

Robertson J (Jane)

From: Telfer, Sandy [REDACTED]
Sent: 19 November 2019 16:33
To: Robertson J (Jane)
Cc: [REDACTED]
Subject: RE: Dart/Ineos appeals
Attachments: Signed letter to The Chief Planner and enclosure 191119(100194845.1).pdf
Categories: Dart

Good afternoon Jane

Further to your email of 13th November, please find attached a copy of a letter that I have been instructed by the appellant to send to the Chief Planner this evening.

In the light of its content, INEOS respectfully requests that the sist of the appeals be continued by the Reporters until the Chief Planner has responded to its request for further information concerning the way in which the Scottish Ministers would intend to apply their policy of "no support" in practice and the parties have had the opportunity to consider its terms. At that point, INEOS believes it will be able to take a more properly informed decision as regards its intention for the appeals.

Kind regards

Sandy Telfer
Consultant



DLA Piper Scotland LLP
www.dlapiper.com

From: [REDACTED]
Sent: 13 November 2019 12:40
To: [REDACTED]

Subject: RE: Dart/Ineos appeals

Our refs: PPA-240-2032 & PPA-390-2029

13 November 2019

Good afternoon Mr Telfer

Thank you for your email of 12 November in response to mine of 31 October.

Scottish Ministers issued a statement on 3 October 2019 which sets out the Scottish Government's finalised policy on unconventional oil and gas development (Scotland's Onshore Unconventional Oil and Gas Policy - The Scottish Government's Finalised Policy Position on Unconventional Oil and Gas Development, October 2019). On page 8 of this document it states:

“On this basis, the Scottish Government does not support the development of unconventional oil and gas in Scotland. This means development connected to the onshore exploration, appraisal or production of coal bed methane or shale oil or shale gas using unconventional oil and gas extraction techniques, including hydraulic fracturing and dewatering for coal bed methane.

On 03 October 2019, Heads of Planning Scotland and the Scottish Environment Protection Agency were informed of the finalised policy position via letters issued by the Chief Planner (HoPS) and Scottish Government officials (SEPA). A Planning Direction has also been issued to reflect the wording of the finalised policy.

This approach ensures decisions on onshore unconventional oil and gas developments will be made having regard to planning policy and procedure, and within the framework of Scottish Government policy – a policy that does not support unconventional oil and gas development in Scotland.”

On page 9 of that document, in the context of transferred powers for granting and regulation of licences to search and bore for and get petroleum within the Scottish onshore area; determining the terms and conditions of licences; and regulating the licensing process, including administration of existing licences, it states:

“In addition to the policy of no support for unconventional oil and gas being a material consideration for planning decisions.....”

It is in that context that the reporters asked for your client’s intentions in the appeals.

It is usual practice in planning appeals where Scottish Government policy is a major consideration that parties to the appeals make submissions on how the policy should be interpreted. Appeals and applications for onshore wind farms are the most obvious example of that practice.

If your client decides to proceed with the appeals, the reporters envisage that your client, and all the other parties to the appeals, would make submissions on the Scottish Government’s finalised policy position on unconventional oil and gas development. In their report to Scottish Ministers, the reporters would include their summary of these submissions and make their recommendations on what should happen with the appeals, as is normal in recalled appeal cases.

The reporters do not consider that DPEA should be used as an intermediary between your client and the Chief Planner and I will not forward your email of 12 November 2019 to him. It is, of course, open to your client to engage in direct discussion with the Chief Planner on this matter.

I would be grateful, therefore, if you could advise whether or not your client wishes to proceed with the appeals. Please reply within 7 days.

Kind regards,

Jane Robertson

Specialised Case Officer

Planning and Environmental Appeals Division

4 The Courtyard

Callendar Business Park

Callendar Road

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FK1 1XR

W: www.dpea.scotland.gov.uk



www.twitter.com/dpeascotland



From: Telfer, Sandy [REDACTED]

Sent: 12 November 2019 11:50

To: Robertson J (Jane) [REDACTED]

Subject: RE: Dart/Ineos appeals

Good morning, Jane

Ahead of giving a final view on their intention for the appeals, INEOS wish to understand what it is that operators, local planning authorities and members of the public are to take from the Scottish Ministers' revised policy position of "no support".

INEOS and the other parties to the appeals are aware that the Scottish Ministers have confirmed in the Court of Session that their new policy does not constitute a ban on onshore unconventional oil and gas development in Scotland. That being the case, it follows that the new policy will fall to be categorised in law as a "material consideration" which the Scottish Ministers will be required to take into account along with all other relevant material considerations, including the tested scientific evidence, when determining the appeals. Again as a matter of law, the weight to be attached to the new policy in the decision-making process will be a matter for them, subject to the usual administrative law test of *Wednesbury* unreasonableness.

