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Dear

Legal Implications of Application by Dart Energy

I have lodged an objection to the above application which is currently under consideration by Falkirk Council. There are a number of concerns in regard to the proposals made by Dart Energy to extract coal bed methane which have been brought to your attention not only in the formal objections lodged but also in terms of the community mandate which has been signed by a large number of local residents.

There are also a number of legal issues which have arisen in the context of this application. I understand that there is already an issue in regard to the process by which an independent consultant firm has been appointed to consider a number of impacts on the local environment of the proposed development. I do not propose to deal with that particular issue in this letter. Instead I wish to comment on a number of matters which, in my opinion, affect the fundamental legality of the application.

Environmental Impact Assessment

The first issue concerns the content of the environmental impact assessment ("EIA") which has been lodged by Dart Energy along with their application. As you will appreciate, the EIA is required in terms of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011. You will no doubt be familiar with schedule 4 part 1 of said Regulations and in particular paragraph 4 and paragraph 3 which outline the aspects of the environment likely to be significantly affected by the development. These include, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architecture and archaeological heritage, landscape, and the inter-relationship between the above factors. In terms of paragraph 4 of part 1 to Schedule 4, the description of the likely significant effects of the development on the environment should

cover the direct effects and any indirect, secondary, accumulative, short, medium and long term, permanent and temporary, positive and negative effects of the development.

These Regulations follow on from the Council Directive 85/337/EEC which is also known as the EIA Directive. The purpose of this Directive was to require member states of the European Union to ensure that environmental assessments were carried out by the competent National Authority for certain projects likely to have significant effects on the environment as a result of their nature, size or location, before development consent was given. Directives require to be introduced into Domestic Law in this country by an Act of the United Kingdom or Scottish Parliaments. However there are circumstances in which the terms of the Directive will have direct effect, meaning that its terms, rather than the terms of Domestic Law, require to be applied

In terms of Article 3 of the Directive the requirements of an environmental impact assessment are set out. The Article states that the purpose of the assessment is to identify, describe and assess in an appropriate manner the direct and indirect effects of any project on a number of factors which are;

- (a) Human beings, fauna and flora;
- (b) Soil, water, air, climate and the landscape;
- (c) Material assets and the cultural heritage;
- (d) The interaction between the factors referred to in points (a), (b) and (c).

You will note that the terms used in Article 3 are slightly different to those in the 2011 Regulations. In particular there is reference in Article 3 (c) to the material assets and cultural heritage. This raises an issue as to which terms are to be considered for the purposes of completing an EIA.

The Department of the Environment produced a Good Practice Guide in 1995 which addressed how environmental assessments were to be prepared in planning applications. The term was considered in said guide as embracing history, archaeology, architecture and urban design. However it was not limited to material and economic value but it extended to human activities, ideas and spiritual and intellectual attitudes. You will appreciate that this

definition of cultural heritage is very wide in its scope. It would certainly seem to be much wider in its ambit than the existing wording of the 2011 Regulations.

The EIA which has been lodged on behalf of Dart Energy's application has been prepared by RPS Group. It purports to deal with the various matters which require to be included in an EIA, and I will return to this subject later in this letter. Having read the EIA prepared by RPS Group, it would appear that they have confined themselves to considering the terms of the 2011 Regulations only and they have not considered cultural heritage as it is used in the EIA Directive. The issue to be considered by the Council is whether or not it is the 2011 Regulations or the EIA Directive which has primacy.

In order for a Directive to have direct effect, the relevant provisions must be unconditional and sufficiently precise. In addition the time limit for implementation for the Directive must have expired without the relevant part of the Directive being correctly and completely implemented into the law of any member state. Finally the action must be against the state. I would refer to the case of *Van Duyn –v- The Home Office* [1975] 1 CMLR 1 and *Pubblico Ministero –v- Ratti* [1980] 1 CMLR 1996. The terms of the Directive are unconditional and precise. The time limit for transposition of the original Directive expired on 3rd July 1988. Finally the European Court has considered the issue as to what constitutes a State and has concluded that Local or Regional Government are State Bodies. In the circumstances the EIA Directive can have direct effect against Falkirk Council.

On the basis of the EIA prepared by RPS Group, it is clear that the terms of Article 3 of the EIA directive have not been complied with. I wish to consider the effect of such a failure later in this letter. Before doing so, I also wish to consider certain other aspects of the EIA prepared by RPS Group.

