DUNDAS & WILSON

CLOSING SUBMISSIONS

on behalf of

Stirling Council

in relation to

Appeal by Dart Energy for Proposed 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

DPEA References: PPA-240-2032 and PPA-390-2029

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1. INTRODUCTION

1.1 Dart Energy (the **Appellant**) is seeking planning permission under the Town and Country Planning (Scotland) Act 1997 (the **1997 Act**) for coal bed methane production including drilling, well site establishment at 14 locations and associated infrastructure (the **Development**). This matter is before you now as the Appellant lodged appeals against deemed refusals of applications for planning permission submitted to Stirling Council (**Stirling**) and Falkirk Council (**Falkirk**). The history of the applications and appeals in relation to the Development is set out in Stirling's Inquiry Statement.

1.2 On 28 November 2013, Stirling's Planning & Regulation Panel resolved to oppose the appeals on the basis of:

1. the precautionary principle, due to insufficient information on the environmental effects on hydrological and gas emission receptors highlighted by AMEC; and
2. cumulative impact on the area.

2. THE RELEVANT TEST

2.1 In accordance with section 25 of the 1997 Act, these appeals must be determined in accordance with the relevant development plans unless material considerations indicate otherwise.

2.2 Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (the **EIA Regulations**) also prohibits the grant of planning permission unless the following have been taken into consideration:

1. The environmental statement and any additional information.
2. Any representations made by any body required by the EIA Regulations to be invited to make representations.
3. Any representations duly made by any other person about the environmental effects of the Development.

2.3 It is also submitted regard will need to be had to Part IV of the Conservation (Natural Habitats, &c.) Regulations 1994 in respect of the Firth of Forth SPA (the **SPA**) when determining the appeals. As the Development is not directly connected with or necessary to the management of the SPA, this will involve an initial screening to assess whether or not the Development is likely to have a significant effect on the SPA. Case law[1] suggests that the ***possibility*** (my emphasis) of a significant effect on the SPA will need to be excluded on the basis of objective information to avoid having to undertake the next step.

[1] *Bagmoor Wind Ltd v The Scottish Ministers* [2012] CSIH 93

2.4 If the possibility of a significant effect cannot be excluded, an appropriate assessment will need to be undertaken in light of the SPA's conservation objectives, and the Development approved only after having ascertained that it will not adversely affect the integrity of the SPA, subject to limited exceptions. The appropriate assessment is a matter for you in consultation with Scottish Natural Heritage.

3. **INSUFFICIENT INFORMATION ON THE ENVIRONMENTAL EFFECTS**

3.1 The Development is EIA Development as defined in the EIA Regulations and, as a result, the applications and appeals were required to be accompanied by an environmental statement which was supplemented by the 'G20 Document' (the **ES**). In terms of the EIA Regulations this ES must, among other things, include the data required to identify and assess the main effects which the development is likely to have on the environment (Schedule 4 Part 2 Paragraph 3) and, to the extent it is reasonably required to assess the environmental effects of the development and the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile it:

- a description of the aspects of the environment likely to be significantly affected by the Development including population, soil, water and air: (Schedule 4 Part 1 Paragraph 3); and
- a description of the likely significant effects of the Development on the environment resulting from the existence of the development, the use of natural resources and the emission of pollutants, and the description by the applicant or appellant of the forecasting methods used to assess the effects on the environment (Schedule 4 Part 1 Paragraph 4).

3.2 Mr Graham confirmed during questioning from you that, in the event of planning permission being granted, monitoring would be carried out for a period of 12 months post consent to establish a baseline for methane and groundwater as the information would be required by SEPA to assess the potential impacts of the Development. It was Dr Salmon's evidence that baseline conditions are required now for the purposes of the environmental impact assessment (**EIA**) while Dr Cuff accepted that baseline monitoring is important for protection of the environment and that the Inquiry was at a disadvantage by not having the baseline monitoring.

3.3 In my submission, Dr Salmon's position is supported by the EIA Regulations and should therefore be preferred. The absence of baseline information means the ES fails to satisfy the requirement to include a description of the aspects of the environment likely to be significantly affected by the Development.

