are asked to make a finding that Dr Salmon and AMEC acted appropriately and professionally throughout the application and appeal proceedings.

11.3.2 Colin Hemfrey – Mr Hemfrey's evidence on the development plan policies was unchallenged. He was asked questions on the application of those policies to the evidence before the inquiry, and the role of SEPA, and use of planning conditions, which were clearly outwith his expertise and knowledge, and his answers should therefore be given little weight. Mr Steele explained that the Council had provided no other planning witness to be asked the questions, but that ignores the purpose of the inquiry session, which was to debate planning policy issues. If the Reporters had scheduled an inquiry session on non-policy planning issues, the Council would have provided a

development management witness to discuss those issues. It was clear from Mr Hemfrey's precognition that his involvement was limited to providing input to development management colleagues on development plan issues.

The Reporters will also note Mr Hemfrey's comment *"If, if, if …"*, which was his way of indicating that the question being put to him depended on the validity of a series of hypotheses, which he was not in a position to accept, because he had not heard the relevant evidence at the inquiry.

The Reporters will also note that it was suggested to Mr Hemfrey that no reason for refusal existed because the issues had been resolved. Mr Hemfrey did not agree fully – he said that there would not be a reason for refusal *"if I was satisfied that all issues were dealt with"*. The key word is *"if"* – the debate between the parties is whether all issues have been dealt with. Mr Hemfrey confirmed in re-examination that he deferred to Dr Salmon's evidence, and Dr Salmon indicated clearly that he is not satisfied the issues have been addressed. As much as Dart will no doubt claim that Mr Hemfrey made a damning concession, it is clear from what he actually said that he made no concession at all.

11.4 The evidence from Dart's witnesses Mr Goold, Dr Cuff, and Mr Graham should be given much less weight. All were new to the project, having been appointed in late 2013 or early 2014. None were involved in the EIA process or production of the G20 documents. None provided a detailed assessment to support their conclusions. Details of their methodology, particularly the criteria which they had applied, were sketchy, or non-existent. There was also a telling absence of reference to the Environmental Statement and the G20 documents.

12 Grant of Planning Permission – waste management plan, planning conditions, section 75 obligation

12.1 If the Reporters decide that planning permission should be granted, Falkirk Council has agreed planning conditions which should be imposed.

12.2 As indicated above, it is inappropriate to use conditions (for example conditions 12 and 43) to require baseline monitoring, because the baseline data is required before a planning decision can be made on the acceptability of the Project.

12.3 Dart also indicated its agreement to pay for Falkirk Council to employ a monitoring officer during the construction of the Project and for 2 years following completion of construction. This cannot be addressed by a planning condition, because it is a requirement for Dart to make financial payments, so it would require a section 75 obligation.

12.4 If permission is to be granted, The Management of Extractive Waste (Scotland) Regulations 2010 require the waste management plan to be approved. As set out in its Hearing Statement, Falkirk Council consider the waste management plan provided by Dart has to be modified:

12.4.1 Extractive waste - the production water in the installed pipe network collecting it to the GDWTF is extractive waste.

12.4.2 Extractive waste areas – the pipe network to the GDWTF is an extractive waste area.

12.4.3 Operator – the waste management plan does not expressly name the operator, contrary to regulation 11(1)(a).

12.4.4 Operator's ability to meet the objectives of the waste management plan – the Reporters must evaluate the operator's ability to meet these objectives (regulation 11(1)(c)). If the Operator is Dart Energy (Europe) Limited, there is very little evidence before the Reporters about the ability of that company to meet the objectives of the waste management plan.

12.4.5 Location of extractive waste areas – the waste management plan provides only an indicative plan of a well site and the proposed location of each well site. It should identify the actual locations of the extractive waste areas in each of the well sites and pipe networks for which permission is sought.

12.4.6 Subsequent treatment – two elements of information are still required: details of the volume of projected water treatment sludge; and confirmation that the proposed existing treatment facilities (Airth 1, 7, 10) is licensed or permitted to received production water for treatment prior to development of the GDWTF [the latter information will not be required if a planning permission condition is imposed to prevent such treatment prior to development of the GDWTF].

12.4.7 Gas venting - In the hearing Dart also confirmed that it does not intend to vent to atmosphere during well commissioning (correction to WMP draft rev 3 11.02.14 para 3.10).

13 Conclusion

"EIA aims to ensure that the likely environmental effects of a development proposal are properly understood before any development consent is granted."

(PAN 1/2013 Environmental Impact Assessment, paragraph 2.1)

13.1 A grant of planning permission for the Project would be inconsistent with the objective of the EIA process, as the evidence shows that the likely environmental effects of the Project are not properly understood.

13.2 In addition to being inconsistent with the objective of EIA, this lack of evidence on environmental effects has the following consequences:

13.2.1 The Project is contrary to the Development Plan. There are no material considerations of sufficient weight to overcome the Development Plan presumption against the Project.

13.2.2 It is inappropriate to use planning conditions/ agreements to obtain the necessary information on those effects.

13.2.3 It is premature to place weight on the lack of an objection from SEPA, and the existence of SEPA's regulatory powers.

13.3 For all these reasons, the Reporters should refuse to grant planning permission for the Project.