If these points are accepted, it follows that their new policy of "no support" cannot be taken as meaning that the Scottish Ministers will dismiss every onshore unconventional oil or gas development application that comes before them, regardless of its individual merits. If that were to be the case, the new policy would in its practical application (i) constitute an effective and immediate ban on all onshore unconventional oil and gas development in Scotland, (ii) breach the fundamental planning law principle that every application must be treated on its own merits and, (iii) so far as the appeals are concerned, render their outcome a foregone conclusion. For those reasons INEOS is keen to understand how the Scottish Ministers see their policy of "no support" being applied in practice.

For example, INEOS would be keen to understand in particular how the Scottish Ministers see their new policy interacting with the regime for the prevention of fugitive gas emissions set out in the Pollution Prevention and Control (Scotland) Regulations 2012 (as amended). As the Scottish Ministers are aware, the PPC regime is intended to prevent or mitigate the impact of emissions in order to render them harmless. If the evidence given at the appeal inquiry showed, as INEOS would contend that it did, that any potential pollution problems, including the potential climate change impacts arising from drilling, flaring and venting operations, could be safely left to the PPC authorisation process, the question then arising would be whether (all other things being equal) it would be lawful in these circumstances for the Scottish Ministers to give little or no weight to that scientific evidence whilst giving overriding weight to their new policy of "no support" in order to justify refusal. In the normal course of events, a decision concerning the weight to be attached by the Scottish Ministers to these apparently competing considerations

would be regarded as an exercise of planning judgement, but, as would be the case with the exercise of any discretionary power, a party in the position of the Scottish Ministers would have to provide reasons explaining why they had concluded that it was reasonable for them to set aside the scientific evidence and give overriding weight instead to their policy of "no support". Put simply is the new policy intended to override every other relevant material consideration, including scientific evidence, no matter how compelling?

In INEOS' view, matters such of these relating to the application of a new planning policy would have been expected to be addressed in supporting explanatory text which had been consulted upon prior to the final policy position being announced. But all that the Scottish Ministers have advised in relation to this new policy, as confirmed in the Chief Planner's letter of 3rd October, is that the Scottish Government "does not support" onshore unconventional oil and gas development in Scotland. No further advice has been issued to explain how the Scottish Ministers would propose to apply their policy of "no support", for example, to an application which was submitted at a time of external threat to energy supplies and against a backdrop where the scientific evidence demonstrated that the issue of emissions to land, air and water could be satisfactorily mitigated. As an application of that nature would require, as a matter of law, to be determined on its individual merits, the question arising is whether in these circumstances, the Scottish Ministers would be prepared to set their policy of "no support" aside and grant the applicant planning permission.

I should be grateful if the Reporters would forward this enquiry on to the Chief Planner with a request that he please confirm on a without prejudice basis how the Scottish Ministers envisage their policy of "no support" being applied in practice.

I look forward to hearing from you.

Kind regards

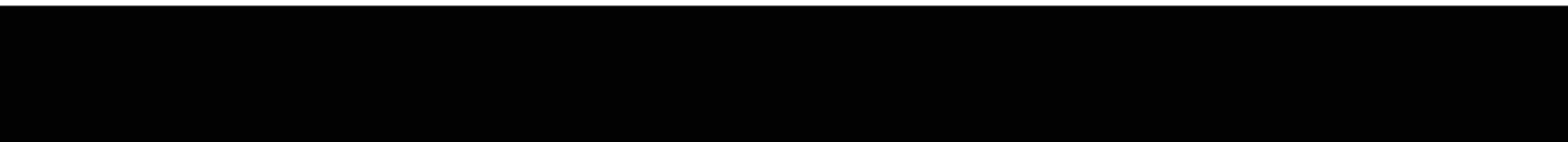
Sandy

Sandy Telfer
Consultant



DLA Piper Scotland LLP
www.dlapiper.com

From: Telfer, Sandy
Sent: 31 October 2019 11:52



Subject: RE: Dart/Ineos appeals

Good morning Jane

Thank you for your letter.