The terms of Article 3 of the EIA Directive clearly indicate that the direct and indirect effects of a development must be considered. In addition the interaction between the factors in points (a), (b) and (c) must also be referred to. On reading the EIA by RPS Group, there does not appear to be any indication as to what indirect effects may occur nor any interaction between the points referred to in Article 3 (a), (b) and (c). Given the size of development being considered by Dart Energy, it would be very unlikely that there would be no indirect effects of the development particularly on the local environment. It is plain from the terms of Article 3 that these matters must be considered in the EIA. It is equally plain that the EIA has failed to address these issues. This failure, and the failure to consider the issue of cultural heritage on its own terms, undermines the fundamental validity of the EIA.

The European Commission has also produced guidance to the Directive. This is contained in "Environmental Impact Assessment of Projects, Rulings of the Court of Justice". On page 24 of said guidance, there is reference made to the issue of splitting of projects and the failure to take into account cumulative effect. It is clear that the purpose of the Directive is not to be circumvented by parcelling a project or projects so that an EIA does not need to be carried out. In *R v Swale Borough Council* [1991] JPL 39, the court held that developments should not be parcelled up where, in effect, the existing smaller development promoted the larger development and was "thereby likely to carry in its wake the environmental effects of the latter". This decision was also approved in *BAA PLC v Secretary of State* [2000] EWHC 1920 (Admin).

Dart Energy have advised local groups that their intention is to have a development which will comprise approximately 100 gas wells. This is substantially more than the number of wells referred to in the present application. The EIA which has been produced on behalf of Dart Energy does not take into account that further parts of the project are likely to proceed if the present application is granted by Falkirk Council. It only considers the impact of the number of wells included in the present application. The EC guidance refers to the cumulative effects on several projects which, in Dart Energy's case, should involve not only the existing, but also the significant number of additional, wells. You will appreciate that there has been drilling in this area by a previous company, Composite Energy, which created 16 wells, and Dart Energy have drilled 2 more (see www.dartenergyscotland.co.uk/about-us/history.html). Furthermore, the EIA does not make reference to the cumulative effects of other industries in the locality which include, inter alia, the petrochemical works at Grangemouth and Longannet Power Station.

For the reasons I have outlined, the EIA produced by RPS Group is fundamentally flawed. I now wish to consider what consequences follow if the application is considered by Falkirk Council on the basis of the present EIA.

Legal Duties on Falkirk Council.

The terms of Article 3 are regarded as a fundamental provision to the Directive. This imposes an assessment obligation on the competent environmental authority which, in this case, is Falkirk Council. In terms of *European Commission –v- United Kingdom* [2006] ECR I/3969, which is also referred to at page 25 of the EC guidance, such an assessment involves the examination of the substance of the information gathered as well as

consideration of the expediency of supplementing it. It is no doubt on this basis that the additional information from AMEC has been sought. There is an obligation on Falkirk Council to remedy the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of the EIA Directive. This obligation is referred to at some length at page 10 of the guidance. At page 11 of the guidance there is reference to the case of Test Claimants in the FII Group litigation [2006] ECR I/11753. This decision indicates that the EIA Directive confers on individuals a right to have the effects on the environment of a project under an examination assessed by the competent services, and that pecuniary damage is covered by the objective of protection under the EIA Directive. This is in addition to the obligation on a member of State to make reparation for the consequences of loss or damage caused by the infringement of the Rule of European Union Law.