3.4 During the course of Inquiry Session 1, evidence was led on behalf of the Appellant (Mr Sloan, Mr Goold, Mr Graham and Dr Cuff) to the effect that information was not produced to

the Inquiry because it related to matters that were more appropriately dealt with by other regulators and that comfort should be taken on the environmental effects because consents will not be obtained from other regulators if they are not satisfied as to the environmental effects. The Appellant was keen to rely on Planning Advice Note 51: Planning, Environmental Protection and Regulation[2] in justifying this approach (**PAN 51**).

3.5 I submit that PAN 51 does not offer support for the Appellant's position in respect of the current development. Paragraph 43 accepts that there may be circumstances, albeit exceptional, where an environmental protection body is satisfied that their requirements in relation to a proposed development can be met but the planning authority takes the view that the development is unacceptable on environmental grounds. Circumstances such as these, where SEPA are still working with the Scottish Government to establish a robust regulatory framework and is uncertain as to how that may finally look, must surely constitute exceptional circumstances. In these circumstances where the regulatory framework is uncertain, it is notable that paragraph 40 of PAN 51 states that "*the planning system has a wider remit in relation to the protection of the environment than any specific regime*" and "*is concerned with…the sum total of the effects which a development has on its surroundings and the environment*".

3.6 The conclusions and recommendations of the Reporters following examination of Stirling's proposed Local Development Plan (**LDP**) should also be borne in mind.[3] Stirling had elected not to identify the specific risks associated with coal bed methane in its draft policy for such development, on the basis that SEPA would be the regulatory body for the concerns expressed, including the accidental escape of methane. The Reporters found the approach adopted by Stirling to be wholly inadequate, particularly in light of paragraph 237 of Scottish Planning Policy, published in February 2010, which recommends that development plans should identify the factors which will be taken into account in determining individual planning applications. Such factors may include pollution of land, air and water, impact on communities and cumulative impact.

3.7 SEPA also accepted in the course of Hearing Sessions that it had not been able to consider the evidence of Dr Salmon, or Professor Smythe for that matter, on potential pathways when submitting its consultation responses. SEPA also could not confirm whether it had detailed information on previous boreholes at the appeal site. As such, I would submit that little weight should be attached to SEPA's position that the Development is *in principle* (my emphasis) capable of consent under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 and the Pollution Prevention and Control (Scotland) Regulations 2012 when you are considering the issues of the potential for fugitive methane emissions and the possibility of the operation of the Development drawing water from more than the coal seams.

[2] DE(M)25
[3] SC15a

3.8 I adopt the evidence of Dr Salmon and invite you to hold that he was a reliable and credible witness. It is clear from the AMEC Technical Notes[4] that Dr Salmon and AMEC engaged with the Appellant throughout the peer review process and, as accepted during cross-examination, were willing to seek advice from the Appellant on the technical aspects of drilling to inform their peer review. It is also notable that Dr Salmon is not necessarily saying that the two issues he still considers to be unresolved, i.e. the potential for fugitive methane emissions and the operation of the Development drawing water from more than the coal seams, will definitely occur but rather there is insufficient information to assess the potential for these issues to arise. In contrast, I would invite you to treat Mr Graham's evidence on the approach of Dr Salmon and AMEC contained in his rebuttal precognition with some scepticism.

3.9 I would also urge you to treat the evidence of Mr Goold, Mr Graham and Dr Cuff on the risks of fugitive methane emissions and the risk of drawing water from the coal seams with considerable caution. It is clear that their evidence is based on 'the Dart database'[5], which information is not before you and has not been provided to the other expert witnesses who gave evidence to you. In my submission, there has to be a question as to the extent to which this evidence can be said to have been tested during the course of the Inquiry in the absence of this information.

3.10 In relation to what evidence could have been provided to resolve AMEC's outstanding concerns, Dr Salmon advocated the use of signal testing and suggested that the facilities are there to carry out signal testing. Dr Salmon also accepted that there are various conceptual models that could prove to be correct for the purposes of assessing the hydrogeological and fugitive emissions risks, his was one and Mr Goold's was another, but data is required to determine which conceptual models may be valid. While it may be possible that Mr Goold's model could prove to be valid, the data which would allow such a conclusion to be reached is not before you. Dr Salmon suggested that signal testing could have provided that data and it is therefore unfortunate that such evidence was not before the Inquiry, particularly as it was suggested that it would be very compelling evidence.