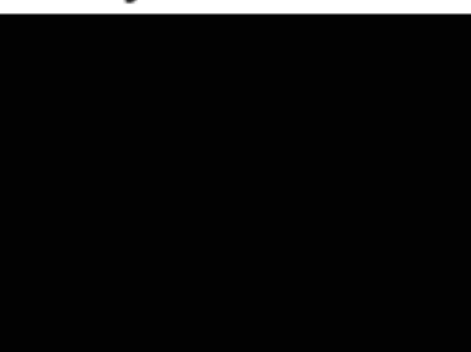
I confirm that I have written to INEOS this morning to request instructions and will revert to you with a substantive response as soon as they are received.

I have highlighted the 14 day response time-limit.

Kind regards

Sandy

Sandy Telfer





DLA Piper Scotland LLP
www.dlapiper.com

From: [REDACTED]

Sent: 31 October 2019 09:42

To: Telfer, Sandy [REDACTED]

Subject: Dart/Ineos appeals

Our refs : PPA-240-2032 & PPA-390-2029

Planning Authority refs : P/12/0521/FUL & 12/00576/FUL

Copied to all inquiry parties

31 October 2019

Dear Mr Telfer

APPEALS BY DART ENERGY (FORTH VALLEY) LTD CONCERNING COAL BED METHANE PRODUCTION, INCLUDING DRILLING, WELL SITE ESTABLISHMENT AT 14 LOCATIONS AND ASSOCIATED INFRASTRUCTURE AT LETHAM MOSS, FALKIRK AND POWDRAKE ROAD, NEAR AIRTH, PLEAN

As you are aware, these appeals have been sisted for some time, pending finalisation of the Scottish Government's policy position on unconventional oil and gas.

I last wrote to parties on 4 April 2019 confirming that it was anticipated that the finalised policy position would be known in the autumn and that I would write again once that had been announced.

On 3 October the Scottish Government announced in parliament its final policy position on onshore oil and gas, as reflected in the enclosed Town and Country Planning (Notification of Applications) (Unconventional Oil and Gas) (Scotland) Direction 2019. This announcement confirmed that it does not support the development of unconventional oil and gas in Scotland and that there is no support from the Scottish Government for development connected to the onshore exploration, appraisal or production of coal-bed methane, shale oil or shale gas using unconventional oil and gas extraction techniques, including hydraulic fracturing and dewatering for coal-bed methane.

Following this announcement and the making of that Direction, the reporters have asked me to seek confirmation of your client's intentions for these appeals. If it is their intention to proceed, then I should be grateful to receive your thoughts on how they consider that the appeals should be progressed, to inform the reporters' next steps.

Given the revised policy position and the age of the submitted environmental information (as reflected in particular in paragraph 3 of that Direction), the reporters' preliminary view is that updated information would be required. Interested parties would need to be given the chance to respond to this. Once I have heard from you, I will issue further correspondence to all interested parties .

A response within 14 days would be appreciated.

I attach, for convenience, a copy of the Chief Planner's direction in respect of the above.

Kind regards


On behalf of Jane Robertson

Mandy McComiskie | Section Manager | Planning and Environmental Appeals Division | 4 The Courtyard | Callendar
Business Park | Falkirk | FK1 1XR | T: 0131 244 6982 Website: WWW.dpea.scotland.gov.uk



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The Chief Planner
Planning and Architecture Division
Local Government and Communities Directorate
Scottish Government
Victoria Quay
Edinburgh
EH6 6QQ

Your reference

Our reference
SRT/MBC/359051/29
UKM/100180318.1

19 November 2019

Dear Chief Planner

APPEALS PPA-240-2032 & PPA-390-2029

We are instructed by the appellant, INEOS Upstream Limited.

We enclose for your information a copy of an email that we received from the DPEA on 13th November 2019.

You will note the advice from the DPEA that if the appellant required any further advice and direction from the Scottish Government on the practical application of its recently finalised policy of “no support” for onshore unconventional oil and gas development in Scotland, it should contact you directly to make the request rather than have that request sent to you via the DPEA.

We have now had the opportunity to discuss this direct contact option with our clients and are instructed to write to you to request your assistance in relation to that practical application issue ahead of them providing the Reporters with their final view on their intention for the subject appeals.

INEOS and the other parties to the appeals are aware that the Scottish Ministers have confirmed in the Court of Session that their new policy does not constitute a ban on onshore unconventional oil and gas development in Scotland. That being the case, it follows, as you explained in your letter to HoPS dated 3rd October, that the new policy will fall to be categorised in law as a “material consideration” which the Scottish Ministers will be required to take into account along with all other relevant material considerations, including the tested scientific evidence, when determining the appeals. Again as a matter of law, the weight to be attached to the new policy in the decision-making process will be a matter for them, subject to the usual administrative law test of *Wednesbury* unreasonableness.