In the context of the present application, a decision to proceed with planning consent on the basis of the defective EIA would expose Falkirk Council to damages claims which would not simply be restricted to personal injury but could also include pecuniary loss. It is considered at page 27 of the EC guidance that this could mean that a decrease in the pecuniary value of property may be a direct economic consequence of an effect on the environment. In the present circumstances, property within an area which may be adversely affected by impacts on the environment caused by Dart Energy's operations may diminish in value. Owners of heritable property would then have the right to seek damages against Falkirk Council for a diminution in the value of their property. There has been research carried out [see Douglas R. Tait, Isaac R. Santos, Damien R. Maehr, Tyler J. Cyronak, and Rachael J. Davis, 'Enrichment of Radon and Carbon Dioxide in the Open Atmosphere of an Australian Coal Seam Gas Field', in *Environmental Science and Technology*, 2013, 47 (7), pp.3099-3104 (published online February 27, 2013)] which suggests that methane escaping from a well can extend to an area of up to 3 kilometres. As some of the workings proposed by Dart are within 20 metres of heritable property in the Inches, a 3 kilometre radius would cover practically the whole of Stenhousemuir, Larbert, Letham and Airth. To illustrate the potential claim to Falkirk Council, I have assumed that there are approximately 40,000 houses within the aforesaid area. I have also assumed the average value of any house would be approximately £150,000. On the basis that Dart Energy's operations led to a 10% decrease in their value, this would represent a loss of £600,000,000. However I anticipate that houses nearer to the wells and other workings would suffer a greater diminution in value. There is also the potential for personal injury claims resulting from adverse effects on the health of individuals. Finally it must be borne in mind that these operations are likely to continue for a number of years. As there is evidence that fugitive emissions can occur, whether or not the wells are being worked on, it is conceivable that methane could leak from

these operations for a number of decades. Once all of these factors are taken into account it would be reasonable to assume that the cost to Falkirk Council would amount to billions of pounds.

Independence of EIA

In preparing this letter, I have carried out some research into RPS Group who have been responsible for the preparation of the EIA. This company is an international Consultancy which, according to its own website, provides "advice upon exploration and production of oil and gas and other natural resources". Its revenue for the year ended 31st December 2012 was £555.9 million and its profit before tax was £40.2 million.

I have also ascertained that RPS Group and Dart Energy have a number of links. These include Norrie Stanley who is listed as a Co-founder of RPS Energy. He currently occupies a position as a non-Executive Director at Dart Energy International. There is also Euan Brown who is a Land and Planning Operator at Dart Energy and was also a consultant with RPS between 2005 and 2008. I have discovered that David Harper was an Operations Director at RPS Group between 2006 and 2008 before joining Greenpark Energy, a company that was taken over by Dart Energy in 2011.

These individuals have occupied senior positions in RPS Group, Dart Energy and Greenpark Energy. In addition RPS Group have been used by Dart Energy for producing reports including one dated 29th February 2012 specifically in regard to Rosehill and Kersebrock, Land west of Letham Moss, Falkirk. This report is headed "Case in support of exploration and pilot test development of coal bed methane....". IN the report, Dart are described at para. 1.7 as "one of the most prolific CBM explorers in Europe over the last decade... with a sound track record and a keen focus on safety and environmental issues". The report goes on to indicate all of the positive advantages for the company of drilling in this area. On a plain reading of this document, it is clear that RPS Group are highly supportive of the proposed development.

In preparing an EIA the experts are providing not only the applicant but also the Local Authority with evidence upon which to base a judgement. Furthermore, the information is also relevant to the local community who have the right to be made aware of the terms of the EIA. It would appear that the February 2012 report covers ground which is

in very large measure the same as the EIA. However the February 2012 report and the EIA have been produced for entirely separate purposes.

It is clear that there are very close and direct connections between RPS Group and Dart Energy. It also appears that RPS Group perform a function for Dart Energy which would undermine their reputation for being independent experts responsible for providing fact-based, scientific evidence in an EIA.

It is widely regarded in law that expert evidence can only be regarded as admissible if it is independent. I would submit that an EIA cannot be independent where the company responsible for its preparation are very closely linked to the applicant company.

The EIA Directive does not explicitly deal with the issue of the independence of an expert responsible for the preparation of an EIA. However it is implicit that the information in the EIA can be relied on by a responsible authority. By implication this means that the EIA must be sufficiently robust for the Local Authority to rely on its terms. In my opinion it cannot be said that in this case the RPS Group's EIA meets this test.

Further Procedural Implications for Falkirk Council

In considering the present application, Falkirk Council are also bound by the European Convention on Human Rights. This is now part of Domestic Law as a result of the enactment of the Human Rights Act 1998. Section 6 (1) of the Act specifically indicates that it is unlawful for a Public Authority to act in a way which is incompatible with a convention right. Such rights would include Article 6 "Right to a Fair Trial" and Article 8 "Right to the Respect for Private and Family Life". Falkirk Council will be carrying out what is in effect a determination of the application by Dart Energy and in doing so must have regard to the civil rights and obligations which may be affected. There are clear issues of "civil rights" in respect of the present application if it has an adverse effect on the local environment or people.