3.11 During questioning from you Mr Graham on behalf of the Appellant contended that geology would only matter for hydrogeological assessment to a material extent if the strata is hydrogeologically permeable. The only evidence which is before you in respect of hydrogeological permeability is one set of lab measurements from the Inch of Ferryton site. Dr Salmon's evidence was that this is insufficient and that field measurements would have offered better evidence as lab measurements miss larger scale features which would be observed in field measurements.

[4] SC12
[5] Dr Cuff's precognition contains a non-exhaustive list at section 4.1

3.12 Dr Salmon also expressed his view that there was insufficient information with which to be confident that de-watering will be confined to the coal seams and to exclude the possibility of de-watering old mine workings.

3.13 Article 3 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the **EIA Directive**) requires an EIA to assess in an appropriate manner, in the light of each individual case, the direct and indirect effects of a project on specified factors including human beings, soil, water, air and climate.

3.14 It is this provision which is the key provision in relation to EIA and has been described by the European Court of Justice as a fundamental provision.[6] It requires an assessment to be carried out before the decision-making, involving an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. An investigation and an analysis must then be undertaken to reach as complete an assessment as possible of the direct and indirect effects of the project on the specified factors. In my submission, the first step, an examination of the substance gathered can only reach a conclusion that there is insufficient information before you and, as a result, you are prevented from reaching as complete an assessment as possible of the direct and indirect effects on the prescribed factors.

3.15 In addition, Councillor Brisley gave evidence that Policy SD1 of the Clackmannanshire and Stirling Structure Plan 2002 (the **Structure Plan**) requires the application of the precautionary principle "*whenever the environmental implications of development are unclear, or inconclusive, but where there is potential for irreversible environmental damage*". The precautionary principle[7] provides that the lack of full scientific certainty as to the threats of serious or irreversible damage shall not be used as a reason for postponing measures to prevent environmental degradation. I submit that, due to the uncertainties I have already outlined, this is a situation where the precautionary principle should be applied. The European Commission[8] has made it clear that it considers that requirements linked to the protection of public health should undoubtedly be given greater weight than economic considerations. The European Commission also suggests that updated scientific data can be used to review the approach to the precautionary principle[9]. It may be that information which emerges in the future, such as signal testing, can satisfy the concerns as to fugitive methane emissions and de-watering from more than the coal seams but I would submit that the information currently before you, or rather the lack of information currently before you, justifies a precautionary approach.

[6] European Commission v Ireland (C-50/09)
[7] DE(J)15 Section E1 p135
[8] CCoF 139 p19
[9] CCoF 139 pp19-20

4. CUMULATIVE IMPACT

4.1 I adopt the evidence of Councillor Brisley, representing the views of Stirling's Planning & Regulation Panel, on the potential for a significant cumulative impact from the Development and the other developments identified in her precognition. Councillor Brisley is an experienced Councillor and member of Stirling's Planning & Regulation Panel, who is very familiar with the area in which the appeal site is situated.

4.2 The Planning & Regulation Panel were concerned as to the nature of the buildings which would comprise the GDWTF, details of which are set out in Councillor Brisley's precognition and shown on Figure 3.15 of the ES. Councillor Brisley's evidence was that these buildings would be incongruous in a relatively flat rural setting with mainly traditional agricultural buildings.

4.3 I submit that no weight should be attached to Mr Bain's evidence that the Appellant only intends to develop $^{1}/_{3}$ of the gas distribution and water treatment facility[10] (**GDWTF**), as Mr Bain accepted during cross-examination that you are required to take the complete GDWTF into account when assessing the Development. In the event of planning permission being granted, the Appellant would be able to develop the entire GDWTF without the need for any further planning permission.

4.4 Councillor Brisley's evidence was that proposed expansion of existing settlements, the Beauly-Denny power line and wind turbine development would create a significant cumulative impact with the Development due to the increasing "industrialisation" of what is a rural area, also important for recreational activity, including walking. This cumulative impact was said to be contrary to policy ENV10 of the Structure Plan. Mr Pollock acknowledged during cross-examination that the types of development identified in Councillor Brisley's precognition had the potential to have a cumulative effect with the Development, contributing to "industrialisation".