This suggests, therefore, that the Scottish Ministers’ new policy of “no support” cannot be taken as meaning that they will dismiss every onshore unconventional oil or gas development application that comes before them, regardless of its individual merits. If that were to be the case, the new policy would in its practical application (i) constitute an effective and immediate ban on all onshore unconventional oil and gas development in Scotland, (ii) breach the fundamental planning law principle that every application must be treated on its own merits and, (iii) so far as the subject appeals are concerned,

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A list of offices and regulatory information can be found at www.dlapiper.com.

UK switchboard
+44 (0) 20 7349 0296



INVESTOR IN PEOPLE

render their outcome a foregone conclusion. For those reasons INEOS wishes to understand, ahead of confirming to the DPEA how it would wish the Reporters to deal with the appeals, how the Scottish Ministers see their policy of “no support” being applied in practice.

For example, INEOS would be keen to understand in particular how the Scottish Ministers see their new policy interacting with the regime for the prevention of fugitive gas emissions set out in the Pollution Prevention and Control (Scotland) Regulations 2012 (as amended). As the Scottish Ministers are aware, the PPC regime is intended to prevent or mitigate the impact of emissions in order to render them harmless. If the evidence given at the appeal inquiry showed, as INEOS would contend that it did, that any potential pollution problems, including the potential climate change impacts arising from drilling, flaring and venting operations, could be safely left to the PPC authorisation process, the question then arising would be whether (all other things being equal) it would be lawful in these circumstances for the Scottish Ministers to give little or no weight to that scientific evidence whilst giving overriding weight to their new policy of “no support” in order to justify refusal. In the normal course of events a decision concerning the weight to be attached by the Scottish Ministers to these apparently competing considerations would be regarded as an exercise of planning judgement, but, as would be the case with the exercise of any discretionary power, a party in the position of the Scottish Ministers would have to provide reasons explaining why they had concluded that it was reasonable for them to set aside the scientific evidence and give overriding weight instead to their policy of “no support”. Put simply the fundamental issue is whether the new policy is intended to override every other relevant material consideration, including scientific evidence supporting the development, no matter how compelling?

In INEOS’ view, matters such of these relating to the application of a new planning policy would normally have been expected to be addressed in supporting explanatory text which had been consulted upon prior to the final policy position being announced. And as the DPEA has reminded INEOS, it is usual practice in planning appeals where Scottish Government policy is a major consideration that parties to the appeals make submissions on how the policy should be interpreted. But all that the Scottish Ministers have advised in relation to this new policy, as confirmed in your letter of 3rd October, is that the Scottish Government “does not support” onshore unconventional oil and gas development in Scotland. No further advice has been issued to explain how the Scottish Ministers would propose to apply their policy of “no support”, for example, to an application which was submitted at a time of external threat to energy supplies and against a backdrop where the scientific evidence demonstrated that the issue of emissions to land, air and water could be satisfactorily mitigated. As an application of that nature would require to be determined on its individual merits, the question arising is whether in these circumstances, the Scottish Ministers would be prepared to set their policy of “no support” aside and grant the applicant planning permission.

INEOS and, doubtless, the other parties to the appeals would welcome any advice or comments that you may be able to provide to assist the interpretation process.



We look forward to hearing from you.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'DLA Piper'.

DLA PIPER SCOTLAND LLP

Encl

Telfer, Sandy

From: [REDACTED]
Sent: 13 November 2019 12:40
To: Telfer, Sandy
Cc: [REDACTED]
Subject: RE: Dart/Ineos appeals

Our refs: PPA-240-2032 & PPA-390-2029

13 November 2019

Good afternoon Mr Telfer

Thank you for your email of 12 November in response to mine of 31 October.

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I would be grateful, therefore, if you could advise whether or not your client wishes to proceed with the appeals. Please reply within 7 days.

Kind regards,

Jane Robertson

Specialised Case Officer

Planning and Environmental Appeals Division

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From: Telfer, Sandy

Sent: 12 November 2019 11:50

To: Robertson J (Jane)



Subject: RE: Dart/Ineos appeals

Good morning, Jane

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I look forward to hearing from you.

Kind regards

Sandy

Sandy Telfer
Consultant





DLA Piper Scotland LLP
www.dlapiper.com

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Sent: 31 October 2019 11:52
To: [REDACTED]

Subject: RE: Dart/Ineos appeals

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Kind regards

Mandy McComiskie
On behalf of Jane Robertson

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