When considering the right to a fair trial, there are fundamental notions which would apply such as justice not only being done but being seen to be done. This notion was affirmed in particular in the case of *In Re Pinochet* [1999] UKHL52. It is interesting to note that the court emphasised that apparent bias could be present where there was a potential interest in a judgement being made which had an indirect benefit on an unincorporated association. In the present case the link between RPS Group and Dart Energy is likely to be

of a financial nature. However, it is also of fundamental importance that any evidence in a civil case given by an expert is regard as impartial and unbiased. As a result of their connections with Dart Energy, RPS Group cannot be said to be sufficiently distant to prevent the appearance of bias. Therefore, any planning decision which is based wholly or partly on EIA by RPS Group would be a fundamental breach of the European Convention of Human Rights.

Further Steps for Consideration

Falkirk Council has already commissioned additional evidence to be obtained prior to final consideration of Dart Energy's planning application. There are two other issues which should be considered in conjunction with the technical data which the Council have sought.

There are a number of potential impacts on health which have been outlined in the community mandate and are also contained in a number of objections lodged on behalf of local residents. I do not wish to deal with these impacts at length but I would draw the Council's attention to them. Given the nature, size and location of the proposed development, it would be reasonable for the Council to consider obtaining a health impact assessment to ascertain how the health of the local community would be affected by coal bed methane extraction.

It is also clear from the comments which I have made in regard to the European Convention on Human Rights that a number of breaches of the Convention may occur. These would include breaches of Article 2 (Right to Life), Article 6 (Right to a fair Trial), Article 8 (Right to Respect for Private Life) and Article 1 of the first protocol "Protection of Property". In the cases of Oneryildiz –v- Turkey [2004] ECHR 657 and Budayeva –v- Russia [2008] ECHR 216, the European Court in Human Rights indicated that the State was under an obligation to put in place a legislative and administrative frame work designed to provide effective deterrents against threats to the right to life. Also in Tatar –v- Romania Case No. 67021/01, the court held the State had breached it citizens' rights in failing to take appropriate steps to assess the likely environmental impact on mining projects and to communicate the results to the local community. The importance of the Tatar case is that not only was a proper environmental impact assessment required but the information which it contained had to be disseminated to the local communities. It would be sensible in such circumstances for Statal Authorities to be aware of the potential risks in order to ensure that litigation did not proceed in regard to breaches of the convention.

The methodology involved in preparing impact assessments in regard to health, the environment and human rights is broadly similar. This involves screening, scoping, evidence gathering and analysis. It would be possible for an assessment in each of these three areas to be carried out simultaneously. Indeed the Scottish Human Rights Commission has published its own practice and guidance on 1st June 2010 which can be referred to as a future template. As I have already indicated, this would also have the benefit of ensuring that Falkirk Council had met all its obligations not only in terms of the EIA Directive but also to ensure that risks to Public Health and potential breaches of the Human Rights Act were clearly identified in advance of further consideration of the planning application

Conclusion

I have highlighted a number of deficiencies with the application process as adopted by Dart Energy. In the event of an unreliable EIA being produced in support of the application by Dart Energy, this creates a risk to Falkirk Council that they will fail in their duties under the EIA Directive. Consequently any adverse impacts experienced by the local population would leave the Council potentially exposed to claims for massive awards of damages. Notwithstanding the fact that the problems inherent in the planning application have been created by Dart Energy or its agents, this would not prevent Falkirk Council from being liable in the event that there was a significant impact on the local community in terms of health or pecuniary loss.

The community at large is entitled to protection under the European Convention of Human Rights. There is potential for a number of breaches of the Convention if consideration of the application is made on the basis of the existing EIA. Given the significant potential for such breaches, Falkirk Council would also be liable in damages if human rights were infringed.

The most reliable way to ensure that Falkirk Council fulfils its obligations in terms of the EIA Directive and the European Convention on Human Rights, and to ensure that it is not exposed unnecessarily to litigation by failures on the part of Dart Energy, would be for further assessments to be carried out concerning impacts on the environment, the health of the community and the possible infringement of Human Rights prior to full consideration Dart Energy's application.

Yours sincerely