5. CONDITIONS, LEGAL AGREEMENT AND WASTE MANAGEMENT PLAN

5.1 The Appellant, SEPA, Stirling and Falkirk are all in agreement that, on the basis of the information contained in the Waste Management Plan (**WMP**), the extractive waste will be managed in an extractive waste area rather than a waste facility as such terms are defined in the Management of Extractive Waste (Scotland) Regulations 2010 (the **MEWS Regulations**). It is understood that other parties may not be in agreement with this and I thought it may assist you to clarify Stirling's basis for concluding that the proposal involves an extractive waste area as it may differ from the Appellant's view.

[10] Figure 3.15 of the ES

5.2 In terms of the MEWS Regulations and Directive 2006/21/EC on the management of waste from extractive industries, one of the following criteria must be met for a waste facility to exist:

1. It is a Category A waste facility, regardless of the period of accumulation or deposit of extractive waste.
2. It is a facility for waste characterised as hazardous in the waste management plan, regardless of the period of accumulation or deposit of the extractive waste.
3. It is a facility where hazardous waste generated unexpectedly will be accumulated or deposited for a period in excess of six months.
4. It is a facility where non-hazardous non-inert waste will be accumulated or deposited for a period in excess of one year
5. It is a facility where unpolluted soil, non-hazardous prospecting waste, waste resulting from the extraction, treatment and storage of peat and inert waste will be accumulated or deposited for a period in excess of three years

On the basis of the information contained in the WMP, Stirling understands that none of the above criteria are met.

5.3 There is substantial agreement between the Appellant, SEPA, Stirling and Falkirk as to the conditions that should be imposed, should you be minded to grant planning permission for the Development. Contrary to the Appellant's position during Hearing Session 5, I would submit that the duration of the permission is more appropriately controlled by condition rather than informative. Section 41 of the 1997 Act provides that "*conditions may be imposed on the grant of planning permission… for requiring… the discontinuance of any use of land so authorised, at the end of a specified period*".

5.4 It was noted that you also asked for submissions on your ability to impose a condition excluding 'Airth 6' and 'Airth 8' from the scope of any planning permission granted. I would submit that it is open to you to do so, but if you are so minded you must fully consider the implications of excluding these two wells. For example, you must consider what effect excluding these two wells would have on the benefits of the Development and how that is weighed against the other effects of the Development.

5.5 In terms of a legal agreement, I would submit that there is justification for a legal agreement to provide for the following:

1. A monitoring officer to be appointed by Falkirk and Stirling at the expense of the Appellant.
2. Financial security for the abandonment of the well-heads and the restoration of the surface area of the well-sites and the abandonment and restoration of the GDWTF, in both cases to a condition capable of beneficial agricultural use.

5.6 In respect of point 2, I would refer you to:

a) the evidence of Mr Speirs that "*the proposal for the GDWTF would include "a fully costed, appropriately phased scheme for restoration and aftercare…and will be secured through appropriate financial guarantees*"[11];

b) the evidence of Dr Cuff that other jurisdictions require a bond or financial surety for aftercare; and

c) Mr Pollock's evidence that the Appellant will be willing to provide financial guarantees for restoration and aftercare in the event that the Reporters are minded to grant planning permission[12].

Even where the Appellant is willing to provide such financial security, it is accepted that you must still be satisfied that the familiar tests set out in Circular 3/2012 are met. In my submission, each of these tests is satisfied in respect of financial security in relation to the Development.

6. CONCLUSION

6.1 The appeals require to be determined in accordance with the development plan unless material considerations indicate otherwise. It is submitted that the Development is not in accordance with the development plan due to uncertainty over the potential for fugitive gas emissions and de-watering from more than the coal seams and the cumulative impact on the area from the Development, expansion of existing settlements, the Beauly to Denny power line and wind turbine development.

6.2 Even if you are satisfied that the proposal is in accordance with the development plan, I submit that there is insufficient information before you to allow you to undertake as complete an assessment as possible of the direct and indirect effects of the Development as required by Article 3 of the EIA Directive.

6.3 In my submission, if you are of the view that the Development is in accordance with the development plan, the uncertainty over the environmental effects would justify the application of the precautionary principle and, together with significant cumulative impact, a departure from the development plan.

6.4 For these reasons, I would respectfully submit that you refuse planning permission for the Development.

[11] Mr Speirs' precognition, paragraph 3.9.7
[12] Mr Pollock's precognition for Inquiry Session 4, paragraph 11.17